

# Bringing Down the “Maternal Wall”: Reforming the FMLA to Provide Equal Employment Opportunities for Caregivers

Iman Syeda Ali†

## Introduction

President Clinton signed the Family and Medical Leave Act<sup>1</sup> (FMLA) into law in 1993.<sup>2</sup> The FMLA provides twelve weeks of unpaid leave to eligible employees<sup>3</sup> who are experiencing particular circumstances considered critical to the life of a family.<sup>4</sup> The list of circumstances that entitle an employee to take leave under the FMLA includes the birth or adoption of a child.<sup>5</sup> The stated purposes of the FMLA are:

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interest in preserving family integrity;

---

†. J.D. expected 2009, University of Minnesota. I would like to thank my family and friends, especially my parents and husband, for their unconditional support and constant encouragement, as well as the board and staff of *Law and Inequality: A Journal of Theory and Practice* for all their hard work in making this publication possible.

1. 29 U.S.C. § 2601–2654 (2000).

2. *See id.*

3. *See id.* § 2611(2) (defining the term “eligible employee”). The FMLA excludes certain employers and employees. Employers with fewer than fifty total employees within a seventy-five mile radius of the company are exempt from the FMLA’s provisions. *Id.* § 2611(2)(B)(ii). In addition, employees must have been employed by the employer for at least twelve months and have worked at least 1,250 hours during that period. *Id.* § 2611(2)(A). Further, an employee who is considered a “highly compensated employee” may be denied restoration if the denial is necessary “to prevent substantial and grievous economic injury to the operations of the employer.” *Id.* § 2614(b)(1)(A).

4. *Id.* § 2612(a)(1).

5. *Id.* § 2612(a)(1)(A)-(B). The four family circumstances which entitle an employee to twelve weeks of leave are:

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

*Id.* § 2612(a)(1).

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.<sup>6</sup>

The FMLA, however, has failed to achieve its stated purposes.<sup>7</sup> Women who attempt to take advantage of such policies are stigmatized by the “maternal wall,” which prevents upward mobility in many professions.<sup>8</sup> This is exemplified in the law firm environment where, despite the increasing number of female law students and associates in law firms,<sup>9</sup> the percentage of women as partners in law firms remains as low as 16.3%.<sup>10</sup>

Part I of this Note will explore the FMLA’s development, legislative history, and stated purposes and goals. Part II will examine the FMLA’s effectiveness with regard to women in the workplace. Part III will examine the law firm environment and specific statistics depicting the numerical disparity between male and female partners. Part III will also explore the conflict between the importance of billable hours in law firms and the importance of a work-life balance for women, as well as the maternal wall and its application to the law firm environment. Part IV will argue that the FMLA has failed to fulfill its stated purposes and goals, and has instead perpetuated gender stereotypes in the workplace, thus necessitating a change in its structure and benefits. Part V will discuss a proposal for paid mandatory parental leave in light of the billable hour requirement

---

6. *Id.* § 2601(b).

7. See discussion *infra* Parts I.C, II & IV.

8. See discussion *infra* Part III.B.

9. See NALP, *Women and Minorities in Law Firms*, Feb. 2003, <http://www.nalp.org/content/index.php?pid=157> [hereinafter NALP, *Women and Minorities*].

10. See discussion *infra* Part III; Press Release, Nat’l Ass’n for Law Placement, Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms (Nov. 17, 2005), <http://www.nalp.org/press/details.php?id=57> [hereinafter NALP Press Release].

in law firms as well as the expressed need for a work-life balance. Part V will also address potential constitutional challenges to a system of mandatory paid parental leave.

The FMLA is currently unsuccessful in providing job security to workers who choose to have children and remain involved in their upbringing. Paid parental leave mandated for both men and women offers an alternative in which the stigma associated with maternal leave will be alleviated. This will help accomplish the stated purposes of the FMLA—including not only enhanced parental involvement in childrearing, but also equal employment opportunity for women at all levels of employment.

## I. The Development of the FMLA

### A. *Predecessors of the FMLA: Title VII and the Pregnancy Discrimination Act*

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."<sup>11</sup> While Title VII guarantees sex equality and prohibits discrimination based on sex, scholars argue it has failed to address discriminatory workplace practices that "hinder the employment opportunities of individuals with parental obligations."<sup>12</sup> Not only did Title VII fail to provide protection to the broad group of individuals with parental obligations,<sup>13</sup> it also failed to protect the more narrow group of pregnant women who were (and are) the targets of workplace discrimination.<sup>14</sup>

Congress later determined that pregnancy is a sex-related characteristic, and that Title VII did not protect women who were targets of workplace discrimination based on pregnancy.<sup>15</sup> In order to alleviate this situation, and to include "pregnancy, childbirth or related medical conditions" within the meaning of

---

11. 42 U.S.C. § 2000e-2(a)(1) (2000).

12. Peggie R. Smith, *Parental Status-Employment Discrimination: A Wrong in Need of a Right?*, 35 MICH. J.L. REFORM 569, 571 (2002); see also Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 35 (2007) (discussing how ineffective Title VII, the Pregnancy Discrimination Act of 1978, and the FMLA have been in protecting low-income workers when family demands conflict with work).

13. See Smith, *supra* note 12.

14. See O'Leary, *supra* note 12, at 28–29.

15. See *id.*

discrimination "because of sex" in Title VII, Congress passed the Pregnancy Discrimination Act (PDA)<sup>16</sup> as an amendment to Title VII.<sup>17</sup> Though the PDA guaranteed pregnant women equal access to employee benefits, it did not ensure that women (or men) would receive leave for pregnancy-related purposes.<sup>18</sup> "Instead, it merely ensure[d] that if an employer [chose] to offer temporary disability leave for injury or illness, such leave must be made available to pregnant women."<sup>19</sup> The campaign for the passage of the FMLA was a response to the inadequacy of the PDA in guaranteeing parental leave to both men and women, as well as its failure to guarantee women returning from maternity leave the same job that they had previously held.<sup>20</sup> Because the PDA failed to protect individuals with childcare responsibilities, Congress passed the FMLA in order to guarantee unpaid leave to individuals so that they could care for family or take medical leave, regardless of their gender.<sup>21</sup>

---

16. The Pregnancy Discrimination Act states:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k).

17. See *id.*; O'Leary, *supra* note 12, at 28; Alison A. Reuter, *Subtle but Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1378-79 (2006) (arguing that despite legislation such as Title VII, the Pregnancy Discrimination Act, and the FMLA, workplace discrimination persists).

18. See O'Leary, *supra* note 12, at 28-29.

19. *Id.* It is clear from the legislative history of the PDA that the Act was not meant to ensure any kind of pregnancy-related leave for women:

It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, *permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter.* [The bill] in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or disability to work.

H.R. REP. NO. 95-948, at 4 (1978) (emphasis added).

20. See Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1517 (2001).

21. See O'Leary, *supra* note 12, at 38.

### B. Legislative History of the FMLA

Before examining the FMLA's stated purposes and goals, it is important to examine its legislative history. "The legislative history of the FMLA reflects the congressional belief that reform was needed to meet the changing needs of American families because of the changing demographics of the workforce and society."<sup>22</sup> These "changing demographics" include the increasing number of women in the workforce and the changes in family roles and responsibilities associated with this increase.<sup>23</sup> Not only are women with employment responsibilities less likely to be available for childcare needs, but an increasing number of men are acknowledging their roles as fathers, due to the birth or adoption of a child, and are seeking leave privileges equal to those of women.<sup>24</sup> Keeping these changes in mind, Congress instituted the FMLA as a "way of balancing the employees' need for greater flexibility with the concerns of employers."<sup>25</sup>

Though the FMLA was proposed in order to help parents balance the needs of their family and work demands, its supporters excluded several important provisions to help meet this goal in order to gain more support for its passage.<sup>26</sup> "Perhaps the most defining feature of the bill in its journey from inception to passage was its shifting terms, which reflected the attempts by its supporters to gain enough additional support for passage."<sup>27</sup> Among these "shifting terms" was the allowance of paid leave.<sup>28</sup>

The original framers of the FMLA considered including paid leave, but the idea "was abandoned for political reasons."<sup>29</sup> "A review of the changing terms reflects that, as time went on, the backers became increasingly willing to get whatever they could, so to speak, and then later build on that start to achieve their original goals."<sup>30</sup> This evidence supports the idea that paid leave was abandoned early because the political atmosphere did not support a bill that would increase government expenditure.<sup>31</sup> This

---

22. Hayes, *supra* note 20, at 1514.

23. *See id.* at 1514–15.

24. *See id.* at 1515.

25. *Id.* at 1515–16.

26. *See id.* at 1518–20.

27. *Id.* at 1518; see Kathryn Kroggel, *Absent Fathers: National Paid Paternity Leave for the United States—Examination of Foreign and State-Oriented Models*, 23 PENN ST. INT'L L. REV. 439, 444–46, 444–45 n.35 & 446–47 n.40 (2004).

28. *See* Hayes, *supra* note 20, at 1518.

29. *Id.* at 1523.

30. *Id.* at 1518.

31. *See id.* at 1518–19.

decision was made even in light of the fact that taking unpaid leave would be financially burdensome, especially for new parents who have increased expenses due to costs associated with caring for additional family members, in particular, newborns.<sup>32</sup> Interestingly, “[p]aid leave is, however, a key provision of European family leave acts often cited by supporters of the American bill.”<sup>33</sup>

### C. *The Stated Purposes and Goals of the FMLA*

Congress predicated the FMLA’s passage on a number of findings, which are listed within the Act.<sup>34</sup> These findings include that “it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing[.]”<sup>35</sup> that “the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting[.]”<sup>36</sup> and that “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”<sup>37</sup>

It is only after establishing these findings that Congress went on to state the Act’s purposes.<sup>38</sup> As discussed in the Introduction, these purposes include: balancing familial needs and integrity with “the demands of the workplace”;<sup>39</sup> authorizing employees to take “reasonable leave . . . for the birth or adoption of a child, and for the care of a child [with a serious health condition]”;<sup>40</sup> accomplishing the stated goals in a manner that “minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . and for compelling family reasons, on a *gender-neutral basis*”;<sup>41</sup> and promoting “the goal of equal employment opportunity for women and men.”<sup>42</sup>

32. *See id.* at 1518, 1524.

33. *Id.* at 1523.

34. *See* 29 U.S.C. § 2601(a) (2006).

35. *Id.* § 2601(a)(2).

36. *Id.* § 2601(a)(3).

37. *Id.* § 2601(a)(5).

38. *See id.* § 2601(b); discussion *supra* Introduction.

39. *Id.* § 2601(b)(1).

40. *Id.* § 2601(b)(2).

41. *Id.* § 2601(b)(3)–(4) (emphasis added).

42. *Id.* § 2601(b)(5).

In *Nevada Department of Human Resources v. Hibbs*,<sup>43</sup> the Supreme Court reiterated that one of the primary aims of the FMLA was to "protect the right to be free from gender-based discrimination in the workplace."<sup>44</sup> The Court found that the text of the Act made this goal clear, and that Congress had premised this goal on its finding that social obligations of women concerning caretaking responsibilities had a disparate impact on the working lives of women as compared to the working lives of men.<sup>45</sup>

## II. The Reality of the FMLA

While reports by the Department of Labor contend that the FMLA is providing significant benefits to employees,<sup>46</sup> scholars argue that, although the FMLA has improved the workplace for employees in general, it has failed to fulfill its stated purpose and goal of alleviating the hardships faced by caregivers trying to balance work and family life.<sup>47</sup> Interestingly, the benefits associated with the FMLA in the Department of Labor's report relate more to leave taken for serious health conditions of the employee or the employee's family (particularly the employee's spouse or elderly parent) than to leave taken for the birth or adoption of a child.<sup>48</sup> Critics of the FMLA argue that the only benefit the Act provides that was not previously available to employees is additional unpaid sick leave.<sup>49</sup> However, the FMLA has conferred some benefits and protections on employees, including: ensuring that employees will not lose their jobs for taking leave due to pregnancy, birth or adoption of a child, or to care for an ill family member; encouraging employers to provide for family and maternity leave; and allowing men to take paternity leave.<sup>50</sup>

---

43. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

44. *Id.* at 728.

45. *See id.* at 728 n.2.

46. *See* Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 124, 35,556 (June 28, 2007) (stating that "FMLA leave is a valuable benefit to the employee, improves employee morale, improves the lives of America's families, and, as a result, benefits employers").

47. *See, e.g.,* Hayes, *supra* note 20, at 1507 (arguing that "it is evident that the FMLA is not achieving the goals expressed at the time of its passage"); Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 396 (1999) (arguing that the FMLA may actually have "retarded progress on the family leave front more than it has plausibly helped").

48. *See* Family and Medical Leave Act Regulations, 72 Fed. Reg., at 35,556-60.

49. *See* Selmi, *supra* note 47, at 407.

50. *See* O'Leary, *supra* note 12, at 38-39.

However, with regard to providing equal opportunity to women with caregiving responsibilities, former President Bill Clinton signed the FMLA into law largely as “a symbolic gesture to signal his support for easing the burden of working women.”<sup>51</sup> Arguably, the Act has failed to provide any significant assistance to working women because it “essentially replicated what the market was already providing—unpaid leave for large employers.”<sup>52</sup> Furthermore, one scholar argues that there is no indication that the FMLA either helped ease the burden of work-family conflict for women or helped induce men to play greater roles in the birth or adoption of a child and subsequent childcare responsibilities.<sup>53</sup> In fact, the Act may actually have “retarded progress on the family leave front more than it has plausibly helped.”<sup>54</sup> Because women are more likely to leave the workplace to have and rear children, they “continue to be disadvantaged in the workplace.”<sup>55</sup> Moreover, women are often discriminated against for taking maternity leave and are subjected to gender stereotyping and increased scrutiny in work performance.<sup>56</sup> Additionally, studies show that “the United States is behind Canada and Europe in providing legal protection and support for employees attempting to balance work and family obligations[,]” and that a statutory framework like the FMLA makes it “more difficult” for workers to maintain such a balance.<sup>57</sup> Furthermore, the FMLA itself contains implicit messages that maintain the status quo and perpetuate gender stereotypes.<sup>58</sup>

---

51. Selmi, *supra* note 47, at 396–97.

52. *Id.*; see Kroggel, *supra* note 27, at 448.

53. See Selmi, *supra* note 47, at 409.

54. *Id.* at 396; see Reuter, *supra* note 17, at 1400.

55. Selmi, *supra* note 47, at 405.

56. See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 (2d Cir. 2004) (holding that stereotyped remarks concerning a woman’s inability to combine work and motherhood directed toward an employee after her return from maternity leave were evidence that gender played a part in an adverse employment decision); *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150, 1162 (8th Cir. 2003) (affirming the jury’s verdict that a female employee’s potential to become pregnant in the future served as a catalyst for the supervisor’s discriminatory behavior, that the supervisor made pregnancy-based discriminatory remarks to the employee upon her return from maternity leave, and that such behavior created a hostile work environment claim under Title VII and the Minnesota Human Rights Act).

57. See Richard N. Block, *Work-Family Legislation in the United States, Canada, and Western Europe: A Quantitative Comparison*, 34 PEPP. L. REV. 333, 355 (2007).

58. See Lindsay R.B. Dickerson, “Your Wife Should Handle It”: *The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429, 443–45 (2005); Reuter, *supra* note 17, at 1400–05.



The absence of paid leave has also impaired the ability of the FMLA to further its proposed goal of helping women balance the demands of the workplace with the needs of families, while preserving family integrity.<sup>59</sup> According to one commentator, the "FMLA had the capacity to change societal perceptions of women: it could change the expectation that women would be the primary caregivers for children and take care of the home, while men would work outside of the home to support the family."<sup>60</sup> As more women enter the workplace, instead of requiring them to "establish[] the difficult balance between career and family," the FMLA allows both men and women to take parental leave in order to work jointly to fulfill childcare responsibilities.<sup>61</sup> The absence of paid leave, however, has disproportionately affected working-class parents (both male and female)<sup>62</sup> and in particular new fathers who want to spend time with their newborn or newly-adopted children.<sup>63</sup> "In the case of a new child, there is an overall increase in household expenses; very few parents can afford to take off more time without pay than is actually necessary. In such cases, the guaranteed twelve weeks of leave is merely an empty promise."<sup>64</sup> The absence of paid leave has been found to be the most prevalent reason why employees do not take advantage of the FMLA.<sup>65</sup> Because men are often considered the primary earners in the family, the absence of paid leave prohibits them from enjoying FMLA benefits, and in turn prevents the sharing of family responsibilities, which would help women balance family and work demands. "This shortcoming [the absence of paid leave] was immediately recognized by commentators, who declared paid leave to be the next goal to be achieved."<sup>66</sup>

Based on the increased litigation concerning the treatment of women after returning to work from maternity leave, many scholars argue that the FMLA has both failed to minimize the potential for employment discrimination on the basis of sex and

---

59. See Hayes, *supra* note 20, at 1523–24.

60. *Id.* at 1520.

61. *Id.*

62. See *id.* at 1523–25. The failure of the FMLA to provide paid leave disproportionately affects working-class parents who are less able to afford unpaid leave. *Id.* at 1523. Arguably, "the FMLA reaches its original goals of family and job security only for those families who can afford to lose at least one income for a three-month period." *Id.* at 1524. Single-family households will less likely be able to utilize the benefits provided by the FMLA. *Id.*

63. See *id.* at 1523–24.

64. *Id.* at 1524 (footnote omitted).

65. See *id.* at 1532.

66. *Id.* at 1523.

failed to provide leave on a gender-neutral basis.<sup>67</sup> Recent court cases exemplify the continued gender stereotyping of women in the employment context. For example, in *Back v. Hastings on Hudson Union Free School District*,<sup>68</sup> an employee receiving positive performance evaluations prior to maternity leave was subjected to stereotyped remarks from her supervisor after returning from leave.<sup>69</sup> The remarks included questioning the employee's ability to juggle her career and motherhood and concerns that the employee's commitment to the job had decreased because she had small children at home.<sup>70</sup> The Second Circuit in *Back* held that stereotyped remarks could be evidence that gender played a part in an adverse employment decision.<sup>71</sup>

In *Lust v. Sealy, Inc.*,<sup>72</sup> a supervisor neglected to recommend a female employee for a management position—even though the employee had voiced her desire for promotion—because the supervisor assumed that the employee would not want to relocate her children.<sup>73</sup> Instead, the position was awarded to a male employee.<sup>74</sup> In affirming a jury verdict in favor of the employee, the Seventh Circuit noted that “antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics,” and that the denial of plaintiff's promotion was unreasonable.<sup>75</sup>

In *Walsh v. National Computer Systems, Inc.*,<sup>76</sup> a female employee who had taken maternity leave due to complications arising from pregnancy was subjected to increased scrutiny of her hours after returning to work.<sup>77</sup> After the employee fainted at work, her supervisor raised concerns, stating that “[she] better not be pregnant again.”<sup>78</sup> The Eighth Circuit affirmed the jury's finding that discrimination based on the employee's potential to become pregnant in the future is not gender-neutral because

---

67. See generally Michael Newman & Shane Crase, *Family Responsibilities Discrimination*, 54 FED. LAW. 14 (2007) (discussing the growing importance of the treatment of caregivers in light of “family responsibilities” discrimination).

68. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d. Cir. 2004)

69. See *id.* at 115.

70. See *id.*

71. See *id.* at 119.

72. *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004).

73. See *id.* at 583.

74. See *id.*

75. *Id.*

76. *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003).

77. See *id.* at 1155.

78. *Id.*

"[p]otential pregnancy . . . is a medical condition that is sex-related because only women can become pregnant."<sup>79</sup> The concern for discrimination against employees with caregiving responsibilities has grown so much that the Equal Employment Opportunity Commission (EEOC) has recently issued guidelines regarding the treatment of workers with such responsibilities.<sup>80</sup>

### III. The Law Firm Environment and Statistics Regarding Females at Law Firms

The position of partner arguably epitomizes and "defines success and power in private law firms."<sup>81</sup> Scholars have documented the variation in status and earnings between men and women associated with different legal practice settings.<sup>82</sup> In general, "[l]arge corporate law firms occupy the top position in this hierarchy, while corporate counsel, solo and small-firm lawyers, and government and public-interest lawyers command lesser incomes and are more likely to work in lower-status fields."<sup>83</sup> Significantly, women are overrepresented in government and public-interest law, and underrepresented among law firm partners.<sup>84</sup> An examination of differences in earnings among male and female University of Michigan Law School graduates for two cohorts—male and female graduates between 1972 and 1978 as well as male and female graduates between 1979 and 1985—found little change in the pay gap: "[Fifteen] years after graduation, women in both cohorts earn approximately 60% of men's earnings. . . . While within occupation sex segregation has declined over time, sex differences in hours worked have increased and assume a more prominent role in explaining the sex gap in lawyers' earnings."<sup>85</sup>

---

79. *Id.* at 1160 (quoting *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996)) (alteration in original).

80. See ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, EEOC NOTICE NO. 915.002 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> [hereinafter EEOC, DISPARATE TREATMENT].

81. Grace M. Giesel, *The Business Client Is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 760, 773 (1993).

82. See Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229, 250–51 (2000).

83. *Id.* at 235.

84. See *id.* at 233.

85. EEOC, *Diversity in Law Firms* (2003), <http://www.eeoc.gov/stats/reports/diversitylaw/index.html> [hereinafter EEOC].

Although law firms employ many women at the associate level, studies indicate that law firms “continue to have relatively few women partners.”<sup>86</sup> Studies of women in law firms indicate that many women occupy entry-level positions, but they have not made significant vertical progress and are “less well represented in the more prestigious and highly paid echelons of the legal profession than men.”<sup>87</sup> Though women may be more likely to hold managerial positions in the legal field as opposed to blue-collar fields, when compared to other white-collar industries the legal field seems to be lagging far behind in the percentage of women in managerial positions.<sup>88</sup> Not only have women failed to make significant progress in attaining partnership positions, but “women associates [are] more likely to express negative feelings regarding partnership [at law firms], citing the conflict between firm and family responsibilities.”<sup>89</sup> For example, a survey of the Chicago Bar found that “[w]omen were more likely than men to report that their career choices or opportunities had been limited by the need to accommodate personal or family priorities and that their decisions about whether to marry or have children had been influenced by career considerations.”<sup>90</sup> The study also found that there is an “interaction effect” between male and female respondents and whether children were present.<sup>91</sup> Among lawyers with children, men were found significantly less likely than women to perceive conflicts between familial duties and job demands.<sup>92</sup> But female lawyers without children were no more likely than their male counterparts to perceive any such conflicts.<sup>93</sup>

Though women have made progress over the last several decades, this progress reflects “a revolution stalled” as measured

---

86. Giesel, *supra* note 81, at 773.

87. Fiona M. Kay & John Hagan, *Cultivating Clients in the Competition for Partnership: Gender and the Organization Restructuring of Law Firms in the 1990s*, 33 LAW & SOC'Y REV. 517, 523 (1999) (citation omitted).

88. See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES, TBL.11, EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY (2007), <http://www.bls.gov/cps/cpsaat11.pdf>. Industries in the healthcare sector are most likely to employ women in managerial positions. *Id.*

89. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 360 (1995).

90. John P. Heinz, Kathleen E. Hull & Ava A. Harter, *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 748-49 (1999) (internal quotations omitted) (footnote omitted).

91. *Id.* at 749.

92. *See id.*

93. *See id.*

against the way "things were expected to be" once women were given access to higher education.<sup>94</sup> Arguments had been made that "once law school graduation rates substantially equalized between men and women, that pipeline would fuel firm diversity and cause partnerships to equalize as well. Yet the pipeline has been gushing for about two decades and partnership disparity remains."<sup>95</sup> Studies have also found evidence of "both horizontal and vertical gender segregation within the practice of law despite women's rapid numerical integration into the profession since the early 1970s."<sup>96</sup>

According to the National Association for Law Placement (NALP), only about 17 percent of the partners at major law firms in 2005 were women, a figure that rose only slightly from the 1993 figure of approximately 12 percent.<sup>97</sup> The NALP study also indicates that larger firms (251 or more attorneys) are more likely to have no women partners than smaller firms (250 or fewer attorneys).<sup>98</sup> Not only are women currently underrepresented in partnership positions, but studies also indicate that they are less likely to gain partnership status in the future, even after controlling for differences in "experience, law school performance[,] and law school prestige."<sup>99</sup> Women's odds of attaining the position of partner in a law firm are less than one-third of men's odds.<sup>100</sup> A study of eight large New York corporate law firms described promotion to partnership as follows:

Using data supplied by the firms and the Martindale-Hubbell Law Directory, we tracked cohorts of first-year associates in the eight firms in periods beginning in 1973-74 and 1985-86 for a ten-year period to see how many associates had been elevated to partner. . . . For each cohort except the first, where one-quarter of women associates (five of twenty) made partner, men associates gained partnership at a higher rate than women. For the entire period, 19% (362 of 1878) of men attained partnership while only 8% (60 of 754) of women made partner.<sup>101</sup>

The disparity in rates of partnership among men and women calls for an analysis of what causes such differences and what can be

---

94. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, (Magazine), at 44.

95. Timothy L. O'Brien, *Why Do So Few Women Reach the Top of Big Law Firms?*, N.Y. TIMES, Mar. 19, 2006, § 3, at 4.

96. Hull & Nelson, *supra* note 82, at 233 (citation omitted).

97. See NALP Press Release, *supra* note 10.

98. See NALP, *Women and Minorities*, *supra* note 9.

99. See Hull & Nelson, *supra* note 82, at 233-34 (citation omitted).

100. See *id.* at 251.

101. EEOC, *supra* note 85 (citation omitted).

done to alleviate the situation.

A recent study undertaken to explore gender differences in the legal profession has revealed several insights about the current disparities between men and women in the legal field.<sup>102</sup> The study analyzes data from the University of Michigan Law School Alumni Data Set, which contains survey responses of University of Michigan Law School male and female alumni from 1967 to the present.<sup>103</sup> The study found that having children and taking time away from paid work to engage in childcare “has a big impact on lawyers’ careers, their income[,] and their levels of [work] satisfaction.”<sup>104</sup> The study also found that men historically have had and continue to have more children than women; however, women are actually spending more on childcare.<sup>105</sup> This may be because men are more likely to be married, have a spouse who focuses on childcare, and have more children, while “women are more likely to have a spouse with an intense job and enjoy much higher spousal income.”<sup>106</sup> The study confirms earlier findings that men are significantly more likely to go into private practice and business, while women are more likely to enter corporate counsel positions, government work, public-interest work, and legal education.<sup>107</sup> Taking on childcare responsibilities negatively correlates with income, and research indicates that women continue to earn lower average incomes than men and that the impact of lower income is “disproportionately borne by women who do childcare.”<sup>108</sup> The study concludes that “there is still a substantial price to pay for the opportunity to do childcare for both men and women in terms of a substantially reduced probability of being a partner and significantly reduced income.”<sup>109</sup>

A. *The Conflict Between the Importance of Billable Hours and a Work-Life Balance*

Women’s negative feelings towards partnership and the conflict cited between firm expectations and family responsibilities may be linked to the “billable hours regime” present at law

---

102. See Kenneth G. Dau-Schmidt et al., *Gender and the Legal Profession: The Michigan Alumni Data Set 1967-2000* (Indiana Legal Research Paper No. 104, Dec. 2007) (manuscript at 1), <http://ssrn.com/abstract=1017362>.

103. See *id.*

104. *Id.* (manuscript at 6).

105. See *id.* (manuscript at 17).

106. See *id.* (manuscript at 74).

107. See *id.*

108. See *id.* (manuscript at 75).

109. *Id.* (manuscript at 76).

firms.<sup>110</sup> The increasing expectation regarding billable hours is cited as "one of the greatest impediments to women's movement up the career ladder at large law firms."<sup>111</sup> Because billable hours have become a "benchmark for ascertaining commitment to the firm," the time demands placed on attorneys "make[] it difficult or nearly impossible to have a life in which family obligations and other non-work activity may be experienced in a conventional way."<sup>112</sup>

The billable hours regime has affected not only female lawyers, but males as well.<sup>113</sup> Commentators note that:

One of the main bugaboos in this debate [of work-life balance] — and one that analysts say[] is increasingly cropping up as an issue for male lawyers as well [as females] — is the billable hours regime. Billing by the hour requires lawyers to work on a stopwatch so their productivity can be tracked minute by minute — and so clients can be charged accordingly. Over the last two decades, as law firms have devoted themselves more keenly to the bottom line, depression and dissatisfaction rates among both female and male lawyers has grown, analysts say; many lawyers of both genders have found their schedules and the nature of their work to be dispiriting.<sup>114</sup>

Recent research using the University of Michigan Law School Alumni Data Set concludes that both men and women who make the greatest childcare commitments work significantly less hours and are less likely to be found in the highest-paid legal practices or as partners in private law firms.<sup>115</sup> The commitment to childcare has a "strong negative impact on the person's income, but a significantly positive impact on his or her satisfaction with career and work/family balance."<sup>116</sup> However, the billable hour structure can be seen as imposing an extra burden for female lawyers with children who "are likely to bear heavier responsibilities as well as differential treatment in the workplace than male counterparts raising a family."<sup>117</sup> One scholar has noted that "[f]rom this perspective, existing work structures are seen as discriminatory, and without change they perpetuate the subordination of women."<sup>118</sup>

---

110. O'Brien, *supra* note 95, at 4.

111. Epstein et al., *supra* note 89, at 378.

112. *Id.* at 379.

113. See O'Brien, *supra* note 95, at 4.

114. *Id.*

115. See Dau-Schmidt et al., *supra* note 102 (manuscript at 75).

116. *Id.*

117. Kay & Hagan, *supra* note 87, at 525 (citation omitted).

118. *Id.* (citation omitted).

Though the work-life balance conversation was started by women, it has evolved to include men.<sup>119</sup> Men are increasingly concerned with family obligations and have followed in the footsteps of women by leaving their careers to become full-time caregivers to their children.<sup>120</sup> However, studies “indicate that female lawyers often feel pushed into that choice [to leave firms in order to become more actively involved in childrearing] and would prefer to maintain their careers and a family if a structure existed that allowed them to do so.”<sup>121</sup> Because women prefer to maintain balance in their lives, many women in management positions indicate that they do not want additional promotions.<sup>122</sup> According to the results of a survey conducted by the American Association of University Women in 2003, a majority of both men and women “would choose a job that had lower pay but provided benefits such as family leave, flexible hours, and help with family care.”<sup>123</sup>

The failure of a larger percentage of women to reach partnership positions in law firms, and the conflicts presented to women between family obligations and billable hour requirements, indicate that—especially in the law firm environment—the FMLA has failed to fulfill its purposes of balancing work-life obligations and creating equal employment opportunities for women at all levels of employment.

### B. *The “Maternal Wall”*

As women increasingly enter the labor market and employment fields from which they were previously excluded (such as the legal field) the fact that they continue to be underrepresented in managerial levels has led one scholar to shift the focus from obstacles faced by women to those faced by mothers.<sup>124</sup> This shift can effectively be seen as one that moves the focus from the “glass ceiling” to the “maternal wall.”<sup>125</sup>

---

119. See Belkin, *supra* note 94.

120. See *id.* at 86. Belkin argues that the increased willingness of employees, both men and women, to leave their careers for caregiving responsibilities may force employers to create more flexible work schedules, which could “usher in a new environment for us all.” *Id.*

121. O’Brien, *supra* note 95, at 4.

122. See Belkin, *supra* note 94, at 45.

123. DEP’T FOR PROF’L EMPLOYEES, AFL-CIO, PROFESSIONAL WOMEN: VITAL STATISTICS (2006), <http://www.pay-equity.org/PDFs/ProfWomen.pdf>.

124. See Belkin, *supra* note 94, at 44.

125. See *id.*; Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN’S RTS. L. REP. 3, 3 (2006).



The term "glass ceiling" reflects the situation in which women and minorities make progress within a firm, but despite their qualifications and ambitions, are unable to obtain key higher level management positions.<sup>126</sup> Arguably, "[w]e all know about the glass ceiling. But many women never get near it; they are stopped long before by the maternal wall."<sup>127</sup> Individuals with caregiving responsibilities encounter the maternal wall through employer stereotyping.<sup>128</sup> The maternal wall does not necessarily affect only females; it affects and penalizes anyone who plays traditionally female sex roles.<sup>129</sup> For women, the maternal wall is "built on the unstated assumption among male [and sometimes female] partners that women who return to firms after having children will automatically be less willing to work hard or will be less capable than they were prior to [maternity leave]—resulting in less-choice assignments or less-senior postings."<sup>130</sup>

Though the maternal wall can affect any individual taking on traditionally female sex roles, it tends to have a greater impact on women because of the gender stereotypes associated with motherhood in the workplace.<sup>131</sup> Gender stereotyping is often perpetuated in what is called "statistical discrimination."<sup>132</sup> Because it is difficult and costly to acquire accurate information regarding individual employees, employers often depend on group information to make employment decisions.<sup>133</sup> Unfortunately, in the context of gender, group information may lead to employers making erroneous decisions based on the notion that women are more likely to leave the employment setting in order to raise children than men.<sup>134</sup> Therefore, women may be treated "differently based on the statistical likelihood that they may impose costs that men would not."<sup>135</sup> Because statistical

---

126. See EEOC, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR (2004), hereinafter EEOC, GLASS CEILING] <http://www.eeoc.gov/stats/reports/glassceiling/index.html>

(defining the "glass ceiling" as a lack of women in high management placements) [127. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 77 (2003); see also Belkin, *supra* note 94, at 44 (using a similar phrase to explain how many women are professionally blocked by the maternal wall).

128. See EEOC, GLASS CEILING, *supra* note 126, at 31.

129. See Williams & Segal, *supra* note 127, at 101–02.

130. See O'Brien, *supra* note 95, at 4.

131. See Hull & Nelson, *supra* note 82, at 250.

132. See Selmi, *supra* note 47, at 403.

133. See *id.*

134. See *id.*

135. *Id.*

discrimination is considered a "rational employment practice," it is not considered discriminatory under any anti-discrimination employment statute; it is instead considered "rational discrimination."<sup>136</sup>

In order to combat the employment consequences of maternity leave it is necessary,

at a minimum, [for] more men to take leave related to the birth of their child and to become more involved with childrearing. It will also require government intervention in the area of family leave, because the social costs of our current policies likely outweigh the private costs, thus limiting the incentive for employers to implement measures that correct the wage gap.<sup>137</sup>

In effect, what is necessary is that "men begin to act more like women in the workplace," which includes finding a way for men to take on more family responsibilities and take advantage of parental leave in order to break down current gendered stereotypes.<sup>138</sup> In the context of law firms, having children has a very different impact on the partnership track for men than for women.<sup>139</sup> For men, having children increases the odds of becoming a partner, but "[w]omen intent on partnership appear to consciously avoid or postpone parenthood."<sup>140</sup>

#### IV. The Failure of the FMLA to Fulfill Its Stated Purposes and Goals

An examination of current literature and statistics relating to women in the workplace reveals that the FMLA has failed to fulfill its stated purposes of balancing the demands of the workplace with the needs of families, entitling employees to take reasonable leave for the birth or adoption of a child (and for the care of a child), accomplishing those goals in a manner that minimizes the potential for employment discrimination on the basis of sex, and promoting the goal of equal employment opportunity for women.<sup>141</sup> Instead, the FMLA has perpetuated gender stereotypes and has not significantly reduced the conflict that women face in having to choose between work and family.<sup>142</sup> A significant change is

---

136. *See id.*

137. *Id.* at 405.

138. *Id.* at 397.

139. *See Hull & Nelson, supra* note 82, at 252.

140. *Id.*

141. *See* discussion *infra* Part IV.A-B; *see generally* discussion *supra* Parts II, III (discussing the realistic effects of the FMLA and the statistical information regarding women in law firms).

142. *See Dickerson, supra* note 58, at 437, 444.

needed in FMLA regulation in order for it to fulfill its stated purposes and goals.

A. *The Perpetuation of Gendered Stereotypes in the Workplace*

"Despite legislation designed to promote equality for women and mothers in the workplace, including . . . the Family and Medical Leave Act . . . , discrimination persists. Role-reinforcing stereotypes and the male-centric job model continue to constrain women."<sup>143</sup> The persistence of stereotypes related to motherhood and childcare is reflected in the increasing number of pregnancy discrimination cases, cases challenging discrimination against mothers and fathers based on their childcare responsibilities, and the attention given by the EEOC and employment law practitioners to such issues.<sup>144</sup>

Stereotypes attributed to mothers and women with caregiving responsibilities include that they are more committed to caregiving than their jobs, that women with caregiving responsibilities are less dependable than men, that pregnant women are less competent than other workers, and that women who adopt more flexible schedules are less competent than other workers.<sup>145</sup> Further evidence of the persistence of stereotypes is provided in research that indicates that men who choose to have children are not viewed as less competent or committed.<sup>146</sup>

Additionally, research indicates that having children significantly increases the odds of becoming a partner in a law firm, but only for men.<sup>147</sup> Women vying for partnership appear to consciously avoid or postpone motherhood, and a study of lawyers in Chicago indicated that of the small number of female partners, 60 percent had no children and had taken no leaves of absence

---

143. Reuter, *supra* note 17, at 1370.

144. *See id.*; *see also* EEOC, DISPARATE TREATMENT, *supra* note 80 (encouraging employers to adopt practices that help employees balance work and personal responsibilities and recognizing that employment decisions based on stereotypes about working mothers are unlawful); Newman & Crase, *supra* note 67, at 14, 15 (noting that employment law practitioners should be aware of the potential legal issues that arise when employees request and take family-related leave and that issues surrounding caregivers in the workplace may arise in a multitude of situations).

145. *See* Reuter, *supra* note 17, at 1374; EEOC, DISPARATE TREATMENT, *supra* note 80, at § II(a) (explaining the stereotypes attributed to mothers in the workplace).

146. *See generally* Hull & Nelson, *supra* note 82, at 252 (discussing the positive effect of having children on a man's odds of becoming partner at a law firm, while the opposite is true for women).

147. *See id.*

during their careers.<sup>148</sup> Female partners who did have children took leave only after attaining partnership in all cases except one.<sup>149</sup> "These results are powerfully suggestive that gender differences in careers of lawyers are in significant part the product of the dynamics of gender inequality within legal employment . . ."<sup>150</sup>

Although the FMLA was passed to help women balance career and family obligations, scholars argue that it has instead served to perpetuate the stereotypes that underlie discrimination against women in the workplace.<sup>151</sup> Some implicit messages sent to women through the FMLA are "that women are dependent on men, that men are the family's breadwinners, that women are the primary caretakers of children" (and other family members, such as elderly parents), and that women are less dedicated to their careers and workplace than men.<sup>152</sup> The lack of paid leave helps perpetuate these stereotypes.

The structure of the FMLA assumes that the mother is more financially and culturally available to take unpaid leave.<sup>153</sup> It does this by assuming that some source of secondary income exists that will enable the leave-taker (the mother) to take unpaid leave to care for the child immediately after childbirth.<sup>154</sup> This presumption of secondary income indicates that the government believed that women were not the primary earners of the family and were dependent on men for their economic livelihood.<sup>155</sup> "Unpaid leave undervalues women by assuming that women can afford to take leave 'because [their incomes are] not essential to their livelihood' and 'that a mother's financial contribution and involvement in the workplace are insignificant.'"<sup>156</sup> By positioning women as the parent most able to take unpaid leave, the FMLA helps reinforce parental roles that designate the mother as the primary caretaker.<sup>157</sup> Specifically, if the mother, rather than both

148. *See id.* at 252-53.

149. *See id.* at 253.

150. *Id.*

151. *See, e.g.,* Dickerson, *supra* note 58, at 437, 444 (arguing that the FMLA contains implicit messages that maintain the status quo and perpetuate gender stereotypes).

152. Reuter, *supra* note 17, at 1400.

153. *See id.* at 1402.

154. *See* Dickerson, *supra* note 58, at 442; *see* Reuter, *supra* note 17, at 1403.

155. *See* Reuter, *supra* note 17, at 1403.

156. *Id.*; *see also* Dickerson, *supra* note 58, at 444 (explaining that unpaid leave undervalues women by assuming that their income is non-essential and insignificant).

157. *See* Reuter, *supra* note 17, at 1402.

the mother and father, is the only parent who stays home following the birth of the child, she automatically assumes the role of primary caretaker.<sup>158</sup> Because the father continues to work during this period, his parenting skills will remain stagnant and he will occupy the secondary role with regard to childrearing.<sup>159</sup> "By effectively preserving the status quo, the FMLA 'perpetuates the legal subordination of women.'"<sup>160</sup>

Section 2614(b)(1)(A) of the FMLA, which allows employers to deny certain highly compensated employees restoration to the same position, also implicitly preserves the status quo and the role of mother as primary caregiver to children.<sup>161</sup> Women who fall into this highly compensated category and take maternity leave due to pregnancy and childbirth do so at the risk that they may not be restored to the same position.<sup>162</sup> However, because men are not physically forced to take leave due to childbirth, those men who would be subject to the highly compensated employee provision are discouraged from taking leave because of the risk of losing their high position and accrual of seniority.<sup>163</sup>

### B. *The Need to Change the FMLA*

The ineffectiveness of the FMLA and the continued discrimination against women with childcare responsibilities calls for significant change to the FMLA. The FMLA has exacerbated existing inequalities, and a new workplace model is needed in which men begin to act like women.<sup>164</sup> Unless "existing gendered patterns of behavior" are "dismantled or substantially disrupted," it is unlikely that gender inequality and discrimination can be either significantly reduced or alleviated in the workplace.<sup>165</sup> "This requires finding ways to induce men to take more family-related leave and shoulder more of the burden for family issues, which may help break down some of the existing patterns and stereotypes."<sup>166</sup> Government intervention is needed to remedy workplace gender inequality because the current policies outweigh the private costs, limiting the incentive for employers to take

---

158. *See id.*

159. *See id.* at 1402-03.

160. *Id.* at 1404.

161. *See Dickerson, supra* note 58, at 441.

162. *See id.*; 29 U.S.C. § 2614(b)(1)(A).

163. *See Dickerson, supra* note 58, at 441.

164. *See Selmi, supra* note 47, at 397.

165. *Id.* at 405.

166. *Id.* at 397.

measures to resolve existing disparities.<sup>167</sup>

With regard to the legal field, the following statement succinctly points to the need for significant change in order to break down existing gender disparities in law firms:

Just as the mechanisms that produce gender inequality in legal careers are difficult to analyze, they also may be resistant to change. Without significant changes in gender relations within families or in the work and family policies of private law firms, there may be little prospect for narrowing the gap between the opportunities for men and women in private practice. . . . Yet, until women gain parity with men in the partnerships of law firms, they will remain at a distinct disadvantage in terms of income, status, and power within a high-income, high-status, and relatively powerful profession.<sup>168</sup>

## V. Proposal for Mandatory Paid Parental Leave for Both Mothers and Fathers

In order to successfully meet its stated goals and objectives, the FMLA should be amended to mandate paid parental leave for both mothers and fathers. Mandating paid leave for parents choosing to give birth to or adopt a child can successfully work towards eliminating existing gender stereotypes and disparities in the workplace. It is necessary for the leave to be both paid and mandatory in order to bring about change in existing gender roles and stereotypes both within families and the workplace. If the FMLA mirrored the parental leave models set by many European countries, leave would be granted for a longer period of time and would be paid.<sup>169</sup> Employers would be required to grant up to twenty weeks of paid parental leave funded jointly by the government and employers (allowing for variations among different-sized employers). The amended FMLA would require both males and females choosing to expand their families through either childbirth or adoption to take a mandatory minimum of eight weeks of parental leave.

### A. *Advantages of Paid Leave*

Providing paid leave is necessary in order to accomplish the goals of the FMLA. The United States was the last industrialized country to enact a law providing for family leave, and it remains the only industrialized country that does not provide paid family

---

167. See *id.* at 405.

168. Hull & Nelson, *supra* note 82, at 253.

169. See Kroggel, *supra* note 27, at 459–62.

leave.<sup>170</sup> As mentioned before, unpaid leave undervalues those with childcare responsibilities (usually women) and assumes that they have the financial ability to support themselves, as well as a new addition to the family, without income from work.<sup>171</sup> Under current provisions of the FMLA, single-parent households, which encompass mostly single-mother households with only one source of income, are not as likely to be able to take advantage of FMLA leave benefits because the leave is unpaid.<sup>172</sup>

Not only will paid leave give single-parent households and those who live from paycheck to paycheck the ability to take leave to care for a newborn or newly adopted child,<sup>173</sup> it will also encourage both parents in two-income households to take leave without having to worry about the financial repercussions.<sup>174</sup> When a child is born or adopted, the family must shoulder additional financial burdens.<sup>175</sup> In families in which both the mother and father work, the mother's income may be lost during parental leave, effectively discouraging the father from taking leave because he has to support not only the mother who is not working, but the new child as well.<sup>176</sup> Few families can forgo the income of both the mother and the father, so the father is more likely to continue working instead of shouldering childcare and childrearing responsibilities, which are implicitly borne by the mother who stays home with the child during its early stages of development.<sup>177</sup> According to the Department of Labor's 2000 Commission Report on the FMLA, the most frequently noted reason for not taking family leave was the inability to afford it, followed by the fear that an employee's work or career would suffer as a result of taking leave or that the employee's job would be lost entirely.<sup>178</sup> This fear existed despite the fact that the FMLA guarantees job security.<sup>179</sup> A vast majority of employees who chose not to take leave, due to an inability to afford it, reported

---

170. See Dickerson, *supra* note 58, at 436.

171. See Reuter, *supra* note 17, at 1400.

172. See O'Leary, *supra* note 12, at 45.

173. See *id.* at 60.

174. See Dickerson, *supra* note 58, at 440.

175. See *id.*

176. See *id.*

177. See *id.*

178. See U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION (WHD), 2000 SURVEY REPORT, CHAPTER 2: EMPLOYEES- USE OF LEAVE, <http://www.dol.gov/esa/whd/fmla/chapter2.htm> (indicating in § 2.2.4 and tbl.2.17 the reasons most frequently given for not taking leave) [hereinafter U.S. DEP'T OF LABOR 2000 SURVEY].

179. See Dickerson, *supra* note 58, at 436.

that they would have taken leave had it been paid.<sup>180</sup>

Paid leave will undermine gender stereotypes, which assume that the mother should be the primary caretaker of the child. By allowing more men to take parental leave, paid leave would facilitate sharing childcare responsibilities between spouses and partners, thus serving the goal of balancing work and family obligations.<sup>181</sup> It will also promote autonomy and independence among women, and it can help undermine the assumption that mothers are dependent on the men in their lives for economic livelihood.<sup>182</sup> Because paid family leave recognizes the contribution caregivers make to the labor market, "employers will no longer be able to make the gendered assumption that women are not committed to the workplace and are therefore less deserving of seniority."<sup>183</sup>

Paid leave has been implemented in the United States at the state level. California has enacted the Paid Family Leave Law, which provides up to six weeks of wage replacement for employees who "take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption."<sup>184</sup> California treats the Paid Family Leave Law

180. See U.S. DEPT OF LABOR 2000 SURVEY, *supra* note 178 (showing in tbl.2.18 that many employees would have taken paid leave).

181. See Dickerson, *supra* note 58, at 448. Dickerson describes the process through which paid leave helps undermine the stereotype of the mother as the primary caregiver:

Alleviating the fundamental barrier to paternal leave will enable fathers to gain competence in the care of the child and become a primary caregiver. . . . The mother will no longer be perceived as the primary caregiver, because her skills, practice, and knowledge of caregiving will be equal with those of the father. Paid family leave will enable fathers to care for a child from its birth, and break the cycle of the more knowledgeable mother as primary caregiver.

*Id.*

182. See *id.* at 448–49.

183. *Id.* at 449.

184. CAL. UNEMP. INS. CODE § 3301(a)(1) (West 2004). Interestingly, the findings upon which the state of California enacted the Paid Family Leave Law are similar to the findings upon which Congress enacted the FMLA, but also include deficiencies associated with the implementation of the FMLA:

The Legislature finds and declares all of the following:

(a) It is in the public benefit to provide family temporary disability insurance benefits to workers to care for their family members. The need for family temporary disability insurance benefits has intensified as the participation of both parents in the workforce has increased, and the number of single parents in the workforce has grown. The need for partial wage replacement for workers taking family care leave will be exacerbated as the population of those needing care, both children and parents of workers, increases in relation to the number of



as a component of its unemployment insurance disability program, and funds it through employee contributions.<sup>185</sup> A federal provision of paid family leave could be funded in a similar way. However, along with employee contributions to a family leave insurance program, funding should also include contributions from the federal and state governments. This investment can be seen as an appreciation and recognition of the time expended by parents in caregiving responsibilities and the benefits society accrues through this activity.

### B. Advantages of Mandatory Leave

Not only should parental leave be paid, it should be mandatory. As with the provision of paid parental leave, European countries are ahead of the United States when it comes to mandating parental leave.<sup>186</sup> Norway and Sweden require both mothers and fathers to take parental leave for the birth or adoption of a child.<sup>187</sup> Gender stereotypes are exceptionally resilient to change,<sup>188</sup> and significant shifts in gender role expectations, both within the family and the workplace, are necessary to allow women to balance work and family. With regard to childbirth, mothers are biologically required to leave the workplace, but there is no similar biological mandate for men.

---

working age adults.

....  
(c) Developing systems that help families adapt to the competing interests of work and home not only benefits workers, but also benefits employers by increasing worker productivity and reducing employee turnover.

....  
(e) State disability insurance benefits currently provide wage replacement for workers who need time off due to their own non-work-related injuries, illnesses, or conditions, including pregnancy, that prevent them from working, but do not cover leave to care for a sick or injured child, spouse, parent, domestic partner, or leave to bond with a new child.

(f) The majority of workers in this state are unable to take family care leave because they are unable to afford leave without pay. When workers do not receive some form of wage replacement during family care leave, families suffer from the worker's loss of income, increasing the demand on the state unemployment insurance system and dependence on the state's welfare system.

(g) It is the intent of the Legislature to create a family temporary disability insurance program to help reconcile the demands of work and family . . . .

*Id.* § 3300 (emphasis added).

185. See *id.* §3300(g).

186. See Kroggel, *supra* note 27, at 461–62.

187. See *id.*

188. See Hull & Nelson, *supra* note 82, at 253.

Because of this biological necessity, women are automatically disadvantaged when it comes to taking leave associated with childbirth. Mandating parental leave for both parents requires men who are having children to share a more equal burden with their female counterparts.

Mandatory parental leave would also help undermine the implicit message in the FMLA that women are the primary caregivers of children and that men are the breadwinners of the family. Mandating leave requires both mothers and fathers to share in childcare responsibilities and develop parenting skills at the same time, with similar intensity. Furthermore, if parental leave is mandatory, workplace discrimination against mothers, stemming from their childcare responsibilities and tendency to take leave for the birth or adoption of a child, would be reduced because both men and women will equally engage in parental leave.<sup>189</sup> Mandating leave would "force employers to assess the true costs of parental leave, rather than basing their decision on existing assumptions regarding the cost of such leave."<sup>190</sup> Thus, "statistical discrimination"<sup>191</sup> based on gendered stereotypes that women are less committed to their careers because of childcare responsibilities would be significantly reduced. Only once society, as seen through laws and government recognition, appreciates and rewards the economic and social benefits of childcare, will caregivers be valued, rather than seen as undependable or less committed to the workplace.

*C. Mandatory Paid Parental Leave as a Way of  
Neutralizing the Effect of Maternity Leave on Billable  
Hour Requirements for Women Striving for Partnership*

The absence of paid leave has stunted the FMLA's ability to allow both men and women to work towards balancing career and family obligations, and has also prevented the Act from changing societal stereotypes regarding women and motherhood. Without mandating paid leave, women are likely to continue bearing the brunt of the burden when it comes to taking leave immediately after the birth or adoption of a child. According to the study examining University of Michigan Law School alumni, men work significantly more hours outside of the home and have more years of practice experience, while women do significantly more

---

189. See Selmi, *supra* note 47, at 410-11.

190. *Id.* at 411.

191. See *id.* at 403.

childcare and have a more interrupted work history.<sup>192</sup> Research indicates that when it comes to billable hours, women who have taken time for childcare work the least number of hours per year.<sup>193</sup> Furthermore, women with children, even those who have not taken time away from paid work to do childcare, work significantly fewer hours than similarly situated men (and women without children) in order to accommodate their childcare responsibilities.<sup>194</sup>

Mandatory paid parental leave offers the potential to help resolve these discrepancies. If men and women are mandated to take parental leave to care for newborns or newly adopted children, they will begin to shoulder similar parental responsibilities. In a billable hour regime, mandating men and women to take parental leave helps to create more equitable opportunities for partnership. Since billable hours are central to law firm operations, both men and women who choose to expand their families will have to face the billable hour effects of such a choice. Women will not be unfairly disadvantaged, and will be on equal footing with men choosing to have children.

#### *D. Potential Constitutional Challenges to Mandatory Parental Leave: Federalism and Equal Protection*

If the federal government were to institute a program of mandatory paid parental leave, federalism and equal protection concerns could arise. With regard to federalism, it could be argued that states should be allowed the independence to make decisions concerning the provision of workplace benefits.<sup>195</sup> "However, careful drafting of a federally administered program could allow the law to follow in the footsteps of the FMLA by working with statutes that may already exist in the various states and simply

---

192. See Dau-Schmidt et al., *supra* note 102 (manuscript at 22).

193. See *id.* (manuscript at 23). An analysis of University of Michigan Law School Alumni Data Set reveals:

... on average men with kids who have not taken time for childcare work the most hours each year (2520 hours) followed by women and men who do not have kids (2363 hours and 2328 hours respectively), men who have kids and have taken time for childcare (2092 hours), women who have kids but have not taken time for childcare (1908 hours) and finally women who have kids and have taken time for childcare (1386 hours).

*Id.*

194. See *id.* (manuscript at 23).

195. See generally Kroggel, *supra* note 27, at 466 (explaining that the government has traditionally allowed states to govern themselves as much as possible).

setting the minimum requirement for the nation as a whole.”<sup>196</sup> Thus, mandatory paid parental leave could be implemented as an amendment to the FMLA, and would set a minimum bar for the provision of parental leave benefits in the workplace.

A second potential concern relating to the implementation of such a program is the potential for an equal protection challenge.<sup>197</sup> However, if implemented like the FMLA, the mandatory paid parental leave program should present no equal protection problems.<sup>198</sup> The same amount and type of leave would be available to—and mandatory—for both men and women. The program would only present a challenge if, like models in some European countries,<sup>199</sup> leave benefits were different for men and women. Additionally, evidence that there have been no equal protection problems or challenges associated with the California Paid Parental Leave Law provides further support for the viability of a similar federal program.<sup>200</sup>

It appears that the greatest obstacle to the provision of mandatory paid parental leave is not a constitutional challenge, but that of gaining support within Congress and the political arena to implement the provision. Commentators have noted that the “reluctance to provide additional money has been and remains the major roadblock to the enactment of a program of paid leave.”<sup>201</sup> Furthermore, because laws reflect the cultural values of the policymakers who enact legislation, until the public voices its concern and desire for such a provision of family leave, Congress is unlikely to pass effective legislation that accommodates parents and combats the gender stereotypes and discrimination that pervade the workplace.

## Conclusion

The FMLA was enacted to address the conflict between the increasing demands of work and family responsibilities faced by caregivers in the employment arena. Congress recognized that this was especially a problem for women, but it focused on helping both men and women balance the demands of work and family

---

196. *Id.*

197. *See id.* at 468.

198. *See id.*

199. *See id.* at 457–58 (indicating that the British model of paid parental leave would present potential equal protection problems under the United States Constitution because it provides women with up to twenty-six weeks of paid maternity leave but provides men only two weeks of paid paternity leave).

200. *See id.* at 468.

201. *Id.* at 457; *see Hayes, supra* note 20, at 1536–37.

while maintaining the integrity of the family unit. Congress provided such leave on a gender-neutral basis in order to promote equal employment opportunities for men and women.

However, the FMLA has been unsuccessful in accomplishing its purpose of providing men and women a greater opportunity to take maternity and paternity leave without work-related stigma. Statistics revealing the increased amount of litigation concerning discrimination based on caregiving responsibilities, as well as the continued disparity between men and women in managerial positions, indicate that the FMLA has failed to meet its goals of providing equal employment opportunities on a gender-neutral basis and helping women balance the demands of the workplace with those of the family. This is especially noticeable in the law firm environment, where a very small number of women occupy the position of partner, which is perceived by many as the most prestigious position within the legal profession. Studies show that the presence of children is detrimental to the long-term career of women lawyers. A maternal wall has been created, and women who decide to take on childcare responsibilities are negatively affected in their employment opportunities.

By implementing a system of mandatory paid parental leave for both men and women, the government can work toward eliminating the maternal wall and enable mothers and fathers to participate in early childrearing without forcing them to choose between job security and parenting. Such a system would help undermine existing gender stereotypes that portray women as primary caregivers and less committed to their careers. It would also help address the FMLA's implicit messages that women are dependent on men and can rely on a second source of income when taking unpaid leave from work. Not only would women benefit from such a system, but men who would like to take parental leave, yet choose not to because of financial reasons, would benefit as well.

Significant change is needed for women to overcome gender stereotypes in the workplace, and it is necessary to provide an environment where women can balance work and family responsibilities while continuing to excel in their careers. Mandating paid parental leave for employees choosing to have or adopt children would create such an environment while engendering the sharing of childcare responsibilities between men and women.

