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California's Campaign For Paid Family Leave: A Model For Passing Federal Paid Leave

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COMMENT

CALIFORNIA'S CAMPAIGN FOR PAID FAMILY LEAVE: A MODEL FOR PASSING FEDERAL PAID LEAVE

INTRODUCTION

As a working mother, I know the importance of having a strong family leave policy. When I adopted my first child . . . I was a single parent struggling to balance my obligations to my job and to my child. Without the support of my employer . . . I could not have managed these two important parts of my life.¹

Congress enacted the Family and Medical Leave Act (FMLA), which requires covered employers to provide up to twelve weeks of unpaid, job-protected leave, with the stated purpose of enabling workers to balance two important parts of their lives: work and family.² However, the FMLA falls short of this purpose because many workers cannot financially support themselves and their families since the leave is unpaid.³

As a result, these workers are financially unable to access the FMLA's key benefits: job protection and the balance of work and family.

¹ 139 CONG. REC. H365-05, H365-66 (daily ed. Feb. 3, 1993) (statement of Rep. Margolies-Mezvinsky in support of the FMLA).

² See 29 U.S.C.A. § 2601(a)(1), (b)(1) (Westlaw 2011).

³ See U.S. COMM'N ON FAMILY & MED. LEAVE, U.S. DEP'T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 272-73 (1996), available at http://www.digitalcommons.ilr.cornell.edu/key_workplace/1; National Partnership for Women & Families, *111th Congress Work and Family Agenda*, NATIONALPARTNERSHIP.ORG (May 19, 2010), http://www.nationalpartnership.org/site/DocServer/111th_Congress_Work_and_Family_Agenda_4.25.10.pdf?docID=7022.

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To fulfill the FMLA's intent, the addition of a wage replacement provision is necessary so that workers have financial security as well as job security.⁴

In 2002, California became the first state to adopt a wage replacement requirement for the time parents take to bond with a newborn or adopted child.⁵ The income replacement of California's Paid Family Leave (PFL)⁶ has been recognized as a potential model for improving upon the FMLA.⁷ An examination of how California successfully passed PFL provides a valuable, practical model for passing federal wage replacement legislation, which is needed to meet the FMLA's intent.

Historically, the United States was one of few industrialized countries without a family leave policy.⁸ Even after the passage of the FMLA, 169 out of 173 countries provide *paid* leave in connection with childbirth; however, the United States, like Liberia, Papua New Guinea, and Swaziland, provides no paid parental leave.⁹ Following Australia's

⁴ See U.S. COMM'N ON FAMILY & MED. LEAVE, U.S. DEP'T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 272-73 (1996), available at http://www.digitalcommons.ilr.cornell.edu/key_workplace/1.

⁵ See Jodi Grant et al., *Expecting Better: A State-by-State Analysis of Parental Leave Programs*, NATIONALPARTNERSHIP.ORG (May 2005), available at www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052; see also CAL. UNEMP. INS. CODE § 3301(a)(1) (Westlaw 2011). In addition to providing wage replacement for bonding with a new child, Paid Family Leave (PFL) also provides compensation for leave taken to care for a seriously ill family member. *Id.* For purposes of narrowing this Comment's focus, it will discuss only the parental leave portions of PFL and the FMLA.

⁶ California's Paid Family Leave is also known as "Family Temporary State Disability Insurance" (FTDI). CAL. UNEMP. INS. CODE § 3301(a)(1) (Westlaw 2011). This Comment will use "Paid Family Leave" or "PFL" to refer to this law.

⁷ See, e.g., Jodi Grant et al., *Expecting Better: A State-by-State Analysis of Parental Leave Programs*, NATIONALPARTNERSHIP.ORG (May 2005), available at www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052; Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J.L. & FAM. STUD. 1, 14-15 (2006) (California's PFL is "[t]he first of its kind in the country While not without flaws, this new law could provide a model for the rest of the country.").

⁸ See Annie Pelletier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 559 (2007). A few proposed reasons to explain why the United States has lagged behind European countries in providing family leave policies include the following: (1) most European nations are social states, which are more accepting of public benefits; (2) the European feminist movement sought special treatment for mothers, while the U.S. feminist movement sought equal treatment; and (3) European social states tend to view the upbringing of children as a societal responsibility, whereas Americans tend to view it as an individual responsibility. See *id.* at 571-76.

⁹ JODY HEYMANN ET AL., THE WORK, FAMILY AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP? (2007), available at <http://www.mcgill.ca/files/ihsp/WFEI2007FEB.pdf>. The Harvard-McGill research team gathered "publicly available data on labor policies in 177 countries. The team relied most heavily on primary data sources including labor codes and other national-level legislation" to support their research. *Id.* at 9.

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passage of paid parental leave in May 2009, the United States is now the only developed nation not to provide its workers with paid leave to care for newborn children.¹⁰ In the 2009 congressional term, there were three federal bills that proposed income replacement during periods of family leave. These bills were the Family Income to Respond to Significant Transitions (FIRST) Act, the Federal Paid Parental Leave Act of 2009, and the Family Leave Insurance Act of 2009.¹¹ To fulfill the FMLA's intent of facilitating the balance work and family, these three bills must be reintroduced and passed in the current congressional term.

Part I of this Comment will provide a background of the stated purposes of the FMLA, the California Family Rights Act (CFRA) and California's Paid Family Leave (PFL), and the benefits each law provides. Part II will discuss the federal income replacement bills of 2009 that need to be reintroduced and enacted to fulfill the FMLA's intent.¹² Part III will explain why wage replacement is needed at the federal level so that more workers are financially able to access the FMLA's protections. Part IV will trace the legislative development of the FMLA and PFL to predict the likely challenges that federal income replacement bills will face. Given that paid leave is necessary to fulfill the FMLA's intent to enable workers to balance work and family, Part V will provide a framework for applying the successful methods of California's PFL campaign and lessons from court challenges to the FMLA's regulations to a federal campaign to pass paid family leave.

I. BACKGROUND

An overview of the intent and protections of the Family Medical Leave Act (FMLA), the California Family Rights Act (CFRA), and California's Paid Family Leave (PFL) will explain the intended purposes of each law, and consequently, will show why the FMLA falls short of fulfilling its legislative intent. Each law is aimed at enabling workers to attend to both work and family; however, the FMLA falls short of this intent, as many workers are unable to afford taking leave without pay.

¹⁰ Lew Daly, *The Case for Paid Family Leave: Why the United States Should Follow Australia's Lead*, NEWSWEEK (Aug. 3, 2009), <http://www.newsweek.com/id/210252/page/1>.

¹¹ Family Income to Respond to Significant Transitions Act of 2009, H.R. 2339, 111th Cong. (2009); Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. (2009); Federal Employees Paid Parental Leave Act of 2009, H.R. 626, 111th Cong. (2009).

¹² See H.R. 2339; H.R. 1723.

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A. FAMILY AND MEDICAL LEAVE ACT (FMLA)

The enactment of the FMLA was the result of a long struggle to pass family leave legislation.¹³ The efforts to pass a federal family leave policy first gained force in the 1960s with the feminist movement.¹⁴ The feminist movement attempted to build upon Title VII of the Civil Rights Act of 1964 (“Title VII”)¹⁵ with the Pregnancy Discrimination Act (PDA) of 1978, which amended Title VII to include protection from discrimination on the basis of pregnancy, childbirth, or related medical conditions.¹⁶ However, the PDA left the provision of unpaid leave for women affected by pregnancy, childbirth, or related medical conditions up to the employer.¹⁷ Thus, a pregnant woman would have the right to protected parental leave only if her company had a policy to provide protected leave for other temporary disabilities.¹⁸

¹³ See Annie Pelletier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 553 (2007); see 139 CONG. REC. E297-01, E297 (daily ed. Feb. 4, 1993) (statement of Hon. Bart Stupak of Mich.) (“[O]ver the past two decades we have witnessed dramatic changes in the American family. Families are finding it more and more difficult to meet both their work and family responsibilities. Today, about two-thirds of all mothers, more than 70 percent of women with school aged children, work outside the home.”); 139 CONG. REC. E402-03, E404 (daily ed. Feb. 3, 1993) (statement of Hon. Glenn Poshard of Ill.) (stating that “three out of four families depend on both parents working outside of the home to make ends meet. Most single-parent families, too, struggle to maintain an adequate income”); 139 CONG. REC. E323-01, E323 (daily ed. Feb. 3, 1993) (statement of Hon. Thomas M. Barrett of Wis.) (stating that the FMLA “encompasses the profound changes in the composition of today’s American work force”); 139 CONG. REC. H447-06, H447 (daily ed. Feb. 3, 1993) (statement of Mr. Richardson) (“Passage of this legislation recognizes the reality of working Americans, that most American families are headed either by two working parents or by single women, and that women are now the fastest-growing segment of the labor market.”).

¹⁴ Annie Pelletier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 550 (2007) (stating that the feminist movement was sparked by “[t]he civil rights movement of the 1960s . . . [which] focused on equal treatment of people regardless of race, color, religion, or national origin. . . . [The feminist movement] stood for the idea that women had the same right to work as their male counterparts, regardless of the fact that they were pregnant or may become pregnant.”).

¹⁵ 42 U.S.C.A. § 2000e (Westlaw 2011). Title VII came out of the civil rights movement and made it illegal “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.” 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw 2011).

¹⁶ See H.R. REP. NO. 103-8(II), at 10 (1993).

¹⁷ See 42 U.S.C.A. § 2000e(k) (Westlaw 2011); Annie Pelletier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 551 (2007).

¹⁸ See 42 U.S.C.A. § 2000e(k) (Westlaw 2011); Annie Pelletier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 551-52 (2007) (“[T]he PDA . . . did not address all employment problems related to pregnancy and childbirth. . . . For example, if an employer has no sick leave

The shortcomings of the PDA, combined with the increasing number of women in the workforce, sparked a nearly decade-long struggle to enact a federal family leave policy.¹⁹ Since 1990, “nearly 57 million women [have been] working or looking for work—more than a 200 percent increase since 1950.”²⁰ Congressional findings during the Clinton administration stated that the number of single-parent households and two-parent households in which both parents worked had significantly increased.²¹ However, workplaces at the time were still “often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities.”²² The lack of labor policies addressing these changing workforce demographics often forced employees to choose between job security and parenting.²³ To address this growing problem, Congress enacted the FMLA, which was finally signed into law by President Clinton on February 5, 1993.²⁴

The purposes articulated for enacting the FMLA were “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 interests in preserving family integrity.”²⁵ The FMLA sought to require all employers to abide by the same basic labor standards, something that the PDA fell short of accomplishing.²⁶ To further the FMLA’s stated

policy in place, or does not allow employees to take unpaid leave for disability, a pregnant woman would not be given these rights either. Under the PDA, an employer only has to give a pregnant woman the same benefits that all other employees would have if they were not able to work.”)

¹⁹ See Annie Pelletier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 549, 552 (2007); see also 29 U.S.C.A. § 2601(a)(1) (Westlaw 2011).

²⁰ Annie Pelletier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 554 (2007).

²¹ See 29 U.S.C.A. § 2601(a)(1) (Westlaw 2011).

²² H.R. REP. NO. 103-8(I), at 17 (1993).

²³ See 29 U.S.C.A. § 2601(a)(3) (Westlaw 2011). Congress was concerned about “the needs of the American workforce, and the development of high-performance organizations.” 29 C.F.R. § 825.101(b) (Westlaw 2011).

²⁴ See 29 U.S.C.A. § 2601(a)(3) (Westlaw 2011); Guissu Raafat, Comment, *Does Paid Leave Really Pay for Small Businesses in California?*, 47 SANTA CLARA L. REV. 573, 577 (2007).

²⁵ 29 U.S.C.A. § 2601(b)(1) (Westlaw 2011). With these motivations in mind, the stated purposes of the FMLA were (1) to balance the demands of the workplace with the needs of families; (2) to entitle employees to take reasonable leave for the birth, adoption, or care of a child; (3) to accomplish these purposes in a manner that accommodates the interests of employers; (4) to accomplish these purposes while minimizing the potential for employment discrimination on the basis of sex; and (5) to promote the goal of equal employment opportunity for women and men. See 29 U.S.C.A. § 2601(b) (Westlaw 2011). For cases discussing the purpose of the FMLA, see *Gudenkauf v. Stauffer Commc’ns, Inc.*, 922 F. Supp. 465 (D. Kan. 1996), and *Johnson v. Primerica*, No. 94 Civ.4869(MBM)(RLE), 1996 WL 34148 (S.D. N.Y. Jan. 30, 1996).

²⁶ S. REP. NO. 103-3, at 5 (1993). The Senate Labor and Human Resources Committee found that “voluntary corrective actions on the part of employers had proven inadequate; with experience

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purposes, the law requires covered employers to provide up to twelve weeks of unpaid, job-protected leave to an eligible employee for any of the following reasons: (1) incapacity due to pregnancy, prenatal care, or childbirth; (2) caring for the employee's child after birth, or placement for adoption or foster care; (3) caring for the employee's spouse, child, or parent who has a serious health condition; (4) inability of the employee to perform his or her job due to a serious health condition; and (5) a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active military duty.²⁷

Since "three out of four families depend on both parents working outside of the home to make ends meet," accessing the FMLA's protections is made difficult for these workers.²⁸ Further, to be considered eligible for FMLA leave, an employee must have been employed for at least twelve months by a covered employer and for at least 1,250 hours of service with that employer during the twelve-month period preceding the leave.²⁹ Also, the FMLA applies only if the employer is a "person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."³⁰ Once eligibility has been established and an employee has elected to use FMLA leave, the employer must maintain the employee's health coverage, and the worker must pay his or her health insurance premiums as if he or she were still at work.³¹

failing to substantiate the claim that, left alone, all employers would act responsibly." *Id.* Furthermore, Congress found that "it is important for the development of children and the family unit that fathers and mothers be able to participate in the early childrearing." 29 U.S.C.A. § 2601(a)(2),(3) (Westlaw 2011).

²⁷ 29 U.S.C.A. § 2612(a)(1) (Westlaw 2011). Section 2612(a)(1)(E) was added to the FMLA in 2008 to provide job-protected leave when caring for a member of the military who is on active duty. *Id.* Additionally, the Supporting Military Families Act of 2009 was introduced. H.R. 3403, 111th Cong. (2009); S. 1543, 111th Cong. (2009). This Act would have revised the FMLA's requirements for exigency leave by repealing the contingency operation requirement for members of the Armed Forces. However, this bill was not passed. *Id.*

²⁸ 139 CONG. REC. E402-03, E404 (daily ed. 1993) (statement of Hon. Glenn Poshard of Ill.) (stating that "single-parent families, too, struggle to maintain an adequate income").

²⁹ 29 U.S.C.A. § 2611(2)(A) (Westlaw 2011). Further, the Third Circuit held that hours worked at home count toward the 1,250-hour requirement. *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500 (3d Cir. 2009). This decision provides additional helpful guidance for complying with the FMLA's requirements. *See id.*

³⁰ 29 U.S.C.A. § 2611(4)(A)(i) (Westlaw 2011).

³¹ 29 U.S.C.A. § 2614(c)(1) (Westlaw 2011); 29 C.F.R. § 825.210(a) (Westlaw 2011). Employees are entitled to, and must be given notice of, any new health plans and benefits, or changes in health benefits, that occur during their period of FMLA leave. 29 C.F.R. § 825.209(c),(d) (Westlaw 2011). Other benefits, including group life insurance, health insurance, disability

The FMLA's key protection is to secure the employee's job during a period of family leave.³² Upon return from FMLA leave, unless specifically excluded,³³ an employee ordinarily must be restored to his or her original or equivalent position, pay, benefits and other employment terms.³⁴ However, an employee is not entitled to reinstatement if the job was eliminated through downsizing or reorganization.³⁵ Significantly, FMLA leave is not paid.³⁶ However, an employee may elect, or an employer may require the employee, to use any accrued paid vacation, personal, or family leave of the employee during FMLA leave.³⁷ Although substitution of paid leave is permissible, employers are not legally required to provide paid vacation leave, personal leave, family leave, or other paid time off.³⁸

insurance, sick leave, annual leave, educational benefits, and pensions, must be resumed upon return in the same manner and at the same levels as provided when the leave began, but subject to any changes that occurred during the leave period. 29 C.F.R. § 825.215(d)(1) (2011); see 29 U.S.C.A. § 2614(a)(2) (Westlaw 2011). Although leave under FMLA must not "result in the loss of any employment benefit accrued prior to the date on which the leave commenced," employees are not entitled to "the accrual of any seniority or employment benefits during any period of leave" nor to any rights other than those rights, benefits, or positions of employment to which they would have been entitled had they not taken the leave. 29 U.S.C.A. § 2614(a)(2),(3) (Westlaw 2011).

³² 29 U.S.C.A. § 2614(a)(1),(2) (Westlaw 2011).

³³ 29 U.S.C.A. § 2614(b)(2) (Westlaw 2011). Employees who are specifically excluded from this provision include highly compensated employees. *Id.* A "highly compensated employee" is defined as "a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed." *Id.* Employers may also deny reinstatement to an equivalent position for the following reasons: (1) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; (2) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines such injury would occur and (3) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice. 29 U.S.C.A. § 2614(b)(1) (Westlaw 2011). For cases interpreting this provision, see *Gonzalez-Rodriguez v. Potter*, 605 F. Supp. 2d 349 (D. P.R. 2009), *Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360 (N.D. Ga. 2008), and *Brown v. J.C. Penney Corp.*, 924 F. Supp. 1158 (S.D. Fla. 1996).

³³ 29 C.F.R. § 825.215(c) (Westlaw 2011).

³⁴ 29 U.S.C.A. § 2614(a)(1),(2) (Westlaw 2011). Additionally, upon return, "an employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases." 29 C.F.R. § 825.215(c) (Westlaw 2011).

³⁵ 29 U.S.C.A. § 2614(a)(3)(B) (Westlaw 2011); 29 C.F.R. § 825.216(a)(1) (Westlaw 2011). The employer has the burden of proving that an employee would have been laid off during the FMLA leave period despite his or her leave. 29 C.F.R. § 825.216(a)(1) (Westlaw 2011). For a case interpreting this provision, see *Parker v. Hanhemann University Hospital*, 234 F. Supp. 2d 478 (D. N.J. 2002).

³⁶ 29 U.S.C.A. § 2612(c) (Westlaw 2011).

³⁷ *Id.* § 2612(d)(2)(A).

³⁸ *Id.* § 2612(d)(1),(2)(A).

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B. CALIFORNIA FAMILY RIGHTS ACT (CFRA)

Two years before the FMLA's passage, California enacted its equivalent to the FMLA, the Moore-Brown-Roberti California Family Rights Act (CFRA).³⁹ Although this Comment primarily addresses California's Paid Family Leave (PFL), a short background of the CFRA is necessary because it was the forerunner to PFL.⁴⁰ Also, it is necessary to clarify that the CFRA and PFL are separate and distinct laws.⁴¹ Like the FMLA, the CFRA provides unpaid, job-protected leave, whereas PFL provides wage replacement without any job protection during leave.⁴²

Similar to the FMLA, the CFRA was enacted to enable families to balance the demands of work and home.⁴³ In 1993, the CFRA was amended to conform most of its provisions to the FMLA.⁴⁴ According to the CFRA, an employee may be granted family leave for the following reasons: (1) to care for a child after giving birth, adopting or fostering a child, and (2) to care for a child, parent, or spouse with a serious health condition."⁴⁵ Both the FMLA and the CFRA guarantee reinstatement to "the same or comparable position upon termination of the leave."⁴⁶

³⁹ CAL. GOV'T CODE §§ 12945.1-12945.2 (Westlaw 2011); CAL. CODE REGS. tit. 2, § 7297.0(b) (Westlaw 2011).

⁴⁰ See RUTH MILKMAN & EILEEN APPELBAUM, PAID FAMILY LEAVE IN CALIFORNIA: NEW RESEARCH FINDINGS (2004), available at <http://www.familyleave.ucla.edu/briefingpapers/papers/newresearch.pdf>.

⁴¹ Compare CAL. GOV'T CODE § 12945.2 (Westlaw 2011), with CAL. UNEMP. INS. CODE § 3301 (Westlaw 2011).

⁴² Compare CAL. GOV'T CODE § 12945.2(a) (Westlaw 2011), with CAL. UNEMP. INS. CODE § 3301(a)(1) (Westlaw 2011).

⁴³ California Family Rights Act of 1991, 1991 Cal. Stats., ch. 462, § 2(d), reprinted as note following CAL. GOV'T CODE § 12945.2 (Westlaw 2011) ("Because of the changing roles of men and women in the work force and the family, and the need to promote stability and economic security in families, both men and women should have the option of taking leave for child-rearing purposes.").

⁴⁴ CAL. CODE REGS. tit. 2, § 7297.10 (Westlaw 2011). Accordingly, the CFRA requires California employers who employ fifty or more employees within a seventy-five-mile radius to provide up to twelve weeks of unpaid, job-protected leave to "eligible employees" for family and medical reasons. CAL. GOV'T CODE § 12945.2(a), (b), (c)(3) (Westlaw 2011); CAL. CODE REGS. tit. 2, § 7297.0(e)(3) (Westlaw 2011). Like the FMLA, employees are eligible for CFRA leave if they have worked for at least 1,250 hours over the twelve months preceding leave. CAL. CODE REGS. tit. 2, § 7297.0(e) (Westlaw 2011); CAL. GOV'T CODE § 12945.2(a) (Westlaw 2011).

⁴⁵ CAL. CODE REGS. tit. 2, § 7297.0(h)(1)-(2) (Westlaw 2011). For additional discussion of the provisions of the CFRA, see the key California Supreme Court decision, *Lonicki v. Sutter Health Center*, which raises issues concerning (1) whether an employee on FMLA leave from one employer may simultaneously work for another employer; and (2) whether an employer is required to obtain a third medical opinion to determine whether an employee is eligible for leave. *Lonicki v. Sutter Health Cent.*, 180 P.3d 321 (Cal. 2008).

⁴⁶ CAL. CODE REGS. tit. 2, § 7297.0(f)-(g) (Westlaw 2011). "Employment in the same position means employment in, or reinstatement to, the original position which the employee held prior to taking a CFRA leave." CAL. CODE REGS. tit. 2, § 7297.0(f) (Westlaw 2011). "Employment

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Although both the CFRA and the FMLA provide job-protected leave, a key difference between the two laws concerns leave taken for pregnancy-related medical conditions.⁴⁷ The CFRA specifically excludes such conditions as a qualifying reason for taking CFRA leave, whereas the FMLA includes them.⁴⁸ The CFRA excludes these medical conditions because California already has a law that provides job protection to women who take leave due to the pregnancy-related conditions, which is the Pregnancy Disability Leave (PDL)⁴⁹ section of the state's Fair Employment and Housing Act (FEHA).⁵⁰ Therefore, in California, the combination of the CFRA and the FEHA's PDL provision is significantly more generous than the FMLA because women affected by pregnancy, childbirth or related medical conditions are entitled to up to four months of unpaid, job-protected leave under the FEHA's PDL provision, in addition to the twelve weeks of leave that CFRA provides to care for a child.⁵¹ In contrast, the FMLA only provides for a total of twelve weeks for either or both reasons.⁵²

C. PAID FAMILY LEAVE OF CALIFORNIA

On September 23, 2002, Governor Gray Davis signed Senate Bill 1661 which marked the passage of PFL.⁵³ California was the first state to accomplish a comprehensive paid family leave program by using the

in a comparable position" means employment in a position that is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It has the same meaning as the term "equivalent position" in FMLA and its implementing regulations. CAL. CODE REGS. tit. 2, § 7297.0(g) (Westlaw 2011).

⁴⁷ Other important differences between CFRA and FMLA include: (1) CFRA includes care of domestic partners; (2) employees eligible for FMLA are entitled to up to twelve weeks of leave for any "qualifying exigency" arising because a family member is on active military duty. See 29 C.F.R. §§ 825.126, 825.127 (Westlaw 2011); CAL. CODE REGS. tit. 2, § 7297.0(p) (Westlaw 2011); see also CAL. CODE REGS. tit. 2, § 7297.0(h)(2) (Westlaw 2011).

⁴⁸ Compare CAL. GOV'T CODE § 12945.2(c)(3)(C) (Westlaw 2011) with 29 U.S.C.A. § 2612(a)(1)(D) (Westlaw 2011).

⁴⁹ CAL. GOV'T CODE § 12945 (Westlaw 2011); CAL. CODE REGS. tit. 2, § 7291.7 (Westlaw 2011).

⁵⁰ CAL. GOV'T CODE 12900, et. seq. (Westlaw 2011).

⁵¹ CAL. GOV'T CODE § 12945(a) (Westlaw 2011).

⁵² CAL. GOV'T CODE § 12945.2(a) (Westlaw 2011); CAL. GOV'T CODE § 12945.2(c)(3)(C) (Westlaw 2011). It should be clarified that the FMLA, the CFRA and PDL provide job protection for leave taken related to pregnancy, but these laws do not provide wage replacement during these leaves. Conversely, PFL provides wage replacement during leave, but does not provide job protection. Compare CAL. GOV'T CODE § 12945.2(c)(3)(C) (Westlaw 2011) with 29 U.S.C.A. § 2612(a)(1)(D) (Westlaw 2011).

⁵³ RUTH MILKMAN & EILEEN APPELBAUM, THE STATE OF CALIFORNIA LABOR 45 (2004), available at http://www.sscnet.ucla.edu/soc/faculty/milkman/paid_family_leave_scl.pdf. PFL became effective on January 1, 2004.

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pre-existing State Disability Insurance (SDI) as its funding source.⁵⁴ PFL is administered by California's Employment Development Department (EDD) in conjunction with the SDI program.⁵⁵ This law made California the first state to provide partial wage replacement for leave taken for all reasons that the FMLA covers.⁵⁶ PFL is funded by a mandatory employee payroll tax.⁵⁷ PFL's weekly compensation is 55% of the employee's salary subject to a maximum benefit cap, and the benefits may not exceed six weeks within a twelve-month period.⁵⁸

Similar to the factors leading to the passage of the FMLA, the two main factors that contributed to the passage of PFL were the increase in female participation in the workforce and the increase in male participation in family caregiving.⁵⁹ Legislators passed PFL largely

⁵⁴ VICKY LOVELL ET AL., FACT SHEET FOR MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG THE BEST U.S. EMPLOYERS (2007), available at http://www.iwpr.org/publications/pubs/maternity-leave-in-the-united-states-paid-parental-leave-is-still-not-standard-even-among-the-best-u.s.-employers/at_download/file. Family leave insurance, based upon the model of SDI, allows employees to draw from an employee-funded state insurance fund for partial wage replacement when they need time off to care for new children or seriously ill family members, or to recover from their own serious illnesses. Eileen Abbelbaum, *Congressional Testimony via FDCHA: Family-Friendly Workplace Policies*, Cong. Testimony (Mar. 3. 2009), 2009 WLNR 4085309 (Westlaw).

⁵⁵ CAL. UNEMP. INS. CODE § 3301(a)(1) (Westlaw 2011); VICKY LOVELL ET AL., FACT SHEET FOR MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG THE BEST U.S. EMPLOYERS (2007), available at http://www.iwpr.org/publications/pubs/maternity-leave-in-the-united-states-paid-parental-leave-is-still-not-standard-even-among-the-best-u.s.-employers/at_download/file.

⁵⁶ VICKY LOVELL ET AL., FACT SHEET FOR MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG THE BEST U.S. EMPLOYERS (2007), available at http://www.iwpr.org/publications/pubs/maternity-leave-in-the-united-states-paid-parental-leave-is-still-not-standard-even-among-the-best-u.s.-employers/at_download/file. In 2007, Washington State passed a law that provides five weeks of paid leave for parents only, paid at a flat rate of \$250 per week. *Id.* In 2008, New Jersey passed a family leave insurance law that provides a worker-funded insurance fund to allow employees to receive up to six weeks of partial wage replacement during family leave. Eileen Abbelbaum, *Congressional Testimony via FDCHA: Family-Friendly Workplace Policies*, Cong. Testimony (Mar. 3. 2009), 2009 WLNR 4085309 (Westlaw). Unlike California and New Jersey, Washington had to create a program from scratch by charging a fixed amount per hour and paying out a fixed benefit per week. *Id.* The different approaches of states provide useful examples for making partial wage replacement funding available nationally. *Id.*

⁵⁷ CAL. UNEMP. INS. CODE §§ 3300(g), 3301(a)(1) (Westlaw 2011).

⁵⁸ Labor Project for Working Families, *Paid Family Leave-SB 1661 (Kuehl): Ten Quick Facts*, FAMILY CAREGIVER ALLIANCE, http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=926 (last visited Mar. 7, 2011). The benefit paid during a family leave period increases automatically each year according to the increase in the state's average weekly wage. In 2004, a minimum-wage worker paid \$11.23 per year into SDI, while the estimated average cost was \$27 per worker per year. In 2009, the maximum weekly benefit was \$959 per week. PAID FAMILY LEAVE, <http://www.paidfamilyleave.org> (last visited Mar. 7, 2011).

⁵⁹ Guissu Raafat, Comment, *Does Paid Leave Really Pay for Small Businesses in*

based upon a finding that the majority of workers who needed leave were unable to afford taking leave without pay.⁶⁰ Thus, the legislature enacted PFL to create a program that would allow not only dual-income families, but also single parents and nontraditional families, to strike a balance between work and home life.⁶¹ The significance of PFL is that it is the first law to mandate that an individual who takes family leave *must* be provided with partial wage replacement.⁶²

PFL, through SDI,⁶³ provides temporary, partial income benefits to an employee who takes time off (1) to care for a sick or injured child, spouse, parent, domestic partner; (2) to bond with a new child; or (3) because the employee is unable to work due to non-work-related illness or injury.⁶⁴ SDI provides pregnancy-related disability benefits to millions of women in California.⁶⁵ Vicky Lovell, from the Institute for

California?, 47 SANTA CLARA L. REV. 573, 574 (2007).

⁶⁰ CAL. UNEMP. INS. CODE § 3300(f) (Westlaw 2011).

⁶¹ CAL. UNEMP. INS. CODE § 3300(a) (Westlaw 2011). As stated in one of the committee reports, it was “the author’s intent to create [PFL] to help reconcile the demands of work and family.” MICHAEL MATTOCH, CALIFORNIA BILL ANALYSIS, S.B. 1661, Cal. Assemb., 2001-2002 Reg. Sess., (Aug. 23, 2002), available at CA B. An., S.B. 1661 Assem., 8/23/2002 (Westlaw) (stating that one of the rationales of PFL was that “[t]he United States is one of the few developed countries in the world without a national paid parental leave program”).

⁶² See Labor Project for Working Families, *Paid Family Leave-SB 1661 (Kuehl): Ten Quick Facts*, FAMILY CAREGIVER ALLIANCE, http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=926 (last visited Mar. 26, 2011).

⁶³ CAL. UNEMP. INS. CODE § 3301(a)(1), (b) (Westlaw 2011). SDI provides income replacement to “workers who need time off due to their own non-work-related injuries, illnesses, or conditions, including pregnancy, that prevent them from working.” CAL. UNEMP. INS. CODE § 3300(e) (Westlaw 2011).

⁶⁴ VICKY LOVELL ET AL., FACT SHEET FOR MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG BEST U.S. EMPLOYERS 2 (2007), available at http://www.iwpr.org/publications/pubs/maternity-leave-in-the-united-states-paid-parental-leave-is-still-not-standard-even-among-the-best-u.s.-employers/at_download/file. Illnesses and injuries include “any illness or injury resulting from pregnancy, childbirth, or related medical condition.” *Id.* In addition to California, Rhode Island, New Jersey, New York, Hawaii, and Puerto Rico all require that employers ensure their employees participate in SDI programs. *Id.* The programs provide wage replacement to workers who are temporarily unable “to perform regular or customary work because of a [non-work-related] physical or mental condition.” *Id.* Benefits are typically provided for twenty-six weeks, although Rhode Island provides a maximum of thirty weeks, and California allows up to fifty-two weeks. *Id.* Administrative expenses for SDI programs are 4.4% of net expenditures in Rhode Island, 5.5% in California and 6.7% in New Jersey; thus, they are very efficient to run. *Id.*

⁶⁵ VICKY LOVELL ET AL., FACT SHEET FOR MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG THE BEST U.S. EMPLOYERS (2007), available at http://www.iwpr.org/publications/pubs/maternity-leave-in-the-united-states-paid-parental-leave-is-still-not-standard-even-among-the-best-u.s.-employers/at_download/file. The pre-existing SDI program is limited to payment of disability compensation to individuals whose unemployment and lost wages resulted from their own disability or sickness. See CAL. UNEMP. INS. CODE § 3300(e) (Westlaw 2011). PFL extends the SDI fund to include disabilities related to providing care to a seriously ill family member or to bond with a new child. See CAL. UNEMP. INS.

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Women's Policy Research, argued that "SDI offers a model for insuring workers against wage loss . . . the funding mechanism is cost-effective, and identifying need is relatively clear-cut."⁶⁶ PFL provides any employee who pays into SDI access to partial wage benefits, regardless of the number of workers employed at the employee's workplace and the number of hours worked.⁶⁷ However, under PFL, an employer does not have to hold a position open if the employee is not otherwise entitled to job protection under the FMLA or the CFRA.⁶⁸

II. SOLUTIONS TO THE FMLA'S SHORTCOMINGS: FEDERAL PAID FAMILY LEAVE LEGISLATION

The rationale behind PFL and its successful passage shows the recognition that wage replacement is a necessary provision in family leave laws to enable more workers the financial ability to take leave. Although the FMLA is aimed at allowing workers to balance work and family, many workers are unable to use this law, because they cannot afford to take leave without pay.⁶⁹ Just as California legislation recognized the need for wage replacement during family leave, the adoption of federal paid family leave law is needed to fulfill the FMLA's intent because it would provide a greater number of workers access to the FMLA's protections.⁷⁰

CODE § 3301(a)(1) (Westlaw 2011).

⁶⁶ VICKY LOVELL, HEALTH AND FAMILY CARE LEAVE FOR FEDERAL WORKERS: USING A SHORT-TERM DISABILITY INSURANCE MODEL TO SUPPORT WORKER AND FAMILY WELL-BEING, ENSURE COMPETITIVE EMPLOYEE COMPENSATION, AND INCREASE PRODUCTIVITY (2008), available at <http://jec.senate.gov/archive/Hearings/03.06.08%20Paid%20Leave/Lovell%20statement%203-6-08.pdf>.

⁶⁷ *Id.*; see CAL. UNEMP. INS. CODE § 3303(a),(b) (Westlaw 2011).

⁶⁸ Labor Project for Working Families, *Paid Family Leave-SB 1661 (Kuehl): Ten Quick Facts*, FAMILY CAREGIVER ALLIANCE, http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=926 (last visited Mar. 7, 2011); see CAL. GOV'T CODE § 12945.2(a) (Westlaw 2011); 29 U.S.C.A. § 2611(2)(A)(i)-(ii) (Westlaw 2011).

⁶⁹ See 139 CONG. REC. E402-03, E404 (daily ed. Feb. 23, 1993) (statement of Hon. Glenn Poshard of Ill.).

⁷⁰ See *id.*

A. FEDERAL LEGISLATION TO FULFILL THE FMLA'S INTENT

1. *Federal Employees Paid Parental Leave Act of 2009, H.R. 626 and S. 354*

The Federal Employees Paid Parental Leave Act of 2009 (FEPPLA) was introduced on January 22, 2009, and was passed by the House on June 4, 2009.⁷¹ The Act proposed to amend the Congressional Accountability Act (CAA) and the FMLA to provide four weeks of paid parental leave to federal and congressional employees for the birth, adoption, or placement of a child.⁷²

The stated need for the bill was that “[m]any employees cannot afford to take unpaid leave, and are forced to choose between spending more time with their new child and maintaining an income to support their family.”⁷³ Congressional supporters of this bill believed that the federal government should be the model employer that sets a standard for the private sector.⁷⁴ In response to the opposition’s concerns with the bill’s costs, supporters stressed the need for this legislation as a basic labor standard needed to provide workers the ability to care for their newborns or adopted children without forfeiting their financial security.⁷⁵ In support of the bill’s passage, the American Federation of

⁷¹ Federal Employees Paid Parental Leave Act of 2009, H.R. 626, 111th Cong. (2009). There was also a companion bill in the Senate. S. 354, 111th Cong. (2009).

⁷² H.R. REP. NO. 116-111, at 2 (2009). The paid leave bill would have applied to four out of the twelve weeks of unpaid leave that are currently available to employees under the Family and Medical Leave Act. *Id.* Rep. Dennis Cardoza stated that “a 2000 Labor Department survey showed that 78 percent of employees chose not to take unpaid leave because they just couldn’t afford it. And they certainly cannot do so in the trying economic times we face today when hardworking families are struggling just to get by.” 155 CONG. REC. H6216, H6217 (daily ed. June 4, 2009).

⁷³ H.R. REP. NO. 116-111, at 2. The report further states that “H.R. 626 will help families by providing four weeks of paid parental leave to federal and congressional employees. Enactment of this measure will ensure that the federal government, as an employer, is providing the type of benefits offered to government workers in other industrialized countries. This family friendly measure will also have a positive impact on our ability to attract and retain a highly qualified federal workforce.” *Id.* The Office of Management and Budget issued a statement that the Obama administration “supports the goal” of H.R. 626. *Paid Leave for Feds Is Harbinger for Private Sector*, 17 No. 5 FAMILY & MED. LEAVE HANDBOOK NEWSL. 5, available at 17 No. 5 FMLHKB-NWL 5 (Westlaw 2009).

⁷⁴ 155 CONG. REC. H6216, H6217 (daily ed. June 4, 2009). In support of the bill, Rep. Dennis Cardoza stated “Madam Speaker, I rise today not as a Democrat or a Republican, but as a father. Nothing can replace the first few days and weeks between a parent and a newborn or a newly adopted child when the bond that is forged is critical and sets the foundation for the child’s entire later life. It is in these first few moments that a child’s emotional and physical health and development is established--time which cannot be made up for later in life once it’s lost.” *Id.*

⁷⁵ 155 CONG. REC. H6216, H6217 (daily ed. June 4, 2009). Cardoza further states, “[Y]ou

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Labor and Congress of Industrial Organizations (AFL-CIO) argued that “[s]pending time with a newborn or a newly adopted child should not be viewed as a luxury that only the rich should be able to afford.”⁷⁶

If this bill were reintroduced and passed by the current Congress, it could serve as an important stepping-stone to the passage of similar paid family leave proposals affecting a broader number of workers in the private sector.⁷⁷ Senator Jim Webb recognized that “[t]he American worker benefits [from such bills] because the federal government often sets the standard that business will follow.”⁷⁸ As with similar bills proposed in the past, the main challenge it faces is the concern about its cost.⁷⁹ To respond to this concern, the focus of the debate needs to shift away from responding to business’s concerns to meeting families’ needs.⁸⁰ Rather than viewing such legislation as an “additional fringe benefit”⁸¹ or as a “government mandate,” such legislation must be viewed as a basic labor standard, just like minimum wage or child labor

can put a price tag on a piece of legislation, but you cannot put a price on the importance of not having to worry about a paycheck and having the full and undivided attention of both parents lavishing boundless love on a disadvantaged child. I can think of no greater gift that we can give as parents to our children than the gift of time. Without it, far too many children will simply slip through the cracks, and for many more, all hope will be lost. As legislators, it is our imperative that we do what is morally right, not to let hope be lost” *Id.*

⁷⁶ 155 CONG. REC. H6216, H6219 (daily ed. June 4, 2009). The AFL-CIO further states, “Virtually all research on child development and family stability supports the notion that parent-infant bonding during the earliest months of life is crucial. Children who form strong emotional bonds or ‘attachment’ with their parents are most likely to enjoy good health and have positive relations with others throughout their lifetimes. H.R. 626 takes as a given that all children who become new members of a family need this critical time with their parents, and provides all parents--adoptive and biological--equal treatment.” *Id.*

⁷⁷ Telephone Interview with Netsy Firestein, Director, Labor Project for Working Families (Nov. 5, 2009); *Paid Leave for Feds is Harbinger for Private Sector*, 17 No. 5 FAMILY & MED. LEAVE HANDBOOK NEWSL. 5 (2009). Senator Jim Webb recognized that “[t]he American worker benefits [from such bills] because the federal government often sets the standard that business will follow.” *Id.* (“Paid leave for federal employees could set the stage for similar benefits to be granted by private sector employers—or mandated by governments.”).

⁷⁸ *Paid Leave for Feds is Harbinger for Private Sector*, 17 No. 5 FAMILY & MED. LEAVE HANDBOOK NEWSL. 5 (2009).

⁷⁹ *Id.* The Congressional Budget Office estimates that “implementing H.R. 626 would cost \$67 million in 2010 and a total of \$938 million over the 2010-2014 period, subject to appropriation of necessary funds.” CONGR. BUDGET OFFICE, COST ESTIMATE FOR H.R. 626, FEDERAL EMPLOYEE PAID PARENTAL LEAVE ACT OF 2009 (May 11, 2009), available at www.cbo.gov/ftpdocs/101xx/doc10152/HR626.pdf.

⁸⁰ See LORI DORFMAN & ELENA O. LINGAS, BERKELEY MEDIA STUDIES GROUP, MAKING THE CASE FOR PAID FAMILY LEAVE: HOW CALIFORNIA’S LANDMARK LAW WAS FRAMED IN THE NEWS (Nov. 2003), available at <http://www.paidfamilyleave.org/pdf/dorfman.pdf>. Rep. Dennis Cardoza stated “[t]his [bill] is about America’s children, about children coming into this world and bonding with a mother and father and having an opportunity to do that in this hectic world we live in today.” 155 CONG. REC. H6216, H6223 (daily ed. June 4, 2009).

⁸¹ 155 CONG. REC. H6216, H6222 (daily ed. June 4, 2009).

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laws.⁸² “It’s a done deal in California and has not proven to be harmful at all,” Rep. Lynn Woolsey said about PFL.⁸³

2. *Family Income to Respond to Significant Transitions Act, H.R. 2993*

On May 7, 2009, Rep. Lynn Woolsey introduced the Family Income to Respond to Significant Transitions Act (FIRST),⁸⁴ legislation previously introduced as part of other omnibus bills.⁸⁵ If the bill were re-proposed and enacted, it would “establish a program that supports the efforts of States to provide partial or full wage replacement to new parents, so that new parents are able to spend time with their new infant or newly adopted child.”⁸⁶ The program would be funded by state grants to pay for the federal share of programs that provide wage replacement for eligible individuals⁸⁷ taking leave.⁸⁸ Reasons for taking leave would include (1) responding to caregiving needs resulting from the birth or adoption of a child, (2) the reasons provided by the Family and Medical

⁸² Telephone Interview with Fred Feinstein, Visiting Professor and Senior Fellow, University of Maryland (Oct. 22, 2009). Additionally, the Statement of Administration policy stated that “[b]eing able to spend time at home with a new child is a critical part of building a strong family. The initial bonding between parents and their new child is essential to healthy child development and providing a firm foundation for the child’s success in life. Measures that support these relationships strengthen our families, our communities, and our nation. The Federal government should reflect its commitment to these core values by helping Federal employees to care for their families as well as serve the public.” 155 CONG. REC. H6216, H6223 (daily ed. June 4, 2009).

⁸³ *Supporters Say Paid Leave Matter of Education: Five Years’ Experience in California Prompts Push for Federal Grants to States*, 17 No. 8 FAMILY & MED. LEAVE HANDBOOK NEWSL. 3 (2009), available at 17 No. 8 FMLHBK-NWL 3 (Westlaw) (“[W]e should be shamefaced at how little support we give our families.”).

⁸⁴ See *H.R. 2339: Family Income to Respond to Significant Transitions Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2339> (last visited Mar. 6, 2011).

⁸⁵ *Balancing Act of 2007*, H.R. 2392, 110th Cong. (2007); *Balancing Act of 2005*, H.R. 1589, 109th Cong. (2005); *Balancing Act of 2004*, H.R. 3780, 108th Cong. (2004). An omnibus bill packages together several measures into one or combines diverse subjects into a single bill. C-SPAN CONGRESSIONAL GLOSSARY, <http://legacy.c-span.org/guide/congress/glossary/omnibus.htm> (last visited Mar. 7, 2011). Examples are reconciliation bills, combined appropriations bills, and private relief and claims bills. *Id.*

⁸⁶ THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2339home/LegislativeData.php?n=BSS;c=111> (last visited Mar. 7, 2011) (referring to Family Income to Respond to Significant Transitions Act of 2009, H.R. 2339, 111th Cong. (2009)).

⁸⁷ Family Income to Respond to Significant Transitions Act of 2009, H.R. 2339, 111th Cong. § 3(c), 2009 Cong. US HR 2339 (Westlaw). Although there are other definitions of “eligible individual” for purposes of the FIRST Act, primarily an “eligible individual” is a person who is “taking leave under the Family and Medical Leave Act of 1993 (29 U.S.C.A. 2601 et seq.), other Federal, State, or local law, or under a private plan, or a program receiving a grant under this Act . . .” *Id.* § 3(c)(2)(A).

⁸⁸ H.R. 2339.

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Leave Act, (3) or other reasons provided under state or local law.⁸⁹ The Act would create two categories of grants: one for states that already have wage replacement programs in place⁹⁰ and another for states that have not yet established such programs.⁹¹ Eligible individuals would be able to receive up to six weeks of wage replacement during a period of leave in any twelve-month period.⁹² This bill is the closest to California's PFL because it would provide partial wage benefits during family and parental leave periods.⁹³

As with the other bills proposed last term, the challenge to reintroducing and passing this bill is the opposition's concerns with its costs, especially due to the current economic climate.⁹⁴ However, this type of legislation is even more crucial during times of economic hardship because workers are in greater need of support.⁹⁵ Furthermore, "[o]ur nation has a history of passing laws to help workers in times of

⁸⁹ *Id.* § 3(a)(1).

⁹⁰ A wage replacement program is a program providing income replacement for individuals taking leave as a result of the birth or adoption of a son or daughter or for other reasons covered under the Family and Medical Leave Act. *Id.* States with existing programs could use the grants to conduct outreach or education programs that promote and increase awareness of the program, cover the cost of providing partial or full wage replacement, cover administrative costs, provide incentives to employers not covered by the Family and Medical Leave Act to provide employment and benefits protection, or for other purposes approved by the Secretary of Labor. *Id.* § 3(b)(2).

⁹¹ *Id.* § 3(b)(1),(2). States without such programs could use the grants to implement and develop the program, pay for administrative costs, and cover the cost of providing partial or full wage replacement. *Id.* § 3(b)(1). To carry out such programs, the FIRST Act proposed that states provide partial or full wage replacement for no less than six weeks during a period of leave either (1) directly through the grants; (2) through an insurance program, such as a State temporary disability insurance program or a state unemployment compensation benefit program; (3) through a private disability or other insurance plan, or another funding mechanism provided by a private employer; or (4) through another mechanism. *Id.* § 3(b)(3)(A).

⁹² *Id.*

⁹³ *See id.*

⁹⁴ 155 CONG. REC. H6216, H6222 (daily ed. June 4, 2009) ("Small businesses are struggling to survive in our tough economic times, and are very concerned that creating an expensive, new paid leave benefit for federal employees will eventually lead to new paid leave mandates on small business.").

⁹⁵ *See* H.R. 2339; *Healthy Families Act: House Education and Labor Subcommittee on Workforce Protections Hearing*, H.R. 2460, 111th Cong. (2009) (statement of Debra Ness, President of National Partnership for Women and Children) ("When workers are stretched so thin, having to take time off . . . to care for a new child can lead to financial disaster for families . . . especially now because in this economic climate, basic workplace standards of paid family and medical leave and paid sick days can prevent workers from being forced to choose between their health or the health of their family, and their paycheck or even their job. Simply put, we need these workplace policies to prevent working families from falling further down an economic rabbit-hole Hard economic times are exactly the right time for the government to take responsible action on behalf of families A responsible worker benefit like federal employee paid parental leave provides a certain source of income that allows families to bond and households during economically troubled times.").

economic crisis.⁹⁶ Social Security and Unemployment Insurance became law in 1935; the Fair Labor Standards Act, and the National Labor Relations Act became law in 1938, all in response to the crisis the nation faced during the Great Depression.”⁹⁷ The need for wage replacement during parental leave is always present and necessary to respond to and prevent economic crisis by allowing workers to feasibly respond to both their work and family needs.⁹⁸ “Twenty-five percent of all poverty spells begin with the birth of a child.”⁹⁹ Debra Ness, President of the National Partnership for Women, supported this bill because “[f]or many workers, the birth of a child . . . forces them into a cycle of economic distress” due in part to the associated loss of income resulting from having to take unpaid time away from work.¹⁰⁰ Therefore, this bill would actually make it easier for small businesses to compete for the best workers because they would be able to offer the same workplace protections as do larger businesses.¹⁰¹ “Research confirms what working families and responsible employers already know: when businesses take care of their workers, they are better able to retain them, and when workers have the security of paid time off, they demonstrate increased commitment, productivity and morale, and their employers reap the benefits of lower turnover and training costs.”¹⁰²

⁹⁶ See *Healthy Families Act: House Education and Labor Subcommittee on Workforce Protections Hearing*, H.R. 2460, 111th Cong. (2009) (statement of Debra Ness).

⁹⁷ *Id.* As was similarly discussed during the passage of the FMLA, supporters of the FIRST Act also stressed that “the United States [still] stands alone among industrialized nations in its complete lack of national policies to ensure that workers are financially able to take time off for day-to-day medical needs, serious illness or to care for a new baby.” *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* Ness further asserted that “[p]roviding paid family leave . . . helps ensure that workers can perform essential caretaking responsibilities for newborns and newly-adopted children. Parents who are financially able to take leave are able to give new babies the critical care they need in the early weeks of life, laying a strong foundation for later development.” *Id.* A story from a Colorado mother “illustrates the devastation of not receiving wages while on leave. She explained: ‘I needed to take FMLA when I was pregnant. My job didn’t offer paid leave when I gave birth to my daughter. Because of FMLA I was guaranteed time off when I was put on bed rest. Because it was unpaid, I had to work from my bed and go back to work before my daughter was ready for me to go back. Financially I needed to go back to work. My daughter was four weeks old and on oxygen. I had to make special arrangements for a family friend to watch her instead of the childcare facility because of her age and special needs.’” *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *id.* (referencing Employment Policy Foundation, *Employee Turnover--A Critical Human Resource Benchmark*, HR Benchmarks 1-5 (Dec. 2002)). Ness stated that studies additionally “show that the costs of losing an employee (advertising for, interviewing and training a replacement) are often greater than the cost of providing short-term leave to retain existing employees. The average cost of turnover is 25% of an employee’s total annual compensation.” *Id.*

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3. *Family Leave Insurance Act of 2009, H.B. 1723*

On March 25, 2009, Rep. Fortney Stark proposed the Family Leave Insurance Act to direct the Secretary of Labor to establish a Family and Medical Insurance Program, which would be mandatory for covered employers.¹⁰³ As with other family leave legislation proposed in the 2009 term, the Family Leave Insurance Act of 2009 followed several prior attempts by Congress to pass wage replacement legislation for reasons related to caregiving.¹⁰⁴ The congressional findings behind this legislation demonstrate Congress's recognition that the FMLA has not fulfilled its legislative intent as a result of the leave being unpaid.¹⁰⁵ This bill recognized that "employees [often] suffer severe financial hardship in order to be responsible family members and provide minor children and aging parents with the care they need."¹⁰⁶ If the bill were reintroduced and passed this term, this family leave insurance program would provide eligible employees with benefits that include percentages of their daily earnings for twelve workweeks of leave taken under the FMLA.¹⁰⁷

¹⁰³ H.R. 1723: *Family Leave Insurance Act of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1723> (last visited on Mar. 7, 2011). The Act states that the "term 'employer' shall have the meaning given that term in section 101(4) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611(4)), except that such term shall include any person who employs 2 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." H.R. 1723, 111th Cong. § 101(2)(B) (2009). Additional definitions for covered employers can be found in H.R. 1723 § 101(2)(A),(C),(D).

¹⁰⁴ H.R. 5873, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/t2GPO/http://www.gpo.gov/fdsys/pkg/BILLS-110hr5873ih/pdf/BILLS-110hr5873ih.pdf>; S. 1681, 110th Cong. (2007), available at <http://www.gpo.gov/fdsys/pkg/BILLS-110s1681is/pdf/BILLS-110s1681is.pdf>; H.R. 3192, 109th Cong. (2005), available at <http://www.gpo.gov/fdsys/pkg/BILLS-109hr3192ih/pdf/BILLS-109hr3192ih.pdf>. Covered reasons for leave under the Family Leave Insurance Act of 2009 are almost identical to those under the FMLA, with the exception that they would include leave to care for a domestic partner. H.R. 1723 § 103(a).

¹⁰⁵ See H.R. 1723 § 2. Congress's first finding reads: "Since its passage, the Family and Medical Leave Act of 1993 . . . has assisted millions of employees in balancing the demands of their jobs with their family responsibilities. However, many eligible employees are not able to utilize the benefits of the FMLA because FMLA leave is unpaid." *Id.* § 2(1). Other bills related to the expansion of the FMLA include Balancing Act of 2009, H.R. 3047, 111th Cong. (2009) (introduced "to improve the lives of working families by providing family and medical need assistance [in part] . . ."); Healthy Families Act of 2009, H.R. 2460, 111th Cong. (2009) (introduced to "allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families"); and the Healthy Families Act of 2009, S. 1152, 111th Cong. (2009). Other bills proposed to amend the FMLA include H.R. 2792, 111th Cong. (2009); H.R. 2744, 111th Cong. (2009); and S. 2059, 111th Cong. (2009).

¹⁰⁶ H.R. 1723 § 2(2) (citing a conclusion from analysis of national data from the 2000 FMLA survey by the Center for Women and Work at Rutgers University). Congress also cites various demographic statistics showing the need for wage replacement including the fact that "56 percent of

B. THE CURRENT CLIMATE

Now is the time for Congress to act to reintroduce and pass these bills. Awareness of the need for work-family balance legislation has been steadily growing.¹⁰⁸ Commentators have said that the political climate appears favorable for the passage of paid family leave bills.¹⁰⁹ Although similar bills have been proposed for several years, an employer-side attorney said “I think it’s potentially different this time.”¹¹⁰ One reason for this difference is that pro-labor Democrats currently control the White House and the Senate.¹¹¹ Additionally, President Obama has identified one of his top five goals to be creating legislation to improve employees’ work-life balance.¹¹² To further this goal, President Obama has created the White House Task Force on Middle-Class Working Families, which is charged with the task of acting quickly to develop policy proposals addressing the needs of working families.¹¹³ Additionally, some states and cities have already enacted

women with children under age 1 are in the labor force” *Id.* § 2(8) (citing a statistic by the Bureau of the Census and the Bureau of Labor Statistics).

¹⁰⁷ *Id.* §§ 101(1), 103(a).

¹⁰⁸ See *Conditions Appear Ripe for Paid Leave Mandates*, 17 No. 4 FAMILY & MED. LEAVE NEWSL. 4 (2009), available at 17 No. 4 FMLHBK-NWL 4 (Westlaw); *Supporters Say Paid Leave Matter of Education: Five Years’ Experience in California Prompts Push for Federal Grants to States, Outreach Efforts*, 17 No. 8 FAMILY & MED. LEAVE HANDBOOK NEWSL. 3 (2009), available at 17 No. 8 FMLHBK-NWL 3 (Westlaw); John Phillips, *The Obama White House and HR: Possible Changes Based on Pending Laws*, 20 No. 10 FLA. EMP. L. LETTER 5 (2008).

¹⁰⁹ See *Conditions Appear Ripe for Paid Leave Mandates*, 17 No. 4 FAMILY & MED. LEAVE NEWSL. 4 (2009), available at 17 No. 4 FMLHBK-NWL 4 (Westlaw); *Supporters Say Paid Leave Matter of Education: Five Years’ Experience in California Prompts Push for Federal Grants to States, Outreach Efforts*, 17 No. 8 FAMILY & MED. LEAVE HANDBOOK NEWSL. 3 (2009), available at 17 No. 8 FMLHBK-NWL 3 (Westlaw); John Phillips, *The Obama White House and HR: Possible Changes Based on Pending Laws*, 20 No. 10 FLA. EMP. L. LETTER 5 (2008).

¹¹⁰ *Conditions Appear Ripe for Paid Leave Mandates*, 17 No. 4 FAMILY & MED. LEAVE HANDBOOK NEWSL. 4 (2009), available at 17 No. 4 FMLHBK-NWL 4 (Westlaw) (citing Corrie Fischel Conway of Morgan, Lewis & Bockius). Ruth Milkman, professor at UCLA, also stated that “[i]n a rare exception to the ongoing rollback of state regulation of the labor market, political momentum for positive government intervention on [the paid family leave] front is growing rapidly.” Ruth Milkman, *Class Disparities, Market Fundamentalism, and Work-Family Policy: Lessons from California*, in GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR 339, 340 (Janet C. Gornick, Marcia K. Meyers & Erik Olin Wright eds., 2009), available at http://www.ruthmilkman.info/Site/Articles_files/pdf%20giant%20gornick.pdf.

¹¹¹ *Conditions Appear Ripe for Paid Leave Mandates*, 17 No. 4 FAMILY & MED. LEAVE HANDBOOK NEWSL. 4 (2009), available at 17 No. 4 FMLHBK-NWL 4 (Westlaw). Thus, “the landscape is looking more favorable than ever for paid leave rights.” *Id.*

¹¹² *Family Friendly Workplace Policies Before the Committee on House Education and Labor, & the Subcommittee on Workforce Protections*, 111th Cong. (2009) (statement of Eileen Appelbaum), available at <http://www.cepr.net/index.php/testimony/family-friendly-policies/>.

¹¹³ *Id.*

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their own paid family leave laws, signaling that several state legislatures have been following California's lead and responding to workers' need for such legislation.¹¹⁴ States' passage of family leave insurance policies provides some needed momentum for passing similar legislation at the federal level.¹¹⁵ Furthermore, wage replacement systems that are already in place, such as workers' compensation, show that insurance funds can be used to accommodate workers' various needs.¹¹⁶

In reference to the FIRST bill, Rep. Lynn Woolsey argued that legislators now have the benefit of having observed California's PFL program for over five years, which can serve as a guide for implementing programs similar to PFL.¹¹⁷ California's experience also shows that such a policy is workable and beneficial.¹¹⁸ A Senior Consultant at Employer's Group said that California businesses were at first resistant to, and skeptical about, California's PFL program because "[e]mployers don't like change [but] overall, employers are viewing [PFL] as successful and not that much of a hindrance or detriment to [their] organization[s]."¹¹⁹ Businesses across the country must recognize the

¹¹⁴ *Conditions Appear Ripe for Paid Leave Mandates*, 17 No. 4 FAMILY & MED. LEAVE HANDBOOK NEWSL. 4 (2009), available at 17 No. 4 FMLHBK-NWL 4 (Westlaw). For example, New Jersey followed California's lead when it recently amended its temporary disability law to allow employees to receive partial wage replacement during family leave periods. *Id.* The New Jersey amendment provided that 0.9% of employees' income (increasing to 0.12% in 2010) would be deducted to allow for a benefit of two thirds of an eligible worker's salary or up to \$524 per week. *Id.* San Francisco, Washington D.C. and Milwaukee all approved legislation to provide for paid sick days, also contributing to the momentum and trend in favor of passing paid leave mandates generally. *Id.*

¹¹⁵ Telephone Interview with Netsy Firestein, Director of the Labor Project for Working Families (Nov. 5, 2009). In addition to California, Rhode Island, New Jersey, New York, Hawaii, and Puerto Rico all require that employers ensure their employees participate in SDI programs to fund periods of family leave. VICKY LOVELL ET AL., FACT SHEET FOR MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG BEST U.S. EMPLOYERS 1, 2, available at http://www.iwpr.org/publications/pubs/maternity-leave-in-the-united-states-paid-parental-leave-is-still-not-standard-even-among-the-best-u.s.-employers/at_download/file.

¹¹⁶ *Conditions Appear Ripe for Paid Leave Mandates.*, 17 No. 4 FAMILY & MED. LEAVE HANDBOOK NEWSL. 4 (2009), available at 17 No. 4 FMLHBK-NWL 4 (Westlaw).

¹¹⁷ *Supporters Say Paid Leave Matter of Education: Five Years' Experience in California Prompts Push for Federal Grants to States, Outreach Efforts*, 17 No. 8 FAMILY & MED. LEAVE HANDBOOK NEWSL. 3 (2009), available at 17 No. 8 FMLHBK-NWL 3 (Westlaw).

¹¹⁸ *Id.* (Woolsey stated that "[i]t was clear that California, with the population [equivalent to] Canada, is really the size of a country . . . so it made sense that California went first, and made a success of the program statewide, then it would be much easier to sell that to other states across the country.")

¹¹⁹ *Supporters Say Paid Leave Matter of Education: Five Years' Experience in California Prompts Push for Federal Grants to States, Outreach Efforts*, 17 No. 8 FAMILY & MED. LEAVE HANDBOOK NEWSL. 3 (2009), available at 17 No. 8 FMLHBK-NWL 3 (Westlaw) (statement of Kimberley Nwamanna).

actual, rather than anticipated, effect of a paid family leave law by looking at how PFL has affected California businesses.¹²⁰ PFL has not proven to be a setback or obstacle to California businesses.¹²¹ In fact, Margaret Hart Edwards, a shareholder at the employer-side Littler Mendelson law firm, showed that there was no significant burden placed on business by PFL when she stated that “[i]f an employee goes on leave that could be paid, they apply directly with the [California Employment Development Department] for the money The employer doesn’t have to do a lot of work here. That’s one of the virtues of the whole thing.”¹²² The positive results of California’s PFL show that the consequences businesses predict in their opposition to federal paid family leave have not occurred with California’s PFL.¹²³

As discussed above, the current economic climate presents a challenge to passing paid family leave legislation.¹²⁴ Eileen Appelbaum, Director of the Center for Economic and Policy Research at Rutgers University, argued that although America is currently faced with a devastating economic recession, “our values and character as a nation will be revealed in how we meet these challenges.”¹²⁵ Family leave insurance is an effective job retention device and reduces turnover costs, which in turn supports the needs of business as well as families in a time of economic crisis.¹²⁶ Family leave policies are “essential to building a sustainable economy for the long run that works for working families.”¹²⁷ The same line of argument made against PFL was also made against the FMLA. Yet American businesses have not collapsed as a result of the FMLA, nor have California businesses been crippled by PFL. Thus, the financial concerns of the opposition and current economic problems should not stand in the way of providing workers with needed work-life balance measures.

¹²⁰ See *id.* (Nwamanna stated that “[t]he biggest hurdle for business owners . . . has been understanding that California’s program is not a new leave benefit but a conduit for paying for otherwise unpaid leave granted by the federal Family and Medical Leave Act and the California Family Rights Act. . . . The key is [for employers] to realize that the paid leave program can be applied to existing unpaid leave rights, but does not increase the total amount of leave available. . . . Once it’s explained, [employers] think it’s a great idea.”).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *Family Friendly Workplace Policies Before the Committee on House Education and Labor, & the Subcommittee on Workforce Protections*, 111th Cong. (2009) (statement of Eileen Appelbaum), available at <http://www.cepr.net/index.php/testimony/family-friendly-policies/>.

¹²⁵ *Id.* (stating that “with the economy struggling to gain traction, policies like . . . family leave insurance are more important than ever”).

¹²⁶ *Id.*

¹²⁷ See *id.*

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III. WHY PAID LEAVE IS NEEDED AT THE FEDERAL LEVEL

In addition to fulfilling the FMLA's intent, a paid family leave law would provide various benefits to workers. Conflict between work and family often leads to lower productivity, higher absenteeism, and greater turnover, all of which negatively impact working parents' careers.¹²⁸ A paid family leave policy would provide a means for eliminating these unnecessary consequences.

There are also health and emotional benefits that come with enabling workers to stay at home to care for new children.¹²⁹ The majority of new mothers experience one or more physical side effects during the five weeks following childbirth; women who have Caesarian sections experience significantly more health impacts.¹³⁰ A woman needs time to heal from childbirth and to establish breastfeeding routines with her new child, as well as bonding time to incorporate the child into her family.¹³¹ When parents must return to work early after childbirth, research has shown that newborns have decreased access to follow-up care, lower rates of immunization, and decreased breastfeeding by four and a half weeks on average.¹³² Parent-child bonding in the early period

¹²⁸ Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 485 (2008). Additionally, research has shown links between work and family conflict and physical and mental health illnesses, depression, physical distress, sleep disorders, decreased concentration, alertness and marital satisfaction. *Id.*

¹²⁹ See generally VICKY LOVELL ET AL., FACT SHEET FOR MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG THE BEST U.S. EMPLOYERS 2 (2007), available at http://www.iwpr.org/publications/pubs/maternity-leave-in-the-united-states-paid-parental-leave-is-still-not-standard-even-among-the-best-u.s.-employers/at_download/file.

¹³⁰ *Id.* For more information on this topic see Patricia McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, 4 ANNALS OF FAMILY MEDICINE 159 (2006), available at www.annfammed.org/cgi/reprint/4/2/159.pdf. Leave for pregnancy-related medical conditions is covered by SDI in California, however most states do not have SDI. See CAL. UNEMP. INS. CODE § 3301(a)(1) (Westlaw 2011).

¹³¹ VICKY LOVELL, HEALTH AND FAMILY CARE LEAVE FOR FEDERAL WORKERS: USING A SHORT-TERM DISABILITY INSURANCE MODEL TO SUPPORT WORKER AND FAMILY WELL-BEING, ENSURE COMPETITIVE EMPLOYEE COMPENSATION, AND INCREASE PRODUCTIVITY (2008), available at <http://jec.senate.gov/archive/Hearings/03.06.08%20Paid%20Leave/Lovell%20statement%203-6-08.pdf>.

¹³² VICKY LOVELL ET AL., FACT SHEET FOR MATERNITY LEAVE IN THE UNITED STATES: PAID PARENTAL LEAVE IS STILL NOT STANDARD, EVEN AMONG THE BEST U.S. EMPLOYERS 2 (2007), available at http://www.iwpr.org/publications/pubs/maternity-leave-in-the-united-states-paid-parental-leave-is-still-not-standard-even-among-the-best-u.s.-employers/at_download/file. For more information on the relationship of the health of newborns and parental leave policies, see Lawrence M. Berger et al., *Maternity Leave, Early Maternal Employment and Child Health and Development in the U.S.*, THE ECONOMIC JOURNAL, 115 at F29-F47 (2005).

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of a child's life fosters positive emotional development in children.¹³³ Paid family leave should be enacted so more workers can meet these basic needs.

IV. EXAMINING THE FMLA'S AND PFL'S HISTORY TO PREDICT LIKELY CHALLENGES TO FEDERAL PAID FAMILY LEGISLATION

The federal bills proposed in the 2009 term were attempts to build upon the protections of the FMLA, using PFL's wage replacement provision as a model. Therefore, the history and debate behind PFL and the FMLA's passage indicate the types of challenges that paid family leave legislation will likely face. Knowledge of these challenges is crucial to getting this important policy passed, because the current lack of a wage replacement provision in the FMLA has rendered the law inaccessible to workers unable to forgo income during parental leave. An ideal leave policy would combine the FMLA's job protection with PFL's wage replacement provision.¹³⁴ An examination of the past debates surrounding the passage of family leave laws also provides a guide both to legislators for drafting a wage replacement policy and to advocates for getting such legislation passed.

A. HISTORY AND PASSAGE OF THE FMLA

The FMLA was intended to equalize access to employment, both in terms of job retention and advancement opportunity, by providing men and women the ability to take job-protected leave following the birth of a child.¹³⁵ FMLA supporters focused on the law's simple, but powerful, goal of ensuring that people can have a family and maintain a career.¹³⁶

¹³³ JODY HEYMANN ET AL., *THE WORK, FAMILY AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP?*, 1, 6 (2007), available at <http://www.mcgill.ca/files/ihsp/WFEI2007FEB.pdf>.

¹³⁴ California's PFL is an innovative example for the federal level in that it is the first law in the nation to provide for paid family leave, but its provisions do not completely fulfill the intent of the PFL because it does not provide job protection. See CAL. UNEMP. INS. CODE § 3301(a)(1) (Westlaw 2011) ("It is the intent of the Legislature to create a family temporary disability insurance program to help reconcile the demands of work and family."). Under the current state of PFL, it is questionable whether the California legislative intent of PFL is being fulfilled, since workers would likely be reluctant to take leave to care for newborns if their jobs were not guaranteed when they return. See Amy Olsen, Comment, *Family Leave Legislation: Ensuring Both Job Security and Family Values*, 35 SANTA CLARA L. REV. 983, 1011 (1995) ("Mandatory reinstatement provides the linchpin of family leave laws because it promotes family well-being without jeopardizing job security. Without a guarantee of reinstatement to the same position an employee had when she took leave, objectives of family leave laws cannot be achieved.").

¹³⁵ See 139 CONG. REC. E402-03, E402 (daily ed. Feb. 23, 1993) (statement of Hon. Glenn Poshard of Ill.).

¹³⁶ See *id.* (stating that the FMLA would "ensure economic fairness for middle-income

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The passage of the FMLA in 1993 marked the culmination of a nearly decade-long political struggle to pass family leave legislation.¹³⁷ When a prior version of the FMLA was introduced in 1983, legislators were aware of neither new family needs nor the political potency that the FMLA would gain when these needs became more apparent.¹³⁸ With the increase in dual-income and single-parent families, Congress recognized that work-life balance had become more difficult and that legislation was needed to address this problem.¹³⁹

B. THE DEBATE SURROUNDING THE FMLA'S PASSAGE

The business community led the opposition to the FMLA, with the Chamber of Commerce as the main leader.¹⁴⁰ When it became clear that a bill that mandated paid leave was unlikely to pass, legislators reluctantly eliminated a wage replacement requirement from the bill's draft.¹⁴¹ However, despite this elimination, the business lobby was still

Americans who so often are forced to choose between job security and the legitimate and serious responsibility they have to care for their children, spouses, and parents at times when extended time at home is crucial").

¹³⁷ See, e.g., Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985); Parental and Medical Leave Act of 1986, H.R. 4300, 99th Cong. (1986) (not enacted because the 99th Congress adjourned before action was taken); Parental and Medical Leave Act of 1986, S. 2278, 99th Cong. (1986); Parental and Temporary Medical Leave Act, S. 249, 100th Cong. (1987); Family and Medical Leave Act of 1987, H.R. 925, 100th Cong. (1987); Parental and Medical Leave Act of 1988, S. 2488, 100th Cong. (1988); Family and Medical Leave Act of 1989, S. 345, 101st Cong. (1989) (not enacted because Senate failed to end filibuster); Family and Medical Leave Act of 1989, H.R. 770, 101st Cong. (1989) (vetoed by President George Bush on June 29, 1990); Family and Medical Leave Act of 1991, H.R. 2, 102nd Cong. (1991); Family and Medical Leave Act of 1991, S. 5, 102nd Cong. (1991) (vetoed by President Bush on Sept. 22, 1992).

¹³⁸ Telephone Interview with Fred Feinstein, Visiting Professor and Senior Fellow, University of Maryland (Oct. 22, 2009).

¹³⁹ See 139 CONG. REC. E297-01, E297 (daily ed. Feb. 4, 1993) (statement of Hon. Bart Stupak of Mich.) ("[O]ver the past two decades we have witnessed dramatic changes in the American family. Families are finding it more and more difficult to meet both their work and family responsibilities. Today, about two-thirds of all mothers, more than 70 percent of women with school aged children, work outside the home."); 139 CONG. REC. E402-03, E404 (daily ed. Feb. 23, 1993) (statement of Hon. Glenn Poshard of Ill.) ("[T]hree out of four families depend on both parents working outside of the home to make ends meet. Most single-parent families, too, struggle to maintain an adequate income."); 139 CONG. REC. E323-01, E323 (daily ed. Feb. 26, 1993) (statement of Hon. Thomas M. Barrett of Wis.) (stating that the FMLA "encompasses the profound changes in the composition of today's American work force"); 139 CONG. REC. H447-06, H447 (daily ed. Feb. 3, 1993) (statement of Mr. Richardson) ("Passage of this legislation recognizes the reality of working Americans, that most American families are headed by either two working parents or by single women, and that women are now the fastest-growing segment of the labor market.").

¹⁴⁰ 139 CONG. REC. E297-01, E297 (daily ed. Feb. 4, 1993) (statement of Hon. Bart Stupak of Mich.).

¹⁴¹ See Sean Stewart, *PDA, FMLA, and Beyond: A Brief Look at Past, Present, and Future Sex Discrimination Laws and Their Effects on the Teaching Profession*, 2003 BYU EDUC. & L.J.

concerned that even the unpaid leave requirement would impose a financial burden on employers.¹⁴² The business community feared the costs of such legislation and was opposed to excessive government entanglement with business.¹⁴³ Specifically, businesses believed such a law would adversely affect their profitability and the availability of jobs.¹⁴⁴ Also, employers feared that FMLA compliance would create administrative burdens such as finding replacements for absent employees.¹⁴⁵

Despite their concerns, businesses have benefited from the FMLA in practice because of the law's effect of increasing the number of productive, long-term employees.¹⁴⁶ The General Accounting Office

835, 845 (2003) (stating that Congress was too focused on budget deficits and businesses were focused on economic competitiveness for proponents to push paid leave). "While [legislators'] intention had been to write a model bill rather than a modest one, the drafting group [of the FMLA] reluctantly chose not to press for paid leave." *Id.* For more information, see RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES LAW 29, 30 (1995).

¹⁴² Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 470 (2008).

¹⁴³ *Id.* Further, "opponents of paid leave argue that forcing employees to fund a paid leave program would be, in effect, an unwarranted intrusion by government on private industry, and would likely burden employers, with unnecessary costs." Sean Stewart, *PDA, FMLA, and Beyond: A Brief Look at Past, Present, and Future Sex Discrimination Laws and Their Effects on the Teaching Profession*, 2003 BYU EDUC. & L.J. 835, 845 (2003).

¹⁴⁴ Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J.L. & POL'Y 169, 169 (2004). A political science professor summarized the main opposition argument as the following: "It was perfectly acceptable for companies to offer such benefits voluntarily (as indeed many already did), but organized business passionately opposed any employer 'mandate' in this (or any other) area." RUTH MILKMAN, *Class Disparities, Market Fundamentalism, and Work-Family Policy: Lessons from California*, in GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR 339, 348 (Janet C. Gornick, Marcia K. Meyers & Erik Olin Wright eds., 2009), available at http://www.ruthmilkman.info/Site/Articles_files/pdf%20giant%20gornick.pdf.

¹⁴⁵ 139 CONG. REC. H379-02, H384 (daily ed. Feb. 3, 1993) (statement of Rep. Dornan of Cal.) (arguing that "this bill would further cripple American businesses who for years have been victims of a government which thrives on intrusive and overburdensome regulations"); Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J.L. & POL'Y 169, 170 (2004). Another highly contested aspect of the legislation was the costs and benefits associated with the continuation of health care benefits during periods of FMLA leave. Rep. Moakley of Mass. stated that "[o]ne of the most important provisions of this legislation is that it guarantees a continuation of health benefits for working families. The spiraling cost of health care can financially devastate uninsured families at a time when they need the benefits the most." 139 CONG. REC. H366-03, H368 (daily ed. Feb. 3, 1993). In contrast, Rep. Cox of California argued that "[h]ealth insurance, in fact, must be paid on a current basis during the 25 percent of the entire work year that the employee is not even working. That is very much paid leave. . . . This is not trivial. . . . This is enormously expensive. . . . It is crooked. It is wrong, and it is not unpaid." *Id.* at H374.

¹⁴⁶ See 139 CONG. REC. E402-03, E402 (daily ed. Feb. 23, 1993) (statement of Hon. Glenn Poshard of Ill.). One legislator asserted that the FMLA would "bring employers in line with other enlightened employers who already have made provision for family leave. These employers already know that there exists a direct correlation between family stability and productivity in the workplace." 139 CONG. REC. E377-02 (daily ed. Feb. 18, 1993) (statement of Hon. Bobby L. Rush

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estimated the cost to eligible employers to be only about \$5 per year per employee.¹⁴⁷ This low estimated cost “is a small price to pay for efficiency, continuity and productivity” in the American workplace.¹⁴⁸ In fact, the FMLA improved competitiveness in the global market because it invested in meeting workers’ basic needs, rather than requiring taxpayers to spend significantly more on welfare, unemployment compensation, Medicaid, and other social programs that workers use when they lose their jobs because of the need for time off to take care of family needs.¹⁴⁹

FMLA opponents contended that mandated leave would increase gender discrimination because employers would be less likely to hire women due to the belief that women are more likely than men to take family leave.¹⁵⁰ However, this argument is not a valid reason to preclude family leave legislation; rather it is a reflection of a larger problem with gender stereotypes and the resultant sex discrimination.¹⁵¹ Moreover, men and children, as well as women, benefit from the FMLA.¹⁵² In fact, FMLA advocates felt very strongly about keeping the bill’s coverage broad by including conditions that apply equally to men and women, such as leave for reason of a serious medical condition.¹⁵³

At a more deeply entrenched, ideological level, opposition to the FMLA centered on a dislike of government-mandated requirements placed on businesses.¹⁵⁴ Scholars have cited what is termed as “market fundamentalism,” or the desire for markets to run independent of government regulation, as the main political obstacle to legislative proposals for parental leave.¹⁵⁵ Businesses consistently termed

of Ill.).

¹⁴⁷ See 139 CONG. REC. E377-02 (daily ed. Feb. 18, 1993).

¹⁴⁸ *Id.*

¹⁴⁹ See 139 CONG. REC. E323-01, E323 (daily ed. Feb. 16, 1993) (statement of Hon. Thomas M. Barrett of Wis.). Businesses that already had family leave policies in place before the FMLA did so because they recognized that “retaining key personnel and fostering employee commitment and loyalty benefits employers in their desire for global competitiveness.” *Id.*

¹⁵⁰ Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act*, 16 AM. U. J. GENDER SOC. POL’Y & L. 459, 471 (2008).

¹⁵¹ *Id.*

¹⁵² *Id.* at 470.

¹⁵³ Telephone Interview with Fred Feinstein, Visiting Professor and Senior Fellow, University of Maryland (Oct. 22, 2009). Legislators rejected compromise legislation that limited protection to only parental leave because FMLA advocates did not want a more limited law even if parental leave was easier to pass. *Id.*

¹⁵⁴ Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J.L. & POL’Y 169, 170 (2004).

¹⁵⁵ Ruth Milkman, *Class Disparities, Market Fundamentalism, and Work-Family Policy: Lessons from California*, in GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR 339, 348 (Janet C. Gornick, Marcia K. Meyers & Erik Olin Wright eds., 2009), available at

“employer mandates” as “job killers.”¹⁵⁶ Businesses’ strong opposition and their argument that labor regulations are “job killers”¹⁵⁷ in part explains why American family leave policy has lagged behind policies of other modern industrialized nations. However, the FMLA does just the opposite; it protects the jobs of workers with family needs, rather than “killing” jobs as the opposition argued.¹⁵⁸

One of the more alarming and pressing signs that the FMLA was needed was the absence of a federal family leave policy in spite of the fact that every other industrialized country already had one in place.¹⁵⁹ Businesses’ concerns did not acknowledge that other countries with family leave policies performed well economically and that such policies had a positive effect on business.¹⁶⁰ Similarly, businesses did not

http://www.ruthmilkman.info/Site/Articles_files/pdf%20giant%20gornick.pdf; see 139 CONG. REC. H448-01, H448 (daily ed. Feb. 3, 1993) (statement of Rep. Kim of Cal.) (“Like all businessmen, I’m insulted that through mandates like this bill, big, bureaucratic government claims to know more about what is best for my firm and its employees than those workers and I do. That is ridiculous. We should let the employer and employee work it out. This is just more government interference.”); 139 CONG. REC. E293-01, E293 (daily ed. Feb. 4, 1993) (statement of Hon. Michael Huffington of Cal.) (“I’ve not met a Member of Congress who is opposed to either the American family or American business. . . . The issue, it seems to me, is merely this: Are we willing to use Government as a tool to assure family and medical leave for American workers? . . . Years of experience in American business left me wary of Government intervention.”).

¹⁵⁶ RUTH MILKMAN, *Class Disparities, Market Fundamentalism, and Work-Family Policy: Lessons from California*, in GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR 339, 349 (Janet C. Gornick, Marcia K. Meyers & Erik Olin Wright eds., 2009), available at http://www.ruthmilkman.info/Site/Articles_files/pdf%20giant%20gornick.pdf.

¹⁵⁷ See 139 CONG. REC. E498-02, E498-99 (daily ed. Mar. 3, 1993) (statement of Hon. Bill Emerson of Mo.) (“The last thing our Nation needs right now is a job-killing bill and H.R. 1 is just that. . . . Mandates kill jobs and the only way for businesses to survive under such burdensome mandates is to cut labor costs.”); 139 CONG. REC. E501-04, E501 (daily ed. Mar. 3, 1993) (statement of Hon. Craig Thomas of Wyo.) (“If Congress is serious about job creation, it should stop stifling economic growth with increased regulations and value businesses for what they are—job providers.”).

¹⁵⁸ See 139 CONG. REC. H365-01, H365 (daily ed. Feb. 3, 1993) (statement of Rep. Collins of Mich.) (“Those who challenge the passage of this bill as adverse to business interests fail to recognize its impact upon those women and men who now live on the margins—women and men for whom the decision to have a child or care for a loved one pushes them into unemployment compensation lines or onto public assistance rolls. Simply put, our failure to enact paid family and medical leave exacts not only a staggering emotional cost for the individual family but a staggering financial cost for our society.”). Further, businesses needed to recognize that the FMLA was “not a business destroying bill. . . . [Rather, it was] a jobs bill. No longer [would] an employer have the right to summarily dismiss an employee who had to stay home for 3 weeks with an ailing child.” *Id.*

¹⁵⁹ See 139 CONG. REC. E311-02, E312 (daily ed. Feb. 4, 1993) (statement of Hon. William D. Ford of Mich.). The business community expressed concern that the FMLA would harm their global competitiveness, but one legislator pointedly retorted that “Japan, Germany, Canada and over 60 other nations have family and medical leave policies—paid leave in some cases—and they’re not having any problems competing with anyone!” *Id.*

¹⁶⁰ See *e.g.*, 139 CONG. REC. E377-02, E377 (daily ed. Feb. 18, 1993) (statement of Hon. Bobby Rush of Ill.); 139 CONG. REC. E311-02, E312 (daily ed. Feb. 4, 1993) (statement of Hon. William D. Ford of Mich.); 139 CONG. REC. H361-06, H361 (daily ed. Feb. 3, 1993) (statement of

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acknowledge the fact that other states in the U.S. had reported that their leave policies were easy to implement and did not cause significant adverse effects on business.¹⁶¹

C. THE DEBATE SURROUNDING PFL'S PASSAGE

The debate surrounding PFL was very similar to that of the FMLA, given that each campaign involved the opposing interests of workers' advocates and business interests. However, because PFL was aimed at providing income replacement to supplement existing job protection laws, whereas the FMLA was directed at providing job protection anew, the PFL campaign focused specifically on the need to extend access to existing family leave laws rather than on providing job protection. Although PFL's focus was slightly different from the FMLA's campaign in this respect, it faced opposition and counter arguments very similar to those encountered by the FMLA's campaign.

PFL proponents stressed that paid leave would reach the unmet needs of workers who otherwise had little or no access to wage replacement during periods of leave.¹⁶² The need for paid family leave had "intensified as both parents' participation in the workforce ha[d]

Mr. Klein); 139 CONG. REC. H61-03, H61 (daily ed. Jan. 5, 1993) (statement of Rep. Reed of R.I.); 139 CONG. REC. H447-06, H447 (daily ed. Feb. 3, 1993) (statement of Mr. Richardson) ("In the past, those who called for the defeat of the Family and Medical Leave Act also operated under the misguided assumption that establishing certain guarantees for employees was necessarily in opposition to the economic well-being of businesses. Indeed, this is not the case. Some of the benefits of family and medical leave include worker productivity, decreased absenteeism, and decreased costs of retaining new employees. It should come as no surprise that some of our greatest trading partners, including Canada, West Germany, and Japan, have family and medical leave policies already in place.").

¹⁶¹ See 139 CONG. REC. H61-03, H61 (daily ed. Jan 5, 1993) (statement of Rep. Reed of R.I.) (In Rhode Island, we have found that leave statutes are not difficult to implement, especially for companies that have experience in managing leave; that companies do not reduce other benefits; and that formal leave statutes help all companies introduce formal, written policies."); 139 CONG. REC. E323-01, E232 (daily ed. Feb. 16, 1993) (statement of Hon. Thomas M. Barrett of Wis.) ("I am proud to be from the State of Wisconsin that has had family and medical leave since 1988. And I am here to tell you that the law works in Wisconsin. The dire predictions or collapse have not materialized.").

¹⁶² SHEEL M. PANDYA ET AL., SUPPORT FOR WORKING CAREGIVERS: PAID LEAVE POLICIES IN CALIFORNIA AND BEYOND 4 (2006), *available at* http://caregiver.jsp/content/pdfs/op_2006_paid_leave2.pdf. In support of PFL, proponents argued that "[w]ith only unpaid leave available, parents of new babies are forced to rush back to work, often leaving their babies in less-than-optimal care. When babies are six or even eight weeks old, it is extremely difficult to find care for them in a licensed center. Most states prohibit centers from taking babies under six weeks old, and for good reason. A young infant's immune system is not yet mature, making babies highly susceptible to infection." MICHAEL MATTOCH, CALIFORNIA BILL ANALYSIS, S.B. 1661, Cal. Assemb., 2001-2002 Reg. Sess., (Aug. 23, 2002), *available at* CA B. An., S.B. 1661 Assem., 8/23/2002 (Westlaw).

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increased, and the number of single parents in the workforce ha[d] grown.”¹⁶³ Californians were concerned with the lack of a national policy providing wage replacement during leave.¹⁶⁴ PFL advocates argued that “[e]mployees who have family responsibilities should not be put in the position of having to choose between a paycheck and a loved one.”¹⁶⁵

The California Chamber of Commerce and other business groups feared that PFL would impose excessive financial and administrative burdens on employers, driving them out of the state.¹⁶⁶ These same concerns arose during the debates surrounding the FMLA’s passage.¹⁶⁷ Business groups thought that the bill would create an increase in worker absences, fraudulent filings for paid leave, and an increase in the cost of seeking temporary replacements.¹⁶⁸ Additionally, the Chamber of Commerce argued that the SDI fund was nearly bankrupt and that the bill would place an “additional strain on an already stressed program.”¹⁶⁹ Yet, this fear proved to be unfounded, given that the SDI fund had a balance of \$1.77 billion at the end of 2004.¹⁷⁰

Despite business’s concern with the costs of the bill, a study by the Economic Development Department (EDD) showed that the expanded PFL benefit would only cost a maximum of \$46 per year per employee,

¹⁶³ MICHAEL MATTOCH, CALIFORNIA BILL ANALYSIS, S.B. 1661, Cal. Assemb., 2001-2002 Reg. Sess., (Aug. 23, 2002), available at CA B. An., S.B. 1661 Assem., 8/23/2002 (Westlaw) (“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 working age adults.”).

¹⁶⁴ *Id.* (“The United States is one of the few developed countries in the world without a national paid parental leave program. One hundred and thirty countries have leave policies. Just three of those countries--Ethiopia, Australia and the United States--provide only unpaid leave.”). Australia has since passed legislation providing for paid leave. Lew Daly, *The Case for Paid Family Leave: Why the United States Should Follow Australia’s Lead*, NEWSWEEK, Aug. 3, 2009, <http://www.newsweek.com/id/210252/page/1> (last visited Mar. 7, 2011).

¹⁶⁵ MICHAEL MATTOCH, CALIFORNIA BILL ANALYSIS, S.B. 1661, Cal. Assemb., 2001-2002 Reg. Sess., (Aug. 23, 2002), available at CA B. An., S.B. 1661 Assem., 8/23/2002 (Westlaw).

¹⁶⁶ RUTH MILKMAN & EILEEN APPELBAUM, THE STATE OF CALIFORNIA LABOR 51 (2004), available at http://www.sscnet.ucla.edu/soc/faculty/milkman/paid_family_leave_scl.pdf.

¹⁶⁷ See Natalie Koss, *The California Family Temporary Disability Insurance Program*, 11 AM. U. J. GENDER SOC. POL’Y & L. 1079, 1086 (2003).

¹⁶⁸ *Id.* The opposition’s concern with fraudulent filing was addressed by safeguards meant to prevent such fraud. *Id.* PFL provides a system that will prosecute those who falsify a medical condition in order to obtain leave or who provide a false written statement in support of a claim for leave. *Id.*

¹⁶⁹ MICHAEL MATTOCH, CALIFORNIA BILL ANALYSIS, S.B. 1661, Cal. Assemb., 2001-2002 Reg. Sess., (Aug. 23, 2002), available at CA B. An., S.B. 1661 Assem., 8/23/2002 (Westlaw).

¹⁷⁰ Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Toward Effective Policies*, 8 J.L. & FAM. STUD. 1, 34 (2006). It is a self-correcting system that ensures the money does not run out, since the contribution rate is adjusted based upon benefits paid out. *Id.*

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or less than \$1 per week.¹⁷¹ Any costs of the bill would be offset by the decline in turnover and rise in employee retention resulting from providing paid family leave.¹⁷² Estimates suggested that PFL would create long-term savings for employers and the State of California.¹⁷³ Studies showed that California companies could save \$89 million under PFL due to costs saved by the increased retention of workers.¹⁷⁴ Additionally, California was estimated to save \$25 million annually in money that would otherwise be expended on public assistance programs such as Food Stamps and Temporary Assistance for Needy Families.¹⁷⁵ Without paid family leave in place, not only would individual families suffer from the loss of income when taking time off work to attend to family needs, but the state's unemployment insurance system and welfare system would be strained.¹⁷⁶

D. HOW CALIFORNIA'S PFL BECAME LAW: A MODEL FOR FEDERAL EFFORTS TO PASS PAID FAMILY LEAVE

The process leading up to the passage of PFL in California involved a long struggle by labor and women's advocacy organizations.¹⁷⁷ An examination of how this struggle led to the successful passage of PFL serves as a guide to federal legislators for enacting similar legislation.

Since 1992 the Labor Project for Working Families (Labor Project) had been educating labor unions about issues related to work-family

¹⁷¹ See MICHAEL MATTOCH, CALIFORNIA BILL ANALYSIS, S.B. 1661, Cal. Assemb., 2001-2002 Reg. Sess., (Aug. 23, 2002), available at CA B. An., S.B. 1661 Assem., 8/23/2002 (Westlaw) (stating that an EDD study looked at the fiscal impact of extending disability benefits to employees using family and medical leave).

¹⁷² RUTH MILKMAN & EILEEN APPELBAUM, PAID LEAVE IN CALIFORNIA: NEW RESEARCH FINDINGS 45, 51 (2004), available at http://www.sscnet.ucla.edu/soc/faculty/milkman/paid_family_leave_scl.pdf.

¹⁷³ Natalie Koss, *The California Family Temporary Disability Insurance Program*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1079, 1087 (2003).

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at 1088. Food Stamps and Temporary Assistance for Needy Families provides assistance and work opportunities to needy families by granting states, territories and tribes the federal funds and wide flexibility to develop and implement their own welfare programs. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited Mar. 4, 2011).

¹⁷⁶ MICHAEL MATTOCH, CALIFORNIA BILL ANALYSIS, S.B. 1661, Cal. Assemb., 2001-2002 Reg. Sess., (Aug. 23, 2002), available at CA B. An., S.B. 1661 Assem., 8/23/2002 (Westlaw).

¹⁷⁷ Guissu Raafat, *Does Paid Leave Really Pay for Small Businesses in California?*, Comment, 47 SANTA CLARA L. REV. 573, 587 (2007); LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>.

concerns, including the need for paid family leave.¹⁷⁸ In June of 1999, the Labor Project formed the Work and Family Coalition to bring state and local labor, advocacy, and community groups together to promote California's work-family policies on a larger scale.¹⁷⁹ The same year, the National Campaign for Leave Benefits was launched by the National Partnership for Women & Families.¹⁸⁰ A key issue on the Work and Family Coalition's agenda was getting PFL passed in California.¹⁸¹

In 1999, Governor Gray Davis opened the door for PFL to be passed when he signed a bill raising California's SDI withholding rate.¹⁸² This increase, which came after many years without any increase, made room for labor groups to argue for the use of SDI funding to provide income replacement during family leave periods.¹⁸³ This bill also ordered the EDD to conduct a study of the potential costs of providing wage replacement for family leave through the SDI fund.¹⁸⁴ In 2000, the EDD's study determined that providing paid family leave through SDI could be achieved at a modest cost.¹⁸⁵ This study, combined with the Labor Project's backing, paved the way for PFL's passage.

A key element in the passage of California's PFL was the Labor Project's ability to garner politically influential support and build a strong coalition.¹⁸⁶ The California Labor Federation, the state-level

¹⁷⁸ LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* These groups had well-established ties with the California Labor Federation, another politically powerful group, as well as the Labor Project. *Id.*; see Interview with Netsy Firestein, Director of the Labor Project for Working Families (Nov. 5, 2009) (stating that most successful campaigns are composed of an alliance of coalitions and one or two anchor organizations which lead the advocacy efforts).

¹⁸¹ LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>.

¹⁸² *Id.*

¹⁸³ LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* The committee's numerous initial activities included the following: creating the Coalition for Paid Family Leave, drafting the legislation, contacting organizations to build support, identifying potential authors in the Senate and Assembly, getting assistance from the National Partnership for Women and Families and the California Senate Office on Research, gathering first-hand accounts to demonstrate the need for paid leave, seeking support from business groups, increasing awareness among unions of the efforts toward paid leave, and working with the University of California professors to estimate the costs and benefits of paid leave, writing opinion editorials and offer testimony.

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equivalent of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), was one of the coalition's founding members and became the lead sponsor for passing PFL.¹⁸⁷ The California Labor Federation asked Senator Sheila Kuehl, who was well-respected across ideological lines, to be the lead author of the legislation.¹⁸⁸

Initially, drafters of Senate Bill 1661, which was to become PFL when enacted, hoped for the duration of benefit payments to parallel the twelve weeks provided under the FMLA and CFRA and for employer contributions to be part of the proposal.¹⁸⁹ Rather than risk the bill failing when faced with increasing opposition, the Labor Federation agreed to cut the leave from twelve to six weeks, and Senator Kuehl decided to eliminate the employer contribution from the bill.¹⁹⁰ During the month the bill sat on the governor's desk, proponents increased media outreach through publishing editorials in major newspapers and broadcasting on National Public Radio, and they asked national politicians and celebrities to call and write to the governor.¹⁹¹ When Governor Davis signed Senate Bill 1661, California became the first state to provide wage replacement during family leave periods.¹⁹²

These same strategies of building coalitions and increasing political pressure and awareness of the need for paid leave should be emulated at the federal level to pass federal paid family leave. Legislative compromises, like the decision to cut the funding period from twelve to six weeks, likely may be necessary to pass similar federal legislation. Since PFL was built upon California's existing SDI, and it took an increase in the SDI withholding rate to open the way for PFL, a similar

¹⁸⁷ *Id.* The California Labor Federation had been successful in passing similar legislation such as the CFRA, PDL and Family Sick Leave. *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ RUTH MILKMAN & EILEEN APPELBAUM, PAID LEAVE IN CALIFORNIA: NEW RESEARCH FINDINGS 51, available at http://www.sscnet.ucla.edu/soc/faculty/milkman/paid_family_leave_scl.pdf.

¹⁹⁰ LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>.

¹⁹¹ *Id.*; Interview with Netsy Firestein, Director of the Labor Project for Working Families (Nov. 5, 2009). Additionally, unions wrote thousands of emails, letters and faxes to the governor encouraging him to sign the bill. LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>.

¹⁹² LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>.

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funding mechanism should be formulated for federal legislation to be successfully enacted.

V. APPLYING LESSONS FROM CALIFORNIA'S PFL CAMPAIGN TO THE EFFORT TO ENACT FEDERAL PAID FAMILY LEAVE BILLS

California is the nation's pioneer in providing wage replacement for family leave.¹⁹³ California's PFL provides a valuable framework for enacting similar federal legislation. Because both the FMLA and PFL faced similar opposition, an examination of the successful efforts and arguments in California's PLF campaign, combined with the success and ease of PFL's implementation, provides effective guidance for predicting and overcoming opposition to federal paid family leave legislation. This final Part will suggest a model for reintroducing and enacting the above-discussed federal legislation based upon an analysis of lessons from PFL and the FMLA's legislative history, subsequent court challenges to the FMLA's implementing regulations, and labor advocacy commentators' suggestions.

A. FEDERAL PAID LEAVE SUPPORTERS SHOULD USE THE MOST EFFECTIVE ARGUMENTS FROM CALIFORNIA'S PFL CAMPAIGN

Proponents of federal paid family leave legislation should examine the main selling points that made California's PFL campaign successful. Of primary importance in the PFL campaign was the gradual development of a strong support base developed by increasing the awareness of the need for the law.¹⁹⁴ Recruiting well-respected political partners to put pressure on Governor Davis was also crucial in achieving PFL's passage.¹⁹⁵ The California Labor Federation endorsed the bill, and Senator Kuehl made it clear to her colleagues and the governor that PFL was a top priority.¹⁹⁶ Proponents of federal paid leave bills should

¹⁹³ *Id.*

¹⁹⁴ *Id.* Advocates of PFL in California spent two years building a base before launching the campaign. *Id.* At the federal level, a broad-based coalition of children's, civil rights, women's, disability, faith-based, community and anti-poverty groups, and labor unions, health agencies, and leading researchers at top academic institutions is already firmly in place and led by the National Partnership for Women & Families. *H.R. 2339, the Family Income to Respond to Significant Transitions Act, and H.R. 2460, the Healthy Families Act: House Education and Labor Subcommittee on Workforce Protections Hearing*, 111th Cong., 2009 WLNR 11446828 (2009) (statement of Debra Ness, President of National Partnership for Women and Children).

¹⁹⁵ LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>.

¹⁹⁶ *Id.*

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similarly reach out to legislators using established coalitions. Although the presence of strong coalitions led by one or two anchor organizations is crucial, Netsy Firestein, Director of the Labor Project, also stresses the importance of obtaining sufficient funding to run and maintain a successful policy campaign.¹⁹⁷

California advocates made several strategic decisions that can be used at the federal level. First, the EDD's study formulated unbiased cost expectations that gave PFL proponents solid data to support their proposal.¹⁹⁸ Similarly, PFL advocates countered the opposition with studies by UC Berkeley economists and the Labor Department.¹⁹⁹ Thus, to get the federal bills passed, legislators must support their proposals with data and similar studies to show not only that federal paid family leave is needed, but that it is feasible. Second, California advocates recognized the need for substantial staff time for conference calls, building a strong coalition, and producing outreach materials.²⁰⁰ PFL proponents successfully argued that the bill would help a wide range of people across different classes, sexes, and ages.²⁰¹ The fact that paid leave provides a universal benefit to men, women, and children should be used to allay any concerns that such family leave policy provides "special treatment" to women.²⁰² Lastly, PFL advocates agreed to compromises to ensure PFL's passage, such as cutting the wage replacement period down from twelve weeks to six weeks.²⁰³ Legislators advocating the passage of federal paid family bills will likely have to make similar compromises, especially in terms of the length and amount and source of funding, which are the most controversial aspects of the bills.

The role of the media was also instrumental in PFL's passage.²⁰⁴ To utilize the far-reaching influence of the news media, advocates of

¹⁹⁷ Telephone Interview with Netsy Firestein, Director of the Labor Project for Working Families (Nov. 5, 2009). The FMLA was led primarily by the National Partnership for Women and Children and California's PFL was run by the Labor Project for Working Families. *Id.*

¹⁹⁸ LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working-families.org/organize/pdf/paidleavewon.pdf>. The EDD study found that paid family leave could be provided at a very modest cost. *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See id.*

²⁰³ *See id.* Possible compromises might include proposing that wage replacement benefits be only employee-funded and limiting the income replacement to a shorter period.

²⁰⁴ *See* LORI DORFMAN & ELENA O. LINGAS, BERKELEY MEDIA STUDIES GROUP, MAKING THE CASE FOR PAID FAMILY LEAVE: HOW CALIFORNIA'S LANDMARK LAW WAS FRAMED IN THE NEWS (Nov. 2003), available at <http://www.paidfamilyleave.org/pdf/dorfman.pdf>.

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federal legislation should consider the Berkeley Media Studies Group's analysis of California's PFL media strategy.²⁰⁵ For example, the study found that the essential and fundamental benefits of the bills must be publicized at the outset, before the opposition's voice takes over the debate or tries to obscure the basic, core need for paid leave with technical policy details.²⁰⁶ Through the media, proponents of federal paid leave legislation must explain why the policy matters, by connecting the goals and values of the policies with concrete, vivid imagery and real-life stories.²⁰⁷ The use of "social math," or understandable financial comparisons, is also effective.²⁰⁸ For instance, advocates of California's PFL argued that the wage replacement benefit would cost the average worker \$3 per month in a payroll deduction, essentially the price of a cappuccino.²⁰⁹ PFL's advocates argued that giving up a cappuccino a month for the tremendous benefit of PFL should not be a point of controversy.²¹⁰ These same types of effective comparisons should be used for passing federal paid family leave.

While the opposition's concerns need to be addressed, such response should be minimized.²¹¹ The consequence of focusing too much on the opposition's concerns is that the policy campaign is put into a weak, defensive position rather than a strong, pro-family position.²¹² Netsy Firestein found that the media's shift in coverage from one of "business vs. labor" to a focus on "the bill as good for families" was a

²⁰⁵ *Id.* The study looked at the various frames by which the media presented the debate surrounding the bill; defining "frames" as "the way an issue is defined, packaged and presented in the news." *Id.* The Study indicated that examining frames is important for determining how to present legislative proposals because they "are powerful [since] they foster certain interpretations and hinder others--often without the reader's awareness." *Id.*

²⁰⁶ *Id.* PFL's "opening preamble about bonding [was] invaluable because it [echoed] the values behind the legislation and [got] picked up and repeated by reporters." *Id.* The core meaning and values behind legislative proposals should be emphasized, rather than responding to the technical details raised by the opposition. *Id.* For example, Senator Kuehl displayed a resigned tone in her statements: "I have bent on several issues, as have the employees of this state" and "this bill was extensively revised . . . to fully address the concerns of the business community." *Id.*

²⁰⁷ *Id.* (stating that proponents should use concrete "examples of both the tragedies that occur without paid family leave, [and] also the healthier families and stronger communities that result when workers do get the support they need").

²⁰⁸ *Id.* Just as the Labor Project recognized, the Berkeley Media Studies Group recommended using concrete supporting statistics before the opposition does as being essential in a legislative campaign. It is a more powerful to present data in support of the bills rather than using data to respond to opposition data. *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

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tremendous benefit to the PFL campaign.²¹³ Once this shift had been established, the use of local business voices in support of PFL's benefits was powerful.²¹⁴ California advocates of PFL organized a conference of businesses that supported PFL, which resulted in fifteen newspapers reporting the event the next day.²¹⁵ Holding such news conferences can create an "echo effect," in which more businesses feel "more confident to speak with a voice other than that of the Chamber of Commerce."²¹⁶ If it is possible to garner business backing for the federal paid family leave bills, the use of the media to broadcast their support would be of tremendous help in getting such legislation passed, because it would minimize the divisiveness of the debate and increase awareness of its wide-reaching need, thus putting political pressure on legislators to enact it.

B. COUNTERING IDEOLOGICAL OPPOSITION TO PAID FAMILY LEAVE BILLS

A campaign to pass federal paid leave bills must also consider deeply-rooted ideological resistance to what are sometimes characterized as "welfare-type" policies.²¹⁷ One of the underlying ideological fears is that enacting family leave insurance could create a slippery slope that legitimates governmental intervention on other issues.²¹⁸ UCLA professor Ruth Milkman argued that while this ideology persists, efforts to appease the opposition with rational arguments about the benefits of family leave insurance are not likely to be effective.²¹⁹ To counteract this

²¹³ Telephone Interview with Netsy Firestein, Director of the Labor Project for Working Families (Nov. 5, 2009) (stating that the family-focused frame is an easier position to advocate for and the opposition's resulting, common response that the policy is "a good idea, but just not now" is much easier to counter).

²¹⁴ LORI DORFMAN & ELENA O. LINGAS, BERKELEY MEDIA STUDIES GROUP, MAKING THE CASE FOR PAID FAMILY LEAVE: HOW CALIFORNIA'S LANDMARK LAW WAS FRAMED IN THE NEWS (Nov. 2003), available at <http://www.paidfamilyleave.org/pdf/dorfman.pdf>.

²¹⁵ *Id.*

²¹⁶ *Id.* As discussed above, Firestein comments that having a few businesses voice support of a paid family leave policy can be powerful because it allows other businesses to feel comfortable speaking against the stated position of the Chamber of Commerce, but is not worth spending too many resources on because it is difficult to obtain public business support for such policies. Telephone Interview with Netsy Firestein, Director of the Labor Project for Working Families (Nov. 5, 2009).

²¹⁷ See Ruth Milkman, *Class Disparities, Market Fundamentalism, and Work-Family Policy: Lessons from California*, in GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR 339, 348-349 (Janet C. Gornick, Marcia K. Meyers & Erik Olin Wright eds., 2009), available at http://www.ruthmilkman.info/Site/Articles_files/pdf%20giant%20gornick.pdf.

²¹⁸ *Id.*

²¹⁹ *Id.* Milkman writes that "market fundamentalism, or 'the idea that society as a whole

ideological obstacle, a legislative campaign must emphasize the compelling, moral need for policy that addresses urgent, unmet human needs, rather than framing the argument as a response to economic concerns.²²⁰ In both the FMLA and PFL campaigns, organized coalitions used this compelling moral argument to attain the passage of both laws.²²¹

A moral, family-based argument that this legislation is essential is likely to influence the passage of federal legislation if the public feels work-life balance issues are at a crisis point.²²² Following the PFL's passage, a 2003 California survey found that 89% of college-educated respondents, and 82% of respondents with some college or higher levels of education, supported paid family leave proposals.²²³ Additionally, Ruth Milkman stated that "[a]s . . . the widespread managerial complacency that set in shortly after FMLA became law well illustrate[s], once business opposition to legislation of this type is successfully overcome, employers tend to pragmatically accept defeat, make the necessary adjustments, and move on."²²⁴ Attempts to pass federal paid leave bills must focus on the urgent need for such a law and on increasing awareness that such legislation would address crucial, yet basic work-life balance concerns.

C. CONSIDERATIONS UNIQUE TO FEDERAL FAMILY LEAVE INSURANCE LEGISLATION: WHAT TO DO DIFFERENTLY FROM CALIFORNIA

There are a few lessons to be drawn from the California campaign in terms of what should be done differently to pass a federal paid family leave bill. PFL proponents waited until the debate intensified to launch a media campaign.²²⁵ The problem with waiting was that it left the

should be subordinated to a system of self-regulated markets' is the most salient political obstacle to the development of work-family policy in the 21st Century U.S." *Id.*

²²⁰ Ruth Milkman, *Class Disparities, Market Fundamentalism, and Work-Family Policy: Lessons from California*, in GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR 339, 359-360 (Janet C. Gornick, Marcia K. Meyers and Erik Olin Wright eds., 2009), available at http://www.ruthmilkman.info/Site/Articles_files/pdf%20giant%20gornick.pdf. Milkman states that "outmaneuver[ing] the formidable business lobby politically . . . is best accomplished not by engaging business on its own market-fundamentalism ideological terrain, but instead by appealing directly to the hearts and minds of the public with a moral narrative that focuses on the family-centered human needs of children, the seriously ill, and the elderly." *Id.* at 360.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID LEAVE (2003), available at <http://www.working->

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campaign open to attack before the public heard from the campaign proponents.²²⁶ Advocates of federal legislation should begin putting out media messages early on in the process. Additionally, rather than waiting until late in the campaign, advocates of federal bills should devote time to directing messages at business and to cultivating relationships with business owners and professional associations early on in a campaign for federal paid family leave.²²⁷

One of the main challenges for passing federal family leave insurance legislation is determining how the program will be funded, which was less of a concern in California.²²⁸ In California and New Jersey, each state's wage replacement law was built upon existing temporary disability insurance programs.²²⁹ Unlike in those states, federal paid leave legislation faces the additional obstacle of creating a new program and a new funding mechanism.²³⁰ The structure and funding of a bill is a key factor contributing to the ease or difficulty of its passage.²³¹ Legislators must draft appropriate funding mechanisms in federal paid leave bills to make their enactment feasible. For example, the funding source for the state grants described in a bill like the FIRST bill must be carefully considered and explained in the bill proposals. Legislators should consider modeling the funding mechanism after PFL's use of an existing pool of money.

Another challenge unique to the federal level is determining the political climate and political opposition the policy proposals face and how to respond to that opposition on the national level.²³² However, while there are more players and more potential for organized opposition

families.org/organize/pdf/paidleavewon.pdf.

²²⁶ *Id.*

²²⁷ *Id.* It is very difficult to gain such support from business; therefore, it is not worth a significant amount of time or resources in an attempt to do so. See Telephone Interview with Netsy Firestein, Director of the Labor Project for Working Families (Nov. 5, 2009). The Labor Project reasons that it would have been extremely effective to have some businesses to voice their support early on, so that the business opposition would appear less monolithic and other businesses would feel more comfortable not siding with the Chamber of Commerce. *Id.*

²²⁸ Telephone Interview with Netsy Firestein, Director of the Labor Project for Working Families (Nov. 5, 2009).

²²⁹ *See id.*

²³⁰ *Id.*

²³¹ *Id.* For more discussion of funding proposals for paid family leave, see Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on The Swedish Model?*, 17 COMP. LAB. L.J. 373, 391-96 (1996) (discussing various methods of funding a wage replacement law).

²³² Telephone Interview with Fred Feinstein, Visiting Professor and Senior Fellow, University of Maryland (Oct. 22, 2009).

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at the federal level, there is also more potential for an extensive, organized coalition in support of each federal proposal.²³³

D. COURT CHALLENGES TO THE FMLA'S REGULATIONS SHOULD CAUTION LEGISLATORS TO DRAFT PAID LEAVE BILLS CAREFULLY

While California's PFL campaign provides the tools for passage of federal paid family leave legislation, case law on the FMLA shows that care must be taken when drafting the implementing regulations as well. Following the enactment of the FMLA, there were several court challenges to the validity of its implementing regulations.²³⁴ These court decisions foreshadow the likely attempts to restrict a federal paid family leave law through challenging either the authority or the scope of implementing regulations. A careful examination of these past challenges to the FMLA's implementing regulations also provides a useful guide to legislators on what to avoid when drafting paid leave legislation.

The leading case challenging a FMLA regulation is the Supreme Court decision *Ragsdale v. Wolverine World Wide, Inc.*²³⁵ The regulation at issue in *Ragsdale* provided that leave taken by an employee does not count against the employee's FMLA entitlement if the employer did not designate the leave as FMLA leave.²³⁶ The decision held the regulation invalid because it found it contrary to the FMLA's intent.²³⁷ The Court reasoned that the regulation fundamentally interfered with the FMLA because it essentially relieved an employee of the burden of proving a real impairment.²³⁸ Significantly, the Court found that its invalidation of the regulation was consistent with upholding a key provision of the FMLA: that an employee is entitled only to twelve weeks of leave in a twelve-month period, not more.²³⁹ The Court stated

²³³ *Id.* For example, passage of a law similar to the FMLA in a politically conservative state would have been more difficult than at the federal level, because of the political dynamic of having a much larger opposition base than support base. *Id.*

²³⁴ *See, e.g., Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002); *Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004); *Roberson v. Cendant Travel Servs., Inc.*, 252 F. Supp. 2d 573 (M.D. Tenn. 2002). Congress granted the Secretary of Labor the authority to implement regulations necessary to carry out the FMLA. 29 U.S.C.A. § 2654 (Westlaw 2011).

²³⁵ *Ragsdale*, 535 U.S. at 81.

²³⁶ *See id.* at 88.

²³⁷ *Id.* The Court focused on 29 C.F.R. § 825.700(a) (2001), which stated: "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." This language has since been deleted. *See* 29 C.F.R. § 825.700(a) (Westlaw 2011).

²³⁸ *Ragsdale*, 535 U.S. at 90-91.

²³⁹ *Id.* at 94.

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that the twelve-week provision was a key, contested provision during the passage of the FMLA, so it should not be altered by one of the implementing regulations.²⁴⁰ Several other lower courts also recognized the invalidity of this particular regulation.²⁴¹

Lower federal courts have also found a separate, but related regulation, 29 C.F.R. § 825.208(c), to be invalid.²⁴² This regulation was subsequently deleted by the Department of Labor.²⁴³ The regulation provided that “[i]n all circumstances it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee . . . based only on information received from the employee.”²⁴⁴ In holding this regulation invalid in *Roberson v. Cendant Travel Services, Inc.* the U.S. District Court for the Middle District of Tennessee reasoned that the intent of the FMLA is to make it unlawful for an employer to impede an employee’s exercise of his or her right to leave, not to enable an employee to sue for the employer’s failure to give notice.²⁴⁵ Courts also disapproved of the regulation’s result of providing an additional twelve weeks of leave if an employer failed to give notice.²⁴⁶ The courts were concerned that the effect of the regulation went beyond the intended protections of the FMLA.²⁴⁷

A third challenged regulation was 29 C.F.R. § 825.111, which defines the conditions necessary to find an employee eligible for FMLA

²⁴⁰ *Id.* (discussing the importance of upholding the intent of legislators to provide only for a twelve-week leave period, and noting that “Congress resolved the conflict by choosing a middle ground, a period considered long enough to serve ‘the needs of families’ but not so long that it would upset ‘the legitimate interests of employers.’”)

²⁴¹ *See, e.g.,* Erdman v. Nationwide Ins. Co., 582 F.3d 500, 502 (3d Cir. 2009); Reed v. Buckeye Fire Equip. Co., 422 F. Supp. 2d 570, 572 (W.D. N.C. 2006); Mondaine v. Am. Drug Stores, Inc., 408 F. Supp. 2d 1169, 1175 (D. Kan. 2006); Bukta v. J.C. Penney Co., Inc., 359 F. Supp. 2d 649, 654 (N.D. Ohio 2004); Sims v. Schultz, 305 F. Supp. 2d 838, 840 (N.D. Ill. 2004); Smith v. Blue Dot Servs. Co., 283 F. Supp. 2d 1200, 1202 (D. Kan. 2003); Farina v. Compuware Corp., 256 F. Supp. 2d 1033, 1037 (D. Ariz. 2003); Brock v. United Grinding Techs., Inc., 257 F. Supp. 2d 1089, 1091 (S.D. Ohio 2003); Roberson v. Cendant Travel Servs., Inc., 252 F. Supp. 2d 573, 575 (M.D. Tenn. 2002); Hunt v. Honda of Am. Mfg. Inc., 2002 WL 31409866, 2 (S.D. Ohio Sept. 4, 2002); Krauss v. Catholic Health Initiatives Mountain Region, 66 P.3d 195, 198 (Colo. App. 2003).

²⁴² *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 162 (2d Cir. 1999); *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999); *Roberson*, 252 F. Supp. 2d at 573. *See* 29 C.F.R. § 825.208(a) (Westlaw 2011).

²⁴³ *See* 29 C.F.R. § 825.208 (Westlaw 2011).

²⁴⁴ 29 C.F.R. § 825.208(a) (Westlaw 2011).

²⁴⁵ *Roberson*, 252 F. Supp. 2d at 576.

²⁴⁶ *See, e.g., Roberson*, 252 F. Supp. 2d at 576 (citing *Sarno*, 183 F.3d at 162; *Ragsdale*, 218 F.3d at 937).

²⁴⁷ *See id.*

leave.²⁴⁸ In *Harbert v. Healthcare Services Group, Inc.*, the Tenth Circuit looked at 29 C.F.R. §825.111(a)(3), the provision defining the “worksites” of jointly employed employees.²⁴⁹ The regulation defined a joint employee’s “worksites” as the office of the primary employer “from which the employee is assigned or reports.”²⁵⁰ The court found that the regulation’s definition of “worksites” was “arbitrary, capricious, and manifestly contrary to the statute.”²⁵¹ The court reasoned that the agency’s interpretation of “worksites” was inconsistent with the purpose of the FMLA’s 50/75 provision, which was to ensure an employer has other employees available as temporary replacements during periods of FMLA leave.²⁵² Just as in the other decisions discussing contested FMLA regulations, this decision shows employers’ attempts to limit the coverage of the FMLA by challenging the validity of its implementing regulations.

These cases indicate that employers may attempt to limit a federal paid leave law by challenging the authority or scope of the implementing regulations. These decisions should caution legislators to enact provisions to ensure that any implementing regulations to a paid federal family leave law, if passed, will be carefully tailored to carry out only the law’s intended protections while still ensuring workers’ protections.

CONCLUSION

With the changing demographics in the workforce and continually growing concern for work-life balance, the need for income replacement during family leave becomes more pressing. Workers should not have to choose between work and family. The potential for improving the United States’ family leave policy has promise. The 2009 passage of the Federal Paid Parental Leave bill in the House signals that federal wage-replacement legislation is attainable.

Federal paid family leave legislation is about meeting basic human needs. The federal bills should not be viewed as an imposition on business; rather, they must be recognized for what they are: basic labor standards. Businesses that have paid leave already in place do so because it makes business sense; it attracts motivated workers, reduces the costs of turnover, and promotes worker loyalty and morale. Funding

²⁴⁸ See *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004).

²⁴⁹ *Id.*

²⁵⁰ 29 C.F.R. 825.111(a)(3) (Westlaw 2011).

²⁵¹ *Harbert*, 391 F.3d at 1154.

²⁵² *Id.* at 1150. The 50/75 provision refers to the requirement that at least 50 employees must be employed within a 75 mile radius. 29 U.S.C.A. § 2611(4)(A)(i) (Westlaw 2011).

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workers' family leave periods benefits both families and businesses. Even more fundamental, this legislation is about supporting people in the balance of two essential aspects of their lives: work and family. It is time for the United States to stand with the rest of the world's developed nations by enacting a federal paid family leave law.

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