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# Maternity Leave Under the FMLA: An Analysis of the Litigation Experience

Rafael Gely<sup>\*</sup>  
Timothy D. Chandler<sup>\*\*</sup>

## INTRODUCTION

With the increase in dual-earner families in the United States, considerable attention has been focused on family-friendly employment benefits as a means of helping employees deal with work and family conflicts.<sup>1</sup> Some employers have voluntarily implemented employment policies to accommodate these conflicts, and government policy makers have likewise responded with legislation intended to provide relief to working families.<sup>2</sup> In the United States, the Family and Medical Leave Act of 1993<sup>3</sup> (FMLA) serves as the most visible and, to date, most significant legislative effort in this regard.

While the FMLA is framed in gender-neutral language,<sup>4</sup> conventional wisdom suggests that it was enacted to protect women.<sup>5</sup> Indeed, in a recent Supreme Court decision, *Nevada Dep't of Human*

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1. See Timothy D. Chandler et al., *Spouses Need Not Apply: The Legality of Antinepotism and No-Spouse Rules*, 39 SAN DIEGO L. REV. 31, 33 (2002) (describing the implications of the increase in the number of dual-earning families on the adoption of antinepotism rules).

2. See Burton T. Beam, Jr. & John J. McFadden, EMPLOYEE BENEFITS 402 (5th ed. 1998).

3. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000).

4. See Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 89 (2000).

5. See *id.* (stating, “While Congress embraced gender-neutral language . . . the Act was meant to relieve the pressures on working women”).

*Res. v. Hibbs*,<sup>6</sup> Chief Justice Rehnquist makes the argument that Congress had the constitutional authority to submit non-consenting states to suits for damages for violations of the FMLA. Rehnquist notes that, at the time of the FMLA's enactment, many states offered women extended maternity leave, while very few states provided men with the same benefit. This differential treatment, according to Rehnquist, is based on the "pervasive sex-role stereotype that caring for family members is women's work."<sup>7</sup>

If conventional wisdom is correct, and the FMLA's motivation is in large measure to protect women, then it is appropriate to evaluate how well the FMLA alleviates problems faced by women due to conflicting job and family responsibilities. The problems faced by women taking leaves due to the birth or adoption of a child seem particularly well-suited for this purpose.

There are, of course, various ways of measuring the effectiveness of the FMLA in addressing women's issues. For example, researchers have conducted surveys to identify changes in leave practices instituted after the enactment of the FMLA,<sup>8</sup> the characteristics of employees more likely to take available leave under the Act,<sup>9</sup> and the various reasons why employees take, or fail to take, family and medical leave.<sup>10</sup>

All of these surveys provide meaningful and important measures of the FMLA's impact on employment outcomes, and indeed some of the other contributions to this Symposium also make significant advances in this regard. We, however, propose a different, and somewhat overlooked approach: Examining the narrow window of the litigation experience regarding disputes involving leaves taken due to the birth or adoption of a child.

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6. 123 S. Ct. 1972 (2003).

7. *Id.* at 1979.

8. See Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 229 (1999).

9. COMM'N ON FAMILY & MED. LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY & MEDICAL LEAVES POLICIES (1996).

10. See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1049-50 (1994).

The litigation experience of plaintiffs and defendants under the FMLA is important for a number of reasons. First, to a large measure, the ultimate effect of a statute depends on litigation outcomes. Thus, by analyzing outcomes of litigated FMLA disputes, we obtain a more complete picture of how concerns related to family-work tensions are being resolved in practice. Together with information on how employers have changed leave policies, and how employees' behavior has been altered following the enactment of the FMLA, we can provide a more complete picture of the overall impact of the legislation.

Second, analysis of the litigation experience provides a unique opportunity to explore the dialogue that takes place between litigants and the judiciary that is so important to fleshing out specific rights and responsibilities from rather ambiguous legislative enactments. Not only does this dialogue allow us to better understand the substantive outcomes of specific cases, but it may shed light on the shape and direction of future developments surrounding the FMLA.

We begin with a brief description of trends in female labor force participation and the presence of dual-earner households in the U.S. labor market, conditions which likely led to the need for family and medical leave legislation. We then review various practices that business and government organizations have implemented to balance work and family conflicts, as well as related features of the FMLA, particularly those pertaining to childbirth and adoption. With this background in place, we introduce a framework for examining FMLA litigation. We then review cases litigated in federal court under the FMLA involving requests for family leave due to the birth or adoption of a child to determine the nature of conflicts occurring under the legislation and the resolution of those conflicts by the courts.

## I. TRENDS IN MARRIED WOMEN'S LABOR FORCE PARTICIPATION

Changes in labor force composition have received considerable attention. Perhaps the most significant development in the post-World War II period has been the increase in women's participation

in the labor force that began in the 1940s,<sup>11</sup> a trend that has continued unabated over the past two decades. Indeed, from 1980 to 1999, women's labor force participation increased from 51.5% to 60%.<sup>12</sup>

Not surprisingly, the increase in female labor force participation has not been restricted to single, childless women. Although prior research finds that women are increasingly delaying marriage and childbirth to pursue early career development,<sup>13</sup> "the levels of market work undertaken by married women have increased relative to those of unmarried women."<sup>14</sup> Consequently, there has been a corresponding increase in the number of working couples and working parents.<sup>15</sup> As shown in Table 1, the number of dual-earner families in the United States has increased steadily. In 1980, there were approximately twenty-two million dual-earner households, comprising 46.4% of total married households; by 1998 the number of dual-earner households had increased to thirty million (56.3% of total married couple households). Similarly, the number of dual-earners in the workforce who have children has increased from 4.9 million in 1980 to 7.3 million in 1998.

TABLE 1:  
TRENDS IN DUAL EARNER HOUSEHOLDS\*

Year	Total Married Couple Households <sup>†</sup>	Total Dual-Earner Households <sup>†</sup>	Percentage Dual-Earner Households	Total Dual-Earner w/Children Under Age 6 <sup>†</sup>
1980	48,180	22,334	46.4	4897
1981	49,294	23,147	47.0	5410
1982	49,630	23,395	47.1	5476

11. See generally Francine D. Blau & Marianne A. Ferber, *Occupations and Earnings of Women Workers*, in *WORKING WOMEN: PAST, PRESENT, FUTURE* 37, 37–41 (Karen Shallcross Koziara et al. eds., 1987) (describing changes in the gender composition of professions in the 1970s).

12. See FRANCINE D. BLAU ET AL., *THE ECONOMICS OF WOMEN, MEN, AND WORK* (4th ed. 2002).

13. See Timothy D. Chandler et al., *Do Delays in Marriage and Childbirth Affect Earnings?*, 75 *SOC. SCI. Q.* 838, 838 (1994).

14. John H. Pencavel, *The Market Work Behavior and Wages of Women: 1975-94*, 33 *J. HUM. RESOURCES* 771, 792 (1998).

15. See Dian L. Seyler et al., *Balancing Work and Family: The Role of Employer-Supported Child Care Benefits*, 16 *J. FAM. ISSUES* 170 (1995).

Year	Total Married Couple Households <sup>†</sup>	Total Dual-Earner Households <sup>†</sup>	Percentage Dual-Earner Households	Total Dual-Earner w/Children Under Age 6 <sup>†</sup>
1983	49,908	23,696	47.5	5608
1984	50,090	24,333	48.6	5982
1985	50,350	25,014	49.7	6153
1986	50,933	25,428	49.9	6271
1987	51,537	26,466	51.4	6618
1988	51,809	27,016	52.1	6651
1989	52,100	27,731	53.2	6772
1990	52,317	28,056	53.6	6932
1991	52,147	28,167	54.0	7061
1992	52,457	28,592	54.5	6972
1993	53,171	28,898	54.3	6934
1994	53,171	29,279	55.0	7283
1995	53,858	29,999	55.7	7406
1996	53,567	29,952	55.9	7189
1997	53,604	30,466	56.8	7142
1998	54,317	30,591	56.3	7310

\* U.S. Bureau of Census, Current Population Reports, Annual March Issues.

† In Thousands.

This represents a thirty-five percent increase in the total number of dual-earners with children relative to the total number of married couple households, and a ten percent increase relative to the total number of dual-earner households.

These trends have generated numerous problems in the workplace, as both women and men grapple with work and family conflicts. In turn, these problems led to the implementation of a broad range of family-friendly employment policies by business and government organizations, and generated the need for passage of the FMLA.

## II. ACCOMMODATING WORK AND FAMILY: EMPLOYMENT PRACTICES AND THE FMLA

The passage of the FMLA in 1993 represented a significant and hard fought victory. Lacking federal legislation, employer goodwill was previously the primary means of access to family-friendly employment policies. What these voluntarily provided approaches lacked in breadth of coverage, they made up for in sheer variety. Indeed, a review of family-related employment benefits and policies finds many and varied approaches by companies trying to balance work and family conflicts.

A number of employment benefits allowed employees to attend to the needs of family members in addition to their own personal needs.<sup>16</sup> Child-care benefits were probably the most common. Some organizations offered family-oriented leave benefits to care for ill children both at home and in the hospital.<sup>17</sup> “Organizations might also provide day care centers, financial aid for outside child care services, a referral service for child care facilities, on site education for children, educational assistance for children, and help with child adoptions.”<sup>18</sup>

In addition to policies designed specifically for working parents, business and government organizations sometimes provided dependent care assistance plans (DCAP), eldercare programs, and spousal transfer support. Other popular options were to extend Employee Assistance Plans (EAPs) and Wellness Programs to all members of an employee’s family.<sup>19</sup> Finally, many organizations offered a variety of alternative work arrangements that enabled employees to attend to family and personal needs, including flex-time,<sup>20</sup> telecommuting, permanent “work from home” arrangements,<sup>21</sup> a compressed workweek, job sharing, and permanent part-time work.<sup>22</sup>

It was within this bewildering patchwork of employer paternalism that the FMLA was enacted. Relative to the full menu of family-friendly options available, the FMLA provides a rather limited set of rights and protections for working parents.<sup>23</sup> Enacted in 1993, after

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16. See Beam & McFadden, *supra* note 2, at 402.

17. See David E. Gundersen et al., *Family Supportive Organizational Benefits as Influences on Entry Level Job Preferences: An Empirical Analysis Using a Policy Capturing Methodology*, BENEFITS Q., First Quarter 1995, at 58, 60; Jennifer J. Laabs, *Schools at Work*, PERSONNEL J., Nov. 1991, at 72, 76.

18. Chandler, *supra* note 1, at 37 & n.23.

19. See Beam & McFadden, *supra* note 2, at 418–22; Miriam B. Scott, *Work/Life Programs Promote Productivity*, 52 EMPLOYEE BENEFIT PLAN REV. 22, 22–23 (1997).

20. See Gundersen et al., *supra* note 17, at 59; Kim L. Sommer & Deborah Y. Malins, *Flexible Work Solutions*, SMALL BUS. REP., Aug., 1991, at 29.

21. See Alan R. Earls, *True Friends of the Family*, COMPUTERWORLD, Feb. 17, 1997, at 83–84.

22. See Scott, *supra* note 19, at 23.

23. See Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507 (2001) (arguing that the FMLA has failed to achieve the goals expressed at the time of its passage); Marc Mory & Lisa Pistilli, Note, *The Failure of the Family and Medical Leave*

eight years in the congressional pipeline,<sup>24</sup> the FMLA mandates twelve weeks of unpaid leave each year to: care for a newborn or newly adopted child; take care of a child, parent, or spouse with a serious health condition; or recover from one's own serious health condition.<sup>25</sup> The FMLA also provides employees the right to return to their previous jobs or "equivalent" jobs, with the same pay and conditions, after their leave.<sup>26</sup>

The FMLA stated purpose includes:

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

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

(3) to accomplish the[se] purposes . . . in a manner that accommodates the legitimate interests of employers;

(4) . . . [to] ensur[e] . . . that leave is available . . . on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men. . . .<sup>27</sup>

Private sector employers are covered only if they employ fifty or more employees.<sup>28</sup> To be covered, employees must have worked at least 1,250 hours for a particular employer within the preceding twelve month period.<sup>29</sup>

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*Act: Alternative Proposals For Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689 (2001) (noting the limited scope of the FMLA).

24. See Bornstein, *supra* note 4, at 78.

25. 29 U.S.C. § 2612(a)(1) (2000).

26. *Id.* § 2614(a).

27. *Id.* § 2601(b).

28. *Id.* § 2611(4)(A).

29. *Id.* § 2611(2)(A).



In a somewhat unusual approach to social-protective legislation, the FMLA makes the benefits it provides conditional on certain notice requirements by employees.<sup>30</sup> In order to trigger the leave benefits under the Act, an employee must give notice to the employer at least thirty days before the leave is to begin in cases involving a foreseen leave.<sup>31</sup>

As a whole, the FMLA is not terribly ambitious.<sup>32</sup> It provides employees with benefits that were gaining widespread, voluntary adoption by business organizations,<sup>33</sup> places restrictions on the scope of coverage,<sup>34</sup> and places a notification requirement on employees to trigger FMLA benefits.<sup>35</sup> Perhaps it is not too surprising that survey data collected after the FMLA's enactment provide a mixed picture regarding its effectiveness in alleviating problems associated with women's family-work conflicts.<sup>36</sup> For example, survey data reveal a low utilization rate of the FMLA—between two and four percent of surveyed employees said they have taken FMLA leave.<sup>37</sup> The main reason cited for not taking FMLA leave is affordability.<sup>38</sup> Those employees who were eligible but decided not to take FMLA leave indicated they could not afford lost wages during the leave period.<sup>39</sup> When they are taken, leaves tend to be of short duration, with the

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30. See Richard Bales & Sarah Nefzger, *Employer Notice Requirements Under the Family and Medical Leave Act*, 67 MO. L. REV. 883 (2002) (discussing the implications of the notice requirements included in the FMLA).

31. 29 U.S.C. § 2612(e)(1) (2000). The FMLA also allows the employer to require the employee to support a request for leave with a certification issue by the health care provider. *Id.* § 2613(a).

32. See Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 396 (1999) (arguing that “the FMLA was primarily a symbolic act, which afforded no significant assistance to working women, or men, and has perhaps retarded progress on the family leave front more than it has plausibly helped”).

33. See 137 CONG. REC. 24,983 (1991) (letter from John J. Motley III, Vice President of Federal Governmental Relations, National Federation of Independent Business) (pointing out that before the enactment of the FMLA, survey data indicated that ninety-four percent of small businesses already provided some form of family leave program).

34. See Bornstein, *supra* note 4, at 114–19 (discussing various limitations in the FMLA's coverage and scope).

35. See Bales & Nefzger, *supra* note 30, at 884.

36. See Bornstein, *supra* note 4, at 84–88; Twomey & Jones, *supra* note 8, at 230–33.

37. See COMM'N ON FAMILY & MED. LEAVE, *supra* note 9, at 83–84.

38. *Id.* at 97–99.

39. *Id.*

median leave being ten days.<sup>40</sup> Survey data also reveal that women were more likely to take FMLA leave than men,<sup>41</sup> and that employees between the ages of thirty-five and forty-nine constituted the largest group of leave-takers.<sup>42</sup> It has been argued that the combination of the relative short duration of leaves taken, and the relatively average age of leave-takers, indicates that “much of the leave was unlikely related to the birth or adoption of a child.”<sup>43</sup> Thus, the survey data suggests that the FMLA might have benefited employees by allowing them to take leave that may not have been available without the Act. However, the data also suggests that the impact has been rather modest, particularly with regard to employees that need to take leave due to birth or adoption.

### III. AN EXPLANATORY FRAMEWORK OF LITIGATION UNDER THE FMLA

In this section, we develop a framework for describing the litigation experience under the FMLA. Our interest is in understanding how litigation practices develop under a newly enacted statute, such as the FMLA, and how those developments might be used to explain the outcomes of lawsuits brought under the statute.

Over the last two decades, public choice scholars have provided a very convincing account of the legislative process as one of political influence and compromise.<sup>44</sup> Interest groups lobby intensively for passage of laws that protect their specific interests, and legislators often respond by enacting legislation in exchange for political and financial support.<sup>45</sup> Thus, the legislative process is an interactive

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40. *Id.* at 97.

41. *Id.*

42. *Id.*

43. See Selmi, *supra* note 32, at 408. Professor Selmi notes that leave designated as “maternity-leave” tended to last substantially longer, but not leave designated as necessary to take care of a newborn. *Id.* at 409.

44. The public choice literature is extensive. For a good review of the literature, see Dennis C. Mueller, *Public Choice in Perspective*, in PERSPECTIVES ON PUBLIC CHOICE 1 (Dennis C. Mueller ed., 1997).

45. See Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103, 105 (1990); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 282–84 (1984).

process in which the outcome (i.e., the statute) is often determined by the very interest groups it regulates.<sup>46</sup>

Relying on recent work in sociology,<sup>47</sup> we argue that a similar dynamic exists in the litigation process, at least with regard to the interactivity between lawmakers and those affected by the law.<sup>48</sup> In particular, the litigation process provides a setting in which judges and litigants engage in negotiations regarding the shape that a particular statute should take.<sup>49</sup> While some negotiations are explicit and formal, others occur tacitly, whereby the meaning of a statute is determined by the independent decisions and actions taken by the involved parties.

We start from the proposition that the law-making process results in statutes written in broad and ambiguous language.<sup>50</sup> Accordingly, the litigation process provides room to shape the scope and application of the law.<sup>51</sup> Specifically, organizations covered by a law communicate their interpretation of the law's meaning to the courts through the adoption of internal employment policies.<sup>52</sup> Subsequent litigation involving those policies provides the courts an opportunity to review organizations' efforts to comply with the law.<sup>53</sup> Assuming

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46. See Terry M. Moe, *The Positive Theory of Public Bureaucracy*, in PERSPECTIVES ON PUBLIC CHOICE 455, 462–63, *supra* note 44.

47. See Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869 (1999) (discussing how rule-making opportunities in the litigation process affect the development of the law); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999) (developing a model of legal developments as endogenous responses to the actions of legal institutions and professional organizations); Fran Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441 (1998) (modeling the interaction between legal institutions and corporations in response to the enactment of the Civil Rights Act of 1964); Erin Kelly & Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105 AM. J. SOC. 455 (1999) (discussing the trends on adoption of maternity leave preceding the enactment of the FMLA).

48. See Albiston, *supra* note 47, at 872–77.

49. *Id.*

50. See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1532 (1992).

51. See John R. Sutton et al., *The Legalization of the Workplace*, 99 AM. J. SOC. 944, 948–51 (1994) (arguing that workplace due-process governance mechanisms became institutionalized as partial solutions to problems of legal uncertainty).

52. See Edelman, *supra* note 47, at 412–14.

53. See Kelly & Dobbin, *supra* note 47, at 462–64.

the employment practices pass legal muster, those practices become accepted standards and, thereafter, the courts seek to interpret the law in a way that is consistent with those standards.<sup>54</sup> In this way, statutory compliance mechanisms are worked out between organizations and the courts.

This interaction has been previously observed in how corporations reacted to various federal anti-discrimination laws.<sup>55</sup> Research indicates that following the passage of Title VII in 1964,<sup>56</sup> corporations undertook a series of actions intended not only to comply with the newly enacted statute, but to influence the way in which courts interpreted the law's ambiguous provisions.<sup>57</sup> For example, research shows that employers changed their employment practices to minimize supervisors' discretion in hiring practices by centralizing the hiring functions in human resources or personnel departments.<sup>58</sup> These practices were then diffused by professional networks, and once sanctioned by the courts, they became a dominant response to the applicable statute.<sup>59</sup>

In the case of the FMLA, we argue that a similar "dialogue" has likely occurred between the courts and organizations, primarily through the litigation process.<sup>60</sup> If one of the objectives of the parties is to shape the contours of the newly enacted statute, distinctive litigation patterns should emerge.<sup>61</sup>

#### IV. METHODS

In order to evaluate the types of legal claims, defenses, and decisions involving FMLA leave taken in association with childbirth or adoption, data was collected on every case for which a written opinion has been issued. Using the computerized legal reporting

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54. See Dobbin & Sutton, *supra* note 47, at 446–50 (describing the ambiguity of various federal statutes regulating the employment relationship).

55. See Edelman, *supra* note 50, at 1532; Kelly & Dobbin, *supra* note 47, at 461–70.

56. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e–17) (2000).

57. Edelman, *supra* note 50, at 1567–68.

58. *Id.* at 1557.

59. *Id.* at 1535.

60. See Albiston, *supra* note 47, at 890–96.

61. *Id.*

service WESTLAW, we identified 140 federal court cases involving childbirth and adoption leave.<sup>62</sup> This includes 109 federal district court decisions and thirty-one federal circuit court decisions, spanning the years 1995 to 2003. After identifying the relevant court decisions, we analyzed the content of each using a survey form based on our review of prior FMLA research.<sup>63</sup> The form focused on six key sets of information thought to be important to understanding FMLA litigation involving childbirth and adoption: characteristics of employee-plaintiffs and employers; reasons provided for the leave request; alleged violations of the FMLA; additional statutory claims made by plaintiffs; the employer's defense(s) to alleged violations; and the case outcome(s).

Two characteristics of the plaintiff-employee were coded: gender and tenure with the organization. Characteristics of the employer also comprised two categories: public-sector versus private-sector employer; and manufacturing-sector versus service-sector employer.

Three aspects of the FMLA claim were examined. First we identified the reason for the leave request (i.e., maternity leave, paternity leave, adoption, or health problems related to pregnancy). Second, we noted the alleged violation(s) that occurred under the FMLA (e.g., denial of leave, failure to reinstate, or reduction in pay after leave). Third, we noted whether or not the employee's FMLA claim occurred in conjunction with another statutory claim, such as Title VII,<sup>64</sup> the Pregnancy Discrimination Act,<sup>65</sup> the Americans with Disabilities Act,<sup>66</sup> or other federal or state statutes.<sup>67</sup>

As for employers' responses to alleged violations of the FMLA, prior research suggests several possible defenses. These defenses relate to questions of whether the case is covered by the FMLA, whether proper notice or certification was provided as required by the Act, or whether the employee was harmed by improper notice, as

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62. The FMLA allows for concurrent federal/state court jurisdiction. 29 U.S.C. § 2617(a)(2) (2000). Consistent with prior research on the FMLA, we limited our sample to federal court cases. *See* Albiston, *supra* note 47, at 888.

63. On file at The University of Cincinnati College of Law.

64. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

65. *Id.* § 2000e.

66. *Id.* §§ 12101–213.

67. *E.g.*, Employee Retirement and Income Security Act, 29 U.S.C. §§ 1001–1461 (2000).

well as claims that the alleged adverse employment action was not based on FMLA leave or that the FMLA regulation was itself invalid.

When coding case outcomes, we noted who won the case (employee or employer) along with the nature of the court decision. With regard to district court cases resulting in summary judgment(s), we noted whether it was granted or denied and, for those district court cases decided after trial, we noted whether the decision favored the employee or the employer. For court of appeals decisions, we examined whether the court upheld or reversed the district court decision, and we distinguished outcomes based on the nature of the district court decision (summary judgment versus cases decided after trial).

#### V. LITIGATION STRATEGIES AND OUTCOMES UNDER THE FMLA: A LOOK AT THE EVIDENCE

An interesting aspect of modeling litigation strategies that might follow the enactment of a new statute is the existence of competing groups. In the case of the FMLA, competing groups include the plaintiff's bar on the one hand and employers and their associations on the other.<sup>68</sup> Neither group has absolute control over what cases they litigate; so in a sense, their strategies are constrained by the hand they are dealt.<sup>69</sup> For example, while plaintiffs' lawyers decide what cases to take, they depend on the plaintiffs who seek their legal services.<sup>70</sup> On the other hand, employers have to respond to whatever lawsuits are brought against them.<sup>71</sup> Nonetheless, within these constraints certain predictions can be made regarding characteristics of the cases that are likely to be litigated under the FMLA. Specifically, we propose that the discourse surrounding legal challenges that have occurred under the FMLA will be a function of: (a) characteristics of the lawsuits filed by employees alleging violation of the FMLA; (b) the nature of employers' defenses to

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68. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 519–21 (5th ed. 1998) (describing the economics of the litigation process).

69. See Albiston, *supra* note 47, at 873–77.

70. See Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111, 112–13 (1991) (explaining the economics of the decision to sue).

71. See Albiston, *supra* note 47, at 873–77.

alleged violations; and (c) the courts' responses to allegations and defenses. Each of these is discussed below.

### A. *Employees' Incentives to Litigate*

While employees ultimately initiate employment litigation through claims of unfair treatment, employers play a pivotal role in generating litigation because they manage the workplace.<sup>72</sup> Consequently, it is employers' actions, or inactions, in relation to legal requirements that initiate a potential response from employees. Broadly speaking, two kinds of actions by employers could lead to a FMLA claim: failure by the employer to provide leave when requested by an employee,<sup>73</sup> or adverse employment actions taken against an employee following a protected leave.<sup>74</sup> Our data show that while both types of cases have occurred, definite patterns have emerged in terms of plaintiffs' characteristics and the nature of the legal claims they make.

Survey results presented in Table 2 reveal that the vast majority of plaintiffs in our sample are women (eighty-six percent).<sup>75</sup> This finding is not surprising. Despite the gender neutrality of the FMLA, women are most likely to suffer adverse employment outcomes due to work-family conflicts and, thus, have more frequent opportunities to benefit from the Act's protections. Indeed, the vast majority of birth or adoption cases under the FMLA involved either childbirth-maternity leave (70.3%) and/or health problems related to pregnancy (27.3%).<sup>76</sup>

Data in Table 2 also show that most cases involved private-sector employers (eighty-eight percent) in a manufacturing industry (ninety-one percent). The private-sector component of this is likely due to the

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72. See Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396, 401 (1993) (arguing that compliance mechanism following the enactment of a new law are worked out between organizations and the state).

73. 29 U.S.C. § 2615(a)(1) (2000).

74. *Id.* § 2615(a)(2).

75. The unit of analysis is a court's decision in a FMLA case including childbirth or adoption. Therefore, the data include eight cases that resulted in both district court and court of appeals decisions. The characteristics of these cases are double-counted in tables 2 through 5.

76. According to the data, only 3.1% of the cases involved paternity leave due to childbirth. Data Descriptive Statistics (on file with author).

higher percentage of total employment that occurs there. As for the manufacturing versus service industry distinction, because of the shift in employment from manufacturing to service during the past twenty years, and the historically high concentration of women in service-sector jobs, one might have expected a more balanced distribution of cases between manufacturing and service industry employers. Perhaps this has not occurred because, historically, manufacturing employers' male-dominated workforces have not required employment policies directed primarily at women, making them less accommodating when employment problems arise related to childbirth or adoption.

TABLE 2:  
CHARACTERISTICS OF LITIGANTS

<b>Plaintiffs</b>	<b>Number of Cases</b>	<b>Percent Of Total</b>
<b>Gender</b>	139	
Female	120	86.33
Male	19	13.67
<b>Employers</b>		
<b>Industry</b>	138	
Mfg.	126	91.30
Service	12	8.70
<b>Sector</b>	136	
Private	120	88.24
Public	16	11.76

As for the types of adverse employment outcomes experienced by employees, data in Table 3 show that the most common alleged violation is the failure by employers to reinstate an employee after leave has ended (thirty-two percent of complaints). A refusal by employers to reinstate the employee to the same job after leave has ended was a distant second (twenty-three percent of complaints) followed closely by the denial of leave (twenty-two percent of complaints), and termination as the result of the leave (eighteen percent of complaints).



TABLE 3:  
TYPE OF ALLEGED VIOLATIONS

Alleged Violation	Number of Cases	Percent of Total
Denial of leave	29	21.8
Failure to reinstate	43	32.3
Failure to reinstate to same job	30	22.6
Termination	24	18.0
Failure to reinstate to same shift	3	2.3
Reduction in pay after leave	4	3.0
Failure to inform of FMLA rights	8	6.0
<i>Other</i>	23	17.3
<i>Total*</i>	133	100.0

\* The sum of the numbers of alleged violations do not equal the total number of cases (133) because in some cases multiple alleged violations occurred.

The finding that employees appear more likely to litigate when they have suffered more severe adverse employment outcomes is understandable. Employees are generally reluctant to engage in litigation against their employers.<sup>77</sup> Litigation is expensive, unpleasant, and unpredictable.<sup>78</sup> Therefore, employees are not likely to consider litigation until the adverse employment action has reached a certain level or threshold—for example, when they lose their jobs, or when they are otherwise materially affected by the adverse employment action (such as a reduction in pay or a transfer to an unwanted shift).<sup>79</sup>

Moreover, plaintiffs' lawyers are likely to find such cases more appealing because they have a personal incentive to pursue narrower, or what they consider to be the most "clear cut" challenges to employers' actions.<sup>80</sup> Because of the manner in which most plaintiffs'

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77. See Hylton, *supra* note 70, at 120.

78. *Id.* at 122.

79. *Id.*

80. See POSNER, *supra* note 68, at 520.

lawyers are compensated, their primary interest is to succeed with the case at hand, as opposed to establishing precedent that might turn out to be helpful in future disputes.<sup>81</sup> Accordingly, cases that could result in outcomes that expand the law, but which are at the fringes of the statute should be less attractive to the plaintiff's bar than cases which fall more directly within the clear statutory language.<sup>82</sup>

Table 4 provides additional insight into plaintiffs' litigation strategies by examining whether other claims accompany the FMLA claim. These results reveal that it was common for a plaintiff to accompany FMLA claims with at least one other federal or state claim. Violations of existing state law (seventy percent of cases) and/or Title VII violations (fifty-four percent of cases) were the most common. To the extent that plaintiffs are trying to convince the courts to rule for them in a new and ambiguous statutory context, this "linking" strategy might be a way to provide legitimacy to their claims by directing the court's attention to statutes or claims for which the statutory and case law are better established.

TABLE 4:  
TYPE OF CLAIMS ACCOMPANYING FMLA COMPLAINTS

Statute	Number of Cases	Percent of Total
Title VII	55	53.9
Pregnancy Discrimination Act	33	32.3
Americans with Disabilities Act	15	14.7
State Law Claim	71	69.6
Other	23	22.5
Total Cases*	102	

\* The total number of statutory claims does not equal the total number of cases (102) because in some cases multiple claims were made.

### *B. Employers' Defenses*

When confronted with an employee's lawsuit alleging a violation of the FMLA, employers' initial interests should focus on limiting the

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81. See Hylton, *supra* note 70, at 120.

82. *Id.*

Act's possible reach.<sup>83</sup> This objective could be accomplished in a number of ways. First, employers could claim they are not covered by the Act.<sup>84</sup> Second, employers could challenge the applicability of the Act to a particular employee.<sup>85</sup> Third, in the case of alleged substantive violations that lead to adverse employment outcomes, the employer could seek to limit the Act's reach by establishing acceptable business justifications for the outcome.<sup>86</sup>

As shown in Table 5, employers commonly used each of these defenses. In ten cases (7.3% of the total), employers argued that they were not covered under the FMLA, and in twenty-eight cases (twenty-one percent of the total) they argued that a particular employee did not qualify for coverage. If acceptable to the courts, these defenses, which can be referred to as "gate-keeping" defenses, may enable employers to gain acceptance of definitions that make it more difficult for potential plaintiffs to qualify for relief under the Statute.<sup>87</sup>

By far, the most common substantive defense was that the adverse employment outcomes experienced by employees were not based on taking FMLA leave (sixty-three percent of the cases). This is a familiar defense to employers, as it is embedded in a myriad of anti-discrimination statutes, such as Title VII<sup>88</sup> and the Age Discrimination in Employment Act.<sup>89</sup> To the extent that this defense has been successful in other statutory contexts, it is not surprising that employers relied on it in the FMLA context. The business justification defense serves an important goal for the employer. In

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83. See Albiston, *supra* note 47, at 899 (discussing the importance for employers of obtaining early favorable judicial interpretations of a newly enacted law).

84. 29 U.S.C. § 2611(4) (2000).

85. *Id.* § 2611(2).

86. *Id.* § 2614(a)(3)(B) (stating that "nothing in this section shall be construed to entitle any restored employee to . . . any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave").

87. See Albiston, *supra* note 47, at 899.

88. For example, under Title VII's shifting burden analysis, initially developed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), after the plaintiff establishes a prima facie case, the defendant must articulate a non-discriminatory reason for the adverse employment action. The defendant's articulation shifts the burden to the plaintiff to prove that the articulated reason is a pretext for intentional discrimination.

89. 29 U.S.C. §§ 621-34 (2000).

particular, employers want to be able to protect their ability to manage employees with as little interference from the courts as possible. Thus it is important for an employer to fence off as broad an area of managerial autonomy as possible. The claim that the adverse employment action was taken for reasons not related to the employee's exercise of FMLA rights serves this objective.

TABLE 5:  
EMPLOYERS' DEFENSES

<b>Employers' Defenses</b>	<b>Number of Cases</b>	<b>Percent of Total</b>
Employer not covered by FMLA	10	7.30
Employee not covered by or exempted under FMLA	28	20.59
Employee failed to satisfy substantive requirements of FMLA	15	11.03
Adverse employment action not based on FMLA leave	86	63.24
Employer provided notification of FMLA rights	2	1.50
Employee not harmed by lack of notice	1	0.70
Other	1	0.70
Total*	136	100.00

\* The sum of the number of employers' defenses does not equal the total number of cases (136) because multiple defenses were sometimes provided by employers.

The Table 5 results show that employers occasionally challenged the substantive provisions of the FMLA. In only fifteen of the 136 cases (about eleven percent of the total) did employers argue either that the employee did not suffer a serious health condition or failed to provide adequate notice or certification for the leave as required under the Act. The small number of employer defenses related to FMLA notification requirements is surprising. Numerous articles have been written in the popular press bemoaning the imposition of notice requirements on employees. Proponents of the Act were concerned that the imposition of notice requirements on employees would reduce the protective impact of the Act by allowing employers to easily circumvent their obligations, either by imposing onerous notice and certification requirements or by pointing to technical

violations of these requirements. The data collected from the cases we reviewed indicate that, at least at the litigation stage, this concern has not materialized.

### *C. Assessing the Courts' Responses*

How have the courts responded to the various legal allegations and defenses? In general, one might expect the courts to be less agreeable with the employer on the “gate-keeping” issues, but more agreeable on the substantive issues.<sup>90</sup> The rationale is twofold. First, because of ambiguities that are usually present in the language of a statute like the FMLA, courts will be reluctant to close the door to litigation too tightly.<sup>91</sup> Second, gate-keeping issues are probably the least ambiguous.<sup>92</sup> For example, whether the employer employs a threshold number of employees is a fairly straightforward determination.

The data allow us to examine the outcomes of litigation involving birth or adoption leave cases under the FMLA. For a basic overview, Table 6 provides the litigation outcomes at the district court level while Table 7 summarizes the outcomes for those cases that were appealed. The data reported in tables 6 and 7 indicate that employers are much more likely than employees to prevail in FMLA litigation. Looking at district court decisions, the vast majority of cases (sixty-eight percent) resulted in a summary judgment dismissing charges of a FMLA violation. However, the district court results also show that, for those cases decided after trial, employees were twice as likely as

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90. See Kelly & Dobbin, *supra* note 47, at 461–70 (discussing the interactions between private employers, courts, and legislatures through litigation in the development of maternity leave policies in the United States).

91. This statement is consistent with the understanding that protective legislation should be broadly construed. *MacDonald v. E. Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1118 (10th Cir. 1991) (discussing the protective Age Discrimination in Employment Act: “[t]he ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination”) (quoting *Dart v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976)); *Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir. 1986) (describing how to interpret Title VII: “Title VII should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination”) (internal quotations omitted).

92. See Dobbin & Sutton, *supra* note 47, at 446–50 (arguing that ambiguity in employment statutes permits employers to manipulate the litigation process).

employers to prevail. As for the circuit court decisions, the vast majority of cases involved challenges to district court decisions to grant summary judgment to dismiss FMLA charges. Not surprisingly, those decisions were usually upheld by the circuit courts (seventy-six percent of cases). This was true regardless of the nature of the district court decision.

TABLE 6:  
CASE OUTCOMES—DISTRICT COURT

<b>Type of Decision</b>	<b>Total Cases</b>	<b>Employee Wins</b>	<b>Employer Wins</b>
Summary judgment (or motion to dismiss) granted	96	1	95
Summary judgment (or motion to dismiss) denied	38	38	0
After trial	12	8	4
Other	2	1	1
<b>Total</b>	<b>148</b>	<b>48</b>	<b>100</b>

\* The total number of district court decisions does not equal the total number of cases (148) because in some cases multiple rulings were made.

TABLE 7:  
CASE OUTCOMES—CIRCUIT COURT

Type of Decision	Total Cases	Employee Wins	Employer Wins
Upheld district court's decision:			
Granting summary judgment	19	0	19
Denying summary judgment	0	0	0
For the plaintiff on decision after trial	4	4	0
For the employer on decision after trial	1	0	1
Denial of trial for damages	1	0	1
Reversed district court's decision:			
Granting summary judgment	6	6	0
Denying summary judgment	1	0	1
For the plaintiff on decision after trial	1	0	1
For the employer on decision after trial	0	0	0
Total*	33	10	23

\* The total number of district circuit decisions does not equal the total number of cases (thirty-three) because in some cases multiple rulings were made.

In Table 8, decisions are examined based on the reason for the FMLA leave by comparing maternal or parental leaves taken due to the birth or adoption of a child with leaves taken due to health problems related to a pregnancy. The data reveal that employees succeeded in forty-four of the 105 cases (41.9%) in which leave was taken for childbirth or adoption. Of these cases, ninety involved maternity leave cases, eleven involved paternity leave, and four involved adoption of a child.<sup>93</sup> Employees succeeded about forty-one percent of the time in maternity cases, and forty-five percent of the time in paternity cases. Employees fared even worse in cases

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93. Although men were much less likely to file FMLA claims related to childbirth or adoption, they are considerably more likely to prevail in litigation. Male plaintiffs won fifty-three percent of the time, compared to a thirty-five percent win rate for women. Likewise, employee win rates were higher in the manufacturing-sector, as opposed to the service-sector, and in the private-sector, as opposed to public-sector. However, in none of the sectors did employees win even fifty percent of the time. It might be expected that more litigation activity could be generated in this area after the recent Supreme Court decision in *Hibbs*, which found that states are not immune from damages lawsuits under the FMLA.

involving leave taken due to health problems related to pregnancy. In these cases, employees prevailed in only 22.9% of the time.

TABLE 8:  
WIN RATES BY REASON FOR LEAVE

	Total	Employee Wins	Employer Wins	Percent of Cases Won by Employees
<i>Reason for leave</i>				
<i>Maternal and paternal leave for childbirth or adoption</i>	105	44	61	41.9
<i>Health problems related to pregnancy</i>	35	8	27	22.9
<i>Other</i>	2	2	0	100.0
<i>All cases*</i>	128	49	79	38.3

\* The "all cases" total (128) does not equal the sum of the reasons for leave because in some cases multiple reasons for leave were provided.

Perhaps most important to understanding how the courts have dealt with birth or adoption leave cases under the FMLA, Table 9 examines employee win rates associated with different alleged violations of the FMLA and with different employer defenses. Several interesting findings are observed.

First, plaintiffs who simply claim a violation of the FMLA based on the denial of leave rarely win in court (thirty-four percent) compared to plaintiffs who claim a violation of rights after leave was taken (forty-nine percent). These results suggest that plaintiffs, at least during the period under study, were well served in litigation by bringing lawsuits only when suffering the most severe forms of an adverse employment action. Employers appear to have the most difficulty defending the reinstatement of an employee to a job other than the one occupied prior to taking leave (employees won fifty-three percent of the cases where this alleged violation occurred).

Ignoring a few infrequently used employer defenses, our data further indicate that employers were most successful when defending themselves against alleged FMLA violations by claiming either that adverse employment actions experienced by employees occurred for reasons unrelated to their FMLA leave (employees won only thirty-



five percent of these cases) or were the result of the employee's failure to satisfy the substantive requirements placed on employees under the FMLA (employees won only 33.3% of these cases). On the other hand, employers were less successful when arguing that they or the plaintiffs were not covered under the Act.

As expected, courts appear less likely to close the door by narrowly interpreting the access provisions of the FMLA. However, courts are more likely to decide the claims on substantive grounds, particularly the business defense arguments, one with which courts are fairly familiar.

TABLE 9:  
WIN RATES BY TYPE OF VIOLATION AND EMPLOYER'S DEFENSE

	Total*	Employee Wins	Employer Wins	Percent of Cases Won by Employees
<b>Alleged Violation</b>	133	50	83	37.6
Denial of leave	29	10	19	34.5
Failure to reinstate	43	20	23	46.5
Failure to reinstate to same job	30	16	14	53.3
Failure to reinstate to same shift	3	1	2	33.3
Reduction in pay after leave	4	2	2	50.0
Failure to inform of FMLA rights	8	4	6	50.0
<i>Other</i>	47	13	34	27.7
<b>Employers' Defenses</b>	171	64	107	37.4
Employer not covered by FMLA	10	5	5	50.0
Employee not covered by or exempted under FMLA	28	13	15	46.4
Employee failed to satisfy substantive requirements under FMLA	15	5	10	33.3
Adverse employment action not based on FMLA leave	86	30	56	34.9
Employer provided notification of FMLA	2	1	1	50.0

	<b>Total*</b>	<b>Employee Wins</b>	<b>Employer Wins</b>	<b>Percent of Cases Won by Employees</b>
rights				
Employee not harmed by employer's lack of notice	1	0	1	0.0
Other	29	10	19	34.5

\* The total numbers of cases providing information on the nature of the alleged violations and the employers' responses do not equal the sums of the alleged violations and employers' defenses because in some cases multiple alleged violations were claimed to have occurred and multiple employer defenses were provided.

## VI. CONCLUSION

The FMLA was in many ways a groundbreaking statute. Congress recognized the need to alleviate the work-family conflicts working parents experienced by providing a right to take leave for family and medical reasons. The FMLA's effectiveness, however, has been the subject of intense academic debate.<sup>94</sup>

In this Article, we looked at the litigation experience of plaintiffs bringing FMLA claims involving leaves due to the birth or adoption of a child in order to provide a different perspective from which to assess the effectiveness of the Act. In evaluating the data collected from the survey of cases, we rely on recent sociology theories discussing the dynamics of litigation practices following the enactment of a new statute. These theories help us to identify the contours of the dialogue taking place between courts and FMLA litigants.

This dialogue appears to have developed along a few specific themes. First, as is the case under other employment statutes, plaintiffs litigating under the FMLA do poorly at the summary judgment stages. Plaintiffs do substantially better when the dispute is decided after trial. Second, the type of cases being brought by plaintiffs is consistent with the factors likely to affect the decision to

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94. See Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1443 (arguing that "the FMLA leaves much to be desired").

litigate generally. For example, the data indicates that the majority of cases litigated under the FMLA involved an adverse employment action following the taking of leave (as opposed to a refusal to grant a leave).

We also identify the most common employer defenses in these types of cases. A common concern raised by employees with regard to other statutes involving individual rights protections is that employers can circumvent their statutory obligations through some of the defenses available to them (e.g., legitimate business reason under Title VII). In a sense, the FMLA provides a larger set of “defenses” to employers by imposing on employees various notice and certification requirements. However, the data indicates that employers have not used the “notice” type of defenses as frequently as one might expect, but instead they have fallen back on the use of the “legitimate business” reasons defense by arguing that the adverse employment action was not taken in response to the employee’s exercise of his/her FMLA rights.

Our analysis suggests that plaintiffs, employers, and the courts are all engaged in a dialogue concerning the proper meaning and regulatory parameters of the FMLA. Plaintiffs and employers are behaving strategically, and their behavior affects the substantive developments of the law.