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## The Employer Perspective on Paid Leave & the FMLA

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# The Employer Perspective on Paid Leave & the FMLA<sup>†</sup>

Peter A. Susser<sup>\*</sup>

## INTRODUCTION

When President William J. Clinton signed the Family and Medical Leave Act (“FMLA” or “the Act”) into law on February 5, 1993,<sup>1</sup> it represented the culmination of a long political struggle between advocates of unpaid leave for employees’ personal and family needs and critics, who feared that potential harms would accompany the new legislation. Proponents worked on the initiative from the mid-1980s, and they eventually prevailed over both a Senate filibuster and a pair of vetoes by President George H.W. Bush.<sup>2</sup>

Members of the business community resisted the concept of job-protected leave for a number of reasons. They rejected the imposition of an additional federal “mandate” on employers and felt that job-protected leave would likely impact the economic profitability of businesses and the availability of jobs. They also questioned the burdens that the statute’s administrative requirements might impose (e.g., the obligation to track employees’ use of protected leave,

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1. Pub. L. No. 103–3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–54 (2000)). The regulations promulgated by the U.S. Department of Labor under the FMLA were published at 60 Fed. Reg. 2180 (January 6, 1995), and are codified at 29 C.F.R. § 825 (2002).

2. Note that these vetoes became an issue in Bush’s unsuccessful reelection campaign in 1992.

including intermittent and reduced-schedule leave), as well as the need to fill in for absent workers for extended periods of time.

Apart from these considerations, many employers and lobbyists were fervent in their opposition to the FMLA's notion of job-protected leave—albeit uncompensated leave—because they saw further dangers in the distance. Many in the business community saw the newly enacted statute as the “foot in the door” that someday would lead to a *paid* leave system in the United States. Such a system would come with a price tag, and an impact on productivity and operations, which would be both substantial and disruptive.

In the decade since the law took effect, many of the forecasts of both sides of the FMLA debate have proven true. A large number of Americans have come to understand and appreciate their rights under the Act, and have increasingly invoked its protections. Many can provide dramatic, personal tales of how FMLA-mandated job security during periods of protected leave were enormously beneficial both for themselves and for their families. The U.S. Department of Labor (DOL) and various advocacy groups have documented some of these circumstances, as family and medical leave protections have become increasingly accepted concepts both for larger employers covered by the Act, as well as those employers outside the scope of the FMLA and comparable state laws.

While many employers have accepted the job-protected leave provisions of the FMLA, allowing employees to care for new children and to deal with serious health conditions (some even *support* the concept), certain practical aspects of implementation have proved frustrating, to say the least. Substantial constraints on the ability of employers to assess or question the health condition of employees, their limited ability to plan for staffing and operations in some instances,<sup>3</sup> and the need to integrate FMLA leave rights with other protected absences, have all proven challenging.

These differences may play out, in some form, through scrutiny that the current Bush Administration can apply to certain of the FMLA regulations.<sup>4</sup> In addition, a fundamental disagreement

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3. This is true because of the great flexibility often afforded to employees on intermittent leave.

4. See, e.g., *Proposed Changes to FMLA Regulations Due Out Shortly*, DOL Regulatory

continues to characterize the viewpoints of interested parties regarding the potential expansion of statutory leave rights to encompass mechanisms that provide income continuation during periods of protected leave. As was made evident by events played out in the political and regulatory arenas in recent years, this question—pushed underground during the initial fight to secure unpaid, job-protected leave—is increasingly out in the open. The polarized views of the constituencies impacted by such policy choices suggest that compromise or harmony in this area will remain elusive. This Article explores: (1) the initial treatment of compensated leave under the FMLA and its implementing regulations; (2) the Clinton Administration’s regulatory experimentation with paid leave protections for certain forms of FMLA-protected leave; and (3) related developments at the state level—particularly California’s 2002 paid leave legislation—to examine the nature and direction of this debate.

### I. KEY ELEMENTS OF THE FMLA

The FMLA covers private entities that “employ[] 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”<sup>5</sup> Public agencies are always covered, regardless of the number of employees employed.<sup>6</sup> To be eligible for leave under the FMLA, an employee must have worked for the employer for at least twelve months (the months need not be continuous), with at least 1250 hours during the twelve months prior to the first day of leave, and there must be fifty or more employees employed at, or within seventy-five miles of, the employee’s work site.<sup>7</sup> An employee may request family and medical leave under the FMLA for any of the following reasons:

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*Agenda Says*, 101 Daily Lab. Rep. (BNA) AA-1 (May 27, 2003).

5. 29 U.S.C. § 2611(4)(A)(i); *see also* 29 C.F.R. § 825.105 (2002).

6. *Id.* § 2611(4)(A)(iii).

7. *Id.* § 2611(2); *see also* 29 C.F.R. § 825.110(a), (b).

1. The birth of a child;
2. The placement of a child with the employee for adoption or foster care;
3. The onset of a serious health condition affecting the employee's child, spouse, or parent; or
4. The onset of the employee's own serious health condition, which prevents the employee from working.<sup>8</sup>

Eligible employees are entitled to up to a total of twelve workweeks of FMLA leave during each twelve-month period.<sup>9</sup>

The FMLA's authorization of leave in order for an employee to provide care for a son, daughter, spouse, or parent with a serious health condition does *not* require the employee to demonstrate that other caretakers are unavailable before obtaining leave.<sup>10</sup> Moreover, an employee may take leave intermittently if care responsibilities are shared with another family member or in other appropriate circumstances.<sup>11</sup> At least one court has held that an employee may be entitled to FMLA leave to take care of his healthy children while his wife was required to stay at the hospital to care for another child with a serious health condition.<sup>12</sup>

An employer can classify an employee's absence as FMLA leave even when the employee has not sought that designation, provided that the reasons for the absence meet the statutory criteria. In addition, there is no FMLA violation for *placing* a qualified employee on an FMLA leave when the employee cannot perform the essential functions of his or her job because of a *serious health condition*.<sup>13</sup> In *Harvender v. Norton Co.*, the employer requested that a pregnant staff technician obtain a note from her physician

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8. 29 U.S.C. § 2612(a)(1); 29 C.F.R. § 825.112.

9. 29 U.S.C. § 2612(a)(1).

10. *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192, 1206 (S.D. Cal. 1998). The court reasoned that the defendant's argument that the plaintiff need not care for his son because other care was available from either the son's step-mother or hospice care is without legal basis. *Id.*

11. *Id.*

12. *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711 (E.D. La. 2002).

13. *Harvender v. Norton Co.*, No. 96-CV-653, 1997 U.S. Dist. LEXIS 21467, at \*19 (N.D.N.Y. Dec. 15, 1997).

indicating that she should be protected from chemical exposure.<sup>14</sup> Because this employee's position entailed significant exposure to chemicals, the employer placed the employee on FMLA leave.<sup>15</sup> Although the employee never requested such leave—in fact, she *objected* to being placed on unpaid leave pursuant to the FMLA<sup>16</sup>—the court ruled: “Nowhere in the Act does it provide that FMLA leave must be granted only when the employee wishes it to be granted. On the contrary, the FMLA only provides that leave must be given when certain conditions are present.”<sup>17</sup>

The FMLA requires that an employer restore an employee to his or her same position or to a position with equivalent “benefits, pay, and other terms and conditions of employment.”<sup>18</sup> The equivalent position must “involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.”<sup>19</sup>

The FMLA provides that “restored” employees are not entitled 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.”<sup>20</sup> Thus, if the employer denies reinstatement, it must show that the employee would not otherwise have been employed at the time reinstatement was requested. For example, an employer would be required to prove that the employee's job has been eliminated or that the employee would have been laid off during the FMLA leave period and, therefore, is not entitled to reinstatement.<sup>21</sup> Similarly, if the employee's shift has been eliminated or overtime has been decreased, then “an employee would

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14. *Id.* at \*2.

15. *Id.* at \*3 (indicating that the employer stated the employee could no longer perform an essential function of her job).

16. *Id.* at \*4.

17. *Id.* at \*21.

18. 29 U.S.C. § 2614(a)(1) (2000).

19. 29 C.F.R. § 825.215(a) (2002).

20. 29 U.S.C. § 2614(a)(3); *see also* 29 C.F.R. § 825.216(a); *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349 (11th Cir. 2000) (denying reinstatement to an employee whose position was eliminated while on leave due to reduction in workforce); *but see* *Miranda v. BBII Acquisition Corp.*, 120 F. Supp. 2d 157 (D.P.R. 2000) (agreeing that employee established that her position was preselected for elimination based on the employer's anticipation of her FMLA absence).

21. 29 C.F.R. § 825.216(a).

not be entitled to return to work that shift or the original overtime hours upon restoration.”<sup>22</sup> An employee hired for a specific term on a specific project has no right to reinstatement if the employment term or project has been completed and the employer would not otherwise have continued to employ the employee.<sup>23</sup>

### *A. Compensation and Benefits During Periods of FMLA Leave*

Job-protected leave under the FMLA is generally unpaid. However, an eligible employee may elect, or an employer may require, the substitution of any accrued paid vacation leave, personal leave, or family leave (if the employer provides paid family leave) for any part of the twelve week period of leave due to the birth or placement of a child or to care for the employee’s child, spouse, or parent who has a “serious health condition.”<sup>24</sup> The paid leave and the FMLA leave can be charged concurrently. An employer may not, however, unilaterally substitute an employee’s accrued paid vacation for any part of the employee’s FMLA leave without giving the employee notice of this substitution.<sup>25</sup> An employer “may either

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22. *Id.* § 825.216(a)(2).

23. *Id.* § 825.216(b).

24. 29 U.S.C. § 2612(d)(2)(A). Similarly, an employer may lawfully deny reinstatement to certain highly compensated employees (“key employees”) if the following conditions are met:

1. The employer determines that denying restoration 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” at the time the employer determines that substantial and grievous economic injury would occur; and
3. In any situation in which leave has commenced, the “employee elects not to return to employment after receiving such notice.”

*Id.* § 2614(b); *see also* 29 C.F.R. § 825.216. This exemption applies only to salaried employees who are among the highest paid ten percent of employees employed by the employer within seventy-five miles of the facility at which the employee works. *Id.* § 825.217. Employers must notify employees in writing of their status as key employees and the consequences with respect to reinstatement at the time the leave is requested. *Id.* § 825.219(a); *Panza v. Grappone Cos.*, No. 99-221-M, 2000 U.S. Dist. LEXIS 16390, at \*6 (D.N.H. Oct. 20, 2000) (holding that employer could not utilize the “key employee” defense to reinstatement where it failed to notify employee of such designation).

25. *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998) (holding that in the absence of proper notice that the employer was charging the employee with taking accrued

permit the employee to use his FMLA leave and paid sick leave sequentially, or . . . may require that the employee use his FMLA leave entitlement and his paid sick leave concurrently.”<sup>26</sup> However, an employer cannot avoid the FMLA’s reinstatement requirements by providing employees with paid sick leave benefits instead of unpaid FMLA leave.

An employer can also require an employee to substitute accrued sick leave for any part of the twelve-week period if the employee is absent due to his own serious health condition.<sup>27</sup> If the employee is absent to care for a spouse, child, or parent with a serious health condition, then substitution requires both the employer and the employee to agree to the substitution unless the employer allows employees to take sick leave for ill spouses, children, and parents.<sup>28</sup> An employer is not required to provide paid sick leave in any situation in which the employer would not normally provide paid leave.<sup>29</sup>

The regulations provide that “an employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases.”<sup>30</sup> Other increases that may be conditioned upon such factors as seniority must be granted only to the extent that it is the employer’s policy to do so with respect to other employees on unpaid leave.<sup>31</sup>

## II. SALARY PAY OBLIGATIONS

Generally, an overtime-exempt employee must be paid his or her full salary for any week in which the employee performs any work. The salary can be reduced for complete days of absence due to illness

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vacation concurrently with FMLA leave, the employee was entitled to twelve weeks of FMLA leave, plus five days of paid vacation leave, for a total of almost thirteen weeks of protected leave).

26. *Strickland v. Water Works Sewer Bd.*, 239 F.3d 1199, 1205 (11th Cir. 2001).

27. 29 C.F.R. § 825.207(c).

28. *Id.*

29. 29 U.S.C. § 2612(d)(2)(B).

30. 29 C.F.R. § 825.215(c).

31. *Id.*



or personal reasons. However, private employers cannot reduce an exempt employee's pay for a partial day of absence.<sup>32</sup>

A special rule contained in the FMLA allows an employer to make otherwise impermissible deductions for partial days of absence where the absence qualifies as FMLA leave without disturbing the individual's "exempt" status.<sup>33</sup> However, such deductions can only be made where an employer is obligated to grant FMLA leave.<sup>34</sup> An employer not covered by the FMLA who grants partial-day leaves to exempt employees cannot make any deduction for such absences. Similarly, if a covered private employer grants partial-day leave to an exempt employee ineligible for such leave, then the employer cannot take a deduction from the employee's salary for the absence.

Despite the clear statement in the regulations allowing the reduction of an exempt employee's salary for family and medical leaves of less than a full day, the treatment of this issue under state law should be considered for each applicable jurisdiction. Some jurisdictions have departed from the DOL guidelines regarding salary reductions in the past and may do so for FMLA purposes, as well.

### III. BENEFITS CONTINUATION

A major impact of the FMLA relates to health benefits. During any period in which an eligible employee takes statutory leave, the employer is required to maintain coverage under any group health plan<sup>35</sup> for the duration of the leave at the same level and under the same conditions for which coverage would have been provided had the employee not taken leave.<sup>36</sup> The employer must continue to pay premiums as though the employee had continued working. For example, if an employer pays seventy-five percent of an active employee's group health insurance premiums, then it must continue

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32. *Id.* § 541.118(a).

33. *Id.* § 825.206(a).

34. *Id.* § 825.206(c).

35. "Group health plan" is defined as "any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees." *Id.* § 825.800.

36. *Id.* § 825.209(a), (b).

to pay that same amount during FMLA-protected leave for as long as twelve workweeks per twelve month period.

Employees are entitled to any new health plans and benefits, or changes in health benefits, that occur during a period of FMLA leave.<sup>37</sup> Notice of any opportunity to change plans or benefits also must be given to employees on FMLA leave.<sup>38</sup> Additionally, if an employee chooses not to retain health coverage during FMLA leave, then benefits must be resumed in the same manner and level as provided when the leave began, without any qualifying period, physical examination, or exclusion of preexisting conditions, immediately upon the employee's return to work.<sup>39</sup> The same requirements apply to other benefits, including life insurance and disability insurance.<sup>40</sup>

The employee remains responsible for, and must continue to pay, any share of the health premiums during the FMLA leave.<sup>41</sup> If premiums are raised or lowered, an employee on FMLA leave is required to pay the new premium rates.<sup>42</sup> The regulations provide several options for collecting the employee's share of the payments during the unpaid leave, provided that the option selected is not more stringent than that made available to employees on other types of unpaid leaves.<sup>43</sup> The employer may require employees to pay their share of premium payments as follows: (1) payment at the same time as would normally be made through payroll deduction; (2) payment on the same schedule as provided pursuant to the Consolidated Omnibus Reconciliation Act (COBRA);<sup>44</sup> (3) payment prepaid pursuant to a cafeteria plan at the employee's option; or (4) payment pursuant to a voluntary arrangement between the employee and the employer.<sup>45</sup>

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37. *Id.* § 825.209(c).

38. *Id.* § 825.209(d).

39. *Id.* § 825.209(e).

40. *Id.* § 825.215(d).

41. *Id.* § 825.210(a).

42. *Id.*

43. *Id.* § 825.210(a)–(c), (e).

44. *See* Pub. L. No. 99–272, 100 Stat. 82 (codified in scattered sections of 29 U.S.C.).

45. *Id.* § 825.210(c).

A family and medical leave must not “result in the loss of any employment benefit accrued prior to the date on which the leave commenced.”<sup>46</sup> However, employees are not entitled to “the accrual of any seniority or employment benefits during any period of [FMLA] leave” or to any rights other than those rights, benefits, or positions of employment to which would have been entitled had they not taken the leave.<sup>47</sup> Regarding pensions and other retirement plans, periods of protected leave must be deemed continued service for purposes of vesting and eligibility to participate.<sup>48</sup> For example, if a plan requires an employee to be working on a specific date in order to be credited with a year of service for vesting or participation purposes, then the employee on FMLA leave who subsequently returns to work must be deemed to have been working on that date.

Additionally, the regulations address the interplay of employer bonus programs with FMLA leave. If an employer’s bonus plan is structured so that bonuses accrue in conjunction with employee performance, then employees with FMLA-qualifying absences may receive a *pro rata* bonus.<sup>49</sup> For example, suppose an employee works every business day during the bonus period, and thus would be entitled to 100% of the bonus. In that scenario, an employee who takes FMLA-qualifying leave halfway through the bonus period would still be entitled to a bonus, but only a fifty percent share.<sup>50</sup> In contrast, no-fault, perfect-attendance bonus programs run afoul of the FMLA when employees are denied a bonus due to FMLA-qualifying leave.<sup>51</sup>

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46. 29 U.S.C. § 2614(a)(2) (2003).

47. 29 C.F.R. § 2614(a)(3).

48. 29 C.F.R. § 825.215(d)(4).

49. *See* [1995–1999 Transfer Binder] Lab. L. Rep. (CCH) ¶ 32,349 (Mar. 28, 1995).

50. *Id.*

51. 29 C.F.R. §§ 825.215(c)(2), 825.220(c); *see also* Dierlam v. Wesley Jessen Corp., 222 F. Supp. 2d 1052 (N.D. Ill. 2002) (holding that an employee who missed time during the bonus period for FMLA-qualifying reasons was entitled to the full amount of “stay bonus”).

#### IV. “BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION”: THE CLINTON ADMINISTRATION’S (SHORT-LIVED) REGULATORY EXPERIMENT

Following the FMLA’s enactment, Congressional sponsors of the legislation and interested advocacy groups began pursuing strategies to secure its expansion. Most of the bills proposed in Congress focused on expanding coverage under the federal leave law, primarily by reducing the Act’s coverage thresholds and extending its reach to more worksites and employees. Similar efforts were expended at the state level, and some jurisdictions adopted independent leave entitlements for purposes beyond those covered by the federal leave law.<sup>52</sup>

Notwithstanding such efforts, a key long-term agenda item of certain advocacy groups and their legislative supporters was and continues to be the increase of accessibility to FMLA rights and comparable state law protections by making protected absences affordable for more workers. Accordingly, efforts have been targeted to increasing access to statutory leave by developing some degree of income continuation during periods of protected family and medical leave.

With a closely divided Congress throughout the entire Clinton Administration, it was clear that initiatives to expand the scope and protections of the FMLA were unlikely to survive the House and Senate legislative processes. Similarly, the prospects of enacting more ambitious legislation that would provide some form of paid leave for periods away from work protected by the FMLA were even less likely. As the Clinton Administration’s time in office approached its conclusion, the DOL—at President Clinton’s direction—commenced study and discussion of an alternative mechanism that would provide some continued income during certain of these leave periods. The Agency’s effort was given impetus by a 1996 study, conducted by the Commission on Family and Medical Leave, which

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52. See, e.g., Small Necessities Leave Act, MASS. GEN. LAWS ch. 149, § 52D (2002). This Massachusetts law provides eligible employees with twenty-four hours of leave during any twelve month period to allow parents to participate in their children’s school activities; to accompany children to routine medical or dental appointments; and to accompany elderly relatives on medical or dental appointments. *Id.*

reported that a substantial number of new parents were unable to utilize needed FMLA leave because they could not afford to be without income for the leave period.<sup>53</sup> In May of 1999, President Clinton directed the Secretary of Labor to develop regulations that would allow the application of such funds to provide partial wage replacement to new parents taking leave following birth or adoption.<sup>54</sup>

In December of 1999, the Clinton Administration published for comment in the *Federal Register* a Notice of Proposed Rulemaking advancing the possibility that state governments that administer unemployment compensation programs would be permitted to adopt rules providing wage replacement through the unemployment compensation system for certain family-related leaves on a voluntary, experimental basis.<sup>55</sup> It proposed the development of funding mechanisms that would pay benefits to parents who take approved leave or otherwise leave employment following the birth or adoption of a child.<sup>56</sup> In this initiative, the DOL sought to exercise its authority to interpret the federal unemployment compensation statutes, and, in particular, the longstanding “able and available” requirements of federal law in a much broader manner than had previously been applied. Those standards traditionally required that claimants for unemployment compensation benefits must be able and available to work, and those concepts would have to be viewed differently if family leave compensation were to be covered by these statutes.<sup>57</sup>

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53. COMMISSION ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 99–100, 272–73 (1996).

54. President’s Memorandum to the Heads of Executive Departments and Agencies on New Tools to Help Parents Balance Work and Family, 1999 PUB. PAPERS 841 (May 24, 1999).

55. Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (Dec. 3, 1999) (codified at 20 C.F.R. pt. 604).

56. *Id.* at 67,973–74.

57. The nation’s unemployment compensation system is administered as something of a partnership between the federal and state governments, with each collecting unemployment compensation taxes. The federal government provides grants for administration of the state systems under the Federal Unemployment Compensation Tax Act, 26 U.S.C. §§ 3301–11 (2003). As described by the agency:

The DOL has broad oversight responsibility for the Federal-State UC program, including determining whether a State law conforms and its practices substantially comply with the requirements of Federal UC law. If a State’s law conforms and its practices substantially comply with the requirements of the FUTA, then the Secretary

In the proposal, the DOL took the dramatic step of interpreting this standard as authorizing a voluntary experimental program for examining the use of the unemployment compensation program to provide partial wage replacement to employees taking leave to care for new children.<sup>58</sup>

This experiment recognizes the impact of women in the workforce and responds to the dramatic societal and economic changes resulting from the large number of families in which both parents work. It should allow parents of newborns and newly-adopted children to strengthen their availability for work by providing them with the time and financial support needed to address several vital needs accompanying the introduction of a new child into the family. The program would allow such parents to provide the initial care that a child needs to form a strong emotional bond with the child, and to establish a secure system of childcare that, once in place, will promote the parents' long-term attachment to the workforce.<sup>59</sup>

The proposal—known as the “Birth and Adoption Unemployment Compensation Rule” (“BAA-UC” or “Baby UI”)—was linked to the very healthy state of the economy at the time of its announcement, including low unemployment rates. Such a healthy economy made the climate conducive for such an experiment while not imposing an unacceptable drain on the unemployment compensation trust funds.<sup>60</sup>

The DOL received more than 3,800 comments following publication of the proposed rule. The Agency described the comments as indicating almost equal levels of support both for and against the BAA-UC initiative.<sup>61</sup> As many anticipated,

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of Labor issues certifications enabling employers in the State to receive credit against the Federal unemployment tax as provided under section 3302, FUTA. If a State and its law are certified under the FUTA, and the State's law conforms and its practices substantially comply with the requirements of Title III of the Social Security Act (SSA), then the State receives grants for the administration of its UC program . . . . The DOL enforces Federal UC law requirements through the FUTA credit and grant certification processes.

Notice of Proposed Rulemaking, 64 Fed. Reg. 67,972 (Dec. 3, 1999) (internal citation omitted).

58. *Id.* at 67,974.

59. *Id.* at 67,973.

60. *See, e.g., Clinton Announces Plan to Allow States to Use Unemployment Funds for Family Leave*, 230 Daily Lab. Rep. (BNA), at AA-1 (Dec. 1, 1999).

61. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,211 (June 13, 2000) (codified at 20 C.F.R. pt. 604).

representatives of the business community raised a number of concerns with the proposed rule. These included the rule's departure from established interpretations of the federal unemployment compensation statutes, as well as what some saw as a fundamental incongruity in applying unemployment trust funds—designed to provide income replacement to those who are seeking work but are unable to locate it—to individuals whose separation from the workforce is due to personal circumstances of their own choosing. Moreover, these employer representatives expressed concerns with the financial vitality of the trust funds, notwithstanding the generally healthy economic climate of the late 1990s.

Some of the objections of business groups were stated succinctly by one witness providing testimony at a Senate subcommittee hearing on the Clinton Administration's initiative:

[Unemployment insurance (“UI”)] and FMLA serve different and incompatible purposes. UI is a reemployment program, and UI funds are dedicated by law to protect workers who lose their jobs when the employer no longer has work available. UI benefits are payable only while the worker seeks new work and cease upon an offer of suitable work. FMLA leave is for workers who have a job but took time off for personal medical reasons. By definition, workers on FMLA leave are not unemployed, because they have jobs . . . .

Grafting onto the unemployment insurance system the wholly alien responsibility to finance and deliver paid family and medical leave to workers who by definition have jobs and are not available for employment will financially and administratively burden the UI system and those whom it sustains. In short, using UI trust funds for paid FMLA leave means that jobless workers and employers will no longer be able to count on the protections afforded by UI.<sup>62</sup>

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62. *Family and Medical Leave Act: Preset Impact and Possible Next Steps: Hearing Before the Subcomm. on Children & Family of the S. Comm. on Health, Educ., Labor, and Pensions*, 106th Cong. 44 (1999) (testimony of Eric J. Oxfield, President, UWC-Strategic Services on Unemployment and Workers Compensation).

The issue of the adequacy of state unemployment insurance reserves was highlighted by business groups, which cited the DOL's previously expressed concerns regarding that subject. As noted by Senator Judd Gregg (R-NH):

During the 1990-91 recession more than half the states depleted their UI reserves and had to borrow from the federal government. Many states had to cut back on their UI benefits and eligibility to keep their unemployment insurance accounts solvent. Congress was forced to pass a 13-week extension of unemployment benefits for people whose benefits had run out. . . . In New Hampshire, we were the only northeastern state that avoided insolvency necessitating loans from the federal government to provide UI benefits to workers during the 1990 recession.<sup>63</sup>

Critics also voiced opposition to the process utilized by the Clinton Administration in advancing its initiative, describing it as a "back door" change to longstanding agency interpretations, and equating it with legislating through the executive branch. Of course, the economic costs of the program to employers was a key point in the debate, with some estimating that payroll tax increases amounting to \$68 billion would be necessary to cover the proposed benefits.

Notwithstanding these and other concerns with the DOL's initiative, the Agency went forward and promulgated a final rule on BAA-UC on June 13, 2000.<sup>64</sup> As published in the *Code of Federal Regulations*, the final rule authorized the states "to develop and experiment with innovative methods for paying unemployment compensation to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children."<sup>65</sup> The rule states that such experiments would enable the DOL to test its new construction of the "able and available" requirements for unemployment compensation eligibility. This new construction views

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63. *Unemployment Compensation and the Family Medical Leave Act: Hearing Before the Subcomm. on Human Res. of the House Comm. on Ways & Means*, 106th Cong. 11 (2000) (testimony of Sen. Judd Gregg, Chairman, Senate Subcommittee on Children and Families).

64. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13, 2000) (codified at 20 C.F.R. pt. 604).

65. 20 C.F.R. § 604.1 (2002).



the program's promotion of a continued connection to the workforce for parents who receive such payments as a worthy means to support continued employment.

The program envisioned by the rule, which allowed voluntary participation by those states choosing to implement it, would provide protection for all individuals covered by a state's unemployment compensation program. It would not allow denial of benefits based on such factors as employer industry, employer size, or the unemployment status of another family member.<sup>66</sup> Parents would be eligible for "Birth and Adoption unemployment compensation during the one-year period" commencing with the birth or adoption of a child.<sup>67</sup> Appended to the regulations was "Model State Legislation," which might be codified by each jurisdiction, but without a precisely mandated form. States would remain free to determine the length of time for which benefits would be paid, although the Model State Legislation provided a maximum duration of twelve weeks with respect to any single birth or adoption.

No one observing the policy debate over the Clinton Administration's initiative was surprised when several leading business groups filed suit challenging the regulatory action, seeking both a declaratory judgment that the DOL rule was invalid and a permanent injunction directing the Agency to withdraw the final regulation.<sup>68</sup> The complaint alleged that the rule violated substantive requirements of the federal unemployment compensation statutes and the FMLA, and that it departed from longstanding agency policy.<sup>69</sup> It further alleged that the Agency's non-compliance with a range of procedural requirements relating to such rulemaking rendered the rule invalid.<sup>70</sup>

Although the legal challenge was noteworthy, it effectively was stymied by political developments that the plaintiffs certainly viewed as beneficial. In a ruling issued in 2002, U.S. District Judge Paul L. Friedman granted the Secretary of Labor's motion to dismiss the

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66. *Id.* § 604.20.

67. *Id.* § 604.21.

68. *See* LPA, Inc. v. Chao, 211 F. Supp. 2d 160, 162 (D.D.C. 2002).

69. *Id.*

70. *Id.*

complaint, largely on the basis of procedural issues.<sup>71</sup> Key to this conclusion was the fact that no state had enacted legislation under the rule from the time of its promulgation in June 2000 until the time of the court's decision, more than two years later.<sup>72</sup>

Notwithstanding this conclusion and the arrival of a new administration philosophically opposed to the expansion of benefits and leave rights, no regulatory action attempted to withdraw the BAA-UC initiative's rule until December 2002. At that juncture, President George W. Bush's Administration published a rulemaking notice proposing the withdrawal of the regulations,<sup>73</sup> and advanced a number of explanations for such action. First, it observed that the Department's prior action constituted a reversal in previously communicated agency policy regarding the use of the unemployment compensation trust funds, and prior standards for construing the "able and available" test for eligibility.<sup>74</sup> Second, it noted that no state had adopted implementing legislation to facilitate participation in the experimental program.<sup>75</sup> Third, it noted that the Agency's review of the 2000 regulatory action took place in the context of a substantial downturn in the economy, resulting in substantially lower state unemployment fund balances than in 2002.<sup>76</sup> This analysis culminated in the (not unexpected) conclusion that "the BAA-UC experiment is poor policy and a misapplication of federal UC law relating to the [able and available] requirements," and proposed its removal.<sup>77</sup>

Business groups, not surprisingly, welcomed the new initiative, emphasizing again the perspective that the BAA-UC regulations were at odds with the fundamental purpose and nature of the unemployment insurance program, jeopardizing the nation's safety net for jobless workers. It was also reported that the comments filed

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71. *Id.* (holding that the plaintiffs failed to demonstrate any injury resulting from the regulatory action).

72. *Id.*

73. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 67 Fed. Reg. 72,122 (Dec. 4, 2002) (codified at 20 C.F.R. pt. 604).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

by those favoring repeal of the Clinton Administration's initiative vastly outnumbered those of opponents of that action.<sup>78</sup> On October 9, 2003, the Bush Administration's DOL took final action to rescind the BAA-UC regulations, ending the self-characterized "experiment" in funding paid leave benefits through the unemployment compensation system.<sup>79</sup>

Republican control of Congress and the Executive Branch, the growing deficits at the federal and state levels, and heightened unemployment (requiring the devotion of unemployment compensation funds for their traditional purposes), all have effectively blocked further federal debate over paid leave concepts in Washington. While the political balance of power can change, it seems more likely than not that these political and economic realities will remain in place at the federal level for several years, likely lasting through the end of this decade.

#### V. PAID LEAVE AT THE STATE LEVEL

As the debate swirled over the federal initiative involving compensated family leave, action continued at the state level. In some jurisdictions, paid leave initiatives made advances, only to be blocked by the same economic and political forces that engulfed Washington. For example, in Massachusetts, one of the nation's most liberal states, legislators passed a measure that would have allowed the use of unemployment compensation funds to provide paid family leave one month after the promulgation of the final Clinton Administration rule, only to see the measure blocked by Republican Governor Paul Cellucci.<sup>80</sup>

Dozens of other bills introduced in state legislatures across the nation considered various forms of paid leave initiatives, including studies of alternative methods of providing such benefits, use of the

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78. See *DOL Receives More Positive, than Negative Input on Proposed Repeal of 'Baby-UI' Rule*, 64 Daily Lab. Rep. (BNA), at C-1 (Apr. 3, 2003).

79. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (Oct. 9, 2003) (codified at 20 C.F.R. pt. 604).

80. *Massachusetts Governor Rejects Bid to Expand UI Fund for Parental Leave*, 156 Daily Lab. Rep. (BNA), at A-6 (Aug. 11, 2000).

unemployment compensation system, and requiring employers to allow use of accrued sick leave and vacation leave during periods of FMLA-type absence. While minor advances were made, it was not until the nation's most populous state took action that a concrete system was implemented in any jurisdiction. In 2002, the California State Legislature debated a paid family and medical leave program in the form of the "Family Temporary Disability Insurance" ("FTDI"), which would amend and expand the State's pre-existing disability insurance program. While some called the goals of the measure laudable, opponents characterized it as a new paid leave entitlement program funded with billions of tax dollars.

The business community attempted to block the measure by pressing a number of points about the legislation. They argued that it would have severe, unintended consequences for the State's economy, particularly on small businesses, because the federal and state leave statutes did not incorporate exemptions into the law.<sup>81</sup> Individual privacy rights and the role of state government in tracking and verifying leave and benefits eligibility—often relating to very personal issues—were also raised as concerns. Employers, who lobbied vigorously through the California Chamber of Commerce and other groups, saw a host of ambiguities and complexities in the proposal. In addition, the Chamber of Commerce noted that the overall State Disability Insurance Trust Fund was nearly bankrupt at the time FTDI was being considered. Apart from philosophical and implementation concerns, business groups perceived that this additional state mandate would further damage the State's difficult business environment. They also felt the mandate would diminish the capability of progressive employers wanting to develop their own voluntary policies—often more generous than the legislation—to act in such a fashion.

After a vigorous political contest, the measure (Senate Bill 1661; Chapter No. 901) passed by a final vote of forty-six to thirty-one in the California Assembly, and twenty-one to eleven in the California State Senate.<sup>82</sup> Signed into law by former Governor Gray Davis (D),

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81. Not only is this true of statutory exemptions, but also of the qualifying periods of employment with the employer and other fundamental concepts.

82. See 2002 Cal. Legis. Serv. 901 (West).

this first-in-the-nation rule provides “disability compensation” for up to six weeks for employees who need to take time off for family and medical needs.<sup>83</sup>

The California FTDI statute includes the following key provisions:

1. *Six Weeks of Paid Leave.* Effective July 1, 2004, FTDI provides up to six weeks of paid leave within any twelve month period, replacing approximately fifty-five percent of an employee’s wages while on leave, up to a maximum of \$728 per week in 2004 and \$840 per week in 2005.
2. *Employee-Funded.* Effective January 1, 2004, employees will contribute to the FTDI fund to build up an initial six month reserve for expected claims. Employees may begin taking FTDI leave beginning on July 1, 2004. Initially, the contribution rate was projected to average \$27 per-year, per-employee; however, required employee contributions may be adjusted administratively up to a maximum of 1.5%, as provided for in the Unemployment Insurance Code.
3. *Applies to Employers with One or More Employees Who Are Covered by State Disability Insurance (“SDI”) or Equivalent Voluntary Plan.* Rather than covering only employers subject to the FMLA or the California Family Rights Act (“CFRA”)—those with fifty or more employees—FTDI applies to employers who have employees covered by SDI or an approved voluntary plan. This is consistent with the required contribution of all California employees; however, no employee can receive more benefits than he or she earned in wages during the base period for calculating benefits (generally, the twelve months prior to the quarter in which the claim is made).
4. *Covers Family Care Needs.* Paid leave is available to care for a new child (birth, adoption, or foster care) or a

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83. *Id.*

seriously ill family member (parent, child, spouse, or domestic partner).<sup>84</sup>

5. *Minimum Qualification Requirements.* Qualifying for the paid leave does not require any minimum number of hours worked,<sup>85</sup> minimum tenure of service (twelve months under FMLA and CFRA) before qualification for leave,<sup>86</sup> or minimum number of employees at the work site.<sup>87</sup>
6. *Application Requirements and Procedures Similar to Current SDI.* An employee applies for FTDI benefits in the same manner as for SDI benefits; moreover, anyone receiving SDI, unemployment insurance, or welfare payments cannot also receive FTDI benefits. The Director of Employment Development will establish filing requirements including a required certificate of medical eligibility of the serious health condition of the family member.<sup>88</sup>
7. *Seven-Day Waiting Period.* FTDI requires an employee to wait for seven consecutive days before receiving benefits.
8. *Use of Vacation Pay.* The FTDI allows an employer to require that an employee use a maximum of two weeks of vacation time before receiving FTDI benefits.<sup>89</sup>
9. *No Independently Guaranteed Reemployment.* The new statutory provisions do not guarantee an employee who takes FTDI leave an automatic right to reinstatement when such leave is not independently covered by the FMLA or CFRA. Applicable reemployment requirements come from

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84. Note that the FMLA and CFRA do not mandate leave to care for a “domestic partner.”

85. Compare this with 1250 hours in the prior twelve months required under the FMLA and CFRA. *See* 29 U.S.C. § 2911(2)(A).

86. Compare with twelve month minimum term of employment under the FMLA and CFRA. *Id.*

87. Compare with the FMLA’s and CFRA’s limits to employers with fifty or more employees at or within seventy-five miles of the employer’s worksite. *See id.* § 2911(2)(B).

88. This certificate will include a diagnostic code, commencement date, probable duration, the estimated amount of time the physician or practitioner believes the employee needs, and a statement that the serious health condition warrants the care of the employee.

89. One such week is to be used to cover the seven day waiting period.

these and other applicable statutes or from public policy, and not from FTDI.

10. *Employer Notice Requirements.* Employers are required to provide notice of the availability of FTDI benefits and leave to all new employees hired on or after January 1, 2004, and to all employees taking a leave beginning on or after July 1, 2004.<sup>90</sup>

These provisions are in many ways more complex than they may seem. Several significant funding and administrative issues will likely require further attention as part of FTDI's 2004 implementation.

One of the greatest impacts of the FTDI program is on smaller employers, as eligibility for FTDI is based on the employees' past contributions to the disability insurance fund, as opposed to employer size. The overwhelming majority of employees in smaller California companies and organizations will be eligible for this leave. At the same time, employers with fewer than fifty employees will still avoid the FMLA and CFRA mandate to offer reemployment. However, this is not the end of the inquiry. If a smaller employer prohibited an employee from using FTDI or terminated an employee for accessing this state benefit, it is possible (if not likely) that the employee would at least claim that the termination was in violation of public policy.

On the other hand, a small employer dependent on the services of a key employee might be forced to hire a full-time replacement if that employee has gone on FTDI leave for six weeks. If hiring a temporary replacement would create an undue hardship on the small employer, the FTDI statute's lack of required reemployment would likely outweigh any public policy argument protecting the employee seeking the paid leave. Nevertheless, drawing a balance between these two factors will often be very difficult. It is important to note that the mere absence of a reemployment requirement does not provide the employer with a veto over FTDI leave.

Similarly, new employees may not have been employed long enough to be eligible for FMLA or CFRA leave rights at their new

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90. See generally 2002 Cal. Legis. Serv. 901 (West).

organization. However, these same employees easily could have the right to six weeks of pay under FTDI because of qualifying quarters worked for another California employer. Additionally, FTDI covers domestic partners while the CFRA and the FMLA do not.

Some observers believe that the California action represents the beginning of a trend rather than an isolated occurrence. Looking at underlying social and economic forces, and recognizing that 127 countries (including most of the European Union) provide some form of paid leave to working parents, proponents rejoiced at what was hoped to be a model for other jurisdictions. While some feel that the enactment of FTDI was an important step towards bringing the United States up to par with other industrialized nations, the mechanism clearly creates significant challenges for covered employers, employees, and legal and human resource departments.

Critics, including those in the business community, argue strenuously that the American economy should not model itself after the less productive aspects of European economies in the form of increased regulation and mandates.<sup>91</sup> They note that in some ways, U.S. family leave laws are broader than some European measures because they provide leave to care for the needs of newborns, older children, parents, and spouses. In addition, critics contend that the FMLA and comparable state laws are more flexible than European measures, which tend to mandate that leave be taken at once, rather than intermittently, if appropriate.<sup>92</sup>

## VI. CONCLUSION

Despite the successes of proponents of paid family leave in breaking through the opposition of conservative lawmakers and energized business groups in the nation's largest state, it seems unlikely that advocates will be able to replicate that success in the foreseeable future. The state of the economy and—perhaps even more compelling—the deficit-laden finances of the state and federal governments will be a major obstacle to new programs of this type

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91. *See generally*, ANITA U. HATTIANGADI, PAID FAMILY LEAVE: AT WHAT COST? (2000).

92. *Id.*



that carry direct economic cost, either to public entities, employers, or individual workers.

Even though “political gridlock” in a narrowly divided Congress is likely to bar federal legislation on paid leave any time in the foreseeable future, the national debate concerning this issue will continue and may even gain heightened visibility in the coming years. While the first federal effort in this area—the withdrawn BAA-UC rules—vanished quickly from the scene with little impact outside of the political realm, alternative approaches will eventually receive serious consideration by federal legislators and regulators.

Just as the advocates of paid leave mechanisms will continue to press their case, it is reasonable to anticipate that the employer community will advance its perspective. Its viewpoint—that paid leave mandates are costly, administratively burdensome, and disruptive of independent initiatives—has been consistent throughout the last fifteen to twenty years as Washington has considered the issue of unpaid versus compensated leave. This topic of paid leave is one on which meaningful compromise is not readily identifiable, and yet is one in which all participants possess strong sentiments. The outlook, therefore, is one that anticipates continued legislative, regulatory, and legal jousting (much as has been seen over the last decade), which is not surprising in light of the economic and philosophical differences this area reflects.