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The Daddy Track: Locating the Male Employee Within the Family and Medical Leave Act

Heather A. Peterson*

With an American workforce increasingly composed of female employees and continuously being shaped by women's concerns and struggles, family leave and workplace accommodation issues are generally characterized as "women's issues."¹ In fact, the acknowledgment that parental leave policies in the workplace were inadequate to meet the needs of working women was the major impetus for Congress's enactment of the Family and Medical Leave Act of 1993² (FMLA or Act).³ However, male employees, and male professionals in particular, are subject to practical limitations and social stigmas that constrain their ability to take parental leave under the current legislation.⁴

This Note will address the American male employee whose struggles to balance work responsibilities and family life, while not the force behind the FMLA, are necessarily affected by the legislation's language and policies. Part I examines the language and legislative history of the FMLA to provide a background for understanding the Act's effects on male employees. Part II explores the societal forces that prompted legislative action and congressional

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1. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994). This characterization has been both rational and necessary considering women's physical need to take leave after childbirth and the significant historical impact the maternal role has on women's career advancement. *Id.* at 1048. "Whereas the careers of single women without children tend to follow the male pattern, women with children often interrupt their careers, begin them later, or otherwise find that child-care responsibilities limit their career involvements." *Id.*

2. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 5 U.S.C. §§ 6381-87 (2000); 29 U.S.C. §§ 2601-54 (2000 & Supp. I 2001-2002)).

3. Malin, *supra* 1, at 1048.

4. *Id.* at 1052 ("Just as the absence of adequate maternal leave policies has been a barrier to women's roles in the workplace, the absence of adequate paternal leave policies has been a barrier to men's roles in the home.").

passage of the FMLA. Part III addresses the shortcomings inherent in the FMLA's language and application as it applies to male employees, and male attorneys in particular. Part IV considers a reworking of the FMLA based on state-enacted parental leave policies; focuses on potential sources of funding for a paid family leave policy; proposes modifications in the length, form, and scope of leave available; and suggests changes in societal attitudes toward paternal leave that must precede legislative modification. Despite the apparent gender-neutrality of the FMLA, male employees will ultimately respond not to the language of a federal policy, but to the unspoken "Daddy Track" lying just beneath the surface.

I. LEGISLATIVE HISTORY AND LANGUAGE OF THE FMLA

A. Legislative History

On February 5, 1993, President Clinton signed the Family and Medical Leave Act into law. Passed after eight years of congressional debate and two vetoes by President George H.W. Bush, the Act represented the first broad federal attempt to address the concerns of working families.⁵ The changing dynamic of the American household

5. 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, 78 (2000). Before the passage of the FMLA, Congress had limited its response to pregnancy discrimination. *Id.* at 82–83. In 1978, Congress passed the Pregnancy Discrimination Act (PDA), intended to stop employer discrimination and to fully integrate women into the workplace by "equating pregnancy with other temporary disabilities." *Id.* at 83. The PDA, while a step in the right direction, failed to speak to broader family needs or to "provide a mechanism to extend parental leave to men." *Id.*

The House and Senate debate records suggest that the congressional battle surrounding the FMLA's passage was frustrating for all those involved. During the Senate debate on February 2, 1993, Senator Dodd, the presiding officer of the debate, said:

I feel, Mr. President, sort of like that mythological figure of Sisyphus who is doomed to roll the rock up to the precipice only to have the rock roll back again. My hope is that on this occasion the predictable outcome of Sisyphus' efforts will be changed and that in face [sic] we will roll that rock over the brink and the family and medical leave legislation will become the law of the land.

139 CONG. REC. 1690 (1993). Senator Dodd emphasized the issue of congressional standstill by reading a letter written by President Clinton. It stated: "For years we have known that we need this legislation. It has been passed by Congress before, with strong bipartisan support, only to be vetoed. We have no excuse for further deadlock and inaction." *Id.* at 1692.

and work environment served as the major springboard for enacting the FMLA.⁶

Congressional debate surrounding the Act's passage centered on the cost of implementation, the success of privately initiated leave policies, potential effects on international competition, and the federal leave's unpaid status. Proponents and opponents predicted grossly different start-up costs.⁷ Those who opposed federal legislation also noted the independent efforts of private companies that had successfully implemented family leave policies without the burden of federal intervention.⁸ Proponents of the FMLA rebutted such arguments by citing the failure of private policies to meet the pleas of American workers and stressing the need for a minimum federal standard.⁹

6. Bornstein, *supra* note 5, at 88–89. During the Senate debate on February 2, 1993, Dodd read a letter from Secretary of Labor Robert Reich that addressed this concern. 139 CONG. REC. 1692–93 (1993). The letter urged the Senate to “act quickly upon a critically important bill.” *Id.* at 1692. The Secretary wrote, “It is simply unfair to ask working Americans to choose between their jobs and their families—between continuing their employment and tending to their own health or to vital needs at home.” *Id.* at 1693. Senator Dodd asserted that “[f]or these families and thousands like them, the Family and Medical Leave Act provides an answer—it is not a complete answer, it is not a perfect answer, but it is an answer—to short-term job security in times of family or medical emergency.” *Id.* at 1690.

7. *Id.* at 1982. Representative Dornan spoke of the enormous burden the FMLA would impose on businesses, estimating the cost to exceed \$3.3 billion in the first year and lead to the loss of almost 60,000 jobs. *Id.* Dornan indicated that these costs would be in addition to the \$500 billion American businesses annually expend in government regulation costs. *Id.* Furthermore, the FMLA would make businesses vulnerable to litigation and the attendant expenses. *Id.* Eventually, these increased costs would be passed on to workers and consumers. *Id.*

In direct opposition to this testimony, Representative Boehlert cited a General Accounting Office (GAO) Report that estimated the cost of family leave, including continuing health insurance benefits, to be less than six dollars per year per employee. *Id.* at 1981. Likewise, Dodd presented the findings of a Small Business Association survey that suggested a savings of \$500 million in new employee hiring and training costs had the Act been passed three years earlier. *Id.* at 1691. He went on to relate the intangible savings associated with the Act by discussing the direct correlation between family stability and workplace productivity. *Id.* at 1693. Dodd, quoting Secretary Reich's letter, stated, “Workers who cannot take a reasonable amount of time off from work to attend to family emergencies can be expected to quit their jobs or to be absent without leave, creating unnecessary and costly job turnover, and higher absenteeism in the workplace.” *Id.*

8. *Id.* at 1983. One of these speakers commented that “[m]ost of America's largest and most competitive corporations already provide the kind of leave that this bill would mandate. Many smaller companies are trying to do the same.” *Id.* (statement of Rep. Gunderson).

9. *Id.* at 1693. Secretary Reich's letter summarized data from the Bureau of Labor Statistics that showed that “in 1991, for private business establishments with 100 workers or

Proponents also pointed to the other countries, including the United States's chief economic competitors, that had benefited from family leave policies for decades.¹⁰ Opponents argued that the United States could not maintain its superior productivity and unemployment rates by instituting a federal leave policy.¹¹

However, the most vehement congressional debate surrounded the FMLA's status as unpaid leave. Opponents criticized the Act's failure to aid the lower-income workers most in need of its aid.¹²

more, 37 percent of all full-time employees (and 19 percent of part-time employees) had unpaid maternity leave available to them, and only 26 percent of all full-time employees in such establishments had unpaid paternity leave available." *Id.* The most recent data for businesses with fewer than 100 workers showed that "only 14 percent of all those employees had unpaid maternity leave available, and only 6 percent had unpaid paternity leave available." *Id.* Ultimately, Reich indicated that the federal government could play a vital role in imposing its minimum standards on the American workforce, and demonstrated the potential costs if such a policy was not instituted. *Id.* Reich's letter stated:

We all bear the cost when workers are forced to choose between keeping their jobs and meeting their personal and family obligations. When they must sacrifice their jobs, we all have to pay for the essential but costly social safety net. When they ignore health needs or their family obligations in order to keep their jobs, we all have to pay more for social services and medical care as neglected problems worsen.

Id.

10. *Id.* at 1987. During House debate, Representative Owens explained that 135 other countries, including most industrialized nations and even some third-world countries, already had in place family leave policies like the FMLA. *Id.* Further, 127 nations, including Japan and Germany, who counted themselves among the United States's chief economic competitors, had implemented paid family leave programs. *Id.*

Owens also indicated that some of these countries had taken advantage of leave policies since before World War I. *Id.* He stated, "These nations have learned that one of the keys to economic growth and success is treating each worker as an essential resource to be developed and invested in—not as an expendable, interchangeable cog to be cast aside the first moment it poses an inconvenience." *Id.*

11. *Id.* at 1694. Senator Kassebaum explained that although other countries might have had more supportive family leave policies than the United States, these countries' productivity levels and unemployment rates were not to be emulated, and the United States should remain dedicated to the practice that best fits its present job market. *Id.* Kassebaum offered the following supporting facts: "France has an unemployment rate of 10 percent; Great Britain, 11 percent; Spain, 17 percent; Italy, 11 percent; Germany is losing jobs at a rate of 100,000 jobs a year because of high labor costs." *Id.*

12. *Id.* at 1982. Dornan stated, "The Family and Medical Leave Act is meant to be a one-size-fits-all measure, but in reality fits only those who can afford to take advantage of it." *Id.* Another representative voiced the hope that Congress would improve the legislation to provide income replacement because "[f]or many families who are living from paycheck to paycheck, family and medical leave will still be an economic impossibility." *Id.* at 1987 (statement of Rep. Owens).

Representatives in favor of implementing the FMLA touted the legislation's ability to reach all American workers, including those who were struggling hardest to accommodate the pressures of work and the responsibilities of family life.¹³

B. Statutory Language of the Family and Medical Leave Act

In order to understand the FMLA's disparate application between male and female professional employees, one must appreciate the language of the Act, including its defined terms, leave qualifications and provisions, financing provisions, notice requirements, and delineation of employee action and employer duty.

1. Definitions

The FMLA avoids being gender-specific by imposing the term "parental leave," rather than referring to "maternity" or "paternity" leave.¹⁴ The word "parent" is designated as "the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter."¹⁵ The words "son" and "daughter" are each framed broadly as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a

13. *Id.* at 1692. Senator Dodd attacked the argument that the FMLA is a "yuppie bill" when he explained that the least privileged workers are also the least likely to have private family leave available, and are thus the most in need of protective federal legislation. *Id.*

President Clinton was well aware of the strains the FMLA placed on employees who wanted to take advantage of the Act's policies but were financially incapable of doing so. Arline Friscia, *Reflections on Legislation: The Worker-Funded Leave Act: The Time is Now to Help Build Stronger Families with a More Stable Economy*, 26 SETON HALL LEGIS. J. 73, 76 (2001). As a result, the President expanded coverage "by ordering the United States Department of Labor to implement a rule allowing states to utilize their unemployment funds to provide up to twelve weeks of paid leave for the care of a newborn or newly adopted child." *Id.* (citing 20 C.F.R. pt. 604 (2003) (removed Nov. 10, 2003)). On June 13, 1999, the United States Department of Labor officially enacted this new policy. *Id.* Several states responded by drafting legislation to provide families with compensation during the course of their leave. *Id.*

14. Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 376 (1996).

15. 29 U.S.C. § 2611(7) (2000).

person standing in loco parentis.”¹⁶ Under the FMLA, “spouse” is defined as “a husband or wife, as the case may be.”¹⁷

The designation of “eligible employee” and “employer” is crucial to the Act’s application. The former refers to an employee who has worked for a period of at least twelve months and for a minimum of 1250 hours for the employer from whom he has requested leave.¹⁸ The term “employer” refers to “any person engaged in commerce or in any industry or activity affecting commerce that employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”¹⁹ The phrase “employment benefits,” which becomes important when the employee returns to work, includes all those benefits that are customarily given to employees by an employer.²⁰ When considering

16. *See id.* § 2611(12). The words “son” and “daughter” are further qualified by the fact that, to be eligible, the dependent must be “(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.” *Id.* § 2611(12)(A)–(B).

17. *Id.* § 2611(13). The FMLA recognizes both spouses married under state law and those whose relationship operates as a common law marriage. Grill, *supra* note 14, at 376.

18. § 2611(2)(A). The term “eligible employee” excludes:

- (i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5; or
- (ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

Id. § 2611(2)(B). Furthermore, the Act mandates that “[f]or purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.” *Id.* § 2611(2)(C). The terms “employ,” “employee,” and “State,” also take their meaning from the Fair Labor Standards Act of 1938, 29 U.S.C. § 203(c), (e), (g). 29 U.S.C. § 2611(3) (2000).

19. *Id.* § 2611(4)(A)(i). The terms “commerce” and “industry or activity affecting commerce” mean “any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ‘commerce’ and any ‘industry affecting commerce,’ as defined in paragraphs (1) and (3) of section 142 of this title.” *Id.* § 2611(1). The term “employer” means “(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and (II) any successor in interest of an employer”; the term also “includes any ‘public agency,’ as defined in section 203(x) of this title.” *Id.* § 2611(4)(A)(ii)–(iii). “Public agency” is referred to as “a person engaged in commerce or in an industry or activity affecting commerce.” *Id.* § 2611(4)(B).

20. *Id.* § 2611(5). Recognized employment benefits include “group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an ‘employee benefit plan,’ as defined in section 1002(3) of this title. *Id.*

the options available to male employees, it is important to note the FMLA's general prohibition on "reduced leave schedules," which are "leave schedule[s] that reduc[e] the usual number of hours per workweek, or hours per workday, of an employee."²¹

2. Leave Qualifications and Provisions

Delineating the leave qualifications and provisions of the FMLA is crucial to understanding how these requirements are later applied in a social context characterized by powerful gender stereotyping and biases. In general, an eligible employee is allowed twelve workweeks of unpaid leave during any twelve-month period.²² In order to qualify, an employee must meet the definition of "eligible employee."²³ If an individual works for a private employer, the

21. *Id.* § 2611(9). As discussed later in this Note, the prohibition of such leave has a disparate effect on male employees, as opposed to their female counterparts.

The term "serious health condition," which derives its significance upon consideration of leave substitution policies, means "an illness, injury, impairment, or physical or mental condition" that necessitates "inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider." *Id.* § 2611(11). The term "health care provider" as used in this statute, refers to "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services." *Id.* § 2611(6).

22. *Id.* § 2612(a)(1). Depending on their employer's policies or the applicable state law, employees may take advantage of longer periods of leave. Grill, *supra* note 14, at 375. By 1993, thirty-four states and the District of Columbia had enacted some form of family leave policy. California, the District of Columbia, Louisiana, Rhode Island, and Tennessee provide both state and private sector employees with longer periods of leave than does the FMLA." *Id.*

An employer is prohibited from restraining or denying an employee's rights under the statute. 29 U.S.C. § 2615(a) (2000). He or she may not discharge or discriminate against an employee for exercising his rights under the Act or for filing a charge, exercising a right, or testifying or providing information in connection with an inquiry under this statute. *Id.* § 2615(b). An employer who violates these conditions shall be liable to the employee for damages and appropriate equitable relief. *Id.* § 2617(a)(1). Such damages may consist of "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation," or if these damages have not been sustained, "any actual monetary losses sustained by the employee as a direct result of the violation," interest accrued on this amount, and liquidated damages equal to the sum of these two amounts, unless otherwise exempted by the court. *Id.* § 2617(a)(1)(A). Equitable relief may include "employment, reinstatement, and promotion." *Id.* § 2617(a)(1)(B).

23. *See* 29 U.S.C. § 2612(a)(1) (2000).

business must employ at least fifty employees within a seventy-five-mile area.²⁴

The FMLA permits three general types of leave: (1) leave subject to the birth of a child or the placement of a child for adoption or foster care;²⁵ (2) leave so that the employee may care for a seriously ill spouse, son, daughter, or parent; or (3) leave due to the employee's own serious health condition.²⁶ The FMLA further restricts an employee's ability to take leave by generally prohibiting the taking of intermittent leave or reduced-schedule leave, unless the employer and employee make special accommodations.²⁷

24. *Id.*; see also *supra* note 18 and accompanying text.

25. This leave "expire[s] at the end of the 12-month period beginning on the date of such birth or placement." 29 U.S.C. § 2612(a)(2) (2000).

26. § 2612(a)(1). Certification requirements within the FMLA assure employers a certain amount of control over an employee's ability to take advantage of family leave policies. *Id.* § 2613(a). The FMLA further specifies the contents of sufficient certification under various provisions of the statute. Under the provision allowing leave in order to care for a seriously ill spouse, child, or parent, certification must include a statement that such care is needed and an approximation of the time required. *Id.* § 2613(b)(4)(A). When taking leave due to an employee's own serious health condition, certification requirements mandate a statement that the employee is incapable of completing his or her job functions. *Id.* § 2613(b)(4)(B). For either of the aforementioned bases for leave, sufficient certification under the Act must include "(1) the date on which the serious health condition commenced; (2) the probable duration of the condition; [and] (3) 'the appropriate medical facts within the knowledge of the health care provider regarding the condition.'" *Id.* § 2613(b). If an employee is permitted to take leave on an intermittent or reduced-leave schedule for "planned medical treatment," certification must include the dates and duration of treatment. *Id.* § 2613(b)(5). Likewise, if employees are allowed leave on an intermittent or reduced-leave schedule in response to their own serious health condition, they must provide the employer with certification showing both the medical reason for the leave and the expected duration. *Id.* § 2613(b)(6). Should intermittent leave or a reduced-leave schedule be agreed to for the purpose of caring for a spouse, child, or parent with a serious illness, the employee's certification must provide that such leave is necessary or "will assist in their recovery," and the expected duration. *Id.* § 2613(b)(7).

Should the employer have reason to doubt the credibility of any certification, the employer may require a second health care provider's assessment for which the employer both approves and pays, but that health care provider may not be "employed on a regular basis by the employer." *Id.* § 2613(c). The Act addresses the possibility of conflicting medical opinions by allowing the employer, at his own expense, to mandate that the employee secure a third, binding opinion of a health care provider, approved by both the employer and employee. *Id.* § 2613(d). Furthermore, the employee may be required to "obtain subsequent recertifications on a reasonable basis." *Id.* § 2613(e).

27. § 2612(b)(1); see also *supra* note 21 and accompanying text. An exception is made for leave taken when medically necessary, subject to the notice provisions of the statute. § 2612(b)(1). Should intermittent leave or a reduced-leave schedule be permitted, it does not thereby result in a reduction of the total leave otherwise allowed an employee under the Act. *Id.* This provision allows an employer who receives notice of an employee's intermittent or

3. Financing of Family Leave

Though FMLA-mandated leave is generally unpaid, the FMLA allows for exceptions.²⁸ For example, nothing within the FMLA may be interpreted to preempt state or local laws allowing greater family or medical leave rights.²⁹ The Act provides that if an employer initiates paid leave for less than the twelve weeks accorded by federal statute, the remaining time may be provided without compensation.³⁰ Paid leave is possible under the FMLA itself if an eligible employee elects, or an employer mandates, that “any of the accrued paid vacation leave, personal leave, or family leave of the employee” be substituted for the otherwise unpaid, twelve-week leave provided for upon the birth or adoption of a child.³¹

reduced-leave schedule to “require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that—(A) has equivalent pay and benefits; and (B) better accommodates recurring periods of leave than the regular employment position of the employee.” *Id.* § 2612(b)(2).

28. *Id.* § 2612(c). The Act provides that leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of an employee under such section.” *Id.* § 2612(c). With the exception of the cost to employers of continuing employees’ health care coverage, employees are required to shoulder the complete economic expense of family leave. Grill, *supra* note 14, at 379. “The General Accounting Office estimated this employer contribution to average \$5.30 per year per employee. A November 1993 survey found that sixty-three percent of employers expected that the FMLA would result in insignificant or minor costs for their firms.” *Id.*

29. § 2651(b) (2000). Thus, female employees in Hawaii, New Jersey, New York, and Rhode Island are entitled to paid maternity leave under the temporary disability insurance laws of those jurisdictions. Grill, *supra* note 14, at 378. Furthermore, the Act avoids a construction that might discourage employers from adopting more protective leave policies, as long as such regulations comply with the FMLA. 29 U.S.C. § 2653 (2000).

30. § 2612(d)(1).

31. *Id.* § 2612(d)(2)(A). In many cases, although employees are entitled to a maximum of twelve weeks of leave, new mothers will take accrued paid sick leave in order to prolong the statutory leave. Grill, *supra* note 14, at 378. Furthermore, a Bureau of National Affairs survey taken in 1993 reported that the majority of fathers taking leave under the FMLA were compensated by substituting vacation days, sick days, or by rearranging their schedules. *Id.* at 377. “This fact emphasizes one of the negative effects of the existing unpaid leave program in the United States.” *Id.*

The Act provides similar substitution of “any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee” for leave taken either to care for a seriously ill spouse, child, or parent or leave due to the employee’s own serious health condition. § 2612(d)(2)(B). This provision is subject to the corollary that substitution does not require an employer to permit paid sick or medical leave under any circumstances where the employer

4. Notice Requirements

The FMLA's "Foreseeable Leave" section also informs the statute's gender-specific implications. The Act requires notice when leave taken upon the birth or adoption of a child is foreseeable based on the expectation of such birth or placement.³² Under these circumstances, "the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin."³³ Restrictions in the statute further qualify the leave provisions by prohibiting spouses employed by the same employer from taking more than a total of twelve weeks leave during any twelve-month period.³⁴

5. Employer Duty

Upon return from leave, the FMLA requires an employer to return employees to their prior position or to a position with "equivalent employment benefits, pay, and other terms and conditions of employment"; the employer may not withhold employment benefits

would not ordinarily be forced to provide such leave. *Id.* Although this language is ambiguous, "[i]n general, exceptions carve out circumstances to which the general rule does not apply; they are not intended to swallow the general rule." Malin, *supra* note 1, at 1086.

32. § 2612(e)(1). Similar notice requirements extend to employees who take leave to care for a seriously ill family member or due to their own serious health condition. *Id.* § 2612(e)(2). The statute states that if an employee's leave :

is foreseeable based on planned medical treatment, the employee—

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

Id.

33. *Id.* § 2612(e)(1). The FMLA makes an exception for situations in which the birth or placement of a child is to begin in less than the thirty-day requirement. *Id.*

34. *Id.* § 2612(f). This restriction applies to employees taking leave because of the birth or adoption of a child or due to the serious illness of a spouse, child, or parent. *Id.* The limitation does not apply to leave taken due to an employee's own serious health condition. *Id.*

amassed prior to when leave began.³⁵ The Act contains an exemption under this section for the “highly compensated employee,” who is among the highest-paid ten percent of employees within a seventy-five-mile area.³⁶ An employer may deny such restoration if the employer will otherwise sustain substantial economic harm, the employer notifies the employee that restoration will be denied, and the employee chooses not to return to work after being so notified.³⁷

II. GOALS OF THE FAMILY AND MEDICAL LEAVE ACT

A. Societal Factors Motivating the Drafters

Three major forces led to the FMLA.³⁸ First, the Act was drafted to accommodate the changing composition of the American workforce and the resulting tension between work and family.³⁹ The increasing number of single parents and dual-career couples, an expanding elderly population reliant on family care, and an increase in the number of women entering the workforce prompted a change

35. *Id.* § 2614(a)(1)–(2). Employee protection is limited in that the employee is not entitled to “(A) the accrual of any seniority or employment benefits during any period of leave; or (B) any right, benefit, or position or employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave.” *Id.* § 2614(a)(3).

The statute further protects eligible employees by mandating that employers maintain then-existing health insurance policies for the whole of the twelve-week leave period. *Id.* § 2614(c)(1). Should the employee fail to return from leave:

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if—

....

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title; or

(ii) other circumstances beyond the control of the employee.

Id. § 2614(c)(2).

36. *Id.* § 2614(b)(2).

37. *Id.* § 2614(b)(1).

38. Donna Lenhoff & Claudia Withers, *Implementation of The Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 48 (1994).

39. *Id.*

in the workplace-and-family dynamic.⁴⁰ The transformations in the American workforce required a leave policy that successfully met the unique challenges of balancing an ever more complex work and family life.

The second major force underlying the FMLA's enactment was the recognition that family responsibilities and medical emergencies affect both male and female employees.⁴¹ Men, like women, suffered economic penalty or job loss for taking leave after the birth or adoption of a child, for their own serious illnesses, or for taking leave to care for the illnesses of family members.⁴² By making leave equally accessible to male employees, the drafters hoped to encourage men to assist in family care and to force employer recognition of male employees' family-centered needs.⁴³

The third concept motivating the enactment of the FMLA was the formation of a minimum labor standard.⁴⁴ Historically, the three conditions that preceded the implementation of a minimum labor standard were the recognition of a serious social problem, the failure of employers' voluntary corrective actions, and the establishment of standards that employers were capable of meeting.⁴⁵ These conditions were all present during the FMLA's legislative process.⁴⁶

40. Bornstein, *supra* note 5, at 88. "The so-called nuclear family in which the father works outside the home as the sole breadwinner and the mother stays at home to care for the children [wa]s a thing of the past." Lenhoff & Withers, *supra* note 38, at 48. In considering the implementation of a federal parental leave policy, the House Education and Labor Committee conducted a survey that found that "sixty-five percent of mothers and ninety-six percent of fathers are in the paid labor force." *Id.* Furthermore, fifty-one percent of mothers of children under the age of one work outside the home. *Id.*

41. Lenhoff & Withers, *supra* note 38, at 49.

42. *Id.* The drafters of the FMLA found that male and female workers were equally likely to have, and to require time off to care for, seriously ill children, parents, and spouses. *Id.* Prior to the Act's passage, the GAO estimated that more than 1.63 million employees a year could benefit from the FMLA, more than 800 thousand of which would be men. *Id.* Furthermore, the GAO's estimates, which assumed that men would not take leave to care for newborn or newly adopted children, found that men would still constitute one-half of the leaves taken under the Act. *Id.* at 50.

43. *Id.* at 49. Legislators hoped to discourage employers from using "the FMLA or women's roles as family caretaker as an excuse for refusing to hire women or otherwise discriminating against them in employment." *Id.* at 50.

44. *Id.* at 50.

45. *Id.* Previously established minimum labor standards included child labor, minimum wage, employment discrimination, safety and health, and pension and welfare benefit laws. *Id.*

46. *See id.* First, the social climate directing their efforts was characterized by "dramatic

B. The FMLA's Response to Societal Factors

1. Congress's Findings

The discrete set of congressional findings listed at the outset of the FMLA reflects the strong social forces that prompted its passage. Congress noted the increase of single-parent and two-parent households in which all parents in the household worked outside of the home.⁴⁷ The drafters emphasized the importance of parental participation in child-rearing and of family involvement in providing care for seriously ill spouses, children, and parents.⁴⁸ Congress recognized the dilemma facing workers due to the lack of employment policies to assist working parents and inadequate job security for employees needing leave to care for their own serious illnesses or those of family members.⁴⁹

changes in the composition of the workforce that [had] created a crisis for working families.” *Id.* Second, the drafters recognized that business’ efforts at adopting family leave policies had fallen short of remedying the social crisis and that many employers had failed to implement any family leave policies whatsoever. *Id.* at 50–51. Lastly, legislators acknowledged the need to formulate a policy to which employers were capable of adhering without compromising business needs. *Id.* at 51.

Crucial to this recognition was the fact that many employers across the country had already adopted leave policies that were neither prohibitively expensive to implement nor overly burdensome to maintain. *Id.* Furthermore, legislators acknowledged that a federal leave policy would actually *save* employers the time and expense of recruiting, hiring, and training employees to replace those on leave; it would help build a stronger, more productive existing workforce. *Id.*

47. 29 U.S.C. § 2601(a)(1) (2000).

48. *Id.* § 2601(a)(2).

49. *Id.* § 2601(a)(3)–(4). Congress noted that “the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting” *Id.* at § 2601(a)(3). The drafters focused on the unique strains faced by women who enter the workforce. They recognized that women’s continued caretaking responsibilities at home might adversely affect their working lives. *Id.* § 2601(a)(5). Congress’s findings also state that “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men” *Id.* The drafters acknowledged, however, that gender-based employment standards would have the potential to encourage sex-based discrimination among employers. *Id.* § 2601(a)(6).

2. Stated Purposes of the FMLA

The FMLA's stated purposes⁵⁰ were a direct response to congressional findings concerning the changing face of the American workforce. The drafters' primary legislative goals were "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."⁵¹ Congress sought to achieve these objectives by allowing employees a reasonable amount of leave for the birth or adoption of a child, to tend to seriously ill children, spouses, or parents, or to care for their own health conditions.⁵² Legislators intended to meet the needs of American workers without sacrificing the legitimate interests of employers.⁵³ Furthermore, the drafters were determined to fulfill these objectives while promoting equal employment opportunities for both men and women.⁵⁴

3. Surveys and Statistics in the Wake of the FMLA

In order to gauge the FMLA's effectiveness, Congress established a commission charged with reporting on the legislation's progress.⁵⁵ In May of 1996, the commission noted critical drawbacks in the legislation's usefulness to employees.⁵⁶ Although a reported two thirds of the American workforce was protected by the FMLA, a significant number of private-sector employees were excluded from coverage.⁵⁷ Furthermore, while many of those workers who reported needing leave under the FMLA did take advantage of its policies,

50. § 2601(b).

51. *Id.* § 2601(b)(1).

52. *Id.* § 2601(b)(2).

53. *Id.* § 2601(b)(3).

54. *Id.* § 2601(b)(6).

55. Bornstein, *supra* note 5, at 84. The Commission collected data from 1,200 businesses and 2,200 employees throughout the United States during the eighteen-month period from January 1994 to June 1995. *Id.*

56. *Id.* at 85.

57. *Id.* Only ten percent of private-sector working environments, or sixty percent of the nation's private sector employees, fell within the Act's purview. *Id.* "Among private sector worksites, then, eighty-nine percent, accounting for 40.5 percent of the nation's employees, [we]re not covered." *Id.*

only a small percentage did so to care for a newborn, adopted, or foster child.⁵⁸

The commission's survey also revealed employees' apparent reluctance or inability to access the full duration of leave offered under the FMLA.⁵⁹ Perhaps most revealing was the survey's discovery of hidden gender disparities inherent in the Act's application: as of October 1995, women made up fifty-eight percent of leave-takers while men composed only forty-two percent of leave-takers.⁶⁰ Also, while men tended to use leave for personal illness, women were the more likely sex to take leave for seriously ill family members.⁶¹

58. *Id.* at 86. "During the period covered by the Commission's report, approximately one-fifth of U.S. workers reported needing leave under the FMLA, almost seventeen percent of employees took leave, and 3.4 percent of employees needed but did not take leave." *Id.* While the eighteen-month survey period accounted for 1.5 to 3 million leave-takers under the Act, estimates of leave among employees since the FMLA was passed are closer to 24 million. *Id.*

Strangely, only thirteen percent of those surveyed took leave to care for a newborn, an adopted, or a foster child. *Id.* Eighty percent of employees reported taking leave under the FMLA for family health and medical concerns. *Id.* Sixty percent of these workers took leave for their own health problems, 7.5% to care for a sick child, and fifteen percent to care for a sick parent, spouse, or other relative. *Id.*

59. *Id.* Forty-one percent of leave-takers were absent from the workplace for seven or fewer days. *Id.* The survey also found that eligible employees usually returned to work within two weeks of taking leave and that the median length of leave averaged only ten days. *Id.*

The Act's effects on employers were considerably more favorable. The commission found that despite vehement opposition from the business community, family-leave legislation did little to increase costs or disrupt the workplace. *Id.* at 85. Most of the two-thirds of employers who changed their policies in accordance with the Act incurred little or no related costs. *Id.* "Almost eighty-seven percent of employers found no noticeable effect on productivity, profitability, or growth, and employers reported increased morale and loyalty as a result of the law." *Id.* Furthermore, over ninety percent of employers found the Act "somewhat" or "very" easy to administer. *Id.* Of these employers, those in control of large businesses reported more difficulties implementing the Act than did those controlling small businesses. *Id.* Intermittent leave was one of the more noticeable problems accompanying the Act's implementation. *Id.* "Although only 11.5 percent of people taking leave did so intermittently, 39.2 percent of employers cited this as posing an administrative difficulty." *Id.* at 86.

60. *Id.* at 86-87.

61. *Id.* at 87. A 1993 survey by the Bureau of National Affairs confirmed these gender disparities, finding that most American men who take leave upon the birth of a child do so by substituting paid vacation or sick days for the unpaid leave offered by the FMLA. Grill, *supra* note 14, at 377. The survey reported that while a mere seven percent of American men would take advantage of the complete twelve weeks of leave allotted by the FMLA after the birth or adoption of a child, forty-three percent of American women would do the same. *Id.* Men who responded to the survey stated that they would take an average of 2.7 weeks of leave under the FMLA, while women said they would take an average of 8.5 weeks. *Id.* Given the option, over twenty percent of working men and four percent of working women said that they would elect

III. LOCATING THE MALE EMPLOYEE WITHIN THE FMLA

A. Shortcomings Present in the Act's Language

1. Unpaid Leave and Male Employees

The FMLA's adoption of unpaid leave is likely one of the most significant obstacles to male employees' ability to access the legislation. Due to gender-based workplace policies, the financial barriers associated with unpaid leave affect men more than women.⁶² While women often take the initial part of their absences following childbirth as disability leave, which often affords full or partial income replacement, men can rarely utilize any form of paid leave.⁶³ Without a wage replacement provision, fathers cannot financially support their families and take advantage of leave provisions.⁶⁴ Many critics of the Act have suggested that to give both men and women a

to take no leave under the FMLA. *Id.*

62. Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 STAN. L. REV. 967, 976 (2001).

The Families and Work Institute, a nonprofit organization that addresses the changing nature of work and family life, surveyed U.S. businesses with over 100 employees and found that fifty-three percent of the companies offered time off for maternity leave with replacement pay, but only thirteen percent offered the same paid leave to men.

Id.

63. Bornstein, *supra* note 5, at 116; *see also* Malin, *supra* note 1, at 1073. Cunningham adds:

Financially, it is often impossible for a man to take unpaid leave when the household has already lost the income of his spouse, who is more likely to take leave after birth; a federal study conducted by the Commission on Family and Medical Leave found that the top reason parents avoid taking parental leave is fear of lost wages.

Cunningham, *supra* note 62, at 975.

64. Malin, *supra* note 1, at 1072. Because paid parental leave for male employees is so rare, American couples are forced to accept one of two economic situations when they make the combined decision to use the FMLA. *Id.* In dual-income families, leave initially following childbirth will be available to the mother, while the father's leave goes unpaid. *Id.* at 1073. In single-income families, the family must forego any income during the leave period because the father's leave will likely be uncompensated. *Id.* "In both cases, the absence of pay poses a major barrier to the father's ability to take leave." *Id.*

Malin goes on to suggest that when employers only offer paid leave to female employees, it sends a signal to parents that mothers are *expected* to take leave. *Id.* "It becomes easy for the father not to take leave by reasoning that the children will be cared for with little or no drop in household income if only the mother stays home." *Id.*

free and fair chance at taking family leave, rather than just a superficial right, the legislation must be made financially feasible for male employees.⁶⁵

Lack of paid leave also has a determinative effect on the decisions many dual-income families make about childcare responsibilities.⁶⁶ Since few families can afford to live without at least one wage-earner, unpaid leave forces men and women to compete for its use.⁶⁷ Therefore, because men's wages are significantly higher than women's, it is economically rational for a married woman to take the leave while her husband continues to work.⁶⁸

Not only are new fathers forced into forsaking leave to maintain their household's financial stability, but they are further compromised by the unique strains accompanying parenthood. While a mother's contribution to household income usually decreases after the birth of a child, childcare-related expenses increase dramatically.⁶⁹ Ironically, "[n]ew fathers facing this economic squeeze tend to react by working more rather than less," thus exacerbating the need for a paid family leave policy.⁷⁰

65. Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 154 (1998). Young suggests that including a form of wage replacement within the FMLA would foster both gender-equality and every American worker's right to be involved in family life. *Id.* In order to achieve these goals, paid leave should be initiated at a level significant enough to remove the financial obstacles that currently prevent men from taking leave. *Id.* "Many experts have suggested wage replacement at seventy-five percent of pre-leave income." *Id.*

66. Bornstein, *supra* note 5, at 116.

67. Malin, *supra* note 1, at 1073. "Traditional sex roles that assign primary caregiving responsibilities to mothers . . . ensure that when both parents compete for taking leaves, the mother will tend to monopolize the leave." *Id.*

68. *Id.* at 1074 n.159. Bornstein predicts that the ideal of shared parenting is unlikely to be achieved until women secure equal wage-earning potential. Bornstein, *supra* note 5, at 116.

69. Malin, *supra* note 1, at 1074.

70. *Id.* Fathers of young children are more likely to work overtime and moonlight than men without young children. *Id.* However, this burden falls mainly on younger, first-time fathers. *Id.* Older fathers in this situation are more likely to have better career standing, higher incomes, and more job flexibility than their younger counterparts. *Id.* Malin concedes that although it is possible that this economic situation would keep men from even taking paid leave, "[k]eeping parental leave unpaid . . . poses an insurmountable barrier to almost all fathers." *Id.* at 1075.

2. Highly Compensated Employees

The Family and Medical Leave Act's "highly-compensated employee" exception also serves to discourage men from taking advantage of parental leave. The exception excuses an employer's normal duty to reinstate employees who take advantage of the FMLA's leave provisions when they are among the highest-paid ten percent of all employees within seventy-five miles of the worksite and their reinstatement would otherwise result in substantial harm to the employer.⁷¹ Furthermore, the seniority of highly compensated employees does not accrue during the extent of their parental leave.⁷² Since "men continue to hold the majority of the powerful and highly paid positions" in the American workforce, the wife of the "key employee" will ordinarily take leave to preserve her husband's job security and prestige.⁷³ Thus, the FMLA's language encourages a gendered division of labor in the household, preventing paternal involvement in childcare and perpetuating male employees' identification of success and achievement with "minimal disruptions in work life."⁷⁴

3. Length and Timing of Parental Leave

Biology necessitates that mothers use parental leave immediately before and after childbirth. If financial circumstances permit, fathers

71. *See supra* text accompanying notes 36–37.

72. *Id.*

73. Bornstein, *supra* note 5, at 119.

74. *Id.* at 118. "As long as these highest ranking employees do not take leave, there is an unspoken message that the top officials neither sanction nor embrace such behavior." *Id.* at 118–19. The "highly compensated employee" exception also has a significant effect on women in managerial, executive, and partnership positions. *Id.* at 118. The forced choice between career and family burdens women's already disadvantaged attempts to climb the corporate ladder. *Id.*

Because women are more often responsible for child rearing and solely for childbearing, this exemption disproportionately affects women in management positions. A women who 'wants to start a family may hesitate to pursue the fast track up the corporate ladder if she will lose her ability to take FMLA leave.'

Id. (quoting Jeremy I. Bohrer, Note, *You, Me, and the Consequences of Family: How Federal Employment Law Prevents the Shattering of the "Glass Ceiling,"* 50 WASH. U. J. URB. & CONTEMP. L. 401, 418 (1996)).

may also take leave immediately following the birth of a child.⁷⁵ However, the most practical time, both financially and otherwise, for fathers to take advantage of the FMLA's parental leave is sometime after the mothers' leave has expired.⁷⁶ Given the emotional attachments and parenting skills they have acquired during the previous twelve weeks, mothers have already established themselves as the primary caregivers.⁷⁷ A father's opportunity for leave comes at a time when his role as the "provider," rather than the nurturer, had already been established, both by the financial necessity of providing for a new family and by societal stereotypes and workplace hostility that prevent fathers from taking leave based on the fear that they might lose their jobs or otherwise be seen as less competent and

75. Bornstein, *supra* note 5, at 116–17. "In recent years, men have increasingly taken time off immediately after the birth of their children, using vacation and personal days, in order to [t]ake some time without jeopardizing their careers and subjection to employer hostility.[]" *Id.* at 117 (citing Malin, *supra* note 1, at 1072).

76. Young, *supra* note 65, at 155. When the mother and father work for the same employer and must split the allotted twelve weeks leave, the father is literally limited to the portion of leave remaining after the mother has taken pregnancy leave. *Id.* at 144.

77. *Id.* at 124; see also *infra* note 85. The time immediately following childbirth is a critical period in determining the long-term division of child-rearing responsibilities. Young, *supra* note 65, at 124. Young contends:

If fathers participated in infant care to the same extent that mothers did, they could debunk the myth that women have a special "maternal instinct" that makes them better parents, or that the mother-infant bond is more natural and more important than the father-infant bond.

Parenting seems to be more a function of practice and opportunity than of maternal instinct. Though a first-time mother and father may begin with the same level of parenting skills, the perception that mothers have greater skills can be a self-fulfilling prophecy. If only the mother stays home after childbirth, both parents are likely to perceive her as more knowledgeable and skilled in childcare.

Id. (citing Malin, *supra* note 1, at 1056–57).

Evidence from Swedish parental leave policies shows that when husbands take parental leave, they are "significantly more likely to be perceived as having child care skills that [are] equal to or greater than those of their wives." Young, *supra* note 65, at 125 (quoting Malin, *supra* note 1, at 1059 (emphasis added)). Young adds:

These fathers are also 'more likely to share in . . . specific child-care tasks, including preparing food, shopping, [] laundry, diapering, bathing, getting up at night, reading, comforting, and taking the child to the doctor.' Hence, the evidence suggests that the role that each parent takes immediately following childbirth is critical in determining the long-term division of responsibility for childcare.

Id. (quoting Malin, *supra* note 1, at 1058).

dedicated workers.⁷⁸ The FMLA's general prohibition on intermittent- or reduced-leave schedules compounds this problem by discouraging male employees from finding a more flexible and practical alternative to the leave offered under the FMLA.⁷⁹

B. Shortcomings Present in the Act's Application

While the language of the FMLA is a significant impediment to male employees, gendered norms drawn from American society's notions of masculinity and femininity also present formidable barriers to paternal leave. "Even if employers offer male employees parental leave, communicate its availability unambiguously, and allow fathers to fund leave following childbirth, many men will not take leave, even though they want to, because of pervasive workplace hostility."⁸⁰ While employers have become more sensitive to employees' family responsibilities, recognition and willingness to accommodate parental leave has been primarily limited to female workers.⁸¹ "Men's accommodation requests are often met by, 'Your wife should handle it.'"⁸² Along with employers, coworkers contribute to the workplace hostility that deters many fathers from taking leave.⁸³

Workplace disapproval directed at men who seek to participate more fully in family life derives from general societal attitudes regarding proper spheres for men and women. In American society, "[t]he father's primary role in providing economic security functions as a barrier to increased paternal involvement in the family;"⁸⁴ in

78. See Grill, *supra* note 14, at 384; Malin, *supra* note 1, at 1089.

79. See *supra* note 27 and accompanying text.

80. Malin, *supra* note 1, at 1089.

81. *Id.* at 1077.

82. *Id.* The 1986 Catalyst Report of a National Study of Parental Leaves found that although large employers are least likely to experience financial setbacks when fathers take parental leave, sixty-three percent of these employers considered it "unreasonable" for a man to take any leave, and seventeen percent thought it reasonable only if limited to a maximum of two weeks. *Id.* 1078. Among large employers offering parental leave to male employees, forty-one percent considered it "unreasonable" for a man to actually take advantage of the policy, and another twenty-three percent thought two weeks or less would be a reasonable amount of paternal leave. *Id.*

83. *Id.* at 1078.

84. *Id.* at 1066. While feminists correctly assert that women have no choice when it comes

other words, fathers should sacrifice establishing close relationships with their children in order to maintain financial stability for their families.⁸⁵ This societal perspective on men's breadwinning responsibilities inevitably enters the workplace environment.

Take, for example, the shortcomings present in the law firm setting, where professional responsibilities have traditionally usurped attorneys' desires to participate in family life.⁸⁶ Law firms are uniquely affected by the FMLA's limited application to businesses employing a minimum of fifty employees—many small and mid-size firms remain outside of the Act's purview.⁸⁷ Furthermore, Courts

to subordinating their careers to childcare, men's choices are also severely limited by their expected roles as breadwinners. *Id.*

85. *Id.* at 1067. "The father's role as primary income provider limits him to intermittent contact with the children at the same time that the mother usually has continuous contact because she has either dropped out of the labor force, reduced her hours in paid employment, or taken leave from her job." *Id.* Mothers' enhanced understanding of their children's needs leads to the presumption that they are inherently superior caregivers, which then results in a maternal domination of childcare responsibilities. *Id.* This supposed expertise motivates mothers to play a "gatekeeping" role, wherein they regulate the fathers' involvement with the children. *Id.* Surveys regarding women's childcare responsibilities have found only a small percentage of mothers who want more contribution from their husbands. *Id.* at 1068. "It is possible that just as men feel threatened in their traditional roles by the entry of increasing numbers of women into the labor force, women may feel threatened in their traditional roles by the prospect of an increased paternal role in child care." *Id.*

86. This traditional expectation shows signs of change, but this is an uphill battle. In response to the younger generation of attorneys' emphasis on quality-of-life concerns, today's law firms have begun to give "family-friendly" policies more serious consideration. Cunningham, *supra* note 62, at 971. When focusing their job search, many of today's law school graduates take both salary and quality-of-life considerations into account. *Id.* at 970. In this respect, the new generation of legal talent possesses values markedly different from their predecessors. *Id.* "The old notion that associates must 'eat, breathe, and sleep' their work might not be as palatable to the new recruits as the old guard would like." *Id.* However, due to both the structural deficiencies inherent in the FMLA and society's cultural mores, law firms' parental leave programs remain merely facially supportive of the family commitments of lawyers, especially male lawyers. *Id.* at 972.

87. *Id.* at 974. Although the FMLA appears to govern all firm members, its scope is restricted to covering employees," as defined by the Fair Labor Standards Act of 1938. *Id.*; see 29 U.S.C. § 203 (2000):

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

Id.

have consistently held that law firm partners, the majority of whom continue to be male, are not “employees” as defined by the Fair Labor Standards Act.⁸⁸ This limitation excludes all partners from the benefits of the FMLA, even those with no controlling interest.⁸⁹ Thus, what began as a mere size requirement ends as a substantial obstacle to male attorneys’ use of the FMLA.

Most law firms implement parental-leave policies that conform to the FMLA, yet treat male and female employees differently.⁹⁰ As a result of this differential treatment, a survey of lawyers with children showed that while only five percent of male lawyers had taken over three months of family leave, twenty-three percent of female lawyers took leave of this duration.⁹¹

Although these policies were originally intended to assist the female attorney in her struggle to balance work and family, they have served to further ingrain the male attorney’s perception of his proper gender role.⁹² Firms justify these policies by claiming that women “need” more time off to recover from pregnancy and childbirth.⁹³ However, following the average childbirth, most women do not medically require three months of recovery time.⁹⁴ Thus, although this justification initially serves as “a pretext for gendered presumptions of caregiver status, the policy becomes a self-fulfilling prophecy.”⁹⁵

The time the mother spends with her newborn during these critical first weeks naturally allows her to develop better childcare skills than

88. Cunningham, *supra* note 62, at 974–75 (citing *Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984) (Powell, J., concurring) (“The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates.”)).

89. *Id.* at 975.

90. *Id.* at 976. Cunningham provides:

A sample study of major law firms last year revealed that nine of ten firms had separate policies for male and female attorneys, either giving men less leave time off than women or requiring men to prove that they were the “primary caregiver” in order to receive parental leave benefits.

Id.

91. *Id.* at 977.

92. *Id.*

93. *Id.*

94. *Id.* at 977–78.

95. *Id.* at 978.

her husband.⁹⁶ The leave policies also affect female attorneys by fostering the presumption that they will become the primary caregivers to their newborn children.⁹⁷ This suggestion becomes a double-edged sword. If a woman does not take maternity leave, she is seen as a lesser mother, but if she does fulfill her prescribed gender role, she is considered less committed to her work and to the firm.⁹⁸ Thus, a firm's official policy regarding parental leave fosters the kind of stigmatization capable of forcing male attorneys to fulfill socially prescribed norms.

Societal expectations that men assume the breadwinning role upon the birth of a child are even more pronounced in the law firm setting because firm culture rewards the employees capable of clocking the maximum billable hours.⁹⁹ Thus, a male attorney's fear of being perceived as less committed to the firm is compounded by societal norms requiring that he remain the breadwinner in his family. Because of the extraordinary time and dedication required of lawyers, male attorneys, more so than most working men, must forsake the role of "good father" in order to assume the role of "good provider."¹⁰⁰

Although male and female attorneys face similar tensions between work and family responsibilities, a man's dilemma remains somewhat invisible.¹⁰¹ Because men, most of whom head single-family households, constitute the majority of management positions, company leadership, bringing "attitudes stemming from socialization, experience, and background . . . infuse[es] a 'gendered perspective'

96. *Id.* "Bolstering cultural expectations, the perceptions created by the policy codify roles for both the mother and father." *Id.*

97. *Id.* at 977.

98. *Id.*

99. *Id.* at 993. For example:

Sixty-eight percent of employed men, compared to fifty-four percent of women, consider working long hours to be a sign of commitment. As an associate gets closer to partnership, he is assessed on an increasingly subjective "dedication" scale; thus, the perception of not being committed to the firm can have very real long-term consequences for his career.

Id. (citation omitted).

100. *Id.* at 997.

101. *Id.* at 994. "Because men have been conditioned to be silent about their inner struggles, topics as deeply personal as work-family conflicts are rarely discussed." *Id.* at 995.

which results in stereotyping and occupational segregation, as well as inflexible parenting options for both men and women.”¹⁰² Therefore, although employers may formally offer their employees choices regarding parental leave, gender stereotypes lurking just beneath the surface severely limit these “choices.”¹⁰³ As long as men are given the semblance of an equal opportunity to take advantage of family leave, the “embedded structural problems” present in the workplace will go ignored.¹⁰⁴

IV. LOST AND FOUND: PROPOSALS TO ACCOMMODATE MEN IN THE FAMILY AND MEDICAL LEAVE ACT

A. Paid Family Leave: Reaffirming the Breadwinner

1. Models for Funding

a. Leading by Example: States’ Paid Leave Policies

i. Baby UI: Drawing on Temporary Disability Insurance

Recognizing that the FMLA does not trump more generous state law, a handful of states now provide paid leave to their employees.¹⁰⁵ Hawaii, New Jersey, New York, and Rhode Island utilize temporary disability insurance laws to provide female employees with

102. Bornstein, *supra* note 5, at 94.

103. *Id.* at 94–95. “The wage gap and occupational segregation, the result of these gendered assumptions about work and family conflicts, create a vicious cycle which perpetuates the limited choices for both women and men.” *Id.* at 95.

104. *Id.* at 95. The modern workplace is modeled around a worker being completely committed to his job, either because he is without a family or because his wife is solely responsible for childcare obligations. *Id.* at 96. Thus, the ideal worker norm, far from being ungendered, is actually formulated to reflect a male employee’s lifestyle. *Id.* Work-related benefits are usually more extensive for employees with uninterrupted job tenure. *Id.* at 97. The most desirable jobs in terms of career advancement opportunities, salary, and other benefits ordinarily require full-time employment. *Id.* Thus, since women continue to take on significant child-care responsibilities that prevent them from fulfilling these conceptualizations of the model employee, they are deemed “imperfect” workers. *Id.* at 98. Likewise, since men are *expected* to meet these requirements, they are incapable of maintaining the kind of family involvement they so desire. *Id.*

105. Grill, *supra* note 14, at 378.

compensation for childbirth and pregnancy-related conditions.¹⁰⁶ Employees contribute anywhere from \$0.60 per week in New York to \$9.50 per week in Rhode Island.¹⁰⁷ While employers make up the difference in total costs in both Hawaii and New York, they do not contribute in Rhode Island.¹⁰⁸ An employee taking advantage of temporary disability in these states may collect one half to two thirds of her weekly wages.¹⁰⁹

ii. California's Paid Family Leave Policy

In September 2002, California Governor Gray Davis, signed a bill creating the nation's first comprehensive paid family leave.¹¹⁰ The legislation added a chapter to the state's Unemployment Insurance Code in response to findings that financial constraints prevented a majority of California workers from taking family leave.¹¹¹ The new law allows workers to use up to six weeks of partially paid leave per twelve-month period.¹¹²

106. *Id.* at 392–93. California was included in this list until September of 2002, when it became the first state to introduce a paid family-leave program. *See infra* note 110.

107. Grill, *supra* note 14, at 393.

108. *Id.*

109. *Id.*

110. Lisa Girion & Megan Garvey, *Davis OKs Paid Family Leave Bill*, L.A. TIMES, Sept. 24, 2002, at B1. “‘I don’t want parents in California to have to choose between being a good parent and a good employee,’ said Davis during the bill signing on the lawn outside UCLA’s Children’s Hospital.” *Id.* Davis’s decision to implement the legislation was informed by the fact that three of four Californians are financially incapable of forfeiting a paycheck in order to care for sick family members. *Id.*

111. CAL. UNEMP. INS. CODE §§ 3300–06 (West 2004). The California Legislature found that “[w]hen workers do not receive some form of wage replacement during family care leave, families suffer from the worker’s loss of income, increasing the demand on the state unemployment insurance system and dependence on the state’s welfare system.” *Id.* § 3300(f).

112. *Id.* § 3301(a)(1), (d). During the last phases of the bill’s passage, Senator Kuehl agreed to the Governor’s suggestions to “scale back the bill’s impact on businesses” by shortening the amount of paid leave from twelve to six weeks and by shifting the expense entirely to workers rather than having employers split the cost with their employees. Gregg Jones, *Davis to Sign Bill Allowing Paid Family Leave Benefits*, L.A. TIMES, Sept. 23, 2002, at A1. State government employees, who are covered under a self-insured program, are exempted from the state disability insurance system, and thus from the bill’s provisions. *Id.* Employees who take a maximum of twelve weeks off to care for newborns or newly adopted children, for seriously ill family members, or for themselves, receive up to fifty-five percent of their weekly salaries. Girion & Garvey, *supra* note 110. Compensation will be untaxed but capped at \$728 per week. *Id.* Payroll deductions, up to seventy dollars per year for employees earning more than \$72 thousand, began in January 2004. *Id.* The legislators’ proponents are still working to

b. Applications and Limitations

While state-funded parental leave through temporary disability insurance and unemployment insurance programs is a significant step toward helping workers achieve a healthy work-family balance and creating a financially feasible and socially acceptable leave policy for male employees, these policies continue to fail American workers—especially American fathers. Temporary disability insurance compensation for childbirth leave does nothing to correct gender-based disparities inherent in the current legislation.¹¹³ Because “[s]tate disability pay essentially is unemployment insurance targeted at *women* who become unemployed due to pregnancy and childbirth,” *men* remain torn between spending time with their families and bearing the financial burdens of a new child.¹¹⁴ Furthermore, under both temporary disability and unemployment insurance provisions, all employees are asked to fund parental leave, while those who decide not to have children or are beyond child-bearing age will never derive any benefits from the added cost.¹¹⁵

Another problem related to employee-funded temporary disability and unemployment insurance leave is that employers are not required to contribute to its cost even though they are rewarded with a happier and more productive workforce.¹¹⁶ This lack of contribution further

sort out financial and administrative details. *Id.* Some businesses maintain that worker contributions will have to be much higher in order to adequately support the program. *Id.* Opponents of the legislation fear that labor groups will attempt to shift some of the costs to employers in the future. *Id.*

113. Grill, *supra* note 14, at 393.

114. *Id.* (emphasis added).

115. *Id.* On the other hand, if only participating employees contribute to the fund, “[i]n essence, these parents would forego compensation during the leave period, just as they currently do under the provisions of the FMLA.” *Id.* at 392. As under the FMLA, parents, and especially fathers, would be unable to take any significant amount of leave. *Id.*

A parental leave insurance fund would also fail to provide participating employees with the kind of funding necessary to ensure greater and more equal participation in family leave. *Id.* “Because most parents are employed for relatively few years before having children, the premium payments would have to be prohibitively expensive to enable insurance companies to pay the family leave benefit.” *Id.* Furthermore, the insurance structure is unworkable in this context because the insured event is both highly probable and the costs are known. *Id.* “The insurance policy becomes a savings account, and parents bear the entire cost of leave, as is the situation under a policy of unpaid leave.” *Id.*

116. *Id.* at 393. However, if employers solely financed family leave, additional problems would arise. Employer-funded parental leave could be accomplished by requiring employers to

ingrains society's conception that the "ideal" worker, or at least the worker seriously committed to his career and his company, does not sacrifice upward mobility for family.¹¹⁷ If employers do not officially "condone" leave in the form of financial support, it is unlikely that their employees, and especially their male employees, will take part in a potentially career-breaking policy.

2. Proposal for Paid Family Leave: Financing Fatherhood

If American workers can sincerely commit to making gender-neutral parental leave and displaying support for the American family—no matter what its color, shape, or size—they must be willing to make a contribution to a federally funded leave program. While states have made progressive efforts to alleviate the monetary burdens associated with the current federal legislation, only a federally funded program can ensure *all* American workers a mandatory minimum level of financial support.

Paid federal leave must be funded by both employer and employee contributions. Employers should pay a yearly tax related to their size alone, rather than their employee composition. This kind of objective tax scheme eliminates any incentives that a company might have to discriminate against the perceived higher costs associated with hiring women of child-bearing age.¹¹⁸ Unlike the current legislative scheme, small companies would also support family leave.¹¹⁹ However, the size-based taxing mechanism would ensure that these businesses are able to bear the financial burdens of this support.¹²⁰

collectively finance the entire workforce or by having individual employers pay for only their own employees. *Id.* at 391. "The former option is disadvantageous because society, as a whole, is the primary beneficiary of parents spending time at home with their newborn children; all participants in the labor force thus should contribute toward the costs of family leave." *Id.* at 391–92. However, if employers were to finance their own employees, they would be inclined to discriminate in hiring women of childbearing age so as to avoid higher labor costs. *Id.*

117. *See supra* note 99 and text accompanying notes 99–100.

118. Young, *supra* note 65, at 156. Opponents of employer-funded family leave argue that imposing costs on employers will promote sex discrimination in hiring since employers will perceive women in their child bearing years as more costly to employ. *Id.*

119. *Cf. supra* note 19 and accompanying text.

120. Young, *supra* note 65, at 156. Those who oppose employer-funded family leave argue that "the ability of employers to pass on the cost of parental leave 'depends in large measure on

Employer contribution to parental and family leave would transform societal attitudes regarding the importance of balancing work and family, and it could lend managerial support to the practice.¹²¹ Employees, especially male employees, would no longer fear the career and financial repercussions associated with taking leave. Employer funding would also place value on benefits businesses garner from “family-friendly” policies, including “improved recruitment, reduced turnover, reduced absenteeism, increased productivity, and enhanced corporate image.”¹²²

Because employers are not the sole beneficiaries of family leave, they should not bear the full financial burden for its implementation.¹²³ Employee funding should take the form of a mandatory payroll tax based on both the worker’s salary and inflation rates. The family leave tax should take on an independent existence, rather than being added to the current social security, temporary disability, or unemployment compensation funds. Otherwise, these other “accepted” forms of employee funding disguise family leave financing, thereby masking societal valuation and support of the family.¹²⁴ American society’s affirmation of the importance of family would eventually make paternal leave not only acceptable but the “norm” among workers.

the nature of their product or service and the structure of the industry,’ thus creating the potential for substantial inequities.” *Id.*

121. *Id.* Opponents of employer-funded leave argue that paid parental leave is meant to recognize the value of work performed outside of the business sphere, for the benefit of society in general, rather than for employers in particular. *Id.* Thus, “imposing the cost on the employer tends to undercut society’s endorsement of the activity.” *Id.*

122. Grill, *supra* note 14, at 393 (quoting NATIONAL COMM’N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 259 (1991)). Some advocates of employer-funded leave argue that employers’ obligation to finance these policies stems from the fact that “caregiving is necessary to produce the next generation of productive employees.” Young, *supra* note 65, at 156.

123. Grill, *supra* note 14, at 393. Under a leave program that is partially funded by employee contributions, “[e]mployees, by partially subsidizing costs, will not be entitled to paid leave but will be forced to earn it.” *Id.*

124. *Id.* at 394. Those who advocate for incorporating family leave taxes into one of the existing payroll taxation systems believe that this strategy will make the additional tax more readily acceptable and palatable to the American workforce. *Id.*

*B. Modifying the Language of the FMLA: Making Room for
“Daddy”*

Additional modifications to the length, form, and scope of family leave, in conjunction with a paid leave provision, will ensure increased male participation in the FMLA. The institution of paid leave alone may significantly improve men’s ability to take advantage of paternal leave immediately following the birth, adoption, or placement of a child.¹²⁵ While biological necessity would continue to dictate mothers’ use of leave directly before and after childbirth, fathers would no longer face the financial pressures of leaving the workforce at this time. As previously discussed, male participation in child-rearing during these first months equalizes fathers’ parenting skills and works to eliminate the stereotypical “maternal” instinct.¹²⁶ Like the recently passed California legislation, six of the FMLA’s twelve weeks of leave should pay up to fifty-five percent of an employee’s weekly salary.¹²⁷ The remaining six weeks should pay at a gradually lesser rate as time goes on so that parents can adjust to the increased financial burden.

Because partially paid leave will inevitably foster caretaking decisions based on salary, biological necessity, and thus gender, a federal leave policy must also allow intermittent leave-taking.¹²⁸ The first six weeks of leave should be available on a reduced-leave schedule, provided that adequate notice is given to the employer.¹²⁹ Additionally, the employee should be limited to choosing between one of several reduced-leave schedules.¹³⁰ Similar to part-time employment, such an arrangement would ensure the kind of regularity and formality needed to facilitate continued productivity.

Likewise, rather than make an exemption for highly compensated employees in terms of employment restoration, employers should

125. See *supra* notes 62–65, 67–68, 70 and text accompanying notes 62–70.

126. See *supra* note 77 and accompanying text.

127. See *supra* note 112 and accompanying text.

128. See *supra* notes 21, 79 and accompanying text.

129. Under the FMLA, adequate notice is defined as not less than thirty days before the date of the leave is to begin, unless the birth or placement is to occur in less than thirty days. See *supra* note 33 and accompanying text.

130. See *supra* note 33 and accompanying text.

request the same kind of notice and more formalized leave schedule so they can adequately prepare for the temporary loss of valued employees.¹³¹ This helps to erase the socially conceived incompatibilities between career and financial success and dedication to family life, especially in work environments like the law firm.¹³²

Lastly, the modified parental leave policy should eliminate the FMLA provision limiting leave taken by two spouses employed by the same business to a total of twelve weeks.¹³³ Rather than viewing paternal leave as the “leftovers” of a maternal leave policy, the new federal legislation should recognize male employees’ *equal* and *independent* right to participate in family life.

C. *Creating a Platform for Paternal Leave: Bringing up Baby*

Until societal attitudes towards male employees’ participation in family leave reflect an acceptance of equal parental involvement in childrearing, a modified federal policy will do little to change fathers’ use of such leave.¹³⁴ Sexist notions of proper gender roles continue to permeate workplace attitudes toward “family-friendly” policies.¹³⁵ These powerful social forces, found most significantly in the form of workplace hostility, are what reinforce the perception that male employees are not interested in parental leave and prevent them from ever displaying such an interest.¹³⁶ Therefore, to truly change male

131. See generally *supra* notes 32–34, 74 and text accompanying notes 71–74.

132. See *supra* notes 100, 102, 104–05 and text accompanying notes 100–05.

133. See *supra* note 34 and accompanying text. This portion of the FMLA effectively restricts fathers to taking that portion of leave remaining after mothers have taken pregnancy leave.

134. Scott A. Caplan-Cotenoff, Note, *Parental Leave: The Need for a National Policy to Foster Sexual Equality*, 13 AM. J.L. & MED. 71, 96. “The fear of stigmatization and discrimination generates reluctance to take advantage of leave policies.” *Id.*

135. Young, *supra* note 65, at 130. Young asks her readers to question why American society equivocates the desire to spend time with family with low-paying, low-status jobs. *Id.* She goes on to state that if it is unfair to force women to choose between career and family, then gender-neutral parental-leave legislation is not only justified but necessary. *Id.* at 131. “In other words, even if the choice between career and family were imposed equally on men and women, neither should have to make this choice.” *Id.*

136. Malin, *supra* note 1, at 1065. “There is considerable evidence that fathers are more emotionally involved with their families than with their paid employment and that they derive more satisfaction and self-worth from family involvement than from paid employment.” *Id.* Some men are so emotionally tied to their wives’ pregnancies that they actually gain weight and

participation in nurturing and caregiving, the American people, especially the workforce, need to embrace a more tolerant position toward family leave in general, and male employees' use of parental leave in particular.¹³⁷ If American employers make a conscious effort to equate career success and fulfillment and employee happiness with gender-neutral participation in both work and family life, federal legislation will work to support and reaffirm their effort.¹³⁸

V. CONCLUSION

While the FMLA is a progressive step toward developing a means by which all American workers can better balance the demands of work and family, it has significant limitations as it applies to male employees. Both the language of the policy, including the provision for unpaid leave and the length, quality, and scope of leave available; and the social context enveloping the legislation prevent fathers from participating equally in parental leave. To better accommodate male employees, a modified federal leave program must provide for employer- and employee-financed family leave based on California's recently enacted funding model. Furthermore, a federal policy must allow for intermittent- or reduced-leave schedules, prefaced by adequate employer notification, and free career protection for all

experience morning sickness. *Id.* at 1066. When fathers are present during labor and delivery, they react to their new babies in much the same way as mothers. *Id.* "They have the same desire to touch and play with the newborn, are impressed with the baby's movements, are extremely elated and relieved that the baby is healthy, and feel pride and closeness to the baby." *Id.* Likewise, some men go on to display symptoms of postpartum depression after the births of their children. *Id.* "Unfortunately for men, their role as breadwinners interferes with their involvement with their children." *Id.*

137. See *supra* notes 83, 85–86 and text accompanying notes 81–86. "While a few occupations may be completely incompatible with taking parental leave or raising small children, the vast majority of occupations need not be." Young, *supra* note 65, at 131. While child-rearing may be difficult to accommodate in the context of some military jobs, which require extensive traveling, most careers in academia, science, law, medicine, and business are theoretically more amenable to leave taking and parental responsibilities, subject to the realities of the workplace and inevitable societal pressures on both the male and female employees. *Id.*

138. By so doing, employers would not only be making a contribution to their current employees' quality of life but also to the growth and development of their future workforce. Caplan-Cotenoff, *supra* note 134, at 100. "Gender-neutral" leave will no longer have an empty and hollowed existence for fathers, but will become a real channel into their children's lives.

employees returning to work, including the most highly compensated. Most importantly, the modified federal leave program must support and be supported by an American society ready and willing to change its attitudes toward male involvement in childcare and the valuation of family in the workplace. Until then, men's fears of an emergent "Daddy Track" will keep them from taking advantage of paternal leave policies, no matter how accommodating.