

LEVELING THE WORK-FAMILY BALANCE:
A COMPARATIVE LOOK AT PAID FAMILY LEAVE IN THE AMERICAS

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ABSTRACT

This Comment will address the lack of a national paid family leave policy in the United States through a comparative case study of paid family leave policies in other countries in the Americas, namely Canada and Chile, as well as state leave policies within the U.S. Specifically, this Comment will analyze the paid family leave policies in each country and U.S. state, evaluate past American legislative attempts at national family leave, examine the impact of COVID-19 on the need for paid family leave, and balance the costs and benefits of a national paid leave policy. Finally, this Comment will offer strategies on how the U.S. can implement a national paid family leave policy in light of the success of these policies in its states and neighboring countries abroad.

* This article is dedicated to Norma Globerman, who passed away from COVID-19 in December 2020, while I was drafting this article. After a 35-year career with the United Nations Development Programme, Norma inspired my interest in international affairs and public policy. Starting as a clerk typist in 1952 and retiring as a senior director in 1987, she epitomized hard work and how a woman can succeed in a role dominated by men. She would have loved to read this.

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I. INTRODUCTION

When Becky, an analyst for the United States Department of State, gave birth to her son, she managed to pull together only three weeks of leave to care for him until she had to return to work—and she obtained this leave only by combining sick leave, vacation time, and donated leave that her co-workers contributed.¹

Another woman had to negotiate with her employer for more leave.² Her company was small enough that it was not required to offer her the federally mandated unpaid leave.³ The employer did have a parental leave policy, but it was only offered to full-time employees and she worked part-time while studying to obtain her master's degree.⁴ When she discussed leave with her employer, it offered six weeks unpaid; after negotiations, the employer agreed to eight weeks of leave and paying half of her normal pay for two weeks.⁵ After a complicated pregnancy and emergency C-section, she returned to work nine weeks after giving birth, with the help of some additional vacation time she had saved.⁶

Alex received seven weeks of paid time off and mixed it with two weeks of vacation time and three weeks of unpaid leave—combining disability, sick time, and vacation time to make her maternity leave work.⁷ During the last week of her maternity leave, Alex was diagnosed with thyroid cancer.⁸ When she returned to work, her employer told Alex that she used up all her unpaid family leave and disability for the year and had no vacation time to use, so she took unpaid leave for her own mental health.⁹

These already prevalent issues with the balance between family life and work life were only exacerbated by the COVID-19 pandemic.¹⁰ Youli, a cybercrime prosecutor for the United States government, decided to take a leave of absence from work after learning that her children's school would

¹ Yuki Noguchi, *Federal Workers Poised to Get 12 Weeks Paid Parental Leave*, NAT'L PUB. RADIO (Dec. 11, 2019), <https://www.npr.org/2019/12/11/787131372/federal-workers-poised-to-get-12-weeks-paid-parental-leave>.

² Women at Work, *Your Parental Leave Stories*, HARV. BUS. REV., at 01:45 (Nov. 12, 2018), <https://hbr.org/podcast/2018/11/your-parental-leave-stories>.

³ *Id.* at 2:38.

⁴ *Id.* at 2:43.

⁵ *Id.* at 2:49.

⁶ *Id.* at 3:56.

⁷ Carrie Kerpen, *From The Mouths Of Working Moms: True Stories Of Maternity Leave*, FORBES (May 5, 2016, 3:24 PM), <https://www.forbes.com/sites/carriekerpen/2016/05/05/from-the-mouths-of-working-moms-true-stories-of-maternity-leave/?sh=4831119a3177>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See infra* Part IV.

only partially reopen.¹¹ She hit her breaking point juggling work Zoom calls from home and managing her children's online learning while her husband worked as a doctor at a hospital seven days per week.¹²

These personal stories illustrate the hardship of parents in the United States ("U.S."), the only high-income country in the world that does not mandate a national paid leave policy.¹³ In the U.S., only 17 percent of private-sector workers have access to paid family leave through their employers—and the access is unequal as low-income workers have less access than high-income workers.¹⁴ Federal law provides for twelve weeks of *unpaid*, job-protected leave under the Family and Medical Leave Act, but less than two-thirds of the workforce is eligible due to strict eligibility requirements.¹⁵

The demand for paid leave has risen dramatically due, in part, to certain social trends, such as the rise in female labor force participation, especially among mothers; the aging of the population and accompanying need for eldercare; and men's increased involvement in parenting and caregiving.¹⁶ The labor force participation rates of mothers have increased sharply: between 1975 and 2010, the participation rate for mothers with children under age three nearly doubled, rising from 34 percent to 61 percent.¹⁷ With the overall female labor force participation rate in 2010 at 59 percent, mothers are now more likely to be in the labor force than women in general.¹⁸ Employment during pregnancy has become even more normal: between 2000 and 2010, about two-thirds of first-time mothers in the U.S. were employed while pregnant.¹⁹ Because of the aging U.S. population, the demand for eldercare increased, and smaller family sizes caused the workload to be distributed among a fewer

¹¹ Andrea Hsu, *'This Is Too Much': Working Moms Are Reaching The Breaking Point During The Pandemic*, NAT'L PUB. RADIO (Sept. 29, 2020, 1:36 PM), <https://www.npr.org/2020/09/29/918127776/this-is-too-much-working-moms-are-reaching-the-breaking-point-during-the-pandemic>.

¹² *Id.*

¹³ Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>; *see also* PAID FAMILY LEAVE IN THE UNITED STATES 1 (2022) [hereinafter CRS REPORT] ("[N]o federal law requires private-sector employers to provide *paid* leave of any kind.").

¹⁴ Maya Rossin-Slater & Jenna Stearns, *The Economic Imperative of Enacting Paid Family Leave Across the United States*, in VISION 2020: EVIDENCE FOR A STRONGER ECONOMY 75 (2020).

¹⁵ *Id.*

¹⁶ RUTH MILKMAN & EILEEN APPELBAUM, UNFINISHED BUSINESS: PAID FAMILY LEAVE IN CALIFORNIA AND THE FUTURE OF U.S. WORK-FAMILY POLICY 2 (2013); *see also* Rossin-Slater & Stearns, *supra* note 14, at 75 ("[T]he aging of the baby boomer population implies that many workers have parents and other older relatives who may require care.").

¹⁷ MILKMAN & APPELBAUM, *supra* note 16, at 2.

¹⁸ *Id.*

¹⁹ *Id.*

number of children or other relatives.²⁰ In 2011, 19 percent of employed women and 15 percent of employed men were eldercare providers, with many of them simultaneously parenting.²¹

This Comment will provide a comparative analysis of paid family leave in the Americas—primarily addressing the U.S. as the only high-income country that does not mandate paid family leave nationally—and address whether this policy is one the U.S. could adopt. Part II of this Comment will discuss the paid family leave provided in other countries in the Western Hemisphere. Part III will evaluate family leave in the U.S., including state-mandated paid family leave offered in a handful of American states, the Family and Medical Leave Act, as well as other American legislative responses to the issue of paid leave. Part IV will examine the impact of the global COVID-19 pandemic on the need for paid leave and the efforts of countries to help mitigate its impact. Part V will address the costs and benefits of a national paid leave policy, while considering strategies for a solution in light of the success of state models and legislation, to determine whether the U.S. could adopt this policy and follow the lead of its neighbors.

The lack of national paid family leave in the U.S. is not meeting the demands of the American labor force, and relying on employers to voluntarily provide paid family leave in the private sector is not enough. Successful paid leave programs in Canada, Chile, and several U.S. states demonstrate the great potential for a national American policy. Despite possible minor tax burdens and workplace disruptions, the benefits of paid family leave—such as improvements to gender equality, pay disparities, worker productivity, public health, and the overall economy—significantly outweigh the costs.

II. PAID FAMILY LEAVE IN THE AMERICAS

Parental leave first emerged in the 1970s as an entitlement for both parents usually following the period of maternity leave to allow working parents to care for their young children.²² The development of parental leave can be perceived as part of encouraging and supporting the employment of both women and men.²³ Leave policy involves competing goals and interests, existing at the intersection of the economic, the social, and the demographic

²⁰ *Id.* at 3.

²¹ *Id.*

²² THE POLITICS OF PARENTAL LEAVE POLICES: CHILDREN, PARENTING, GENDER AND THE LABOUR MARKET 2 (Sheila Kamerman & Peter Moss eds., 2011) [hereinafter POLITICS OF PARENTAL LEAVE]; see also *OECD Family Database: Parental leave systems*, OECD (Aug. 2019), http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf, at 1 (parental leave refers to an employment-protected leave of absence for employed parents that usually follows the period of maternity leave).

²³ POLITICS OF PARENTAL LEAVE, *supra* note 22, at 2.

because of the impact of leave policy on labor force participation and labor market regulation; children, family, and gender equality; and fertility.²⁴

The international community seems to value the coexistence of these interests. The International Labour Organization (“ILO”) is a United Nations agency tasked with establishing labor standards, advancing social justice, and developing policies and programs that promote decent work for all women and men.²⁵ Since its inception, the ILO has been concerned with ensuring that women’s participation in the workforce does not pose health risks to the woman or her child and ensuring that women’s reproductive roles do not “compromise their economic and employment security and subject them to undue discrimination.”²⁶ The ILO recognizes that the “intersection of work with maternity, paternity and care responsibilities” is central to improving health, gender equality, and job quality.²⁷ It realizes that measures to support caregiving responsibilities are a “precondition to the achievement of gender equality at work and in the home” by safeguarding the employment and income security of women during and after pregnancy.²⁸

While parental leave is not included in any ILO Convention, its Recommendations No. 191 and No. 165 provide that a period of parental leave should be available to either parent following maternity leave while protecting their employment and employment rights.²⁹ The ILO appears to be most concerned with advancing gender equality because it urges governments to ensure that work-family policies do not reinforce stereotypes or traditional roles—such as women bearing the sole responsibility for the family—or limit their access to the labor force.³⁰ It views appropriate work-family policies as an effective tool for “neutralizing the potential ‘penalty’ associated with being a worker with family responsibility.”³¹ For this Comment’s comparative analysis of paid parental leave, it will focus on those case studies in the Western Hemisphere.

²⁴ *Id.* at 9.

²⁵ *About the ILO*, INT’L LABOUR ORG., [https://www.ilo.org/global/about-the-ilo/lang—en/index.htm](https://www.ilo.org/global/about-the-ilo/lang-en/index.htm) (last visited Feb. 16, 2021).

²⁶ LAURA ADDATI ET AL., INT’L LABOUR ORG., MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD ix (2014) [hereinafter *ILO Report*].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 60 (“[P]arental leave refers to a relatively long-term leave available to either or both parents, allowing them to take care of an infant or young child over a period of time, usually following the maternity or paternity leave period.”).

³⁰ *See id.* at 68–69.

³¹ *Id.* at 69.

A. Canada

In Canada, there are nuances between parental leave policy in the province of Québec and the rest of Canada.³² Social policies such as education, social assistance, and childcare fall under provincial jurisdiction, whereas social security falls under federal jurisdiction.³³ With respect to leave policies, all fourteen jurisdictions in Canada have distinct employment standards legislation.³⁴ Canada even provides its citizens with paid caregiving leave—up to six weeks of income support for certain workers caring for a gravely ill family member, provided through the Employment Insurance Compassionate Care Benefit.³⁵ Canada’s maternity and parental leave benefit program is a federal program because it is administered through the federal Employment Insurance (“EI”) program.³⁶ The only province with its own leave benefit program is Québec.³⁷

1. Canada’s Federal Leave Program

The EI program, managed by the Canadian Department of Human Resources and Social Development, began providing ten weeks of parental leave benefits in 1990.³⁸ The rationale of the program was to allow working parents to care for newborn children.³⁹ In 2001, new legislation altered the program to make the leave entitlement a total of thirty-five weeks and to lower the eligibility requirements: the required number of annual employment hours decreased from 700 to 600.⁴⁰ The increase in duration to thirty-five weeks led to a 15 percent increase in use by fathers between 2000 and 2005.⁴¹ As of December 2017, there are two options under the EI program.⁴² Under the standard option, parents are eligible for thirty-five weeks of parental leave with a wage replacement rate of 55 percent, capped at \$52,400 per year.⁴³ Alternatively, one or both parents may opt to share extended benefits: sixty-one weeks of leave with a wage replacement rate of 33 percent, capped at

³² POLITICS OF PARENTAL LEAVE, *supra* note 22, at 33

³³ *Id.* at 34.

³⁴ *Id.* at 35.

³⁵ CRS REPORT, *supra* note 13, at 14.

³⁶ POLITICS OF PARENTAL LEAVE, *supra* note 22, at 35.

³⁷ *Id.*

³⁸ *Id.* at 35–36.

³⁹ *Id.* at 36.

⁴⁰ *Id.*

⁴¹ *Id.* at 38.

⁴² Andrea Doucet et al., *Canada Country Note*, INT’L REV. LEAVE POLICIES & RSCH. 152 (Apr. 2020).

⁴³ *Id.* (as of Jan. 23, 2023, \$52,400 Canadian dollars is equivalent to \$39,253.63 U.S. dollars).

\$344 per week.⁴⁴ In 2011, self-employed workers became eligible for federal benefits if they opt in.⁴⁵ The provinces of British Columbia and New Brunswick also provide three to five days of unpaid leave per year to care for immediate family members.⁴⁶ Another benefit is available throughout Canada (including Québec) for low-income families with a net annual income lower than \$25,921; those families receive a “Family Supplement,” which increases their wage replacement rate to 80 percent.⁴⁷

2. Québec’s Provincial Leave Program

Starting in 1997, Québec tried to adopt a separate parental leave program from the federal government, and it succeeded in 2006 with the adoption of the Québec Parental Insurance Plan (“QPIP”).⁴⁸ The objectives of QPIP were to “ensure equity of access for the majority of women and men, whatever their employment status, and to offer more flexibility and better income.”⁴⁹ These objectives arose from concerns regarding equity of women in employment, equity rights of children, and fathers’ involvement in family responsibilities.⁵⁰ Funding for QPIP is based on contributions paid by employers, employees, and self-employed workers.⁵¹

QPIP provides more flexibility and increased income compared to the federal EI program.⁵² The flexibility is a result of the ability to choose between two plans under QPIP: the basic plan or the special plan.⁵³ The basic plan—offering longer leave with lower benefits—provides 70 percent wage replacement for seven weeks of parental leave and then 55 percent wage replacement for the remaining twenty-five weeks of leave.⁵⁴ The special plan—offering shorter leave with higher benefits—provides 75 percent wage replacement for twenty-five weeks of parental leave.⁵⁵ The increased income available under QPIP is a result of the cap on benefits at \$78,500, compared

⁴⁴ *Id.*

⁴⁵ *Id.* at 145.

⁴⁶ POLITICS OF PARENTAL LEAVE, *supra* note 22, at 33.

⁴⁷ *Id.* (as of Jan. 23, 2023, \$25,921 Canadian dollars is equivalent to \$19,417.81 U.S. dollars).

⁴⁸ *Id.* at 39–40.

⁴⁹ *Id.* at 40.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See id.* at 42.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

to the cap at \$52,400 under the EI plan.⁵⁶ Increased caps and wage replacement rates have a positive effect on the participation of fathers.⁵⁷

The QPIP program also offers greater accessibility as parents are eligible for benefits if they earned \$2,000 in the past year, and self-employed workers are still eligible for benefits.⁵⁸ Without the requirement of working 600 hours in the EI program, more students and part-time workers are eligible to receive benefits under QPIP because the \$2,000 earnings requirement is an easier threshold to achieve.⁵⁹ Québec also provides ten days per year unpaid to care for sick children.⁶⁰ There was a dramatic increase in Québécois fathers taking leave after this program started—from 32 percent of eligible fathers in 2005, under the federal EI program, to 56 percent in 2006, under QPIP.⁶¹ Québec's distinct family policy from the rest of Canada demonstrates that province's focus on child well-being, gender equality, women's employment, and encouraging fathers' participation in family responsibilities.⁶²

B. Chile

Chilean law is far more protective of working women and their families than U.S. law.⁶³ Not only does Chile provide generous post-natal parental leave, but its Labour Code also requires businesses with at least twenty female employees to provide day care services, subsidize infant care, and provide paid breastfeeding time for all mothers of children under one year old.⁶⁴ Chile's Congress passed a law in 2011 creating a universal right to twelve weeks of post-birth leave to the mother, as well as an additional twelve weeks of leave that either the mother or father can use.⁶⁵ The entire twelve week

⁵⁶ Doucet, et al., *supra* note 42, at 147.

⁵⁷ POLITICS OF PARENTAL LEAVE, *supra* note 22, at 42.

⁵⁸ *Id.* at 43 (as of Jan. 23, 2023, \$2,000 Canadian dollars is equivalent to \$1,200 U.S. dollars).

⁵⁹ *Id.*

⁶⁰ *Id.* at 33.

⁶¹ *Id.* at 38.

⁶² *Id.* at 47.

⁶³ See Ann C. McGinley, *Gender, Law, and Culture in the Legal Workplace: A Chilean Case Study*, 60 ARIZ. L. REV. 675, 678–80 (2018).

⁶⁴ *Id.* at 678; Lidia Casas & Tania Herrera, *Maternity Protection vs. Maternity Rights for Working Women in Chile: a Historical Review*, 20 REPROD. HEALTH MATTERS 40, 140 (2012), [https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080\(12\)40666-8](https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080(12)40666-8) (while Chile does not provide parental leave, per se, its post-natal parental leave is akin to parental and family leaves in Canada and the U.S. because it allows a prolonged period of bonding time with a new child after birth).

⁶⁵ Casas & Herrera, *supra* note 64, at 144; see also *Employee Benefits in Chile*, L&E GLOB. (Jan. 4, 2021), <https://knowledge.leglobal.org/employee-benefits-in-chile/> (the mother may choose to return to work on a part-time basis during the second period of leave, in which case the leave is extended to eighteen weeks, and the subsidy is split between the social security system and the employer).

period immediately after birth is obligatory;⁶⁶ allowing an employee to return to work before the three months of post-natal leave ends is illegal in Chile because labor rights cannot be waived.⁶⁷ During the period of leave, the health insurance institution of the employee pays 100 percent of her salary.⁶⁸ All employees with permanent job contracts are eligible to take this leave, and independent workers are eligible if they meet certain requirements, such as contributing to the pension system and health insurance institution.⁶⁹ Leave is also available to care for children between one and eighteen years of age with serious illnesses or who suffered serious accidents.⁷⁰ The mother, or father if both parents work, is entitled to ten days of leave with full pay if she or he has a job contract and paid eight contributions to pension insurance in the two years preceding the leave period.⁷¹

III. PAID FAMILY LEAVE IN THE UNITED STATES

Based on data compiled by the Organization for Economic Cooperation and Development (“OECD”), the U.S. is the only nation among forty-one advanced-economy nations that does not mandate paid leave for new parents nationally.⁷² While the U.S. does not mandate paid family leave nationally, some states have adopted the policy—and the list of states providing this leave continues to grow.⁷³ Likewise, paid family leave continues to be a major topic in the national legislature as lawmakers propose new policies.⁷⁴

A. State-Mandated Leave Programs

1. California

California was the first U.S. state to effectuate a paid family leave program in 2004.⁷⁵ Initially enacted in 2002, the benefits officially became available to workers in 2004.⁷⁶ California workers enjoy up to eight weeks of

⁶⁶ Maria Jose Bosch, *Chile Country Note*, INT’L NETWORK ON LEAVE POLICIES & RSCH. 174 (Apr. 2020).

⁶⁷ McGinley, *supra* note 63, at n.92.

⁶⁸ Bosch, *supra* note 66, at 174.

⁶⁹ *Id.* at 175–76.

⁷⁰ *Id.* at 178.

⁷¹ *Id.*

⁷² Livingston & Thomas, *supra* note 13.

⁷³ *See infra* Part III(A).

⁷⁴ *See infra* Part III(B).

⁷⁵ *Overview of California’s Paid Family Leave Program*, CA EMP. DEV. DEP’T (2022), https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de2530.pdf, at 5.

⁷⁶ *Id.*

paid family leave per year.⁷⁷ In addition to bonding with a new child or caring for a sick family member, employees also can use the program to care for their own disabilities and for qualifying exigencies related to a partner, child, or parent's being on active duty.⁷⁸ The program's benefit is calculated as a percentage of the worker's recent weekly earnings, between 60 and 70 percent;⁷⁹ as of 2020, the program is funded by a 1.0 percent payroll tax (contribution rate) paid by workers.⁸⁰

The Paid Family Leave program is designed as an insurance program; the wage replacement benefit is funded entirely by the employee-paid payroll tax, so there is no direct cost to the employer.⁸¹ The program covers all private sector employers, and self-employed individuals may opt in.⁸² Although, unlike FMLA,⁸³ the California program does not provide job protection or the continuation of employer-provided health insurance, but many employees have these protections under the FMLA or the California Family Rights Act.⁸⁴ However, unprotected employees fear using state paid leave because of potential negative consequences, such as missed opportunities for career advancement or termination.⁸⁵

Nevertheless, a substantial increase in male leave claims for bonding with a new child has occurred since the program began operation—suggesting that the California program is helping to reduce gender inequality in the distribution of family responsibilities.⁸⁶ A 2010 study of 250 employers across California illustrated that the state program had either a positive effect or no effect on employee productivity, costs, and morale in 90 percent of the surveyed firms.⁸⁷ Another study of wage costs and turnover rates at California firms from 2000 to 2014 showed that neither wage costs nor turnover rates increased as leave-taking rates increased; rather, the average employer saw a lower wage bill per worker and a lower turnover rate compared to before the

⁷⁷ *Id.* at 10; see CAL. UNEMP. INS. CODE § 3301(a)(1) (2021) (“Family temporary disability insurance shall provide up to eight weeks of wage replacement benefits.”).

⁷⁸ See *id.*; NAT'L P'SHIP FOR WOMEN & FAMS., STATE PAID FAM. & MED. LEAVE INS. L. 2–3 (Jan. 2021) [hereinafter STATE LEAVE COMPARISON CHART].

⁷⁹ CRS REPORT, *supra* note 13, at 6, 20.

⁸⁰ See *Overview of California's Paid Family Leave Program*, *supra* note 75, at 9.

⁸¹ MILKMAN & APPELBAUM, *supra* note 16, at 11 (“The combined tax in 2012 was 1.0% on the first \$95,585 in wages.”).

⁸² See STATE LEAVE COMPARISON CHART, *supra* note 78, at 15–16.

⁸³ See *infra* Part III(B).

⁸⁴ MILKMAN & APPELBAUM, *supra* note 16, at 11.

⁸⁵ *Id.* at 15.

⁸⁶ *Id.* at 13.

⁸⁷ Kelly Bedard & Maya Rossin-Slater, *The Economic and Social Impacts of Paid Family Leave in California: Report for the California Employment Development Department*, CA EMP. DEV. DEP'T 7 (Oct. 13, 2016).

paid family leave program started.⁸⁸ In fact, many employers have experienced cost savings because of the state leave program; the program subsidizes employers who previously provided some form of wage replacement during family leaves because employees will utilize the state benefits instead.⁸⁹

One issue with the California program was lack of public awareness; according to a survey conducted one year after the program's implementation, only 30 percent of California adults were aware the program even existed.⁹⁰ However, since its implementation in 2004, about 14.2 million claims have been paid in California; nearly one-third of the claims were for family caregiving or child bonding, while two-thirds were for personal medical reasons.⁹¹

2. New Jersey

New Jersey adopted its paid family leave law in 2009, patterned closely after the California program.⁹² In order for employees to be eligible for the program, they must have worked twenty calendar weeks or earned at least 1,000 times the state minimum wage during the fifty-two weeks prior to taking leave.⁹³ The New Jersey program provided up to two-thirds of wages up to \$524 per week for six weeks for the care of a child, parent, parent-in-law, grandparent, spouse, or domestic partner.⁹⁴ As of July 2020, the benefit increased to 85 percent of the average weekly wage and the duration increased to twelve weeks.⁹⁵ Workers also are eligible to take the leave if they or their family members have needs related to domestic or sexual violence.⁹⁶ Employees fund the family care program, contributing 0.08 percent of the taxable wage base, or the first \$34,400 in covered wages paid during the calendar year.⁹⁷ Private and public sector employers who are covered by the state's Unemployment Compensation Law must provide paid leave for family

⁸⁸ *Id.* at 20.

⁸⁹ MILKMAN & APPELBAUM, *supra* note 16, at 14.

⁹⁰ *Id.* at 89 (“low-income respondents, those with less education, young workers, Latinos, and immigrants had substantially lower levels of awareness of PFL than the state’s adult population as a whole.”).

⁹¹ NAT’L P’SHIP FOR WOMEN & FAMILIES, PAID LEAVE WORKS: EVIDENCE FROM STATE PROGRAMS (Feb. 2022) [hereinafter PAID LEAVE WORKS].

⁹² MILKMAN & APPELBAUM, *supra* note 16, at 11.

⁹³ *State Family and Medical Leave Laws*, NAT’L CONF. STATE LEGISLATURES (Sept. 21, 2020), <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [hereinafter NCSL REPORT].

⁹⁴ *See id.*

⁹⁵ CRS REPORT, *supra* note 13, at 24; *see* STATE LEAVE COMPARISON CHART, *supra* note 78, at 4.

⁹⁶ CRS REPORT, *supra* note 13, at 24.

⁹⁷ STATE LEAVE COMPARISON CHART, *supra* note 78, at 13.

care and temporary disability, but there are some exceptions for government employers.⁹⁸ Since the program's inception, over 1.4 million claims have been filed.⁹⁹

3. New York

Under the New York program, employees are eligible for the program if they have worked twenty-six or more consecutive weeks for a covered employer; all private employers are included, but public employers have a choice to opt in.¹⁰⁰ New York's program instituted a gradual increase in benefits over a period of four years: starting January 1, 2018, the maximum leave period was eight weeks; from January 1, 2019 to January 1, 2020, the maximum leave period was ten weeks; starting January 1, 2021, the maximum leave period became twelve weeks.¹⁰¹ The maximum benefit amount was 50 percent of the employee's average weekly wage or 50 percent of the state average weekly wage in 2018—with the rate increasing annually to 55 percent in 2019, 60 percent in 2020, and 67 percent in 2022.¹⁰² In the first year of New York's program, about 128,000 claims were paid—representing just under 2 percent of the covered workforce.¹⁰³ New York was also the first state to provide a paid benefit to military families for military exigency purposes, or family needs related to active duty deployment.¹⁰⁴ New York's program is for employees who need to take time off work to bond with a new child, care for a seriously ill family member, care for one's own disability, or deal with a qualifying exigency related to active military duty.¹⁰⁵

4. Rhode Island

The paid family leave program in Rhode Island includes all private sector employers and public sector employers who opt in.¹⁰⁶ The Rhode Island Temporary Caregiver Insurance Program provides four weeks of paid leave for the birth, adoption or fostering of a new child, or to care for a relative with a serious health condition—and it provides up to thirty weeks of paid leave

⁹⁸ *Id.* at 15.

⁹⁹ PAID LEAVE WORKS, *supra* note 91, at 1.

¹⁰⁰ NCSL REPORT, *supra* note 93.

¹⁰¹ STATE LEAVE COMPARISON CHART, *supra* note 78, at 7.

¹⁰² *Id.* at 18; *see also* CRS REPORT, *supra* note 13, at 24.

¹⁰³ PAID LEAVE WORKS, *supra* note 91.

¹⁰⁴ *Id.*

¹⁰⁵ STATE LEAVE COMPARISON CHART, *supra* note 78, at 3.

¹⁰⁶ *See* NCSL REPORT, *supra* note 93.

for the employee's own disability.¹⁰⁷ Depending on earnings, the minimum benefit is \$98 per week, and the maximum benefit is \$852 per week—or approximately 60 percent of weekly earnings.¹⁰⁸ Employees fund the program with a withholding rate of 1.1 percent of the worker's first \$71,000 in wages.¹⁰⁹ Since the program's implementation in 2014, just under 300,000 claims have been paid, and the Rhode Island program was the first to offer workers reinstatement and protection from workplace retaliation for taking paid leave.¹¹⁰

5. Washington State

The Washington State Legislature passed its Paid Family and Medical Leave program in 2017¹¹¹ and implemented it in 2020.¹¹² Administered by the Employment Security Department, it allows most employees to receive up to twelve weeks of paid leave for bonding after the birth or placement of a child, an employee's serious health condition, a serious health condition of a qualifying family member, and certain military events.¹¹³ The benefits provided are a percentage of the employee's gross wages, between \$100 and \$1,000 per week.¹¹⁴ To receive benefits, the employee must have worked a total of at least 820 hours for any Washington employers during the previous twelve months.¹¹⁵ For the first year of the program, employees were funding it, contributing 0.4 percent of the worker's first \$132,900 in wages; in the future, the rate will be adjusted annually based on the solvency of the fund.¹¹⁶

6. Washington, D.C.

The District of Columbia ("D.C.") began administering paid leave benefits in July 2020.¹¹⁷ The Paid Leave Act provides up to eight weeks to bond with a new child, six weeks to care for a family member with a serious

¹⁰⁷ *Id.*; see also R.I. GEN. LAWS § 28-41-35(a), (d)(1) (2020) (providing that benefits are available for bonding with a newborn, adopted, or fostered child or caring for a family member with a serious health condition for a duration of four weeks).

¹⁰⁸ STATE LEAVE COMPARISON CHART, *supra* note 78, at 17.

¹⁰⁹ *Id.* at 13.

¹¹⁰ PAID LEAVE WORKS, *supra* note 91, at 2.

¹¹¹ *Paid Family & Medical Leave*, WASH. STATE DEP'T LABOR & INDUS., <https://lni.wa.gov/workers-rights/leave/paid-family-and-medical-leave> (last visited Feb. 16, 2021).

¹¹² PAID LEAVE WORKS, *supra* note 91.

¹¹³ *Paid Family & Medical Leave*, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ STATE LEAVE COMPARISON CHART, *supra* note 78, at 8.

¹¹⁷ *DC Paid Family Leave*, D.C. DEP'T OF EMP. SERVS., <https://does.dc.gov/page/dc-paid-family-leave> (last visited Feb. 16, 2021).

health condition, and two weeks to care for an individual's own serious health condition.¹¹⁸ The D.C. program is a result of the enactment of the Universal Paid Leave Amendment Act of 2016, which became effective in April 2017 and sought to establish a paid leave system for individuals employed in D.C.¹¹⁹ The benefit amount depends on the worker's average weekly wages, but the maximum benefit is \$1,000 per week.¹²⁰ Unlike most other state programs that are financed by employee payroll taxes, a payroll tax on covered *employers* funds the D.C. program.¹²¹

7. Massachusetts

Massachusetts began providing paid family and medical leave benefits in January 2021.¹²² Its Paid Family Medical Leave program is a state-offered benefit for anyone who works in Massachusetts—whether full-time, part-time, seasonal, or self-employed workers.¹²³ Beneficiaries will be eligible to take up to twenty-six weeks total of paid leave—of which twelve weeks may be used for the arrival of a new child, a family member's serious health condition, or a family member's military deployment; twenty-six weeks may be used for military caregiver leave; and twenty weeks may be used for the individual's own medical leave.¹²⁴ The benefit amount depends on the worker's wages, but the maximum benefit is \$850 per week.¹²⁵ Payroll taxes on employees fund the family leave, but payroll taxes on both employees and their employers, if the employer has at least twenty-five employees, fund the medical leave.¹²⁶

8. Connecticut

Connecticut enacted its Paid Family and Medical Leave Act in June 2019.¹²⁷ The law started paying benefits in January 2022, but employers had

¹¹⁸ CRS REPORT, *supra* note 13, at 22.

¹¹⁹ *DC Paid Family Leave*, *supra* note 117.

¹²⁰ CRS REPORT, *supra* note 13, at 22.

¹²¹ *Id.*

¹²² Act Relative to Minimum Wage, Paid Family and Medical Leave and the Sales Tax Holiday, 2018 Mass. Acts ch.121.

¹²³ *Your Eligibility for Paid Family and Medical Leave (PFML)*, COMMONWEALTH OF MASS., <https://www.mass.gov/info-details/your-eligibility-for-paid-family-and-medical-leave-pfml> (last visited Feb. 16, 2023).

¹²⁴ CRS REPORT, *supra* note 13, at 23.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Craig T. Dickinson & Lindsay M. Rinehart, *Complying with Connecticut's Paid Family and Medical Leave Act*, SOC'Y OF HUM. RES. MGMT. (Nov. 12, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/connecticut-paid-family-and-medical-leave-act.aspx>.

to begin deducting pay from employees to fund the program on January 1, 2021.¹²⁸ Funded through mandatory payroll deductions capped at 0.5 percent, the program covers all employers with at least one employee in Connecticut.¹²⁹ Employees will be eligible for the program if they earned wages of \$2,325 in the highest-earning quarter of the first four of the five most recently completed quarters, are currently employed, and have been employed within the last twelve weeks.¹³⁰ Employees are permitted to take the paid leave for reasons related to the birth of a child, adoption or foster care placement of a child, the need to care for a family member with a serious health condition, the employee's own serious health condition, service as an organ or bone marrow donor, military exigency, or family violence.¹³¹

This law greatly expands the scope of a covered family member—expanding coverage to siblings, parents-in-law, grandparents, grandchildren, and any other individual whose “close association” to the employee “shows to be the equivalent of those family relationships.”¹³² Beneficiaries may receive up to twelve weeks of paid leave in a twelve-month period with an additional two weeks in the event of a pregnancy-related health condition resulting in incapacitation.¹³³ The maximum benefit for employees is up to 95 percent of the employee's regular weekly pay, capped at 60 times the state minimum wage.¹³⁴

9. Oregon

Oregon workers become eligible for paid family and medical leave benefits in 2023.¹³⁵ State lawmakers passed the bill that will offer twelve weeks of paid leave for workers to care for their own illnesses, care for illnesses of family members, bond with new babies, or deal with issues related to domestic violence, sexual assault, stalking, or harassment.¹³⁶ The law offers full wage replacement to low-income workers and partial wage replacement to other workers—depending on income level.¹³⁷ Employers with at least twenty-five workers as well as employees must contribute to the program.¹³⁸

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Dickinson & Rinehart, *supra* note 127.

¹³⁴ *Id.*

¹³⁵ Lisa Nagele-Piazza, *Paid Family Leave Is Coming to Oregon*, SOC'Y OF HUM. RES. MGMT. (July 1, 2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/paid-family-leave-is-coming-to-oregon.aspx>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

10. Colorado and Beyond

The list of states offering paid family leave is still expanding. In the 2020 election, Colorado voters approved a new paid family and medical leave law.¹³⁹ With the support of 57 percent of voters, Proposition 118 would require that Colorado employers provide twelve weeks of paid time off for childbirth, adoption, family medical emergencies, family active-duty military service, and reasons related to abuse and sexual assault.¹⁴⁰ Premiums equal to about 0.9 percent of a worker's wages would fund the new law, with workers and employers splitting the cost.¹⁴¹ The program would begin collecting fees in 2023 and offering benefits in 2024.¹⁴² With the number of state paid leave programs expanding over the years and the fact that paid leave still shows up on state ballots, it is evident that Americans continue to be interested in expanding leave benefits.

B. Legislative Attempts at National Paid Leave

The Family and Medical Leave Act ("FMLA") of 1993 was the first law signed by President Bill Clinton after he entered office.¹⁴³ Requiring a nine-year effort to become enacted, this modest policy represents the hardship of advocating for family policies in the U.S.¹⁴⁴ Nevertheless, the purpose of the FMLA was 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," as well as "to promote the goal of equal employment opportunity for women and men."¹⁴⁵ In his remarks at the signing of the FMLA on February 5, 1993, President Clinton proclaimed that family and medical leave "is a matter of pure common sense and a matter of common decency" that "will provide Americans what they need most: peace of mind."¹⁴⁶

¹³⁹ Andrew Kennedy, *Colorado Voters Say Yes To A Paid Family And Medical Leave Program*, COLO. PUB. RADIO (Nov. 3, 2020, 10:05 PM), <https://www.cpr.org/2020/11/03/colorado-voters-say-yes-to-a-paid-family-and-medical-leave-program/>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ DONNA R. LENHOFF & LISSA BELL, NAT'L P'SHIP FOR WOMEN & FAM., GOVERNMENT SUPPORT FOR WORKING FAMILIES & FOR COMMUNITIES: FAMILY & MEDICAL LEAVE AS A CASE STUDY 1 [hereinafter FMLA CASE STUDY].

¹⁴⁴ *Id.*

¹⁴⁵ 29 U.S.C. §§ 2601(b)(1), (5) (2020).

¹⁴⁶ *February 5, 1993: Remarks at the Signing of the Family Medical Leave Act*, UNIV. VA. MILLER CTR. 05:22 <https://millercenter.org/the-presidency/presidential-speeches/february-5-1993-remarks-signing-family-medical-leave-act> (last visited Mar. 4, 2021).

The primary strength of the FMLA is that it provides job-protected leave, mandating that employers guarantee its employees their jobs for up to twelve weeks per year when they take family and medical leave—which is defined as leave to care for a newborn or newly adopted child, leave to care for a child, spouse, or parent who has a serious health condition, or leave to recover from the employee’s own serious health condition.¹⁴⁷ Notably, the employers must also continue to pay its share of the employees’ health insurance premiums during the period of leave.¹⁴⁸ Employers have the following duties under the FMLA that protect workers: (1) employers must provide employees with notice of their benefits; (2) employers must maintain the employee’s same healthcare coverage throughout the leave period, if she had such coverage before taking leave; (3) employers must maintain all the employee’s benefits accrued prior to taking leave, such as pensions, disability insurance, and group life insurance; and (4) employers must restore the employee to the same position she held prior to taking leave or find an equivalent position.¹⁴⁹

However, there are significant weaknesses of the FMLA, representing the compromises made to ensure the bill became law.¹⁵⁰ Employees are eligible to take this leave only if they have worked for their employer for at least one year and worked for 1,250 hours during the year immediately preceding the year in which they take leave.¹⁵¹ Additionally, the law only applies to employers with fifty or more employees.¹⁵² Because of these strict eligibility requirements, the FMLA only covers approximately 60 percent of the U.S. workforce.¹⁵³ The principal weakness of the law is that it provides for *unpaid* leave.¹⁵⁴ Because the leave is unpaid, some employees do not utilize the leave because they cannot afford to forego paychecks.¹⁵⁵ Essentially, the “promise” of leave for family and medical reasons is “illusory

¹⁴⁷ See FMLA CASE STUDY, *supra* note 143, at 2; see also 29 U.S.C. § 2612(a)(1) (2020) (providing twelve weeks of leave for any of these circumstances).

¹⁴⁸ FMLA CASE STUDY, *supra* note 143, at 2.

¹⁴⁹ See Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California’s Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 82–83 (2004); see also 29 U.S.C. § 2614(a), (c) (2020) (providing for restoration and maintenance of health benefits).

¹⁵⁰ See FMLA CASE STUDY, *supra* note 143, at 2 (“While these compromises were made to ensure the bill’s passage, they significantly limit its accessibility and affordability for millions of American workers.”).

¹⁵¹ *Id.*

¹⁵² *Id.*; see 29 C.F.R. § 825.104(a) (2021).

¹⁵³ Jackson Brainerd, *Paid Family Leave in the States*, NAT’L CONF. OF STATE LEG. (Aug. 1, 2017), <https://www.ncsl.org/research/labor-and-employment/paid-family-leave-in-the-states.aspx>.

¹⁵⁴ FMLA CASE STUDY, *supra* note 143, at 2.

¹⁵⁵ THE CONS. OF ECON. ADVISORS, THE ECONOMICS OF UNPAID LEAVE 3 (June 2014) [hereinafter ECONOMIC ADVISORS REPORT].

if a worker cannot afford to actually take the time off.”¹⁵⁶ An in-depth look at the legislative history of the FMLA and the strategies utilized to secure its passage can inform future possible legislation on paid family leave.¹⁵⁷

Since the enactment of the FMLA, lawmakers have attempted to expand family leave to include pay and remedy the shortfalls of the FMLA.¹⁵⁸ In February 2019, Representative Rosa DeLauro introduced House Resolution 1185, otherwise known as the Family and Medical Insurance Leave Act (“FAMILY Act”), to the House of Representatives.¹⁵⁹ With 219 co-sponsors—218 Democrats and one Republican—the FAMILY Act sought to establish sixty days of paid leave at a wage replacement rate of 66 percent, using a 0.2 percent payroll tax on employees and employers.¹⁶⁰ Senator Kirsten Gillibrand introduced the bill to the Senate simultaneously with thirty-six co-sponsors—thirty-four Democrats and two Independents.¹⁶¹ Congress has made no progress on these bills since introduction,¹⁶² possibly because new family leave legislation was introduced the following month to Congress.

Legislators have proposed other paid leave plans that are limited only for parents of new children, so the proposals fail to acknowledge the “caregiving crisis” in the U.S., in which paid leave to care for elderly relatives is necessary to cope with the “rapidly aging population.”¹⁶³ The New Parents Act of 2019 and the Child Rearing and Development Leave Empowerment (“CRADLE”) Act would allow workers to take leave only for the birth, adoption, or foster placement of a child.¹⁶⁴ Besides the fact that these bills fail to cover eldercare, they also fail to cover parents when they need to take time off to care for children or themselves long after the arrival of a new child.¹⁶⁵ The proposals run contrary to evidence that only 21 percent of workers used FMLA leave to care for a new child; rather, the majority of workers taking FMLA leave—55 percent—used it to recover from a personal illness.¹⁶⁶ In sum, these bills were inadequate and were not geared toward the reasons why workers take leave.¹⁶⁷

¹⁵⁶ Thompson, *supra* note 149, at 77.

¹⁵⁷ *See infra* Part V(C).

¹⁵⁸ *See, e.g.*, Family and Medical Insurance Leave Act, H.R. 1185, 116th Cong. (2019); Federal Employee Paid Leave Act, H.R. 1534, 116th Cong. (2019) (enacted); DIANA BOESCH, CTR. FOR AM. PROGRESS, RHETORIC VS. REALITY: NOT ALL PAID LEAVE PROPOSALS ARE EQUAL 2–3 (2019) [hereinafter RHETORIC V. REALITY].

¹⁵⁹ Family and Medical Insurance Leave Act, H.R. 1185.

¹⁶⁰ *Id.*

¹⁶¹ *See* Family and Medical Insurance Leave Act, S. 463, 116th Cong. (2019).

¹⁶² *See id.*

¹⁶³ RHETORIC V. REALITY, *supra* note 158, at 2–3.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 3.

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

In March 2019, Representative Carolyn Maloney introduced House Resolution 1534, also known as the Federal Employee Paid Leave Act (“FEPLA”), to the House of Representatives along with forty-seven co-sponsors—forty-five Democrats and two Republicans.¹⁶⁸ Senator Brian Schatz introduced the bill to the Senate the following month along with five Democratic co-sponsors.¹⁶⁹ Essentially, the FEPLA proposed amending the FMLA to provide twelve weeks of *paid* family leave for certain covered federal employees.¹⁷⁰ In other words, the FEPLA would allow federal employees to receive pay during their FMLA leave.¹⁷¹ The federal government is the largest employer in the U.S.—employing more than two million employees across the nation.¹⁷²

President Trump signed the act into law in December 2019, and the FEPLA became effective on October 1, 2020.¹⁷³ While the law is a great achievement for working families, it does not apply to all federal employees.¹⁷⁴ It applies only to federal employees under standard civil service laws, so it excludes employees of certain agencies;¹⁷⁵ specifically, the FEPLA does not apply to employees of the U.S. Postal Service, Federal Aviation Administration, medical personnel of the Department of Veterans Affairs, and certain employees of the Transportation Security Administration.¹⁷⁶ Legislation to extend the benefits to these excluded agencies has been unsuccessful thus far.¹⁷⁷ Nonetheless, the enactment of the FEPLA represents one of the most substantial expansions of federal benefits since the creation of unpaid parental leave under the FMLA—almost three decades ago.¹⁷⁸

IV. THE IMPACT OF COVID-19

Since early 2020, the world has been devastated by the global impact of the Coronavirus (“COVID-19”) pandemic—American workers in particular.¹⁷⁹ There have been over 676 million cases and over 6.8 million

¹⁶⁸ Federal Employee Paid Leave Act, H.R. 1534, 116th Cong. (2019) (enacted).

¹⁶⁹ Federal Employee Paid Leave Act, S. 1174, 116th Cong. (2019) (enacted).

¹⁷⁰ Federal Employee Paid Leave Act, H.R. 1534.

¹⁷¹ NAT’L P’SHP FOR WOMEN & FAMS., FEDERAL EMPLOYEE PAID LEAVE ACT (Mar. 2019).

¹⁷² *Id.*

¹⁷³ Eric Yoder, *Starting Thursday, Most Federal Employees are Eligible for Paid Parental Leave*, WASH. POST (Oct. 1, 2020), <https://www.washingtonpost.com/politics/federal-paid-parental-leave/2020/09/30/ac8e36c8-0335-11eb-b7ed-141dd88560eastory.html>.

¹⁷⁴ *See id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See* GENE FALK ET AL., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC 2 (2021) [hereinafter UNEMPLOYMENT REPORT].

deaths worldwide due to COVID-19.¹⁸⁰ The pandemic caused U.S. unemployment numbers to surpass those seen during the Great Recession (2007–2009).¹⁸¹ The economic downturn began in February 2020 and quickly peaked in April 2020, with the unemployment rate skyrocketing to 14.8 percent.¹⁸² The sharp increase in unemployment correlated to mandatory stay-at-home orders that affected demand in the U.S.¹⁸³ As a result, unemployment was concentrated among workers who were previously employed in industries that provided in-person services and among young workers, women, workers with low educational attainment, part-time workers, as well as racial and ethnic minorities.¹⁸⁴

Moreover, the Congressional Budget Office and the Federal Reserve anticipated that elevated unemployment rates would endure over the next three years.¹⁸⁵ Along with unprecedented unemployment rates, 5.4 million U.S. workers became uninsured when they lost their jobs in the first four months of the pandemic.¹⁸⁶ There also was a devastating blow to women's involvement in the labor force: almost one million mothers left the workforce during the pandemic, with single mothers, Black mothers, and Hispanic mothers being those most affected.¹⁸⁷ Nearly one-quarter of children suffered from food insecurity in 2020, which is linked to the loss of maternal income.¹⁸⁸ The pandemic has only exacerbated the prevalent issue of access—or the lack thereof—to paid family leave because those workers fortunate to have maintained their jobs are struggling with caring for their family's illnesses, as well as caring for their children while schools and daycares remain closed due to the pandemic.¹⁸⁹ In response, some legislatures have enacted or amended laws to help mitigate the effects of the pandemic.¹⁹⁰

¹⁸⁰ *Coronavirus Resource Center*, JOHNS HOPKINS UNIV. & MED., <https://coronavirus.jhu.edu/map.html> (last updated Mar. 10, 2023).

¹⁸¹ See UNEMPLOYMENT REPORT, *supra* note 179 (The unemployment rate last peaked at 10 percent in October 2009. During the latest recession, the unemployment rate peaked at 14.8 percent in April 2020.).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Diana Boesch, *The Urgent Case for Permanent Paid Leave: Lessons Learned From the COVID-19 Response*, CTR. FOR AMERICAN PROGRESS (Sept. 1, 2020), <https://www.americanprogress.org/issues/women/reports/2020/09/01/489914/urgent-case-permanent-paid-leave/>.

¹⁸⁷ Jessica Grose, *America's Mothers Are in Crisis: Is Anyone Listening to Them?*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/parenting/working-moms-mental-health-coronavirus.html>.

¹⁸⁸ *Id.*

¹⁸⁹ See Hsu, *supra* note 11.

¹⁹⁰ See, e.g., Families First Coronavirus Response Act, H.R. 6201, 116th Cong. (2020) (enacted).

A. American Response to COVID-19

Due to COVID-19, the U.S. Congress enacted the Families First Coronavirus Response Act (“FFCRA”) in March 2020 to help alleviate some of the caregiving issues caused by the pandemic.¹⁹¹ The FFCRA mandated that employers with fewer than 500 workers must provide up to twelve weeks of paid leave for an employee who cannot work because the school or childcare provider of that employee’s child is closed as a result of the pandemic.¹⁹² After the first ten days of the leave period, the employer must pay no less than two-thirds of the employee’s regular pay for the number of hours per week the employee normally works.¹⁹³ This leave was only available through December 31, 2020.¹⁹⁴ The bill had important exemptions, namely the fact that the FFCRA did not apply to companies with over 500 employees; therefore, large companies such as Amazon or McDonald’s were not required to provide the leave.¹⁹⁵

The FFCRA was also incredibly narrow: the emergency paid leave was only available for a worker who must care for her child because the child’s school or daycare is closed due to the pandemic.¹⁹⁶ This meant that workers could not use the leave to care for seriously ill family members or elderly relatives who lost access to senior care during the pandemic.¹⁹⁷ Additionally, the twelve weeks of emergency child care leave proved inadequate to meet long-term needs—especially with schools choosing to conduct online learning instead of in-person learning.¹⁹⁸ However, the law was surprisingly expansive in that it covered many workers who were usually excluded from paid leave benefits; part-time workers and self-employed workers were covered, and they only had to meet a thirty-day tenure requirement to be eligible for the emergency paid child care leave.¹⁹⁹ The law also covered private sector workers at businesses with fewer than fifty employees—a group excluded from accessing unpaid leave under the FMLA.²⁰⁰

¹⁹¹ *See id.*

¹⁹² *Id.* (The FFCRA also provided emergency sick leave, which will not be discussed because it is outside the scope of this Comment’s focus on family leave.)

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Greg Rosalsky, *Paid Leave vs. The Pandemic*, NAT’L PUB. RADIO (Mar. 17, 2020, 6:30 AM), <https://www.npr.org/sections/money/2020/03/17/816849671/paid-leave-vs-the-pandemic>.

¹⁹⁶ *See* Boesch, *supra* note 186.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (Covering part-time workers is “especially important to ensure the inclusion of women” because almost one-quarter of employed women work part time, usually due to caregiving responsibilities.)

²⁰⁰ *Id.*

The inadequacies of the FFCRA could have been remedied by the new Biden Administration.²⁰¹ After the relief package expired in December 2020, President Biden proposed reinstating and expanding the provision.²⁰² He recommended expanding the paid leave to people who are sick with COVID-19 symptoms, quarantining because of exposure, requiring time off to get the vaccine, caring for family members who are sick with COVID-19 symptoms, caring for elderly relatives whose long-term care facilities are closed because of the pandemic, as well as people who are caring for children whose school or daycare center is closed because of the pandemic.²⁰³ This plan was more conducive to the goal of slowing the spread of the virus by encouraging quarantining and isolation, while ensuring that no American has to “choose between putting food on the table and quarantining to prevent further spread of COVID-19.”²⁰⁴ The president also proposed easing the eligibility requirements to include nearly all American workers; his plan would cover 106 million more workers than the previous paid leave provision.²⁰⁵

In December 2020, women lost 156,000 jobs in the U.S., whereas men gained 16,000 jobs.²⁰⁶ This disparity most likely is due to the fact that women were bearing the brunt of caregiving responsibilities during the pandemic, so expanding paid caregiving leave would have helped keep them employed.²⁰⁷ Under President Biden’s plan, worker’s wages would be replaced up to \$1,400 per week and workers would be eligible for fourteen weeks or more of paid leave.²⁰⁸ Employers with fewer than 500 employees would be reimbursed for the paid leave in the form of a payroll tax credit, and if the employers pay more in leave than what they owe in taxes, the government would send them a check for the difference.²⁰⁹ If this proposal had been passed by the U.S. Congress, the emergency paid leave measures would have been in effect until September 30, 2021,²¹⁰ and Americans would have benefitted from a much-needed safety net during the ongoing public health crisis, in which over 1.1

²⁰¹ See Claire Cain Miller, *How Biden’s Proposed Paid Leave Would Work*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/2021/01/17/upshot/paid-leave-biden-plan.html>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ THE WHITE HOUSE, NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS 89 (Jan. 2021).

²⁰⁵ Miller, *supra* note 201.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Tara K. Burke, *President Biden Calls for Reinstating and Expanding Mandatory Paid Leave As Part of Covid Relief Package*, NAT’L L. REV. (Jan. 20, 2021), <https://www.natlawreview.com/article/president-biden-calls-reinstating-and-expanding-mandatory-paid-leave-part-covid>.

million Americans have died as a result of COVID-19; as of March 2023, President Biden is still pushing for a paid family leave program.²¹¹

B. Canadian Response to COVID-19

In Canada—a nation that has suffered over 51,000 COVID-19-related deaths²¹²—multiple provinces amended leave laws to help alleviate the hardship caused by caregiving duties as well.²¹³ The legislatures of British Columbia, Ontario, Alberta, and Saskatchewan amended their respective Employment Standards Acts in March 2020; the amendments provided workers with unpaid, job-protected leave if they are unable to work because they must provide care to their children or adult family members for reasons related to COVID-19, including a school, daycare, or similar facility closure in several provinces.²¹⁴ For instance, the Alberta government amended its Employment Standards Code to allow full-time and part-time employees to take up to fourteen consecutive days of the unpaid, job-protected leave if the employee is required to care for a child or dependent adult that is required to self-isolate.²¹⁵ In most of the provinces, employers are prohibited from requiring a medical note as evidence of the need to take leave.²¹⁶ There is no tenure requirement—or minimum length of service—to qualify for the leave in Alberta and Saskatchewan.²¹⁷

C. Chilean Response to COVID-19

The Chilean government responded to COVID-19 by enacting legislation in July 2020 providing parents with an extension of up to ninety days of additional parental leave benefits for caregivers of children born in or after 2013 (children aged seven years or younger).²¹⁸ The permitted extension was available as long as Chile remained in a constitutional state of emergency due

²¹¹ *Coronavirus Resource Center, supra* note 180; Kathryn Mayer, *Biden Proposes \$325 Billion Paid Family Leave Program*, SOC'Y OF HUM. RES. MGMT. (Mar. 14, 2023), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/biden-proposes-325-billion-paid-family-leave-program.aspx>.

²¹² *Coronavirus Resource Center, supra* note 180.

²¹³ See Michael Comartin, *Canada's COVID-19 Update: More Provinces Enact Leave Laws*, NAT'L L. REV. (Mar. 28, 2020), <https://www.natlawreview.com/article/canada-s-covid-19-update-more-provinces-enact-leave-laws>.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Erika C. Collins et al., *COVID-19: Chile's New Law Extends Benefits for Some Parents*, NAT'L L. REV. (Aug. 13, 2020), <https://www.natlawreview.com/article/covid-19-chile-s-new-law-extends-benefits-some-parents>.

to COVID-19 and the law had not been repealed.²¹⁹ During the extended leave, employees would receive the same amount of paid parental leave benefits that they received during their initial period of leave, and it would be funded by a private insurer or through Chile's national health care system.²²⁰ Chile has suffered over 64,000 COVID-19-related deaths.²²¹

V. ADOPTING NATIONAL PAID FAMILY LEAVE IN THE UNITED STATES

As 84 percent of polled voters support a national paid family and medical leave policy that covers every worker, there is certainly demand for it in the U.S.²²² Current policies in place clearly are not meeting the demand because only 19 percent of civilian workers have access to paid family leave through their employers, and only a few states provide paid family leave—leaving millions of workers across the country to decide between caring for their families or receiving a paycheck.²²³ While opponents of a national paid family leave program may point out tax burdens or disruptions to the workplace,²²⁴ the long-term benefits—such as improved gender equality, pay disparities, worker productivity, public health, and overall economic growth—outweigh the short-term costs.²²⁵ Utilizing lessons learned from past legislation, primarily the FMLA, there is a path toward successfully enacting new legislation by emphasizing the success of state programs, taking advantage of a favorable political configuration, and building a strong, broad coalition of supportive interest groups.²²⁶

A. Costs of National Paid Leave

1. Tax Burdens

Rather than implementing a mandate on employers, most paid family leave programs are financed through some version of a payroll tax—which spreads the costs of providing leave over employees or employers or both.²²⁷ Workers ultimately bear the burden in the form of tax payments or lower

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Coronavirus Resource Center, supra* note 180.

²²² RHETORIC VS. REALITY, *supra* note 158, at 1.

²²³ *Id.*

²²⁴ *See infra* Part V(A).

²²⁵ *See infra* Part V(B); *see generally* NAT'L P'SHIP FOR WOMEN & FAMS., PAID FAMILY & MEDICAL LEAVE: GOOD FOR BUSINESS (Sept. 2018) (discussing how businesses benefit from paid family leave).

²²⁶ *See infra* Part V(C).

²²⁷ Harry J. Holzer, *Paid Family Leave: Balancing Benefits and Costs*, BROOKINGS INST. (Jan. 30, 2017), <https://www.brookings.edu/blog/social-mobility-memos/2017/01/30/paid-family-leave-balancing-benefits-and-costs/>.

wages, but the employers will bear some burden with respect to minimum wage workers, whose wages cannot be reduced further.²²⁸ Recall the U.S. state programs discussed in Part III(A): the California paid family leave program is financed by a 1.0 percent payroll tax; the Massachusetts program is financed by a tax of no more than 0.75 percent on eligible wages; and the Connecticut program is financed by a 0.5 percent payroll tax.²²⁹ These slight taxes create a minor burden for workers but an even smaller burden for employers as the tax is imposed directly on workers' wages.²³⁰

Nevertheless, any new policy proposal that will "complicate[] the tax code is sure to be criticized on those grounds."²³¹ Despite the rhetoric about the costs of paid leave programs, the U.S. states with these programs have all utilized an insurance model in which employees or employers or both make "small payroll contributions that provide a sustainable source of funding for workers' wage replacement benefits."²³² This model frames paid leave as an "earned benefit" that is "inexpensive, efficient, and inclusive."²³³ Some states have even reported a surplus in funds due to take-up rates being lower than expected.²³⁴ Most Americans appear to be willing to make the payroll contributions in order to receive the benefit: more than 70 percent of surveyed workers said they would be willing to contribute at least one cent for each dollar they earn, or one percent of wages, in order to fund a national paid family leave program.²³⁵

2. Disruptions to the Workplace

If employees have the right to return to their positions after taking paid leave, employers may experience a burden in maintaining the position during the absence.²³⁶ Employers may be forced to hire temps, whose wages they must pay and whose performance quality will vary.²³⁷ The FMLA provides unpaid, *job-protected* leave, so employers must find temporary replacements regardless.²³⁸ Moreover, it is worth noting that such disruptions would be infrequent as the birth of a child or a serious medical illness generally does not occur regularly.²³⁹

²²⁸ *Id.*

²²⁹ *See supra* Part III(A).

²³⁰ Holzer, *supra* note 227.

²³¹ FMLA CASE STUDY, *supra* note 143, at 12.

²³² RHETORIC V. REALITY, *supra* note 158, at 6.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Holzer, *supra* note 227.

²³⁷ *Id.*

²³⁸ *See supra* Part III(B).

²³⁹ ECONOMIC ADVISORS REPORT, *supra* note 155, at 16–17.

Evidence from states with paid leave programs suggests that such policies do not cause “undue interruptions in the workplace.”²⁴⁰ The majority of employers in California surveyed in 2010 reported that they usually temporarily reassign the work of leave-takers to other employees.²⁴¹ Other employers reported hiring temporary replacements to cover leave-takers, but this method was less common.²⁴² Most managers surveyed were able to cover the work of leave-takers with few issues, but sometimes the cost in overtime pay or payment to temp agencies was significant; however, regardless of family leave, businesses must have contingency plans in place for worker absences.²⁴³

B. Benefits of National Paid Leave

1. Increased Gender Equality in the Workplace

Paid family leave promotes gender equality in the workplace by preventing women from leaving the workforce permanently due to family caregiving. A study conducted by the Institute for Women’s Policy Research surveyed labor market participation among women in California and New Jersey before and after the states launched their paid family leave programs.²⁴⁴ The results revealed a 20 percent reduction in the number of female employees leaving their jobs in the first year after giving birth and up to a 50 percent reduction after five years in states that had implemented paid leave programs.²⁴⁵

The researchers also found that, over the long term, paid family leave “nearly closed the gap in workforce participation” between mothers with young children and women without.²⁴⁶ For those women without access to paid leave, nearly 30 percent exited the workforce within one year after giving birth, and 20 percent of women did not return to the workforce for more than a decade.²⁴⁷ In most U.S. households, the mother leaves the workforce temporarily after a child is born, so guaranteeing job security and providing partial wage replacement “encourage[s] her attachment to the workforce.”²⁴⁸

²⁴⁰ *Id.* at 17.

²⁴¹ MILKMAN & APPELBAUM, *supra* note 16, at 72.

²⁴² *Id.*

²⁴³ *Id.* at 77.

²⁴⁴ Stephen Miller, *Paid Family Leave, on the Rise, Helps Women Stay in the Workforce*, SOC’Y OF HUMAN RES. MGMT. (Jan. 15, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/paid-family-leave-helps-women-stay-in-the-workforce.aspx>.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*; see also Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J. L. & GENDER 1, 2 (2005) (“For women on the margin between working and staying home, the availability of

However, taking a leave that is too long in duration can have the opposite effect on gender equality than intended.²⁴⁹ Leave entitlements that exceed one year can weaken labor force attachment among mothers²⁵⁰ because such a prolonged absence may damage their abilities to advance in their careers and achieve promotions, which would result in wage penalties.²⁵¹ Long leaves are mostly taken by women and “can weaken their standing in the [labor] market and exacerbate gender inequalities” in the workforce and in the division of labor within the home and family.²⁵² Policy solutions that promote gender equality in the workplace and in caregiving responsibilities include providing adequate compensation, offering flexibility in taking leave, and allocating portions of leave as individual and non-transferable, rather than shared entitlements.²⁵³

Paid family leave increases women’s labor force participation after the birth of a new child, but women’s attachment to the labor force can still decline later in their careers if the leave policies do not allow them to manage their caregiving responsibilities in general for children, themselves, or family members—so paid leave in order to provide care, not just after the arrival of a child, is crucial.²⁵⁴ Family-friendly working arrangements for women and men help facilitate the return to work of mothers after family leave.²⁵⁵ To ensure the promotion of gender equality, it is imperative that paid leave provisions be gender neutral and available to both mothers and fathers.²⁵⁶ It is vital to remember that gender equality benefits women and men alike; after all, “[e]quality for women represents progress for all.”²⁵⁷

2. Ending the Cycle of Pay Disparities

Permitting private employers to provide paid leave benefits as a discretionary matter, as opposed to enacting a sweeping national policy,

paid leave may make market work more feasible and attractive, and as a result, increase their attachment to the workforce.”).

²⁴⁹ See CRS REPORT, *supra* note 13, at 14.

²⁵⁰ *Id.*; see also Lester, *supra* note 248, at 2 (“Very generous leave provisions might encourage such lengthy absences from the job as to undermine women’s development of human capital and connection to the workforce.”).

²⁵¹ ILO REPORT, *supra* note 26, at 8–9; see also Rossin-Slater & Stearns, *supra* note 14, at 82 (Paid leave longer than one year “could have adverse consequences for mothers’ long-term career opportunities.”).

²⁵² ILO REPORT, *supra* note 26, at 61.

²⁵³ *Id.* (“[S]tudies have shown that parental leaves which allocate non-transferable portions to the father lead to higher take-up by fathers than parental leaves that allow the parents to choose.”).

²⁵⁴ RHETORIC VS. REALITY, *supra* 158, at 3.

²⁵⁵ ILO REPORT, *supra* note 26, at 68.

²⁵⁶ *Id.* at 65.

²⁵⁷ *Id.* at ix.

perpetuates the cycle of pay disparities and class divisions.²⁵⁸ Access to employer-provided fringe benefits, such as paid family leave, is concentrated in the upper levels of the labor force.²⁵⁹ In other words, access to the leave increases with average wage levels; paid leave is limited for low-wage workers but significantly more accessible for people with the highest wages.²⁶⁰ The “most pronounced disparities in access to paid leave exist across education and wage levels.”²⁶¹ With respect to educational attainment, college-educated workers are twice as likely to have access to paid leave as workers without a high school degree.²⁶²

Regarding wage levels, full-time workers in the top income quartile are 1.7 times more likely to have access to paid leave as workers in the bottom quartile.²⁶³ According to a national survey conducted by the Bureau of Labor Statistics, only 16 percent of private sector employees had access to paid family leave through their employer in March 2018.²⁶⁴ Access to that leave was more prevalent among managerial and professional occupations, financial and technical service industries, high-paying occupations, and workers at large companies.²⁶⁵ Therefore, employees who do not work at multinational corporations such as Facebook, General Mills, or Deloitte—which is the majority of Americans—likely do not have access to paid family leave.²⁶⁶ Low wage replacement rates reinforce these class inequalities.²⁶⁷ Wage replacement rates that mirror a worker’s normal earnings allow low-wage earners to afford to take a longer period of leave.²⁶⁸ This pattern indicates that

²⁵⁸ See MILKMAN & APPELBAUM, *supra* note 16, at 8.

²⁵⁹ *See id.*

²⁶⁰ *Id.*

²⁶¹ ECONOMIC ADVISORS REPORT, *supra* note 155, at 12.

²⁶² *Id.* (72 percent versus 35 percent).

²⁶³ *Id.* (83 percent versus 50 percent).

²⁶⁴ CRS REPORT, *supra* note 13, at 2.

²⁶⁵ *Id.*

²⁶⁶ The congressional report states as follows:

Examples of companies that offer paid leave benefits for broader purposes include General Mills, which (starting in 2019) is to offer salaried and non-union production employees 18-20 weeks of fully compensated maternity leave for birth mothers, 12 weeks of parental leave, 2 weeks of caregiver leave (for the care of an immediate family member with a serious health condition), and up to 4 weeks of bereavement leave; Facebook, which in 2017 extended paid leave to those providing care to a sick family member (three days for short-term illness and six weeks for serious illness) and to bereavement (20 days for an immediate family member and 10 days for extended family); and Deloitte, which offers its employees up to 16 weeks of paid leave for family caregiving.

CRS REPORT, *supra* note 13, at n.4.

²⁶⁷ POLITICS OF PARENTAL LEAVE, *supra* note 22, at 44.

²⁶⁸ *Id.*

the burden of having to take unpaid leave for childcare or caregiving falls more heavily on the shoulders of low-wage workers, whereas the higher earners—who are likely more capable of affording to take unpaid leave—attain the benefit of paid leave.²⁶⁹ As low-wage workers are forced to take unpaid leave while high-wage workers can obtain paid leave, the well-known aphorism remains true: the rich get richer and the poor get poorer.²⁷⁰

3. Increased Worker Retention, Productivity, and Morale

By enabling employees to take short-term leave as opposed to dropping out of the labor force altogether, employers enjoy the long-term productivity benefits of improving recruitment, worker retention, and motivation.²⁷¹ Research suggests that paid leave programs can benefit employers by decreasing costly worker turnover and “minimizing loss of firm-specific skills and human capital, as well as boosting morale and worker productivity.”²⁷² When mothers return to their jobs after giving birth, instead of quitting permanently, employers save the expense of recruiting and training replacements.²⁷³

Studies indicate that employee turnover costs businesses about one-fifth of a worker’s salary to replace that worker.²⁷⁴ Replacing workers is costly because of the lost productivity when someone leaves the job, the cost of hiring and training the new employee, and the cost of slower productivity until the new worker becomes acclimated to the new job.²⁷⁵ Skilled-labor jobs that require higher levels of education and specialized training experience even higher turnover costs.²⁷⁶ For instance, the passage of FEPLA—providing paid family leave for certain federal workers—is expected to save the U.S. federal government \$50 million in costs related to employee turnover.²⁷⁷ Some employers in a California survey reported they considered low-wage workers to be dispensable, so they were less concerned with reducing turnover, but turnover costs can still be substantial for hourly employees, “varying from about \$4,000 to \$8,000 per employee.”²⁷⁸ Ninety-five percent of the

²⁶⁹ *See id.*

²⁷⁰ *See id.*

²⁷¹ ECONOMIC ADVISORS REPORT, *supra* note 155, at 4.

²⁷² *Id.* at 17.

²⁷³ *Id.*

²⁷⁴ HEATHER BOUSHEY & SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, THERE ARE SIGNIFICANT BUSINESS COSTS TO REPLACING EMPLOYEES (Nov. 16, 2012).

²⁷⁵ *Id.* at 5.

²⁷⁶ *Id.* at 2.

²⁷⁷ Sarah Jane Glynn, *The Rising Cost of Inaction on Work-Family Policies*, CTR. FOR AM. PROGRESS (Jan. 21, 2020), <https://www.americanprogress.org/issues/women/news/2020/01/21/479555/rising-cost-inaction-work-family-policies/>.

²⁷⁸ MILKMAN & APPELBAUM, *supra* note 16, at 87.

respondents in the California survey who took family leave returned to work after, and over four-fifths of them returned to their same employer.²⁷⁹

4. Improved Public Health

Policies that benefit parents and caregivers benefit children.²⁸⁰ When new mothers are forced to return to work without taking leave, children can experience higher rates of infant mortality, lower rates of breastfeeding, and lower rates of immunization.²⁸¹ Researchers have found a positive impact of leave on infant outcomes.²⁸² Paid family leave allows parents to better care for their children and monitor their health, and there is evidence that children experience shorter hospital stays when their parents can stay home to provide care.²⁸³ There is even evidence that paid leave policies can have long-term benefits for the children of leave-takers, including “higher educational attainment, lower teen pregnancy rates, higher IQ rates, and higher earnings in adulthood.”²⁸⁴ Paid family leave can also improve maternal postpartum physical and mental health as well as parent-child bonds.²⁸⁵ The implementation of California’s paid family leave program is linked with “lower rates of being overweight, attention deficit hyperactivity disorder, and hearing problems in Kindergarten.”²⁸⁶

Research suggests that providing twelve weeks of job-protected paid leave would cause almost 600 fewer infant and post-neonatal deaths per year.²⁸⁷ Additionally, more time at home with newborns and infants allows parents to breastfeed, attend doctors’ appointments, and ensure their children receive immunizations.²⁸⁸ Paid leave leads to prolonged breastfeeding, which, in turn, decreases childhood infections.²⁸⁹ Research in California also showed that paid leave can prevent child maltreatment, likely by “reducing risk factors such as parental stress and depression.”²⁹⁰ Reliance on private and public health expenditures can decrease if parents can attend to their children’s early

²⁷⁹ *Id.* at 101.

²⁸⁰ See NAT’L P’SHP FOR WOMEN & FAMS., THE CHILD DEVELOPMENT CASE FOR A NATIONAL PAID FAMILY AND MEDICAL LEAVE PROGRAM (Dec. 2018) [hereinafter *Child Development Report*].

²⁸¹ See Family and Medical Insurance Leave Act, H.R. 1185, 116th Cong. § 2(a)(12) (2019).

²⁸² ECONOMIC ADVISORS REPORT, *supra* note 155, at 8.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Rossin-Slater & Stearns, *supra* note 14, at 79.

²⁸⁶ *Id.* at 80.

²⁸⁷ CHILD DEVELOPMENT REPORT, *supra* note 280.

²⁸⁸ *Id.*

²⁸⁹ *Id.* (New mothers in low-income families who use the New Jersey paid leave program breastfeed one month longer than those who do not use the program).

²⁹⁰ *Id.*

medical needs and illnesses.²⁹¹ The idea that benefits to children have a “broader value to society” justifies government-mandated paid leave policies.²⁹² Caring for children is a “collective concern because it is an investment in the future of society: healthy, well-adjusted children will eventually become good citizens and workers.”²⁹³

5. Mitigation of Lost Wages and Overall Economic Growth

Working families in the U.S. lose an estimated \$20.6 billion in wages each year due to a lack of access to paid family and medical leave.²⁹⁴ Because of the hardship of forgoing wages, workers shorten their time away from work or even decline to take the necessary leave, and a significant number of workers without access to paid leave “resort to public assistance for support during family leaves.”²⁹⁵ Paid leave benefits the economy as a whole because it helps workers “stay in jobs that are a good match for them and where they have developed skills”—which improves productivity.²⁹⁶ Increased productivity combined with improved labor force participation strengthens economic growth.²⁹⁷

Paid leave can even reduce reliance on public assistance programs: women who return to work after taking paid leave are 40 percent less likely to receive public assistance in the year after giving birth than those who do not take leave.²⁹⁸ There are also broad repercussions internationally to not providing paid family leave: research indicates that the major reason why the U.S. fell from sixth among OECD countries in female labor force participation in 1990 to seventeenth in 2010 is the U.S.’ failure to adopt such family-friendly policies.²⁹⁹

C. Strategies for a Solution

1. Success of State Models

The U.S. has a history of using states as “laboratories for public policy making, in that state-level experiments often come to inform the crafting of

²⁹¹ *Id.*

²⁹² Lester, *supra* note 248, at 19.

²⁹³ *Id.*

²⁹⁴ Family and Medical Insurance Leave Act, H.R. 1185, 116th Cong. (2019); *see also* Glynn, *supra* note 277.

²⁹⁵ Lester, *supra* note 248, at 3.

²⁹⁶ JOINT ECON. COMM., THE ECONOMIC BENEFITS OF PAID LEAVE: FACT SHEET 2.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 3.

federal legislation.”³⁰⁰ Also considered “laboratories of democracy,” state programs are the necessary first step to experiment with new federal policies because there must be some evidence that the policies work before implementing them nationally.³⁰¹

A survey of employers affected by the California paid family leave program discovered that over 90 percent of employers reported either a positive effect or no noticeable effect on profitability, turnover, and morale after implementation of the program.³⁰² The California program also demonstrated a positive impact on gender inequality, resulting from increased male participation in caregiving.³⁰³ Californians who used the paid leave program to bond with a new child or care for an ill family member reported improved economic, social, and health outcomes than those who did not use the program.³⁰⁴ These leave-takers also experienced an increased likelihood of returning to their employers after taking leave.³⁰⁵

These positive outcomes indicate that the state’s program is working as intended by improving gender equality, health outcomes, and workplace attachment.³⁰⁶ As the most populous U.S. state, California provides several lessons for policymakers, including that paid leave can be offered to virtually all employees (including low-wage workers and part-time workers) without seriously disrupting business operations.³⁰⁷ Moreover, one reason eligible Californians do not take advantage of the program is fear of retribution from their employers—such as losing out on promotions and being fired—so a national paid leave program should make such employer retaliation or discrimination against leave-takers illegal.³⁰⁸ Research from leave-takers in California and New Jersey, revealing a 20 percent reduction in the number of women leaving their jobs in the first year after giving birth and up to a 50 percent reduction after five years in states with paid leave programs, illustrates the positive impact of paid leave on keeping women attached to the labor force.³⁰⁹

Programs abroad also demonstrated success in improving gender equality: the number of Québécois fathers taking leave dramatically increased after the Québec program started—from 32 percent of eligible fathers in 2005, under the federal EI program, to 56 percent in 2006, under QPIP.³¹⁰ After

³⁰⁰ MILKMAN & APPELBAUM, *supra* note 16, at 15.

³⁰¹ See FMLA CASE STUDY, *supra* note 143, at 8.

³⁰² ECONOMIC ADVISORS REPORT, *supra* note 155, at 17.

³⁰³ MILKMAN & APPELBAUM, *supra* note 16, at 53.

³⁰⁴ *Id.* at 95–96.

³⁰⁵ *Id.* at 96.

³⁰⁶ *Id.* at 53, 95–96.

³⁰⁷ *Id.* at 114.

³⁰⁸ *Id.* at 117.

³⁰⁹ Miller, *supra* note 244.

³¹⁰ POLITICS OF PARENTAL LEAVE, *supra* note 22, at 38.

Canada extended its federal leave provision to thirty-five weeks of paid leave, the proportion of women returning to work after a year off soared from 8 percent in 2000 to 47 percent in 2001.³¹¹

2. Political Configuration

Among the broad population, there is a “weaker relationship between political identification and attitudes toward family leave.”³¹² In a November 2012 national election night poll, 86 percent of voters thought lawmakers should consider new paid family and medical leave laws—with 73 percent of Republicans, 87 percent of Independents, and 96 percent of Democrats agreeing that this was an important issue.³¹³ This pattern of public support contradicts the popular idea of market fundamentalism—or “the idea that society as a whole should be subordinated to a system of self-regulated markets.”³¹⁴ Work-family legislation could be the exception to the belief that government-sponsored social programs are abhorrent to the majority of Americans.³¹⁵ Beyond the preference for self-regulated markets, social legislation is particularly difficult to enact in the anti-government climate of the twenty-first century.³¹⁶ The issue of paid family leave “transcends the usual Left-Right divisions”; liberals support it as part of the “government’s obligation to provide an economic safety net for working families,” and conservatives support it as “a form of state support for ‘family values.’”³¹⁷

Despite the interest in paid family leave on both ends of the political spectrum, a situation where “Democrats hold power may be a necessary condition of success” for this type of legislation.³¹⁸ The California legislature had a Democratic majority when it passed its paid family leave law.³¹⁹ The FMLA was first drafted in 1984 during the Reagan Administration, but because the Senate was under Republican control, there was “no chance” of passing the bill during that Congress.³²⁰ Proponents of the FMLA even thought it was impossible to enact the law until the political configuration in the Capitol consisted of a Democratic House, Democratic Senate, and a Democratic president,³²¹ as was the case when President Clinton signed the

³¹¹ Katherine Marshall, *Parental leave: More Time off for Baby*, STATS. CAN. (Mar. 2003), <https://www150.statcan.gc.ca/n1/pub/11-008-x/2003003/article/6702-eng.pdf>.

³¹² MILKMAN & APPELBAUM, *supra* note 16, at 17.

³¹³ *Id.* at 18.

³¹⁴ *Id.*

³¹⁵ *Id.* at 19.

³¹⁶ *Id.* at 21.

³¹⁷ *Id.* at 107.

³¹⁸ *Id.* at 19.

³¹⁹ *Id.*

³²⁰ FMLA CASE STUDY, *supra* note 143, at 4.

³²¹ *See id.* at 9.

FMLA into law in 1993. The political alignments of the co-sponsors of the FAMILY Act and FEPLA, overwhelmingly Democratic, indicate that Democrats are the ones initiating paid family leave reform.³²²

Luckily—for advocates of a national paid family leave policy—history seemed to repeat itself in the year 2021. After the events of the Senate runoff elections in Georgia, Democrats took narrow control of the Senate, and combined with Democratic control in the House of Representatives, Democrats had control of Congress and the White House for the first time since 2011.³²³ This configuration, eliminating congressional gridlock based on party lines, is advantageous for proponents of a new paid family leave policy.³²⁴ A Democratic majority is a necessary but not sufficient condition for passage of a law such as paid family leave; successful legislation still requires organization of a variety of interest groups into a broad coalition.³²⁵

3. Coalition-Building

Building a strong alliance of support from interest groups with varying needs is crucial to passing narrow social legislation, especially to overcome opposition from the business lobby.³²⁶ In order to enact its paid family leave program, activists in California assembled a broad coalition that featured women’s organizations, child advocates, senior citizens’ groups, medical practitioners, labor unions, and a few business owners.³²⁷ The coalition in California consisted of over 700 organizations and individuals, including advocates from the American Association of Retired Persons (“AARP”), the National Organization for Women, Planned Parenthood, the American Association of University Women, the Children’s Advocacy Institute, the American Academy of Pediatrics, and more.³²⁸ One of the critical factors that led to the parental leave program in Québec was also strong mobilization by trade unions, including the women’s committees within the largest unions, women’s groups, and progressive family groups.³²⁹

³²² See *supra* Part III(B).

³²³ Deirdre Walsh & Kelsey Snell, *Democrats Take Control of Senate With Twin Georgia Victories*, NAT’L PUB. RADIO (Jan. 6, 2021, 6:07 PM), <https://www.npr.org/2021/01/06/953712195/democrats-move-closer-to-senate-control-as-counting-continues-in-georgia> (The Senate would be split 50-50 between the two parties, with Vice President Kamala Harris providing the tie-breaking vote.).

³²⁴ See MILKMAN & APPELBAUM, *supra* note 16, at 107.

³²⁵ *Id.* at 19–20.

³²⁶ See *id.* at 37.

³²⁷ *Id.* at 20, 38.

³²⁸ *Id.* at 37.

³²⁹ POLITICS OF PARENTAL LEAVE, *supra* note 22, at 46.

When the FMLA was first drafted, it was initially scoffed at as a “girl” bill, but public support grew with the support of labor union members.³³⁰ The National Partnership for Women & Families (“National Partnership”) wrote the first draft of the bill and organized the coalition.³³¹ Aside from the expected support of women, labor unions, child advocates, senior citizens’ groups, and disability advocates, the National Partnership also garnered the support of an unlikely ally: the U.S. Catholic Conference (“USCC”).³³² The USCC was at odds with the pro-choice women’s group of the National Partnership, but the unexpected support was due to strategic framing.³³³ A focus of the anti-abortion movement was to provide incentives for women to choose not to abort, and because the FMLA would provide job-guaranteed leave, pro-life supporters and members of Congress could not oppose the bill.³³⁴ Job security acted as an incentive against abortion because women would not have to fear losing their jobs if they carried the baby to term.³³⁵

Another strong supporter of the FMLA coalition was the AARP because its members stood to benefit from the bill if they required leave to recover from their own serious health issues.³³⁶ Once the bill proposal was amended to include eldercare leave, the AARP expended significant lobbying resources because the amended bill would allow the working adult children of elderly people to take leave to care for them.³³⁷ The coalition for the FMLA also included two key labor unions: the Service Employees International Union and the American Federation of State, County and Municipal Employees.³³⁸ Both had large female memberships and were crucial in “providing financial resources, interest group coordination, and personnel for the lobbying drive.”³³⁹ The FMLA campaign had strong support from the National Organization for Women and other feminist organizations as well.³⁴⁰

The success of the FMLA campaign certainly was influenced by the broad coalition of diverse supporters,³⁴¹ but the campaign also benefitted from strategic framing in the media and the political configuration of the legislature. Previously called a “girl” bill, the campaign developed a values-based message summarized by the slogan, “[e]mployees shouldn’t have to

³³⁰ FMLA CASE STUDY, *supra* note 143, at 4.

³³¹ *Id.* at 5.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 5–6.

³³⁵ *See id.* at 5.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ MILKMAN & APPELBAUM, *supra* note 16, at 24.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *See* FMLA CASE STUDY, *supra* note 143, at 6.

choose between the jobs they need and the families they love.”³⁴² Because of that messaging, it became more difficult for social conservatives to argue that “job needs should trump family needs.”³⁴³ If paid family leave proponents hope to achieve a new policy, they need to garner support from similar interest groups that would all stand to benefit from family, caregiving, or medical leave.³⁴⁴

VI. CONCLUSION

Each worker, at some point in his or her life, may need to take time away from work to care for themselves or a family member or to welcome a new child.³⁴⁵ The vast majority of Americans support a national paid family and medical leave policy.³⁴⁶ National paid family leave would benefit American families, businesses, and the economy as a whole because “making full use of American talent requires policies that let workers better balance their family lives.”³⁴⁷ Evidence of success from programs at home and abroad, as well as research indicating improvements to gender equality, pay disparities, worker productivity, public health, and the overall economy as a result of paid family leave provide the blueprint. Those far-reaching benefits greatly outweigh the minimal potential costs of tax burdens and workplace disruptions. As a government by and for the people, the U.S. should enact a national paid family leave policy, unless it would prefer to remain the pariah of the developed world.

³⁴² *Id.* at 7.

³⁴³ *Id.*

³⁴⁴ *See generally id.*

³⁴⁵ *See* RHETORIC VS. REALITY, *supra* note 158, at 1.

³⁴⁶ *See id.*

³⁴⁷ ECONOMIC ADVISORS REPORT, *supra* note 155, at 22.