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## An Assessment of Family and Medical Leave Policy

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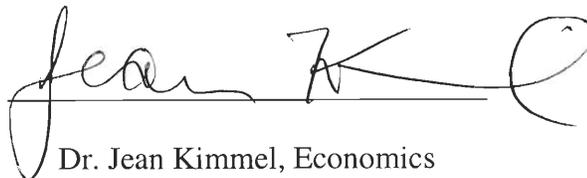
## THE CARL AND WINIFRED LEE HONORS COLLEGE

### CERTIFICATE OF ORAL EXAMINATION

Stefanie Wilde, having been admitted to the Carl and Winifred Lee Honors College in Fall 2002, successfully presented the Lee Honors College Thesis on April 25, 2006.

The title of the paper is:

"An Assessment of Family and Medical Leave Policy"



Dr. Jean Kimmel, Economics



Dr. Dan Farrell, Management



Ms. Melissa Robinson, Denso Manufacturing Michigan

**An Assessment of Family and Medical Leave Policy**

Stefanie A Wilde

Lee Honors College Senior Thesis

## **An Assessment of Family and Medical Leave Policy**

### **Definition**

The US Family and Medical Leave Act (Public Law 103-3, or 29 CFR 825) and similar policies throughout the world, such as maternity leave policies (PL507 Rev 4) in the UK, or Maternity and Parental leave in Canada (Part III of the Canada Labour Code), are policies that require employers to provide an employee with a period of leave for the birth or adoption of a child, family and dependant health needs, or personal illness. Under these acts, typically the employer must allow the employee to return to the same position or a position similar to that held before taking the leave. In the United States, an employee is entitled to up to 12 weeks of leave in a year's time. The employee is also entitled to be restored to the position held by the employee when the leave commenced; or to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment (1995).

The major events that usually qualify an employee for this leave include the birth of a child, the placement of an adopted child, medical care of a family member, including a child, spouse, or parent, or for the employee's own serious health condition, because this condition makes the employee unable to perform the functions of his or her job. This can also include personal injury, whether it took place on or off the job.

The FMLA does have several restrictions for eligibility. The employer must have 50 or more employees located within 75 miles of the worksite. The employee must have worked for that employer for at least 12 months. During the past 12 months, the employee must also have worked at least 1,250 hours (an average of 25 hours/week). Upon returning from the leave, the

employee is entitled to be restored to the same or an equivalent position with equivalent pay, benefits, and working conditions.

Another restriction is that of the key employee. A "key employee" is defined as "a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite" (1995). In the case of a key employee, the employer has the right to determine that "substantial and grievous economic injury" will result from reinstatement of the employee to his or her previous position from the FMLA leave. If this is determined, the employer may decide to deny reinstatement if the employee does not return to work from the leave within a reasonable period (1995).

The employer is also entitled to at least 30 days advance notice where feasible, such as in the birth or adoption of a child. They can also request that vacation time be used before FMLA can be applied. The employer may also have the right to request documentation from a health-care professional to substantiate the need for the leave, or to request a certification of fitness to return to work when the employee has recovered from their own serious health condition (1995).

### **Importance**

Based on a survey by the Employment Policy Foundation in Washington, D.C., the costs of FMLA compliance added up to an estimated \$21 billion in 2004 (Henthorne 2005). These costs to employers include labor replacement costs, continuation of health benefits, and lost productivity. The survey also found that 14.5 percent of employees took FMLA leave in 2004, with 35 percent of those taking the leave more than once. The flexibility allowed by the FMLA's "serious health condition" provision and intermittent leave availability make the FMLA subject to possible misuse and abuse by employees. At present, 30 percent of FMLA leave is

intermittent leave "comprising shorter periods of leave, sporadically throughout the year and without prior notice to employers." Also, under current law, an employee may be absent for up to 2 days before informing his or her employer that the absence was an FMLA leave, allowing some employees to use FMLA to protect themselves against employer discipline for missed work that may not actually be FMLA-eligible (Henthorne 2005). FMLA has been a topic in recent news debates, as the UK works to increase the protections that their family and medical leave systems provide. Similarly, several US states have recently adopted their own provisions which increase the protections given under the Act.

### **Related Concepts**

FMLA is related to several other pieces of US legislation that came about prior to 1993. One such piece of legislation is the Pregnancy Discrimination Act of 1978. This Act prevents discrimination based on pregnancy, childbirth, and related medical conditions. It also requires employers to hold open a job for a pregnancy related absence the same length of time jobs are held open for employees on sick or disability leave (2006).

Several amendments to ERISA (Employee Retirement Income Security Act) also have provisions that relate to some of the protections under FMLA. The Health Insurance Portability and Accountability Act (HIPAA), an act which prohibits preexisting health condition exclusions from group health insurance plans, allows for enrollment in health plans (even for those not previously covered) for newborns and their families, as the birth of the child is considered a "special enrollment". Also, under HIPAA an insurance issuer cannot refuse to pay benefits by imposing a preexisting condition relating to pregnancy. Another amendment, referred to as the "Newborns' Act", prohibits a group health plan, health insurance company, or health

maintenance organization (HMO) from restricting benefits for a hospital stay in connection with childbirth to less than 48 hours (2004).

FMLA is somewhat different from short term disability, although they are often categorized together. Short term disability is limited to an individual being substantially limited in performing a major life function. A serious health condition, as defined under FMLA, could also be considered to limit a major life function, and therefore also be considered eligible for STD. Pregnancy-related health conditions can also be eligible for STD. However, short-term disability typically does not cover the need for dependant care, or for parenting needs after childbirth that do not impact the health of the mother. It also has no relation to adoptive placement. Pregnancy-related health conditions, such as a difficult pregnancy that requires a form of bed rest keeping the mother away from work, could be eligible for STD, but based on the restrictions of the employer, could be required to run concurrently with FMLA leave. This means that while employers with short term disability coverage typically offer some form of wage replacement, many employers will still only grant up to 12 weeks of total leave.

## **History**

As more and more households become dual career and more and more fathers begin to take over primary child care responsibilities in the home, changes in this family unit required Congress to begin to examine the need for legislation that accommodated the work-life balance of these working parents. In order to allow both fathers and mothers to participate in childrearing, it was necessary to adjust such employment standards as the Pregnancy Discrimination Act, as it applied only to a single gender and had serious potential for encouraging discrimination. Congress wanted to put standards in place that would prevent

working parents from being forced to choose between caring for their families and their job security, and also to put more job security in place for those employees who may have serious health conditions (1995). In the 1992 election, Clinton included the concept of an FMLA policy in his campaign promises. The bill was drafted by the National Partnership for Women and Families, the same group that was also instrumental in passing the Pregnancy Discrimination Act of 1978. Following his successful election, Clinton quickly signed the act into law.

The Family and Medical Leave Act became effective on August 5, 1993. The purpose of this act was originally to “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” (1995). It was intended to benefit both employees and their employers, citing a link between stability in the family and productivity in the workplace, and a “comparatively small cost” of guaranteeing stable workplace relationships (1995).

## **Comparisons**

When comparing this policy with the family and medical leave policies of other developed countries around the world, it becomes apparent that there are great differences in how they are structured, including the duration of the leave, eligibility for the leave, and the issue of wage replacement. A primary focus would be specifically that of maternity leaves. All western European countries currently offer a minimum of three months of maternity leave with at least some degree of wage replacement (Ruhm 1997). Some countries, including Finland, Sweden, and Germany, provide a year or more (Ruhm 1997). Currently, the only industrialized countries with no national form of paid leave are the United States and Australia (Grant 2005).

The current policy in the UK has been under some debate as officials look to extend the benefits of the present leave. Under the current policy, mothers in the UK have a right to take up to 26 weeks of leave under normal conditions (regardless of length of employment), and may qualify for an extended leave if she has completed 26 weeks of continuous service with her present employer. Not only is this leave a great deal longer than that of the US, but the economic entitlement is also very different: For an employee with 26 weeks' continuous service with her employer into the 15th week before the week her baby is due, six weeks of the leave are paid at 90% wage replacement of weekly average earnings. The remaining 20 weeks are then to be paid at £106 or 90 per cent of her average weekly earnings if that is less than the flat rate. Women without 26 weeks of continuous service are paid for 26 weeks at a flat rate of £106 or 90 per cent of her average weekly earnings if that is less than the flat rate. Eligible male employees are also entitled to paid paternity leave, two weeks at the same rate of £106 or 90 per cent of average weekly earnings (2005).

## **II. Individual State Provisions:**

### **Massachusetts**

Some states have taken their own measures to provide where the FMLA falls short. In Massachusetts, the Small Necessities Act was enacted in 1998 to provide for certain other family obligations that do not normally fall under the provisions of FMLA. While the eligibility requirements are much the same as the FMLA, the SNLA is a 24 hour block of leave time that

can be used in addition to the 12 weeks of FMLA leave, and can be taken intermittently or all in one period (1998). Examples of uses of SNLA include:

- Participation in school activities of a child. Activities must be "directly related to the educational advancement" of the child, such as parent-teacher conferences.
- Accompanying a son or daughter to routine health care appointments.
- Accompanying an "elderly relative" (defined as an individual at least sixty years of age related to the employee by blood or marriage) to routine health care appointments.
- Accompanying an elderly relative to an appointment for professional services related to the individual's care, such as interviewing at a nursing home or group care facility.

If the employee is aware that SNLA leave will be necessary, the employee must provide at least three days' notice before the leave is to begin. If the need for SNLA leave is not foreseeable, the employee must provide notice as possible. Employers may require supporting documentation with a request for leave.

## **Vermont**

Vermont also issued a similar law in 1998 that entitles workers to "short-term family leave" that provides 4 hours in any 30-day period to provide for medical emergencies involving the employee's child, or the employee's parent, spouse, or parent-in-law (2006). This leave may also be used for some school activities, routine medical and dental appointments, or other professional services for health and family purposes, similar to the Massachusetts law.

## California

California's provisions are the most inclusive of all states in the US. California is the only state to offer some paid leave for the purpose of family and medical care. California began offering paid family leave on July 1, 2004 (2005). The California Family Rights Act is concurrent with the Family and Medical Leave Act, and provides for Paid Family Leave (PFL), also known as Family Temporary Disability Insurance (FTDI). While FMLA allows for 12 unpaid weeks in a 12 month period, the coverage of the PFL gives the employee 6 of those weeks paid. Wage replacement is paid at approximately 55% of base period earnings up to the maximum benefit amount (in 2005, the maximum was \$840). Acceptable reasons for use of the PFL include:

- Bonding with employee's own child or the employee's domestic partner's child.
- Bonding with a child placed for adoption or foster-care with the employee or the employee's domestic partner.
- Caring for a seriously ill child, parent, spouse or domestic partner of the employee.
- If employees quit their jobs to care for themselves or an individual covered by the law

The Family Temporary Disability Insurance is funded through employee payroll deductions as a part of the State Disability Insurance programs (Dube 2002). This resulted in an increase of 0.08 percent in the payroll reductions in order to fund the program. While the immediate costs of this program are not burdens on the employer, they may face other implications of this law, such as the costs of administering the program, hiring and training

replacement workers, or rising overtime cost of existing workers who cover for their co-workers out on leave (Dube 2002).

### **III. Effects of Existing FLMA Legislation**

#### **Economic Effects on the Employee**

Family and medical leave policies have often been at the center of heated economic debates. While some theorists believe that these policies are beneficial to the overall economy of a country, several others believe that these policies can prove to be extremely detrimental to the economic health of a society. Family and medical leave has an extremely important impact on the wages and employability of working women. It is also an important economic factor in the health of business organizations who employ a great deal of women of childbearing age.

Due to the variability of different reasons for which employees may choose to take a family or medical leave, it is difficult to measure the economic impact of all types of leave. Therefore, the remainder of this paper will focus primarily on leaving work for the birth or placement of a new child. While one's own personal illness is the most common reason for taking FMLA leave in the US, there often very little consistency between one person's reason for leave and another's. Childbirth and placement is more easily used for an economic comparison due to the fact that childbirth is a common occurrence, while also being a health case that is unique and identifiable from other reasons for taking leave. It is also the second most common reason for FMLA leave in the US, accounting for twenty-three percent of leave (2003).

There are several economic theorists who have established a positive correlation between the ability for women to take FMLA leave for childbirth, and a general increase in

positive economic effects, including an increase in women's overall wages and an increase in their labor force participation.

### **Economic Effects on the Employer**

In the 2000 FMLA report conducted by the US department of labor, it was shown that 23,830,305 employees took FMLA-qualified absences from work. Of these taking leaves, the majority of the leaves (about 42%) took between 4 and 10 days off from work (2003). The costs to employers to cover for these workers who are off on leave, can still be quite high, even though the leave is unpaid. Most often, work is assigned to other employees (in over 55 percent of all cases), which can result in increased overtime costs for the workers who cover for the FMLA absence (2003). The costs of hiring and training possible replacement workers, as well as the administrative costs of maintaining the FMLA program, in addition to the costs of continuing benefits, including health plans, during leave must all be considered in the economic impact on the employer as a direct result of FMLA supported leaves.

These costs are also steadily increasing as the years pass, especially with the ever-mounting costs of health care. When employers were surveyed about how their costs have changed since the FMLA program began, 43.4% believe there was an increase in administration costs, 28.1% believe there was an increase in benefit cost, and 22.5% saw a perceived increase in hiring and training costs (2003).

### **Sociological Effects on Parent and Child's Well-Being**

Many child development experts have studied the effect of parental leave policies and of substitute-care programs on young children and on the parent-child bond. Most seem to support

the belief that the first three years in a child's life are critical to all major aspects of development, as well as in forming a lasting bond between parent and child (Kaplan 1991). With steadily rising costs of living, it is becoming more common to have two working parents in the household, and less likely that either parent will drop completely out of the workforce to care for the child during these three years. The Family and Medical Leave Act allows for one parent to leave the workforce for a short period of time, but are these 12 weeks enough to be of significant benefit to newborn children? Countries such as Norway and Finland allow workers to take leave for up to three years if desired. A study conducted by Winegarden and Bracy found that entitlement to paid leave is negatively correlated with infant mortality rates (Winegarden 1995). Other studies have shown that maternal employment during the first year following a child's birth appears to negatively affect cognitive test scores and lead to an increased likelihood of behavioral problems later in the child's life (Ruhm 2000). The well-being of children in the United States is one of the biggest reasons why many organizations are supporting the increase in protections and benefits under the Family and Medical Leave Act.

#### **IV. Possible Changes to the US's FMLA**

##### **A case for increasing FMLA provisions**

Supporters of adding greater coverage under the Family and Medical Leave Act often use the effects on the children as their main focus to bring about changes. These supporters wish for the length of the leave to be increased, as it is in most all other industrialized nations, in order to ensure more effective child care and development and a greater parent-child bond. As the

OECD (Organization for Economic Cooperation and Development) average for childbirth-related leave is 10 months, the United States falls well below that (Waldfogel 2001).

Many also support the addition of some formal wage replacement system. As the United States and Australia are currently the only two industrialized nations with no form of paid parental leave, it could be seen as a strong economic benefit to employees and a strong incentive for women of child-bearing age to enter and remain in the labor market, rather than staying at home (Waldfogel 2001). As a result, it could have a long-term effect on reducing the female wage gap, as women would be less likely to lose their earning potential during their time outside of work. It would allow parents to take leave who previously may not have been able to afford it, resulting in another benefit to children. On the state level, this idea has been widely identified as a possibility, with 28 different states introducing bills with some form of paid leave (Dube 2002). Supporters of these bills emphasize a savings in a decreased reliance on public assistance programs and increased employee retention. The programs are funded with the State Disability Insurance program, resulting in a mere 0.2% increase in employee payroll taxes, shared between employees and employers (Dube 2002).

Several organizations are also seeking an expansion of FMLA in order to cover a greater number of workers. Currently, only organizations with 50 or more employees are required to comply with FMLA legislation. The American Association of University Women (AAUW) is one such organization that is seeking to “lower the eligibility threshold from 50 employees to 25 or more” (2004). Currently, only about 60% of the labor force works for organizations covered by FMLA regulations, and so many workers are not able to use the existing benefits of the FMLA.

## **A case for limiting FMLA provisions**

Many employers feel that several changes are necessary the FMLA, as the law as it currently stands is open to a good deal of interpretation and often faces serious misuse by employees. High administration costs also lead to FMLA being somewhat of a burden on employers.

One proposed change is to define a “serious illness” as covered by the law in order to prevent those with less critical health issues from taking leave when it truly isn’t warranted (Lewis 2005). Also being considered is a provision that would allow employers to contact doctors of employees applying for FMLA leave to confirm that claims of chronic illness are indeed valid. Some companies are also seeking to define a “serious illness” as a medical condition that would require at least 10 days recovery time. An objection to this change is that while a serious medical condition such as appendicitis might require 10 days recovery in one patient, another may be ready to return to work in 7 or 8, but be required to take the 10 days in order to qualify for protection under the leave. This is aimed at reducing misuse by the employee who is constantly taking days off at will with complaints of a migraine headache or an ingrown toenail.

A major change that is being proposed is to enact a minimum amount of intermittent leave that can be taken at one time. Currently, an employee who may need to leave work for treatment, such as cancer treatments, kidney dialysis, or prenatal care appointments may use hours from their leave period as needed to provide for such care. New recommended changes to the FMLA would require a minimum of a four-hour block to be used for these intermittent appointments. Employers believe that this would aid them in tracking use of FMLA hours, as it would follow a standard schedule, and therefore reduce administration costs. However, many

opponents of the changes believe that it would cause many employees to exhaust their leave benefits sooner than would be necessary under the current legislation.

## **V. Conclusions**

In examining the arguments made for and against different proposed changes to FMLA legislation, it is apparent that some change should be expected in our current FMLA policy. There are very apparent shortcomings in the existing Act that were not anticipated with the current regulations, and both those for expansion of the protections and those for limiting the applications have several valid points in their arguments.

As has been shown with California's recent addition of wage replacement for family and medical leave, it would be greatly beneficial to implement such a program at the Federal level. While the program has not really been in place long enough to study long term effects on things such as child development or labor market impact, a brief comparison to other countries who offer wage replacement can show the benefits that such a program could provide. So far the program has been very successful and would only require very modest funding, a small price to pay for the benefits of better health and development of children, as well as a higher standard of living for the people who need it most.

The length of the leave must also be increased to remain beneficial. While the OECD average is 10 months, this may not be a practical figure for the U.S. The strength of industry and demand for service and business would make a leave of that length impractical from an

employer's standpoint. A shorter duration of leave, approximately 6 months, would be beneficial both to employees and employers in the U.S.

The current systems in place in the UK and Canada are ideal benchmarks for an improved US FMLA design. The UK's plan allows for 26 weeks paid leave, with 6 weeks of 90% wage replacement, and 20 weeks at a flat rate, similar to an unemployment insurance design. A program with a similar design would encourage many workers to return to work after the 6 weeks of wage replacement, because the flat rate would likely be lower than the wage replacement. However, it would allow for workers to take the additional time when it is necessary.

In Canada, mothers and fathers are permitted to split the paid leave period between them. Implementing a similar policy in the U.S. would help promote gender equity within the Act. While this was the original goal of FMLA in regards to maternity leave, it is still rare that fathers take any FMLA leave for the birth of their children.

While no singular model will provide the ideal example that the U.S. should follow while redesigning FMLA, it has been shown that there are several that could provide a beneficial framework, and should be examined in detail when these changes are made. If such policies are adequately examined, the Family and Medical Leave Act can be developed in a way to benefit employers and employees and make great strides in family development in the United States.

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