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# PAID FAMILY LEAVE: STRIKING A BALANCE BETWEEN THE NEEDS OF EMPLOYEES AND EMPLOYERS

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## I. INTRODUCTION

Ten years after the Family and Medical Leave Act (“FMLA”) was signed into law, paid family leave emerged as the new focal point in the family rights movement. Paid family leave legislation has been proposed in twenty-eight states and momentum is growing.<sup>1</sup> In September 2002, advocates of paid family leave celebrated their first victory. California became the first state in the nation to enact legislation guaranteeing pay to employees taking leave to care for an ill family member.<sup>2</sup> This legislation propelled paid family leave into the national spotlight, sparking debate on both sides of the issue.<sup>3</sup>

Paid family leave advocates argue that the benefit is a necessary response to demographic and cultural changes in the United States. Labor force participation of women with young children has increased

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1. See Arindrajit “Arin” Dube & Ethan Kaplan, Paid Family Leave in California: An Analysis of Costs and Benefits 4 (June 19, 2002) (unpublished manuscript, at <http://www.laborproject.org/publications/paidleave/dube.pdf>).

2. See, e.g., LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID FAMILY LEAVE (2003), <http://www.laborproject.org/publications/paidleave.html> [hereinafter LABOR PROJECT]; Kimberly Edds, *Calif. Adopts Family Leave*, WASH. POST, Sept. 24, 2002, at A3; Lisa Girion & Megan Garvey, *Davis OKs Paid Family Leave Bill Benefits*, L.A. TIMES, Sept. 24, 2002, at B1.

3. See, e.g., *Family and Medical Leave: New California Law, Other Proposals Intensify Argument Over Paid Family Leave*, 71 U.S. L. WK. 2259 (2002) [hereinafter *Family and Medical Leave*].

dramatically in the past few decades. In 1998, 62% of women with children under three were working, compared to 34% in 1975.<sup>4</sup> Further, the number of children living in single-parent families rose from 12% in 1970 to 28% in 1998.<sup>5</sup> These changes have resulted in a declining share of children living with a parent who is available to care for them full-time. By 1998, only a quarter of all children had one parent staying at home while the other worked.<sup>6</sup> As a result, balancing the demands of work and family has become more challenging, and advocates argue that paid family leave is of increasing importance for working Americans.<sup>7</sup>

The potential costs and unprecedented reach of this mandate has fueled businesses' opposition to paid family leave. They argue that mandated paid leave will impose significant costs without any additional benefits and that the proper role for government is not to mandate fringe benefits.<sup>8</sup> Predictions that the costs of a mandated paid family leave policy will result in reduced wages, lay-offs, and the closure of smaller businesses strike fear in politicians and citizens.<sup>9</sup> Further, paid family leave is particularly troublesome to business because it represents a cultural shift in American social policy.<sup>10</sup> Rather than relying on the free-market system and private employers to voluntarily provide a benefit, paid family leave mandates the benefit. Unlike other mandated benefit programs, paying an employee wages to care for an ill family member is only indirectly related to employment.<sup>11</sup> In the context of the FMLA debates, businesses demonstrated the reach of their political power, successfully preventing legislation from passing for over ten years.<sup>12</sup> They hope to do the same with paid family leave.

This fierce opposition poses a dilemma for advocates of paid family leave. They cannot compromise their goal of providing paid leave to workers to care for a family member; however, employers' support is

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4. Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 273, 275 (2001).

5. *Id.* at 276.

6. *Id.*

7. *Id.*

8. See Miguel Bustillo, *Paid Leave Bill Ignites Emotions*, L.A. TIMES, July 29, 2002, at A1.

9. See, e.g., *id.*; *Morning Edition: California Senate Passes Bill Offering Paid Family Leave for Nearly All Employees* (NPR radio broadcast, Aug. 7, 2002) (interviewing a representative from the California Chamber of Commerce who stated that paid family leave would be a "business killer," and asked why a business would "locate to a state where [you] have more costs vs. any other state?").

10. See generally Theda Skocpol, *The Politics of American Social Policy, Past and Future*, in INDIVIDUAL AND SOCIAL RESPONSIBILITY 309, 312-21 (Victor R. Fuchs ed., 1996).

11. See *infra* notes 23-26 and accompanying text.

12. See RONALD D. ELVING, CONFLICT AND COMPROMISE 12-13 (1995).

critical to both the type of legislation that is passed and the speed at which it is enacted. Further, once the law is implemented, their support is necessary to execute the law effectively and fairly; if employers have a negative perception of the law, they will discourage employees from using the benefit even though employees may be entitled to do so.<sup>13</sup> The study by the Department of Labor's Commission on Leave reflects this fact, finding that approximately one-fourth of employees stated that they did not take leave because they thought their job might be lost, and approximately 26% of employees thought that taking leave might diminish their prospects for job advancement.<sup>14</sup> Thus, enacting the law is only one part of the challenge; gaining employers' support is also necessary to ensure accessibility to eligible employees once it is enacted.

This Note argues for a balanced approach to paid family leave, one that imposes minimal costs on employers while entitling workers to paid family leave. Part II examines the emerging models of paid family leave legislation, evaluating the needs of employees and concerns of employers. Part III analyzes the three arguments against paid family leave that employers cite most frequently: its significant costs, its questionable benefits, and their dislike of mandated benefits. The cost argument is of particular concern, because if paid family leave truly does impose overwhelming costs on employers, they may be forced to respond by relocating or laying-off workers. Part IV concludes that a balanced approach to paid family leave is feasible if employers' contributions are eliminated, disability insurance is used as a funding stream, and additional provisions are added to reduce the impact on employers.

## II. EMERGING MODELS OF PAID FAMILY LEAVE

Although paid family leave proposals vary from state to state, the debate focuses on two issues: funding mechanisms and duration of leave. Funding mechanisms not only impact the source of funds that pay for the leave, but also the administrative requirements and amount of wage replacement for employees. The length of leaves is a concern for both

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13. See Holly B. Tompson & Jon M. Werner, *The Family and Medical Leave Act: Assessing the Costs and Benefits of Use*, 1 EMPLOYEE RTS & EMP. POL'Y J. 125, 144 (1997). Holly Tompson and Jon Werner found that perceived management support predicted the amount of leave taken under the FMLA. *Id.* In addition, this support from top management was "predicted by the extent to which HR professionals perceived greater overall benefits and fewer overall costs associating with the FMLA" *Id.* at 144-45.

14. See DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEY 2-15 (2000), <http://www.dol.gov/asp/fmla/main2000.htm> [hereinafter DEP'T OF LABOR].

employee and employer advocates, and each emphasize different issues. Employee advocates highlight the biological needs of the child and employee, whereas employer advocates focus on the impact the leave will have on productivity and direct financial costs to employers.

#### A. FUNDING MECHANISMS

Most paid family leave proposals are funded using unemployment insurance (“UI”), temporary disability insurance (“TDI”), or tax incentives. These can be distinguished by the division of control between employer and the state, the costs to the employer, and the administrative requirements of each.

##### 1. Unemployment Insurance

President Clinton proposed the Birth and Adoption Unemployment Compensation Rule (“BAA-UC”), which “creates an opportunity” for individual states to reinterpret their eligibility guidelines.<sup>15</sup> This rule enables individual states, on a voluntary and experimental basis, to provide partial wage replacement “to parents on approved leave or who otherwise leave employment following the birth or placement for adoption of a child.”<sup>16</sup> BAA-UC is limited in that it does not cover other forms of FMLA leave, including caring for the employee’s or family member’s serious health condition.<sup>17</sup> However, it gives states wide latitude in determining most eligibility criteria and is purposely flexible to reflect the experimental nature of the proposal.<sup>18</sup>

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15. See Regulations for Birth and Adoption Unemployment Compensation, 20 C.F.R. § 604 (2002).

16. *Id.* § 604.1.

17. *Id.* § 604.2.

18. See *id.* Several states proposed bills that expand the scope permitted in these regulations to employees separated from work due to “undue family hardship,” see H.B. 342, 142d Gen. Assemb., Reg. Sess. (Ga. 2001), and to cover leave benefits due to an employee’s family member. See H.B. 30, 21st Leg., Reg. Sess. (Haw. 2001).

Although there are several benefits to this method of funding,<sup>19</sup> the Bush Administration proposed to repeal BAA-UC, which would effectively halt all state proposals that include funding through the UI system.<sup>20</sup> This was most likely driven by the drastic decline in unemployment fund balances in recent years, with most states below the recommended 1.00 average high-cost multiple.<sup>21</sup> Besides the declining unemployment fund balances, the Department of Labor emphasized that no state has enacted BAA-UC legislation, and that California, the only state that has enacted paid family leave legislation, chose to use disability insurance rather than unemployment funds.<sup>22</sup>

Employer groups heavily criticized this method of funding, arguing that the purposes of UI and paid family leave are contrary.<sup>23</sup> Congress originally created the unemployment insurance system to serve as a safety net for employees involuntarily separated from work and to encourage

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19. One of the major benefits, and perhaps what made it so attractive to many states, is that to fund BAA-UC, money is taken from a pre-existing source, and using surplus revenues seemed like a good compromise. *See* STEVEN K. WISENDALE, FAMILY LEAVE POLICY 188–89 (2001). In addition, proponents argued that conservative politicians cannot complain that paid family leave will not deplete the UI trusts funds when the business lobby had succeeded in the 1990’s in reducing UI taxes. *See id.* at 189. Between 1993 and 1998, the average rate of employer contributions to the UI system dropped from 2.5% to 1.92%, and advocates argued that America’s family caregivers should receive a break before wealthy corporations. *See id.* Lastly, advocates framed this as a “states’ rights issue,” because the use of UI allows federal power to be shifted to the states, allowing them to design expansive UI provisions. *See id.* Finally, BAA-UC takes a very cautious approach to paid leave, recognizing that it is an experimental effort. *See* 20 C.F.R. § 604.1.

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

21. *See id.* at 72,123. The average high-cost multiple (“AHCM”) is a measure of the number of “years of benefits a state has available under a recessionary scenario.” *Id.* For example, a 1.00 rating indicates that the state has one year’s worth of benefits on hand. *Id.* This number is recommended “to ensure trust fund solvency in periods of high unemployment.” *Id.* In 2002, fund balances were so low that Congress enacted legislation distributing \$8 billion to states to assist in the payment of UC. *See* Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 204, 116 Stat. 21 (2002).

22. *See* Unemployment Compensation—Trust Fund Integrity Rule, 67 Fed. Reg. at 72,122–72,123 (citing to the inflexible eligibility conditions of BAA-UC and the potential conflict with the Federal Unemployment Tax Act).

23. *See, e.g.,* Waldfoegel, *supra* note 4, at 287; Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1535 (2000); Marc Mory & Lia Pistilli, Note, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689, 703–05 (2001); Yochi J. Dreazen, *Prospect of Unemployment Insurance Funding Family Leave Prompts Lawsuit*, WALL ST. J., June 13, 2000, at C24 (reporting that business groups are accusing the White House of “playing politics with money meant to provide a safety net for out-of-work Americans”).

stabilization of the economy.<sup>24</sup> Employer groups argue that paid family leave does not fulfill this purpose. Employees taking care of their families are not involuntarily separated from their work and paying employees to care for their families will not prevent a depression. The Department of Labor recently recognized this in its review of the regulations, stating that Congress intended the UI system to assist the involuntarily unemployed in getting back to work<sup>25</sup> and by permitting voluntary withdrawal from the workforce, BAA-UC contradicts the requirement that recipients must be able and available to work.<sup>26</sup>

Employers are also concerned that this source of funding will ultimately impose additional costs on them. Congress intended the experience rating requirement to provide employers with incentives to increase the efficiency of the labor supply by imposing costs on employers who lay-off employees.<sup>27</sup> With paid family leave, the employer has little control over whether an employee leaves work when taking leave.<sup>28</sup> Thus, not only are the policies behind unemployment insurance inconsistent with those of paid family leave, but funding paid family leave through unemployment insurance may result in increased taxes to employers.

## 2. Temporary Disability Insurance

Advocates of paid family leave have proposed expanding the TDI program to fund paid family leave.<sup>29</sup> Five states—California, New York, New Jersey, Rhode Island, and Hawaii—already have an existing TDI program that provides partial wage replacement to employees who are temporarily disabled for nonwork-related reasons, including pregnancy and childbirth.<sup>30</sup> Although each of the existing TDI programs varies,<sup>31</sup> all are funded by a combination of employer and employee contributions and the state funds are all solvent.<sup>32</sup> The flexibility of this program allows it to be

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24. See Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 33 (2002).

25. See Unemployment Compensation—Trust Fund Integrity Rule, 67 Fed. Reg. at 72,124.

26. See *id.* at 72,125.

27. See Ulrich, *supra* note 24, at 40.

28. See *id.*

29. See, e.g., CARNEGIE CORP. OF N.Y., STARTING POINTS 47 (1994) [hereinafter CARNEGIE CORP.]; WISENDALE, *supra* note 19, at 190–92, 248; Ulrich, *supra* note 24, at 49–50.

30. See Ulrich, *supra* note 24, at 44.

31. See *id.* at 45. Each program uses different financing mechanisms, benefit levels, eligibility requirements, and administrative bodies. See *id.*

32. See NAT'L P'SHIP FOR WOMEN AND FAMILIES, FAMILY LEAVE BENEFITS: A MENU OF POLICY MODELS FOR STATE AND LOCAL POLICY LEADERS 8 (2001) [hereinafter A MENU OF POLICY MODELS].

expanded through further payroll tax deductions that would allow partial wage replacement to employees who are either on parental leave or family medical leave.

Advocates argue that TDI is an attractive funding source for several reasons. First, rather than requiring implementation of a new system, these programs already exist in several states, decreasing the burden on states and employers.<sup>33</sup> In addition, the programs in other states have been successful, and states looking to implement a program can emulate existing programs. In the fifty-plus years these five states have managed a TDI program, not one has chosen to abandon the program because it was too expensive or unmanageable.<sup>34</sup> Another benefit to TDI is the flexible contribution schedule, which allows employers to be exempt from funding the leave.

Economists argue, on the other hand, that there will be some amount of deadweight loss associated with any payroll tax.<sup>35</sup> While employees are required to contribute, many will not derive benefits from paid leave.<sup>36</sup> This may foster resentment from employees who do not need the benefit or who cannot afford to participate even with the wage replacement.<sup>37</sup> This concern is mitigated, however, by the expansive coverage of paid family leave in that it covers both child and elder care. In addition, the contribution amount will most likely be minimal for employees.<sup>38</sup> Thus, TDI's demonstrated success in the disability context and its flexible contribution structure outweigh the minimal impact from deadweight loss.

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33. See *id.* at 9.

34. See WISENDALE, *supra* note 19, at 122.

35. See Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 29 AM. ECON. REV. 179, 179–81 (1989) (discussing the deadweight loss associated with tax-financed benefit provisions).

36. See Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 392–93 (1996).

37. See, e.g., FMLA TECHNICAL CORRS. COALITION, TESTIMONY OF DEANNA R. GELAK, SPHR, EXECUTIVE DIRECTOR, BEFORE OREGON LEGISLATURE'S PAID FAMILY LEAVE TASK FORCE (2002), at [http://www.workingforthefuture.org/pdf/oregon\\_testimony.pdf](http://www.workingforthefuture.org/pdf/oregon_testimony.pdf) [hereinafter FMLA TECHNICAL CORRS. COALITION].

38. See LABOR PROJECT, *supra* note 2 (estimating that payments will average approximately \$3/month or \$27/year).

### 3. Tax Incentives

Legislation providing tax incentives to employers who fund paid family leave benefits has been proposed in several states.<sup>39</sup> This type of legislation encourages employers to provide fringe benefits to employees through tax code provisions that allow the employer to deduct the cost of premiums as a business expense.<sup>40</sup> The structure of the legislation resembles child care tax credits and allows for a percentage credit against salary or wage costs incurred as a result of paid family leave.<sup>41</sup> Child care legislation has prompted businesses to increase child care benefits, demonstrating the potential impact tax incentives can have on business.<sup>42</sup>

Employers favor the tax incentive approach and argue that they are more effective than state mandates.<sup>43</sup> They emphasize that incentives allow employers to compete for the best leave policies.<sup>44</sup> Furthermore, they emphasize the benefits to employees and the state, arguing that employees' privacy will be compromised because filing certificates with the state allows the state to gain access to medical and family information.<sup>45</sup> In addition, they argue that tax incentives will reduce bureaucratic costs and complexity to the state because they are using the existing structure provided by the income tax.<sup>46</sup> Regardless of whether the state or employer administers the leave, employees' privacy may be diminished. If an employer manages the program, employees will file certificates with their employers, and similar to the state in a mandated program, employers will be responsible for verifying their leave. Concerns about violation of privacy will be reduced only if employees feel comfortable with their employer having access to this information. In addition, if the mandated

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39. See, e.g., H.B. 262, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003); H.B. 1291, 63rd Gen. Assemb., 1st Reg. Sess. (Colo. 2001); H.B. 89, 21st Leg., Reg. Sess. (Haw. 2001); S.B. 453, 91st Gen. Assemb., 1st Reg. Sess. (Mo. 2001).

40. See Ulrich, *supra* note 24, at 58.

41. See Sharon C. Nantell, *The Tax Paradigm of Child Care: Shifting Attitudes Toward a Private/Parental/Public Alliance*, 80 MARQ. L. REV. 879, 931 (1997). Legislation among the states varies, but the child care credits typically vary in amount from 5% to 50%. See *id.* at 931–37.

42. See SONYA MICHEL, CHILDREN'S INTERESTS / MOTHERS' RIGHTS 256 (1999); Nantell, *supra* note 41, at 936–37. In 1996, one study found that between 1400 and 2000 on-site child care centers exist throughout the United States. See Nantell, *supra*, at 946.

43. See, e.g., FMLA TECHNICAL CORRS. COALITION, *supra* note 37; *The Childless Lament*, 71 U.S. L. WK. 2260 (2002) (quoting an employer advocate who stated that “[i]ncentives always work better” and the government should “[g]ive companies a tax credit to voluntarily expand their own paid leave programs”).

44. See FMLA TECHNICAL CORRS. COALITION, *supra* note 37.

45. See *id.*

46. See *id.*

program uses state disability insurance and there is an established program, they will be using TDI's existing structure, which will minimize administrative costs. Thus, employers' concerns for employees and the state appear to be a smokescreen for their desire to avoid mandated benefits through tax incentives.

Employee advocates acknowledge that tax credits are a potential source of funding for paid family leave but do not emphasize or promote them as a funding stream.<sup>47</sup> In comparison with TDI and UI, which guarantee coverage to eligible employees, tax incentives are not as efficient at increasing the availability of paid family leave. The fact that employers support this type of legislation, however, increases the probability of tax incentive legislation being enacted as compared with TDI and UI legislation.

#### B. DURATION OF LEAVES

Paid family leave proposals vary in the length of leaves provided. Most unemployment insurance legislation emulates the model legislation for the BAA-UC and provides for a twelve-week benefit period within a one-year eligibility period.<sup>48</sup> The twelve-week period addresses both biological and administrative concerns and "correlates the needs related to introducing a new child into a family with the current benefit year under the UC program."<sup>49</sup> Most TDI proposals have provided for a similar time period.<sup>50</sup>

Employee advocates propose generous lengths of leave, suggesting lengths ranging from three to six months.<sup>51</sup> They stress that longer leaves promote parenting by allowing for sufficient time to care for the child after childbirth,<sup>52</sup> creating solid family bonds at birth or adoption,<sup>53</sup> and

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47. See A MENU OF POLICY MODELS, *supra* note 32, at 6, 24.

48. See, e.g., H.B. 593, 2002 Leg., Reg. Sess. (Md. 2002) (twelve weeks); H.B. 2458(d), 45th Leg., 1st Reg. Sess. (Ariz. 2001) (ninety days); S.B. 500, 2001 Leg., Reg. Sess. (Fl. 2001) (twelve weeks); S.B. 389(b), 92d Gen. Assemb., Reg. Sess. (Ill. 2001) (twelve weeks); S.F. 1597, 82d Leg., Reg. Sess. (Minn. 2001) (twelve weeks).

49. See Regulations for Birth and Adoption Employment Compensation, 20 C.F.R. § 604 (2002).

50. See, e.g., S.B. 847, 182d Gen. Court, Reg. Sess. (Mass. 2003) (twelve weeks); A.B. 7453, 224th Gen. Assemb., Reg. Sess. (N.Y. 2001) (twelve weeks).

51. See Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 348 (1993); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 155 (1998); Hayes, *supra* note 23, at 1538.

52. See Dowd, *supra* note 51, at 348.

53. See *id.* at 341.

improving health for both infants and women.<sup>54</sup> In support of these claims they frequently cite European legislation as an example, as many European countries have policies that provide an average sixteen weeks of paid maternity leave and between one and three years of parental leave.<sup>55</sup> They argue that European countries have reaped tangible benefits as a result of these laws, as indicated by the high labor rates among women, the improved position of women in the workplace, and an improvement in the overall health of children.<sup>56</sup>

Although European policies are helpful for research purposes, the results of these policies cannot be accurately compared with those in the United States. Whereas European governments have accepted responsibility for their citizenry from the “cradle to grave,” the United States has adopted a free-market approach.<sup>57</sup> In addition, the high labor force participation rates that are frequently cited often do not consider extraneous factors<sup>58</sup> such as the calculation method<sup>59</sup> and other “family-friendly” policies that were in place at the same time they extended durations of paid time-off of work.<sup>60</sup> Finally, the FMLA actually provides a broader leave policy than most European countries in terms of eligibility requirements, flexibility in duration periods, and limited coverage for sick parents, older children, and paternity leaves.<sup>61</sup>

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54. See Waldfoegel, *supra* note 4, at 293. Advocates admit, however, that there is also some evidence that excessively long leaves cause other problems, such as women being out of the work force for long periods of time. See *id.* Women who are out of the workforce for long periods of time might lose their attachment to the labor market and undermine their position in the labor market in the long run. See *id.* at 294.

55. See RUTH COLKER, *AMERICAN LAW IN THE AGE OF HYPERCAPITALISM* 144 (1998); Waldfoegel, *supra* note 4, at 293.

56. See Mory & Pistilli, *supra* note 23, at 709.

57. See, e.g., ANITA U. HATTIANGADI, *EMP. POL'Y FOUND., STUDY: PAID FAMILY LEAVE PROPOSAL PUTS UNEMPLOYED IN JEOPARDY* 2 (2000); Grill, *supra* note 36, at 386 (admitting that the United States, unlike Sweden, is not a social welfare state and does not have the structure in place for a social insurance system).

58. See FRANCINE D. BLAU ET AL., *THE ECONOMICS OF WOMEN, MEN, AND WORK* 402 (Prentice Hall, 4th ed. 2002).

59. See *id.* For example, women on leave are included in the calculation of Sweden's labor force. See *id.*

60. See Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons From Europe*, 113 Q. J. ECON. 285, 311 (1998) [hereinafter *Lessons from Europe*].

61. See HATTIANGADI, *supra* note 57, at 4–5. For example, Austria, Sweden, and Britain imposed eligibility requirements that effectively limit the bill's coverage to full-time workers. The FMLA, on the other hand, makes eligible all workers who are employed at firms with fifty or more employees and have worked with their employer for one year and 1250 hours over the previous twelve months. See *id.* at 5. In addition, European leaves are granted on a per child basis, whereas FMLA leaves can be taken for the same child multiple times as long as annual eligibility requirements are met. See *id.* at 4.

In contrast with the employee advocates' focus on biological needs, employers emphasize the cost concerns associated with duration. Employers argue that extended leaves impose substantial non-wage costs on firms, including difficulty in scheduling replacement workers and the uncertainty that employers face regarding the timing and likelihood of the individual's return to the job.<sup>62</sup> Economists agree with employers and estimate that if leaves were extended so that they were comparable to those in Europe, the costs to employers would begin to outweigh the benefits, resulting in adverse effects on the labor market.<sup>63</sup> Economists, however, also have found that the current duration of FMLA leaves has imposed minimal costs.<sup>64</sup> Thus, although the generous leaves that advocates propose will inflict considerable costs, leaves that are twelve weeks or less have a negligible effect on employers.<sup>65</sup>

Realistically, advocates of paid family leave must recognize these legitimate cost concerns and limit proposals to the twelve weeks provided for in the FMLA in order to minimize conflict with employers. The real issue, however, will ultimately be whether or not the leave should be less than twelve weeks, as employers will undoubtedly argue. Even though the financial impact of a four, six, or twelve-week leave will most likely be insignificant to employers, it may also affect whether legislation is enacted at all.<sup>66</sup> If the legislation includes a shorter leave, perhaps employers will eventually realize that, in this context, the benefits of paid family leave outweigh the costs. Once paid family leave is recognized as an entitlement, the duration of leave can be gradually extended until the entire FMLA leave is covered.<sup>67</sup>

### III. EMPLOYERS' ARGUMENTS: COSTS, QUESTIONABLE BENEFITS, AND ANOTHER GOVERNMENT MANDATE

Employers have voiced several concerns throughout the paid family leave debate. First, they argue that their administrative and productivity

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62. See FAMILIES & WORK INST., PARENTAL LEAVE AND PRODUCTIVITY 63 (Dana E. Friedman et al. eds., 1992); *Lessons from Europe*, *supra* note 60, at 314. Leaves that last longer than one year are the exception. See FAMILIES & WORK INST., *supra*, at 63. Leaves lasting six to twelve months are the most expensive because of the difficulty in finding temporary replacement workers. See *id.*

63. See Christopher J. Ruhm, *Policy Watch: Family and Medical Leave Act*, J. ECON. PERSP., Summer 1997, at 175 [hereinafter *Policy Watch*].

64. See *id.*

65. See *id.*

66. See Girion & Garvey, *supra* note 2 (reporting that California Governor Davis agreed to sign the bill that was scaled back from earlier proposals that allowed up to twelve weeks of paid leave).

67. See Grill, *supra* note 36, at 397.

costs will increase considerably as a result of paid family leave mandates. Second, they dispute employee claims that retention and productivity will increase and argue that benefits are negligible when all employers are required to provide paid family leave.<sup>68</sup> Finally, they argue that the government is attempting to mandate another fringe benefit that businesses are not capable of providing.<sup>69</sup>

#### A. COSTS OF PAID FAMILY LEAVE

Employers argue that paid family leave will impose substantial costs due to increased administrative requirements, decreased productivity, and mandated direct financial contributions by employers. The concern is that if there are unnecessary costs, paid family leave may have a negative impact on the economy and result in lowered wages, laid-off employees, or relocation by businesses to a different state.<sup>70</sup> This potentiality increases the media's and politicians' receptivity to such arguments<sup>71</sup> and is particularly effective in a recession, where threats about businesses leaving with or without their employees become more persuasive to the voting public.<sup>72</sup> Further, the cost concern remains important after legislation is enacted because employers' perceptions of costs may influence employees' usage of leave.<sup>73</sup> When employers support an employee benefits program, usage tends to increase because employees are more inclined to take

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68. See, e.g., FMLA TECHNICAL CORR. COALITION, *supra* note 37 (testifying that only voluntarily provided paid leave will increase retention and that paid family leave will decrease productivity); *Paid Family Leave—The Devil Lies in the Details*, CAL. EMP. L. LETTER, Oct. 28, 2002, at 1.

69. See, e.g., Bustillo, *supra* note 8.

70. See *id.* See also Editorial, *Paris, California*, WALL ST. J., Sept. 27, 2002, at A14; Opinion, *Not So Golden: California's Business Climate Worsens*, SAN DIEGO UNION-TRIB., Jan. 10, 2003, at B8. This argument has its roots in "competitive federalism," where states compete against each other to attract wealth. This creates incentives for them to engage in a race to the bottom, lowering taxes and benefits in an effort to attract wealth-producing benefits and to repel wealth-draining welfare recipients. ANYA BERNSTEIN, *THE MODERATION DILEMMA* 112 (2001). Businesses argue that leave policies have the reverse effect and that they "hinder their ability to make profits and lead them to locate in places without those policies." *Id.* at 112–13.

71. See BERKELEY MEDIA STUDIES GROUP, *MAKING THE CASE FOR PAID FAMILY LEAVE: HOW CALIFORNIA'S LANDMARK LAW WAS FRAMED IN THE NEWS* 9 (2003), <http://www.laborproject.org/publications/paidleave.html> [hereinafter BERKELEY MEDIA STUDIES]; BERNSTEIN, *supra* note 70, at 7–8.

72. See BERKELEY MEDIA STUDIES, *supra* note 71, at 9; BERNSTEIN, *supra* note 70, at 8. One media analysis performed after the paid family leave debates in California determined that 59% of the media coverage during the debate focused on the "unfair burden" on employees and an additional 30% focused on the "unfair burden" employers faced as a result of the legislation. BERKELEY MEDIA STUDIES, *supra* note 72, at 9.

73. See Tompson & Werner, *supra* note 13, at 134.

advantage of the policy when management accepts both the purpose and specific provisions of the legislation.<sup>74</sup> Conversely, employees may feel intimidated from taking leave if management does not support the bill.<sup>75</sup>

The cost argument was first made during the FMLA debates and has reemerged in the past several years as a result of the renewed threat of FMLA expansion.<sup>76</sup> Although the predictions that FMLA costs would reach billions have failed to materialize, employers continue to argue that the FMLA created excessive costs for them because the FMLA has been interpreted in a manner that diverges from the original intent of Congress.<sup>77</sup> These claims, however, contradict most studies, which have found that employers actually face minimal costs.<sup>78</sup> Because paid family leave is an expansion of the FMLA, paid family leave costs will be additional, and not separate from, the costs that originated with the FMLA. In order to determine whether or not paid family leave will be as devastating as employers suggest, the FMLA costs must first be analyzed and then the costs imposed by paid family leave can be examined.

#### 1. Costs of the Family and Medical Leave Act

Even before the FMLA was enacted, employers were concerned about the costs that would result from the legislation.<sup>79</sup> Commentators have found that these concerns were mostly unwarranted, and that the FMLA has imposed few costs on employers because employee eligibility is strictly limited.<sup>80</sup> The FMLA limits leave by the size of employer and tenure of employee; leave is available only to employees working for businesses with fifty employees or more, to those individuals who have worked for the employer for at least one year, and to those who have worked 1250 hours in

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74. *See id.*

75. *See id.* at 134.

76. *See* WISEDALE, *supra* note 19, at 163.

77. *See, e.g., The Family and Medical Leave Act: Present Impact and Possible Next Steps: Hearing Before the Subcomm. on Human Res. of the House Ways and Means Comm.*, 106th Cong. (2000) (testimony of Kimberly K. Hostetler, Director, Human Resource Services, Connecticut Hospital Association).

78. *See* DEP'T OF LABOR, *supra* note 14, at 6-6; *Policy Watch*, *supra* note 63, at 176, 184-85. This was reflected in the Department of Labor's survey, where 67% of employers found that the FMLA had no noticeable impact on productivity, 62% of employers found maintaining additional record-keeping requirements "easy or somewhat easy," and 83.4% of employers found that determining whether certain employees are eligible to be "easy or somewhat easy." *See* DEP'T OF LABOR, *supra* note 15, at 6-6.

79. *See* ELVING, *supra* note 12, at 86. In 1987, the Chamber of Commerce estimated that paid family leave would cost businesses \$2.6 billion in temporary replacements and productivity losses. *See id.* at 88.

80. *See Policy Watch*, *supra* note 63, at 184-85.

the year preceding the leave.<sup>81</sup> Employer groups that dispute these findings have testified several times before Congress and proposed several amended versions of the FMLA that would limit the Act's reach.<sup>82</sup> Rather than emphasizing vague costs that are difficult to quantify, such as productivity and administrative costs, they narrowed their arguments, focusing on the effect of the regulation's defining "intermittent leave," "serious health condition," and "benefit."<sup>83</sup>

The intermittent leave provision allows employees to take their leave "intermittently or on a reduced leave schedule" either after the birth or placement of a child for adoption or foster care, or when the employee or employee's family member suffers from a serious health condition.<sup>84</sup> Intermittent leaves were designed to protect employees attending to their own medical appointments, "family member medical appointments, or [who] take necessary time off intermittently for serious chronic conditions."<sup>85</sup> When leave is taken intermittently in separate blocks of time, it must be for the same qualifying reason.<sup>86</sup> Further, employees can take the maximum amount of leave or twelve weeks in a twelve-month period.<sup>87</sup>

Employers argue that allowing employees to take leave in segments that can be as small as six or eight minutes long<sup>88</sup> makes it more difficult

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81. See 29 U.S.C. §§ 2611(2)(a), (4)(a) (2000). If small businesses had been included in the Act, costs would have been substantially greater. Small businesses do not have the staff knowledge and often have to hire consultants to rewrite their policies and benefit manuals. See Bruce D. Phillips, *The Economic Costs of Expanding the Family and Medical Leave Act to Small Business*, 37 BUS. ECON., 44 (2002). In addition, their record-keeping costs are higher because larger businesses may already have automated systems and procedures in place to deal with other federally mandated programs and a larger and more specialized staff to implement the program. See *id.* at 50. Productivity costs are higher because when one person goes on leave, replacing him or her with another employee is more difficult because there may be no other person who is capable of performing similar tasks. See *id.* Finally, small business employees already work longer hours on average than those who work for larger businesses, and may not be able to handle the additional workload. See *id.*

82. See *The Family and Medical Leave Act: Hearing Before the Subcomm. on Oversight and Investigation of the House Comm. on Educ. and the Workforce*, 105th Cong. (1997) (statement of Laura Avakian, Sr. Vice President of Human Resources, Beth Israel Deaconess Medical Center and Caregroup) [hereinafter *The Family and Medical Leave Act*].

83. See *id.* (statement of Laura Avakian, Sr. Vice President of Human Resources, Beth Israel Deaconess Medical Center and Caregroup; testimony of Kimberly K. Hostetler, Director, Human Resource Services, Connecticut Hospital Association; statement of Kenneth A. Buback, Vice President of Human Resources, Sutter Health).

84. See Wage and Hour Division, 29 C.F.R. § 825.203(a)–(c) (2002).

85. See *supra* note 77.

86. See *supra* note 77.

87. See Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1) (2000).

88. Employees can take leave in increments that are equal to the "shortest period of time that the employer's payroll system uses." 29 C.F.R. § 825.203(d).

for managers to maintain control over employees and keep track of the workers' absences.<sup>89</sup> They argue that intermittent leaves are difficult to integrate with automated payroll systems.<sup>90</sup> Also, when employees come and go, it is more practical to have coworkers cover for them than hire a temporary worker, which reduces productivity.<sup>91</sup>

Furthermore, employers have expressed concern that absences resulting from intermittent leaves can lead to a decrease in the morale of other employees. They argue that allowing employees to arrive late and leave early makes it more difficult for coworkers to plan their schedules.<sup>92</sup> In addition, when an employee with attendance problems takes advantage of the intermittent leave provision, coworkers are aware that their own behavior is judged by a different standard and resent having to cover for their fellow employees.<sup>93</sup>

There is evidence, however, that intermittent leave is used infrequently and has imposed minimal burden on employers.<sup>94</sup> Approximately 28% of all leave-takers used the intermittent leave provision, and 54% of these leave-takers indicate that intermittent leaves comprised "less than half" of their leave time.<sup>95</sup> The survey indicated that this provision has a limited impact, because leave-takers comprise only 16.5% of the employee population<sup>96</sup> and only a quarter of those taking intermittent leave use intermittent leave "more than half" of the time they take leave.<sup>97</sup> This was reflected in the Department of Labor's employers' survey which found that less than a third of large employers surveyed reported that intermittent leave had a negative impact on productivity.<sup>98</sup>

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89. See Robert B. Gordon & Christopher L. Ekman, *Attendance Control Issues Under the ADA and FMLA*, 13 LAB. LAW. 393, 402 (1997); Alicia Ault Barnett, *Fixing Dysfunctional Family Leave*, BUS. & HEALTH, Mar. 1997, at 2.

90. See *Paperwork Inflation—The Growing Burden on America: Before the Subcomm. on Energy Policy, Natural Res. and Regulatory Affairs of the House Comm. on Gov't Reform*, 107th Cong. (2002) (statement of Kenneth A. Buback, Vice President of Human Resources, Sutter Health) [hereinafter *Paperwork Inflation*] (citing a study by the Society for Human Resource Management, where only 17% of respondents worked for organizations with automated tracking of intermittent leave).

91. See *The Family and Medical Leave Act*, *supra* note 83 (statement of Laura Avakian, Sr. Vice President of Human Resources, Beth Israel Deaconess Medical Center and Caregroup).

92. See *id.* at 7.

93. See *id.*

94. See DEP'T OF LABOR, *supra* note 14, at 2-10.

95. *Id.*

96. *Id.* at 2-2.

97. *Id.* at 2-11. Of leave-takers using the intermittent leave provision, 19.6% took intermittent leave about half the time and 26.4% took intermittent leave more than half of the time. See *id.*

98. *Id.* at 6-10.

Moreover, an employer has several options available under the law that can help minimize the inconvenience caused by the provision.<sup>99</sup> Under certain circumstances an employer may transfer an employee to an alternate position to accommodate recurring periods of leave.<sup>100</sup> Also, an employee is expected to consult with his or her employer before scheduling treatment and must make a reasonable effort to accommodate the employer's preferences in scheduling the necessary appointments.<sup>101</sup> Finally, the employee must provide the employer with a certification from a healthcare provider explaining the nature of the intermittent or reduced schedule and the expected duration and schedule of the intermittent leave or reduced schedule.<sup>102</sup> These provisions help to minimize the adverse effects of intermittent leave and, combined with the relatively infrequent use of intermittent leaves, limit the impact on employers.

Employers argue that the Department of Labor's interpretation of the phrase "serious health condition" has posed an obstacle for them as well. Employers have asked Congress to redefine the term so that it embodies hospitalization and extended lengths of treatment or serious chronic conditions, and also to eliminate the current regulations that require employers to certify a variety of minor conditions, including bad colds, simple outpatient procedures, stress, back pain, and even nonmigraine headaches.<sup>103</sup> They contend that this broad definition has created a "national sick leave policy" that contradicts Congress's original intent.<sup>104</sup> Finally, employer advocates argue that this definition has a ripple effect and has compounded the costs caused by the intermittent leave provision and increased litigation.<sup>105</sup>

Employers' concerns are partially valid. The definition of "serious health condition" has posed a more severe problem than intermittent leave because it is used more frequently. Approximately 90% of all leaves taken

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99. See Gordon & Eckman, *supra* note 89, at 402.

100. See Family and Medical Leave Act, 29 U.S.C. § 2612(b)(2) (2002); Wage and Hour Division, 29 C.F.R. § 825.204(a) (2003). Only employees who require either intermittent or reduced schedule leave that is foreseeable based on planned medical treatment, or who are granted intermittent or reduced schedule leave for the birth or adoption of the child may be transferred. See 29 C.F.R. § 825.204(a). There are other requirements for the transfer to occur, including equivalent pay and benefits and restoration to the same or equivalent job once the employee has completed the leave. See *id.* § 825.204(c).

101. See 29 C.F.R. § 825.302(e)-(f).

102. See 29 U.S.C. § 2613(b); 29 C.F.R. § 825.306(c).

103. See Serious Health Condition, Op. Dep't. of Labor Wage and Hour No. 86 (Dec. 12, 1996).

104. See, e.g., *Paperwork Inflation*, *supra* note 90, at 7.

105. See *id.*; *The Family and Medical Leave Act*, *supra* note 82, at 6 (testimony of Lynn Outwater on Behalf of the Society for Human Resource Management and the FMLA Corrections Coalition).

are for either the serious health condition of the employee or of a spouse, child, or parent.<sup>106</sup> The frequent use of this provision increases administrative costs of the Act because of the difficulty in accurately categorizing a condition. This is reflected in the Department of Labor survey, where only 57% of employers found that determining whether or not a health condition is serious to be “very or somewhat easy.”<sup>107</sup>

The impact on employers has been minimized somewhat by the limitations within the regulation itself and the courts’ interpretation of “serious health condition.” For example, “colds” and “migraine headaches” are only considered serious health conditions if the employee has been hospitalized, has demonstrated a “period of incapacity” of more than three calendar days with two or more treatments by a healthcare provider, or has undertaken a regimen of continuing treatment under a health provider’s supervision.<sup>108</sup> In addition, when the serious health provision is litigated, federal courts tend to be reasonable in assessing the severity of health conditions.<sup>109</sup> Courts have limited the definition by finding that neither an illness that may be serious, nor symptoms of a serious illness, constitute serious health conditions in and of themselves.<sup>110</sup> Courts have also found that even though employees are not required to cite the FMLA in their request, employers must receive sufficient information to make an informed decision or the employee may not qualify for leave.<sup>111</sup> Finally, courts have found that asserting a health condition will not necessarily prevent disciplinary action for other documented reasons.<sup>112</sup> Thus, even though the provision is used frequently and is difficult to administer, awareness of the regulations and proper documentation can minimize employee overuse of this provision.

Finally, employers have argued that the regulation prohibiting employers from counting FMLA leave under no-fault attendance policies

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106. See DEP’T OF LABOR, *supra* note 14, at 2-13 (finding that 48.1% of leaves were taken for the employee’s own serious health condition, 19.6% for a child’s health, 9.0% for an ill spouse, and 22.6% for an ill parent).

107. See *id.* at 6-7.

108. See Wage and Hour Division, 29 C.F.R. § 825.114 (2003).

109. See Robert J. Aalberts & Lorne H. Seidman, *The Family and Medical Leave Act: Does it Make Unreasonable Demands on Employers?*, 80 MARQ. L. REV. 135, 158-59 (1996).

110. See *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 310 (E.D. Ky. 1996); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 246 (E.D. Pa. 1994).

111. See, e.g., *Reich v. Midwest Plastics, Inc.*, No. 1:94-CV525, 1995 WL 514851, at \*3 (S.D. Mich. July 26, 1995); *McGinnis v. Wonder Chem. Co.*, No. Civ.A. 95-4384, 1995 WL 756590, at \*3 (E.D. Pa. Dec. 21, 1995).

112. See *Sakellarion v. Judge & Dolph, Ltd.*, 893 F. Supp. 800, 805 (N.D. Ill. 1995); *Niemiec v. H&K Inc.*, No. 94-C-553, 1995 WL 465683, at \*2-3 (E.D. Wis. Apr. 26, 1995).

interferes with the management of their businesses.<sup>113</sup> The purpose behind the provision is to ensure that if an employee takes leave, an employer cannot discriminate against them by decreasing their benefits or using the leave as a negative factor in employment decisions.<sup>114</sup> By prohibiting employers from counting FMLA under “no-fault attendance policies,” however, employees can take frequent intermittent leaves or an extended leave for up to twelve weeks and still be eligible for perfect attendance awards. Employers argue that this decreases the morale of employees who earned perfect attendance awards without taking leave.<sup>115</sup> Further, they argue that this provision interferes with an employers’ ability to develop individual human resources policies.<sup>116</sup> Moreover, this interpretation contradicts Congress’ intent, and evidence of this is in the law itself.<sup>117</sup>

Thus, although the FMLA regulations have imposed costs on employers, they are neither unreasonable nor unmanageable. The concern with the current debate is how and to what extent paid family leave will exacerbate these costs.

## 2. Paid Leave Costs

The extent to which paid leave legislation impacts employers’ costs will depend on the increase in leaves taken and the design of the legislation. Increased or extended leaves may aggravate the FMLA’s current problems and increase administration and productivity costs. The design of the legislation will limit the cost increase by decreasing administrative requirements for employers, limiting or eliminating employer financial contributions, and adding provisions that may decrease the incentive to take leave.

### a. Leave Frequency and Length

Leave usage will increase if leave becomes paid, but the extent to which this will occur is uncertain. The Department of Labor survey indicates that 2.4% of employees needed, but did not take, a leave of absence in the period questioned.<sup>118</sup> Of those “leave-needers,” 77.6% stated that the reason they did not take leave is because they could not

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113. See 29 C.F.R. § 825.220(c); *The Family and Medical Leave Act*, *supra* note 83 (statement of Laura Avakian, Sr. Vice President of Human Resources, Beth Isreal Deaconess Medical Center and Caregroup).

114. See 29 C.F.R. § 825.220(c).

115. See *The Family and Medical Leave Act*, *supra* note 83, at 7.

116. See *id.*

117. See Family and Medical Leave Act, 29 U.S.C. § 2611(5) (2002).

118. See DEP’T OF LABOR, *supra* note 14, at 2-13.

afford it.<sup>119</sup> It is unclear from the survey, however, whether pay prevented this number of employees from taking leave. More than one reason could be given by respondents and other reasons may have prevented the “leave-needer” from taking leave even if it was paid. In addition, the question did not specify how much pay they needed to receive to afford to take leave.<sup>120</sup>

The Labor Project for Working Families analyzed the costs and benefits of paid family leave for the California legislature, and their analysis provides a framework for determining the increase in leave usage and the lengths of leaves in other states.<sup>121</sup> They examined several variables to determine the expected impact of paid family leave on leave frequency and length, including the types of leave covered by the legislation, the degree of substitution between various types of leaves, and the length of leaves needed.<sup>122</sup>

It is difficult to estimate the exact increase in leave take-up because of numerous sources of uncertainty. First, as the Labor Project discusses, the availability of paid disability and pregnancy leave will impact how many more employees take leave because it is paid.<sup>123</sup> California, for example, currently provides paid leave for disability or sickness related to pregnancy and for an employee’s own sickness through the state disability insurance program.<sup>124</sup> Thus, the only new leave-takers would be those who needed leave to care for an ill child, spouse, or parent. In a state without pregnancy or disability coverage, the take-up rate will be higher because there will be a larger increase in employees covered as a result of the law.

Second, employees may choose to use other benefits in lieu of paid family leave. Depending on the employer and the legislation, employees may be able to choose between sick days, vacation time, personal leave, disability insurance, and any other benefits publicly or privately available to the employee.<sup>125</sup> For example, those who currently use vacation or personal days for family leave reasons may decide to use paid family leave in the future when they need time off to care for a family member, and use

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119. *See id.* at 2-14.

120. *See id.*

121. *See Dube & Kaplan, supra* note 1, at 21-26. Arin Dube and Ethan Kaplan analyze the California legislation as proposed and before changes were made during negotiations, which included lowering the amount of leave employees could take under the law and requiring employees to use vacation before taking leave. *See id.* at 20-26.

122. *See id.* at 20-26.

123. *See id.*

124. *See id.* at 20-21.

125. *See id.* at 21-23.

their vacation or personal days for other purposes.<sup>126</sup> This uncertainty is compounded by the limited information available on the type and amount of paid family leave policies currently offered by employers.<sup>127</sup> Thus, although it is certain that leave-taking will increase, calculating an exact percentage is difficult.

When determining the increased length of leave, the Labor Project compared data on “financially constrained” individuals, or those who state they would have taken leave if they had received more pay, and those who currently receive some pay on leave.<sup>128</sup> In their calculation, the Labor Project considered demographic characteristics of “leave-needers.”<sup>129</sup> They concluded that maternity and paternity leaves would increase up to 16% and all other leaves would increase up to 38%.<sup>130</sup>

An accurate calculation of paid family leave costs is difficult to make because of the limited data available on private paid family leave policies and the difficulty in predicting employees’ behavior. Studies conducted with the limited information available indicate that the frequency and length of leaves will increase. Fortunately, the design of the legislation can limit some of this uncertainty and increase the accuracy in predictions of leave length and frequency.

#### b. Design of the Legislation

Increased use of family leave does not necessarily entail a proportional increase in administrative and productivity costs because employers already have procedures to comply with the FMLA. The design of the legislation will impact any additional administrative requirements, employers’ direct financial costs, and may decrease the incentives for employees to abuse the law.

The funding stream will have the largest impact on employers’ administrative requirements. Both unemployment insurance and TDI will increase the state’s administrative costs but impose few additional requirements on the employer. BAA-UC is administered through the

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126. *See id.* at 23–24.

127. *See id.* at 23–24, 48 (concluding that variation in estimates could be dramatically reduced by more accurate data giving precise information on current paid family leave programs).

128. *See id.* at 27–29.

129. *See id.* at 26, 29–30. The characteristics of “leave-needers” included age, race, gender, marital status, family income, educational attainment, government employment, and part-time status. *Id.*

130. *Id.* at 30–31. Maternity and paternity leaves would likely increase from 6.8 weeks to 7.5 weeks, and all other leaves would increase from 2.8 weeks to 3.7 weeks. *Id.* The lower estimate assumed, however, that leaves would not increase, and the upper estimate assumed that maternity and paternity leaves would increase by 1.3 weeks, and all other leaves would increase by 1.5 weeks. *Id.*

current unemployment insurance system, and payments are made through state public employment offices.<sup>131</sup> Similarly, TDI is administered through the state disability insurance systems, and employees will communicate directly with the state when applying for benefits. Both require minimal start-up costs, which include any notification provisions and payroll procedures. Contrary to employers' claims, tax incentives impose the greatest requirements on employers. Implementing their own program involves substantial start-up costs, which include developing employer policies, altering employee handbooks, and rewriting forms.

The funding stream also determines whether or not employers are required to contribute directly to fund an employee's leaves, which is the most pressing issue for employers. Unemployment insurance is funded by employers' state and federal payroll taxes.<sup>132</sup> Employers have a legitimate concern that expanding the requirements for the fund will increase taxes because of the susceptibility of funds to economic swings and increased use. TDI is flexible with regard to contributions, but legislation can require that employers contribute. This potential will undoubtedly impact employers' perception of TDI as a funding source.

The tax incentive approach imposes significant costs on employers. Employers are responsible for funding the entire leave, and are only reimbursed for a portion of their expenses. The amount of the credit will decrease their costs slightly; however, the credits are typically limited to 50% of an employer's expenses per employee.<sup>133</sup> Thus, compared with unemployment insurance, where employers will be subject to increased taxes, and TDI, where employers can be exempted from contributions altogether, the tax incentive approach is significantly more expensive.

Finally, legislation can address employers' concerns about increased employee abuse and reduced employee morale. Employers argue that once the leave becomes paid, the FMLA's current problems will be exacerbated because employees will have a greater incentive to take leave.<sup>134</sup> For example, under TDI, advocates argue that receiving a percentage of the average weekly salary will not entice employees to stay at home any longer

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131. See Regulations for Birth and Adoption Unemployment Compensation, 20 C.F.R. § 604 (2002).

132. Cf. WISEDALE, *supra* note 19, at 187. Some states presently require minimal employee payments. *Id.*

133. See *supra* Part II.A.3.

134. See, e.g., *Family and Medical Leave*, *supra* note 3, at 2259–60; Bustillo, *supra* note 8; Girion & Garvey, *supra* note 2.

than needed.<sup>135</sup> By contrast, if an employee with child care costs is given the opportunity to receive approximately half of their salary tax-free and to spend more time with their family, paid family leave may create an incentive to take unnecessary leave.

In addition to the indirect cost of increased employee abuse, there may also be a decrease in employee morale because employees are receiving wages while away from work. Childless workers receive fewer benefits under the new law, yet they may be forced to subsidize a portion of the costs.<sup>136</sup> They argue that they will end up contributing a disproportionate amount to the law in comparison with the benefits they actually receive.<sup>137</sup> There is evidence that workers who take FMLA leave are subject to resentment from childless workers, who argue that they are frequently asked to work extra hours so workers with children may have time off.<sup>138</sup> When the employee is receiving pay while on leave and a coworker is required to work extra hours, there is a potential for further problems with morale under any paid leave policy.

The California legislation illustrates how well-crafted legislation can counter these incentives. Its vacation-use requirements and penalty provisions will increase employers' control over the process while deterring misuse. The vacation provision authorizes employers to require that employees use up to two weeks of earned but unused vacation leave prior to going on paid leave.<sup>139</sup> This reflects the likelihood that some employees will use paid family leave rather than vacation time if it is available.<sup>140</sup> Forcing employees to use vacation before using paid family leave will deter them from taking unnecessary leaves. These provisions

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135. See Arline Friscia, *The Worker-Funded Leave Act: The Time Is Now to Help Build Stronger Families With a More Stable Economy*, 26 SETON HALL LEGIS. J. 73, 81 (2001).

136. See *Childless Lament*, *supra* note 43, at 2260. If the reasons for use of leave correlate with the reasons for use of leave for the FMLA, then childless workers will use the law less frequently. The Department of Labor survey found that, with the exception of taking leave for an employees' own health, more workers took leave either to care for a newborn, newly adopted, newly placed, or a child than to take leave to care for an ill spouse or parent. See DEP'T OF LABOR, *supra* note 14, at 2-3.

137. See *Childless Lament*, *supra* note 43, at 2260.

138. See BERNSTEIN, *supra* note 70, at 122. Anya Bernstein cites a study by the Heldrich Center for Workforce Development and the Center for Survey Research, which found that 35% of respondents who were unmarried or childless thought it was "unfair to offer family-friendly benefits without offering other benefits to employees without dependents." See *id.* In addition, the Department of Labor survey found that the most common method of replacing workers on leave is with co-workers. See DEP'T OF LABOR, *supra* note 14, at 6-10.

139. See CAL. UNEMP. INS. CODE § 3303(g) (West 2002).

140. See Dube & Kaplan, *supra* note 1, at 24-25. In estimating usage rates, Dube and Kaplan's study found that one-third of employees would use paid family leave instead of other benefits, such as vacation time or personal days. See *id.*

give employers increased control by allowing them to decide whether to implement this policy and will have a negative impact on usage.

Penalties may also deter employees from abusing the law. The California bill allows the director to “assess a penalty against the individual in the amount of 25% of the benefits paid” when an employee falsely certifies the medical condition of a family member with the intent to defraud.<sup>141</sup> The FMLA contains no such provision, presumably because the incentive to take leave is increased when the leave is paid. Although the impact on deterrence is unclear,<sup>142</sup> it will certainly penalize those who abuse the law.

The extent to which paid family leave imposes additional costs beyond those of the FMLA will depend on the increase in length and frequency of leave and the design of the legislation. The funding stream will have the greatest impact on employers, potentially requiring them to contribute directly to the leave or fund their own leave policy. Furthermore, penalty and vacation provisions will give employers more control and may deter employee abuse.

#### B. QUESTIONABLE BENEFITS

In response to employers' complaints about the increased costs of providing paid leave, advocates cite several advantages that leave policies offer employers. Employers either fail to recognize them or argue that they have yet to materialize.<sup>143</sup> The most often cited benefit to employers is the increase in retention,<sup>144</sup> which leads to a more loyal and experienced work force and ultimately increases productivity.<sup>145</sup> Employer groups argue that retention is actually unaffected when paid family leave policies are mandated.<sup>146</sup> Employers argue that under voluntary paid family leave plans the employee has chosen that particular employer for their generous paid leave policies and has an incentive to stay with that company.<sup>147</sup> When the government requires all employers to offer paid family leave, the employee

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141. See CAL. UNEMP. INS. CODE § 3305.

142. Unless the notice required by the Employment Development Department includes information about the penalty provision, employees may not be aware of this provision, and therefore not deterred by it.

143. See *supra* note 68 and accompanying text. See also *Childless Lament*, *supra* note 43, at 2260.

144. See *Tompson & Werner*, *supra* note 13, at 143.

145. See *Grill*, *supra* note 36, at 390.

146. See *supra* note 68 and accompanying text.

147. See *FMLA TECHNICAL CORRS. COALITION*, *supra* note 37.

is aware that if they switch employers they will still receive this benefit.<sup>148</sup> The Department of Labor survey reflects this perception, where 86% of employers found that the FMLA had no noticeable effect on turnover and only 5.7% found a positive effect.<sup>149</sup>

Studies have found that retention increases when employers offer leave benefits, regardless of whether the benefit is mandated. Employers focus on their decreased ability to compete with other employers in the benefits market; however, the actual benefit stems from the fact that employees are more likely to remain in their jobs if allowed to take paid leave.<sup>150</sup> The Labor Project for Working Families studied the retention and turnover impact on employers and found that there would be substantial gains to employers as a result of reduced turnover.<sup>151</sup> They compared the “return probability”<sup>152</sup> of leave-takers receiving some pay with that of leave-takers receiving no pay, including the impact of pay-status, type of leave, and demographic variables on return probability.<sup>153</sup> The study found that those on maternity or paternity leave had an 11.4% greater chance of returning to work when on paid leave as compared with unpaid leave and that those on all other leaves had an 8.2% greater chance of returning to work.<sup>154</sup> Translating this into financial cost savings, the study found that in the year 2001 almost \$90 million could have been saved as a result of reduced turnover in California.<sup>155</sup> Rather than leaving their job and relying on public assistance or a part-time job, employees take the paid leave and remain employed with the same employer.<sup>156</sup> Thus, the attachment to their job reduces turnover costs and the increased job tenure leads to increased productivity and wages.<sup>157</sup>

There are other benefits to employers from paid family leave as well. When employers hire workers, they invest in them through hiring and

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148. *See id.*

149. DEP’T OF LABOR, *supra* note 14, at 6.2.3, tbl. 6.5. It is interesting to note that a slightly higher percentage, 8.4%, of employers found that the FMLA actually had a negative effect on turnover. *Id.*

150. *See Dube & Kaplan, supra* note 1, at 42.

151. *See id.*

152. *Id.* at 40. The “return probability” is defined as “the fraction of employees who return to the same employer out of all who re-entered the labor market after completing the leave.” *Id.*

153. *Id.*

154. *Id.* at 41.

155. *Id.* at 42. The study found that almost 80,000 California workers would have returned to the labor force as a result of paid leave and multiplied this by the estimated cost of an employee termination, or \$1100. *See id.*

156. *Id.* at 13.

157. *See id.* at 13–14.

training costs. “[L]eaves that maintain the employment relation keep the firm from forfeiting its investment in the worker and bearing the search costs for a new employee.”<sup>158</sup> Also, productivity will likely be reduced in the case of a maternity leave if the employee returns to work immediately because of “the physical rigors of childbirth and the demands of a very young infant.”<sup>159</sup> Giving employees more time to recover will increase productivity and morale when they return. In addition, by allowing employees to take leave during this period, employers will avoid paying wages during this period of reduced productivity.<sup>160</sup>

### C. THE FEAR OF GOVERNMENT MANDATES

Employers argue that mandated benefits are neither an efficient nor effective method of providing a fringe benefit. Family leave legislation departs from the United States’ past avoidance of socialized programs to provide employment benefits.<sup>161</sup> Historically, the government has relied on private programs to fill any needs created by demographic and sociological shifts.<sup>162</sup> Americans’ wariness of giving “the state” a stronger role than “competitive market forces”<sup>163</sup> has led them to distrust the government to implement social programs when private programs can or are in place.<sup>164</sup> They cite the problems with early federal regulatory programs as a reason to prevent the government from taking a larger role in social programs.<sup>165</sup> Employers’ distrust of government mandates “fit[s] with the American belief that capitalism is a central good that needs to be protected or at least not interfered with and with the belief that business strength is the key to maintaining prosperity.”<sup>166</sup>

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158. Jacob Alex Klerman & Arleen Leibowitz, *Labor Supply Effects of State Maternity Leave Legislation*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE 65, 67 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997).

159. *Id.*

160. *Id.*

161. See Skocpol, *supra* note 10, at 312–21. As Theda Skocpol states, “[H]istory . . . reveals that many sorts of proposed social policy reforms . . . have been highly vulnerable to ideological counterattacks against government ‘bureaucracy.’” *Id.* at 325. See also Dana M. Muir, *Contemporary Social Policy Analysis and Employee Benefit Programs: Boomers, Benefits, and Bargains*, 54 WASH. & LEE L. REV. 1351, 1357–62 (1997).

162. See Muir, *supra* note 161, at 1360–62 (describing the historical development of private pension plans).

163. Skocpol, *supra* note 10, at 325. Some have gone as far as to say that Americans resent government regulations even more than they dislike taxes. See *id.*

164. See *id.* at 324–25.

165. See *id.*

166. BERNSTEIN, *supra* note 70, at 7.

Employers' responses to the FMLA reflected this underlying concern with government mandates.<sup>167</sup> When the FMLA was passed, the actual cost of the leave was seen as a mere inconvenience.<sup>168</sup> The concern was that once there was a pattern of mandates established, the FMLA would become a precedent for other mandated benefits, such as passage of health care reform, paid leave, paid vacation, and other social legislation.<sup>169</sup> Businesses argued that this relatively minor mandate would lead to a larger government that interfered with the determination of benefits and workplace rules,<sup>170</sup> and that it would interfere with employer-employee negotiations.<sup>171</sup> The bill was labeled as "a direct intrusion by the Federal Government into the free market [that] . . . mandat[ed] certain fringe benefits whether or not . . . [they were] desired or in the best interest of [the] employer or employee."<sup>172</sup> A lobbyist from the National Federation of Independent Businesses attributed the strength of businesses opposition to the issue of government mandates, stating: "The whole idea of fighting to the bitter end . . . was to show them that the employer mandate battle was going to be bitter, it was going to be bloody."<sup>173</sup>

The paid family leave arguments echo those made during the FMLA debates.<sup>174</sup> Employer groups assert that in mandating paid family leave, the government will undermine competition by creating a system where incentives for employers to do more are removed.<sup>175</sup> In addition, they are concerned that when the government mandates benefits, the government is seen as the benefactor rather than the employer.<sup>176</sup> Employers hope these arguments will resonate with the American public and politicians, so they emphasize the increased cost to the state of administering a large government mandate and the privacy concerns involved with a state administered program.<sup>177</sup>

Paid leave also is alarming to employers because it reaffirms their fears that the FMLA was precedent-setting legislation that made way for

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167. See ELVING, *supra* note 12, at 13.

168. See *id.* at 289.

169. See BERNSTEIN, *supra* note 70, at 101; ELVING, *supra* note 12, at 289, 292.

170. See BERNSTEIN, *supra* note 70, at 101 (quoting opponents arguments that FMLA would be "the first domino" or "the camel's nose under the tent"); ELVING, *supra* note 12, at 292.

171. Mory & Pistilli, *supra* note 23, at 694.

172. 137 CONG. REC. S14156 (daily ed. Oct. 2, 1991) (statement of Sen. Hatch).

173. BERNSTEIN, *supra* note 70, at 102 (quoting John Motley of the National Federation of Independent Businesses).

174. See BERKELEY MEDIA STUDIES, *supra* note 71, at 10.

175. See FMLA TECHNICAL CORRS. COALITION, *supra* note 37.

176. See *id.*

177. See *id.*

more expansive mandated benefits.<sup>178</sup> Advocates of paid family leave announced during the FMLA debates that they were using an incremental approach and hoped to expand the FMLA once it was passed.<sup>179</sup> The paid family leave debate has reaffirmed employers' initial fears that each bill is merely an incremental step to more intrusive government mandates.<sup>180</sup>

Finally, perhaps the greatest indication of employers' dislike for government mandates in this context is the fact that employers support the concept of paid family leave solely through tax incentives provided to employers.<sup>181</sup> Employers argue that tax incentives will benefit employees and the state and increase the incentives for employers to compete for the best leave policies.<sup>182</sup> Even with these benefits, assuming the state-based programs were funded entirely by employee contributions, the direct costs of tax incentives would be more expensive for employers, which effectively invalidates their cost argument. Developing a paid family leave policy entails administrative and direct financial costs which would make the total cost substantially greater than a state-mandated policy. Employers' willingness to contribute to a leave policy that they have designed and implemented voluntarily demonstrates the extent to which employers dislike an approach to paid family leave based on a government mandate.

#### IV. ACHIEVING A BALANCED APPROACH TO PAID FAMILY LEAVE

Considering employers' concerns is crucial to passing legislation and implementing the resultant policies. During the FMLA, and more recently during the paid family leave debates, employers demonstrated that they will

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178. See BERKELEY MEDIA STUDIES, *supra* note 71, at 10; Carl Ingram, *The State Senate Advances Paid Family Leave Benefits*, L.A. TIMES, June 11, 2002, at B6 (quoting Sen. Ray Haynes who voiced concerns that when the legislature passed unpaid leave, it was promised that unpaid leave's backers would never return with a paid leave bill).

179. See BERKELEY MEDIA STUDIES, *supra* note 71, at 19, 96, 115.

180. This has also occurred with the debate concerning the FMLA and small business. Bills that decrease the small business threshold in the FMLA have been introduced in spite of the fact that legitimate arguments were put forth when the FMLA was originally passed in favor of this threshold number. See Family and Medical Leave Improvements Act of 1999, H.R. 91, 106th Cong. § 2 (1999); Phillips, *supra* note 81, at 44; BERKELEY MEDIA STUDIES, *supra* note 71, at 10. Now that the California legislation has passed, employers are "worried that the next step will be putting the employer contribution back in, or extending the time off." BERKELEY MEDIA STUDIES, *supra*, at 10.

181. See *supra* Part II.A.3. See also Karen Lee, *States Creep Toward Paid Family Leave*, EMPLOYEE BENEFIT NEWS, Nov. 1, 2002, at 20 (quoting an employer lobbyist who stated that the business community supports paid family leave "as long as an employer offers the benefit of its own volition and not because of a state mandate").

182. See Lee, *supra* note 181, at 20.

use their political power to prevent legislation from being passed, and continue to protest once it is passed. Working with employers to develop effective legislation will expedite the debate and diminish some of the concerns of employers once the law becomes effective. Employers' support is also crucial during the implementation phase to prevent employees from being discouraged from using the law.

This Note argues that paid family leave can address employers' concerns while achieving the goal of allowing employees to receive partial salary to care for a family member. Funding leaves through employee contributions and state disability funds, while implementing the program on an incremental basis, will accomplish this goal.

#### A. ELIMINATING EMPLOYER CONTRIBUTIONS

The largest obstacle preventing the passage of paid family leave legislation is the prospect of employer contributions. Paid family leave can and should be funded solely through employees because of the excessive costs to employers and the difficulty in predicting employers' responses. In addition, legislation will appear more credible and legitimate to employers and politicians if employees fund the policy.

Requiring employers to pay for part of the leave may force them to reduce expenses in other areas in order to find a way to pass on these costs, which will ultimately have an adverse impact on employees.<sup>183</sup> The FMLA did not pass on direct costs to employers, and as a result, has not lowered employment or wages for affected workers.<sup>184</sup> As compared with the intangible and relatively minimal costs of administration and productivity loss, financial contributions will be incorporated into their budget and directly impact the bottom line.<sup>185</sup> This will have a negative economic impact and detract from both employees' and employers' support of the issue.

Moreover, it is difficult to predict how employers will respond in economic terms. In California, before the employer contributions were omitted, the Labor Project for Working Families stated that the economic consequences were unclear, but admitted employer contributions may force

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183. See Young, *supra* note 51, at 156.

184. See Waldfoegel, *supra* note 4, at 290.

185. The Labor Project for Working Families estimated that under the original California legislation, monthly employer contributions could range from \$1.41 to \$3.90 per employee. See Dube & Kaplan, *supra* note 1, at 35-36.

employers to lower wages or cut jobs.<sup>186</sup> Employers may respond by eliminating benefited positions and hiring part-time or temporary employees to decrease benefits. The effect of such actions may be disproportionately passed on to women<sup>187</sup> because they make up a majority of the “disposable workforce” and would be unfairly burdened by such cuts.<sup>188</sup> Adding to this concern is the unpredictable impact on different businesses. The impact of financial contributions will vary greatly depending on a business’s product or service, industry, and size, leading to substantial inequities.<sup>189</sup>

Eliminating employer contributions will increase the credibility of the legislation and decrease political resistance. Unlike previous mandated contributions that were related to the employer’s business,<sup>190</sup> paid family leave requires employers to financially assist employees in an area unrelated to the employer’s business. Conservative and moderate politicians will likely view this as an unprincipled approach to paid family leave and oppose such a bill. The California debates reflected this fact; after encountering substantial opposition from the business community, even the sponsor of the bill acknowledged that employers would be neutral if the provision requiring an employer contribution was removed.<sup>191</sup> The California legislation passed shortly after it was amended to eliminate employer contributions.<sup>192</sup>

Further, any inequities caused by financial contributions will likely impact small businesses the most. History demonstrates that allowing the small business community to respond forcefully to any proposed legislation can have devastating effects on the movement.<sup>193</sup> Allowing the small business lobby to mobilize and unite in opposition is dangerous for employee advocates, because they have a reputation for being “highly

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186. See *id.* at 14–15. Many companies have already begun replacing full-time clerical workers with part-time workers to avoid mandated benefits. See Young, *supra* note 51, at 157.

187. See Waldfoegel, *supra* note 4, at 275, 278 (stating that this may reduce equity between any group most impacted by a leave and other groups, and because the affected group is primarily women, and as one of the primary goals of family-friendly benefits is to promote gender equity, this is a major concern).

188. See Young, *supra* note 51, at 157.

189. See *id.* at 156.

190. See *supra* notes 23–26 and accompanying text.

191. See Bustillo, *supra* note 8.

192. See, e.g., LABOR PROJECT, *supra* note 2 (outlining the important developments that paved the way for paid family leave in California); Girion & Garvey, *supra* note 2 (describing Governor Gray Davis’s decision to sign the bill only after employer contributions were eliminated).

193. See BERNSTEIN, *supra* note 70, at 8.

effective at blocking or preventing the enactment of social policy initiatives.”<sup>194</sup>

Employee advocates argue that employers receive a benefit from providing family leave and therefore should bear some of the costs.<sup>195</sup> The intention of paid family leave, however, is to minimize the work-family conflict, and employees are the primary beneficiaries. Although the employer will eventually receive a benefit from increased retention and recruiting savings, until they notice a statistical improvement that correlates with a leave policy, employers will fail to acknowledge this benefit. In addition, employers have not found the FMLA to have a positive impact on retention so far, and may be doubtful that paid family leave will be any different. Subsidizing a policy while receiving nothing in return will generate a negative perception of the law and potentially impact employers’ implementation of the policy.

Advocates of paid family leave may also argue that eliminating employers’ contributions removes an important negotiating tool. A similar argument was made during the FMLA process, where some claimed that by only proposing unpaid leave, they “compromise[d] too early in an effort to respond to anticipated opposition.”<sup>196</sup> Focusing on unpaid leave during the FMLA debates was successful, however, because it emphasized the underlying issue of creating a leave entitlement for workers to care for their families, rather than what kind of entitlement should be offered. Instead of eliminating a negotiating tool, developing a similar strategy during the paid family leave debates will emphasize the issue of workers taking leave to care for a family member to receive pay.

Thus, placing the burden of funding leaves on employees will minimize costs to employers, reduce economic uncertainty, and require those who receive the benefit of paid family leave to subsidize the policy. In addition, the probability of passing legislation and successfully implementing it will increase substantially.

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194. *See id.*

195. *See, e.g., Committee Report: Hearing on Cal. S. B. No. 1661, Before Assemb. Comm. on Appropriations* Reg. Sess. (Cal. 2001) (stating that “in recognition of the shared benefit, the program will be implemented through employee contributions and the provision of benefits by employers.”). This committee meeting occurred prior to the elimination of employer contributions in California.

196. BERNSTEIN, *supra* note 70, at 96.

## B. DISABILITY INSURANCE

Funding paid family leave through state disability insurance will ensure consistent coverage and minimal costs. TDI imposes minimal costs on employers because states are responsible for administering the program and, depending on the legislation's design, employers can be exempt from financial contributions. Furthermore, there are additional benefits to disability insurance funds beyond the low costs to employers. First, in comparison with tax incentives, TDI ensures consistent benefits and coverage across all eligible workers. Second, the purposes behind disability insurance and paid family leave are complementary, which will decrease resistance to the legislation and establish credibility.

Despite employers' claims that tax incentives are the most effective approach to paid family leave, they will result in inconsistent coverage and increased employer costs when compared with TDI. First, tax incentives do not guarantee paid leave to eligible employees. Employers argue that if there are incentives to do so, competition from other firms will spur them to enact paid family leave policies. Further, although child care programs have increased as a result of tax incentives to employers, paid family leave and child care benefits differ. Family leave is a "scattered and occasional benefit" that employees do not plan to use in advance.<sup>197</sup> Often it will be needed without warning in emergency situations for a short period of time. This contrasts with child care, which is generally needed on a long-term basis and impacts a specific group of employees. Job applicants generally are aware that they will need child care benefits in the future; whereas they may not predict that they will use paid family leave. In addition, the possibility of employees directly lobbying their employer for paid family leave is also reduced, because after the need for family leave has passed they may not feel lobbying their employer will benefit them. If employers are not aware of the market need, they will fail to react by enacting paid family leave policies.

This problem is compounded by the extensive costs of designing and implementing their own paid leave policy. If employers are not aware of the need for this benefit, they will likely view the costs as outweighing the benefits, which will prevent widespread implementation. Furthermore, if a majority of employers do not implement their own program, tax incentives will merely serve to reward those companies who already do so, rather than encouraging new companies to enact a policy.

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197. *Id.* at 9.

In addition, tax incentives will produce inconsistent benefits that vary by economic cycle. If the benefits are implemented during profitable years, employers may decrease or eliminate the benefits when faced with a recession. The competition incentive diminishes during recessions because employees become less selective when looking for jobs and are more likely to accept reduced benefits in exchange for employment. Compared with TDI, where all eligible employees receive the benefit, tax incentives provide scattered coverage to employees.

Consistent coverage resulting from TDI will also reduce the impact of adverse selection. Adverse selection is an economic theory that “implies that certain insurance policies will not be provided in the private market in spite of their social desirability.”<sup>198</sup> If selected employers offer paid family leave, a disproportionate number of employees who wish to take advantage of this type of fringe benefit, those with sick parents or young children for example, would be attracted to those companies.<sup>199</sup> These companies will then be forced to pay lower wages because they will be paying more in benefits.<sup>200</sup> This would result in “sorting behavior,” where these “high-risk” employees would receive lower wages and workers who are less likely to need these benefits will shun these firms.<sup>201</sup> If benefits are mandated, however, all eligible companies will be required to provide paid family leave, and the risks of adverse selection will be minimized.

Besides providing consistent coverage, the purposes behind family leave and TDI are complementary. Disability insurance was originally conceived as a way to help disabled workers.<sup>202</sup> Allowing employees to receive pay while caring for an ill family member expands on this policy of insuring workers against the risk of becoming ill. Also, similar to family leave, disability funds were developed to assist employees with problems in their personal lives, rather than work-related issues. This differs from unemployment insurance, where expanding the program to allow for paid leave has completely subverted the original purpose: to assist those who were involuntarily unemployed and looking for work. Workers using paid

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198. See Dube and Kaplan, *supra* note 1, at 13–14.

199. *Id.*

200. *Policy Watch*, *supra* note 63, at 178.

201. *Id.*

202. See, e.g., CAL. UNEMP. INS. CODE § 2601 (West 2003) (stating that the purpose is to compensate for the “wage loss sustained by any individual who is unable to work due to the employee’s own sickness or injury.”). See also A MENU OF POLICY MODELS, *supra* note 32, at 9 (quoting Nicholas Spano, State Senator from New York, describing the logic of extending Temporary Disability Insurance to more employees because it is “conceived of as a way to help disabled workers and new parents”).

family leave are not unemployed and are voluntarily taking time off work to care for a family member.

Common principles are necessary to gain legitimacy and the support of both the public and politicians. Using funds that have been marked for an entirely different purpose may have a negative impact on public opinion and increase resistance from opponents of paid family leave. Thus, TDI is the most efficient funding mechanism because of the low costs it imposes on employers, the reliable coverage it creates for employees, and its compatibility with paid family leave.

### C. A CAUTIOUS APPROACH

Addressing the uncertainty of paid family leave requires a cautious approach to legislation. In order to gain employers' support without interfering with an employee's right to paid family leave, proposals must include safeguards that will minimize costs to employers, curtail employee abuse, and increase employers' control.

Shortening the duration of paid family leave will appease businesses' concerns with uncertain cost estimates without sacrificing the objectives of employee advocates. Duration can be limited to six or eight weeks without compromising the credibility of the bill. For employers, lowering the duration of leaves will result in cost savings and cushion the impact of any paid family leave policy, increasing the likelihood that they will compromise employee advocates in creating legislation.

This approach proved successful during both the FMLA passage and with California's enactment of paid family leave. Before the FMLA debate began, the coalition in support of the bill agreed to compromise on "the number of employees covered, the type of employees covered, and the number of weeks provided."<sup>203</sup> Their willingness to compromise made it more difficult for business groups who opposed the bill to make credible arguments.<sup>204</sup> In California, the sponsor of the paid family leave bill lowered the number of weeks covered from twelve to six in response to concerns about the Employment Development Department's cost estimates.<sup>205</sup> Although this move was seen as purely political by most, it

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203. See BERNSTEIN, *supra* note 70, at 100.

204. See *id.* at 102. Even opponents agreed that these compromises made it more difficult to oppose legislation. See *id.*

205. The Employment Development Department is the regulatory agency in California responsible for administering the disability insurance program.

proved to be a crucial negotiating ploy that played a large role in the bill's passage.<sup>206</sup>

Decreasing incentives for abuse and unnecessary use further reduces uncertainty. The California bill added both a penalty provision and a provision allowing employers to require employees to use vacation before taking leave. Providing employers with a tool to respond to abuse will appease business groups and deter workers attempting to use paid leave as a means to get a day off.

The vacation provision eliminates the uncertainty caused by the substitution effect and deters unnecessary use. Estimating leave use is difficult partly because of the substitution effect, namely how employees would choose to use their vacation time as compared with paid family leave. The vacation provision eliminates uncertainty because employees are required to use their vacation first and then take paid family leave. In addition, employees will want to avoid using vacation and will be deterred from taking unnecessary leave. Provisions such as these not only reduce uncertainty, but also placate politicians who are concerned about the impact on businesses. In California, the penalty and vacation provisions increased the bills' attractiveness to moderate Democrats who ultimately voted for the bill.<sup>207</sup>

Finally, a pilot program may be a more feasible method of implementation.<sup>208</sup> Even advocates of paid family leave admit that “[m]echanisms for financing a paid national leave policy are not out of reach, if done on a phased-in basis.”<sup>209</sup> Proposing a pilot program demonstrates responsiveness to employers' concerns about a lack of data on paid family leave. The opportunity to test a paid leave policy decreases the threat to employers and may limit resistance. In addition, the program's success will legitimize paid family leave benefits and lead to public acceptance, making it more difficult for politicians and employers to repeal the pilot program. The FMLA debate reflected this effect: Initially 57% of the public thought the bill should become law, characterized by employee advocates as “strong but not overwhelming support.”<sup>210</sup> In 1998 a similar

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206. See *supra* note 2.

207. See LABOR PROJECT, *supra* note 2; Ed Mendel, *State Finds Funds to Keep Centers for Disabled Open*, SAN DIEGO UNION-TRIB., Aug. 23, 2002, at A4.

208. Massachusetts is the only state who has proposed a pilot program in conjunction with the paid family leave legislation. See H.B. 774, 182d Gen. Court, Reg. Sess. (Mass. 2001). The legislation also contained a provision requiring a report to the commerce and labor committee “evaluating the effectiveness of the payment of benefits” one year before the pilot program would expire. See *id.*

209. CARNEGIE CORP., *supra* note 29, at 47.

210. See BERNSTEIN, *supra* note 70, at 131.

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poll found that 88% of the American public had a favorable view of the Act.<sup>211</sup> Observing the minimal impact a paid leave policy has on their business will increase employers' support of similar proposals and decrease their resistance to permanent legislation.

Legislation can be limited in scope while still accomplishing the goals of employee advocates. These provisions are not mandatory for legislation to succeed; however, if they are offered during the negotiation process, advocates can compromise and achieve their objective of legitimizing the concept of paid family leave. A cautious approach will minimize the impact on employers' businesses and increase the probability of success once the bill is enacted.

## V. CONCLUSION

Employers' fear of legislated paid family leave stems from the uncertain impact that such legislation will have on employees and businesses. Although experts estimate that the costs will be minimal and that employers will benefit, the exact increase in frequency and duration of leaves is unknown. Further, the unprecedented nature of mandated paid family leave legislation aggravates employers' concerns, a trend that will continue until paid family leave becomes an accepted and universal benefit.

Fortunately, properly structured legislation can minimize this uncertainty. If employees fund the entire leave, costs to employers will be reduced substantially. Further, using disability insurance to fund paid family leave is consistent with the original purpose for the funding programs, will decrease costs to employers, and will ensure that all eligible employees have access to paid family leave. Finally, limiting the duration of leaves and adding provisions that negate the incentives for abuse can provide negotiating points for both sides and limit employers' concerns regarding uncertainty. Proposing legislation within this framework increases both the chance of passage and success in implementation.

Groundbreaking legislation requires a balanced approach. Comprising on the provisions of legislation allows employers to reduce the burdens on employees inherent in balancing work and family demands while enabling employee advocates to achieve the goal of entitling workers to a partial salary when caring for a family member.

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211. *See id.*

