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## PAID FAMILY LEAVE: HOW A GLOBAL PANDEMIC EXACERBATES THE NEED FOR A COMPREHENSIVE NATIONAL PAID LEAVE POLICY

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*Even after a global pandemic swept through the nation's workforce, the United States remains one of only a few countries without a permanent paid family leave policy. Although temporary paid extensions to the current national, unpaid family and medical leave policy were enacted, the expiration of these policies leaves employees without needed job and income protections. Despite historic job losses and nearly 2.5 million women leaving the workforce, current paid leave proposals have yet to gather enough support to pass in Congress and still lack the comprehensive assistance necessary to support the workforce they are aimed at protecting.*

*This Note acknowledges that some state and private paid leave programs are already in place. It recommends, however, broader protections in the form of a comprehensive paid family leave program, which is imperative to fill the gaps and to facilitate an inclusive economic recovery.*

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## I. INTRODUCTION

Despite growing need and continued public support, the United States still lacks a comprehensive and permanent national paid leave policy.<sup>1</sup> The country's first national leave program, the Family and Medical Leave Act ("FMLA"), was enacted almost thirty years ago and offers some unpaid leave to qualifying workers.<sup>2</sup> The FMLA, however, leaves vulnerable large sectors of the U.S. workforce who do not fall within the categories that offer unpaid leave or who do not have the economic means to take it.<sup>3</sup> The reality of the Coronavirus pandemic has created a monumental opportunity to enact a comprehensive, national paid leave policy that has previously not had enough congressional support to pass.<sup>4</sup>

The FMLA was designed to support a changing workforce, one that included more women than ever before.<sup>5</sup> As women were—and still are—more likely to bear the brunt of familial responsibilities and care,<sup>6</sup> the FMLA was enacted to provide additional support in emergency situations to keep more women employed.<sup>7</sup> The FMLA's detractors have argued that the FMLA would actually increase the gender inequality because employers would be disinclined to hire women, who would be more likely to take the offered leave.<sup>8</sup> This argument, however, exposes the much larger problem of gender inequality in society. Although broader family leave policies cannot address gender disparity in its entirety,<sup>9</sup> they can at least help reduce the economic harm to women.<sup>10</sup> The

1. Gregory Svirnovskiy, *Paid Leave Is Incredibly Popular—Even with Republicans*, Vox (June 7, 2021, 8:00 AM), <https://www.vox.com/2021/6/7/22380427/poll-paid-leave-popular-democrats-republicans-covid-19> [https://perma.cc/2W8W-VX7S].

2. Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654.

3. Kelly McDonald Garrison, Avantica Shinde, Mary Stoney, Daniel Wood & Xiaodan Zhang, *The Family and Medical Leave Act & Parental Leave Policies*, 21 GEO. J. GENDER & L. 333, 352 (2020).

4. See Usha Ranji, Michelle Long & Alina Salganicoff, *Coronavirus Puts a Spotlight on Paid Leave Policies*, KFF (Dec. 14, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/coronavirus-puts-a-spotlight-on-paid-leave-policies/> [https://perma.cc/3P77-VXRB]; e.g., Steven A. Holmes, *House Backs Bush Veto of Family Leave Bill*, N.Y. TIMES, July 26, 1990, at A16.

5. Garrison et al., *supra* note 3, at 353; *Women in the Labor Force*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/wb/data/facts-over-time/women-in-the-labor-force> (last visited Apr. 6, 2022) [https://perma.cc/V9WJ-RBXK].

6. Pallavi Gogoi, *Stuck-at-Home Moms: The Pandemic's Devastating Toll on Women*, NPR (Oct. 28, 2020, 7:01 AM), <https://www.npr.org/2020/10/28/928253674/stuck-at-home-moms-the-pandemics-devastating-toll-on-women> [https://perma.cc/H7MK-3V3C] ("[T]he uncomfortable truth is that in their homes, women are still fitting into stereotypical roles of doing the bulk of cooking, cleaning and parenting. It's another form of systemic inequality within a 21st century home that the pandemic is laying bare.").

7. See Garrison et al., *supra* note 3, at 353.

8. See MEGAN A. SHOLAR, *GETTING PAID WHILE TAKING TIME: THE WOMEN'S MOVEMENT AND THE DEVELOPMENT OF PAID FAMILY LEAVE POLICIES* 52 (2016).

9. See Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U.J. GENDER SOC. POL'Y & L. 459, 469–70 (2008).

10. See JULIE KOHLER, STEPHANIE ODIASE & JESSICA FORDEN, *TIME'S UP FOUND., WOMEN'S WORK: KEY POLICIES AND PARADIGMS FOR AN INCLUSIVE POST-PANDEMIC ECONOMY* 10 (2021),

FMLA was a huge step forward, but not everyone is eligible for or able to take the leave, and the Coronavirus pandemic has only made this distinction starker.<sup>11</sup>

The first reported SARS-CoV-2 (“Covid-19” or “Coronavirus”) infection in the United States was reported on January 20, 2020.<sup>12</sup> Since this initial infection, the country declared a national emergency,<sup>13</sup> the unemployment rate in the United States peaked at 14.8%,<sup>14</sup> and the United States alone surpassed 76 million total cases and nearly 900,000 deaths,<sup>15</sup> while the world totaled over 386 million cases and 5.7 million deaths.<sup>16</sup> The pandemic shuttered businesses and schools—sometimes for months<sup>17</sup>—and caused a shift in how we view relationships with the outside world and each other.<sup>18</sup> Emerging evidence suggests, however, that the pervasive effects of the pandemic will disproportionately and differently impact women,<sup>19</sup> so far indicating higher unemployment rates and reduced labor force participation.<sup>20</sup> Additionally, as the pandemic continues, the United Nations reports data highlighting an increase in unpaid work, job and income loss, and a burden on women’s mental health.<sup>21</sup>

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[https://timesupfoundation.org/wp-content/uploads/2021/07/Times-Up\\_Womens-Labor-Force-Report\\_Version-2.pdf](https://timesupfoundation.org/wp-content/uploads/2021/07/Times-Up_Womens-Labor-Force-Report_Version-2.pdf) [https://perma.cc/97P9-6X2J].

11. Garrison et al., *supra* note 3, at 352; KOHLER ET AL., *supra* note 10, at 6.

12. See Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 N. ENGL. J. MED. 929, 929–30 (2020); see also Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html> [https://perma.cc/83US-RL6Q].

13. *Pelosi and Trump Reach Deal on a Relief Package*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/13/world/coronavirus-news-live-updates.html#:link=37509802> [https://perma.cc/E4ZS-892N].

14. Civilian Unemployment Rate, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> (last visited Apr. 20, 2022) [https://perma.cc/WK9H-SSRV] (showing the most recent unemployment rate high was 10% in October 2009).

15. *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CTR. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (last visited Apr. 6, 2022) [https://perma.cc/JE6N-D2XB].

16. WHO *Coronavirus (Covid-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last visited Apr. 6, 2022) [https://perma.cc/WAU3-3375].

17. Sharon Bernstein & Dan Whitcomb, *California Shuts Down Businesses, Schools as Coronavirus Outbreak Grows*, REUTERS (July 13, 2020, 10:29 AM), <https://www.reuters.com/article/us-health-coronavirus-usa/california-shuts-down-businesses-schools-as-coronavirus-outbreak-grows-idUSKCN24E23E> [https://perma.cc/AY5A-C3PD].

18. *Coronavirus Will Change the World Permanently. Here’s How.*, POLITICO (Mar. 19, 2020, 7:30 PM), <https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579> [https://perma.cc/829A-VUQ7].

19. UNITED NATIONS, POLICY BRIEF: THE IMPACT OF COVID-19 ON WOMEN 4 (2020), <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf> [https://perma.cc/GDS7-PEX9] (“Across the globe, women earn less, save less, hold less secure jobs, are more likely to be employed in the informal sector. They have less access to social protections and are the majority of single-parent households. Their capacity to absorb economic shocks is therefore less than that of men.”).

20. Liana Christin Landivar, Leah Ruppanner, William J. Scarborough & Caitlyn Collins, *Early Signs Indicate that COVID-19 Is Exacerbating Gender Inequality in the Labor Force*, 6 SOCIO. RSCH. DYNAMIC WORLD 1, 1 (2020).

21. U.N. *Women Surveys Reveal that Women Are Bearing the Brunt of the COVID-19 Pandemic*, U.N. WOMEN (July 23, 2020), <https://data.unwomen.org/news/un-women-surveys-reveal-women-are-bearing-brunt>.

Even as women return to the workforce, they are vulnerable to career setbacks, lower pay, and decreased retirement benefits.<sup>22</sup>

In response to major disruptions wrought by the Covid-19 pandemic on the economy and the labor force, the United States passed two temporary paid leave policies, the Families First Coronavirus Response Act (“FFCRA”) and the American Rescue Plan, which expand family and medical leave for certain qualifying workers due to circumstances unique to the pandemic.<sup>23</sup> These acts bolstered existing unpaid provisions under the FMLA—creating a paid leave counterpart—for a public health emergency.<sup>24</sup> These changes, however, were enacted as temporary solutions for problems created by the pandemic, such as child care or school closures, quarantine orders, or testing mandates.<sup>25</sup> Prior to the pandemic, four out of five workers across the country did not have access to paid family leave,<sup>26</sup> 24% of United States civilian workers—roughly 33.6 million people—did not have access to paid sick leave,<sup>27</sup> and only twelve states required employers to provide it.<sup>28</sup>

The true impact of this public health crisis may be felt for decades. *Bloomberg Magazine* called it the “Lost Year,” and equated its effect to a “long hauler,” a medical term to describe patients with lingering health problems, stating “the least-advantaged will suffer the most in damaged health, derailed schooling, and wrecked careers.”<sup>29</sup> Federal Reserve Board Governor Lael Brainard warned of the potential for “scarring effects, with longer-term implications for household incomes and potential growth” after the sharp decline in women’s labor force participation during the pandemic.<sup>30</sup> Efforts by the federal government to support workers during the pandemic can, and should, be

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Covid-19-pandemic [<https://perma.cc/SZ8Y-4VF3>] (“Despite the data showing that both men and children are stepping up to help with household chores, the burden still falls on women . . .”).

22. Julie Kohler, Stephanie Odiase & Jessica Forden, *The Current State of Women’s Economic Well-Being is in Jeopardy*, TIME’S UP FOUND. (July 13, 2021), <https://timesupfoundation.org/the-current-state-of-womens-economic-well-being-is-in-jeopardy/> [<https://perma.cc/MXF2-9GEM>] (“[A] typical American woman earning a median wage before the pandemic could lose \$250,000 in lifetime earnings if she returns to work in 2022 and \$600,000 if she does not return to work until 2024.”).

23. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3101–3106, 134 Stat. 178, 189–92 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3132, H.R. 1319.

24. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3101–3106, 134 Stat. 178, 189–92 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3132, H.R. 1319.

25. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3101–3106, 134 Stat. 178, 189–92 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3132, H.R. 1319.

26. U.S. DEPT OF LABOR & U.S. BUR. OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2019 BUREAU 119–20 STATS. tbl. 31a (2019).

27. Drew DeSilver, *As Coronavirus Spreads, Which U.S. Workers Have Paid Sick Leave—and Which Don’t?*, PEW RSCH. CTR. (Mar. 12, 2020), <https://www.pewresearch.org/fact-tank/2020/03/12/as-coronavirus-spreads-which-u-s-workers-have-paid-sick-leave-and-which-don-t/> [<https://perma.cc/SC2U-URJ7>]

28. *Id.*

29. Peter Coy, *The Legacy of the Lost Year Will Be Devastating Inequality*, BLOOMBERG (Mar. 10, 2021, 4:00 AM), <https://www.bloomberg.com/news/articles/2021-03-10/covid-pandemic-made-racial-income-inequality-much-worse> [<https://perma.cc/963J-BRF7>].

30. Lael Brainard, Governor, Fed. Rsrv. Bd., U.S. Economic Outlook and Monetary Policy: An Update (Mar. 2, 2021), <https://www.federalreserve.gov/newsevents/speech/brainard20210302a.htm#fn6> [<https://perma.cc/9H34-7RCY>].

expanded to provide continued support even after this immediate health emergency has passed. The Biden Administration put forth the American Families Plan,<sup>31</sup> which includes a permanent paid family leave proposal. Although this plan is far more than the unpaid leave currently granted under the FMLA, it is far less than the country needs.<sup>32</sup>

This Note recommends a national paid family leave policy that encompasses permanent and expanded leave protections above what is currently covered under the Family and Medical Leave Act, the Families First Coronavirus Response Act, and the American Rescue Plan and beyond what is proposed under the American Families Plan.<sup>33</sup> Part II introduces the history of family leave policies in the United States, beginning with early legislative proposals, the FMLA and the purpose of its enactment, and more recent federal proposals, then considers state and global leave policies. Finally, Part II examines the Covid-19 pandemic, its impact on women in the workforce, and the federal policies enacted in response to the crisis. Part III argues that the nature of the pandemic and the state of the country require lasting policies aimed at reinforcing protections for workers faced with emergency situations. Part IV recommends a six-month national paid family leave policy. This Note concludes that the absence of a comprehensive paid family leave plan leaves vulnerable populations without necessary protections that states and employers struggle to provide.

## II. BACKGROUND

In the fight for family leave, the United States remains behind other countries, with no permanent, national paid leave policy in place and only a patchwork of state and private policies used to fill this gap.<sup>34</sup> Leave policies are typically made up of family leave, medical leave (also known as sick leave), or both.<sup>35</sup> The family leave umbrella includes parental leave and caregiving leave.<sup>36</sup> Parental leave can encompass maternity or paternity leave given for a limited period around the time of the birth or adoption of a child to care for the child, and parental leave may provide gender-neutral, job-protected leave after

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31. Neil Reichenberg, *Biden Administration Proposes Paid Family and Medical Leave*, HR CERTIFICATION INST. (May 14, 2021), <https://www.hrci.org/community/blogs-and-announcements/hr-leads-business-blog/hr-leads-business/2021/05/14/biden-administration-proposes-paid-family-and-medical-leave> [https://perma.cc/YH3G-TBTA].

32. See Bryce Covert, *Biden's Paid Leave Plan Is Years Out of Date*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/opinion/biden-child-care-care-paid-leave.html> [https://perma.cc/R72P-UUCE] (noting six months has become the standard, bare minimum that workers should be guaranteed).

33. See discussion *infra* Section II.A.

34. See generally Nicole Ogrysko, *Lawmakers Unveil Details of 'Historic' Federal Paid Parental Leave Benefits*, FED. NEWS NETWORK (Dec. 10, 2019, 3:39 PM), <https://federalnewsnetwork.com/workforce/2019/12/lawmakers-unveil-details-of-historic-federal-paid-parental-leave-benefits/> [https://perma.cc/7HZL-XFF5] ("The United States and Papua New Guinea are the only countries in the world that don't have paid parental leave programs written into law.").

35. See generally U.S. DEP'T OF LABOR & U.S. BUR. OF LAB. STAT., *supra* note 26.

36. *Coronavirus and Paid Leave*, PAID LEAVE U.S., <https://paidleave.us/coronavirus-paid-leave> (last visited Apr. 6, 2022) [https://perma.cc/ZVR7-C6A6].

maternity or paternity leave has expired, to care for small children.<sup>37</sup> Caregiving leave allows for leave to care for a sick family member.<sup>38</sup> Separate from parental or caregiving leave, medical leave encompasses leave to address an employee's own illness or medical issue beyond the limited number of sick days granted by some employers.<sup>39</sup>

This Part will introduce the national, state, global, and private leave policies which are currently in place, have recently expired, or are being debated. This Part will then explore the strain the pandemic has put on labor force participation and the legislation enacted in response.

#### A. Leave Policies

Family leave policy proposals differ from the federal to state level.<sup>40</sup> U.S. proposals—state and federal—also differ from policies in other places, such as Japan and Europe.<sup>41</sup> The differences in these programs depend on when and why they were enacted. The first national U.S. policy was not enacted until 1993, while the first ever maternity leave policy was enacted in Switzerland more than a century earlier.<sup>42</sup>

##### 1. Federal Leave Policies

The fight for family leave in the United States has been long. The first federal legislative proposal was the Family Employment Security Act in 1984, which was never formally introduced in Congress.<sup>43</sup> The first policy to actually grant unpaid family and medical leave was not enacted until almost a decade later, in 1993.<sup>44</sup> Several earlier proposals, the Parental Disability Leave Act and the Parental and Medical Leave Act, died in committee before ever reaching a vote in either House.<sup>45</sup> Importantly, these early proposals opened “a legislative dialogue on family leave and set the stage for future bills.”<sup>46</sup>

The interest in passing a national family leave policy recognized the importance of federal policies to facilitate gender equality.<sup>47</sup> Before the leave proposals just mentioned, Congress adopted the Pregnancy Discrimination Act (“PDA”), which gave some protection for pregnancy disability leave.<sup>48</sup> Enacted

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37. SHOLAR, *supra* note 8, at 3.

38. *Coronavirus and Paid Leave*, *supra* note 36.

39. *Id.*

40. SHOLAR, *supra* note 8, at 3.

41. *See id.* at 2.

42. *Id.* at 2, 4.

43. *See Anthony*, *supra* note 9, at 469; Megan A. Sholar, *The History of Family Leave Policies in the United States*, ORG. AM. HISTORIANS, <https://www.oah.org/tah/issues/2016/november/the-history-of-family-leave-policies-in-the-united-states/> (last visited Apr. 6, 2022) [<https://perma.cc/HZ7A-L4GY>].

44. Anthony, *supra* note 9, at 469.

45. *Id.*

46. Sholar, *supra* note 43.

47. Garrison et al., *supra* note 3, at 338.

48. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k).

in 1978, the PDA amended Title VII of the Civil Rights Act of 1964, in an attempt to provide a more stable position for women in the American workforce.<sup>49</sup> Prior to its passage, and with the backing of the U.S. Supreme Court, employers continued to implement employment policies that disadvantaged women.<sup>50</sup> These policies disadvantaged women by refusing to treat disabilities resulting from pregnancy, such as miscarriage, abortion, or childbirth and recovery, in the same way as they treated other temporary disabilities,<sup>51</sup> despite guidelines drafted in 1972 by the Equal Employment Opportunity Commission which required such treatment.<sup>52</sup> And although Title VII protected women as a class from discrimination, discrimination based on pregnancy did not fall within this protection as it was considered to distinguish between pregnant and nonpregnant persons, not between women and men.<sup>53</sup>

In a string of cases,<sup>54</sup> the Supreme Court found that discrimination against pregnant women did not constitute sex discrimination under Title VII, although only women were directly harmed by these policies, since only biological women can become pregnant.<sup>55</sup> After its passage, the PDA expressly prohibited pregnancy-based discrimination where Title VII did not.<sup>56</sup> The PDA prohibited discrimination “in the hiring or retaining of a woman on the basis of pregnancy,” which the Supreme Court upheld by “declaring that it guaranteed women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”<sup>57</sup> Outlawing employment discrimination against women based on pregnancy was an important step in achieving gender equality in employment.<sup>58</sup>

Because the PDA only pertained to the narrow circumstances surrounding disability following the birth of a child,<sup>59</sup> the policy protections did not include other issues that contribute to the difficulties women face in the workforce, such as the need to care for a sick child or family member, nor did it offer paternal leave.<sup>60</sup> In part, the FMLA was designed to address these difficulties and to

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49. Garrison et al., *supra* note 3, at 336–37.

50. *Id.* at 336.

51. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976) (holding that the defendant's benefit plan did not violate Title VII by excluding pregnancy from coverage because there was no indication that the employer's lack of an inclusive benefit plan was a pretext for discriminating against women); *see also* Garrison et al., *supra* note 3, at 337.

52. Sholar, *supra* note 43.

53. Anthony, *supra* note 9, at 464.

54. *Geduldig v. Aiello*, 417 U.S. 484, 485 (1974) (holding that denying coverage for pregnancy-related services was not sex discrimination because the plan excluded individuals only on the basis of pregnancy, not sex); *Gen. Elec. Co.*, 429 U.S. at 136 (deciding that excluding pregnancy from a company's disability plan did not constitute sex discrimination because women were also included in the group of nonpregnant workers); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145 (1977) (deciding that denying sick pay to an employee on maternity leave did not violate Title VII).

55. SHOLAR, *supra* note 8, at 36.

56. Garrison et al., *supra* note 3, at 337.

57. *Id.*

58. Anthony, *supra* note 9, at 464–65.

59. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1991).

60. Garrison et al., *supra* note 3, at 337.

facilitate gender equality by implementing support beyond pregnancy disability leave.<sup>61</sup>

After the passage of the PDA and before the enactment of the FMLA, key policy debates in early bills centered on “the length of leave that should be provided, the amount of time the worker must be employed to qualify for leave, the minimum size of the company to be held to the new legal requirements, and how much these benefits would cost businesses.”<sup>62</sup> Opposition to these policies came largely from businesses concerned with the potential for a costly financial burden and weary of excessive governmental regulation.<sup>63</sup> Some arguments against enactment included the belief that the FMLA would “actually increase gender inequality in the workplace by leading to more gender discrimination since employers would be disinclined to hire women due to the presumption that women are more likely to take such leave.”<sup>64</sup> Proponents, however, argue this belief exposes larger problems of gender inequality in society and should actually bolster efforts for antidiscriminatory policies and changes in social attitudes about gender.<sup>65</sup>

The text of the legislation highlights a commitment to balancing the demands of the workplace and family with the goal of ensuring gender equality by referencing the Equal Protection Clause of the Fourteenth Amendment.<sup>66</sup> The FMLA states that accomplishing its purposes—balancing workplace and family demands, promoting the stability and economic security of families, and preserving family integrity—consistent with the Equal Protection Clause—“minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . and for compelling family reasons, on a gender-neutral basis” and promotes equal employment for men and women.<sup>67</sup> As the first legislation that the then-newly elected President Bill Clinton signed, the FMLA recognized a shift in society—with “more than half of mothers [] either the breadwinner for their families or shar[ing] that responsibility with a partner.”<sup>68</sup>

When the Act was passed, families and the workforce were changing.<sup>69</sup> One notable change was an increase in women’s labor force participation.<sup>70</sup> In 1945, women comprised only 28.6% of the civilian labor force while men comprised

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61. *Id.* at 337–38.

62. Anthony, *supra* note 9, at 469–70.

63. *Id.* at 470–71.

64. *Id.* at 471.

65. *Id.* at 470–71.

66. 29 U.S.C. § 2601(b)(1)–(5) (1993); see also Sarah Jane Glynn, *Coronavirus Paid Leave Exemptions Exclude Millions of Workers from Coverage*, CTR. FOR AM. PROGRESS (Apr. 17, 2020, 5:00 A.M.), <https://www.americanprogress.org/issues/economy/news/2020/04/17/483287/coronavirus-paid-leave-exemptions-exclude-millions-of-workers-from-coverage/> [https://perma.cc/8WSF-UA9F].

67. 29 U.S.C. § 2601(b)(1)–(5) (1993).

68. Sarah Jane Glynn, *The Family and Medical Leave Act at 20: Still Necessary, Still Not Enough*, ATLANTIC (Feb. 5, 2013), <https://www.theatlantic.com/sexes/archive/2013/02/the-family-and-medical-leave-act-at-20-still-necessary-still-not-enough/272605/> [https://perma.cc/3YFB-JLM2].

69. *Id.*

70. SHOLAR, *supra* note 8, at 5.

71.4%.<sup>71</sup> These numbers grew in 1980 to 42.5% women and 57.5% men and increased again to 45.5% women and 54.5% men in 1993 when the FMLA was passed.<sup>72</sup> The labor force participation rate of mothers also increased. In 1975, women with children under the age of eighteen had a labor force participation rate of 47.4%, which rose to 66.9% in 1993 and to 70.8% in 2015.<sup>73</sup> As more women participated in the compensated workforce, fewer families had a full-time caregiver at home. In 2012, only 28.3% of married couples consisted of a father in the workforce and a mother at home.<sup>74</sup> The FMLA was passed to reflect and support a new reality which often did not include a full-time, stay-at-home caregiver, as it had in the past.<sup>75</sup>

The FMLA also recognized that “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men” and “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.”<sup>76</sup> A significant part of passing the FMLA was understanding what the shift in increased female employment meant. In the early twentieth century, women were treated as temporary workers.<sup>77</sup> It was assumed that women would work only until they were married and began to raise children, and many employers refused to hire married women.<sup>78</sup> When “women were allowed to work, they were typically fired or forced to resign upon becoming pregnant.”<sup>79</sup> “During World War II, many women entered the workforce to replace their departed husbands’ salaries and to support the war effort,” and many stayed even after the war ended.<sup>80</sup> Increases in education rates, the introduction of birth control, new job sectors, and shifting family dynamics all contributed to more women in the workforce.<sup>81</sup> Despite this dramatic increase in labor force participation, there remained an assumption that women were meant to be full-time homemakers and did not belong in the workplace, meaning that jobs were not organized to allow for time at home.<sup>82</sup>

Despite years of opposition, the FMLA eventually passed and became the first national leave policy enacted by the United States.<sup>83</sup> The FMLA provides wide protections for workers to take time off to care for their own health or the health of a family member, which Congress hoped would “ensure that employees

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71. *Women in the Labor Force*, *supra* note 5.

72. *Id.*

73. *Id.*

74. SHOLAR, *supra* note 8, at 5.

75. Glynn, *supra* note 68.

76. 29 U.S.C. § 2601(a)(5)-(6) (1993).

77. SHOLAR, *supra* note 8, at 32.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 33.

82. *Id.*

83. Anthony, *supra* note 9, at 472.

could manage illness and care for family members without threatening the stability of their work environment.”<sup>84</sup>

The FMLA provides eligible employees of covered employers with up to twelve workweeks of unpaid, job-protected leave for qualifying family and medical reasons and up to twenty-six workweeks to care for a covered servicemember.<sup>85</sup> The policy requires employers to maintain health benefits for employees taking leave and to restore employees to the same or an equivalent position after leave.<sup>86</sup>

To qualify for FMLA leave, an employee must have worked a minimum of 1,250 hours for at least twelve months prior to taking leave, and the employer must have more than fifty employees working within a seventy-five-mile radius.<sup>87</sup> Some employers, including state, local, and federal employers, and local education agencies, are required to offer leave regardless of the number of people employed.<sup>88</sup> Non-full-time employees and minimum wage workers are not covered.<sup>89</sup> If an employer violates an employee’s rights under the FMLA, the employee is entitled to certain compensation but not to punitive damages or damages for emotional or physical distress.<sup>90</sup>

Few changes have been made since the law’s enactment, one of which was to provide twenty-six weeks of unpaid leave to workers who are caring for a wounded service member on active duty.<sup>91</sup> Another amendment extended military caregiver leave to cover qualified veterans and expanded “serious injury or illness” to include those that existed before active duty and were aggravated by service.<sup>92</sup> The work specification requirements were also amended for airline and restaurant workers to reflect different industry conditions.<sup>93</sup>

A 1995 report by the Commission on Family and Medical Leave detailed the ways employees were utilizing the program.<sup>94</sup> The report found the FMLA covered approximately 11% of all U.S. private-sector worksites, which

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84. Garrison et al., *supra* note 3, at 338.

85. U.S. DEP’T OF LAB., THE EMPLOYER’S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 6.

86. *Id.*; see also Matthew Burr, *When Family Needs You at Home*, 30 EXPERIENCE 20, 22 (2020). Additionally, the FMLA includes a carve out for certain “key” employees, waiving the requirement that employers restore workers to the same or equivalent position if an employee is among the highest paid 10% of all employees within seventy-five miles of the worksite and if the employer will suffer substantial grievous economic injury. See U.S. DEP’T OF LAB., *supra* note 85, at 21, 65 (noting a company can replace “key” employees—an employee among the highest paid 10% of all employees within seventy-five miles of the worksite—if the employer will suffer substantial grievous economic injury).

87. Burr, *supra* note 86, at 21.

88. Garrison et al., *supra* note 3, at 339 (citing U.S. DEP’T OF LAB., FACT SHEET #28: THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (2012)).

89. *Id.*; see also Juan C. Flores, *12 Months, 12 Weeks, 1250 Hours, 75 Miles, and 50 Employees: Why the Numbers of the FMLA Don’t Add Up for New Parents of Color and Low-Wage Workers*, 54 U.S.F. L. REV. 313, 326 (2020).

90. Garrison et al., *supra* note 3, at 340 (citing *Pagan-Cohon v. Walgreens of San Patricio, Inc.*, 697 F.3d 1, 16 (1st Cir. 2012)).

91. Glynn, *supra* note 68.

92. SHOLAR, *supra* note 8, at 70.

93. *Id.* at 71.

94. *Id.* at 75–77.

employed 59.5% of the country's private-sector workers; including covered public-sector workers raised this coverage to 66%.<sup>95</sup> Not every covered employee is eligible, however, and the report found that 54.9% were both covered under the FMLA and met its eligibility requirements.<sup>96</sup> The utilization rate of FMLA leave among all private and public-sector employees was 2%; of this group: 20% of women took leave and 12.7% of men did.<sup>97</sup> Of those who took FMLA leave in 1995, over 60% did so for their own health problem, approximately 20% to care for an ill family member, 13.3% for the birth, adoption, or foster care placement of a new child, and only 3.8% for maternity disability leave.<sup>98</sup> Finally, of those surveyed, 3.1% said they needed leave but did not take it, 64% of whom said they could not afford the time off.<sup>99</sup>

The same study conducted in 2000 offered similar results.<sup>100</sup> There was little difference in the percentage of employers and employees covered, about the same percent took leave, and the gender gaps in leave takers remained the same, 19.8% women to 13.5% men.<sup>101</sup> There were some changes in the makeup of why workers were taking leave—more were taking it to care for a sick family member, 27.1%, and to care for a new child, 17.9%; fewer were taking leave for their own illness, 47.2%, and almost twice as many were taking maternity disability leave, 7.8%.<sup>102</sup>

This same study was commissioned again in 2012.<sup>103</sup> This final survey reported similar results: of the 59% of covered and eligible employees, 13% took FMLA qualifying leave the previous year, women were 56% of leave takers, and 5% of employees surveyed claimed they needed leave but could not take it.<sup>104</sup> Most leave was still taken for the respondent's own illness, 55%, approximately 20% was for new childcare or pregnancy disability, and 18% was to care for a family member.<sup>105</sup>

There is another, newer, federal leave policy which offers paid parental leave for some federal employees.<sup>106</sup> The Federal Employee Paid Leave Act was passed in December 2019 as part of the National Defense Authorization Act and included the first federal policy in the United States to offer paid family leave.<sup>107</sup>

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95. *Id.* at 74.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 75.

101. *Id.*

102. *Id.*

103. *Id.* at 76.

104. *Id.*

105. *Id.*

106. See Federal Employee Paid Leave Act, Pub. L. No. 116-92, § 7602, 133 Stat. 1198 (2019).

107. Nicole Ogrysko, *Trump Signs Shutdown—Averting Spending Bills, Makes Federal Pay Raise Law*, FED. NEWS NETWORK (Dec. 20, 2019, 10:35 PM), <https://federalnewsnetwork.com/budget/2019/12/trump-signs-shutdown-averting-spending-bills-makes-federal-pay-raise-law/> [https://perma.cc/4CAS-NAAK]; see also Federal Employee Paid Leave Act, Pub. L. No. 116-92, § 7602, 133 Stat. 1198 (2019).

This Act was passed in part to fulfill former-President Trump's campaign promise of paid maternity leave.<sup>108</sup>

Starting October 1, 2020, the program allows Title 5 federal employees,<sup>109</sup> regardless of gender, up to twelve weeks of paid time off for the birth, adoption, or foster of a new child.<sup>110</sup> Similar to the FMLA, the leave applies only to employees who have worked for the government for at least a year and is not available to those working on a temporary or intermittent basis.<sup>111</sup> Additionally, any employees who do take paid leave are then required to work for the government for at least twelve weeks following their return or else they must repay the government's contribution toward their health insurance for that time.<sup>112</sup>

As noted, the law does not apply to all federal employees, and it excludes employees of some agencies which fall outside the Title 5 distinction.<sup>113</sup> This includes approximately 630,000 U.S. Postal Service employees, 44,000 Federal Aviation Administration Employees, 109,000 Title 38 medical personnel of the Department of Veterans Affairs, and around 20,000 nonscreener employees within the Transportation Security Administration.<sup>114</sup> Other agencies may choose to separately extend benefits to their employees, and some have.<sup>115</sup>

## 2. *Federal Policy Proposals*

Three proposed paid family leave plans are the Family and Medical Insurance Leave ("FAMILY") Act, the Healthy Families Act, and the American Families Plan. First, the FAMILY Act would create a national paid family and medical leave insurance program, enabling workers to receive 66% of total wages for up to twelve weeks for their own serious health condition, to deal with the serious health condition of a close family member, or for some military

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108. Joelle Saad-Lesser & Kate Bahn, *The Importance of Paid Leave for Caregivers*, CTR. FOR AM. PROGRESS (Sept. 27, 2017, 9:02 AM), <https://www.americanprogress.org/issues/women/reports/2017/09/27/439684/importance-paid-leave-caregivers/> [https://perma.cc/RZV8-Q86K]. This policy was first proposed by the Trump campaign during the 2016 presidential election and at first, only included maternity leave but was later modified to include paternity leave as well. *Id.*

109. Eric Yoder, *Starting Thursday, Most Federal Employees Are Eligible for Paid Parental Leave*, WASH. POST (Oct. 1, 2020, 5:00 AM), [https://www.washingtonpost.com/politics/federal-paid-parental-leave/2020/09/30/ac8e36c8-0335-11eb-b7ed-141dd88560ea\\_story.html](https://www.washingtonpost.com/politics/federal-paid-parental-leave/2020/09/30/ac8e36c8-0335-11eb-b7ed-141dd88560ea_story.html) [https://perma.cc/3GCZ-CWDE].

110. Ogrysko, *supra* note 107.

111. Yoder, *supra* note 109.

112. *Id.*

113. *Id.*

114. *Id.*

115. Notably, several government divisions now include separate benefits, such as the Veterans Affairs extension to its Title 38 employees or the Federal Deposit Insurance Corporation and the Securities and Exchange Commission's negotiation of an expanded twelve weeks of paid leave with the National Treasury Employees Union. *See id.*

caregiving purposes.<sup>116</sup> The FAMILY Act would also extend coverage to contingent and self-employed workers, who are excluded from most other paid leave plans.<sup>117</sup> The FAMILY Act would be funded by employer and employee payroll contributions.<sup>118</sup> Critics of this plan note the 66% wage reimbursement would exclude some new parents who do not have additional financial support, such as those with only one breadwinner.<sup>119</sup>

The Healthy Families Act (“HFA”) proposes a maximum of seven paid working days (fifty-six hours) per year of sick or medical leave for workers to care for themselves or their families.<sup>120</sup> The HFA would extend coverage to care for a child, parent, spouse, or individual “related by blood or affinity whose close association with the employee is the equivalent of a family relationship.”<sup>121</sup> This inclusive coverage protects LGBTQ and other nontraditional familial relationships that are sometimes excluded in other plans.<sup>122</sup> The HFA would require employers with fifteen or more employees to provide at least one hour of earned paid sick leave for every thirty hours worked, up to a maximum of fifty-six hours per year.<sup>123</sup> These earned hours can be used for the employee’s own illness, to care for a family member, or to address needs resulting from domestic violence, sexual assault, or stalking.<sup>124</sup>

The American Families Plan is the Biden Administration’s newest paid family leave proposal. This plan is a permanent extension of the already passed American Rescue Plan,<sup>125</sup> and promises direct support to Americans in the form of child-care support—proposing a universal pre-school program among other education programs—and paid family and medical leave.<sup>126</sup> The paid family leave segment promises partial wage replacement for twelve weeks of paid parental, family, and personal illness or safe leave by year ten of the program.<sup>127</sup> The program purports to provide workers up to \$4,000 a month, with a minimum of two-thirds of average weekly wages replaced, which increases to 80% for the

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116. See FAMILY Act, H.R. 3712, 116th Cong. § 2 (2019); FAMILY Act, S. 248, 117th Cong. § 4 (2021); see also Flores, *supra* note 89, at 334; NAT’L P’SHIP WOMEN & FAMS., THE FAMILY AND MEDICAL INSURANCE LEAVE (FAMILY) ACT: FREQUENTLY ASKED QUESTIONS (2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/family-act-faq.pdf> [https://perma.cc/4ZF6-8MHM].

117. Flores, *supra* note 89, at 334.

118. *Paid Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 17, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s/> [https://perma.cc/NY78-64BG].

119. Flores, *supra* note 89, at 335.

120. Healthy Families Act, H.R. 1516, 115th Cong. § 3 (2017).

121. *Healthy Families Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/healthy-families-act> (Oct. 8, 2021) [https://perma.cc/W82E-45CV].

122. *Id.*

123. NAT’L P’SHIP WOMEN & FAMS., THE HEALTHY FAMILIES ACT I (2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/the-healthy-families-act-fact-sheet.pdf> [https://perma.cc/2353-FAAN].

124. *Paid Leave in the U.S.*, *supra* note 118.

125. *Fact Sheet: The American Families Plan*, WHITE HOUSE BRIEFING ROOM (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/> [https://perma.cc/ZVF7-52E8].

126. *Id.*

127. *Id.*

lowest wage workers.<sup>128</sup> It also promises three days of bereavement leave beginning in the first year of the program.<sup>129</sup>

### 3. State Leave Policies

Many state and local governments have proposed or enacted legislation to establish their own paid leave programs rather than waiting for a federal leave policy.<sup>130</sup> Currently, five states—California, New Jersey, New York, Rhode Island, and Washington—and the District of Columbia have paid family leave programs.<sup>131</sup> Several other states have enacted legislation which will become effective in the near future,<sup>132</sup> the most recent of which is Colorado, which passed Proposition 118 during the November 2020 election.<sup>133</sup> These policies offer a range of paid leave time and protections for a variety of qualifying reasons.<sup>134</sup> All legislation enacted so far allows leave to bond with or care for a new child (birth, adoption, or foster) and to care for a family member with a serious health condition.<sup>135</sup> Most legislation includes leave to care for one's own serious health condition or disability, or for a qualifying exigency arising out of a family member being on active military duty.<sup>136</sup> These states administer and fund paid leave through employer and/or employee payroll contributions to a Temporary Disability Insurance program.<sup>137</sup>

For example, California's leave policy provides workers access to eight weeks of partially paid leave to care for a newborn or for a sick family member.<sup>138</sup> Dependent upon the employee's income, eligible recipients can receive 60 to 70% of wages earned during the five to eighteen months before the claim start date,<sup>139</sup> with no restrictions on employer size or minimum hours, but no job protection unless the employee's leave runs concurrently with qualifying

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128. *Id.*

129. *Id.*

130. Garrison et al., *supra* note 3, at 362.

131. Brittany Buccellato, *State and Local Paid Family and Sick Leave Laws Continue to Sweep the Country*, LEXOLOGY (July 20, 2020), <https://www.lexology.com/library/detail.aspx?g=7cb4dae9-9b70-4da0-9c1e-e71d4654231f> [https://perma.cc/6PSE-EYYQ] (noting recent enactment of paid family leave laws in Washington D.C. and Washington state); Garrison et al., *supra* note 3, at 362 (identifying California, New Jersey, New York, and Rhode Island).

132. Garrison et al., *supra* note 3, at 362 (including Massachusetts, Connecticut, and Oregon); *see also* NAT'L P'SHIP WOMEN & FAMS., STATE PAID FAMILY AND MEDICAL LEAVE INSURANCE LAWS 2 (, NAT'L P'SHIP WOMEN & FAMS. (Nov. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf> [https://perma.cc/UM39-A6XW]).

133. Michael Andre et al., *Colorado Proposition 118 Election Results: Establish Paid Medical and Family Leave*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-colorado-proposition-118-establish-paid-medical-and-family-leave.html> (Dec. 4, 2020) [https://perma.cc/N2EM-F9WB].

134. NAT'L P'SHIP WOMEN & FAMS., *supra* note 132, at 2–4.

135. *Id.*

136. *Id.*

137. *Paid Leave in the U.S.*, *supra* note 118.

138. *Disability Insurance and Paid Family Leave Benefits*, CAL. EMP. DEV. DEP'T., <https://edd.ca.gov/en/disability/> (last visited Apr. 5, 2022) [https://perma.cc/4M6S-J96V].

139. *Id.*

FMLA leave.<sup>140</sup> The program is funded through deductions from employee paychecks.<sup>141</sup> Interestingly, the City of San Francisco has an ordinance requiring “Covered Employers” (as denoted in the city code) to provide “Covered Employees” on leave with supplemental compensation in order to reach six weeks of 100% compensated wages.<sup>142</sup> The program runs concurrently with the California Paid Family Leave Benefit and requires employers to provide the difference in wages, as the state program provides only reduced wages.<sup>143</sup> This compensation program is only available to employees who are receiving benefits for new child bonding.<sup>144</sup> The state expanded leave eligibility starting in January 2021 to include claims for leave because of a spouse, domestic partner, parent, or child’s military deployment to a foreign country.<sup>145</sup>

Other states’ policies differ from California’s in noteworthy ways. Some states, like New Jersey, define family differently. New Jersey’s family leave policy includes a broad definition of “family,” including an individual’s chosen family, or people who “have a close association with the employee which is the equivalent of a family relationship.”<sup>146</sup> Some states manage leave requests through the state rather than an employer. Washington’s paid leave policy manages leave requests directly with the state rather than through an employer, and employees and employers pay a percentage of wages into the program.<sup>147</sup>

The Washington program does exempt some employees, including federal employees, self-employed people, employees of businesses located on tribal land, and employees covered by certain collective bargaining agreements.<sup>148</sup> Employees are eligible for job protection provided their employer has fifty or more employees and the employee has worked for that employer for twelve months or longer and have worked 1,250 hours in the year before they take paid leave.<sup>149</sup> Employees can be eligible for twelve, sixteen, or eighteen weeks of paid leave depending on the conditions of the leave.<sup>150</sup> Additionally, the program

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140. Saad-Lessler & Bahn, *supra* note 108.

141. Sachi Barreiro, *California Paid Family Leave*, NOLO, <https://www.nolo.com/legal-encyclopedia/california-paid-family-leave.html> (last visited Apr. 12, 2022) [<https://perma.cc/3YCD-EPB3>].

142. S.F. OFF. OF LAB. STANDARDS ENF’T., RULES IMPLEMENTING THE PAID PARENTAL LEAVE ORDINANCE SAN FRANCISCO POLICE CODE ARTICLE 33H 1 (2016).

143. *Id.*

144. *Id.*

145. EMP. DEV. DEP’T., CALIFORNIA PAID FAMILY LEAVE 2 (2020), [https://www.edd.ca.gov/pdf\\_pub\\_ctr/de8520.pdf](https://www.edd.ca.gov/pdf_pub_ctr/de8520.pdf) (last visited Apr. 12, 2022) [<https://perma.cc/78ZT-UZZ7>].

146. Katherine Gallagher Robbins, *New Jersey Now Offers Paid Leave for All Families—Including Chosen Ones*, TALKPOVERTY (Feb. 19, 2019), <https://talkpoverty.org/2019/02/19/new-jersey-paid-leave-chosen-family/> [<https://perma.cc/WM5G-Z6FX>]; see also Diana Boesch, *The Urgent Case for Permanent Paid Leave*, CTR. FOR AM. PROGRESS (Sept. 1, 2020, 9:00 AM), <https://www.americanprogress.org/issues/women/reports/2020/09/01/489914/urgent-case-permanent-paid-leave/> [<https://perma.cc/7XHW-6XVL>].

147. *How Paid Leave Works*, WASH. PAID FAM. & MED. LEAVE, <https://paidleave.wa.gov/how-paid-leave-works/> (last visited Apr. 6, 2022) [<https://perma.cc/UVN6-UJKZ>].

148. *Id.*

149. *Id.*

150. *Id.*

allows for more flexible use of the leave which can be taken in increments of eight hours (if needed) rather than the entire leave period at once.<sup>151</sup>

Washington's policy is funded through a premium paid by employers and employees.<sup>152</sup> The 0.4% premium is paid from each employee's gross wages, up to the Social Security cap.<sup>153</sup> Business with fewer than fifty employees do not have to pay the employer portion of premiums.<sup>154</sup> Businesses with 150 or fewer employees can apply for grants to help cover the costs associated with employees on leave, and businesses with fewer than fifty employees who would normally be allowed to opt out of employer premiums must pay the employer portion to be eligible to receive these grants.<sup>155</sup> This program is among the most generous in the country, and program supporters are optimistic that it will "increase worker security and help provide stability for employers."<sup>156</sup>

Similarly, Colorado's recently passed paid leave policy, Proposition 118, will be funded through a 0.9% tax on an employee's pay to be split evenly with the employer for the first two years.<sup>157</sup> The program benefits allowing eligible employees up to twelve weeks of paid family and medical leave insurance will begin in 2024.<sup>158</sup> The Colorado paid leave program includes leave when the individual or the individual's family member is a victim of domestic violence, stalking, or sexual assault.<sup>159</sup> Serious complications related to pregnancy or childbirth can extend leave for an additional four weeks, and, as with the Washington plan, employees are not required to take the leave consecutively.<sup>160</sup> Most employers are required to participate unless they have nine or fewer employees, are self-employed, are a local government that opted-out, or already offer approved paid leave benefits.<sup>161</sup>

In addition to federal and state programs are public and private employer programs. Concurrent with federal or state leave programs, some private and nonfederal public employers offer employees paid leave benefits.<sup>162</sup> A 2019 nationally representative sample of nonfederal public and private employers found 25% of firms offer paid parental leave (maternity, paternity, or both) to at

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151. *Id.*

152. *Small Businesses: Your Role and How You Benefit*, WASH. PAID FAMILY & MED. LEAVE, <https://paidleave.wa.gov/small-businesses/> (last visited Apr. 6, 2022) [<https://perma.cc/K8DE-75AV>].

153. *Id.*

154. *Id.*

155. *Small Business Assistance Grants*, WASH. PAID FAMILY & MED. LEAVE, <https://paidleave.wa.gov/help-center/employers/small-business-grants/> (last visited Apr. 6, 2022) [<https://perma.cc/2PKY-RCYR>].

156. Rachel Lerman & Benjamin Romano, *Workers Start Paying for Washington State's New Paid-Leave Law in 2019. Here's How it Works.*, SEATTLE TIMES (Dec. 26, 2018, 7:07 PM), <https://www.seattletimes.com/business/employers-would-be-parents-get-set-for-new-washington-state-medical-and-family-leave/> [<https://perma.cc/S6JY-48C5>].

157. LEGIS. COUNCIL OF THE COLO. GEN. ASSEMBLY, 2020 STATE BALLOT INFORMATION BOOKLET RSCH. PUB. NO. 748-1 57 (2020).

158. *Id.* at 53.

159. *Id.* at 54.

160. *Id.; How Paid Leave Works*, *supra* note 147.

161. LEGIS. COUNCIL OF THE COLO. GEN. ASSEMBLY, *supra* note 157, at 58.

162. *Paid Leave in the U.S.*, *supra* note 118.]

least some employees, and 35% of workers are employed in firms which offer paid parental leave.<sup>163</sup> Leave rates vary by several characteristics, including size and wage levels.<sup>164</sup> The survey found that employers with 1,000 or more workers are more likely to offer paid parental leave than smaller employers, and among large employers (200 or more workers), those with higher-wage workers are more likely to offer paid parental leave than firms with few high-wage workers.<sup>165</sup>

#### 4. Global Leave Policies

Other countries, such as Switzerland, Germany, Finland, Sweden, and Japan, are leaders in passing national leave policies.<sup>166</sup> Switzerland passed the first maternity leave policy in 1877.<sup>167</sup> This leave allowed women eight weeks of unpaid, job-protected leave surrounding the birth of a child.<sup>168</sup> Soon after, Germany passed the first paid maternity leave policy through its social security system, which “recognized that the government and employers were responsible for assuming the risks facing employees, such as illness and accidents.”<sup>169</sup> From there, countries steadily passed maternity leave laws—fourteen additional countries by World War I and almost all developed countries by World War II.<sup>170</sup> Almost every developed country has some form of paid maternity leave, and several have also enacted paternity leave and family leave policies.<sup>171</sup>

Today, several European countries have generous leave policies to combat declining birth rates and gender inequality, though not all policies have proven to be successful in solving these problems.<sup>172</sup> Designed to be “gender-neutral” by offering both men and women the same amount of leave, a recent Finnish policy grants each parent seven months of paid leave, which became effective Fall 2021.<sup>173</sup> Iceland also offers each parent three months of nontransferable paid leave and another three months of shared leave.<sup>174</sup> Similarly, the United Kingdom offers two weeks paid maternity leave, two weeks paid paternity leave, and thirty-seven weeks of shared paid leave, which is designed to promote a more egalitarian division of labor.<sup>175</sup> Sweden, with Europe’s most generous policy, offers 240 days of leave per parent, some of which can be transferred to the other

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163. *Id.*

164. *Paid Leave in the U.S.*, *supra* note 118.

165. *Id.*

166. See Laurel Wamsley, *Finland’s Women-Led Government Has Equalized Family Leave: 7 Months for Each Parent*, NPR (Feb. 5, 2020, 2:52 PM), <https://www.npr.org/2020/02/05/803051237/finlands-women-led-government-has-equalized-family-leave-7-months-for-each-parent> [https://perma.cc/JF7R-XWQ7].

167. SHOLAR, *supra* note 8, at 4.

168. *Id.* at 4.

169. *Id.* at 4–5.

170. *Id.* at 5. Additionally, in the 1920s, the International Labor Organization recommended its member countries enact maternity leave programs, which most European leave programs today come from. *Id.*

171. *Id.*

172. Wamsley, *supra* note 166.

173. *Id.*

174. SHOLAR, *supra* note 8, at 1.

175. *Id.*

parent but ninety days of which cannot.<sup>176</sup> In Germany, new parents are allowed twelve months of leave, but if both parents apply, leave can be extended to fourteen months.<sup>177</sup>

Although some of these policies target gender disparities in the workplace—by offering comparable leave for either parent—not all who are eligible are taking leave.<sup>178</sup> For example, Japan offers six months leave at full pay for fathers, but in 2017, only one in twenty took it.<sup>179</sup> The effect is that “[m]others end up shouldering the burden of child-rearing themselves, and companies continue to demand long hours that don’t provide the flexibility required by worker parents.”<sup>180</sup> Of the forty-one countries studied, twenty of which allocate the majority of paid leave for maternity leave, six countries only offer maternity leave, but thirty-four of the forty-one countries offer some paternity leave as well.<sup>181</sup> In effect, these policies work to balance parental and caregiver responsibilities across genders.<sup>182</sup>

### B. Coronavirus Pandemic

The Covid-19 pandemic created monumental disruptions in the U.S. and abroad. In response to a crashing economy and reduced labor force, the United States passed two temporary paid leave policies which offered some paid leave to certain qualifying workers for circumstances unique to the pandemic.<sup>183</sup>

Coronavirus was first detected at the end of 2019; since then, it has infected nearly every country with over 110 million cases and over 2.4 million deaths.<sup>184</sup> On January 30, 2020, the World Health Organization declared a public health emergency “of international concern.”<sup>185</sup> From there, infections spread across the world.<sup>186</sup> Due to the unstable nature of changing information and rapidly accumulating case rates, efforts to contain the outbreak were largely unsuccessful.<sup>187</sup> The United States was especially unable to contain the disease, “making [the U.S.] one of the main drivers of rising case numbers around the

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176. Wamsley, *supra* note 166.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/> [<https://perma.cc/7D5T-QWZL>].

182. *See id.*

183. *See Families First Coronavirus Response Act*, Pub. L. No. 116-127, §§ 3101–3106, 134 Stat. 178, 189–92 (2020); *American Rescue Plan Act of 2021*, Pub. L. No. 117-2, § 3132, H.R. 1319.

184. *See Taylor, supra* note 12; *see also* *Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html> (last visited (Apr. 6, 2022) [<https://perma.cc/F34Q-SFR6>]).

185. Taylor, *supra* note 12, at 184.

186. *See id.*

187. *See id.*

world.”<sup>188</sup> New cases rose consistently from May 2020 until January 2021, when new transmissions began to steadily decline.<sup>189</sup>

Data shows the pandemic’s employment impact is concentrated within three sectors where social distancing is difficult or there is little opportunity for teleworking.<sup>190</sup> These sectors include leisure and hospitality, education and health services, and retail trade.<sup>191</sup> In February 2020, these three sectors accounted for 47% of jobs held by women, compared to only 28% of jobs held by men.<sup>192</sup> Separate from other factors, this alone exposes women to a higher risk of unemployment in recent months, as these industries were forced to close due to the infectious nature of the disease.<sup>193</sup>

Several policy responses have been enacted or proposed. These policies focus on expanding federal leave protections under the FMLA to cover the unique circumstances the pandemic created.<sup>194</sup> The first policy, the Families First Coronavirus Response Act, was enacted as part of the first Coronavirus relief package.<sup>195</sup> Two other plans were proposed, one by the Biden-Harris campaign during the 2020 election cycle and the other by the Biden Administration after President Biden’s election.<sup>196</sup> These two plans are similar to the FFCRA but would provide more relief and close some gaps the FFCRA neglected.<sup>197</sup>

Congress passed its first national paid leave law in March 2020 to provide temporary relief for workers in the face of the Covid-19 pandemic.<sup>198</sup> As part of the Coronavirus stimulus bill, the FFCRA expanded protections under the FMLA to provide relief for American workers and employers affected by the virus.<sup>199</sup> This act included paid leave requirements, emergency sick leave,<sup>200</sup> and

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188. See *Coronavirus World Map: Tracking the Global Outbreak*, *supra* note 184.

189. *See id.*

190. Rakesh Kochhar, *Hispanic Women, Immigrants, Young Adults, Those with Less Education Hit Hardest by COVID-19 Job Losses*, PEW RSCH. CTR. (June 9, 2020), <https://www.pewresearch.org/fact-tank/2020/06/09/hispanic-women-immigrants-young-adults-those-with-less-education-hit-hardest-by-Covid-19-job-losses/> [https://perma.cc/AY7U-8HNX].

191. *Id.*

192. *Id.*

193. *Id.*

194. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3101–3106, 134 Stat. 178, 189–92 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3132, H.R. 1319.

195. *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> (last visited Apr. 6, 2022) [https://perma.cc/8XKG-VTMW].

196. *Build Back Better: Joe Biden’s Jobs and Economic Recovery Plan for Working Families*, BIDEN HARRIS, <https://joebiden.com/build-back-better> (last visited Apr. 6, 2022) [https://perma.cc/Q55X-K3KJ]; *President Biden Announces American Rescue Plan*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/> [https://perma.cc/ATL4-CU8Z].

197. Compare *Build Back Better*, *supra* note 196, and *President Biden Announces American Rescue Plan*, *supra* note 196, with Families First Coronavirus Response Act, §§ 3101–3106.

198. *See Families First Coronavirus Response Act*, §§ 3101–3106.

199. *See id.*

200. Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,326 (Apr. 6, 2020) (to be codified at 29 C.F.R. pt. 826) (noted under Division E of the FFCRA, “The Emergency Paid Sick Leave Act” (“EPSLA”))).

emergency family leave.<sup>201</sup> The FFCRA required private employers with fewer than 500 employees and certain public employers to provide employees with expanded sick leave or family medical leave for reasons related to Covid-19, such as experiencing (or caring for another who is experiencing) a government or healthcare quarantine order or caring for a child whose school or place of care is closed for Covid-19 reasons.<sup>202</sup>

The FFCRA provided workers with up to twelve weeks (or eighty hours) of emergency paid sick leave and up to twelve weeks, only ten of which are paid, for child care.<sup>203</sup> If being tested or treated for Covid-19 and not already covered by their employer's leave policy, workers could receive up to two weeks of sick leave to be reimbursed to employers up to \$511 per day.<sup>204</sup> If family members were affected by contracting the virus or from school closures, workers could make up to two-thirds of their pay, capped at \$200 per day, for ten weeks to care for these family members.<sup>205</sup> Exemptions for certain employers and other loopholes excluded an estimated 68 million to 106 million private sector workers,<sup>206</sup> including exempting employers with more than 500 workers and allowing smaller companies with fifty or fewer employees to petition for exclusion.<sup>207</sup>

The two proposed plans by the Biden-Harris team afforded similar protections. The first proposed plan by the Biden-Harris campaign was the Biden-Harris Proposed Emergency Relief Plan.<sup>208</sup> As part of the newly elected president's campaign initiative for a robust Coronavirus response, President Biden aimed to pass emergency paid sick leave and caregiving leave to ensure workers could take paid leave during the Covid-19 crisis without causing employers to bear any additional costs to furnish wages.<sup>209</sup> The leave policy proposal originally included twelve weeks of paid family and medical leave, seven days of paid sick leave for routine personal and family health needs and for survivors of domestic and sexual assault to seek services, and fourteen days of paid leave for those who are sick, exposed, or subject to quarantines.<sup>210</sup> The plan called for employer reimbursement for the fourteen-day leave or for direct

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201. *Id.* (noted under Division C of the FFCRA, amending Title 1 of the FMLA, “The Emergency Family and Medical Leave Expansion Act” (“EFMLEA”).)

202. Families First Coronavirus Response Act, §§ 3101–3106.

203. Boesch, *supra* note 146.

204. Alexandra Ossola, *How Biden’s Paid Sick Leave Plan Could Stop the Spread of Covid-19*, QUARTZ (Oct. 30, 2020), <https://qz.com/1924468/bidens-paid-sick-leave-plan-could-stop-the-spread-of-Covid-19/> [https://perma.cc/UH7L-S69Y].

205. *Id.*

206. Glynn, *supra* note 66 (noting the FFRCA excludes 53 to 83% of all private of all private sector workers).

207. Roselyn Miller, Brigid Schulte & Haley Swenson, *Which Companies Still Aren’t Offering Paid Sick Days?*, NEW AM., (May 5, 2020), <https://www.newamerica.org/better-life-lab/reports/which-companies-still-arent-offering-paid-sick-days/> [https://perma.cc/3EB5-XGZZ].

208. See *Build Back Better*, *supra* note 196.

209. *Id.*

210. *Id.*

payments to workers, if necessary, and for a federal fund to cover salaries, with earnings capped at \$1,400 a week.<sup>211</sup>

Although the plan proposed immediate fund disbursement using existing Social Security Administration offices, which could be used for building permanent infrastructure for paid leave benefits, no permanent benefits were proposed at that time.<sup>212</sup>

The second proposal was an updated version of the first. Named the American Rescue Plan, this proposal was passed by Congress and signed by President Biden as part of the \$1.9 trillion rescue package enacted to combat the economic downturn and the Covid-19 crisis.<sup>213</sup> The President's original proposal, the Biden-Harris Emergency Relief Plan, was expanded to include fourteen weeks of paid leave, instead of twelve weeks, for parents with additional caregiving responsibilities, for people who have or are caring for someone who has Covid-19 symptoms, are quarantining due to exposure, or who need time off to receive the vaccine.<sup>214</sup> Additionally, the leave plan aimed to provide emergency paid leave to 106 million more Americans by eliminating exemptions under the FFCRA for employers with more than 500 and fewer than fifty employees and to include the 2 million federal workers who were previously exempt as well.<sup>215</sup> This leave plan extended through September 30, 2021.<sup>216</sup>

### III. ANALYSIS

In the United States, the demands of childcare, coupled with layoffs and furloughs in an economy hit hard by the pandemic, have forced many women out of the labor market. Since the beginning of the pandemic, nearly 2.5 million women have left the workforce, compared with 1.8 million men,<sup>217</sup> and in spring 2021, roughly 493,000 more women than men were absent from the labor force since beginning of the pandemic.<sup>218</sup> Despite overall labor growth, women's labor force participation remains at its lowest since 1988.<sup>219</sup> Vice President Kamala Harris declared this loss a national emergency.<sup>220</sup>

Before the pandemic, the United States trailed far behind other developed countries because of its lack of national paid leave policies, which forced workers

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211. *Id.*

212. *Id.*

213. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3132, H.R. 1319; *President Biden Announces American Rescue Plan*, *supra* note 196.

214. *President Biden Announces American Rescue Plan*, *supra* note 196.

215. *Id.*

216. *Id.*

217. Katie Rogers, *2.5 Million Women Left the Work Force During the Pandemic Harris Sees a 'National Emergency'*, N.Y. TIMES, (Mar. 30, 2021), <https://www.nytimes.com/2021/02/18/us/politics/women-pandemic-harris.html> [<https://perma.cc/T4WL-BT5N>].

218. Jonathan Rothwell & Lydia Saad, *How Have U.S. Working Women Fared During the Pandemic?*, GALLUP (Mar. 8, 2021), <https://news.gallup.com/poll/330533/working-women-fared-during-pandemic.aspx> [<https://perma.cc/K9XJ-H8QG>].

219. KOHLER ET AL., *supra* note 10, at 9.

220. Rogers, *supra* note 217.

to rely on discretionary employer policies or in some cases, state-mandated policies.<sup>221</sup> Even as the FMLA exists, providing unpaid leave for personal illness or caring for a sick relative or new child, it covers less than 60% of the workforce, and some workers who are eligible for leave are still unable to take it due to the unaffordable loss of income.<sup>222</sup> Although some employers offer paid leave, access is limited, especially for low-wage workers who are not eligible for most health benefits.<sup>223</sup> The FMLA was intended to promote “healthy families and protect workers from termination or demotion for taking protected time off,” but “its eligibility requirements create barriers for certain workers to access leave, and the benefits provided to those eligible workers do not necessarily benefit all workers.”<sup>224</sup> The initial purpose of the FMLA and the realities of who it protects, and how, are no longer enough, if they ever were.

Although the federal government now offers paid leave to some of its own employees, this leave only covers maternity and paternity leave sought for the birth, adoption, or placement of a new child.<sup>225</sup> No paid leave is allowed for caregivers.<sup>226</sup> Those who do require leave for the care of a close family member are forced to rely on the unpaid protections of the FMLA.<sup>227</sup> At its passage, House Oversight and Reform Committee Chairwoman Carolyn Maloney, who took the lead in introducing the Federal Paid Employee Leave Act, urged her colleagues to extend similar paid leave benefits to the entire country, stating, “I’m so thrilled that 2.1 million federal workers have this support now, but we’re going to keep working so that it can be out for those who work in the private sector.”<sup>228</sup> Additional comments by Representative Maloney’s colleagues promote the need for broader coverage to include paid benefits to care for oneself or a sick relative, both of which are absent from the current federal leave plan.<sup>229</sup>

Paid leave programs vary in leave eligibility, what leave is offered, and for how long, but most programs are funded in generally the same way.<sup>230</sup> To function, most state paid leave policies create an insurance fund as an extension of an existing state program, which is supported by a small percentage withdrawn

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221. Livingston & Thomas, *supra* note 181.

222. Isabel V. Sawhill & Sarah Nzau, *What Are the Challenges to Adopting a Federal Paid Family Leave Program?*, BROOKINGS INST. (Oct. 15, 2019), <https://www.brookings.edu/policy2020/votervital/what-are-the-challenges-to-adopting-a-federal-paid-family-leave-program/> [https://perma.cc/UTP2-JFAX].

223. *Id.*

224. Flores, *supra* note 89, at 314–15.

225. See Federal Employee Paid Leave Act, Pub. L. No. 116-92, § 7602, 133 Stat. 1198 (2019).

226. See Nancy A. LeaMond, *Paid Leave Would Be a Lifeline for Family Caregivers*, AARP: BLOGS (Sept. 28, 2021, 8:58 AM), <https://blog.aarp.org/paid-leave-would-be-a-lifeline-for-family-caregivers> [https://perma.cc/C9FB-VWWU].

227. *See id.*

228. Ogrysko, *supra* note 34.

229. *Id.* (House Majority Leader Steny Hoyer describing this leave agreement as a “first step” and stating, “While I am relieved that all federal employees will enjoy this benefit after Oct. 1, 2020, and not only Department of Defense employees as some had suggested, I am disappointed that paid benefits are limited only to the birth or adoption of a child and not time needed to care for oneself or a sick relative . . .”).

230. See Kiely Kuligowski, *How Paid Leave Policies Can Help Small Businesses*, BUS. NEWS DAILY (May 26, 2020), <https://www.businessnewsdaily.com/10548-how-paid-leave-policies-can-help-small-businesses.html> [https://perma.cc/CQK9-ZTBX].

from every employee's paycheck.<sup>231</sup> Some programs include an employer portion, requiring that employers also pay a percentage, similar to the Social Security system.<sup>232</sup> These insurance funds then pay workers a wage replacement (usually at a reduced rate from their normal pay) for the time of their eligible leave.<sup>233</sup> Conversely, paid sick leave programs are largely implemented by the employer per state or local laws, and do not include any state participation.<sup>234</sup>

Large corporations like Amazon have also begun to offer paid leave programs as an employee benefit.<sup>235</sup> Steve Winter, director of human resources and benefits for Amazon, explained that "Amazon wanted to reshape the employee experience, including for those who are not parents," by offering improved family leave.<sup>236</sup> Winter noted employee retention as one way leave policies benefit the organization.<sup>237</sup> Similarly, studies have shown that better family leave policies save money in the long term by lowering health care costs, cutting down on absenteeism, and improving employee retention, particularly among women.<sup>238</sup> Research demonstrates paid leave policies can benefit employers as well as their employees by raising morale and productivity and leading to significantly less employee turnover.<sup>239</sup>

#### A. Traditional Gender Norms

The pandemic has a disproportionate impact on women in the workforce, due in part to the pervasiveness of traditional gender norms.<sup>240</sup> There were mass school closures when the pandemic first hit the United States in mid-March, and as the pandemic continued, many students were forced to stay home for another school year.<sup>241</sup> In August 2020, a *New York Times* survey found that only one in seven children would be returning to school full-time for the fall, while the rest would continue with some form of remote learning.<sup>242</sup> For many, remote learning requires hands-on help from an adult at home—to help balance video classes, timed assignments, and more—yet four in five parents said they would have no

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231. *Id.*

232. *Id.*

233. *Id.*

234. *See id.*

235. Rebecca Gale, *How the Women of Amazon Fought for—and Won—a Revolutionary Family Leave Policy*, SLATE (Oct. 10, 2017, 10:00 AM), <https://slate.com/human-interest/2017/10/how-the-women-of-amazon-fought-for-and-won-a-revolutionary-family-leave-policy.html> [https://perma.cc/62Y9-US2M].

236. *Id.*

237. *Id.*

238. *Id.*

239. Kuligowski, *supra* note 230.

240. *See* Rogers, *supra* note 217.

241. *See* Claire Cain Miller, 'I'm Only One Human Being': Parents Brace for a Go-It-Alone School Year, N.Y. TIMES (Sept. 8, 2020), <https://www.nytimes.com/2020/08/19/upshot/coronavirus-home-school-parents.html> [https://perma.cc/4BY8-2R2R].

242. *Id.*

in-person help with education or care.<sup>243</sup> Thus, the burden of childcare and remote learning would fall on the parents, more than half of whom would be taking on this additional role while also continuing to work in the compensated workforce.<sup>244</sup>

Regarding attitudes of parents surrounding this new challenge, Kate Avarett, a sociologist at the University of Albany who interviewed parents nationwide said, “There is a lot of stress, a lot of anxiety. Parents tell me about not being able to sleep because they’re so anxious, or [they] tell me they’ve been crying a lot. There’s been a lot of actual crying during interviews.”<sup>245</sup> Many families are left trying to fit childcare and schoolwork around their work schedules, especially parents who cannot work remotely.<sup>246</sup> For example, Euqueva Varner and Kenneth Watts are security officers in Detroit with sons in second and third grade.<sup>247</sup> The family has a plan for the fall, but it is precarious, requiring childcare handoffs between back-to-back shifts, “so they’ll trade off who’s home with the children, with no flexibility in their handoffs and little time to spend together as a couple or a family. Sometimes the children have to go to work with a parent, busying themselves with coloring and reading.”<sup>248</sup>

Additionally, the pandemic has exacerbated existing trends. Despite a recent Gallup poll which found “a record-high percentage of women prefer to be in the workforce than at home,” other studies show the division of household labor remains “largely tilted toward traditional stereotypes” with women “more likely than their husbands to take care of the house and children, and men remain the primary caretakers of the car and the yard.”<sup>249</sup> Now, this burden transfers to planning and spending the most time caring for and educating children.<sup>250</sup> A *New York Times* survey reported that 54% of women said they would be “mostly responsible for educating their children on weekdays,” while 29% of men said they would be.<sup>251</sup> Only 2% of women surveyed, however, said their male partners would be.<sup>252</sup> As Betsy Twitchell, mother of two in Oakland, California, said, “Here’s the reality: The moms are doing it . . . [W]e’re the ones who are really bearing the brunt of this, and having to take on this third shift in order to get our children through this distance learning.”<sup>253</sup>

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243. *Id.* (reporting that some schools have begun to provide schedules and live video meetings in an effort to make remote learning more robust than the spring, but this additional material requires even more parent involvement).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Megan Brenan, *Women Still Handle Main Household Tasks in U.S.*, GALLUP (Jan. 29, 2020), <https://news.gallup.com/poll/283979/women-handle-main-household-tasks.aspx> [https://perma.cc/VBS6-43BU].

250. See Miller, *supra* note 241.

251. *Id.*

252. *Id.*

253. *Id.*

Because of traditional caregiver roles, closure of schools and day-care centers has a “differential impact on women parents or guardians, who will often be expected to take on additional caregiving responsibilities due to discriminatory gender norms, further restricting their work and economic opportunities.”<sup>254</sup> As was seen in previous health emergencies—like the Zika outbreak—“the amount of unpaid work carried by women increased exponentially.”<sup>255</sup> More than half of United States parents polled reported their household had difficulties with online learning, a little under half reported trouble finding child care when needed, and an equal proportion reported having to cut back or not return to work due to child care or other schooling issues.<sup>256</sup> As parents are left to balance the demands of their family with those of their work, many are forced to leave jobs to care for their children.<sup>257</sup>

#### B. Lost Jobs and Wages

The pandemic has caused an unprecedented number of job losses throughout the private and public sectors.<sup>258</sup> In many countries, the United States included, women are concentrated in low-wage and informal sector jobs which lack paid sick or family leave, health insurance or social security, and these sectors were hit hardest by the virus response.<sup>259</sup>

Mothers of young children’s reduced labor force participation during and after the pandemic also shows disparity between mothers and fathers in the workforce.<sup>260</sup> Women workers who are caregivers to young children were pushed out of the paid labor force because of pandemic-induced school and childcare closures, and during the pandemic, women were three times more likely than men to not be working as a result of child care challenges.<sup>261</sup> From February to April 2020, a period covering the weeks before the first wave of the virus up through the first pandemic lockdowns, women with children under six left the labor force at a rate of 3.2% and women with children aged six to twelve left at a rate of 4.3%.<sup>262</sup> Fathers also left the workforce, but at a rate 1% to 2% lower, meaning nearly 250,000 more mothers than fathers left between February

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254. U.N. HUM. RTS. OFF. HIGH COMM’R, COVID-19 AND WOMEN’S HUMAN RIGHTS: GUIDANCE 5 (2020).

255. *Id.*

256. John Halpin, Karl Agne & Nisha Jain, *What Do Voters Want on Child Care Ahead of the 2020 Elections?*, CTR. FOR AM. PROGRESS (Sept. 25, 2020, 10:03 AM), <https://www.americanprogress.org/issues/early-childhood/reports/2020/09/25/490772/voters-want-child-care-ahead-2020-elections/> [https://perma.cc/Z9PC-XZV3].

257. *Id.*

258. See, e.g., Ryan Ansell & John P. Mullins, *COVID-19 Ends Longest Employment Recovery and Expansion in CES History, Causing Unprecedented Job Losses in 2020*, U.S. BUREAU OF LAB. (June 2021), STATS., <https://www.bls.gov/opub/mlr/2021/article/covid-19-ends-longest-employment-expansion-in-ces-history.htm> [https://perma.cc/ZA4Q-TP42].

259. U.N. HUM. RTS. OFF. HIGH COMM’R, *supra* note 254, at 4–5.

260. Landivar et al., *supra* note 20, at 1.

261. Jasmine Garsd, *Women Three Times More Likely Than Men to Not Work During Pandemic Because of Child Care*, MARKETPLACE (Aug. 21, 2020), <https://www.marketplace.org/2020/08/21/women-three-times-more-likely-than-men-to-not-work-during-pandemic-because-of-child-care/> [https://perma.cc/YKJ9-YKZT].

262. Landivar et al., *supra* note 20, at 1–2.

and April.<sup>263</sup> This shift represents the reversal of a major milestone in December 2019, when for the first time in about a decade, women held more payroll jobs than men.<sup>264</sup>

Additionally, in November 2020, almost a year after the pandemic began, nearly all fathers had returned to the labor force, while mothers had not.<sup>265</sup> Labor force participation among mothers of young children remained 2.8% less than their November 2019 participation rate.<sup>266</sup> For perspective, following the almost ten-year-long decline of the Great Recession, labor force participation among twenty-five to fifty-four-year-olds was 2.5% less from December 2007 to the 2015 post-recession trough.<sup>267</sup>

During the pandemic, the unemployment rate peaked at 14.7% in April and remained at 7.9% six months later in September, resulting in over 12.5 million Americans unemployed.<sup>268</sup> Although unemployment is rarely equal among genders, this crisis has predominantly affected nonwhite women, leading many to call this recession a “she-cession,” after the 2008 recession moniker “mansion,” given its impact on men in the workforce.<sup>269</sup> From February to May 2020, 11.5 million women lost their jobs compared to 9 million men.<sup>270</sup> In April, women accounted for 55% of 20.5 million job losses.<sup>271</sup> Different from the 2007 to 2009 Great Recession, when twice as many men than women lost their jobs,<sup>272</sup> the April unemployment rate for adult women was about 15% and the unemployment rate for adult men was 13%.<sup>273</sup> Women of color were affected even more, with the unemployment rate for Black women at 16.4% and Hispanic women at 20.2%.<sup>274</sup> Disproportionate losses are attributed to the virus’s concentrated impact on the three sectors that account for almost half of jobs held by women: leisure and hospitality, education and health services, and retail trade.<sup>275</sup>

The pandemic shows a disproportionate impact on female workers leaving the job market, and also highlights the necessity of a more comprehensive paid

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263. *Id.*

264. Alisha Haridasani Gupta, *Why Some Women Call This Recession a “Shecession”*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2020/05/09/us/unemployment-coronavirus-women.html> [https://perma.cc/H6WG-G7PQ].

265. Tyler Boesch, Robe Grunewald, Ryan Nunn & Vanessa Palmer, *Pandemic Pushes Mothers of Young Children Out of the Labor Force*, FED. RSRV. BANK MINNEAPOLIS (Feb. 2, 2021), <https://www.minneapolisfed.org/article/2021/pandemic-pushes-mothers-of-young-children-out-of-the-labor-force> [https://perma.cc/W9H5-C8AS].

266. *Id.*

267. *Id.*

268. *Civilian Unemployment Rate*, *supra* note 14. A rate this low has not been seen since February 2013. *Id.*

269. Gupta, *supra* note 264 (noting the 2008 recession was known as the “mansion” due to more men being affected).

270. Kochhar, *supra* note 190.

271. Gupta, *supra* note 264.

272. Kochhar, *supra* note 190.

273. Gupta, *supra* note 264.

274. *Id.*

275. Kochhar, *supra* note 190.

leave system to support workers burdened by childcare or family members' health needs.<sup>276</sup> But even outside of the immediate demands of the pandemic, workers will benefit from a national paid leave plan that recognizes and validates the various reasons a person may want or need paid family leave.<sup>277</sup> Those who are forced out of the compensated workforce risk a large loss in overall lifetime earnings.<sup>278</sup> An Institute for Women's Policy Research report found that an employment gap of even a year leads to a 39% decrease in women's annual earnings.<sup>279</sup> This loss increases to 65% for a gap of four years or more.<sup>280</sup>

Large employers who offer paid leave programs are trying to help employees meet family obligations, such as "caring for an elderly parent or sick child, [or] coping with the death of a family member."<sup>281</sup> These obligations can vary broadly, and employees can benefit from taking leave to deal with these matters as they come up.<sup>282</sup> After taking the four weeks of caregiving leave offered by her employer, Jackie Christie said, "To give somebody the permission to not have guilt about how they're juggling work with the really trying job of caregiving—it's indescribable. I don't think anybody can know what it's like until you go through it."<sup>283</sup> Ms. Christie took her employer-offered paid leave to help care for her dying father and be with him and her children before he passed.<sup>284</sup>

State leave programs are important to bridge the gap in leave policies as well. Brian Wiggins uses the New York Paid Family Leave Program to help care for his diabetic daughter.<sup>285</sup> Mr. Wiggins said the program "has been a life changer"—even with only a little more than half his wage reimbursed, the program "helps with that sting" of otherwise going without an income.<sup>286</sup> For people like Ms. Christie and Mr. Wiggins, paid family leave makes it possible to take time off work and care for a parent or child when they are ill or dying. Without a national paid leave policy, many workers who do not have employer or state programs still will not have this option.

Without a broad national plan, states may continue to jigsaw protections for workers, but many employees will struggle to balance work with caregiving responsibilities, and the economy will suffer from decreased labor force

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276. See *id.*

277. See generally Jena McGregor, *The New Paid Family Leave*, WASH. POST (Dec. 30, 2019), <https://www.washingtonpost.com/business/2019/12/30/new-paid-family-leave/?arc404=true> [<https://perma.cc/VR4H-V2DU>].

278. STEPHEN J. ROSE & HEIDI HARTMANN, INST. WOMEN'S POL'Y RSCH., STILL A MAN'S LABOR MARKET: THE SLOWLY NARROWING GENDER WAGE GAP 8 (2018).

279. *Id.*

280. *Id.*

281. McGregor, *supra* note 277.

282. See *id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

participation and earnings.<sup>287</sup> In the absence of a pandemic, protections are still required for short- or long-term care that would not otherwise be covered by sick leave.<sup>288</sup> An American Association of Retired Persons and National Alliance for Caregiving survey found that 18.2% of respondents reported being caregivers for someone else, 85% of whom were relatives.<sup>289</sup> Of those surveyed, 60% of caregivers were also employed, and a little more than half of them were employed full time.<sup>290</sup> Policies must encompass access to paid leave as most workers cannot afford to take unpaid time off without some guarantee of a replacement income.<sup>291</sup> Additionally, of these caregiving responsibilities, new children only account for 21% of FMLA-type leave, more than half is taken by individuals to address their own illness, and 18% to care for a parent, spouse, or child—other than a new child.<sup>292</sup> Thus, paid family leave programs must address the full scope of a worker’s caregiving needs beyond leave offered for new parents.

The American Rescue Plan, which was signed into law on March 11, 2021, combats some of the immediate concerns of the current Covid-19 crisis.<sup>293</sup> This plan extends relief initiated in the FFCRA and offers more direct assistance by planning for vaccine dissemination and providing funding for schools to safely reopen.<sup>294</sup> It also includes direct payments to those who need it the most.<sup>295</sup> During a digital forum on the American Rescue Plan, Vice President Kamala Harris said,

Our economy cannot fully recover unless women can participate fully. So, I believe, I think we all believe, this is a national emergency. Women leaving the workforce in these numbers? It is a national emergency, and it demands a nation solution. We do believe that the American Rescue Plan is a very big part of the solution to this issue. . . .<sup>296</sup>

Vice President Harris further emphasized the plan’s proposed inclusion of funding for schools to safely reopen, investment in childcare services, and a

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287. See Danielle Corley, Sunny Frothingham & Kate Bahn, *Paid Sick Days and Paid Family and Medical Leave Are Not Job Killers*, CTR. FOR AM. PROGRESS (Jan. 5, 2017, 9:00 AM), <https://www.americanprogress.org/issues/women/reports/2017/01/05/295908/paid-sick-days-and-paid-family-and-medical-leave-are-not-job-killers/> [https://perma.cc/N2LF-KEWZ].

288. *Id.*

289. AARP PUB. POL’Y INST. & NAT’L ALL. FOR CAREGIVING, AM. ASS’N RETIRED PERS. CAREGIVING IN THE U.S.6 (2015), [https://www.caregiving.org/wp-content/uploads/2020/05/2015\\_CaregivingintheUS\\_Final-Report-June-4\\_WEB.pdf](https://www.caregiving.org/wp-content/uploads/2020/05/2015_CaregivingintheUS_Final-Report-June-4_WEB.pdf) [https://perma.cc/7ML5-9V5D].

290. *Id.* at 55–56.

291. Corley et al., *supra* note 287, at 6.

292. The Women Initiative, *Paid Family and Medical Leave: By the Numbers*, CTR. FOR AM. PROGRESS (Sept. 27, 2017, 9:02 AM), <https://www.americanprogress.org/issues/women/reports/2017/09/27/439527/paid-family-medical-leave-numbers/> [https://perma.cc/YP7H-YHDA].

293. Barbara Sprunt, *Here’s What’s in the American Rescue Plan*, NPR (Mar. 11, 2021, 2:39 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/03/09/974841565/heres-whats-in-the-american-rescue-plan-as-it-heads-toward-final-passage> [https://perma.cc/K2JY-CK5D].

294. *See id.*

295. Rogers, *supra* note 217.

296. *Women Leaving Work Force Is a ‘National Emergency,’ Harris Says*, N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/video/us/politics/100000007612219/harris-women-work-force.html> [https://perma.cc/6B66-9GRJ].

broader vaccine rollout.<sup>297</sup> Vice President Harris ended by saying, “So simply put, the American Rescue Plan will help get women back to work.”<sup>298</sup> During the same video conference, Representative Rosa DeLauro said,

Women are not opting out of the work force. They are being pushed by inadequate policies. So we have an opportunity not just to throw money at a problem, but to build that architecture for the future. Use this as a moment to address the serious inequities that has been further exposed by the coronavirus pandemic.<sup>299</sup>

The focus on getting women back to work is even more important when one considers the steep drop in female employment. Prior to the pandemic, a 2016 report by the Center for American Progress found that limited or no access to paid leave cost the American economy \$20.6 billion per year in lost wages.<sup>300</sup> New data from California’s paid leave program shows significant increases in labor force participation for those who were caring for family members, with an 8% increase in short-run labor force participation and 14% increase in long-run labor force participation.<sup>301</sup>

#### IV. RECOMMENDATION

When the FMLA was first passed almost thirty years ago, President Bill Clinton declared that American workers “will no longer need to choose between the job they need and the family they love.”<sup>302</sup> But the same purposes for enacting the FMLA—creating work-family balance and promoting the stability and economic security of families—remain unfulfilled today.<sup>303</sup> New legislation providing comprehensive paid family leave is imperative to further fill the gaps left behind and help facilitate an inclusive economic recovery.<sup>304</sup> A new paid leave policy must cover all workers, include both short- and long-term medical and caregiving leave, provide sufficient duration of leave, ensure adequate wages, allow workers to care for their families and loved ones, and ensure employment protections for the workers who use paid leave.<sup>305</sup>

The emergency leave policies passed during the Coronavirus pandemic can help policymakers design more effective national and permanent paid leave policies. To improve racial, gender, and economic equity, this new policy must cover all workers, no matter their income, full- or part-time status, employer size, or occupation.<sup>306</sup> The Biden Administration’s current proposal promises the

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297. *Id.*

298. *Id.*

299. *Id.*

300. Corly, et al., *supra* note 287.

301. The Women Initiative, *supra* note 292.

302. Pauline T. Kim, *The Family Medical Leave Act of 1993: Ten Years of Experience*, 15 WASH. U. J.L. & POL’Y 1, 1 (2004) (quoting Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law*, L.A. TIMES, Feb. 6, 1993, at A22).

303. See Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654.

304. Boesch, *supra* note 146.

305. See generally *id.*

306. *Id.*

passage of universal paid sick days and twelve weeks paid family and medical leave.<sup>307</sup> During the 2020 presidential campaign, President Biden promoted a permanent leave plan with twelve weeks paid family and medical leave, similar to the FAMILY Act, and coverage which encompassed leave for personal and family health needs, including leave for survivors of domestic violence and sexual assault to seek services, as in the Healthy Families Act.<sup>308</sup> These proposals are included in the American Families Plan, the Biden Administration's most recent proposal, and if passed, would enact paid leave benefits which are similar to the unpaid benefits under the FMLA.<sup>309</sup> Although this proposal promises more permanent paid leave than is currently available to most Americans, as none is currently offered, this plan is still far behind the rest of the world and far less than what the U.S. truly needs.<sup>310</sup>

Compared to other government-mandated parental leave benefits around the world, a twelve-week policy remains behind the curve. From 1990 to 2010, the U.S. increased leave benefits from zero to twelve unpaid weeks, while parental leave benefits in other countries during the same period increased from thirty-seven to fifty-seven paid weeks.<sup>311</sup> Although a vast increase from zero paid leave, a twelve-week paid family leave policy still lags far behind. This distinction is important when considering the effects on women's labor force participation. In 1990, the U.S. had one of the highest labor force participation rates for women among Western nations.<sup>312</sup> By 2010, however, this was no longer the case as "women in most other economically advanced countries had surpassed those in the United States in their participation rates."<sup>313</sup> The difference is that "[u]nlike the United States, most other economically advanced nations have enacted an array of policies designed to facilitate women's participation in the labor force, and such policies have on average expanded over the last 20 years relative to the United States."<sup>314</sup>

Additionally, a United Nations report on Covid-19 and Women's Human Rights suggests leave policies should "[p]romote equal caregiving responsibilities of all parents and guardians and flexible, family-friendly work practices" and "[e]nsure that economic incentives and social safety nets are gender-sensitive and reach and empower every woman and girl."<sup>315</sup> The report suggests a variety of measures, such as establishing or scaling up cash-transfer programs, family leave policies, partial or full unemployment benefits, or short-time work benefits.<sup>316</sup>

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307. Reichenberg, *supra* note 31; see also *Build Back Better*, *supra* note 196.

308. See Reichenberg, *supra* note 31.

309. *Id.*

310. See KOHLER ET AL., *supra* note 22, at 12.

311. *Id.*

312. Francine D. Blau & Lawrence M. Kahn, *Female Labor Supply: Why Is the United States Falling Behind?*, 103 AM. ECON. REV. 251, 251 (2013).

313. *Id.*

314. *Id.*

315. U.N. HUM. RTS. OFF. HIGH COMM'R, *supra* note 254, at 5–6.

316. *Id.*

As was seen on a global scale in the wake of Covid-19, there are many reasons an employee may need emergency leave to care for themselves or others. By including protections for both short-term and long-term medical and caregiving leave, a broader policy would ensure protection for workers not traditionally covered under the FMLA or other parental leave acts.<sup>317</sup> The FFCRA recognized the critical issue of providing family leave to care for a close family member who was ill or quarantining or for a child unable to attend school or childcare due to closures.<sup>318</sup> This coverage, however, should be extended to future policies even after the immediate threat of the virus has diminished.

No matter the public support for paid leave policies, challenges remain for small businesses who may not be able to support funding a paid leave program.<sup>319</sup> A national program would help alleviate these difficulties and democratize access to paid family leave.<sup>320</sup>

Recently, businesses have begun to advocate for paid leave as well. A report by Paid Leave for the U.S. and Promundo, in collaboration with the Parental Leave Corporate Task Force, suggests that businesses, as well as employees, benefit from leave policies.<sup>321</sup> The report found that in light of the significant challenges wrought by Covid-19, paid leave policies “provided an important support for companies during the pandemic, ensuring greater employee morale and workplace satisfaction, reduced rates of attrition and turnover, and acted as an effective recruitment tactic,” and that “[p]aid leave programs help employees feel supported and cared for and effectively able to take care of themselves and family members while remaining engaged with their employer.”<sup>322</sup>

The report found that both small and medium businesses believe that “a paid leave . . . policy will help them weather structural and economic volatility,” like a pandemic, by alleviating financial burdens on businesses, equalizing the available leave for all working people, reducing ambiguities in paid leave public policy, and advancing the awareness and acceptance of the importance of family caregiving and medical leave.<sup>323</sup>

Shifting the leave burden from small-business owners to a national program would enable industries which do not currently have leave programs to offer similar—and essential—benefits, thus helping to level the playing field among workers.<sup>324</sup> For example, unless a large chain, most small to medium businesses in the food and service industry are unable to provide paid leave.<sup>325</sup> A national policy would help “legitimize the service and food industry as a career. . . . A

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317. Boesch, *supra* note 146.

318. See Kuligowski, *supra* note 230.

319. *Id.*

320. *Id.*

321. PL+US & PROMUNDO WITH THE PARENTAL LEAVE CORP. TASK FORCE, PAID LEAVE AND THE PANDEMIC: EFFECTIVE WORKPLACE POLICIES AND PRACTICES FOR A TIME OF CRISIS AND BEYOND 7 (2021).

322. *Id.* at 5–6.

323. *Id.* at 7.

324. See *id.* at 32.

325. See *id.*

national paid leave public policy might help shift it to a job where you can have a family and a life.”<sup>326</sup>

## V. CONCLUSION

In the wake of the Coronavirus pandemic, the case for permanent paid family leave is only clearer. As the protections of the FMLA fall short, and the FFCRA and American Rescue Plan expire, the country is left without a comprehensive plan to protect workers as they care for themselves and others. In the wake of a severely infectious disease, with case numbers in the millions, workers forced to work in-person increased their chance of exposure; those workers, however, were also less likely to have job or wage protections should they or their family become infected. For families with school and day-care closures, caring for their children became an unwieldy burden. Paid leave protections allow employees paid time off in the case of emergencies just like these.

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326. *Id.* at 31.