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## MOVING FORWARD FROM THE FAMILY ACT: IMPLICATIONS FOR WORKING WOMEN, BUSINESS, AND CONTEMPORARY CONDITIONS OF CARETAKING LABOR

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### ❖ NOTE ❖

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#### *Abstract*

*In response to the historical rise of women in the workforce, Congress asserted Family and Medical Leave Act (FMLA) that aimed to preserve women's employment status through mandating unpaid parental leave. While still in force today, the Act fails to adequately deliver its promise to resolve the difficult choice women face between work and family care. The Family and Medical Insurance Leave Act (FAMILY Act) unsuccessfully sought to provide a comprehensive, national paid parental leave program. This Note argues that a national paid leave program should be resurrected to ameliorate the gender disparity embedded in conditions of parental caretaking. The Note examines the historical development of the FAMILY Act through discussion of FMLA's goals and limits. Additionally, the Note analyzes popular arguments put forth by the FAMILY Act's supporters and critics and explains how the Act would have positively affected women and businesses alike. Most significantly, the Note concludes that efforts towards implementing a national paid parental leave program are necessary to address structural imbalances between gender, family, and work that flow from modern American workplace inequality.*

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## I. INTRODUCTION

In 2016, the Family and Medical Insurance Leave Act (FAMILY Act) was poised to make significant federal advances toward workplace protections for women just as New York became the fourth state to adopt a mandatory paid parental leave program.<sup>1</sup> The bill introduced the most ambitious effort to date towards realizing a national policy of paid parental leave; and despite not becoming enacted in the last Congress, the FAMILY Act bill established a meaningful legal foundation for future policy proposals for national paid parental leave. Legislation similar the FAMILY Act should be passed in Congress because it will help working women retain their financial security, employers reduce costs and enhance their workplace environment. An additional reason for passage of a similar bill is that the FAMILY Act attempts to restructure the gender division in parental caretaking. This Note begins with the historical background of the FAMILY Act, describes its objectives, and outlines its supporting and opposing arguments. In Part II, this Note analyzes the legal and business issues associated with a national paid parental leave program through discussing how it impacts women and businesses. Finally, this Note recommends that a national paid parental leave program should be established to improve problematic conditions of caretaking labor that disadvantage women and points out how the current federal policy for unpaid parental leave reinforces gender inequality.

## II. HISTORICAL BACKGROUND

The Family and Medical Insurance Leave Act (FAMILY Act) stands on the shoulders of the Family and Medical Leave Act (FMLA), which was enacted in 1993.<sup>2</sup> The FMLA importantly expanded the opportunity for working women to take leave for specified familial or medical reasons such as to give birth, raise newborns and take care of ill family members. Under the

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<sup>1</sup> S. 786, 114th Cong. § 1 (2015); Christina Cauterucci, *New York Just Established the Best Paid Family Leave Policy in the Country*, SLATE (Apr. 1, 2016, 12:29 PM), [http://www.slate.com/blogs/xx\\_factor/2016/04/01/new\\_york\\_established\\_the\\_best\\_paid\\_family\\_leave\\_policy\\_in\\_the\\_country.html](http://www.slate.com/blogs/xx_factor/2016/04/01/new_york_established_the_best_paid_family_leave_policy_in_the_country.html).

<sup>2</sup> Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.

Act, eligible employees—regardless of gender—are entitled to twelve work weeks of unpaid leave if they or their spouse gives birth, adopts or has placed a new foster child, seeks to care for a parent, spouse or child with a serious medical condition, or cannot work because of their serious medical condition.<sup>3</sup> Congress expressed that the purpose of FMLA was to “further balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interest in preserving family integrity.”<sup>4</sup> The FMLA signified social progress for working women because it helped alleviate the burden of choosing between job security and parenting as women disproportionately served as the family’s primary caretaker.<sup>5</sup>

Nevertheless, today—a little over twenty years later—FMLA still imposes provisions that noticeably limit women’s mobility and security in the workplace. FMLA’s benefits are conditioned on the basis that an employee has worked for the employer for a minimum of twelve months or 1250 hours in the past twelve months and that employers have at least fifty or more employees.<sup>6</sup> This means that FMLA critically fails to cover women and other employees who work in part-time, temporary positions, or in small businesses. In 2015, an estimated 64.2% of all part-time workers were women compared to 35.8% of men.<sup>7</sup> Furthermore, for low-income women and single mothers, FMLA’s unpaid parental leave deeply threatens family finances because not working means little to no family income.<sup>8</sup> Therefore, FMLA represents just a minimum threshold of employment protection or benefits for working women with familial caretaking obligations.

The FAMILY Act’s proposed paid parental leave presents a significant, progressive policy milestone for working women without unduly burdening their employers. Senator Kirsten Gillibrand and Representative Rose DeLauro sponsored a 2013 bill that proposed to allow eligible employees to collect 66% of their income for up to twelve weeks when they take family or

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<sup>3</sup> 29 U.S.C. § 2602(a)(1) (2012).

<sup>4</sup> *Id.* § 2601(b)(1).

<sup>5</sup> *Id.* § 2601(a)(5).

<sup>6</sup> *Id.* § 2611(2)(A).

<sup>7</sup> *Latest Annual Data*, U.S. DEP’T. OF LABOR, [https://www.dol.gov/wb/stats/latest\\_annual\\_data.htm#part](https://www.dol.gov/wb/stats/latest_annual_data.htm#part) (last visited Feb. 20, 2017).

<sup>8</sup> MICHELLE I. NAPLES, FAMILY LEAVE FOR LOW-INCOME WORKING WOMEN: PROVIDING PAID LEAVE THROUGH TEMPORARY DISABILITY INSURANCE: THE NEW JERSEY CASE 1–2 (2001), [http://www.iwpr.org/publications/pubs/family-leave-for-low-income-working-women-providing-paid-leave-through-temporary-disability-insurance-the-new-jersey-case/at\\_download/file](http://www.iwpr.org/publications/pubs/family-leave-for-low-income-working-women-providing-paid-leave-through-temporary-disability-insurance-the-new-jersey-case/at_download/file).

medical leave.<sup>9</sup> Conditions entitling leave included pregnancy, childbirth or child adoption, childcare, health treatment for employee or employee's spouse, parent, partner or children, and particular military caregiving and leave, which are equivalent to the reasons permitting parental leave under FMLA.<sup>10</sup> The proposed bill would have applied to all employers regardless of number of employees and not take into account the length of time an employee has worked, unlike FMLA.<sup>11</sup> Furthermore, the FAMILY Act would not have unduly burdened employers because it would not have required employers to fully pay the partial wage replacement during the employee's leave.<sup>12</sup> Instead, the replacement wages would have come from an insurance fund administered by a new Office of Paid Family and Medical Leave within the Social Security Administration.<sup>13</sup> The bill would have required employees and employers to contribute two-tenths of one percent each, or about \$1.50 per worker around median salary per week to a national insurance fund.<sup>14</sup>

Unsurprisingly, the FAMILY Act encountered a wide range of supporters and detractors who articulated contrasting claims about its future effects. FAMILY Act supporters claim that it would have greatly improved maternal, newborn and child health outcomes. Through paid leave, new mothers can continue breastfeeding and ensure young children and newborns receive more important health services, such as immunizations.<sup>15</sup> For example, longer contact with newborns leads to improved bonding that "improve[s] a child's brain development, social development, and overall well-being."<sup>16</sup> Consistent, positive interaction between young children and their parents may reduce the impact of adversity and help foster stronger relationships between parents and children.<sup>17</sup> The FAMILY Act would have afforded new mothers the

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<sup>9</sup> S. 1810, 113th Cong. (2013).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, THE FAMILY AND MEDICAL INSURANCE LEAVE ACT 1 (March 2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf>.

<sup>14</sup> S. 1810.

<sup>15</sup> Naples, *supra* note 13.

<sup>16</sup> See HUMAN IMPACT PARTNERS, FACT SHEET: PARENTAL LEAVE AND THE HEALTH OF INFANTS, CHILDREN AND MOTHERS 1 (Nov. 2011), <http://www.humanimpact.org/doc-lib/finish/7-policy-hias/149-paid-family-leave-factsheet>.

<sup>17</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, THE CHILD DEVELOPMENT CASE FOR A NATIONAL PAID FAMILY AND MEDICAL LEAVE INSURANCE PROGRAM 1 (March 2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/the-child-development-case-for-a-national-paid-family-and-medical-leave-insurance-program.pdf>

chance for longer leave periods, which are linked to a decline in depressive symptoms and the likelihood of severe depression, and improved health outcomes.<sup>18</sup>

Critics of the FAMILY Act argued that the FAMILY Act nevertheless would have unfairly burdened employers, particularly small businesses, who may not have been able to easily absorb the costs of contributing to a national insurance fund because of thinner profits.<sup>19</sup> Furthermore, critics claimed that the new policy may harm women because companies would hire fewer women out of concern that they would be encouraged to take parental leave and increase the likelihood for employers' to have to seek a paid replacement for their absence.<sup>20</sup> In recent years, states and cities have enacted their own, more limited versions, of the FAMILY Act. In California, parents are now provided with six weeks of paid parental leave during or after pregnancy; in New Jersey, parents are allowed six weeks of paid parental leave at two-thirds of monthly income.<sup>21</sup> The rise of states enacting broad paid parental leave alludes to increased opportunity and public support for national paid parental leave.

### III. STRENGTHENING WOMEN AND THEIR WORKPLACE

Federal policies for paid parental leave like the FAMILY Act would help reduce the job risks that fall upon women across the fifty states, which have historically disadvantaged them when they have taken work leave to give birth and care for family members. Since women are traditionally the primary caretakers of the family, women more than men, have had to face choosing between taking unpaid leave to raise young children or care for family and sacrificing familial relationships in order to earn necessary wages and retain their job. Mandatory paid parental leave provides the wage replacement that otherwise makes taking unpaid parental leave a financial impossibility. The FAMILY Act would have enabled women to not only have income stability, but also job security during childbirth, which is considered to be "the most expensive health event that families face during childbearing years."<sup>22</sup>

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(citing EDWARD ZIGLER, SUSAN MUENCHOW, & CHRISTOPHER J. RUHM, *TIME OFF WITH BABY: THE CASE FOR PAID CARE LEAVE* (2012)).

<sup>18</sup> *Id.*

<sup>19</sup> Wendy McElroy, *The FAMILY Act is Smart Politics but Bad for Business*, THE HILL (Nov. 4, 2014), <http://thehill.com/blogs/pundits-blog/healthcare/219766-the-family-act-is-smart-politics-but-bad-for-the-economy>.

<sup>20</sup> *Id.*

<sup>21</sup> Anne Bartel et al., *California's Paid Family Leave Law: Lessons from the First Decade* (June 23, 2014), <https://www.dol.gov/asp/evaluation/reports/PaidLeaveDeliverable.pdf>.

Additionally, mandatory paid parental leave helps ensure retirement security for employed women who have intensive elder care responsibilities, such as for aging parents.<sup>23</sup> For example, adult female children, typically over the age of 50, who take care of their parents lose an average of \$142,693 as a result of their decision; in contrast, adult male children only lose an average of \$89,107 despite having the same obligations from income and retirement benefits lost from reduced work hours and leaving the work force early.<sup>24</sup> Therefore, mandatory paid parental leave helps women stay employed when they are facing some of their most challenging and vulnerable life events and encourages them to not leave the workplace early.

Additionally, the FAMILY Act would have helped businesses by reducing excessive costs, contributing to greater profits, and improving the workplace environment. First, unpaid parental leave under the FMLA leads to working women prematurely leaving their jobs and businesses incurring extra expenses locating and training a replacement.<sup>25</sup> Since turnover costs can be high, up to an average of one-fifth of employee's salary, paid parental leave encourages valued female employees to stay at their job.<sup>26</sup> In fact, first time mothers who took paid parental leave were shown to be more likely to return to their same employer after their leave than mothers who did not take paid parental leave.<sup>27</sup> California's state paid parental leave program revealed that 87% of businesses reported no increased costs because of the program and instead discovered increased savings due to higher employee retention and reduced costs associated with private parental leave benefits.<sup>28</sup> 90% of businesses also reported positive or no noticeable effect of the program on employee productivity and morale.<sup>29</sup> Businesses, knowing that their

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<sup>22</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, THE CASE FOR THE FAMILY ACT 2 (March 2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/the-case-for-the-family-act.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> METLIFE MATURE MARKET INST., CAREGIVING COSTS TO WORKING CAREGIVERS: DOUBLE JEOPARDY FOR BABY BOOMERS CARING FOR THEIR PARENTS 1 (June 2011), <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/Highlights/mmi-caregiving-costs-working-caregivers-highlights.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See E. APPELBAUM & R. MILKMAN, UNFINISHED BUSINESS: PAID FAMILY LEAVE IN CALIFORNIA AND THE FUTURE OF U.S. WORK-FAMILY POLICY 78–79 (2013).

<sup>29</sup> See E. Appelbaum & R. Milkman, *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California*, CTR FOR ECON. AND POLICY RESEARCH (Jan. 2011), <http://www.cepr.net/index.php/publications/reports/leaves-that-pay>.

employees have access to paid parental leave, may improve their bottom line through avoiding costly worker turnover and retaining valuable and profitable employee talent. Thus, the FAMILY Act and other mandatory paid parental leave policies are not likely to hurt businesses economically, as evidenced by similar state programs.

#### IV. REPOSITIONING WOMEN IN GENDERED WORK POSITIONS

On a societal level, paid parental leave policies, such as the FAMILY Act, should be passed in Congress and apply to the public on a national scale because they reform underlying structural inequality facing women. While working women are individual actors, their actions are informed by social, cultural and economic systems in place that import certain, and sometimes problematic, values on gender. The current national system of unpaid parental leave under the FMLA reinforces traditional gender roles for men and women in the workplace by supporting a troubling presumption of women as primary caretakers. In *Garska v. McCoy*, the Supreme Court of West Virginia held that child custody belongs to the primary caretaker who performs duties such as cooking, bathing, dressing, putting the child to bed.<sup>30</sup> While the ruling was dressed in gender-neutral language, it effectively favored awarding custody to mothers because housework and childcare generally fall upon mothers more than fathers.<sup>31</sup> This presumption of mothers as primary caretaker still animates contemporary family court custody rulings, as mothers win custody of children around two-thirds of the time during divorce.<sup>32</sup>

However, seeing childcare as primarily a woman's role supports a gendered structure of emotional labor, which ultimately disadvantages women. Emotional labor is based on the management and expression of one's own emotions as well as those of others involved in certain forms of public and private work.<sup>33</sup> Scholar Nicky James theorizes that "its value lies in its contribution to the social reproduction of labour power and the social

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<sup>30</sup> *Garska v. McCoy*, 167 W.Va. 59 (1981).

<sup>31</sup> Kim Parker & Wendy Wang, *Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family*, PEW RESEARCH CTR (March 14, 2013), <http://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family/>.

<sup>32</sup> TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2013 (January 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf>.

<sup>33</sup> Nicky James, *Emotional Labour: Skill and Work in the Social Regulation of Feelings*, 37 THE SOCIO. REV., 1, 15 (1989).

relations of production, with the divide between home and work and the gender division of labour influencing the forms in which it is carried out.”<sup>34</sup> She highlights that there is:

the supposed 'naturalness' of women's caring role is central to the significance, value and invisibility of emotional labour and its development through gender identity and work roles. Part of women's caring role is that they are deemed to be 'naturally' good at dealing with other people's emotions because they are themselves 'naturally' emotional . . . .<sup>35</sup>

Pregnancy, childcare and elder care—which requires mothers to intensively regulate their emotions and absorb and manage those of their family—readily characterize emotional labor. By taking unpaid parental leave under FMLA to perform these familial caretaking tasks, working women are forced to accept a form of unpaid emotional labor.

The negative impact from this widespread, unremunerated emotional labor primarily falls upon women, which disparately harms women and exacerbates structural gender inequality. The lack of remuneration for women’s emotional work reinforces a dichotomy that gainful employment on the marketplace indicates a masculine endeavor while familial caretaking constitutes feminine, domestic work that is part of women’s supposed natural or moral duty, which despite requiring women to sacrifice substantial time, energy and personal expenses, can ultimately be had for nothing. Invisible expectations that women should take care of children leaves most women with a bleak option of either having to suffer loss of wages from taking leave or limiting critical bonding time with their newborn from returning to work very soon after childbirth. Unpaid leave perpetuates the questionable message that family is distinct from work, which hides women’s historical struggle of navigating the tensions between and demands of both spheres of labor and silences the voices of working women who speak out against the compulsory divide.

The FAMILY Act addressed this systemic issue of unpaid emotional labor by providing partial wage replacement that tries to minimize income insecurity that discriminately face women because of gendered division of labor in society. It boldly asserts that women’s caretaking is important enough to not be free. Thus, FMLA’s unpaid parental leave policy

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<sup>34</sup> *Id.* at 19.

<sup>35</sup> *Id.* at 22.



unfortunately helps reproduce social conditions of gender inequality that it sought to remedy in the first place. Therefore, when it comes to national policy, Congress and the public should strive for inclusive programs like paid parental leave that define “family” to incorporate and foster the full agency of mothers and equalize the economic stakes or values involved in American women’s common dilemma of deciding between work and family.

## V. CONCLUSION

With the inception of the Trump administration and a Republican-controlled Congress, establishing mandatory and fair paid parental leave through national policy appears more than ever to be an uphill battle; however, these antagonistic conditions emphasize the importance of its legal advocacy.<sup>36</sup> During his presidential campaign, Trump proposed six weeks of paid maternity leave, which would be funded by the savings gained from eliminating waste in unemployment insurance.<sup>37</sup> But, Trump’s proposal would be limited to married women who give birth, leaving behind many other types of working women and men participating in childcare, adopted, foster or step children, and affirms antiquated gender roles.<sup>38</sup> Furthermore, Trump estimated that such a program would cost around \$2.5 billion, financed from unemployment fraud overpayments, but the problem remains that out of the \$3.2 billion in estimated unemployment overpayments, only \$850 million is thought to have come from fraud.<sup>39</sup> Unemployment overpayments due to fraud does not reasonably indicate a predictable and consistent source of money either. Nevertheless, the recent trend of state-administered paid parental leave programs reflects positive progress, but should not constitute its own ends, but rather a means to an end: a national

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<sup>36</sup> See Erin Gloria Ryan, *One of These Paid-Leave Policies Is Not Like the Other*, THE DAILY BEAST (Feb. 10, 2015), <http://www.thedailybeast.com/articles/2017/02/10/one-of-these-paid-leave-policies-is-not-like-the-other.html>.

<sup>37</sup> Sean Sullivan & Robert Costa, *Donald Trump Unveils Child-care Policy Influenced by Ivanka Trump*, N.Y. TIMES (Sept. 13, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/09/13/donald-trump-joined-by-ivanka-trump-to-outline-child-care-policy/?postshare=4881473768713550&tid=sm\\_tw&utm\\_term=.442db8088d89](https://www.washingtonpost.com/news/post-politics/wp/2016/09/13/donald-trump-joined-by-ivanka-trump-to-outline-child-care-policy/?postshare=4881473768713550&tid=sm_tw&utm_term=.442db8088d89).

<sup>38</sup> *Id.*

<sup>39</sup> Mark Gimein, *Why Trump’s Maternity-Leave Plan Won’t Work*, THE NEW YORKER (Sept. 16, 2016), <http://www.newyorker.com/business/currency/why-trumps-maternity-leave-plan-wont-work> (citing U.S. Dept. of Labor, *Unemployment Insurance (UI) Improper Payments*, <https://www.dol.gov/general/maps/data> (last visited Feb. 20, 2017)).

program for paid parental leave that imparts new life into the legacy of the FAMILY Act.