

WHY FIFTY: AN ANALYSIS OF THE SMALL BUSINESS EXEMPTION CODIFIED IN THE FAMILY AND MEDICAL LEAVE ACT OF 1993

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ABSTRACT

This article examines the small business exemption codified in the Family and Medical Leave Act of 1993 (FMLA), which excludes from coverage all workers employed with private businesses with less than fifty employees. This examination is timely as working Americans have faced unprecedented conflict this year between work, family, and health concerns that were created by the global pandemic of Covid-19. Although the struggle to achieve flexibility and balance with these priorities is certainly not new, the pandemic exposed our country's lack of comprehensive and effective leave legislation. By June of 2020, more than 45 million Americans had filed new unemployment compensation claims during the pandemic: workers that did not benefit from the FMLA's guarantees of job-protected leave and access to health care.

Part I of this article makes a substantial contribution to current legal scholarship by examining the legislative history and political climate that persuaded Congress to adopt a significantly larger small business exception in the FMLA than in similar employment statutes. Part II explains how States currently approach family and medical leave in local legislation and reveals that these approaches are widely diverse, creating inequity in coverage and failing to provide a uniform alternative to federal legislation. Part III advocates that the coverage under the FMLA is inadequate and provides suggestions for expansion of its provisions to more Americans. As Congress considers ways to help America recover from the pandemic, as well as strengthen

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our families and our economy in ordinary life, one of its top priorities should be to revise the FMLA's small business exemption.

I. INTRODUCTION

In March of 2020, in the midst of the global pandemic caused by a novel coronavirus, Congress enacted several emergency laws intended to provide some stability to the U.S. economy and to protect the health and security of Americans.¹ At the time these statutes were enacted, many states had issued stay at home orders for nonessential workers, causing closures of schools and businesses, a downturn in the national economy, and increased unemployment.² One emergency enactment, titled the Emergency Family and Medical Leave Expansion Act (“EFMLEA”),³ temporarily amended the Family and Medical Leave Act of 1993 (“FMLA”).⁴ Specifically, the EFMLEA amended the FMLA’s definition of the term “employer,” temporarily requiring private sector employers with fewer than 500 employees to provide its workers with job-protected leave if the employee was absent from work due to coronavirus-related reasons.⁵ This enactment exposed several significant and chronic deficiencies to the FMLA: namely, that there are gaping holes in the coverage of the FMLA that render the statute inapplicable to millions of Americans.⁶

¹ Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116–123, 134 Stat. 146 (2020); Families First Coronavirus Response Act, Pub. L. No. 116–127, 134 Stat. 178 (2020) (codified at 29 U.S.C. § 2601); Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116–136, 134 Stat. 281 (2020) (codified at 15 U.S.C.A. § 9001).

² See, e.g., Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/M3ZB-42HX>]; Eric Morath, *How Many U.S. Workers Have Lost Jobs During Coronavirus Pandemic? There Are Several Ways to Count*, WALL ST. J. (June 3, 2020, 5:30 AM), <https://www.wsj.com/articles/how-many-u-s-workers-have-lost-jobs-during-coronavirus-pandemic-there-are-several-ways-to-count-11591176601> (last visited Oct. 16, 2020).

³ See Emergency Family and Medical Leave Expansion Act (EFMLEA), Pub. L. No. 116–127 § 3101, 134 Stat. 189, 189–92 (2020) (codified at 29 U.S.C. § 2601).

⁴ Family and Medical Leave Act of 1993 (FMLA), Pub. L. No. 103–3, 107 Stat. 6 (codified as 29 U.S.C.A. §§ 2601–2654) (West 2020).

⁵ See 29 U.S.C. § 2611(4)(A)(i)–(iv); *Temporary Rule: Paid Leave Under the Families First Coronavirus Response Act*, U.S. DEPT’ LAB., <https://www.dol.gov/agencies/whd/ffcra> [<https://perma.cc/DLF2-WP5D>].

⁶ See, e.g., Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 341 (1993) (concluding that leave under the FMLA “is extremely limited. The time benefit is seriously inadequate to resolve the work-family conflicts that the legislation is designed to ameliorate or eliminate.”); Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 5 (2007) (contending that “[t]he pressing challenge for Congress is to reform federal pregnancy and family leave laws to increase coverage for low-wage workers and to incorporate labor protections for low-wage working women into the continued effort to transform our nation’s welfare system into a program that

Moreover, these deficiencies have existed for more than twenty-five years without Congressional intervention.

When President Clinton signed the FMLA into law in February of 1993, he declared that “the need of the American family for flexibility in the workplace” was “compelling” and that the enactment of the FMLA ensured that “American workers will no longer have to choose between the job they need and the family they love.”⁷ Despite President Clinton’s characterizations of the statute, the FMLA only applies to a limited segment of American workers. Specifically, Congress drafted the FMLA to apply only to those businesses employing fifty or more workers,⁸ thereby exempting smaller businesses from its requirements and denying millions of American workers access to its provisions.⁹ Passed after almost eight years of Congressional debate and two Presidential vetoes,¹⁰ many of the original goals of the legislation were compromised,¹¹ with supporters classifying the FMLA as “an important first step”¹² and raising expectations that broader legislation would follow.¹³ Although the FMLA was enacted more than twenty-five years ago, Congress never

promotes stable work.”); Michael Selmi, *Is Something Better Than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL’Y 65, 67 (2004) (maintaining that “it is clear that the statute has not accomplished its goals with respect to combatting stereotypes or discrimination against women in the workplace” and observing that “[b]y far, the FMLA is most frequently used by employees for their own serious illness—a fact that has effectively transformed the statute from one involving *family* leave to one involving *sick* leave.”).

⁷ Presidential Statement on Signing the Family and Medical Leave Act of 1993, 29 WKLY. COMP. PRES. DOC. 144 (Feb. 5, 1993).

⁸ See 29 U.S.C. § 2611(4)(A)(i) (1993) (defining employer as “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”).

⁹ See 139 CONG. REC. S1843 (Feb. 3, 1993); 139 CONG. REC. H1970 (Feb. 3, 1993); (expressing concern that the definition of employer incorporated into FMLA will exempt 95% of the U.S. business and more than half of all workers); see, e.g., Michael L. Ripple, *Supervisors Beware: The Family and Medical Leave Act May be Hazardous to Your Health*, 16 J. CONTEMP. HEALTH L. & POL’Y 273, 300–01 (1999) (estimating that “[b]y creating an exemption for small businesses, the FMLA actually excludes from coverage approximately ninety-five percent of the workforce”).

¹⁰ See *10 Years of Advocacy and Two Presidential Vetoes: The Political Backstory of FMLA*, ECON. OPPORTUNITY INST. (Aug. 6, 2013), <http://www.opportunityinstitute.org/blog/post/10-years-of-advocacy-and-two-presidential-vetoes-the-political-backstory-of-fmla/> [<https://perma.cc/USV8-QC86>].

¹¹ See Ronald D. Elving, *Conflict and Compromise: How Congress Makes the Law* 12–13 (1995).

¹² See, e.g., Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992-2012 and Beyond*, 2013 Mich. St. L. Rev. 1621, 1625 (2013) (describing the FMLA as “an important first step toward a federal family leave policy” but explaining that the appropriate theme of the statute is one “of unfinished business” because it never was “sufficient to address the needs of workers”).

¹³ See Selmi, *supra* note 6, at 71–72.

permanently altered the size of its small business exception.¹⁴ Thus, when businesses started laying off a significant number of workers due to the coronavirus in March of 2020,¹⁵ many of these workers were unprotected by the FMLA, a deficiency that Congress considered when enacting the EFMLEA.¹⁶

The FMLA is not the only modern employment statute containing a small business exception.¹⁷ Congress previously enacted several employment statutes containing small business exemptions.¹⁸ Yet, none of the small business exemptions in these statutes are as broad as the one codified in the FMLA. For instance, when Congress enacted Title VII of the Civil Rights Act of 1964, it originally applied only to employers with a minimum of twenty-five employees.¹⁹ Three years later, Congress enacted the Age Discrimination in Employment Act of 1967, and its definition was somewhat smaller, applying to employers with twenty or more employees.²⁰ In 1972, Congress amended the definition of employer contained in Title VII by lowering the requisite number of employees from twenty-five to fifteen.²¹ Congress subsequently borrowed Title VII's definition of employer when it enacted the Americans with Disabilities Act of 1990, thereby applying its provisions to employers with fifteen or more employees.²²

Unfortunately, when Congress enacted the FMLA just three years after the ADA, Congress increased its small business exception, deviating significantly from its thirty-year trend of gradually reducing the exception in other employment legislation. Instead of following the Title VII model,²³ Congress adopted a larger small

¹⁴ *But cf.*, Families First Coronavirus Response Act, Pub. L. No. 116-127, § 3102(b)(a)(1)(B), 134 Stat. 178 (2020) (temporarily amending the definition of employer found in section 101(4)(A)(i) of the FMLA to provide up to twelve weeks of leave for specified reasons related to COVID-19, and these amendments apply to an employer with "fewer than 500 employees").

¹⁵ See Rebecca Rainey, *Coronavirus layoffs surge across America, overwhelming unemployment offices*, POLITICO (Mar. 17, 2020, 7:43 PM), <https://www.politico.com/news/2020/03/17/coronavirus-layoffs-america-unemployment-134819> [<https://perma.cc/CPH3-48UY>]; Justin Wolfers, *The Unemployment Rate is Probably Around 13 Percent*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/upshot/coronavirus-jobless-rate-great-depression.html> [<https://perma.cc/7SHU-MRUZ>].

¹⁶ See, e.g., 139 CONG. REC. S1843 (Feb. 3, 1993); 139 CONG. REC. H1970 (Feb. 3, 1993); Ripple, *supra* note 9, at 300-301.

¹⁷ See Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1197-98 (2006) (tracing the historical origins of the small business exemption).

¹⁸ See *id.*; *infra* notes 18-21.

¹⁹ See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b) (1964) (codified at 42 U.S.C. § 2000e *et seq.*).

²⁰ See 29 U.S.C. § 630(b) (2015).

²¹ See 42 U.S.C. § 2000e(b) (2018).

²² See *id.* at § 12111(5)(A) (2012).

²³ See *id.* at § 2000e(b).

business exemption than any employment discrimination statute when it defined a covered employer under the FMLA to require the employment of fifty or more employees rather than fifteen or twenty.²⁴

The larger the definition of a covered employer, the greater the number of employees that remain unprotected from these laws. According to the most recent data from the U.S. Census Bureau, American businesses are overwhelmingly composed of smaller businesses.²⁵ This data shows that businesses or firms with less than fifty employees comprise 73% of the total composition of businesses, and these same businesses currently employ more than 33.6 million workers.²⁶ Once the small business exception is combined with the other statutory exclusions of the FMLA, such as the exclusions for part-time and temporary workers, the Congressional Research Service reported in 2012 that approximately 43.5% of Americans are not legally eligible for FMLA benefits.²⁷

Given the significance of this exclusion, this article examines the small business exemption codified in the FMLA. Part I of the article takes a novel approach by exploring the legislative history behind the statute's definition of employer, focusing in particular on the reasons Congress altered the Title VII model so significantly when enacting the FMLA. In part, this legislative history documents the codification of a preemption clause into the FMLA, thereby clarifying that this statute only sets the minimum level of protection for workers²⁸ and encouraging states to enact more generous protections.²⁹ Accordingly, Part II examines current state family and medical leave legislation, identifying which states follow or deviate from the federal approach when defining those employers that are obligated to provide family and medical leave. Benefits vary widely from state to state, creating significant inequity in coverage across

²⁴ See 29 U.S.C. § 2611(4)(A) (2015).

²⁵ See *2017 SUSB Annual Data Tables by Establishment Industry*, U.S. CENSUS BUREAU (March 2020), <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html#> [<https://perma.cc/LZP6-T77D>].

²⁶ See *id.*

²⁷ See GERALD MAYER, U.S. CONG. RESEARCH SERV., R43214, *THE FAMILY AND MEDICAL LEAVE ACT (FMLA): POLICY ISSUES* at 8–9, tbls. 1 & 2 (2013) (analyzing the most recent survey data, from the 2012 Family and Medical Leave Act Employee and Worksite Surveys conducted by the Department of Labor, and comparing it with data extracted from the 2011 survey conducted by the Annual Social and Economic supplement to the monthly Current Population Survey).

²⁸ See Family and Medical Leave Act of 1993, 29 U.S.C. § 2651(b).

²⁹ See S. REP. NO. 103–3, at 4, 5 (1993) (stating that “[t]he bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.”).

the country. Given this inequity at the state level, Part III of the article asserts that the time for an amendment to the small business exception is long overdue. Given the disparity of FMLA protection both at the state level and under the EFMLEA, Congress must act to ensure its benefits and protections are available to more American workers.

A. *Legislative History: The Origins of Fifty*

The FMLA has been characterized as a deceptively simple statute as it imposes two primary obligations on covered employers.³⁰ First, the FMLA is an accommodation statute, requiring covered employers to provide twelve weeks of unpaid leave to eligible employees for qualifying family and medical reasons.³¹ Second, the statute prohibits covered employers from discriminating against employees who take protected leave.³² To better assure compliance with this anti-discrimination mandate, the FMLA affirmatively requires employers to maintain employees' health insurance during their protected absences, and to restore them to the same or an equivalent position upon their return from such leave.³³

This statutory right to family and medical leave was deemed necessary to close a gender gap in the federal statutory framework that existed prior to the law's passage.³⁴ Both the passage of Title VII, and its subsequent amendment through the passage of the Pregnancy Discrimination Act, were undoubtedly important workplace protections for women as they increasingly entered the paid workforce. Title VII prohibited employers from discriminating

³⁰ See A.B.A. SECTION OF LABOR LAW AND EMP'T LAW, *THE FAMILY AND MEDICAL LEAVE ACT*, at xiv (Michael J. Ossip & Robert M. Hale, eds., 2d ed. 2006).

³¹ See Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1)(A)–(E).

³² See *id.* § 2615(a)(2).

³³ See *id.* § 2614(a)(1)(A)–(B).

³⁴ See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J. L. REFORM 371, 426 (2001); *Parental and Disability Leave: Joint Hearing Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service and the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Committee on Education and Labor*, 99th Cong., 1st Sess. (1985) [hereinafter *1985 House Hearings*] (testimony of Professor Wendy W. Williams) (explaining that "while Title VII as amended by the PDA has required that benefits and protections be provided to millions of previously unprotected women wage earners in this country, it leaves gaps which an antidiscrimination law cannot, by its nature, fill. This bill . . . is designed to fill those gaps."); see also *Kazmier v. Widmann*, 225 F.3d 519, 547 (5th Cir. 2000) (Dennis, J., dissenting) ("Perceiving that enacting the PDA had not achieved the intended result of preventing discrimination against either women or men in the granting of leave time in that the States felt it necessary to affirmatively grant pregnancy leave to women and not men, in 1985 Congress began considering the issue of family and medical leave.").

against women based on their sex;³⁵ whereas the Pregnancy Discrimination Act established that differential treatment due to pregnancy was a form of sex discrimination and required employers to treat pregnant women in an equivalent manner as their male employees.³⁶ Under this statutory regime, however, the availability of leave “benefits for pregnant workers were only guaranteed if similar benefits were already available to other workers.”³⁷ If an employer did not offer any sort of leave benefits to its employees, the antidiscrimination statutes did not impose an affirmative obligation on employers to do so.³⁸

Thus, while these “antidiscrimination laws . . . facilitated women’s entrance into and advancement in the workforce . . . they . . . afforded women little protection from demotion or termination on the basis of their family caregiving responsibilities.”³⁹ Accordingly, feminists believed that additional protections were needed to create job security for women during periods of caregiving responsibilities, thereby facilitating greater gender equality in the workplace.⁴⁰

1. The Inaugural Bill: The Dream of Family Leave for All Americans

Early on in the campaign to achieve statutorily protected leave, advocates of family and medical leave were divided over a number of strategic issues related to the scope of the conceptualized legislation. First, one of the earliest issues to divide them was whether to seek paid or unpaid leave.⁴¹ When the American Association of Junior Leagues held a conference in New York in March of 1985, the

³⁵ See 42 U.S.C. § 2000e-2(a)(1) (1991).

³⁶ See *id.* at § 2000e(k) (1991).

³⁷ 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, 467 (2008).

³⁸ See Kessler, *supra* note 34, at 426.

³⁹ *Id.* at 377.

⁴⁰ See, e.g., Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699, 699–700 (1986) (arguing that the primary focus in enacting Title VII and the PDA was “to remove the barriers to equal employment opportunity” for women, but that “simply removing these impediments has not been enough” and advocating for a “restructuring [of] the workplace in the context of maternity leave.”); Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 942–43 (1985) (discussing the limits of relying on Title VII and the PDA to challenge employer leave policies and acknowledging that many are based on the traditional view of “pregnancy as incompatible with employment”); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN’S RTS. L. REP. 151, 167, 168, 171–72 (1992) (discussing the PDA’s adoption of an equality theory but acknowledging its limits in achieving family leave).

⁴¹ See ELVING, *supra* note 11, at 39.

attendees endorsed paid leave.⁴² The Chairwoman of the Public Policy Department of the Association of Junior Leagues, Joan Krupa, later advocated her organization's preference for paid leave during the hearing before four joint subcommittees in the House on October 17, 1985, testifying that unpaid leave would be particularly difficult for "low income employees [who] simply can't afford to stay away from work very long . . . [and they would be] forced to return to work too soon."⁴³

On the other hand, many advocates emphasized the realities of navigating the then-Republican-controlled Senate and obtaining President Reagan's support.⁴⁴ While these advocates agreed that paid leave was preferable, they believed that an unpaid bill would minimize the anticipated complaints from Republicans about employer costs, and curtail their mischaracterizations of the bill as "a new federal entitlement."⁴⁵ Accordingly, the legislation's chief advocates reached an early consensus to support the enactment of an initial statute providing unpaid leave,⁴⁶ hoping to build momentum for the future enactment of paid leave by a subsequent Congress.⁴⁷

Second, advocates were divided over how to structure any statutory leave, specifically, whether the leave should be gender-specific leave or gender-neutral.⁴⁸ Supporters of gender-specific leave preferred a bill which was limited to the creation of maternity leave, explaining that a narrower bill would be easier to pass through Congress.⁴⁹ A number of feminists expressed concern about the constitutionality of a gender-specific bill; they also feared the practical consequences of

⁴² See *id.* at 39–40; see also *1985 House Hearings*, *supra* note 34, at 66 (testimony of Joan Krupa explaining the Association of Junior Leagues' support for paid parental leave).

⁴³ *1985 House Hearings*, *supra* note 34, at 66 (testimony of Joan Krupa).

⁴⁴ See Selmi, *supra* note 6, at 71.

⁴⁵ ELVING, *supra* note 11, at 30, 39.

⁴⁶ See Selmi, *supra* note 6, at 71.

⁴⁷ See *1985 House Hearings*, *supra* note 34, at 9 (testimony of Professor Williams) (characterizing the lack of a paid leave provision in the PDLA as a "cautious approach," indicating that this approach is "appropriate" in light of the bill's provision creating a commission to study methods of funding a possible wage replacement system, and emphasizing that a wage replacement system "certainly warrants the best and deepest forethought we can bring to it").

⁴⁸ See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 48–49 (2012) (Ginsburg, J., dissenting); see also ELVING, *supra* note 11, at 20–21.

⁴⁹ See ELVING, *supra* note 11, at 18, 30, 32, 38 (explaining that Rep. Berman from California had supported a bill in California providing a four-month disability leave for new mothers, and he was an early advocate supporting a similar federal bill. He initially expressed reservations about a gender-neutral bill stating that a "broader bill was reaching too far. Maybe someday, he thought, but not in the mid-1980s. As for right now, Berman said, if we had a leave bill that just covered birth and adoption we could pass it tomorrow." Berman started the drafting process for a maternity leave bill, but never introduced it in the House, agreeing instead to endorse the broader, gender-neutral bill).

providing only maternity leave, arguing that it would deter employers from hiring and promoting women.⁵⁰ These feminists advocated that a new statute be drafted in gender-neutral terms, providing equal rights to both male and female workers.⁵¹ They also hoped that a gender-neutral bill would encourage fathers to take paternity leave, which would diminish the cultural stereotype that women were the primary caregivers.⁵²

Third, early strategists proposed that the scope of the bill extend “beyond issues of gender discrimination and the challenges posed by pregnancy” and “attempt to target the problem of work-family balance more broadly.”⁵³ They hoped to achieve this broad objective by providing medical leave for a wide range of “temporary, nonwork-

⁵⁰ For example, this concern was expressed by Professor Eleanor Holmes Norton in her testimony in support of the FMLA in 1987:

Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, employers would very likely be reluctant to hire or promote women of child-bearing age. Under the proposed legislation, however, because employers would be required to provide job-protected leaves for all employees in circumstances that affect them all approximately equally, they would have no incentive to discriminate against women.

Family and Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service on H.R. 925, 100th Cong. 39 (1987) [hereinafter 1987 House Hearings] (statement of Eleanor Holmes Norton); see also Williams, *supra* note 40, at 171–72 n.122 (opposing California’s maternity leave statute and noting its unconstitutionality).

⁵¹ Professors Wendy W. Williams and Susan Deller Ross from Georgetown University Law Center were involved early in the women’s coalition that supported the FMLA, and they also were some of the leading academic voices at the time advocating for a gender-neutral statute. See ELVING, *supra* note 11, at 20; see also Susan Deller Ross, *Legal Aspects of Parental Leave: At the Crossroads*, in PARENTAL LEAVE AND CHILD CARE: SETTING AND RESEARCH AND POLICY AGENDA 114–115, n.27 (Janet Shibley Hyde & Marilyn J. Essex eds., 1991) (participating as one of the leading academic voices at the time to advocate for a gender-neutral statute); Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 328 (1984).

⁵² The opinion explains:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the women’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.

SUSAN DELLER ROSS, WOMEN’S HUMAN RIGHTS: THE INTERNATIONAL AND COMPARATIVE LAW CASEBOOK 313 (2013); see, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (upholding the constitutionality of the family care provisions of the FMLA, concluding that sex stereotyping of women was sufficiently prevalent to justify such legislation).

⁵³ Timothy P. Glynn et al., *Employment Law: Private Ordering and Its Limitations* 812 (3d ed. 2015).

related disabilities.”⁵⁴ By insisting on equal treatment for all workers with temporary disabilities, the bill would necessarily include “leave for women disabled during pregnancy or while recuperating from childbirth—without singling out pregnancy or child-birth.”⁵⁵

All three of these strategic policy decisions—unpaid leave in order to build support across party lines, gender neutrality to minimize a potentially negative impact on women, and expanded coverage to include pregnancy accommodations and a broader range of disability accommodations—were incorporated into the first official bill introduced by Representative Patricia Schroeder, a Democrat from Colorado, in the House on April 4, 1985.⁵⁶ This bill, entitled the Parental and Disability Leave Act of 1985 (“PDLA”), only guaranteed employees unpaid leave, thereby incorporating the advocates’ first strategic decision.⁵⁷ However, the PDLA attempted to generate momentum for paid leave by creating a commission to study and recommend possible methods for replacing the salary of employees taking parental or disability leave.⁵⁸

The PDLA was written in gender-neutral terms, and it provided both male and female employees with a maximum of eighteen weeks of parental leave every two years as a result of the birth or adoption of a child, or a child’s serious illness.⁵⁹ Finally, the PDLA contained separate leave provisions for employees unable to work due to nonoccupational medical disabilities, entitling these workers to take a maximum of twenty-six weeks each year.⁶⁰ Moreover, every employee, whether full or part-time, was eligible to take both categories of leave,⁶¹ provided that the maximum combined amount per year taken by an employee did not exceed thirty-nine consecutive weeks.⁶² Most importantly, the PDLA did not contain a small business exemption, defining the term employer with sweeping language to consist of “any person engaged in commerce or in any industry or activity affecting commerce.”⁶³

⁵⁴ Elving, *supra* note 11, at 23.

⁵⁵ *Coleman*, 566 U.S. at 50 (Ginsburg, J., dissenting).

⁵⁶ See Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. 1 (1985); *H.R. 2020 (99th): Parental and Disability Leave Act of 1985*, GovTrack, <https://www.govtrack.us/congress/bills/99/hr2020%2> [https://perma.cc/DS8C-UAFQ].

⁵⁷ See *id.* at §§ 1(a), 102(b).

⁵⁸ See *id.* at § 201(a).

⁵⁹ See *id.* at 1, § 103(a).

⁶⁰ See *id.* at § 102(a).

⁶¹ See *id.* at § 101(2).

⁶² See *id.* at § 105.

⁶³ See *id.* at § 101(3) (stating the entire definition of employer as “any person engaged in commerce or in any industry or activity affecting commerce who acts directly or indirectly in

Although Representative Schroeder introduced the PDLA in the House, no companion bill was ever proposed in the Senate.⁶⁴ In part, this was due to opposition in the Senate, and the resulting need for additional time to identify strong sponsors for a companion Senate bill.⁶⁵ In the 99th Congress, the House was controlled 254 to 181 by the Democratic Party,⁶⁶ whereas the Senate was controlled fifty-three to forty-seven by the Republican Party.⁶⁷ Additionally, President Reagan had been sworn in for a second term as President in January of 1985, returning to the Republican party control of the White House.⁶⁸

To raise awareness and build support in both Houses of Congress for a national family leave law, Representative Schroeder held a joint hearing on the PDLA on October 17, 1985, before four subcommittees in the House, including the subcommittee she chaired, the Subcommittee on Civil Service.⁶⁹ This joint hearing highlighted the objectives of the PDLA, including the importance of providing job security to every American arising from a temporary medical disability or due to the birth or adoption of a new child.⁷⁰ Numerous professional witnesses testified in support of the PDLA, including Wendy W. Williams, Professor at Georgetown Law Center, who not only was involved in advocating for the enactment of the Pregnancy Discrimination Act during the 1970s,⁷¹ but also participated in the early drafting and formulation stages of the PDLA.⁷² Professor

the interest of an employer to one or more employees, and any agent or successor in interest of [any] such . . . person”).

⁶⁴ See ELVING, *supra* note 11, at 53.

⁶⁵ See *id.* at 40.

⁶⁶ See *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [<https://perma.cc/P6UD-3A5U>].

⁶⁷ See *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/C3NX-Y5CW>].

⁶⁸ See *Chronology of the Reagan Administration*, NAT'L ARCHIVES, <https://www.reaganlibrary.gov/sreference/chronology-of-the-reagan-administration> [<https://perma.cc/6Q78-MP2B>]; see also ELVING, *supra* note 11, at 36.

⁶⁹ See *1985 House Hearings*, *supra* note 34, at 1 (statement of Rep. Patricia Schroeder).

⁷⁰ See, e.g., *id.* at 2 (statement of Rep. William L. Clay) (announcing that Congress is “overdue in examining the job security needs of employees taking leave from work to care for a newborn child or to recover from a temporary disability.”); *id.* at 8 (testimony of Professor Wendy W. Williams, Professor, Georgetown Law Center) (explaining that the PDLA would protect “those most vulnerable among wage earners whose employers have not seen fit to provide their employees with minimum job security.”).

⁷¹ See *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the H. Comm. on Educ. and Labor*, 95th Cong. 11–12 (1977) (statement of Professor Wendy W. Williams, Professor, Georgetown Law Center).

⁷² See ELVING, *supra* note 11, at 48–49.

Williams described the PDLA as “a milestone in our fight for workplace recognition of the basic needs of . . . wage earners and their families” and she declared that it “constitute[d] sound labor and family policy as well as contributing to the equality of the sexes.”⁷³ Another notable witness at the hearing included Mrs. Joan Specter, Councilwoman from the City of Philadelphia and spouse of Republican Senator Arlen Specter.⁷⁴ Councilwoman Specter testified about her involvement in amending the city charter of Philadelphia to permit both male and female employees of the city to take six months of unpaid parental leave.⁷⁵

Even in this initial hearing, Republicans raised concerns about the impact the PDLA would have on small businesses. For instance, Congressman Harris W. Fawell, a Republican from Illinois, questioned the cost such legislation would have on small businesses and asked about the practical application of the PDLA to these entities.⁷⁶ Several panelists responded to these concerns, including Alfred J. Kahn, a Professor from Columbia University School of Social Work, who explained that temporary personnel agencies would provide essential support to small businesses while covered employees were absent from work during the period of leave:

It is certainly true that if you have a mom-and-pop shop with two workers, you may have a special problem. However, I should also like to point out to the committee that we have a rapidly developing industry of temporary personnel that is taking on major roles in helping companies so that they may avoid hiring permanent staff when they need filling in. This is a service that can be developed and will be developed if every business has the same obligations on parental leaves The temporary help industry is part of the answer to the small business need for coverage.⁷⁷

Other panelists responded to cost concerns by emphasizing that the leave provided under the PDLA was unpaid, thereby reaffirming the

⁷³ 1985 House Hearings, *supra* note 34, at 7, 10 (statement of Professor Wendy W. Williams).

⁷⁴ *See id.* at 5 (statement of Councilwoman Joan Specter); Diane Stoneback, *Upper Crust Joan Specter's Gourmet Pies are a Slice of the Rich Life Food*, MORNING CALL (Nov. 12, 1986), <https://www.mcall.com/news/mc-xpm-1986-11-12-2551260-story.html> [<https://perma.cc/QY6E-KKY9>].

⁷⁵ *See 1985 House Hearings*, *supra* note 34, at 6 (statement of Councilwoman Joan Specter).

⁷⁶ *See id.* at 14 (Rep. Fawell).

⁷⁷*Id.* at 31 (testimony of Professor Alfred J. Kahn, Professor of Social Policy and Planning, Columbia University School of Social Work).

strategy adopted by early advocates of the bill who abandoned the loftier goal of paid leave.⁷⁸

The PDLA, unfortunately, stalled in committee shortly after the conclusion of these hearings.⁷⁹ Although a number of concerns contributed to the PDLA's lack of success, one of these concerns was resolved prior to the introduction of a new bill the following year.⁸⁰ Specifically, disability advocates had objected to the use of the term disability in the title of the PDLA, arguing that the label should be replaced with the word "medical" because it was "broader and less stigmatizing."⁸¹ This suggestion was incorporated in 1986 by changing the title of the subsequent legislation to the Parental and Medical Leave Act of 1986 (PMLA).⁸²

2. The Initial Concession for Small Businesses

When the PMLA was introduced in the House on March 4, 1986, it was sponsored by Representative William L. Clay, Sr., a Democrat from Missouri, on behalf of himself and twenty-nine original cosponsors, including Representative Schroeder.⁸³ While support for a family leave bill had grown in the House, so had concerns for business interests. Accordingly, the first draft of the PMLA contained a small business exception:⁸⁴ The House version of the PMLA defined employer to consist of "any person who employs five or more employees and is engaged in commerce."⁸⁵

Although the PDLA did not have a companion bill introduced in the Senate the previous year, Senator Christopher Dodd, a Democrat from Connecticut, filed a companion bill for the PMLA in the Senate,

⁷⁸ See *id.* at 14 (testimony of Councilwoman Specter), 61 (testimony of Stephen F. Webber).

⁷⁹ See ELVING, *supra* note 11, at 51, 52.

⁸⁰ See *id.* at 51–52.

⁸¹ Steven K. Wisensale, *Family Values and Presidential Elections: The Use and Abuse of the Family and Medical Leave Act in the 1992 and 1996 Campaigns*, 15 NEW ENG. J. PUB. POL'Y 35, 39(1999).

⁸² See Parental and Medical Leave Act of 1986, H.R. 4300, 99th Cong. 2 (1986); see also 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 (2008) (explaining the PDLA died in committee and was reintroduced the next year as the PMLA).

⁸³ See 132 CONG. REC. 3480 (1986); Clay, William Lacy, Sr., U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/People/Detail?id=11058> [<https://perma.cc/85U5-HQZF>] (recognizing Representative William L. Clay, Sr. as a Democrat from Missouri).

⁸⁴ See Parental and Medical Leave Act of 1986, H.R. 4300 99th Cong. § 102(3)(A) (1986) (not classifying businesses which employ four or fewer employees as "employers").

⁸⁵ *Id.*

on April 9, 1986.⁸⁶ The Senate companion bill was filed only one month after the introduction of the House bill, but it contained several pertinent differences.⁸⁷ First, the Senate bill only had four original sponsors, not nearly as many as the House bill.⁸⁸ Second, the definition of employer contained in the Senate bill increased the small business exception from five to fifteen.⁸⁹ Supporters hoped that this employer definition would be more acceptable to a Republican-controlled Senate; it also made the Senate's version of the PMLA identical to Title VII's definition of employer.⁹⁰

a. Raising Concerns about the Impact of Family Leave on Small Businesses

Two hearings on the PMLA were held in the House of Representatives in April of 1986. Representative Schroeder presided over a joint hearing on April 10, 1986, before two subcommittees of the Post Office and Civil Service Committee.⁹¹ Although this joint hearing focused primarily on the lack of uniform leave policies for federal workers, the hearing included testimony about the impact of the PMLA on small businesses.⁹² Specifically, Meryl Frank, the director of the Yale-Bush Center Infant Care Leave Project, testified about the results of several research studies commissioned by her organization.⁹³ These studies explored both parental care preferences arising from the birth or adoption of a new child, and recommendations for financing such policies.⁹⁴

⁸⁶ See ELVING, *supra* note 11, at 58 (detailing that Senator Dodd introduced a companion bill in the Senate in April of the same year as Clay and Schroeder's bill, which was introduced in March).

⁸⁷ See Parental and Medical Leave Act of 1986, S. 2278, 99th Cong. II, § 102(4)(A) (1986); *id.*

⁸⁸ Compare 132 CONG. REC. 3973 (1986) (introducing the Senate bill with the following four original sponsors: Senator Dodd; Senator Specter; Senator Hart; and Senator Moynihan) with H.R. 4300 99th Cong. (1986) (introducing the House bill with thirty original sponsors).

⁸⁹ See S. 2278, 99th Cong. § 102(4)(A) (defining employer to constitute "any person who employs 15 or more employees and is engaged in commerce").

⁹⁰ See ELVING, *supra* note 11, at 59 (detailing the expansion of the small business exception after prolonged pushback from Republicans, who controlled the Senate); compare S. 2278, 99th Cong. § 102(4)(A) (defining employer to constitute "any person who employs 15 or more employees and is engaged in commerce") with 42 U.S.C. § 2000e(b) (defining employer to consist of "a person affecting commerce who has fifteen or more employee").

⁹¹ See *Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv.*, 99th Cong. 1 (1986) [hereinafter *Vol. I of 1986 House Hearings*].

⁹² See *Vol. I of 1986 House Hearings*, *supra* note 91, at 18, 20, 24, 32.

⁹³ See *id.* at 18 (testimony of Meryl Frank, Director, Infant Care Leave Project, Yale-Bush Center in Child Development and Social Policy).

⁹⁴ See *id.* at 18, 19, 33 (testimony of Ms. Frank).

When asked whether employers who participated in these studies had expressed concern about the impact that parental leave would have on businesses, Ms. Frank answered that “[w]e have not found a lot of objection.”⁹⁵ Ms. Frank explained that larger employers “told us that a leave policy is really not a big deal,” others described it as “just another cost of doing business” and “it is not terribly disruptive.”⁹⁶ She acknowledged, however, that some small businesses expressed concern about “the problems of having to find someone to fill in for one of his designers.”⁹⁷ Ms. Frank offered several recommendations to accommodate absent workers, stating that “some employers will have other employees cover for the employee on leave while others will hire someone new.”

Less than two weeks later, Representative Clay presided over the second joint hearing in the House of Representatives to consider the PMLA, focusing on the need for family leave in the private sector.⁹⁸ Republican Representatives on the House Education and Labor Committee were more vocal at this hearing than in previous hearings, voicing numerous concerns about the impact this type of leave would have on small businesses.⁹⁹ Additionally, three Republican Representatives, Steve Bartlett from Texas, Harris Fawell from Illinois, and Margaret Roukema from New Jersey, took an active role in questioning witnesses at this hearing.¹⁰⁰

Very early in the hearing, Representative Roukema, one of the few women elected to the 99th Congress, disagreed with the costs the PMLA would impose on businesses, stating the bill was “too far reaching both for the ultimate good of the workforce as well as the ultimate good of the business community.”¹⁰¹ Conceding that the bill advances policies of “humanity and . . . compassion,” Representative Roukema complained that the PMLA particularly was not cost-effective for small businesses.¹⁰²

Anticipating that these cost concerns would arise at the hearing, Representative Clay called Mr. Thomas Donahue, the Secretary-Treasurer of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), to testify about union

⁹⁵ *Id.* at 32.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 1–2 (1986) [hereinafter *Vol. II, 1986 House Hearings*].

⁹⁹ See *id.* at 2–3, 10, 11, 17, 18, 20–21, 22–24, 48, 50, 76–77.

¹⁰⁰ See *id.* at II, 10, 11, 17, 18, 20–21, 22–24, 48, 50, 76–77.

¹⁰¹ *Id.* at 2 (statement of Rep. Roukema).

¹⁰² *Id.* at 2, 11.

experiences with such costs.¹⁰³ Mr. Donahue testified that “it is quite possible to accommodate [unpaid leave] without any great disruption” to businesses and explained that unions often rely on the use of temporary workers.¹⁰⁴ When pressed by Representative Roukema to identify other costs to employers under a leave policy, Mr. Donahue discussed the costs of health insurance benefits for the replaced worker, but described these costs as “really quite small” and one the “employer should be expected to bear.”¹⁰⁵

Republicans also questioned Mr. Donahue about the PMLA’s definition of employer, and whether he and the AFL-CIO supported its application to employers with five or more employees.¹⁰⁶ For instance, Representative Bartlett asked Mr. Donahue whether he agreed with the PMLA’s definition of employer:

Mr. Bartlett: One other question, and that is, can you give us a sense of how you would define small business under this? As I understand the legislation, it defines the small businesses that are exempt anyway of five employees, either part time or full time. Is that a fair definition in your mind, or should it be larger or smaller?

Mr. Donahue: Well, I have never accepted the view that anybody should be exempt from social policy in this Nation, and so we have always testified against excluding any group of employees from a particular benefit or coverage under a social policy.

We recognize the realities of legislative enactment and so we have supported the exclusion of five as in this bill.¹⁰⁷

Shortly thereafter, Representative Fawell challenged Mr. Donahue about his position that the PMLA should apply to all employers, without exception, as a matter of social policy.¹⁰⁸

¹⁰³ See *id.* at 11 (testimony of Mr. Thomas Donahue, Secretary-Treasurer of AFL-CIO).

¹⁰⁴ See *id.* at 13–14.

¹⁰⁵ *Id.* at 17–19.

¹⁰⁶ See *id.* at 20–21 (questioning by Rep. Bartlett); *id.* at 23–24 (questioning by Rep. Fawell).

¹⁰⁷ *Id.* at 21.

¹⁰⁸ See *id.* at 23–24 (questioning by Rep. Fawell).

Mr. Fawell: . . . I would like your reaction again, . . . to the small employer. Here we are talking about an employer being defined as one as small as five employees.

The 1978 Pregnancy Discrimination Amendments of Title VII, I believe, have 15 employees defined as a small employer. And it also covered part-time employees.

I know you have indicated that apparently you would generally favor . . . not to set any limits. . . .

Mr. Donahue: I must say to you that I regard that number 15 as a step backward for social legislation. In fact, most of our social legislation and most of the coverage of employers for almost any Government requirement has employers of four or more generally being included.

I regard five as a number that you have and I don't know that it is worth the argument, whether you have five or four. Fifteen would disturb me very greatly. Then you are talking about a much larger section of the workforce and you are talking about the people who most need the imposition on that employer of the social responsibility this legislation calls for.

What it demonstrated is that the large corporations have developed some measure of . . . leave. It is the small employer who hasn't done it. The reason you legislate is to make people do what is socially responsible.

It seems to me the higher you push that number of employees, the larger group you are going to exempt from this and that is disadvantageous to them and to the Nation.¹⁰⁹

Later in this hearing, the size of the FMLA's small business exception was raised again, but this time by witnesses who testified on behalf of the Chamber of Commerce.¹¹⁰ Faced with growing support in Congress for a national leave policy, the Chamber of

¹⁰⁹ *Id.* at 23.

¹¹⁰ *See id.* at 61–68 (testimony of Ms. Susan Hager, President, Hager, Sharp & Abramson, and national board member, National Small Business Association, and Ms. Virginia Lamp, attorney for the U.S. Chamber of Commerce).

Commerce had sent a letter “early in 1986 announcing the formation of a business coalition against the parental leave bill.”¹¹¹ Thereafter, the Chamber was represented at the April hearing by the following two witnesses who formally opposed the PMLA: Ms. Virginia Lamp, an attorney representing the U.S. Chamber; and Ms. Susan Hager, a board member of the National Association of Women Business Owners.¹¹² They concluded that “unpaid leave represents a serious and substantial threat to businesses’ ability to grow, compete, and create jobs—particularly small businesses.”¹¹³

Ms. Hager challenged the reasons the PMLA settled on five or more employees as the appropriate size of the small business exception.¹¹⁴ Specifically, Ms. Hager questioned “[i]f there is a reason to exempt 4 or 10, why not 25 or 100? I don’t understand what the cutoff is.”¹¹⁵

After the conclusion of these hearings, the House bill was amended on June 4, 1986, to add additional cosponsors to the PMLA, thus, raising the bill’s cosponsors from twenty-nine to a total of sixty-three cosponsors, including thirteen Republicans.¹¹⁶ Shortly thereafter, the Subcommittee on Labor-Management Relations began its deliberations on the PMLA, including its consideration of a formal amendment in the nature of a substitute to the bill’s original language.¹¹⁷ This amendment was offered by Representative Roukema, and she suggested a number of significant revisions to the PMLA, including a proposal to increase the small business exception from five to fifty employees.¹¹⁸

Although all Republican members of the Subcommittee voted in favor of Representative Roukema’s amendment, all Democrats voted against it, defeating the amendment by a vote of 6 to 9.¹¹⁹ On June 12, 1986, the Subcommittee on Labor-Management Relations ordered the PMLA to be favorably reported to the House Committee on Education and Labor as originally proposed, with a small business exception for employers with less than five employees.¹²⁰

¹¹¹ ELVING, *supra* note 11, at 61–62.

¹¹² See Vol. II, 1986 House Hearings, *supra* note 98, at 1, 61.

¹¹³ *Id.* at 66 (prepared statement of Ms. Hager).

¹¹⁴ See *id.* at 62, 64 (testimony of Ms. Hager).

¹¹⁵ *Id.* at 62.

¹¹⁶ See H.R. 4300, 99th Cong. (June 4, 1986) (sponsors added).

¹¹⁷ See H.R. REP. NO. 99-699, pt. 2, at 14 (1986); see also ELVING, *supra* note 11, at 65.

¹¹⁸ See ELVING, *supra* note 11, at 65, 67.

¹¹⁹ See H.R. REP. NO. 99-699, pt. 2, at 14; ELVING, *supra* note 11, at 65.

¹²⁰ See H.R. REP. NO. 99-699, pt. 2, at 14; ELVING, *supra* note 11, at 65, 67.

b. Transitioning from “Parental” Leave to “Family” Leave

Subsequently, in June of 1986, Representatives Clay and Roukema, and their respective colleagues, began a series of negotiations in the hopes of reaching a compromise on the appropriate scope of the PMLA.¹²¹ One of the most pivotal suggestions to arise out of these negotiations was a proposal to expand the scope of the bill to include employees who were caring for other immediate family members with serious health conditions including elderly parents.¹²² Importantly, this change in scope to the bill was endorsed by the American Association of Retired Persons.¹²³ Thus, in order to further broaden the support base for the bill, Representative Clay proposed an amendment that the title of the bill be modified to reflect this change.¹²⁴ Representative Clay’s amendment would substitute the new word “Family,” for the word “Parental” used in the original title of the bill, so the bill thereafter would be referred to as the Family and Medical Leave Act.¹²⁵

The negotiations between Representatives Clay and Roukema in June of 1986 also included additional discussions about the appropriate size of the small business exception.¹²⁶ Representative Roukema continued to insist that the bill should not apply to employers with less than fifty employees.¹²⁷ As a compromise position, Representative Clay offered to increase the small business exception in the bill from five to fifteen employees.¹²⁸ Representative Clay’s suggestion would have created consistency between the size of the small business exception in the family leave bill and this

¹²¹ See ELVING, *supra* note 11, at 65–66.

¹²² See *Parental Leave: Hearing Before the Comm. on Small Business of the House of Representatives*, 100th Cong. 22 [hereinafter *Vol. III, 1987 House Hearings*] (hearing was held on Aug. 4, 1987) (statement of Rep. Roukema) (explaining that she “was the person [to] present[] the amendment to include care of a dependent elderly parent” and explaining that she “did so . . . because of [her] . . . close concern and interest in our health care issues in this country”).

¹²³ See *The Family and Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 100th Cong. 67–68 [hereinafter *Vol. I, 1987 House Hearings*] (hearings were held on Feb. 25 and March 5, 1987) (testimony of John Denning, President, A.A.R.P) (declaring that “we view this bill as one of the most critical elements of any nationwide effort to recognize the importance of caregiving to families and to protect the jobs of older workers” and stating that the “A.A.R.P. strongly supports [it]”).

¹²⁴ See ELVING, *supra* note 11, at 66.

¹²⁵ Compare H.R. REP. NO. 99-699, pt. 1, at 1 (showing that “Parental and Medical Leave Act of 1986” is the title of the proposed bill), with H.R. REP. NO. 99-699, pt. 2 at 1 (showing that “Family and Medical Leave Act of 1986” is the title of the proposed bill).

¹²⁶ See ELVING, *supra* note 11, at 67.

¹²⁷ See *id.*

¹²⁸ See *id.*

provision in Title VII.¹²⁹ Significantly, the data also showed that “[t]he exemption of small employers with less than fifteen employees exclude[d] more than one-fifth of the private sector workforce.”¹³⁰ Despite these concessions, Representative Roukema rejected Representative Clay’s informal compromise on the grounds that its increase to the small business exception was insufficient.¹³¹

Thereafter, Representative Roukema remained steadfastly committed to the idea that any leave bill should only apply to employers with fifty or more employees. For instance, Representative Roukema proposed a second amendment in June of 1986, in the nature of a substitute to increase the size of the small business exception in Representative Clay’s bill from five to fifty.¹³² Representative Roukema’s amendment was rejected by the Committee on Education and Labor by a vote of 13 to 19.¹³³ Representative Clay also offered an amendment in the nature of a substitute, thus formally proposing to increase the small business exception from five to fifteen employees.¹³⁴ The Committee on Education and Labor accepted Representative Clay’s amendment by a vote of 22 to 10 on June 24, 1986.¹³⁵

Although the House Committee on Education and Labor reported Representative Clay’s amended bill favorably to the House on August 8, 1986, no further action was taken on the bill by the House during the 99th Congress.¹³⁶ Yet, considerable progress had been made during the 99th Congress in raising awareness of the need for a national leave bill and in garnering support for such a bill, especially among Democrats in the House.¹³⁷ Democrats were hopeful that

¹²⁹ See *id.*; 42 U.S.C. § 2000e(b) (2018).

¹³⁰ H.R. REP. NO. 99-699, pt. 2, at 26.

¹³¹ See ELVING, *supra* note 11, at 67–68; see generally H.R. REP. NO. 99-699, pt. 2, at 50 (1986) (dissenting views on the Family and Medical Leave Act of 1986) (declaring that “[o]ne of the foremost problems with H.R. 4300 is that the small employer exemption is grossly inadequate. The bill exempts only those employers who have less than fifteen employees. Throughout the hearings and during consideration of this legislation, one thing became clear: No one knows how lengthy mandated leave periods will affect the small employer [W]e believe that an appropriate response at this stage is to raise the employer exemption from fifteen to a substantially higher number and to study the effect of such legislation on small business.”).

¹³² See H.R. REP. NO. 99-699, pt. 2, at 14 (1986); see ELVING, *supra* note 11, at 67.

¹³³ See H.R. REP. NO. 99-699, pt. 2, at 14 (1986).

¹³⁴ See *id.*; see ELVING, *supra* note 11, at 67.

¹³⁵ See H.R. REP. NO. 99-699, pt. 2, at 14 (1986).

¹³⁶ See *id.* at 1; Vol. I, 1987 House Hearings, *supra* note 123 at 1 (statement of Rep. William Clay, Chairman, Subcomm. on Labor-Mgmt. Relations).

¹³⁷ See ELVING, *supra* note 11, at 69, 72. When Representative Clay originally introduced 99 H.R. 4300 on March 4, 1986, the bill had 29 cosponsors, but by August of 1986, the bill had accumulated 126 cosponsors. See *H.R. 4300 - Family and Medical Leave Act of 1986*, CONGRESS,

their legislative efforts would be more successful in the 100th Congress, given that Democrats gained enough Senate seats in the November 1986 elections to become the majority party in both houses.¹³⁸

2. A New Legislative Session Brings Deeper Small Business Concessions

At the beginning of the 100th Congress, the Democratic supporters of a family leave bill adopted the same positions on the small business exception that they adopted at the end of the previous Congress. First, the new Senate bill introduced by Senator Dodd applied to businesses with fifteen or more employees.¹³⁹ Likewise, the new House bill filed by Representative Clay retained the title of Family and Medical Leave Act, and it also applied to employers with fifteen or more employees, thereby continuing the same small business exception that House Democrats had adopted as a compromise position at the end of the previous Congress.¹⁴⁰

There was one startling difference in the posturing of the parties at the beginning of the 100th Congress, however: a Republican, for the first time, also introduced a family leave bill.¹⁴¹ Representative Roukema formally proposed her own leave bill on January 6, 1987, called the Family and Medical Leave Job Security Act of 1987.¹⁴² Representative Roukema now openly supported the idea of a national minimum standard for family leave, calling it “a bedrock family issue.”¹⁴³ Moreover, her decision to advocate in support of family leave put her in direct conflict with the position taken by the

<https://www.congress.gov/bill/99th-congress/house-bill/4300/cosponsors?searchResultViewType=expanded> [<https://perma.cc/59GV-ZHJ6>].

¹³⁸ See *Vol. I, 1987 House Hearings*, *supra* note 123, at 1 (statement of Rep. William Clay, Chairman, Subcomm. on Labor-Mgmt. Relations); *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/CVF3-RWZZ>].

¹³⁹ See Parental and Medical Leave Act of 1987, S. 249, 100th Cong. § 102(4)(A) (1987).

¹⁴⁰ See Family and Medical Leave Act of 1987, H.R. 925, 100th Cong. § 101(4)(a) (1987); *see also* Family and Medical Leave Act of 1986, H.R. 4300, 99th Cong. § 101(4)(A) (1986).

¹⁴¹ See *Vol. III, 1987 House Hearings*, *supra* note 122, at 10 (statement of Rep. Roukema) (describing herself as a “conservative Republican” and stating that “[i]t is beyond my comprehension why conservative Republicans and other conservatives should not recognize this as a bedrock family issue . . .”).

¹⁴² Family and Medical Leave Job Security Act of 1987, H.R. 284, 100th Cong. (1987) [hereinafter FMLJSA].

¹⁴³ See *Vol. I, 1987 House Hearings*, *supra* note 123, at 3 (statement of Rep. Roukema).

Chamber of Commerce, which continued to oppose, as a matter of principle, any family leave bill.¹⁴⁴

Representative Roukema openly acknowledged her disagreement with the Chamber of Commerce during the committee hearings held that year, stating that “[s]ome of my best friends are the members of the Chamber of Commerce” but explaining that “we just do not see eye to eye on the particular issue, so there is a family fight going on here between us.”¹⁴⁵ Despite her vocal support for the concept of a family leave bill, Representative Roukema continued to advocate that any enacted bill must balance the legitimate concerns of small businesses.¹⁴⁶ One of the ways she sought to achieve this balance is that Representative Roukema’s bill only applied to employers with fifty or more employees.¹⁴⁷

a. Roukema Explains Why the Exemption Should Be Fifty

More Congressional committee hearings were held in 1987 on the family leave bill than in any other year of its eight-year journey through Congress.¹⁴⁸ One of the central topics in these hearings was the appropriate size of the small business exception. In the House of Representatives, Representative Roukema repeatedly criticized Representative Clay’s small business exception as “too sweeping” and “unsustainable by small business.”¹⁴⁹ She justified this criticism by explaining that “a firm with as few as 15 employees could be paralyzed if five or more employees took simultaneous leaves.”¹⁵⁰

More importantly, Representative Roukema was repeatedly asked to explain why she insisted that the correct size for the small business

¹⁴⁴ See *id.* at 136 (testimony of Ms. Virginia Lamp, Labor Relations Attorney for U.S. Chamber of Commerce) (declaring that “we do not endorse the Roukema bill” and that “[w]e cannot endorse any bill that mandates new benefits.”).

¹⁴⁵ *Id.* at 138 (statement of Rep. Roukema).

¹⁴⁶ See *Vol. III, 1987 House Hearings*, *supra* note 122, at 10–11 (statement of Rep. Roukema) (explaining that one of her “foremost concern[s] . . . in addressing this subject has been to ensure that no legislation be enacted which would cripple small business” and stating that she “introduced an alternative which I believe properly balances the competing needs of employers and employees”).

¹⁴⁷ See FMLJSA § 101(4)(A).

¹⁴⁸ Three separate hearings were held by committees in the House of Representatives in the 100th Congress. See *Vol. I, 1987 House Hearings*, *supra* note 123; *Family and Medical Leave Act of 1987: Joint Hearing before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Emp. Benefits of the H. Comm. on Post Office and Civil Serv.*, 100th Cong. 1 [hereinafter *Vol. II, 1987 House Hearings*] (hearings were held on Apr. 2, 1987); *Vol. III, 1987 House Hearings*, *supra* note 123. In the Senate, the Subcommittee on Children, Family, Drugs, and Alcoholism of the Committee on Labor and Human Resources held seven legislative hearings in 1987. See H.R. REP. NO. 100-511, pt. 2, at 15 (1988).

¹⁴⁹ *Vol. I, 1987 House Hearings*, *supra* note 123, at 3 (statement of Rep. Roukema).

¹⁵⁰ *Id.*

exception was fifty employees or more.¹⁵¹ Surprisingly, Representative Roukema admitted that “50 is somewhat of an arbitrary number.”¹⁵² She also conceded that her small business exception would exclude a large percentage of the workforce, admitting that “[f]ifty employees or less would exempt approximately 44[%] of the work force” and admitting that this “has become a sticking issue.”¹⁵³ Nevertheless, Representative Roukema contended that it was preferable to Representative Clay’s small business exception because businesses with fifty employees “can absorb and still effectively continue its operations with a family and medical leave policy in place.”¹⁵⁴

What is abundantly clear, however, is that Representative Roukema lacked an objective basis for adopting this small business exemption.¹⁵⁵ Indeed, she contended that the lack of supporting data served as an additional justification for adopting a significantly larger small business exception than one previously adopted in similar employment statutes.¹⁵⁶ Representative Roukema explained her rationale for this deviation, as follows:

[W]ith regard to the issue of the size of businesses, I think this is the core issue. My bill would include any business that has at least 50 employees or more, 50 as opposed to the 15 in the other bill.

¹⁵¹ See, e.g., *id.* at 71; *Vol. III, 1987 House Hearings*, *supra* note 122, at 11–14, 19–20.

¹⁵² *Vol. III, 1987 House Hearings*, *supra* note 122, at 11, 19 (stating that the size of the small business exception “is admittedly arbitrary” and that “[t]here is no hard, fast data on this.”).

¹⁵³ *Id.* at 19. Representative Roukema explains that:

The area that is most difficult to judge is the size of the business that needs to be covered, whether it is 50 employees or 40 employees.

Some people look at these numbers and say, “Well, 50 employees covers only 56[%] of the work force. You have excluded 44[%] of the workers,” and they use that as an argument.

I am trying to take a practical approach in determining what small business can legitimately live with.

Would it be 45 or 40 employees? I am not quite sure. I know they can live with 50.

Id. at 13.

¹⁵⁴ *Id.* at 11.

¹⁵⁵ See *id.* at 11, 19.

¹⁵⁶ See *Parental Leave: Hearing Before the Comm. on Small Bus. of the House of Representatives*, 100th Cong. 11 (1987) [hereinafter *Vol. I, 1987 House Hearings*] (arguing that because “my bill . . . recognizes that 50 is somewhat of an arbitrary number, does call upon the Department of Labor to direct a study as to the feasibility of applying the act to smaller employers and report back to Congress within 2 years. Then, at least, we will have some solid information. But for now, I believe we should proceed cautiously.”).

I believe this provision recognizes the special problem small employers have in getting the work done when employees are on more than a short leave.

Although any number is admittedly somewhat arbitrary, I must tell you that there is no firm data that anybody seems to have on this subject.

... But in my own random survey of business in my district, 50 employees or more seem to be a workable and feasible number with which my small business community seem to be able to work.

....

But for now, I believe we should proceed cautiously. Fifty does exclude a good number of the work force, but I believe it is the only feasible way that business can proceed at this point in time.¹⁵⁷

When Representative Roukema was asked to explain whether she would be willing to compromise on the size of the small business exception, she acknowledged there were “ongoing discussions” with Democratic members of the Committee.¹⁵⁸ She cautioned, however, that any compromise reached would not result in a significant reduction:

Would I be willing to discuss with Mr. Clay, the chairman of the subcommittee, and the majority on the committee, modifications? Surely. Those discussions are ongoing, but I have got to tell you right now, at this point in time, I don’t see exactly where the compromise position would be. But the number of employees in any particular division, to me, is critical to whether or not this kind of legislation can work, and whether or not it will cripple or paralyze small business.

....

The number of weeks is more negotiable in my opinion. I believe, since they are unpaid, and since there is a

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 12.

requirement for a doctor's certification, I think the people will not abuse the number of weeks, and, therefore, I think we could be more expansive on that leave time period.¹⁵⁹

b. Roukema's Partial Victory: Democrats Compromise by Agreeing to Fifty for the First Three Years

Multiple compromise discussions over the appropriate size of the small business exception continued in the fall of 1987 between Representatives Clay and Roukema, and their respective supporters.¹⁶⁰ Representatives Clay and Schroeder publicly contended that their bill sufficiently protected the interests of small businesses by increasing the size of the small business exception from zero to fifteen,¹⁶¹ but they ultimately agreed to another compromise position in the fall of 1987.¹⁶² As set forth below, this compromise largely reflected the views of Representative Roukema.

Specifically, Representative Roukema proposed an amendment in the nature of a substitute to Representative Clay's bill in November of 1987, before the House Committee on Education and Labor.¹⁶³ This amendment expanded the bill's small business exception, proposing that the bill apply to employers with fifty or more employees for the first three years.¹⁶⁴ However, the bill also included a phase-in period, and after passage of the initial three-year period, the bill would apply to employers with thirty-five or more employees.¹⁶⁵ Finally, the amended bill required that a commission be established to study the effect of this legislation on small businesses, and report the results of this study to Congress prior to the lowering of the small business exception.¹⁶⁶ The timing of this report was intended to give Congress the opportunity to amend the small business exception again, if the conspicuously absent data

¹⁵⁹ *Id.* at 20.

¹⁶⁰ See H.R. REP. NO. 100-511, pt. 2, at 29 (1988).

¹⁶¹ See *Vol. I, 1987 House Hearings*, *supra* note 123 at 4 (statement of Rep. Schroeder) (arguing that "when we talk about small employers, the Chairman [Clay] has already taken care of that by putting in 15 or below as the cutoff. And I think that is very important to keep pointing out"); *id.* at 71 (statement of Rep. Clay, Chairman, H. Subcomm. on Labor-Mgmt. Relations) (arguing that his bill would not impose a hardship on all small employers explaining that there are some small businesses with less than 15 employees "that gross tremendous amounts of money").

¹⁶² See H.R. REP. NO. 100-511, pt. 2, at 14, 29.

¹⁶³ See *id.* at 14–15.

¹⁶⁴ See Family and Medical Leave Act of 1988, H.R. 925, 100th Cong. § 101(5)(A) (1988) (as introduced in the House on Mar. 9, 1988).

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* §§ 301–306.

revealed such an amendment was necessary to prevent financial harm to businesses employing less than fifty employees.¹⁶⁷ The House Committee on Education and Labor approved Representative Roukema's amendment, and also voted to approve the bill, as amended, by a vote of 21 to 11 on November 17, 1987.¹⁶⁸

c. Another Justification for Fifty: The Cost of Family Medical Leave

Whereas the House hearings in 1987 included much discussion on the appropriate size of the small business exception, a major focus in the Senate hearings was the cost of a family leave bill.¹⁶⁹ This can be partially attributed to the timing of the cost estimate released by the Chamber of Commerce in February of 1987, indicating that in its view, the projected annual cost of Senator Dodd's bill was approximately sixteen billion dollars.¹⁷⁰ The Chamber's first cost estimate attributed part of these extensive costs to Senator Dodd's small business exception which excluded only employers with less than fifteen employees.¹⁷¹ However, witnesses called the Chamber's estimate "grossly inflate[d]" in the Senate hearings held on February 19, 1987,¹⁷² and Senator Dodd criticized a number of the assumptions underlying the Chamber's initial cost estimate.¹⁷³ In response to multiple criticisms of the Chamber's estimate, and in anticipation of

¹⁶⁷ See H.R. REP. NO. 100-511, pt. 2, at 46.

¹⁶⁸ *Id.* at 14-15.

¹⁶⁹ In the Senate, the Subcommittee on Children, Family, Drugs, and Alcoholism held seven legislative hearings in 1987. Three of these hearings were held in Washington, D.C., and four additional regional hearings were held in the following cities: Boston, Massachusetts; Los Angeles, California; Chicago, Illinois; and Atlanta, Georgia. See *Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor and Human Resources*, 100th Cong. 5, 277 (1987) [hereinafter *Vol. I, 1987 Senate Hearings*] (hearings were held on Feb. 19, Apr. 23, and June 15, 1987); *Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor and Human Resources*, 100th Cong. 1 (1987) [hereinafter *Vol. II, 1987 Senate Hearings*] (hearings were held on July 20, Sept. 14, Oct. 13, and Oct. 29, 1987).

¹⁷⁰ See *Vol. I, 1987 Senate Hearings*, *supra* note 169, at 5, 155, 278.

¹⁷¹ See *id.* at 124 ("Supporting Documentation for National Cost Estimate Presented by the U.S. Chamber Testimony").

¹⁷² *Id.* at 64, 74 (testimony from Karen Nussbaum, on behalf of the Service Employees International Union, and 9 to 5, the National Association of Working Women); *id.* at 278 (statement of Sen. Dodd) (observing the Chamber's "wild[ly] fluctuat[ing]" cost estimates); *id.* at 313 (testimony of Mr. William J. Gainer, on behalf of the U.S. General Accounting Office) (describing the Chamber's estimate as "high"); *id.* at 430 (statement of Sen. Kennedy) (concluding that the Chamber's estimates were "inaccurate").

¹⁷³ See *id.* at 155 (discussing the Chamber's estimate assumes that employers will always hire the most costly replacement workers); *id.* at 306-27 (concluding the Chamber's "estimate is high because it used a variety of assumptions").

an independent estimate from the U.S. Government Accountability Office (GAO), the Chamber revised its cost estimate by letter, dated March 10, 1987, reducing its projected estimate to 2.6 billion dollars per year.¹⁷⁴

Additionally, Senator Dodd and Republican Senator Arlen Specter sent a joint letter to the U.S. General Accounting Office in February of 1987, requesting both that this agency evaluate the Chamber's cost estimate, and also that the GAO issue an independent cost estimate.¹⁷⁵ At a subsequent Senate hearing held on April 23, 1987, a representative from GAO confirmed that this office had completed its review of both estimates offered by the Chamber, and it concluded that both were high.¹⁷⁶ Specifically, GAO identified a number of ways in which the Chamber had inappropriately inflated the costs of the bill, stating:

In brief, we believe the Chamber's cost estimate is high because it used a variety of unrealistic assumptions about

-- the number of people who would use unpaid leave and the length of their unpaid absences,

-- the number of leave users who would be temporarily replaced, and

-- the cost of hiring these replacements.

In addition, the Chamber made no offsetting adjustments for some likely benefits and related savings, such as improved employee morale, reduced turnover, and a more experienced, loyal, and committed work force.¹⁷⁷

By October 29, 1997, GAO had completed its own, independent cost estimate, and it concluded the annual cost of the bill to be less than 500 million dollars per year.¹⁷⁸

Despite the significantly lower cost estimate offered by GAO, Republican Senators present at the hearings continued to object that

¹⁷⁴ See *id.* at 278, 428 (statements of Sen. Dodd).

¹⁷⁵ See *id.* at 6, 278, 306 (statements of Sen. Dodd).

¹⁷⁶ See *id.* at 428 (statement of Sen. Dodd) (explaining that "the GAO will report to the Congress more fully later this fall. But on April 23rd, the GAO testified before this Subcommittee that any costs associated with any unpaid leave would be significantly less, I might add, than the \$2.6 billion figure now used by the Chamber").

¹⁷⁷ *Id.* at 314 (statement of William J. Gainer, Associate Director Human Resources Division of the U.S. General Accounting Office).

¹⁷⁸ See *Vol. II, 1987 Senate Hearings, supra* note 169, at 465 (statement of William J. Gainer, Associate Director Human Resources Division of the U.S. General Accounting Office) (estimating that "we believe the total cost will be less than \$500 million").

the bill imposed egregious costs on small businesses.¹⁷⁹ They also asked the representative from GAO, Mr. Gainer, whether expanding the small business exception from fifteen to a larger number would impact the costs; Gainer confirmed that such an expansion would result in decreased costs.

Mr. Gainer: . . . [F]or example, if you were to change your firm's size to greater than 20 for this legislation to apply to, you would lower the percentage of the workforce covered from 71 percent to 67 percent. And the cost reduction would be roughly proportional to that. You'd be knocking off perhaps five percent, or six percent, of the cost by that kind of a reduction.¹⁸⁰

In light of the criticisms of the bill, Senator Dodd recognized that a compromise would be necessary in order to accomplish a successful passage of family leave legislation in the Senate.¹⁸¹ Rather than offer an amendment to the bill he proposed at the beginning of the 100th Congress, Senator Dodd instead proposed a new bill on June 8, 1988, calling it a compromise bill.¹⁸² Senator Dodd's new bill contained a number of concessions, including an expansion of the small business exception, which now only excluded businesses with less than twenty employees.¹⁸³

In the House, GAO confirmed the relationship between the size of the small business exception and the cost of the proposed legislation by offering a separate cost estimate for Representative Clay's amended bill in the House. Specifically, GAO released a cost estimate to Representative Clay by letter dated November 10, 1987,¹⁸⁴ however, this estimate was more limited in scope than the estimate GAO provided to the Senate.¹⁸⁵ Specifically, GAO's estimate

¹⁷⁹ See *Vol. I, 1987 Senate Hearings*, *supra* note 169, at 9 (statement of Sen. Thurmond requesting the insertion of a wide variety of letters from businesses into the hearing record and many of these letters expressed concern about the costs of the legislation); *id.* at 28–30 (statement of Sen. Hatch).

¹⁸⁰ *Id.* at 481 (testimony of William J. Gainer, Associate Director Human Resources Division of the U.S. General Accounting Office).

¹⁸¹ See *ELVING*, *supra* note 11, at 106–07.

¹⁸² See Parental and Medical Leave Act of 1987, S. 2488, 100th Cong. (1988); see also PARENTAL AND MED. LEAVE ACT OF 1988, S. REP. NO. 100-447, at 33 (1988).

¹⁸³ See S. REP. 2488, § 102(4)(A).

¹⁸⁴ See *Vol. III, 1987 House Hearings*, *supra* note 122, at 108 (letter from Richard L. Fogel, Assistant Comptroller General, on behalf of the U.S. General Accounting Office).

¹⁸⁵ See *id.* at 108; see also H.R. REP. NO. 100-511, pt. 2, at 62 (minority views) (explaining that “[o]ne of the major debates over H.R. 925 is the cost which this mandate would impose on American employers and the economy,” acknowledging the estimate provided by GAO, but

for Representative Clay only calculated the cost to the employer for continuing health coverage for the absent employee.¹⁸⁶ This estimate stated:

This report responds to your request for a cost estimate of H.R. 925, “The Family and Medical Leave Act of 1987,” as amended. . . . In the first 3 years after enactment, firms employing 50 or more people are subject to the legislation, and thereafter firms employing 35 or more people must provide these benefits.

We estimate the cost of this legislation to employers having 50 or more workers will be about \$188 million annually. This represents the cost to employers for the continuation of health insurance coverage for employers on unpaid leave.

. . . .

With firms employing between 35 and 49 people included, we estimate the annual cost to be about \$212 million.¹⁸⁷

Despite the limited scope of the House estimate, it confirmed, nonetheless, that one relatively easy way to reduce the overall costs of the legislation was to enlarge the small business exception.

Cost concerns contributed to the legislation’s failure to pass, yet again, in either the House or Senate in the 100th Congress. Although Representative Clay’s amended bill was approved by the full House Committee on Education and Labor, and introduced on the floor of the House, it was never placed on the House debate calendar.¹⁸⁸ Likewise, Senator Dodd’s compromise bill was approved by the Senate Committee on Labor and Human Resources,¹⁸⁹ and received limited debate on the floor of the Senate, but no vote was taken before the Senate adjourned prior to the elections in November of 1988.¹⁹⁰

cautioning that GAO’s estimate “only represents the cost to the employer for continuing health coverage”).

¹⁸⁶ See Vol. III, 1987 House Hearings, *supra* note 122, at 108.

¹⁸⁷ Vol. III, 1987 House Hearings, *supra* note 122, at 108.

¹⁸⁸ See ELVING, *supra* note 11, at 103, 109, 125.

¹⁸⁹ See S. REP. NO. 100-447, at 33 (1988) (stating that the Senate Committee on Labor and Human Resources approved S. 2488 by a vote of eleven to five on July 14, 1988).

¹⁹⁰ See ELVING, *supra* note 11, at 122–23.

Despite neither bill passing in the 100th Congress, important concessions were made during this Congress which would ultimately limit all future negotiations on the small business exception. As previously discussed, Representative Roukema began the 100th Congress's legislative session by proposing and advocating that the appropriate size for the small business exception in family leave legislation was fifty or more employees.¹⁹¹ Although Representative Roukema conceded that the size of her small business exception was arbitrary,¹⁹² Republicans subsequently worked to justify her position through discussions of minimal cost savings.¹⁹³ Moreover, these cost discussions permeated the Committee hearings throughout the remainder of the bill's legislative journey through Congress.

3. Roukema Prevails: Congress Adopts Fifty as the Small Business Exception

The beginning of the 101st Congress brought a new President, George H.W. Bush.¹⁹⁴ With a new Republican President in the White House, Democrats did not attempt to renegotiate the size of the small business exception at the beginning of the 101st Congress.¹⁹⁵ Instead, they proposed new bills containing their respective compromise positions from the 100th Congress and filed them simultaneously in the House and Senate on February 2, 1989.¹⁹⁶ In the Senate, Senator Dodd's family leave bill applied to businesses with twenty or more employees.¹⁹⁷ In the House, although Representative Roukema now officially joined as a cosponsor, Representative Clay's bill retained the same phase-in approach to the small business exception they had negotiated in the previous Congress.¹⁹⁸ Thus, the House bill applied to businesses with fifty or

¹⁹¹ See *supra* notes 142, 147–48 and accompanying text.

¹⁹² See *supra* note 153–54, 157–58 and accompanying text.

¹⁹³ See *supra* notes 170, 180–81 and accompanying text.

¹⁹⁴ See *100th to 109th Congresses (1987–2007)*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Session-Dates/100-109/> [<https://perma.cc/Q2XM-U8QQ>]; *George H.W. Bush: A Resource Guide*, LIBR. CONGRESS (May 2, 2018), <https://www.loc.gov/rr/program/bib/presidents/bush/loc.html> [<https://perma.cc/3UYJ-YGAD>].

¹⁹⁵ See ELVING, *supra* note 11, at 129–131.

¹⁹⁶ See Family and Medical Leave Act of 1990, H.R. 770, 101st Cong. § 101 (1989) (as introduced in H., Feb. 2, 1989); Family and Medical Leave Act of 1989, S. 345, 101st Cong. § 102 (as introduced in S., Feb. 2, 1989).

¹⁹⁷ See S. 345 § 102(4)(A).

¹⁹⁸ See H.R. 770 § 101(5)(A); *H.R. 770 – Family and Medical Leave Act of 1990*, CONGRESS.GOV, <https://www.congress.gov/bill/101st-congress/house-bill/770/cosponsors?searchResultViewType=expanded> [<https://perma.cc/8G8T-UYRC>].

more employees for the first three years, and thereafter applied to businesses with thirty-five or more employees.¹⁹⁹ By promoting the previous compromise position on the small business exception, supporters of the family leave bill strategized that this would ensure both the bill's quick passage through Congress and its approval from President Bush.²⁰⁰ As explained below, neither strategy proved successful.

Both bills made their way through their respective Congressional Committees by early July of 1989 without further amendment to their small business exceptions during committee consideration.²⁰¹ However, all indications from the White House were that President Bush was opposed to a national mandate on family leave.²⁰² Specifically, Congressional leaders frequently reported that President Bush threatened to veto the bill in part due to concerns about the bill's impact on businesses.²⁰³ Thus, before placing the bills on the calendars for floor discussion, the supporters of these bills strove to rally as much bipartisan support for their family leave bills as possible.²⁰⁴ Representative Roukema focused on only obtaining support from other Republicans,²⁰⁵ whereas others targeted Southern Democrats due to speculation they were likely to side with business interests over family leave.²⁰⁶

In the House, the family leave bill was scheduled for floor consideration beginning on May 9, 1990.²⁰⁷ A joint amendment was anticipated from Representative Curt Weldon, a Republican from Pennsylvania, and Representative Bart Gordon, a Democrat from

¹⁹⁹ See H.R. 770 § 101(5)(A).

²⁰⁰ See ELVING, *supra* note 11, at 131.

²⁰¹ See H.R. REP. NO. 101-28, pt. 1, at 44 (1989); see S. REP. NO. 101-77, at 4 (1989).

²⁰² See H.R. REP. NO. 101-28, pt. 1, at 66 (declaring that the Bush "Administration opposes the bill. Secretary of Labor Elizabeth Dole has stated that she will advise the President to veto the bill and any mandated leave legislation"); H.R. REP. NO. 101-28, pt. 2, at 27, 31 (1989) (explaining that "the Department of Justice opposes the enactment of H.R. 770" and declaring that "H.R. 770 is simply irreconcilable with this Administration's philosophical views and goals").

²⁰³ See 136 CONG. REC. 9885 (1990) (statement of Rep. Penny) (explaining that if the House passes H.R. 770, "the President's veto threat will be carried out thereby stopping this legislation"); *id.* (statement of Rep. Miller) (warning that "President Bush says he is going to veto this bill. He says he supports parental leave, but thinks it should be a private decision by private businesses").

²⁰⁴ See ELVING, *supra* note 11, at 161–64.

²⁰⁵ See *id.* at 164.

²⁰⁶ See *id.* at 163; 136 CONG. REC. 9979–80 (statement of Rep. Gordon) (explaining that the Gordon-Weldon substitute "is the product of legitimate concerns expressed about the committee bill. Those concerns brought Republicans like Curt Weldon and Marge Roukema together with Democrats like me in an effort to give American businesses a fair bill.").

²⁰⁷ See 136 CONG. REC. 9825 (1990) (beginning of floor consideration in the House).

Tennessee.²⁰⁸ The joint amendment, referred to as the Gordon-Weldon substitute, proposed further restrictions to H.R. 770, including the size of the small business exception.²⁰⁹ The supporters of this amendment explained that additional compromises were necessary to secure not just additional votes to pass the bill, but also to override the anticipated Presidential veto.²¹⁰

Specifically, the Gordon-Weldon substitute defined the term employer as businesses with fifty or more employees.²¹¹ It also removed the phase-in approach to the small business exception contained in H.R. 770, thereby ensuring that the bill would apply indefinitely to fifty or more employees, rather than reduce its application to businesses with thirty-five employees after an initial three-year period.²¹² Additionally, the Gordon-Weldon substitute also adopted a uniform length of twelve weeks of unpaid leave, rather than the approach in H.R. 770 which varied the lengths of leave depending on the justifications for the leave.²¹³ This substitute bill was labeled yet another compromise, but one that was deemed necessary to address “the concerns raised by business[es] and employers concerning this legislation.”²¹⁴

Several of the supporters of the original family leave bill expressed frustration over an additional compromise for H.R. 770.²¹⁵ Poignantly, Representative Schroeder spoke during the debate on the

²⁰⁸ See 136 CONG. REC. 9980 (addressing the “authors” of the Weldon-Gordon substitute, “either the gentleman from Tennessee [Mr. Gordon] or the gentleman from Pennsylvania [Mr. Weldon]”).

²⁰⁹ See 136 CONG. REC. 9973–79 (statement of Rep. Gordon) (offering “an amendment in the nature of a substitute”).

²¹⁰ See 136 CONG. REC. 9872 (statement of Rep. Schroeder) (“But let us be perfectly honest about this, this is a compromise because we know nothing else will pass.”).

²¹¹ See 136 CONG. REC. 9957 (statement of Rep. Stokes) (“The Gordon-Weldon substitute will also permanently exempt all firms with less than 50 employees, thereby exempting 95 percent of all businesses from the act.”); 136 CONG. REC. 9980 (statement of Rep. Gordon) (“[W]e understand that America’s small businesses really are special. They need special flexibility. And they need the 50-employee permanent exemption provided in our amendment.”).

²¹² See 136 CONG. REC. 9953 (statement of Rep. McGrath) (“[B]y expanding the applicability from 35 employees in H.R. 770 to 50 employees in the substitute, I believe the substitute answers much of criticism levied by small businesses.”).

²¹³ See 136 CONG. REC. 9952 (statement of Rep. Owens) (“The amount of leave that would be available to employees has been cut back dramatically. When we started this process we were talking about providing 18 weeks of family leave and 26 weeks of disability leave. What we are down to now is a total of just 12 weeks of leave for any reason.”); 136 CONG. REC. 9957 (statement of Rep. Stokes) (“The Gordon-Weldon substitute provides for one category of unpaid leave, which covers either family or medical leave, limited to 12 weeks per year.”).

²¹⁴ 136 CONG. REC. 9888 (statement of Rep. Snowe); see 136 CONG. REC. 9947 (statement of Rep. Roukema) (“I have labored long to develop a compromise bill—far different from the original parental leave bill. The legislation balances the problems and hard realities facing working families with the legitimate concerns of the business community.”).

²¹⁵ See 136 CONG. REC. 9871 (statement of Rep. Schroeder).

House floor describing herself “[a]s the author of the original bill that came out 5 years ago” but explaining that “I have trouble supporting this compromise because [the bill] has been watered down so much.”²¹⁶ Likewise, Representative Bill Owens, a Democrat from New York, declared that “[i]t would be hard to weaken and water down this bill any more than it has been in the 5 years it has taken it to get to the floor.”²¹⁷ Representative Owens specifically criticized the small business exception, explaining that “[m]ost businesses are not even covered by this bill anymore. Small businesses with fewer than 50 employees are now completely exempted. This bill will have no effect at all on 95 percent of the businesses and 44 percent of the employees in the country.”²¹⁸ Accordingly, Representative Owens stated that he rose “in support of H.R. 770 . . . and against the killer amendments.”²¹⁹

Despite the additional compromises incorporated into the Gordon-Weldon substitute, many Republican legislators continued to criticize the bill on a number of grounds. For instance, some legislators argued the bill was too costly for American businesses and attacked the reliability of the GAO estimate, labeling it a “fairy-tale estimate.”²²⁰ Yet other Republican Congressmen lobbied for an even larger small business exception, cautioning that Congress should “not lull ourselves into a false sense of security over the bill’s 50-employee . . . threshold” and warning that this bill could put much larger businesses “over the brink” into financial ruin.²²¹

Regardless of the criticisms expressed with the Gordon-Weldon substitute, the House adopted the substitute on May 10, 1990, by a vote of 259 to 157, with seventeen Representatives not voting.²²² That same day, the House passed its first Family and Medical Leave bill, H.R. 770, by a vote of 237 to 187, with nine Representatives not voting.²²³

The House’s referral of H.R. 770 to the Senate for consideration meant that Senator Dodd, and the other cosponsors of his family leave bill, had a pivotal choice to make. On one hand, Dodd could

²¹⁶ *Id.*; see 136 CONG. REC. 9953 (statement of Rep. Schroeder) (calling the Gordon-Weldon substitute a “truly . . . big compromise from where we started. As a matter of fact, this is the third compromise in a row.”).

²¹⁷ 136 CONG. REC. 9952 (statement of Rep. Bill Owens).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See 136 CONG. REC. 9888 (statement of Rep. Ballenger).

²²¹ 136 CONG. REC. 9964 (statement of Rep. Stenholm).

²²² 136 CONG. REC. 9986 (daily ed. May 10, 1990) (recorded vote on H. Amdt. 442 to H.R. 770, the Gordon-Weldon substitute).

²²³ See 136 CONG. REC. 9990 (recorded vote on the H.R. 770, as amended).

endorse the bill passed by the House.²²⁴ Alternatively, Dodd could press forward with the bill he sponsored in the Senate, S. 345, and advocate that it also be placed on the calendar for floor consideration by the Senate.²²⁵ There were legitimate advantages to choosing this second option. After all, Dodd's bill was a stronger family leave bill than H.R. 770 in several of its material provisions, including the size of its small business exception.²²⁶ Dodd's bill applied to private businesses with twenty or more employees, whereas H.R. 770, as amended by the Gordon-Weldon substitute, only applied to employers with fifty or more employees.²²⁷

Additionally, the House was aware of the differences in each bill's small business exception and discussed it during the House debate on H.R. 770.²²⁸ Specifically, Representative Fred Grandy, a Republican from Iowa who opposed the family leave bill, predicted the Senate would propose yet another compromise to the small business exception.²²⁹ Representative Grandy relied on this key difference in the bill, urging his colleagues to oppose the bill and arguing that small businesses were not sufficiently protected by the Gordon-Weldon substitute.²³⁰ He argued: "look at the bill in the Senate. In the other body they have 20 employees as a threshold. This bill has 50. Now what is the usual compromise between 50 and 20? Probably 35."²³¹

Ultimately, Senator Dodd chose the first option: he endorsed H.R. 770 and discontinued his efforts to advance his own bill, S. 345.²³² Senator Dodd explained his decision to endorse H.R. 770 during the Senate debate on H.R. 770:

[W]e find ourselves in a situation—I might say, a happy one—where I had come fully prepared. I had suited up, the armor was on; I had mounted my charger, my lance and broadsword in hand. I entered the field to slay the dragon, and there are no dragons.

²²⁴ See ELVING, *supra* note 11, at 184–85.

²²⁵ See *id.*

²²⁶ See *supra* notes 212–14 and accompanying text.

²²⁷ See *id.*

²²⁸ See 136 Cong. Rec. 9949.

²²⁹ See *id.* (statement of Rep. Grandy).

²³⁰ See *id.*

²³¹ *Id.* (contending that "tell[ing] people that this bill does not cost anything is an outrageous lie. It is bogus. It is untrue and it is deceitful.").

²³² See 136 Cong. Rec. 14177 (statement of Sen. Dodd).

We have a consensus on a bill that I thought was going to be debated for a number of days, and I was fully prepared to answer every accusation and to respond to every charge . . . about this legislation

But thanks to the leaders, both the majority leader and the minority leader, and others, a decision was made not to contest this matter and to agree to pass the bill. So I am grateful for that.²³³

On the same evening that Senator Dodd made these statements on the floor of the Senate, the Senate passed H.R. 770 without amendment.²³⁴

By passing the House bill without amendment, a conference committee was unnecessary, and H.R. 770 was delivered to President Bush for his consideration. As predicted by several Republican legislators, President Bush vetoed H.R. 770 on June 29, 1990, citing his objection “to the Federal Government mandating leave policies for America’s employers.”²³⁵ On July 25, 1990, the House failed to override the Presidential veto,²³⁶ voting 232 to 195 to pass the bill over the President’s objections.²³⁷ Thus, despite multiple compromises in both houses of Congress, including a capitulation on the size of the small business exception, the promise of a family leave bill would not be achieved in the 101st Congress.²³⁸

Moreover, the promise of a family leave bill would not be realized for three more years. It would withstand more Congressional hearings, and more Congressional debate.²³⁹ It would endure

²³³ *Id.*

²³⁴ See 136 CONG. REC. 14206.

²³⁵ *Message from the President Transmitting His Veto of H.R. 770, The “Family & Medical Leave Act of 1990,”* H. R. DOC. NO. 101-209, at 1 (1990).

²³⁶ ELIZABETH RYBICKI, CONG. RESEARCH SERV., RS22654, VETO OVERRIDE PROCEDURE IN THE HOUSE AND THE SENATE 2 (2019).

²³⁷ See 136 CONG. REC. 5501 (1990) (vote to override the Presidential Veto on H.R. 770) (with 194 Democrats and 38 Republicans voting to override the Presidential Veto, but 57 Democrats and 138 Republicans voting against the override).

²³⁸ See *The Family & Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor Mgmt. Relations of the H. Comm. on Educ. & Labor*, 103d Cong. 2–3 (1991) (statement of Chairman Williams) (explaining “[t]hrough the years, as the bill has made its way through the legislative process, significant compromise has been made to accommodate a wide range of concerns raised primarily by our friends in the business community. . . . The small employer exemption has gone from five employees in the original bill to 50, resulting in the exclusion of 95 percent of all employers in America Some suggest we have compromised too far, but I believe we now have a bill that reflects a broad consensus”).

²³⁹ See, e.g., *The Family & Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the S. Comm. on Labor & Human Res.*, 102d Cong. 1

another veto by President Bush in 1992.²⁴⁰ Despite the years remaining in its legislative journey, never did any elected official renegotiate the size of the small business exception.

Indeed, every family leave bill filed in the House and Senate from 1991 to 1993 applied to businesses with fifty or more employees.²⁴¹ This is true even for the bill President Clinton signed into law on February 5, 1993.²⁴² Thus, even with Democrats controlling both the House and Senate in January of 1993, as well as the Presidency,²⁴³ the priority was enacting a family bill, rather than strengthening its provisions.²⁴⁴

It is true that President Clinton pledged during his Presidential campaign to sign family leave legislation.²⁴⁵ President Clinton also envisioned it being the first piece of legislation he signed into law as President.²⁴⁶ Congressional supporters of family leave legislation filed their respective bills in both houses of Congress on January 3,

(1991); *The Family & Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. & Labor*, 102d Cong. 1 (1991).

²⁴⁰ See *Message from the President Returning Without My Approval S. 5, The Family & Medical Leave Act of 1992*, S. DOC. NO. 102-26, at 1 (1992).

²⁴¹ See Family and Medical Leave Act of 1991, H.R. 2, 102d Cong. § 101(5)(A) (1991); Family and Medical Leave Act of 1991, S. 5, 102d Cong. § 101(5)(A) (1991); Family Financial and Job Security Act of 1991, S. 688, 102d Cong. § 101(5)(A) (1991); Family and Medical Leave Act of 1993, S. 5, 103d Cong. § 101(4)(A) (1993); Family and Medical Leave Act of 1993, H.R. 1, 103d Cong. § 101(5)(A) (1993).

²⁴² See Family and Medical Leave Act of 1993, H.R. 1, § 101(4)(A) (1993).

²⁴³ See *Congress Profiles*, UNITED STATES H.R.: HIST., ART, & ARCHIVES, <https://history.house.gov/Congressional-Overview/Profiles/103rd/> [<https://perma.cc/NJ2U-C9K7>]; Party Division, UNITED STATES S., <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/LPB3-U99S>].

²⁴⁴ See *The Family and Medical Leave Act: Legislative Hearing on H.R. 1 Before the Subcomm. on Labor-Mgmt. Relations of the Comm. on Educ. and Labor*, 103d Cong., 24 (1993) [hereinafter *1993 House Hearings*] (statement of Hon. Robert B. Reich, Secretary of Labor) (stating “[w]e are committed to this legislation. President Clinton wants this legislation. We are not going to reexamine this legislation”); see also ELVING, *supra* note 11, at 261–62 (stating that Representative Ford, Chairman of the House Education and Labor Committee, “told reporters that Clinton had called him . . . and made clear he wanted to go with the bill that Bush had vetoed. That would Heighten the contrast between administrations and prove the government was working again. . . . Translation: no new issues, no new hand-ups, move it.”); accord Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 338 (1993) (explaining that “[p]assing leave legislation became symbolic of the end of legislative gridlock, and the beginning of executive-legislative cooperation. The new Democratic administration did not, therefore, reopen the leave debate, but rather characterized the legislation as a model of bipartisan consensus”).

²⁴⁵ See *1993 House Hearings* at 4 (statement of Rep. Ford), 30 (statement of Rep. Kildee), 36 (statement of Rep. Martinez).

²⁴⁶ See *id.* at 21 (statement of Hon. Robert B. Reich, Secretary of Labor) (explaining that President Clinton wants Congress to move quickly because “the passage of the Family and Medical Leave Act will signal not only a turning point in the history of American workforce policy but as an emphatic opening statement of the Clinton administration’s workforce agenda with regard to minimal standards of decency”).

1993, and the bill filed in the House, the Family and Medical Leave Act of 1993, was intentionally designated as H.R. 1 to symbolize its significance to the Clinton Administration.²⁴⁷

Even in this expedited process, however, several members of Congress expressed frustration that the proposed bill in 1993 was too “watered down.”²⁴⁸ They also expressed their “disappointment” that there was no attempt to strengthen some of the bill’s provisions, including the small business exception, prior to the bill’s enactment.²⁴⁹

President Clinton’s newly appointed Secretary of Labor, Robert B. Reich, appeared at one of the committee meetings held in the House in January of 1993, and he offered two primary suggestions for these concerns.²⁵⁰ First, Secretary Reich conceded that “95 percent of American businesses are not covered by this bill” and he characterized the bill as “a good step, but . . . a very modest step.”²⁵¹ He emphasized that the bill established a commission on leave, which was authorized to conduct a study on the cost-benefits of the bill and its effectiveness, and that appropriate revisions would be considered after the conclusion of this study.²⁵² Second, Secretary Reich categorized the bill as the “minimal standard,” and Representative Eliot Engel reminded Congressional leaders of the bill’s preemption clause, which allowed states to enact local legislation providing greater benefits for its workers.²⁵³

Unfortunately, neither of Secretary Reich’s suggestions has proven to be viable for uniformly reducing the small business exception. Several years later, President Clinton challenged Congress to lower the small business exception in the FMLA from fifty to twenty-five

²⁴⁷ See *id.* at 4 (statement of Rep. Ford) (explaining that “the President’s interest in this legislation [was] expressed so many times this past fall and his subsequent discussions with our leadership, they were kind enough to designate this legislation as H.R. 1, which is saying to the country that the number one priority that we could all agree on quickly for the 103d Congress was family and medical leave, and I trust that this legislation will move in an orderly way”).

²⁴⁸ See *id.* at 38 (statement of Rep. Donald M. Payne) (“I am truly disappointed, though, in this watered down version. It was watered down so that the previous administration would not veto it, and I wish we did not start with that same premise, I am personally disappointed.”); *id.* at 41 (statement of Rep. Patsy Mink) (“My only disappointment is that it is not as strong as I would have wished it to be, and it comes as a product of the work of the Bush administration in trying to water down our efforts over a number of years.”); *id.* at 43 (statement of Rep. Ron Klink) (expressing that he has “some concerns,” describing this as a “watered down version”).

²⁴⁹ See *id.* at 38 (statement of Rep. Donald M. Payne), 41 (statement of Rep. Patsy Mink).

²⁵⁰ See *id.* at 18–23 (statement of Secretary Robert B. Reich).

²⁵¹ *Id.* at 29 (statement of Secretary Robert B. Reich).

²⁵² See *id.* at 41–2.

²⁵³ See *id.* at 19, 43.

employees in his State of the Union Address in 1999,²⁵⁴ but Congress did not do so.²⁵⁵ Thus, the FMLA has applied to businesses with more than fifty employees for more than twenty-five years, even though Representative Roukema openly conceded the arbitrary basis for originally selecting fifty as the appropriate size of the small business exception.²⁵⁶ Moreover, as set forth below, the FMLA's preemption clause has failed to offer a uniform solution to providing coverage for more workers, as many states continue to apply the FMLA's "minimum standard" small business exception.

B. State Family and Medical Leave Laws: The Perpetuation of Fifty

When the FMLA was enacted in 1993, Congress declared that this statute established a minimum federal mandate for family and medical leave, or a floor of benefits for eligible employees.²⁵⁷ Nothing in the statute would prevent either employers from providing additional benefits to their employees,²⁵⁸ or states from enacting their own legislation that mandated greater benefits to employees within local jurisdictions. Indeed, the FMLA contains a preemption provision clarifying that the statute shall not "be construed to supersede any . . . State or local law that provides greater family or medical leave rights."²⁵⁹ The critical question, therefore, is whether the FMLA has encouraged states to enact more expansive legislation, applying state provisions to a larger scope of employers or, alternatively, whether states merely comply with the FMLA, thereby perpetuating its small business exemption.²⁶⁰

²⁵⁴ See Family and Medical Leave Fairness Act of 1999, S. 201, 106th Cong. (1999); President William J. Clinton, State of the Union Address, Jan. 19, 1999 (referring to the Senate bill expanding coverage to include private employers with 25 or more employees).

²⁵⁵ See Family and Medical Leave Fairness Act of 1999, S. 201, 106th Cong. (1999).

²⁵⁶ See Vol. I, 1987 House Hearings, *supra* note 156, at 11.

²⁵⁷ See S. REP. NO. 103-3, at 4 (1993) ("The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.").

²⁵⁸ President Bush advocated that family leave policies should be voluntary for employers rather than compulsory and he vetoed two earlier bills in part based on this basis. See, e.g., *Message from the President of the United States Returning Without My Approval S. 5, the Family and Medical Leave Act of 1992*, S. Doc. No. 102-26, at 1 (1992) ("I have always supported employer policies to give time off for a child's birth or adoption or for family illness and believe it is important that employers offer these benefits. I object, however, to the Federal Government mandating leave policies for America's employers and work force."); *Message from the President of the United States Transmitting His Veto of H.R. 770, the "Family and Medical Leave Act of 1990"*, H.R. Doc. No. 101-209, at 1 (1990).

²⁵⁹ 29 U.S.C. § 2651(b) (1993).

²⁶⁰ See Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WAS. U. J. L. & POL'Y 65, 81-2 (2004) (observing, ten years after the FMLA was

Indeed, numerous states enacted local family and medical leave legislation before the FMLA successfully concluded its eight-year journey through Congress.²⁶¹ Moreover, the passage of this early legislation at the state level was a frequent topic of discussion at numerous Congressional hearings, as well as during the floor debate in the House and Senate.²⁶² The Supreme Court also documented the inconsistencies and shortcomings of most of these state laws in *Nevada Department of Human Resources v. Hibbs*.²⁶³ Specifically, the Court explained that many of the statutes only applied to women;²⁶⁴ some provided no family leave, thus, limiting their provisions to adoption and childbirth;²⁶⁵ and some statutes left the length of leave primarily to the discretion of employers.²⁶⁶ Given these limitations and inconsistencies of the state leave policies that existed when the FMLA was enacted, it is appropriate to re-examine the current status of family and medical leave policies throughout the states, focusing specifically on the states' incorporation of a small business exception.

1. States that Follow the FMLA's Small Business Exception for Private Employers

Twenty-four states follow the FMLA's small business exception when determining which employers are required to provide leave benefits for their workers.²⁶⁷ Two of these states have not enacted

enacted, that "there is some reason to believe that the FMLA has hindered rather than assisted efforts to pass more meaningful legislation, particularly on the state level").

²⁶¹ See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 732 (2003) (observing that that states began to consider similar legislation "only '[s]ince Federal family leave legislation was first introduced'").

²⁶² See, e.g., *The Family and Medical Leave Act of 1991: Hearing Before the Subcomm. on Labor Mgmt. Relations of the H. Comm. on Educ. and Labor*, 102d Cong. 4 (1991) (statement of Rep. Roukema) (observing that family leave is "an issue which has picked up tremendous momentum in the States"); H.R. REP. NO. 103-8, pt. 1, at 32 (1993) (indicating that "[s]ince Federal family leave legislation was first introduced, numerous States have begun to consider similar family leave initiatives"); 137 CONG. REC. 31,587 (1991) (statement of Sen. Petri) (agreeing that several states have enacted some type of family or medical leave laws but explaining that they "range from strictly maternity coverage to comprehensive family and medical leave coverage. However, analysis shows that no State has a family and medical leave law as broad in scope and coverage as the legislation we are considering here today").

²⁶³ See *Hibbs*, 538 U.S. 721, 733-34 (2003).

²⁶⁴ See *id.* at 733 & n.6 (citing statutes from Massachusetts, Colorado, Iowa, Kansas, New Hampshire, Louisiana, and Tennessee).

²⁶⁵ See *id.* at 733 & n.7 (citing statutes enacted in Colorado, Delaware, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Montana, New Hampshire, New York, Tennessee, and Virginia).

²⁶⁶ See *id.* at 734 & n.8 (citing statutes enacted in Colorado, Kansas, New Hampshire, and Oklahoma).

²⁶⁷ The twenty-four states that follow the FMLA's small business exemption without substantial modification for private employees are: Alabama; Alaska; Arkansas; Colorado;

any local family and leave legislation, thereby requiring the eligibility of leave to be solely determined by the FMLA, including its small business exception, for all the private employers within these jurisdictions.²⁶⁸ Eight additional states only regulate the use of

Delaware; Florida; Idaho; Indiana; Kansas; Michigan; Mississippi; Missouri; Nevada; New Mexico; North Carolina; Ohio; Oklahoma; Pennsylvania; South Dakota; Tennessee; Texas; Virginia; Wisconsin; and Wyoming. *See generally* COLO. REV. STAT. § 8-13.3-203(1) (2020) (declaring that Colorado follows the FMLA); FLA. STAT. § 741.313(3) (2020) (providing local leave for employers with fifty or more workers); MICH. COMP. LAWS SERV. § 408.962(f) (2020) (defining employer to include “any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, government entity, or other entity that employs 50 or more individuals”); MISS. ADMIN. CODE Pt. 110, R. 7.9.1 (2020) (adopting the FMLA for the state of Mississippi); MO. CODE REGS. ANN. tit. 1, § 20-5.020(7)(B) (2020) (declaring that Missouri follows the FMLA); NEV. ADMIN. CODE § 284.811 (2020) (following the leave provisions of the FMLA); OKLA. ADMIN. CODE § 260:25-15-45(a) (2020) (declaring that Oklahoma follows the FMLA); WIS. STAT. ANN. § 103.10(1)(c) (2020) (defining employer as having 50 or more employees); 006.0010.6 WYO. CODE R. § 16 (2020) (adopting the FMLA’s leave provisions); *Jackson v. City of Hot Springs*, 751 F.3d 855, 859–60 (8th Cir. 2014) (affirming jury verdict on an FMLA claim for an Arkansas employee); *White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, No. 07–2319–CM, 2008 WL 4148602, at *4–5 (D. Kan. Sept. 4, 2008) (acknowledging that Kansas follows the FMLA); *Garber v. Lance, Inc.*, No. Civ.A.1:06CV00005, 2006 WL 1318360, at *2 (W.D. Va. May 12, 2006) (applying the FMLA’s small business exception); *Lau v. Behr Heat Transfer Sys., Inc.*, 150 F.Supp.2d 1017, 1022, 1023 (D. S.D. 2001) (analyzing a motion for summary judgment requesting dismissal of an employee’s claim for retaliatory discharge and denial of benefits under the FMLA); *Grund v. American Trim, LLC*, 57 So.3d 773, 780 (Ala. Civ. App. 2010) (evaluating claim between employee and employer for reimbursement of health insurance premiums under the FMLA); *Olson v. Teck Cominco Alaska, Inc.*, 144 P.3d 459, 461 (Alaska 2006) (plaintiff had taken leave under FMLA); *Kelsall v. BayHealth, Inc.*, No.: K15C-10-023 RBY, 2015 WL 9312477, at *2 (Del. Super. Ct. Dec. 18, 2015) (dismissing plaintiff’s FMLA complaint against a Delaware employer because she failed to allege the corporation employed fifty or more employees); *Thornberry v. City of Hobart*, 887 N.E.2d 110, 113 (Ind. Ct. App. 2008) (discussing leave taken by an employee within the state under the FMLA); *Harvell v. North Carolina Ass’n of Educators, Inc.*, 510 S.E.2d 403, 404 (N.C. Ct. App. 1999) (explaining that employees eligible for leave benefits in North Carolina are required to satisfy the FMLA); *Howard v. Bobby D. Thompson, Inc.*, No. 24357, 2011 WL 2739623, at *3 (Ohio Ct. App. July 15, 2011) (applying the FMLA’s definition of employer to a dispute arising out of an employer’s office in Dayton, Ohio); *Carlson v. Cmty. Ambulance Servs., Inc.*, 824 A.2d 1228, 1231–32 (Pa. Super. Ct. 2003) (affirming the district court’s grant of summary judgment on grounds that plaintiff was ineligible for FMLA benefits in Pennsylvania due to the insufficient size of her employer); *Horelica v. Fiserv Sols., Inc.*, 123 S.W.3d 492, 493 (Tex. App. 2003) (analyzing plaintiff’s FMLA claim against a Texas employer); *Tenn. Op. Att’y Gen. No. 94-006* (Jan. 13, 1994), 1994 Tenn. AG LEXIS 32 (explaining that Tennessee generally follows the FMLA); *Governor Little Signs Families First Act, Guarantees State Employees Eight Weeks of Paid Parental Leave*, OFFICE OF THE GOVERNOR, <https://gov.idaho.gov/pressrelease/governor-little-signs-families-first-act-guarantees-state-employees-eight-weeks-of-paid-parental-leave/> [<https://perma.cc/NM2V-DULF>] (discussing that the State of Idaho provides increased benefits only to public employees); *Family Medical Leave Act 1993: Frequently Asked Questions*, N.M. ST. PERSONNEL OFF., https://www.spo.state.nm.us/uploads/FileLinks/44d9464532f4472d4fe00e8d336cb590/FMLA_FAQs.pdf [<https://perma.cc/RP5G-AX8X>] (explaining that New Mexico follows the FMLA).

²⁶⁸ The two states that lack a local leave statute are North Carolina and Pennsylvania. *See Harvell*, 510 S.E.2d at 404 (explaining that employees eligible for leave benefits in North Carolina must satisfy the FMLA); *Carlson*, 824 A.2d at 1231–32 (affirming the district court’s grant of summary judgment on grounds that plaintiff was ineligible for FMLA benefits in Pennsylvania due to the insufficient size of her employer).

family leave for their public employees, and therefore private employees within these states are governed by the FMLA.²⁶⁹

Several additional states have enacted local leave statutes that expand the acceptable reasons for taking leave, but these states have largely borrowed the FMLA's definition of employer, ensuring that leave benefits are only available to employees who work for businesses with more than fifty employees.²⁷⁰ For instance, Indiana has adopted a local military leave statute requiring employers of fifty or more to offer ten days of unpaid leave to employees when designated family members are assigned to active military duty.²⁷¹ Colorado and Texas have enacted statutes that ensure employers offer the same amount of leave to adoptive or foster parents that they offer to biological parents, although neither statute guarantees a minimum amount of leave.²⁷²

Six states have not adopted local family and medical leave statutes for private employers, but instead have enacted local employment discrimination statutes which decreased the small business

²⁶⁹ The eight states that have only regulated the use of family and medical leave by public employees are: Florida; Idaho; Kansas; Mississippi; Nevada; New Mexico; Virginia; and Wyoming. See FLA. ADMIN. CODE ANN. r. 60L-34.0051(4)(b) (2020) (establishing the Family Supportive Work Program where public employees can receive up to six months of family and parental leave); KAN. ADMIN. REGS. § 1-9-5(b) (2020) (regulating the use and accrual of paid sick leave to state employees); MISS. CODE ANN. § 25-3-95(2)(b) (2020) (allowing the accrual of paid sick days for state employees and establishing the conditions for their use); NEV. ADMIN. CODE § 284.558 (2020) (permitting state employees to take a maximum of 120 hours of paid sick leave per year to care for a member of the employee's immediate family); N.M. CODE R. § 1.7.7 (2020) (specifying the permissible uses of leave for state employees including, but not limited to, paid annual 1.7.7.8 and sick leave 1.7.7.10, family and medical leave 1.7.7.12, educational leave, and military leave); VA. CODE ANN. § 2-2-1201(A)(14) (2020) (regulating when state employees may use some of their accrued paid leave during their absence protected by the FMLA); 006-0010-6 WYO, CODE R. § 16(b) (specifying that state agencies are covered employers under the FMLA regardless of the total number of employees); Idaho Exec. Order No. 2020-03 (Jan. 22, 2020), <https://gov.idaho.gov/wp-content/uploads/sites/74/2020/01/eo-2020-03.pdf> [<https://perma.cc/Q7X2-RB9S>].

²⁷⁰ The three states largely follow the FMLA except they have enacted local legislation providing additional categories of leave are: Indiana, Colorado, and Texas. See *infra* note 272 and accompanying text.

²⁷¹ See IND. CODE ANN. § 22-2-13-1 (LexisNexis 2019) (defining employer for purposes of military family leave as one who "employs at least fifty (50) employees for each working day during each of at least twenty (20) calendar work weeks"); IND. CODE ANN. § 22-2-13-11 (LexisNexis 2020) (specifying the eligibility and length of leave permitted).

²⁷² See COLO. REV. STAT. ANN. § 19-5-211(1.5) (West 2020) (requiring any "employer who permits paternity or maternity time off for biological parents following the birth of a child shall, upon request, make such time off available for individuals adopting a child"); TEX. LAB. CODE ANN. § 21.0595 (West 2017) (declaring that "[a]n employer commits an unlawful employment practice if: (1) the employer administers a leave policy under which an employee is entitled to personal leave to care for or otherwise assist the employee's sick [biological or adopted minor] child; and (2) . . . [this leave policy] . . . does not treat in the same manner as an employee's . . . foster child").

exception when forbidding pregnancy discrimination.²⁷³ While Title VII forbids discrimination based on sex,²⁷⁴ and the Pregnancy Discrimination Act amended the definitional provisions of Title VII to clarify that discrimination based on pregnancy constituted a form of sex discrimination prohibited by Title VII,²⁷⁵ these prohibitions only apply to employers with fifteen or more employees.²⁷⁶ Yet, these six states have adopted small business exceptions forbidding even smaller employers from committing pregnancy discrimination. For instance, Alaska, Michigan, and Oklahoma prohibit private employers with one or more employees from engaging in pregnancy discrimination,²⁷⁷ whereas antidiscrimination statutes enacted in Delaware and Ohio apply to employers with four or more employees,²⁷⁸ and Arkansas's statute applies to employers with nine or more employees.²⁷⁹ Admittedly, these statutes do not guarantee any time off from work, but they do offer more women job security and protection from disparate treatment on the basis of pregnancy when compared to female workers who live in states that only follow the FMLA. Finally, one state has adopted a local leave statute that

²⁷³ These six states are Alaska, Arkansas, Delaware, Ohio, Oklahoma, and Michigan. *See infra* notes 277–79 and accompanying text.

²⁷⁴ *See* 42 U.S.C. § 2000e-2(a)(1) (2020).

²⁷⁵ *See* 42 U.S.C. § 2000e(k) (2020); *see also* Lynn Ridgeway Zehrt, *A Special Delivery: Litigating Pregnancy Accommodation Claims After the Supreme Court's Decision in Young v. United Parcel Service, Inc.*, 68 RUTGERS U. L. REV. 683, 689–90 (2016) (discussing the historical background behind the enactment of the Pregnancy Discrimination Act).

²⁷⁶ *See* 42 U.S.C. § 2000e(b) (2020).

²⁷⁷ *See* ALASKA STAT. § 18.80.220 (2020) (prohibiting discrimination on the basis of “sex” and “pregnancy”), ALASKA STAT. § 18.80.300(5) (2014) (defining employer to consist of “a person . . . who has one or more employees in the state but does not include a club”); MICH. COMP. LAWS ANN. § 37.2201(a) (West 2020) (defining employer to “mean[] a person who has 1 or more employees, and includes an agent of that person”), MICH. COMP. LAWS ANN. § 37.2202(1)(d) (West 2020) (prohibiting employers from “[t]reat[ing] an individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose”); OKLA. STAT. ANN. tit. 25, § 1301(1) (West 2014) (defining employer to mean “a legal entity, institution or organization that pays one or more individuals a salary or wages for work performance”); OKLA. STAT. ANN. tit. 25, § 301(6) (West 2014) (defining sex discrimination).

²⁷⁸ *See* DEL. CODE ANN. tit. 19, § 710(7) (2014) (defining employer as “any person employing 4 or more employees within the State at the time of the alleged violation”), DEL. CODE ANN. tit. 19, § 711(a)(1) (2016) (prohibiting unlawful employment practices including discrimination due to “sex (including pregnancy)”); OHIO REV. CODE ANN. § 4112.01(A)(2) (LexisNexis 2016) (defining employer to include “any person employing four or more persons within the state”); OHIO REV. CODE ANN. § 4112.01(B) (LexisNexis 2016) (mandating that employers treat “[w]omen affected by pregnancy, childbirth, or related medical conditions . . . the same . . . as other persons not so affected but similar in their ability or inability to work”).

²⁷⁹ ARK. CODE ANN. § 16-123-102(5) (2017) (defining employer to consist of “a person who employs nine (9) or more employees in the State of Arkansas”), ARK. CODE ANN. § 16-123-107(a) (2020) (forbidding discrimination based on gender and declaring “[t]he right . . . to be free from discrimination . . . to be a civil right”).

increased the duration of unpaid leave but only for employees who work for large employers.²⁸⁰

Specifically, Tennessee requires employers who have at least 100 full-time employees at one location to provide four months of unpaid time off to employees for pregnancy, childbirth, adoption, and nursing an infant.²⁸¹ If an employee is eligible for leave under both the FMLA and Tennessee's leave statute, the leave time will run simultaneously under both laws, preventing eligible employees from exceeding a maximum of four months of leave.²⁸²

2. States that Reduce the FMLA's Small Business Exception for Private Employers

On the other side of the spectrum, twenty states and the District of Columbia, have enacted local family and leave legislation that reduced the scope of the small business exception for private employers, thereby making leave available to more employees within these jurisdictions.²⁸³ Six states, Arizona, Hawaii, Massachusetts,

²⁸⁰ TENN. CODE ANN. § 4-21-408 (1998) (providing that "Nothing contained within this section shall be construed to . . . [a]pply to any employer who employs fewer than one hundred (100) full-time employees on a permanent basis at the job site or location").

²⁸¹ See TENN. CODE ANN. § 4-21-408(a), (d)(2) (allowing eligible employees to "be absent from such employment for a period not to exceed four (4) months for adoption, pregnancy, childbirth and nursing an infant").

²⁸² See Tenn. Att'y Gen. Ops., No. 94-006, Opinion Letter on Effect of Federal Family and Medical Leave Act of 1993 (Jan. 13, 1994), at 1–3.

²⁸³ These twenty states and the District of Columbia have reduced the size of the small business exemption for private employers: Arizona; California; Connecticut; the District of Columbia; Georgia; Hawaii; Iowa; Louisiana; Maine; Maryland; Massachusetts; Minnesota; Montana; New Hampshire; New Jersey; New York; Oregon; Rhode Island; Vermont; and Washington. See ARIZ. REV. STAT. § 23-372(A), (B) (LexisNexis 2020) (requiring all private employers must offer some amount of paid sick leave); CAL. GOV'T CODE § 12926(d) (Deering 2020) (effective Jan. 1, 2021) (defining employer for purposes of pregnancy disability leave as "any person regularly employing five or more persons"); CONN. GEN. STAT. § 31-51kk(4) (2020) (effective Jan. 1, 2022) (applying to a person who employs one or more employees); D.C. CODE § 32-531.01(3)(A) (2020) (defining employer as any entity that directly or indirectly "employs or exercises control over the wages, hours, or working conditions of an employee"); GA. CODE ANN. § 34-1-10(a)(3) (2019) (defining employer as "any individual or entity that employs 25 or more employees"); HAW. REV. STAT. ANN. § 378-1(2020) (defining employer as "any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees"); IOWA CODE ANN. § 216.6(6)(a) (2019) (excluding employers "who regularly employs less than four individuals"); LA. STAT. ANN. § 23:341(A) (2019) (applying to employers "who employs more than twenty-five employees"); ME. REV. STAT. ANN. tit. 26, § 843(3)(A) (2019) (applying to "[a]ny person . . . that employs 15 or more employees at one location"); MD. CODE ANN. LAB. & EMPL. § 3-1201(c)(1) (LexisNexis 2020) (defining employer as "a person who employs at least 15 but not more than 49 individuals in the State"); MASS. ANN. LAWS ch. 175m, § 1 (LEXISNEXIS 2020) (applying to all nongovernmental employers with one or more employees although employers with less than twenty-five employees have different contribution requirements); MINN. STAT. ANN. § 181.940(3) (West 2014) (applying unpaid leave provisions to employers that employ "21 or more employees at at least one site"); MONT. CODE ANN. § 49-

Montana, New York and Washington, have completely eliminated the small business exception in their local leave statutes by defining employer to include any person employing one or more employees, and most of these statutes were enacted recently, beginning in 2017.²⁸⁴ Three additional states have adopted extremely small business exceptions, intended to exempt only the smallest of entities: Iowa's small business exception only exempts employers with less than four employees;²⁸⁵ certain parts of California's leave statute exempt employers with less than five employees,²⁸⁶ and New Hampshire's statute exempts employers with less than six employees.²⁸⁷

Unfortunately, three of the states with the most limited small business exceptions also have significant ambiguity in their local leave legislation. Specifically, Hawaii, Montana, and New Hampshire's statutes require employers to offer a "reasonable period of leave" for pregnancy, childbirth, and related conditions.²⁸⁸ None of

2-101(11) (West 2019) (defining employer as an "employer of one or more persons or an agent of the employer"); N.H. REV. STAT. ANN. § 354-A:2(VII) (2020) (excluding from the term employer any person "with fewer than 6 persons in its employ"); N.J. REV. STAT. ANN. § 34:11B-3(f) (2020) (defining employer as "a person or corporation, partnership, [or similar entity] . . . which . . . employs 100 or more employees for each working day during each of 20 or more calendar workweeks"); N.Y. WORKERS' COMP. LAW § 202(1) (Consol. 2020) (defining a covered employer as anyone "who has in employment . . . one or more employees on each of at least thirty days in any calendar year"); OR. REV. STAT. ANN. § 659A.153(1) (West 2020) (applying to private employers with 25 or more employees); 28 R.I. GEN. LAWS § 28-48-1(3)(i) (2020) (applying to employers with 50 or more employees); VT. STAT. ANN. tit. 21 § 471(1) (2019) (defining employer as a "doing business in or operating within this state for which the purposes of parental leave employs 10 or more individuals . . . and for the purposes of family leave employs 15 or more individuals"); WASH. REV. CODE ANN. § 50A.05.010(7)(a),(b) (LexisNexis 2020) (defining employer to include "[a]ny individual or type of organization . . . [except] the United States of America").

²⁸⁴ The six states that have eliminated the small business exemption in their local family and medical leave legislation are: Arizona; Connecticut; Hawaii; Massachusetts; Montana; New York; and Washington. See ARIZ. REV. STAT. § 23-372(A), (B); CONN. GEN. STAT. ANN. § 31-51kk(4); HAW. REV. STAT. ANN. § 378-1; MASS. ANN. LAWS ch. 175m, § 1; MONT. CODE ANN. § 49-2-101(11); N.Y. WORKERS' COMP. LAW § 202(1); WASH. REV. CODE ANN. § 50a.05.010(7)(a)(b)).

²⁸⁵ IOWA CODE ANN. § 216.6(6)(a) (explaining that these provisions shall not apply to "[a]ny employer who regularly employs less than four individuals . . . [excluding] individuals who are members of the employer's family").

²⁸⁶ CAL. GOV'T CODE § 12926 (Deering 2020) (effective Jan. 1, 2021) (defining employer for purposes of pregnancy leave as "any person regularly employing five or more persons"). *Contra* CAL. GOV'T CODE § 12945.6(a)(1) (Deering 2020) (repealed Jan. 1, 2020) (defining employer for purposes of parental leave as any person with "at least 20 employees within 75 miles").

²⁸⁷ N.H. REV. STAT. ANN. § 354-A:2(VII) (excluding from the term employer any person "with fewer than 6 persons in its employ").

²⁸⁸ See HAW. CODE R. § 12-46-108(a) (LexisNexis 2020) (requiring that "[d]isability due to and resulting from pregnancy, childbirth, or related medical conditions shall be considered by the employer to be justification for a leave, with or without pay, by the female employee for a reasonable period [of] time"); N.H. REV. STAT. ANN. § 354-A:7(VI)(b) (compelling employers to

these statutes guarantee a specific minimum quantity of leave, nor provide objective guidelines for determining what amount of leave is sufficiently reasonable. When comparing these three statutes, Hawaii's statute offers the most guidance by specifying that the amount of leave is determined by the employee's physician.²⁸⁹ Moreover, all three of these statutes only apply to female employees rather than providing gender-neutral benefits to both parents.²⁹⁰ Therefore, given the ambiguity in determining the quantity of leave in these three statutes, and the limited application to female employees during childbirth or related conditions, benefits to employees in these states are minimal.

Three additional states, Maine, Maryland, and Vermont, exempt businesses employing less than fifteen employees.²⁹¹ In these states, the small business exception for the local family and medical leave legislation is consistent with the size of the small business exceptions found both in Title VII and the Americans with Disabilities Act.²⁹² By adopting the same small business exemption as the Americans with Disabilities Act, these statutes have simplified coverage for those women who are experiencing complications with pregnancy, allowing these workers to simultaneously request medical leave under the local leave law as well as request a reasonable accommodation under the Americans with Disabilities Act.²⁹³

"permit a female employee to take [a] leave of absence for the period of temporary physical disability resulting from pregnancy, childbirth or related medical conditions"); MONT. CODE ANN. § 49-2-310 (2019) (declaring under the heading of maternity leave provision that "[i]t is unlawful for an employer . . . to . . . refuse to grant to the employee a reasonable leave of absence for the pregnancy"). *But see* HAW. REV. STAT. ANN. § 398.1-8.3 (LexisNexis 2020) (requiring employers with 100 or more employees to provide four weeks of family leave due to the birth or adoption of a child, or for a qualifying serious health condition).

²⁸⁹ Compare HAW. CODE R. § 12-46-108(a) (explaining that a "[r]easonable period of time" as used by this section shall be determined by the employee's physician, with regard for the employee's physical condition and the job requirements"), with CAL. GOV'T CODE § 12945(a)(1) (Deering 2020) (providing employees "disabled by pregnancy, childbirth, or a related medical condition [with the opportunity] to take a leave for a reasonable period of time not to exceed fourth months").

²⁹⁰ See HAW. CODE R. § 12-46-108(a) (explaining that pregnancy and related conditions are justifications "by the female employee for a reasonable period" of leave); N.H. REV. STAT. ANN. § 354-A:7(VI)(b) (discussing an employer's requirement to "permit a female employee to take [a] leave of absence"); MONT. CODE ANN. § 49-2-310 (referring to this statute in the heading as "[m]aternity leave").

²⁹¹ See ME. REV. STAT. ANN. tit. 26, § 843(3)(A) (2020); MD. CODE ANN. LAB. & EMPL. § 3-1201(c)(1) (LexisNexis 2020); VT. STAT. ANN. tit. 21, § 471(1) (2019).

²⁹² See 42 U.S.C. § 2000e(b) (2018) (defining, in pertinent part, the term employer under Title VII as "a person engaged in an industry affecting commerce who as fifteen or more employees for each working day in each of twenty or more calendar weeks"); 42 U.S.C. § 12111(5)(A) (2008) (adopting the same definition of the term employer under the Americans with Disabilities Act).

²⁹³ See, e.g., Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 141 (2013) (explaining that "pregnant

Although this article is primarily dedicated to evaluating the development of small business exemption under the FMLA and similar local leave statutes, it is appropriate to acknowledge briefly that eight states and the District of Columbia have not only enacted local leave legislation reducing the small business exemption, but they also have amended their statutes to provide paid leave to supplement an employee's income for various amounts during the leave period.²⁹⁴ The unpaid nature of the FMLA has long been a source of criticism of that statute, excluding most lower-income families who could not afford to request FMLA leave even if they satisfied all of its eligibility requirements.²⁹⁵ Therefore, in these eight states, not only are more employees eligible for the job protections provided by these local leave statutes, but also more

workers will not always be entitled to accommodation [under the ADA]. . . . While pregnancy is clearly not a disability *per se*, when a pregnant worker experiences a medical condition or disease that qualifies as a disability under the ADA, ADA protections are triggered"); Zehrt, *supra* note 275, at 710–12 (discussing the relationship between the FMLA, the ADA, and the Pregnancy Discrimination Act and declaring that coverage is complicated and not universal).

²⁹⁴ Eight states and the District of Columbia have passed both paid family leave laws and have reduced the small business exemption. See CAL. UNEMP. INS. CODE § 3300–01 (Deering 2020) (providing up to eight weeks of wage replacement benefits under the state's disability insurance program during qualifying family and medical leave requests); CONN. GEN. STAT. § 31-511l(a)(1) (2020) (effective Jan. 1, 2022) (entitling employees to take a maximum of twelve weeks of family leave, and up to fourteen weeks of paid leave due to reasons related to pregnancy); D.C. CODE § 32-531.02(a) (2020) (requiring all employers to provide a minimum number of paid sick leave hours each year to eligible employees but determining the employers' varying obligations based on their total number of employees); MASS. GEN. LAWS ch. 175M, § 2(c)(1) (LexisNexis 2020) (entitling qualified employees to a maximum of twenty weeks of paid medical leave and twelve weeks of paid family leave per year beginning on Jan. 1, 2021); N.J. STAT. ANN. § 43:21-40 (2020) (providing qualifying employees with paid family leave for a maximum of twelve weeks at 85% of their average weekly wage); N.Y. WORKERS' COMP. LAW § 204(2)(a) (Consol. 2020) (providing eligible employees with paid family and medical leave that gradually increases over the first few years, with a maximum recovery in 2021 of twelve weeks of paid leave at 67% of weekly salary); OR. REV. STAT. § 659A.162(1) (2020) (requiring employers to offer a maximum of twelve weeks of paid family leave to eligible employees per year); 28 R.I. GEN. LAWS § 28-57-5(a) (2020) (requires employers with eighteen or more employees to provide a maximum of twenty-four hours of paid leave during 2018, a maximum of thirty-two hours of paid leave in 2019, and a maximum of forty hours in 2020 and thereafter); WASH. REV. CODE ANN. § 50A.15.020 (LexisNexis 2020) (providing eligible employees of twelve weeks of paid family and medical leave beginning Jan. 1, 2020).

²⁹⁵ See, e.g., Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 227, 247 (1998) (explaining why the FMLA "has serious limitations for pregnant women," and these include that "many pregnant women cannot afford to take advantage of the FMLA because it mandates only unpaid leave"); Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 29 (2009) (declaring that many of the workers who are eligible for leave under the FMLA simply "cannot afford to take unpaid leave"); Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1005 (2013) (declaring that, "[e]ven for covered employees, [] the FMLA is often inadequate" because "[f]irst, and very importantly, it is unpaid").

employees actually exercise their leave rights due to the supplemental income provided by these statutes during their absence from work.²⁹⁶

3. States that have Adopted Smaller Business Exemptions for Private Employers in Pregnancy Accommodation Statutes

Finally, a majority of states in this country have enacted local statutes requiring employers to accommodate pregnancy.²⁹⁷ Seven of these states have passed local pregnancy accommodation statutes exclusively without also enacting local leave legislation.²⁹⁸ Thus, in these seven states, pregnant employees must either qualify for leave under the FMLA, or establish that leave is a reasonable accommodation under their state's pregnancy accommodation statutes.

While the specific provisions of these state statutes vary, all require that private employers provide reasonable accommodations to employees who request them on the basis of pregnancy, childbirth, or related conditions.²⁹⁹ Statutes enacted in Illinois and North Dakota do not contain a small business exemption;³⁰⁰ whereas West Virginia's statute applies to employers with twelve or more

²⁹⁶ See Linda Houser & Thomas P. Vartanian, Rutgers Ctr. for Women & Work, Pay Matters: The Positive Economic Impacts of Paid Family Leave for Families, Business and the Public 7 (2012); Gillian Lester, *A Defense of Paid Family Leave*, 28 Harv. J.L. & Gender 1, 34 (2005).

²⁹⁷ See Nat'l Partnership for Women & Families, Reasonable Accommodations for Pregnant Workers: State and Local Laws 1 (2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> [<https://perma.cc/GW6S-7J2C>] (stating that “[t]hirty-one states, including the District of Columbia, and four cities have passed laws requiring some employers to provide reasonable accommodations to pregnant workers”); Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 Wm. & Mary L. Rev. 969, 974, 974 n.14 (2018) (estimating that approximately 22 states and the District of Columbia have enacted local pregnancy accommodation statutes).

²⁹⁸ The focus of this section is limited to those states that have only enacted pregnancy accommodation statutes without any provision guaranteeing family and medical leave. These seven states are: Illinois, Kentucky, Nebraska, North Dakota, South Carolina, Utah, and West Virginia. See 775 Ill. Comp. Stat. Ann. 5/2-102 (LexisNexis 2020); 2019 SB18 Ky. Rev. Adv. Legis. Serv. 200 (LexisNexis 2019); Neb. Rev. Stat. Ann. § 48-1107.02(2) (LexisNexis 2020); N.D. Cent. Code Ann. § 14-02.4-03(2) (2019); S.C. Code Ann. § 1-13-30(T) (2020); Utah Code Ann. § 34A-5-106(1)(g) (LexisNexis 2020); W. Va. Code Ann. § 5-11B-2(1) (LexisNexis 2020).

²⁹⁹ 775 ILL. COMP. STAT. ANN. 5/2-102(J); 2019 SB18 Ky. Rev. Adv. Legis. Serv. 200; NEB. REV. STAT. ANN. § 48-1107.02(2); N.D. CENT. CODE ANN. § 14-02.4-03(2); S.C. CODE ANN. § 1-13-30(T); UTAH CODE ANN. § 34A-5-106(1)(g); W. VA. CODE ANN. § 5-11B-2(1).

³⁰⁰ See 775 ILL. COMP. STAT. ANN. § 5/2-101(B)(1)(a) (defining employer as “[a]ny person employing one or more employees within Illinois”); N.D. CENT. CODE ANN. § 14-02.4-02(8) (specifying that employer “means a person within the state who employs one or more employees”).

employees,³⁰¹ and statutes enacted in Kentucky, Nebraska, South Carolina, and Utah apply their pregnancy accommodation requirement to employers with fifteen or more employees.³⁰² Similar legislation, entitled the Pregnant Workers Fairness Act, has been proposed at the federal level beginning in 2012, but Congress has not enacted it.³⁰³

The overall goal of this legislation is to provide an independent statutory basis mandating accommodations specifically for pregnant workers.³⁰⁴ The benefit to this approach is twofold: it avoids the coverage challenges that pregnant workers currently face when seeking an accommodation under either the Americans with Disabilities Act or the Pregnancy Discrimination Act; and ensures that more pregnant workers are offered reasonable accommodations in the workplace.³⁰⁵ Neither the ADA nor the PDA provides an ideal framework for accommodating pregnancy.³⁰⁶

³⁰¹ W. VA. CODE ANN. § 5-11-3(d) (defining employer to include “the state, or any political subdivision thereof, and any person employing twelve or more persons within the state”).

³⁰² 2019 SB18 Ky. Rev. Adv. Legis. Serv. 200 (stating that “for purposes of determining accommodations for an employee’s own limitations related to her pregnancy, childbirth or related medical conditions, employer means a person who has fifteen (15) or more employees within the state”); NEB. REV. STAT. ANN. § 48-1102(2) (explaining that employer “mean[s] a person engaged in an industry who has fifteen or more employees”); S.C. CODE ANN. § 1-13-30(e) (defining employer as “any person who has fifteen or more employees”); UTAH CODE ANN. § 34A-5-102(1)(i)(D) (defining employer to include “a person employing 15 or more employees within the state”).

³⁰³ See Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. § 2(1) (2020); Pregnant Workers Fairness Act, S. 1512, 114th Cong. § 2(1) (2015); Pregnant Workers Fairness Act, H.R. 2654, 114th Cong. § 2(1) (2015); Pregnant Workers Fairness Act, S. 942, 113th Cong. § 2(1) (2013); Pregnant Workers Fairness Act, H.R. 1975, 113th Cong. § 2(1) (2013); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. § 2(1) (2012); Pregnant Workers Fairness Act, S. 3565, 112th Cong. § 2(1) (2012).

³⁰⁴ See Zehrt, *supra* note 275, at 715 (advocating for the enactment of the Pregnant Workers Fairness Act because it would “eliminate[] the requirement that pregnant workers identify a comparator, and [] provide[] these employees with an affirmative and unequivocal right to reasonable workplace accommodations”).

³⁰⁵ See, e.g., Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 860–66 (2016) (explaining that due to “gaps in federal law, particularly relating to accommodation rights” that the “shift[] in pregnancy discrimination law has been from federal to state law” and analyzing several of the recently-enacted state pregnancy accommodation statutes).

³⁰⁶ See, e.g., Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1128–31 (2016) (explaining that neither the PDA nor the ADA is “a guarantor of accommodations for pregnant employees” and advocating for more universal accommodations to all workers without reference to a protected-class identity); Grossman, *supra* note 305, at 858–59 (acknowledging that “even when interpreted correctly, the PDA’s scope is limited. It provides, at best, the accommodations that are available to other employees in the same workplace. That gives employers a lot of latitude to deny accommodations, even ones that are minor and costless, simply by denying them to everyone. . . . The lack of an absolute right of accommodation necessitates legislative action”).

Admittedly, private employers have a duty to provide reasonable accommodations to employees with disabilities under the Americans with Disabilities Act.³⁰⁷ However, the traditional view is that pregnancy itself is not considered a disability, although certain medical conditions and complications related to pregnancy, such as gestational diabetes and preeclampsia, can qualify as disabilities.³⁰⁸ Similarly, the PDA provides an accommodation to pregnant workers only if their employers offered such accommodation to other employees who are similar in their ability to work.³⁰⁹ Therefore, while both of the ADA and the PDA have assisted many pregnant women in obtaining a variety of accommodations, neither statute guarantees that such an accommodation is available to most pregnant workers.

While these local statutes more clearly mandate accommodations to pregnant workers, the guidance they provide in accessing the reasonableness of these accommodations varies tremendously. Statutes enacted in Illinois, Kentucky and Nebraska, for example, are more progressive, providing expansive examples of accommodations qualifying as reasonable, including light duty, modified work schedules, and time off from work.³¹⁰ They also

³⁰⁷ See Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5) (2012).

³⁰⁸ See 29 C.F.R. § 1630.2(h) (2012); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [<https://perma.cc/Y35K-5QY9>].

³⁰⁹ See 42 U.S.C. § 2000e(k) (2012); *see also* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 204–06 (1991) (explaining that the PDA mandates that “[w]omen who are either pregnant or potentially pregnant must be treated like others ‘similar in their ability ... to work.’” In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job” (citation omitted)).

³¹⁰ 775 ILL. COMP. STAT. ANN. 5/2-102(J) (2020) (defining reasonable accommodation to “mean[] reasonable modifications or adjustments to the job application process or work environment, or to the manner or circumstances under which the position desired or held is customarily performed” and explaining that these “may include, but [are] not limited to: more frequent or longer bathroom breaks, breaks for increased water intake, and breaks for periodic rest; private non-bathroom space for expressing breast milk and breastfeeding; seating; assistance with manual labor; light duty; temporary transfer to a less strenuous or hazardous position; the provision of an accessible worksite; acquisition or modification of equipment; job restructuring; a part-time or modified work schedule; appropriate adjustment or modifications of examinations, training materials, or policies; reassignment to a vacant position; time off to recover from conditions related to childbirth; and leave necessitated by pregnancy, childbirth, or medical or common conditions resulting from pregnancy or childbirth”); 2019 SB18 Ky. Rev. Adv. Legis. Serv. 200 (providing examples of reasonable accommodations of pregnant workers including “more frequent or longer breaks, time off to recover from childbirth, acquisitions or modification of equipment, appropriate seating, temporary transfer to a less strenuous or less hazardous position, job restructuring, light duty, modified work schedule, and private space that is not a bathroom for expressing breast milk”); NEB. REV. STAT. ANN. § 48-1102 (11) (2020) (specifying that “[r]easonable accommodations, with respect to pregnancy, childbirth, or related medical conditions, shall include acquisition of equipment for sitting, more frequent or longer breaks, periodic rest, assistance with manual labor, job restructuring, light-duty assignments,

require employers to engage in a good faith interactive process with employees who request an accommodation due to pregnancy or childbirth.³¹¹

Four of these states (North Dakota, South Carolina, Utah and West Virginia), require employers to provide reasonable accommodations, but their statutory provisions are more general when defining what constitutes a reasonable accommodation.³¹² In these states, there is no specific identification of leave as a potential reasonable accommodation, leaving this reasonableness determination to a case-by-case analysis.

Additionally, all of these statutes give an employer the right to refuse a requested accommodation on the grounds that it would impose an undue hardship.³¹³ Many of these statutes specify that the undue hardship analysis consists of various factors, including cost considerations, the size of the employer's business, the disruption of the employer's normal operation, and the extent of the accommodation.³¹⁴

Nor do these state statutes guarantee a minimum period of leave for most pregnant workers.³¹⁵ While pregnant employees may

modified work schedules, temporary transfers to less strenuous or hazardous work, time off to recover from childbirth, or break time and appropriate facilities for breast-feeding or expressing breast milk").

³¹¹ 775 ILL. COMP. STAT. ANN. 5/2-102(J)(1) (requiring both an "employee and employer [to] engage in a timely, good faith, and meaningful exchange to determine effective reasonable accommodations"); 2019 SB18 Ky. Rev. Adv. Legis. Serv. 200 (requiring "a timely, good faith, and interactive process to determine effective reasonable accommodations").

³¹² See N.D. CENT. CODE § 14-02.4-03(2) (2019); S.C. CODE ANN. § 1-13-30(T) (2020); UTAH CODE ANN. § 34A-5-106(1)(g) (LexisNexis 2016); W. VA. CODE ANN. § 5-11B-2(1).

³¹³ See 775 ILL. COMP. STAT. ANN. § 5/2-102(J)(1); 2019 SB18 Ky. Rev. Adv. Legis. Serv. 200; NEB. REV. STAT. ANN. § 48-1107.02(2)(d); N.D. CENT. CODE § 14-02.4-03(2); S.C. CODE ANN. § 1-13-80(A)(4)(a); UTAH CODE ANN. § 34A-5-106(1)(g)(i)(B); W. VA. CODE ANN. § 5-11B-2(1).

³¹⁴ See 775 ILL. COMP. STAT. ANN. § 5/2-102(J) (defining undue hardship to consist of "an action that is prohibitively expensive or disruptive when considered in light of the following factors: (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility or facilities involved in . . . the effect on expenses and resources, or the impact otherwise of the accommodation upon the operation of the facility"); 2019 SB18 Ky. Rev. Stat. Adv. Legis. Serv. 200 (specifying that undue hardship for purposes of "pregnancy, childbirth, or related medical conditions . . . means an action requiring significant difficulty or expense" and providing a number of factors to consider including the "cost of the accommodation needed[,] the financial resources of the facility[,] and "the number of persons employed at the facility"); NEB. REV. STAT. ANN. § 48-1102(11) (indicating that employers were not required to accommodate that "which the covered entity can demonstrate require significant difficulty or expense thereby posing an undue hardship upon the covered entity" and providing factors to guide the undue hardship analysis).

³¹⁵ See 775 ILL. COMP. STAT. ANN. § 5/2-102(J)(4) (stating that it is unlawful "[f]or an employer to require an employee, including a part-time, full-time, or probationary employee, to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the known medical or common conditions related to the pregnancy or childbirth of an employee" but providing that reasonable accommodations "may include" leave such as "time

request leave as an accommodation under any of these seven statutes, neither the availability nor the duration of the leave is guaranteed in any of them.³¹⁶ Indeed, some employees may prefer an accommodation that allows them to continue to work, thus, providing them with continued wages and permitting them to preserve any leave available to them until the birth of their child.³¹⁷

Moreover, these pregnancy accommodation statutes apply only to women and, thus, are contrary to the gender-neutral purposes and equality goals of the FMLA.³¹⁸ As previously discussed, many of the original advocates of a national leave bill opposed both gender-specific legislation, as well as legislation limited to pregnancy, expressing concerns that both would deter employers from hiring women.³¹⁹ These original advocates also strove to change traditional, societal norms that women bear primary responsibility for child rearing, believing this stereotype created “gender-based barriers to the hiring, retention, and promotion of women in the workplace.”³²⁰ While it is true that these statutes provide more protection for women during times of pregnancy, they also lend credibility to the growing criticism that “the statute has not accomplished the goals with respect to combating stereotypes or discrimination against women in the workplace.”³²¹

Finally, after examining all of the current state leave laws, it is clear that there is no uniform approach to family leave. These local

off to recover from conditions related to childbirth; and leave necessitated by pregnancy, childbirth, or medical or common conditions resulting from pregnancy or childbirth.”); 2019 SB18 Ky. Rev. Stat. Adv. Legis. Serv. 200 (mandating that an “employee shall not be required to take leave from work if another reasonable accommodation can be provided” but stating that a reasonable accommodation “may include” “time off to recover from childbirth”).

³¹⁶ See 775 ILL. COMP. STAT. ANN. 5/2-102(J); 2019 SB18 Ky. Rev. Stat. Adv. Legis. Serv. 200; NEB. REV. STAT. ANN. § 48-1107.02(2)(d); N.D. CENT. CODE § 14-02.4-03(2); S.C. CODE ANN. § 1-13-30(T)(2)(b); UTAH CODE ANN. § 34A-5-106(1)(g); W. VA. CODE ANN. § 5-11B-2(1).

³¹⁷ See Stephanie A. Pisko, *Towards Reasonable: The Rise of State Pregnancy Accommodations Laws*, 23 MICH. J. GENDER & L. 147, 159–60 (2016).

³¹⁸ See 29 U.S.C.S. §§ 2601(a)(5)–(6), (b)(5) (2020).

³¹⁹ See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (explaining that “[b]y creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.”); see also Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk about Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 94 (2009) (disclosing that “women’s groups in Washington could have gotten maternity leave a decade before the passage of the Family and Medical Leave Act in [1993], but refused to support legislation that contained only maternity leave. Instead, they fought on for ten more years, insisting that the right to maternity leave be folded into the right of all workers to take leave for their own health reasons.” (footnote omitted)).

³²⁰ *Hibbs*, 538 U.S. at 734 n.10.

³²¹ See Selmi, *supra* note 6, at 67.

laws create wide disparity in benefits and protection today, just as they did when the FMLA was enacted. Admittedly, there are a growing number of states that have either reduced or completely eliminated the small business exception in their local legislation.³²² While this trend is encouraging, it does not yet reflect the majority approach.³²³ Accordingly, there are still far too many families who work in states that have not adjusted the FMLA's minimal coverage, leaving many of these workers without any legal entitlement to family and medical leave.

C. More than Twenty-five Years with the FMLA: Reconsidering Fifty

For more than twenty-five years, Congress has retained the same small business exception in the FMLA. This is true even though this small business exception was selected by Representative Roukema on an admittedly arbitrary basis.³²⁴ Despite this unlikely beginning, Roukema's arbitrary proposal nevertheless prevailed and was enacted into the FMLA. Thus, even though the FMLA provides only minimal benefits, consisting of unpaid leave, health insurance, and job protection, these benefits continue to be unavailable today to workers employed by private businesses with less than fifty employees.³²⁵

It is true that multiple bills have been filed in Congress over the years to lower the FMLA's small business exception. The most common legislative proposal would reduce the small business exception to exempt employers with less than twenty-five workers.³²⁶

³²² See *supra* note 284–85 and accompanying text.

³²³ See *id.*

³²⁴ See *supra* note 153–54, 157–58, and accompanying text.

³²⁵ See 29 U.S.C. § 2611(4)(A) (2009).

³²⁶ See, e.g., Family and Medical Leave Enhancement Act of 2011, H.R. 1440, 112th Cong. § 2 (2011) (amending the term employer in the FMLA “by striking ‘less than 50’ each place it appears and inserting ‘fewer than 25’”); Family and Medical Leave Enhancement Act of 2009, H.R. 824, 111th Cong. § 2 (2009) (amending the FMLA “by striking ‘less than 50’ each place it appears” in the section defining the term employer and inserting “fewer than 25”); Right Start Act of 2003, S. 18, 108th Cong. § 522 (2003) ((amending the FMLA by striking fifty each place it appears in the section defining the term employer and inserting twenty-five); Family and Medical Leave Expansion Act, S. 304, 108th Cong. § 202 (2003) (amending the FMLA by striking fifty each place it appears in the section defining the term employer and inserting twenty-five); Family and Medical Leave Enhancement Act of 2003, H.R. 956, 108th Cong. § 2 (2003) (amending the FMLA by striking “less than 50” each place it appears in the section defining the term employer and inserting “fewer than 25”); Family and Medical Leave Expansion Act, S. 3141, 107th Cong. § 202 (2002) (amending the FMLA by striking fifty each place it appears in the section defining the term employer and inserting twenty-five); Family and Medical Leave Fairness Act of 1999, S. 201, 106th Cong. § 3 (1999) (amending the FMLA by striking fifty each place it appears in the section defining the term employer and inserting twenty-five); Family and Medical Leave Improvements Act of 1999, H.R. 91, 106th Cong. § 2

None of these proposals have been approved by Congress. For instance, both Representative Clay and Senator Dodd sponsored such legislation in 1997, 1999, and early in the 2000s.³²⁷ They advocated that such an amendment was appropriate based on the results of the study, conducted by the Family and Medical Leave Commission, which demonstrated that “[n]ot only are the costs to employers of complying with the law negligible, but in many instances the FMLA has led to improvements in employer operations [I]n short, we have now had sufficient experience under the law to justify extending the law to employers of 25 or more employees.”³²⁸ Likewise, President Clinton challenged Congress to enact similar legislation in his State of the Union Address in 1999, arguing that such an amendment would extend the FMLA to at least 10 million more workers.³²⁹ Again, Congress failed to do so. President Obama also supported expanded family leave legislation, but legislation that would have reduced the small business exception was not enacted.³³⁰

In the past twenty-five years, the states have not reached a consensus on the appropriate size of the small business exception when adopting local family leave legislation. Although twenty states and the District of Columbia have adopted smaller business exceptions for their family leave legislation, twenty-four states have not.³³¹ This hodgepodge approach to family leave causes confusion and inconsistency, particularly for multi-state companies, resulting

(1999) (amending the FMLA by striking fifty each place it appears in the section defining the term employer and inserting twenty-five); Family and Medical Leave Fairness Act of 1997, S. 183, 105th Cong. § 3 (1997) (amending the FMLA by striking fifty each place it appears in the section defining the term employer and inserting twenty-five); Family and Medical Leave Improvements Act of 1997, H.R. 109, 105th Cong. § 2 (1997) (amending the FMLA by striking fifty each place it appears in the section defining the term employer and inserting twenty-five).

³²⁷ Family and Medical Leave Expansion Act, S. 304, 108th Cong. § 202; Family and Medical Leave Expansion Act, S. 3141, 107th Cong. § 202; Family and Medical Leave Fairness Act of 1999, S. 201, 106th Cong. § 3; Family and Medical Leave Improvements Act of 1999, H.R. 91, 106th Cong. § 2; Family and Medical Leave Fairness Act of 1997, S. 183, 105th Cong. § 3; Family and Medical Leave Improvements Act of 1997, H.R. 109, 105th Cong. § 2.

³²⁸ 143 CONG. REC. E57 (daily ed. Jan. 7, 1997) (statement of Rep. Clay) (introducing the Family and Medical Leave Improvements Act of 1997, H.R. 109); *see also* 145 CONG. REC. S626 (daily ed. Jan. 19, 1999) (statement of Sen. Dodd) (introducing the Family and Medical Leave Fairness Act of 1999 and explaining that “[t]he report’s conclusions are clear—the [FMLA] is helping to expand opportunities for working Americans while at the same time not placing any undue burden on employers”).

³²⁹ PRESIDENT WILLIAM JEFFERSON CLINTON STATE OF THE UNION ADDRESS (Jan. 19, 1999), <https://clintonwhitehouse4.archives.gov/WH/New/html/19990119-2656.html> [<https://perma.cc/9FLN-E9MX>].

³³⁰ *See* Family and Medical Leave Enhancement Act of 2011, H.R. 1440, 112th Cong. § 2 (2011); Family and Medical Leave Enhancement Act of 2009, H.R. 824, 111th Cong. § 2; *see also* Kitchen, *infra* note 359, at 307–12 (discussing various legislative attempts to expand family and medical leave during President Obama’s Administration and the reasons for their failure).

³³¹ *See supra* note 268, 284 and accompanying text.

in coverage questions that vary from worker to worker, and depend on a worker's location and the underlying basis for the leave.³³² Finally, while a growing number of states have lowered the small business exemption when enacting local legislation more narrow than the FMLA, such as Pregnancy Accommodation statutes, this admittedly does not guarantee access to leave.³³³ Given the states' failure to reach a consensus over the appropriate size of the small business exemption, the only way to uniformly protect American workers is through legislation enacted at the federal level. Nonetheless, up until this year, Congress has been unable to do so.

The pandemic apparently provided Congress with the necessary motivation to reconsider the FMLA's small business exemption; however, even this amendment was temporary. On March 18, 2020, Congress enacted the Families First Coronavirus Response Act ("FFCRA").³³⁴ The FFCRA included the Emergency Family and Medical Leave Expansion Act ("EFMLEA"), which expanded certain FMLA benefits to workers employed at businesses with less than 500 workers.³³⁵ Among other things, the EFMLEA provides expanded leave when an employee is unable to work or telework due to caring for a minor child if their school or place of childcare closed due to the COVID-19 emergency.³³⁶ Under the terms of the EFMLEA, these expanded benefits expire, however, on December 31, 2020.³³⁷

The Congressional Record in March of 2020 documents how the FMLA failed many American workers during the pandemic. Specifically, Congressional Representatives shared numerous personal stories from American workers who were forced to make difficult choices about conflict between their work, family, and health issues caused by the coronavirus. For instance, Senator Murray described a letter she received from Chris, a grocery worker in Seattle, who wrote: "It's an awful decision[.] Go to work and put your life at risk, or lose your job, lose your income, and lose your insurance."³³⁸ Another letter was received from a pastor in Washington who wrote expressing concerns from parents "with school-aged children who worr[y,] [w]hat if they call off school? I don't

³³² See Lisa Nagele-Piazza, *Paid-Sick-Leave Laws Continue to Give Employers Headaches*, SHRM (Apr. 15, 2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/paid-sick-leave-laws-continue-to-give-employers-headaches.aspx> [https://perma.cc/67J5-VRAL].

³³³ See *supra* notes 298, 307, 314–17 and accompanying text.

³³⁴ See Families First Coronavirus Response Act, 134 Stat. 178 § 3102(b) § 110(a)(1)(B) (2020).

³³⁵ See *id.*

³³⁶ See *id.* at § 3102(b) § 110(a)(2)(A).

³³⁷ See *id.* at § 3102(a)(1).

³³⁸ See 166 CONG. REC. S1793 (daily ed. Mar. 18, 2020) (statement of Sen. Murray).

have anyone to care for the kids.”³³⁹ Still, other constituents wrote about their own health concerns, explaining that a husband and wife had “autoimmune diseases, but her husband’s job is not allowing him to work from home.”³⁴⁰ These difficult choices, “between the job [workers] need and the family they love” are the exact types of choices that the FMLA hoped to diminish.³⁴¹ Yet, in the middle of a global health crisis, when all American workers most needed flexibility and job security, the FMLA failed to provide it.

Knowing that the FMLA’s small business exemption excludes millions of workers from coverage, Congress enacted the EFMLEA to protect different workers by applying its provisions to private employers with less than 500 employees.³⁴² Thus, the EFMLEA arguably should apply portions of the FMLA to some small employers for the first time, namely, those employers with less than fifty employees. However, small employers with less than fifty employees still might qualify for an exemption under the EFMLEA if they can establish that the statute’s “requirements would jeopardize the viability of the business.”³⁴³ So, while the FMLA automatically exempts all private employers with less than fifty workers regardless of financial viability, the EFMLEA’s approach is more narrow, and requires the employer to establish that it qualifies for an exemption.³⁴⁴

Sadly, early indications are that the EFMLEA’s effectiveness has been limited both by implementing regulations promulgated by the Department of Labor, as well as a lack of an immediate enforcement mechanism when employers refuse to comply with the statute.³⁴⁵ By

³³⁹ See *id.* at S1792–93.

³⁴⁰ See *id.* at S1792.

³⁴¹ See OFFICE OF FED. REG., STATEMENT ON SIGNING THE FAMILY AND MEDICAL LEAVE ACT OF 1993, 29(5) WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 143, 144 (Feb. 5, 1993); see also 29 U.S.C.S. §§ 2601(b)(1)–(2) (explaining that the purposes of the FMLA are “to balance the demands of the workplace with the needs of families” and “to entitle employees to take reasonable leave for medical reasons, . . . and for the care of a child, spouse, or parent who has a serious health condition”).

³⁴² See EFMLEA § 110(a)(1)(B).

³⁴³ See *id.* § 110(a)(3)(B).

³⁴⁴ See *id.*

³⁴⁵ See, e.g., 29 C.F.R. § 826.40 (2020) (providing interpretation and guidance for the EFMLEA’s statutory exemption for private businesses with less than 50 employees and defining what constitutes sufficient requirements that “jeopardize the viability of the business”); see also Ben Penn, *Paid-Leave Promise Turns ‘Mirage’ for Most Workers in Pandemic*, BLOOMBERG L. (May 27, 2020, 6:01 AM), <https://news.bloomberglaw.com/daily-labor-report/paid-leave-promise-turns-mirage-for-most-workers-in-pandemic> [<https://perma.cc/V26P-BAR8>]; Sarah Jane Glynn, *Coronavirus Paid Leave Exemptions Exclude Millions of Workers from Coverage*, CTR. FOR AM. PROGRESS (Apr. 17, 2020, 5:00 AM),

July of 2020, over 45 million Americans had filed new claims for unemployment benefits during the pandemic,³⁴⁶ as significant numbers of employers laid off workers rather than placed them on leave during this time under the EFMLEA.³⁴⁷ Moreover, there are growing health concerns for workers who have exhausted their unemployment benefits and remain unemployed.³⁴⁸ Given these exigent circumstances, Congress should acknowledge both the current failures of the EFMLEA, as well as the long-standing coverage deficiencies in the FMLA. Congress could rectify both by amending the FMLA on a permanent basis, thereby providing job stability and continued health coverage to more working Americans.

A modest reform proposal would decrease the FMLA's small business exception to private employers with less than fifteen employees. Reducing the FMLA's small business exception in this way would expand the coverage of the statute to more workers, while simultaneously also excluding the truly small employers who may find its provisions challenging. If such an amendment were adopted, approximately sixteen million additional workers would be entitled to the benefits of the statute.³⁴⁹

<https://www.americanprogress.org/issues/economy/news/2020/04/17/483287/coronavirus-paid-leave-exemptions-exclude-millions-workers-coverage/> [https://perma.cc/AK44-2VNS].

³⁴⁶ See Paul Davidson, *Layoffs: 1.5M workers file for unemployment amid COVID-19 even as states let businesses reopen*, USA TODAY, <https://www.usatoday.com/story/money/2020/06/18/unemployment-claims-another-1-5-m-file-jobless-claims-amid-covid-19/3210774001/> [https://perma.cc/EB3U-WWJX] (last updated Jun. 18, 2020, 2:38 PM); Lance Lambert, *45 Million have filed for unemployment during the pandemic—greater than the combined population of 23 states*, FORTUNE (Jun. 18, 2020, 9:16 AM), <https://fortune.com/2020/06/18/45-7-million-have-filed-unemployment-during-the-pandemic-greater-than-the-combined-population-of-23-states/> [https://perma.cc/4YCY-TAQN].

³⁴⁷ See, e.g., Taylor Borden et al., *The coronavirus outbreak has triggered unprecedented mass layoffs and furloughs. Here are the major companies that have announced they are downsizing their workforces*, BUS. INSIDER (Oct. 8, 2020, 5:53 PM), <https://www.businessinsider.com/coronavirus-layoffs-furloughs-hospitality-service-travel-unemployment-2020> [https://perma.cc/M59A-G396]; see also Michael S. Pepperman & Ivo J. Becica, *The Pandemic Hits the Payroll: Employer Options for Cutting Costs and Staying Compliant in the Time of COVID-19*, HR LEGALIST (Mar. 31, 2020), <https://www.hrlegalist.com/2020/03/the-pandemic-hits-the-payroll-employer-options-for-cutting-costs-and-staying-compliant-in-the-time-of-covid-19/> [https://perma.cc/8F58-VQBS].

³⁴⁸ See Maggie Cordish, *The conservative case for paid family leave*, HILL (Jul. 16, 2020, 6:30 PM), <https://thehill.com/opinion/healthcare/507717-the-conservative-case-for-paid-family-leave> [https://perma.cc/W73K-6SKK]; see also Jennifer Liu, *Coronavirus relief policies kept 10 million Americans out of poverty. They're Set to Expire in July*, CNBC MAKE IT (Jul. 9, 2020, 12:10 PM), <https://www.cnbc.com/2020/07/09/coronavirus-relief-that-kept-10-million-out-of-poverty-expires-in-july.html> [https://perma.cc/6Q29-M838].

³⁴⁹ See *2017 SUSB Annual Data Tables by Establishment Industry*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html#> [https://perma.cc/482Y-X4SE]; 2017 Statistics of U.S. Businesses Annual Data, Table for Small Employment Sizes less than 500 Employees, available at https://www2.census.gov/programs-surveys/susb/tables/2017/us_state_naicssector_small_emplsize_2017.xlsx.

This approach also would create consistency between the FMLA and the small business exemption found in Title VII and other modern employment discrimination statutes.³⁵⁰ Additionally, lowering the FMLA's small business exemption to fifteen workers would be faithful to the original concessions made by family leave supporters.³⁵¹ As previously explored in this article, the proposed family leave bills submitted by Representatives Schroeder and Clay, as well as Senator Dodd, in 1986 and 1987, contained a small business exemption, applying to private employers with less than fifteen employees, that was modeled on and consistent with the exemption found in Title VII.³⁵²

Moreover, such consistency between the FMLA and Title VII is appropriate given the shared gender equality goals in both statutes.³⁵³ Specifically, both the FMLA and Title VII seek to diminish gender discrimination in the workplace, albeit by employing different methods.³⁵⁴ While Title VII openly prohibits employers from discriminating against their workers on the basis of their sex in the terms and conditions of their employment, the FMLA seeks to achieve gender equality more subtly by creating gender-neutral parental leave.³⁵⁵ As the Supreme Court explained in *Hibbs*, such

³⁵⁰ See Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1197–1200 (2006) (exploring the historical development of the small business exemption in employment laws and summarizing their primary justifications).

³⁵¹ See *supra* notes 83–89, 122–30, 133–36 and accompanying text.

³⁵² See *id.*

³⁵³ See, e.g., Boyd Rogers, *Individual Liability Under the Family and Medical Leave Act of 1993: A Senseless Detour on the Road to a Flexible Workplace*, 63 BROOKLYN L. REV. 1299, 1305–1307 (1997) (concluding that the FMLA “was grounded in the same soil as other federal antidiscrimination statutes. Similar to the federal prohibitions against employment discrimination based on race, gender, religion, disability and national origin, the new statute was conceived and designed to protect working women from losing their jobs, benefits and career advancements when family duties called.” (footnote omitted)); Sandra F. Sperino, *Under Construction: Questioning Whether Statutory Construction Principles Justify Individual Liberty Under the Family and Medical Leave Act*, 71 MO. L. REV. 71, 98–99 (2006) (observing that “it is difficult to construct an argument denying that the FMLA shares a similar purpose to Title VII”).

³⁵⁴ See *Coleman v. Ct. App. of Md.*, 566 U.S. 30, 47 (2012) (Ginsburg, J., dissenting) (maintaining that “[t]he FMLA’s purpose and legislative history reinforce the conclusion that the FMLA, in its entirety, is directed at sex discrimination”); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (observing that the FMLA “aims to protect the right to be free from gender-based discrimination in the workplace” regarding parental leave); 42 U.S.C. § 2000e–2(a)(1) (2018) (expressing that Title VII prohibits sex discrimination in terms of a workers’ employment).

³⁵⁵ Compare 42 U.S.C. § 2000e–2(a)(1) (2018) (forbidding an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex”), with 29 U.S.C.S. § 2601(a)(6) (finding that “employment standards that

gender-neutral leave was intended to shift stereotypical notions “that only women are responsible for family caregiving.”³⁵⁶ Thus, the Court explained, “[b]y creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.”³⁵⁷

Yet, this moderate reform proposal would still leave approximately twenty million workers without access to the job protections and health insurance coverage mandated by the FMLA.³⁵⁸ For this reason, many scholars and other reform groups have lobbied for more significant reform to the FMLA’s small business exemption, including that it be eliminated entirely.³⁵⁹ Advocates for universal coverage for all Americans emphasize the reality that most workers will inevitably fulfill the role as caretaker sometime in their careers.³⁶⁰ Moreover, displacing workers from the workforce impacts those workers professionally, creating wage gaps and loss of seniority, and making it more challenging for them to reenter the workforce.³⁶¹

If the pandemic has taught us anything, it has shown us that workers need access to a flexible and sustainable leave program. Millions of Americans were quarantined at home during the pandemic for various reasons.³⁶² On the one hand, over one hundred

apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender”).

³⁵⁶ See *Hibbs*, 538 U.S. at 737.

³⁵⁷ *Id.*

³⁵⁸ See 2017 SUSB Annual Data Tables by Establishment Industry, *supra* note 349.

³⁵⁹ See, e.g., Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 352 (1993); Rona Kaufman Kitchen, *Missing the Mark: How FMLA’s Bonding Leave Fails Mothers*, 31 HOFSTRA LAB. & EMP. L.J. 303, 325 (2014); Frans Pennings & Paul M. Secunda, *Towards the Development of Governance Principles for the Administration of Social Protection Benefits: Comparative Lessons from Dutch and American Experiences*, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 313, 392 (2015). See also HELENE JORGENSEN & EILEEN APPELBAUM, EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 1 (2014). See generally Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN L. REV. 537, 576 (1998) (concluding that “[s]pecial treatment of small firms has little beneficial effect on society and a host of serious bad effects”).

³⁶⁰ See Kitchen, *supra* note 359, at 325.

³⁶¹ See generally Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 21–23 (2005) (explaining why “[t]he ‘career costs’ to women of interrupting work to care for children and other family members are considerable. Empirical researchers who have compared the wages of women workers with and without children estimate a wage penalty for having children of between 10% and 15%; this wage differential is known as the ‘family gap.’” (footnote omitted)).

³⁶² See Sarah Mervosh et. al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home->

million Americans tested positive for the coronavirus, and these individuals were instructed by medical professionals to quarantine at home during their recovery.³⁶³ From a public health standpoint, requesting that workers stay home during times of illness mitigates the risk of spreading contagious conditions to others.³⁶⁴ Yet to do so, workers need access to medical or sick leave. On the other hand, many workers who did not have confirmed cases of the coronavirus were also required to quarantine at home in compliance with stay at home orders.³⁶⁵ With schools and nonessential businesses closed, many workers struggled with unprecedented caregiving responsibilities: caring for both children and family members with serious health conditions.³⁶⁶ While these caregiving responsibilities are not new by any means, the pandemic has increased the visibility and frequency of these responsibilities.³⁶⁷ Here again, in order for workers to balance their responsibilities between work and family, not only during a national emergency but also in everyday life, they need access to family leave.

II. CONCLUSION

The Family and Medical Leave Act's eight-year legislative journey resulted in extensive compromises on the floors of both Congressional chambers. One of the most striking compromises reached pertained to the FMLA's small business exemption: a compromise which deviated from historical trends and definitions found in prior foundational legislation including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990. Although the size of the FMLA's small business exemption was arrived at arbitrarily,

order.html [https://perma.cc/9G6Z-6RME] (last updated Apr. 20, 2020); Mayo Clinic Staff, *COVID-19 quarantine, self-isolation and social distancing*, MAYO CLINIC (Aug. 6, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-quarantine-and-isolation/art-20484503> [https://perma.cc/AA73-UNP3].

³⁶³ See *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_totalcases [https://perma.cc/QTH4-PBSB] (last updated Dec. 29, 2022); Mayo Clinic Staff, *supra* note 362.

³⁶⁴ See *What to Do if You Are Sick*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html> [https://perma.cc/M35H-RFP6].

³⁶⁵ See Mervosh et. al., *supra* note 362.

³⁶⁶ See Diana Boesch & Katie Hamm, *Valuing Women's Caregiving During and After the Coronavirus Crisis*, CTR. FOR AM. PROGRESS (June 3, 2020, 3:15 PM), <https://www.americanprogress.org/issues/women/reports/2020/06/03/485855/valuing-womens-caregiving-coronavirus-crisis/> [https://perma.cc/6HK8-3GMB].

³⁶⁷ See *id.*

Congress has never permanently amended it during the twenty-five years since its enactment. This is true despite the coverage gaps in the statute that render the FMLA inapplicable to millions of Americans.

However, the recent global COVID-19 pandemic has emphasized the precarity faced by millions of American workers who remain unprotected by its provisions. The statutory benefits of the FMLA, including access to job-protected leave and health insurance coverage during that leave, are critical to workers. They not only are crucial as we navigate our way through this global health crisis, but they also are crucial for workers and families to achieve a healthy balance in everyday life.