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Family and Medical Leave Act Reform: Is Paid Leave the Answer

Eric Daniel

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FAMILY AND MEDICAL LEAVE ACT REFORM: IS PAID
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I. INTRODUCTION

Shannon, a thirty year old woman living alone in Ohio, is a cashier at a large shopping center. She has worked there for two years and anticipates a promotion to Assistant Manager within three months. She has little money saved and is eight months pregnant. When Shannon gives birth the following month to Jessica, she is granted leave under the Family and Medical Leave Act [FMLA]. The new mother does not have enough money to take three months off of work and is forced to return to the store after only three weeks. Jessica's earliest bonding moments are spent in an unfamiliar home with little supervision as the neighborhood babysitter takes care of her and five other children by turning on a television and talking on the phone with her boyfriend.

John, an eighty-seven year old man living in Idaho, has been working at the local bowling alley for seven years to help pay the bills. Social Security checks are not enough. When John has a heart attack, he is granted leave under the FMLA. One month later, he has spent all of the money in his savings account and knows that he will be unable to pay next month's bills. His slow recovery prevents his return to work and he soon falls far behind on his rent payments. John is evicted a few months later.

Lindsay, a thirty-five year old woman living in Minnesota, has been living with her mother for two years to try to save money to go to college. She has been working at a local fast food restaurant where she is given no benefits. When Lindsay's mother is diagnosed with cancer, Lindsay knows that taking leave under the FMLA will be financially impossible because her mother will be relying on her to pay the bills until she gets better. Lindsay's mother dies alone in her home two months later while Lindsay is taking trash bags of soggy french-fries out to the dumpster.

Since these three people were only eligible for leave under the FMLA, a federal *unpaid* leave program, they were unable to afford time away from work. If they had been living in California and were eligible for the state's new paid leave program, the results may have been dramatically different. Shannon's baby may have been able to begin her life without a feeling of abandonment. Robert may have had enough money to fully recover, allowing him to return to work and avoid eviction. Lindsay may have been able to spend time comforting her dieing mother instead of comforting a customer that got the wrong sandwich.¹

¹The names "Shannon," "John," and "Lindsay" are fictional and are meant to represent individuals involved in common situations that may arise under the Family and Medical Leave Act.

Section II of this Note will discuss the current status of the FMLA² and the drawbacks of having an unpaid federal leave program. It will explore the inability of the current federal program to achieve the fundamental goal of enabling workers to take time off of work to bond with a newborn child, to tend to an ill relative, or to allow time for recuperation of the employee's own serious health condition. In discussing this shortfall, this Note will focus on the impractical expectation that an employee in one of these situations will be able to spend up to three months without pay at a time when, arguably, more money is needed to overcome adversity.

In examining the current weaknesses in the FMLA, Section III will review the paid leave programs that other countries have implemented, as well as the comprehensive family leave law that was recently adopted in California.³ In discussing these paid leave programs, consideration will be given to the perceived and actual economic impact on businesses that have employees who qualify for the programs.

After considering the paid leave programs that have been implemented elsewhere, Section IV will include suggestions on ways to reform the FMLA by creating financial protection for qualified employees while avoiding the negative economic impact on businesses that a paid leave program could introduce. These suggestions will be made by outlining an employee-funded program that will not require a burdensome federal commitment. By putting the cost of the program into the hands of the employees that seek protection, employer opposition to such an act should be minimal.

In conclusion, Section V of this Note will discuss methods of effectively avoiding the abuse of this program that most business owners fear. It will argue the necessity of establishing more stringent guidelines for employee qualification under the FMLA through the use of a "bright line" rule that will leave little room for judicial interpretation. By establishing a higher threshold requirement for qualification in the paid leave program, employers will rest assured that abuse of the system will be unlikely.

II. THE FAMILY AND MEDICAL LEAVE ACT OF 1993: FAILED EXPECTATIONS

A. *Current Status of the Law*

The Family and Medical Leave Act of 1993 was adopted after eight years of Congressional debate, thirteen votes, and two vetoes by former President George

²See 29 U.S.C. § 2601 (1993). Although this Note will not discuss the Constitutionality of the Family and Medical Leave Act, it is important to note that the issue of whether the creation of the FMLA fit within Congress's legislative powers pursuant to § 5 of the 14th Amendment of the Constitution of the United States was recently addressed in *Nevada Dept. of Human Resources v. Hibbs*, 123 S. Ct. 1972 (U.S. 2003). With Justices Scalia, Kennedy, and Thomas voicing a firm dissent, the Court held that the creation of the FMLA did not exceed Congress's legislative powers because the Act is "congruent and proportional to its remedial object." *Id.* at 1984. In reaching this conclusion, the Court quoted the language of the landmark case of *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), which stated that Congressional legislation should be upheld if it can "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 1984.

³See S.B. 1661, 2002 Leg. (Cal. 2002).

H.W. Bush.⁴ The Act provides up to twelve weeks of job-protected leave for eligible employees.⁵ As the first major bill signed by former President Bill Clinton, the purpose of the Act was to:

[B]alance the demands of the workplace with the needs of families...to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.⁶

Participation in the FMLA requires specific qualifications for both the employer and the employee. The FMLA covers private employers with fifty or more employees.⁷ The employees must work within seventy-five miles of each other for the employer to be covered.⁸ Thus, employers that have numerous sites that are far apart may not be required to offer FMLA protection. The Family and Medical Leave Act also covers public employers, including federal, state, city, and local agencies and schools.⁹ As a public employer, the fifty-employee requirement does not apply.¹⁰

Even if an employer meets the requirements for FMLA coverage, an employee will only be eligible to obtain coverage if she meets additional criteria. An employee will not be eligible for FMLA coverage unless she has worked for the employer for at least twelve months¹¹ and has worked at least 1,250 hours during the twelve months immediately preceding the start of the leave.¹² A vast amount of case law has been used to refine these basic requirements to determine who is an “eligible employee” under the FMLA.¹³ These initial requirements have been implemented to

⁴ROBERT M. SCHWARTZ, *THE FMLA HANDBOOK: A UNION GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 13* (Work Rights Press 2001) (1996).

⁵*See* 29 U.S.C. § 2612(a)(1) (1993).

⁶29 U.S.C. § 2601(b)(1), and (b)(2).

⁷29 U.S.C. § 2611(4)(A)(i).

⁸29 U.S.C. § 2611(2)(B)(ii).

⁹29 U.S.C. § 2611(4)(A)(iii).

¹⁰*See generally* U.S. Department of Labor, *Families and Employers in a Changing Economy* 3, ¶ 1 (2002), at <http://www.dol.gov/esa/regs/compliance/whd/fmla/summary.htm> (on file with author).

¹¹*See* 29 U.S.C. § 2611(2)(A)(i) (1993).

¹²29 U.S.C. § 2611(2)(A)(ii).

¹³*See generally* Jolliffe v. Mitchell, 971 F. Supp. 1039 (W.D. Va. 1997) (when an employee is reappointed to the same position by an elected official, the employee does not lose FMLA eligibility); Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1 (1st Cir. 1998) (being a current employee is not a requirement to assert FMLA rights); Santos v. Shields Health Gp., 996 F. Supp. 87 (D. Mass. 1998) (FMLA covers those currently unable to perform essential functions of the job and those who are unable to perform job duties after treatment for serious health conditions); Voskuil v. Environmental Health Ctr.-Dallas, 1997 WL 527309 (N.D. Tex. 1997) (52-week time period for calculating FMLA eligibility begins on the first day of FMLA back and not on the anniversary of the beginning of employment).

protect only employees that have worked for an employer for a substantial period of time.¹⁴

An employee will be eligible for FMLA leave for the following reasons:

1. Because of the birth of a son or daughter¹⁵ of the employee and in order to care for such son or daughter;
2. Because of the placement of a son or daughter with the employee for adoption or foster care;
3. In order to care for the spouse,¹⁶ or a son, daughter, or parent, of the employee, if such spouse, son, daughter or parent has a serious health condition;¹⁷
4. Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.¹⁸

The fourth prong, which entails medical leave, includes “inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment¹⁹ by a health care provider.”²⁰ Any one of these requirements will be sufficient to obtain leave.

¹⁴Individual states generally have their own criteria for family leave qualification. However, most states have requirements that are similar to the Family and Medical Leave Act. For example, California has the same, twelve month, 1,250 hour requirement for qualification that the FMLA creates. *See generally*, California Government Code § 12945.2(a). State requirements, like California’s, generally dictate that leave taken by an employee of the state pursuant to the state leave act shall run concurrently with FMLA leave. *See generally*, California Government Code § 12945.2(s). The scope of qualification for unpaid state leave programs, however, exceeds the scope of this Note.

¹⁵“Son or daughter” includes biological, adopted, foster, step child, ward, and child of a person standing *in loco parentis*, provided that the individual is under [eighteen] years of age or is any age if incapable of self-care due to mental or physical disability. *See* D.O.L. Reg. 29 C.F.R. § 825.113.

¹⁶A “spouse” is generally defined based on each state’s law. Thus, a “spouse” could be defined to include common law marriages if the state recognizes such a marriage. However, unmarried domestic partners generally do not fit the definition of “spouse.” *See* D.O.L. Reg., 29 C.F.R. § 825.113(a).

¹⁷“Serious health condition” means an illness, injury, impairment, or physical or mental condition that involves: (1) [a]ny period of incapacity or treatment in connection with, or consequent to, inpatient care in a hospital, hospice, or residential medical care facility; (2) [a]ny period of incapacity requiring absence from work, school, or other regular daily activities, of more than [three] calendar days, that also involves continuing treatment by a health care provider; (3) [c]ontinuing treatment by a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than [three] calendar days; or (4) [p]renatal care. *See* D.O.L. Reg. 29 C.F.R. § 825.114.

¹⁸29 U.S.C. § 2612(a)(1)(A)-(D).

¹⁹“Continuing treatment” is defined as “two or more visits to, or ongoing supervision by, a health care provider.” D.O.L. Reg., 29 C.F.R. § 825.114.

²⁰29 U.S.C. § 2611(11)(A)-(B).

B. Drawbacks of Unpaid Leave

The majority of eligible employees in the United States are unable to take advantage of the FMLA to tend to the personal emergencies that frequently arise. A study by the Commission on Family and Medical Leave recognized the relatively low number of eligible employees that could handle the financial reality of twelve weeks without a paycheck.²¹ This study found that 63.9% of eligible employees who needed to take leave could not afford the loss of wages that accompanied FMLA leave.²² The financial inability of most Americans to take unpaid leave through the FMLA indicates that its general purpose, "...to balance the demands of the workplace with the needs of families,"²³ is not being achieved. In reality, the option of unpaid leave still allows the demands of the workplace to surpass the needs of families.

It is also necessary to note that the findings of the Family and Medical Leave Act intended for the Act to protect American families, which have been shaped dramatically by changes in the workforce. Specifically, the findings of the Act recognize that:

1. the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
2. it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing...; [and]
3. the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting.²⁴

While this language seems to indicate an intention to provide all parents with an equal opportunity to take leave from work, reality shows that there is a significantly disproportionate division of which workers are able to take advantage of an unpaid leave program.²⁵ As a result, the goals of the FMLA have only begun to approach a resolution to the concerns that prompted the movement toward increased leave rights.

²¹See U.S. Department of Labor, *Families and Employers in a Changing Economy* 5, ¶ 1 (2002), at <http://www.dol.gov/esa/regs/compliance/whd/fmla/summary.htm>.

²²*Id.*

²³See 29 U.S.C. § 2601(b)(1) (1993).

²⁴29 U.S.C. § 2601(a).

²⁵In fact, the groups of workers who are statistically least likely to take leave include women, African Americans, and employees who are given hourly wages. The middle-class and upper-class employees tend to be the ones that are able to take leave under the FMLA. See generally, Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993* (2001); see also footnote 95 (citing Joseph P. Ritz, *New Family Leave Act Doesn't Help Everybody*, BUFF. NEWS, Aug. 7, 1993, at B9, "The law divides people by class, helping those who can afford the three months without pay, and bypassing those who can't"; also citing Wendy Chavkin, *What's a Mother to Do? Welfare, Work, and Family*, 89 AM. J. PUB. HEALTH 477 (1999), "The FMLA 'disproportionately excludes' low-wage workers and women. Just 43% of workers earning less than \$20,000 per year (compared with 64% of workers earning between \$50,000 and \$75,000 per year) and slightly more than half (56%) of American working women are eligible for FMLA protection.").

III. ALTERNATIVE LEAVE OF FOREIGN COUNTRIES AND CALIFORNIA

The United States leave policy lags behind the generous paid leave programs that many foreign countries have had in place for a number of years. In fact, the United States is one of the only nations with an advanced economy to lack any paid leave provisions.²⁶ However, more than twenty states have recognized the need for paid family leave and have already begun discussions regarding the implementation of such a program in their state.²⁷ On September 23, 2002, California Governor Gray Davis signed California Senate Bill No. 1661, the first comprehensive paid leave program in United States history.²⁸

This recent paid leave adoption poses the inevitable question whether a similar paid leave provision should be implemented on a federal level. Since so many states have discussed the adoption of paid leave, the federal legislature should implement a system similar to California's. Doing so would create a uniform system and would prevent years of state legislative debate about how their paid leave provision should be implemented.

A. *Paid Leave Programs of Foreign Countries*

The United States is one of the only nations to refrain from implementing a paid leave act. In fact, 127 developed nations have national paid-leave policies.²⁹ Paid leave provisions were originally enacted in Europe nearly a century ago in the form of maternity leave. The implementation of these programs was intended to increase birthrates and lower infant mortality rates.³⁰ The wide array of European countries that have implemented paid family leave policies tends to illustrate the goal of these

²⁶See Anita U. Hatiangandi, *Paid Family Leave: At What Cost?* EMPLOYMENT POLICY FOUND., June 2000 (recognizing some form of paid leave for numerous countries, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom); see also icftu-apro.org, Asia and Pacific Labour, at <http://www.icftu-apro/aplabour> (last visited Oct. 9, 2002 – on file with author) (discussing varying levels of paid leave in Korea, India, Pakistan, Sri Lanka, Bangladesh, Israel, China, Iraq, Afghanistan, Samoa, and Thailand).

²⁷See Mark Suppenfield, *Paid Family Leave is Gaining in States*, CHRISTIAN SCIENCE MONITOR, (2002), at <http://www.csmonitor.com/2002/0806/p01s01-ussc> (last visited Oct. 9, 2002 – on file with author) (acknowledging a movement toward paid leave in twenty-three states and stating that the primary reason for this movement is an increase in the number of females in the workforce which subsequently decreases the number of people available to provide care for newborns and the elderly).

²⁸See S.B. 1661, 2002 Leg. (Cal. 2002). This bill was authored by State Senator Sheila Kuehl.

²⁹See Mary Ann Milbourn, *How the New Family Leave Law Works*, THE ORANGE COUNTY REGISTER, September 24, 2002, at Finance and Economy Section.

³⁰See Hatiangandi, *supra* note 26. The United States, however, initially invoked leave provisions to promote gender equality in workforce participation. *Id.*

countries to accept the responsibility of protecting the citizens from “cradle to grave.”³¹

Although paid leave in foreign countries was originally implemented only in the form of paid maternity leave, many countries have since adopted paid leave provisions for fathers of newborns,³² the care of an ill child,³³ spouse or parent,³⁴ or to tend to an employee’s own illness.³⁵ Although each of these countries provides unique levels of paid leave, a substantial number provide the employee with 100% of her income during the leave period.³⁶

Among the various countries that have implemented paid leave acts, there are a number of approaches that countries have developed for their citizens. In the United Kingdom, employers give a statutory maternity pay to eligible employees through the Inland Revenue.³⁷ Pregnant employees become eligible if they have been

³¹*Id.* Contrarily, the United States has a free market approach in which leave policies are typically negotiated between the employers and the employees. *Id.* Thus, the United States has not accepted a policy entitling every citizen to medical leave.

³²*Id.* at Figure 3 (noting paid paternity leave in Belgium, Denmark, Finland, France, Luxembourg, Portugal, Spain, and Sweden).

³³*Id.* (noting paid leave to care for a sick child in Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, and Sweden).

³⁴*Id.* (noting paid leave to care for a sick spouse or parent in Austria, Denmark, Germany, Ireland, Italy, Luxembourg, and Sweden).

³⁵*Id.* (noting paid leave to care for an employee’s own illness in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom).

³⁶See generally Irish Jobs.ie, *Time Off for Mum*, at <http://www.exp.ie/advice/maternity.html> (2002) (noting 100% paid maternity leave for varying lengths of time in Norway, Denmark, Portugal, France, Austria, Netherlands, Spain, Luxembourg, Germany, and Sweden); see also icftu-apro.org, *Asia and Pacific Labour*, at <http://www.icftu-apro.org/aplabour> (on file with author) (noting 100% paid maternity leave for varying lengths of time in Korea, India, Pakistan, Sri Lanka, Bangladesh, Israel, China, Iraq, Afghanistan, Samoa; additionally noting full paid leave in Thailand with an additional one-time payment beyond the woman’s salary). It is interesting to take into consideration that at the time this Note was written, the United States government was considering spending large quantities of money and additional resources to attack and reform Iraq. Government officials fueled anti-Middle East sentiment during this time by discussing how poorly the governments of Iraq, Afghanistan, and other Middle East countries treated their female citizens. While this is certainly a valid point from a domestic perspective, numerous Middle Eastern countries (including Iraq and Afghanistan) provide 100% paid maternity leave. Perhaps the money that could be spent to “reform” Middle Eastern governments should be used to implement a paid maternity leave that would allow the United States to catch up to these “uncivilized” nations.

³⁷See generally HREOC, *Valuing Parenthood-Options for Paid Parental Leave: Interim Paper 2002* (2002), (citing Department of Trade and Industry, *Work and Parents: Competitiveness and Choice* (updated November 20, 2001), available at www.dti.gov.uk/er/individual/workparents_features.htm. available at http://www.hreoc.gov.au/sex_discrimination/pml/report/sectionb.html).

employed with the employer for at least twenty-six weeks, fifteen weeks before the baby is due. They must also earn at least £67 (before tax) per week.³⁸

In Canada, the government funds an Employment Insurance Program for maternity, parental and sickness benefits. The benefit rate is calculated to be 55% of the woman's average insured earnings with a maximum of \$413 per week.³⁹ The woman must show that she has suffered a regular weekly earnings decrease of over 40% and that she has accumulated six hundred insured hours in the last fifty-two weeks.⁴⁰

The vast number of countries that have implemented varying paid leave programs indicates a global trend toward employee rights. While it may be unrealistic to expect the United States to adopt a paid program providing employees with 100% of their income during periods of family or medical leave,⁴¹ the interim steps to full paid leave that have been recently made by California seem to recognize this trend and tries to approach a middle ground toward providing financial protection to qualified employees.

B. California's Paid Leave Program

1. California Senate Bill No. 1661

California recently adopted the first comprehensive paid leave program to be implemented in the United States. California Senate Bill No. 1661, which was signed into effect on September 23, 2002 by California Governor Gray Davis, will provide up to six weeks of paid leave to employees who are "unable to work due to the employee's own sickness or injury, the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child."⁴² It will provide the same financial protection to employees that have a need to take time off work "to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child."⁴³

The Bill establishes a family temporary disability program through the state's current disability insurance program.⁴⁴ The program is meant to be entirely

³⁸*Id.* This amount is equivalent to approximately \$122 American. *See generally* <http://www.x-rates.com/calculator.html> (on file with author).

³⁹*Id.* (citing Human Rights Development Centre, *Maternity, Parental and Sickness Benefits* (updated April 8, 2002), available at www.hrdcdrhc.gc.ca/ae-ei/pubs/in201_e.shtml#Who (on file with author)).

⁴⁰*Id.*

⁴¹100% paid leave will likely cause a burdensome financial commitment which most employees and employers are not ready to accept. By implementing a leave program with only partial paid leave, the legislature will be able to avoid the shock of funding a program that will pay employees their full salary. Further, employees who are given only partial paid leave will be less likely to take advantage of the system by attempting to "milk" their time off.

⁴²*See* S.B. 1661, 2002 Leg. (Cal. 2002).

⁴³*Id.*

⁴⁴*Id.*

employee-funded and is intended to provide eligible employees with 55% of their salary, up to an annually-adjusted maximum of \$728 a week.⁴⁵ Employees will begin to pay into the fund on January 1, 2004 and can begin to take paid leave on July 1, 2004.⁴⁶

Unlike the Family and Medical Leave Act, this new law will apply to employees working in businesses with less than fifty employees.⁴⁷ Although these employees will be permitted to take the paid leave through State Disability Insurance, the employers of businesses with fifty or fewer employees will not be required to keep the employee's job position open during the leave period.⁴⁸ Thus, employees at small businesses will not enjoy the job protection during leave that is provided under the FMLA. Since businesses with less than fifty employees are required to offer paid leave through California's new program, the cost to employers if any becomes exceedingly important.⁴⁹

2. Potential Benefits of the Bill

There are numerous reasons why a state would want to implement a paid leave program. Although it is too soon to speculate exactly how many employees will take advantage of California's paid leave act, such a program will likely benefit employers, the government, and, of course, numerous workers.⁵⁰ Although employers may balk at the potential increase in taxes that they will be required to pay under a paid leave program, having such a policy will likely cause many employees to become more attached to their job.⁵¹ As a result of this increased attachment, turnover costs will be reduced significantly and employee productivity will increase.⁵² Through this increase in productivity, the increased tax burden will be justified.

⁴⁵*Id.* Employees will be expected to pay an additional \$11.23 to \$27.00 per year into the current state disability fund.

⁴⁶*Id.*

⁴⁷*See* S.B. 1661, 2002 Leg. (Cal. 2002).

⁴⁸*Id.* No provision requiring job security is added to this Bill beyond that given through the Family and Medical Leave Act. Thus, job security will not be granted to employees at small businesses and may discourage such employees from taking paid leave.

⁴⁹Generally, small businesses will feel the impact of missing employees more than large businesses. There should be a substantial amount of legislative concern about the impact on employers that have few employees since financial and staffing problems for small businesses could lead to their demise.

⁵⁰*See generally* Arindrajit Dube & Ethan Kaplan, *Paid Family Leave in California: An Analysis of Costs and Benefits at 12* (June 19, 2002), at <http://laborproject.berkeley.edu/publications/research/dube.pdf> (on file with author) (describing the benefits to families, employers, and government from legislated paid family leave).

⁵¹*Id.* at 13.

⁵²*Id.* at 14.

While employers will likely benefit from a paid leave act, the government will also experience positive results. Specifically, the addition of paid leave will encourage more people to enter, and remain in, the labor force.⁵³ As a result of this increase in labor market participation, expenditures of programs such as TANF, renter's assistance, Medicaid, and other public income maintenance programs will likely drop.⁵⁴ Further, income taxes will probably increase significantly over a longer period of time.⁵⁵ Thus, a paid leave program could substantially benefit the government over time.⁵⁶

Although employers and the government will likely benefit significantly from the addition of paid leave provisions to the FMLA, the most important beneficiaries under a paid leave program will be the employees and their family members. Specifically, the children and the elderly parents of employees taking leave will experience an improved quality of care giving and, as a result, will likely have a speedier, more complete recovery from their illnesses.⁵⁷ Thus, employees that take advantage of a paid leave act for the purpose of caring for their ill child or parent will be able to ensure the best opportunity for their loved ones to be as healthy as possible.⁵⁸

3. Criticisms of the Bill

Although California Senate Bill No. 1661 claims to create an "employee-funded" paid leave program, many business owners, who assert that they will be forced to bear a significant financial burden, fought fervently to prevent the implementation of the Bill and are greatly disappointed by its inception. In fact, prior to the Bill's passing, the California Chamber of Commerce compiled a list of nearly 700 businesses that opposed paid family leave.⁵⁹ Specifically, the Chamber of

⁵³*Id.* at 12.

⁵⁴*Id.*

⁵⁵*See generally*, Dube & Kaplan, *supra* note 50, at 12.

⁵⁶As a result of this decrease in government spending, more money could be placed into employer/employee education funds discussed extensively in note 72. Another alternative would be for the government to use the money that has been saved to subsidize the paid leave programs of the States. This subsidization will decrease the financial burden placed on employees without adding a burden to employers.

⁵⁷*See generally* Dube & Kaplan, *supra* note 50, at 12.

⁵⁸It should also be noted that an employee that is currently unable to afford to take leave for the purpose of caring for a loved one may be more likely to harbor resentment toward their place of employment. Thus, paid leave options will further decrease the likelihood of turnover, benefiting both employers and the government. Employers will be benefited because they will have a more sturdy workforce that will be able to provide consistent and effective service to customers. The government will benefit from the decrease in unemployment and the decrease in the number of people applying for and receiving welfare or other subsidizations.

⁵⁹*See* Julianne Broyles, California Chamber of Commerce Memorandum, *Coalition in Opposition to SB 1661 (Kuehl)*, August 1, 2002 (listing several hundred California businesses opposed to paid leave and reasons for the opposition to paid leave).

Commerce decried the increased expense to business owners of all sizes in California through the implementation of Senate Bill No. 1661 as a result of new taxes that would fall on the employer.⁶⁰

According to the California Chamber of Commerce, an adoption of Senate Bill No. 1661 would require an implementation of taxes on both the employee and the employer. As a result of this tax, employers will likely pay up to \$138 per worker in the first year alone.⁶¹ Estimates by the California Chamber place the total tax increase at \$3 billion, with half paid by workers and half paid by employers.⁶² With \$1.5 billion coming from employers, the concept of an “employee-funded” paid leave program is arguably just a façade.

The tax increase also may have the effect of severely damaging small businesses. Unlike the current provisions of the FMLA, there is no requirement under Senate Bill No. 1661 that the employee work for a business of fifty or more employees.⁶³ Thus, a business with only a few employees will be subject to the burdensome tax hike and could potentially suffer a more crippling economic reaction than larger businesses. This increased tax burden on smaller businesses could cause new businesses to fold under the financial pressure.

Another problem under California’s new leave act is that the act does not require an employee to work for the business for a minimum time before applying for leave.⁶⁴ Thus, a worker could be at a company for only a few days before obtaining paid leave. The employer in this situation will still be expected to pay the requisite tax established under Senate Bill No. 1661. As a result of this “loop hole,” an employee could potentially take advantage of the new system by leaving the employer with an inevitable economic burden.

IV. IMPLEMENTING PAID FAMILY AND MEDICAL LEAVE

A. Introduction

Although the paid leave program that was recently implemented in California seems to aid workers that would not have previously had the financial resources to take leave, the financial burden placed on employers through additional tax implications seems to be prohibitively expensive and fails to create a truly “employee-funded” program. For a federal paid leave program to be successful, it will be necessary to decrease the financial burden on the employers and to place this cost solely on the shoulders of the employees. A program should be implemented that will provide paid leave to certain qualified employees while mitigating the financial burden placed on employers through an entirely employee-funded system without the potential loopholes. The following section will outline reasonable requirements for such a program in an attempt to protect both the employee and the employer.

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

⁶³*See generally* S.B. 1661, 2002 Leg. (Cal. 2002).

⁶⁴*Id.*

B. Financial Protection- The Salary Cap

A federally funded paid leave program must provide an amount of the employee's wages that will allow the employee to pay basic bills. While every employee's bills will vary, a program providing 55% of the employee's salary with an annually-adjusted maximum of \$728 per week seems to be sufficient to accommodate many employee's monthly needs. California Senate Bill No. 1661 determined this to be a proper amount to provide most employees with the requisite financial protection to be able to afford to take leave to tend to family or medical needs.⁶⁵ Like the California Act, this program should provide paid leave for six weeks. This period of time will allow the employee to pay for most bills without encouraging her to take additional time away from work simply to have a paid vacation.

Providing a capped amount of the employee's salary will also help to prevent the employee from taking leave longer than the need exists. Since most people spend more than 55% of their salary on a monthly basis, the employees will still feel enough of a financial strain to encourage them to return to work as soon as possible.⁶⁶ Thus, most people arguably will not take advantage of the paid leave that they are taking. Because California has not actually implemented its paid leave program, it is too soon to determine whether employees will try to take advantage of the 55% salary cap to "milk" the paid time off.

C. "For Qualified Employees"- Will the FMLA Requirements Work?

Under the current FMLA, qualified employees must have worked for the employer for at least twelve months and at least 1,250 hours within the last year.⁶⁷ This requirement was removed under California's new paid leave program and now allows new employees to acquire paid leave.⁶⁸ While this approach is consistent with a disability insurance program that is intended to protect all employees within the state, it may create inequitable results to small business owners who generally feel the impact of lost employees much more than larger businesses.

The federal government should implement a program that will still require an employee to work for the employer for a minimum period of time before qualifying

⁶⁵Even though people with very high salaries may not be able to pay their bills with \$728 per week, they will likely be the employees that have more generous paid leave programs through their workplace. Thus, the employees that will benefit the most from this type of program will be the ones that are in low-income environments. A 55% salary replacement during leave may be sufficient to allow these employees to take leave.

⁶⁶This assumption is based on common sense and practical experience and not on statistical evidence.

⁶⁷See 29 U.S.C. § 2611(2)(A)(i)-(ii) (1993).

⁶⁸See generally S.B. 1661, 2002 Leg. (Cal. 2002). Specifically, the Bill lacks any time requirement for qualification to receive paid leave. Thus, an employee could work for only a few days before seeking paid leave, or, could seek a job with the awareness that she will have to take leave immediately. While this approach is consistent with an insurance-based system in which no time prerequisite is implemented, it is still necessary to protect the employers from potential abuse. With this system, people with known illnesses will not be encouraged to seek a job simply to meet the initial requirements for qualification in the paid leave program.

for paid leave. This type of provision will significantly reduce the potential financial hardships that a small business owner might face if an employee had the ability to work for a short period of time before applying for paid leave. If the employee were required to work for the employer for three months⁶⁹ before qualifying for paid leave, two potential problems would be avoided. First, there would be less likelihood of an employee finding a job simply to achieve a means to qualify for paid leave. Because a person that otherwise may meet the requirements for FMLA qualification would no longer be able to work at a job for only a few days before applying for leave, the employees that did participate in the paid leave program would likely be long term employees that have discovered a serious health issue or family problem since being employed.⁷⁰

While the avoidance of abuse is an important reason to encourage a minimum period of employment before eligibility for paid leave, creating this eligibility requirement will also decrease the likelihood that the fund will run out of money. Although California has not implemented its paid leave program yet, it is common for there to be concerns that any program like this one will eventually run out of money.⁷¹ Because California's legislation likely calculated its rates with the intention of avoiding such fund shortage dilemmas, the additional requirement that an employee work at the place of employment for three months or more before being eligible for paid leave will create a much higher likelihood that the program will have sufficient funds.⁷² Thus, the requirement that an employee must work at the

⁶⁹Further studies will be needed to determine whether three months will be sufficient to deter people from taking advantage of this program or whether six or nine months would be more appropriate. Regardless of what time period is determined to be most appropriate, it seems unlikely that a one year requirement will be needed to avoid unnecessary abuse of the program because few people are likely to plan so far in advance for six weeks of partially paid time away from work. Thus, a threshold time period that is less than the current FMLA requirements seems necessary. However, this time period may be adjusted after the program has been implemented to determine whether a lengthier time period is needed.

⁷⁰Although unemployed people who have serious health conditions do deserve protection, it seems inequitable to allow them to find a job simply to be able to qualify for paid leave. After all, the fund itself will be created through the payments of people who are working and contributing regularly to the program. Thus, the threshold requirement of time that the employee must work before qualifying for the leave will deter such "back door" approaches that would inevitably injure both employers (who take time to hire and train employees) and long-term employees (who regularly pay into the fund that would finance these short-term employees). The ways that an *unemployed* citizen with family and medical needs can or should receive government protection is well beyond the scope of this Note.

⁷¹For example, Social Security is frequently analyzed to ensure that a certain age group will not exhaust the available funds. Paid family leave seems to be even less predictable than Social Security because there is no way of knowing when an employee will have a serious illness, newborn child, or ill parent or spouse. It will be necessary for the program to be in place for some time before an assessment of such time constraints can be made.

⁷²In fact, it is likely that the program will now have a surplus of funds. If this is the case, provisions could be added to eventually use part of the funds to create programs that will educate employers and employees in potential work related issues relating to health and safety. Employees could be given training in general nutrition, fitness and stress management while employers could be given training in creating healthy work environments and in reducing

place of employment for at least three months before becoming eligible for paid leave will diminish abuse of the program while increasing the likelihood that there will always be sufficient funds to cover the costs of the program's implementation.

D. Mitigation of Economic Burden Placed on Employers

While the amount of financial protection given to eligible employees and the length of employment needed for eligibility are issues that need to be addressed in implementing a federal paid leave program, the concern that will likely cause the most nationwide outcry among business owners is the potential economic burden on employers.⁷³ Although California Senate Bill No. 1661 claims to provide "employee-funded" paid leave, businesses are still responsible for half of the estimated \$3 billion required to implement the program.⁷⁴ This estimate will require employers to pay up to \$138 per employee in additional taxes.⁷⁵ Arguably, the employee, who is the person that will benefit from this program, should be faced with both the monthly contributions to the program that will keep it intact and the tax burden that will need to be imposed. Since the employer has the financial burden of hiring and training temporary employees while the employee on paid leave is not working, an additional tax burden seems inequitable. If an employee had to pay the maximum of \$138 in the first year, the monthly rate of \$11.50 would still be relatively low compared to the six week period of protection that they would be ensured in the case of a serious family or medical need.⁷⁶ Thus, the employees

unnecessary stress in the workplace. These options could potentially decrease the likelihood of sickness caused by work-related stress and lack of general knowledge, thus decreasing the number of absences due to illness and increasing business productivity. The result would be favorable to both employees and employers. If this "educational" approach is not implemented, an alternative option would be to decrease the amount of money that employee's are expected to pay into the fund. After a few years have passed, it will be possible to create reasonably accurate assessments of the number of people who generally take advantage of a paid leave program. While this number will fluctuate, it will be possible to decrease the financial burden placed on employees while avoiding an increased burden on employers. Thus, employees would eventually get a "tax break" that would be greatly appreciated.

⁷³*See generally*, Broyles, *supra* note 59. With the large number of businesses in California who objected to the implementation of paid leave and the unavoidable influence that businesses have on political decisions, it will be a daunting task for legislators to create a federal paid leave program that will appease business owners and employees alike. However, creating a program that will gain the support of business owners will significantly increase the likelihood that the Bill will pass. As a result, drafters of any new provisions should advocate an approach that will benefit employers.

⁷⁴*Id.*

⁷⁵*Id.* This estimate is also expected to increase after the first year to a still unknown amount. Under this calculation, a business with forty employees could face an additional \$5,520 in taxes in the first year alone. Although it is arguable that this increased tax burden on employers will simply be displaced through decreased company benefits or, more likely, increased product cost, this type of "trickle down" effect can be avoided entirely by placing the tax burden directly on the employee. Thus, it will be ensured that unemployed individuals who do not qualify for the program will not be forced to pay for its implementation.

⁷⁶Although some employees may resent being forced to lose part of their paycheck to help protect people who essentially have not planned ahead for potential family or medical

should be required to pay the additional taxes that will be required to keep the program intact.

If the financial burden of full tax expenses is deemed to be too much for employees to bear, employers should be required to share *some* of the cost.⁷⁷ However, the employees should still be expected to shoulder the majority of the burden to avoid turning this “employee-funded” program into a façade by forcing the employers to provide the paid leave through their own funds. By requiring employees to pay into the fund and to pay for most, or all, of the tax burden, this paid leave program will effectively create a truly employee-funded program that will require little or no financial commitment from the employer. Thus, there should be far less protest from business owners when the program is introduced to the legislature.

V. AVOIDING ABUSE OF A PAID LEAVE ACT

A. Current FMLA Abuse

An inevitable concern of paid leave adversaries is abuse of the system. Under the current FMLA, there has been an expansion of the definition of “serious health condition” to an excessively liberal level. A person is considered to have a serious health condition if they have “an illness, injury, impairment, or physical or mental condition that involves continuing treatment by a health care provider.”⁷⁸ This requirement creates a regulatory standard that is open to abuse and particularly receptive to misapplication in the judicial branch. As a result, people who have developed relatively minor illnesses have been able to gain qualification for coverage under the FMLA as long as they made three or more trips to a doctor to get treatment.⁷⁹

problems, the number of states considering the implementation of paid leave seems to indicate that the majority of workers would be willing to make some personal financial commitment toward a paid leave program. While most people do not want to pay additional taxes, the potential benefits of a paid leave provision will outweigh the minimal negative impact on an employee’s paycheck.

⁷⁷Essentially, no more than 25% of the total tax burden should be required of the employer. This amount would be relatively low and would still create a program that required mostly employee-funded implementation. This 25% compromise, however, should be the maximum contribution expected of employers. Otherwise, business owners will be expected to contribute too much toward their employee’s leave.

⁷⁸See 29 U.S.C. § 2611(11)(B) (1993).

⁷⁹See generally *Thorson v. Gemini, Inc.*, 205 F.3d 370, 377 (8th Cir. 2000) (stating the requirements for an objective test to determine whether a person qualifies for leave under the Family and Medical Leave Act as 1) that she had a “period of incapacity requiring absence from work,” 2) that this period of incapacity exceeded three days, and 3) that she received “continuing treatment by... a health care provider” within the period); see also *Employers Express Concerns with Definition of Serious Health Conditions in FMLA Rules*, DAILY LAB. REP. (BNA) Item 25, (Dec. 15, 1993) (stating that members of the Equal Employment Advisory Council were forced to provide leave for conditions such as whiplash, migraine headaches, back problems, chicken pox, a root canal, and poison ivy and contending that Congress specifically rejected covering these types of illnesses). Jane Rigler, Comment,

A particular concern of the regulatory criteria element under the current FMLA is inconsistent interpretation of what medical conditions qualify a person for job protection. The original legislative purpose was to protect people who have health conditions that are more serious than the common flu.⁸⁰ However, case law has created its own standard for FMLA qualification based on one's own illness⁸¹ and the illness of a relative⁸² that is somewhat inconsistent with the legislative intent. As a result, persistent employees with relatively minor illnesses may qualify for FMLA coverage by making three or more trips to see their doctor while employees that seem to have legitimate health concerns may be denied leave.⁸³ The following case law will show the inconsistencies in judicial interpretation of FMLA coverage in recent years.

Analysis and Understanding of the Family and Medical Leave Act of 1993, 45 CASE W. RES. L. REV. 457 at footnote 145 (1995).

⁸⁰The Senate Report made in conjunction with the Family and Medical Leave Act defines "serious health condition" as: heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth, and recovery from childbirth. S. REP. No. 3, 103rd Cong., 1st Sess. 5 (1993).

⁸¹*See generally* Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001) (stating that, although influenza is usually insufficient for FMLA protection, common illnesses, such as upset stomachs, common colds, and the flu may be enough to satisfy the regulatory definition of a serious health condition if the condition lasts for more than three days and include at least two "treatments" by a health care provider, which may include as little as an examination or monitoring); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151 (1st Cir. 1998) (stating that employee's atrial fibrillation was a "serious health condition" because employee had been absent from work for three consecutive days and his illness may have become fatal if left untreated); *but see* Bauer v. Varsity Dayton-Walther Corp., 118 F.3d 1109 (6th Cir. 1997) (holding that employee's rectal bleeding was insufficient to trigger leave under the FMLA even though employee could have later been diagnosed with rectal cancer. This holding relied heavily on the employee's decision not to miss work due to the illness); Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997) (stating that a diagnosis of carpal tunnel syndrome was insufficient for FMLA qualification); Olsen v. Ohio Edison Co., 979 F. Supp. 1159 (N.D. Ohio 1997) (determining that health conditions diagnosed by a chiropractor are not sufficient for FMLA qualification because a chiropractor is not a "health care provider").

⁸²*See generally* Brannon v. OshKosh B'Gosh, Inc., 897 F. Supp. 1028 (M.D. Tenn. 1995) (holding that the throat and upper respiratory problem of the employee's child was sufficient for FMLA qualification because the child had made repeated visits to see the doctor); *but see* Martyszenko v. Safeway, Inc., 120 F.3d 120 (8th Cir. 1997) (determining that an employee did not qualify for FMLA leave to tend to her sexually abused child because the child showed no physical or mental reaction to the abuse and, therefore, was not experiencing a "serious health condition"); Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238 (E.D. Pa. 1994) (holding that the ear infection of an employee's child was not a "serious health condition" and, therefore, employee did not qualify for FMLA leave).

⁸³*See generally* case law discussed, *supra*, notes 80 and 81.

1. When Does an Employee Have a “Serious Health Condition?”

The following cases examine the varied approaches to interpretation of what is a “serious health condition” of an employee. While some courts consider the intent of the legislature to be important,⁸⁴ others rely strictly on the language of the statute.⁸⁵ As a result, the numerous FMLA cases have left employers and employees wondering what it really takes for an employee to be qualified for leave. It will be necessary for legislation to address these inconsistencies prior to implementing a paid leave program. Unless the “serious health condition” definition is made more stringent, abuse of a paid leave program will be inevitable and will cause a high level of concern among business owners.

a. Miller v. AT&T Corp.

In *Miller v. AT&T Corp.*,⁸⁶ the Fourth Circuit of the United States Court of Appeals affirmed a decision by the lower court that a person could be eligible for leave under the FMLA even if they only have the flu.⁸⁷ In *Miller*, the employee was diagnosed as suffering from the flu and severe dehydration.⁸⁸ As a result of the illness, Miller was given a work-excuse slip allowing her to miss work from December 28, 1996 through January 1, 1997.⁸⁹ Miller then requested FMLA leave for the period of time that her doctor had felt that she would be unable to work.⁹⁰ AT&T, however, denied the request for FMLA leave because “(1) the flu is not generally considered to be the type of condition for which an employee is entitled to FMLA leave; and (2) the information submitted by Miller did not demonstrate that she received treatment on two or more occasions.”⁹¹ As a result, Miller was soon terminated for excessive absenteeism.⁹²

Miller filed an action in August 1998, alleging that AT&T violated her rights under the FMLA by denying her request to take leave.⁹³ The district court granted Miller’s request for summary judgment, holding that her episode of influenza could be construed as a serious health condition and that she had provided adequate certification indicating her need for FMLA leave.⁹⁴ The United States Court of

⁸⁴See generally *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 163 (1st Cir. 1998).

⁸⁵See generally *Miller v. AT&T Corp.*, 250 F.3d 820, 835 (4th Cir. 2001).

⁸⁶250 F.3d 820 (4th Cir. 2001).

⁸⁷*Id.*

⁸⁸*Id.* at 828.

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Miller*, 250 F.3d at 829.

⁹²*Id.* The decision to terminate Miller’s employment was also based, in large part, on numerous prior absences for which she was given repeated warnings. Miller was warned prior to this leave that any additional absences would result in her termination. *Id.*

⁹³*Id.* at 830.

⁹⁴*Id.*

Appeals, Fourth Circuit affirmed this decision and discussed, *inter alia*, their reasoning behind 1) allowing the flu to meet the requirements for FMLA qualification, and 2) determining that doing so would not contradict Congress's intent in enacting the Family and Medical Leave Act.⁹⁵

In the opinion, Circuit Judge Wilkins observed that Miller would meet the prerequisites for FMLA qualification by receiving "treatment" from a health care provider on two or more occasions.⁹⁶ Even though Miller's second trip to see her doctor only resulted in a blood test, Wilkins acknowledged the lenient requirements for qualification that define "treatment" to include "examinations to determine if a serious health condition exists and evaluations of the condition."⁹⁷ As a result of this definition, Miller's follow up appointment to have blood tests was sufficient to meet the regulatory criteria for FMLA qualification.⁹⁸

The next argument, that the regulations specifically exclude the flu and other minor illnesses from FMLA coverage,⁹⁹ also failed because the court determined that the use of the word "ordinarily" as describing what may create qualification creates the opportunity for coverage in certain situations.¹⁰⁰ Specifically, the court determined that the language describing what "ordinarily" does not lead to FMLA qualification is merely meant to clarify that "some common illnesses will not ordinarily meet the regulatory criteria" for qualification.¹⁰¹ Thus, if a common illness does meet the regulatory criteria, the employee will be eligible for FMLA protection.

AT&T next argued that, if Miller's flu was considered to be a serious health condition pursuant to the regulations, the regulations must be considered invalid as contrary to congressional intent.¹⁰² Their primary argument was that the definition of "treatment" should not include a "mere evaluation of a patient's condition."¹⁰³ With this argument, AT&T also stated that Congress did not intend to protect employees

⁹⁵*Id.*

⁹⁶*Miller*, 250 F.3d at 830.

⁹⁷*Id.*

⁹⁸*Id.* at 831.

⁹⁹AT&T specifically pointed to regulatory language stating "[o]rdinarily, unless complications arise, the common cold, *the flu*, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not qualify for FMLA leave (emphasis added)." 29 C.F.R. § 825.114(c) (2000). 250 F.3d at 831. AT&T argued that this language establishes that absent complications, the flu is *never* a serious health condition even if the regulatory test is satisfied (emphasis added). *Id.* AT&T further cited *Brannon v. OshKosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1036 n.8 (M.D. Tenn. 1995) to support their argument through the statement "[a]lthough the flu patient may pass the [regulatory] test, flu is specifically excluded from coverage" under the FMLA. *Id.*

¹⁰⁰*Miller*, 250 F.3d at 832.

¹⁰¹*Id.*

¹⁰²*Id.* at 833.

¹⁰³*Id.*

with relatively minor illnesses such as the flu.¹⁰⁴ The court pointed out that evaluation of a patient's condition by a health care specialist can be sufficient to meet the definition of "treatment" because the regulatory definition also requires that an employee experience a period of incapacity for at least three days.¹⁰⁵ Since both requirements have to be fulfilled for qualification, the court stated that claims based on "multiple visits to a physician for a minor health complaint" would be weeded out.¹⁰⁶

AT&T's next argument, the legislative purpose underlying the FMLA is thwarted by allowing employees with the flu and similar illnesses to obtain coverage, was also determined to be unconvincing.¹⁰⁷ AT&T cited a Senate Report passage to support their claim that employees diagnosed with the flu are not meant to be covered by the FMLA.¹⁰⁸ Although the court conceded that Congress might have only intended to protect employees with "major" illnesses, the Senate Report indicating such intent is not reflected in the language of the FMLA.¹⁰⁹ Thus, under *Miller*, strict adherence to the language of the FMLA can lead to coverage for a person who has relatively "minor" illnesses such as the flu.¹¹⁰

b. Hodgens v. General Dynamics Corp.

In *Hodgens v. General Dynamics Corp.*,¹¹¹ the First Circuit of the United States Court of Appeals held that "intermittent leave" under the FMLA was meant to include visits to a doctor when the employee has symptoms that may eventually be diagnosed as a serious health condition.¹¹² In reaching at this conclusion, the court also determined that the language of the FMLA does not require the employee's physical condition to "actually incapacitate" him and prevent him from working.¹¹³

In this case, John Hodgens had taken numerous days off from work to visit his doctor as a result of his medical problems, including chest pains, visual problems,

¹⁰⁴*Id.*

¹⁰⁵*Miller*, 250 F.3d at 834.

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸AT&T specifically referred to a passage from the Senate Report stating "[t]he term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. *It is expected that such conditions will fall within even the most modest sick leave policies.* Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period." S. REP. NO. 103-3, at 28-29, reprinted in 1993 U.S.C.C.A.N. at 30-31 (emphasis added). *Id.*

¹⁰⁹*Miller*, 250 F.3d at 835.

¹¹⁰*Id.*

¹¹¹*Hodgens*, 144 F.3d at 151.

¹¹²*Id.* at 163.

¹¹³*Id.* at 164.

and profuse perspiration.¹¹⁴ Hodgens's doctor was concerned that his symptoms were signs of angina, a potentially fatal heart condition.¹¹⁵ He then missed numerous days of work due to tests and recommendations that he should not aggravate his potential condition.¹¹⁶ After numerous tests, Hodgens was told that he was actually experiencing atrial fibrillation, another potentially life-threatening heart condition.¹¹⁷ He was later terminated due to the excessive absences relating to the testing and diagnosis of this condition.¹¹⁸

General Dynamics Corporation, Hodgens's employer, contested whether his numerous trips to the doctor, which were initially unable to produce diagnosis, were sufficient to meet the requirements for FMLA eligibility.¹¹⁹ The court noted that it is unlikely that Congress had an intent to "punish people" who suffered from diseases that went undiagnosed.¹²⁰ As a result, a person who suffers from symptoms that may eventually be diagnosed as a serious health condition could obtain FMLA protection.¹²¹

The court went on to hold that 29 U.S.C. § 2612(a)(1)(D)¹²² does not require a person to be unable to perform the functions of his position.¹²³ The court decided to adopt a broad interpretation of the FMLA allowing an employee to be eligible as long as she is "unable to perform" her job because she needs to seek medical treatment or diagnosis.¹²⁴ To support its decision, the court cited legislative history indicating that physical or mental incapacity should not be a prerequisite to qualification.¹²⁵ Thus, the court in *Hodgens*, unlike the court in *Miller*, found that

¹¹⁴*Id.* at 156.

¹¹⁵*Id.* at 157.

¹¹⁶*Hodgens*, 144 F.3d at 157.

¹¹⁷*Id.*

¹¹⁸*Id.* at 158.

¹¹⁹*Id.* at 161.

¹²⁰*Id.* at 163.

¹²¹*Hodgens*, 144 F.3d at 163.

¹²²This section of the FMLA states that an employee will be eligible for coverage if she has to miss work "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee."

¹²³*Hodgens*, 144 F.3d at 164.

¹²⁴*Id.*

¹²⁵*See* S. REP. No. 103-3, pt. 1, at 25 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 27 stating "[t]he requirement that the employee be unable to perform his or her job functions does not mean in each instance that the employee must literally be so physically and mentally incapacitated that he or she is generally unable to work... [I]f the employee must be physically absent from work from time to time in order to receive the treatment, it follows as a matter of common sense that the employee is, during the time of the treatments, temporarily 'unable to perform the functions of his or her position' for purposes of [§ 2612(a)(1)(D)] and therefore eligible for leave for the time necessary to receive the treatments." *Id.*

legislative history should be taken into consideration.¹²⁶ These two cases, therefore, show that even courts which allow FMLA qualification follow different paths to reach their decision.

c. Bauer v. Varsity Dayton-Walther Corp.

In *Bauer v. Varsity Dayton-Walther Corp.*,¹²⁷ the Sixth Circuit of the United States Court of Appeals determined that “serious health condition” did not include Christopher Bauer’s intermittent rectal bleeding, even though the potential diagnosis, rectal cancer, could have been fatal.¹²⁸ In *Bauer*, the employee was experiencing intermittent episodes of hematochezia, the passage of bloody stools, which later led to absences from work.¹²⁹ Bauer missed work on June 18, 1994 after experiencing three weeks of intermittent rectal bleeding.¹³⁰ On this day in particular, he stated that he was “passing blood ‘pretty bad’” and he stayed home primarily for this reason.¹³¹ Three days later, Bauer left work early after experiencing heavy bleeding.¹³² He then called his doctor and scheduled an examination.¹³³ Bauer was not given an excused absence for his appointment with his doctor and later was warned that if he missed work to have flexible sigmoidoscopy, the recommended procedure for this inflection, his absence would also be unexcused.¹³⁴ As a result of this warning, Bauer cancelled the procedure.¹³⁵ Bauer was terminated for excessive absenteeism after an additional unrelated absence.¹³⁶

Bauer filed a complaint against his former employer alleging that it had violated the FMLA by terminating his employment.¹³⁷ In examining his claim, the court determined that Bauer’s affliction was not a serious health condition even though it could have been rectal cancer or another condition severe enough to require future absences.¹³⁸ The court reasoned that he “did not have a ‘serious health condition’ as defined under subsection (a)(2),¹³⁹ as his condition did not cause him to be absent

¹²⁶*Id.*

¹²⁷118 F.3d 1109 (6th Cir. 1997).

¹²⁸*Id.*

¹²⁹*Id.* at 1110.

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Bauer*, 118 F.3d at 1110.

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Id.*

¹³⁷*Bauer*, 118 F.3d at 1111.

¹³⁸*Id.* at 1112.

¹³⁹For purposes of FMLA, “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves: “...(2) [a]ny period of incapacity requiring

from his position for more than three calendar days.”¹⁴⁰ The court’s strict adherence to the text of the statute prevented Bauer from being eligible for leave under the FMLA.¹⁴¹

As illustrated by the three aforementioned cases, the definition of “serious health condition” needs to be addressed.¹⁴² A paid leave program will only be successful if employers and employees have a clear understanding of what illnesses and actions qualify for coverage. Otherwise, it will be possible, if not likely, that people with relatively minor illnesses will be able to cleverly receive benefits while other employees with more serious conditions will be denied leave.

2. When Can an Employee Care for a Child’s “Serious Health Condition?”

There has also been speculation about what constitutes a serious health condition of a relative. The following cases will show that a relatively minor illness, like a child’s flu, can create FMLA leave qualification, while an employee who wants to spend time with her two sexually abused children will be denied leave because sexual abuse is not a “serious health condition.” The paradoxical results show the importance of creating a system that will remove confusion about what constitutes the “serious health condition” of a child.

a. *Brannon v. OshKosh B’Gosh, Inc.*

In *Brannon v. OshKosh B’Gosh, Inc.*,¹⁴³ the Middle Division of the United States District Court of Tennessee held that the throat and upper respiratory infections of an employee’s child constituted a “serious health condition” and, therefore, were

absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider. . . .” 29 C.F.R. § 825.114 (1993).

¹⁴⁰*Bauer*, 118 F.3d at 1112.

¹⁴¹Had Bauer simply gone to his previously scheduled procedure, he may have missed enough days of work to meet the statute’s requirement. He did not go to the recommended procedure, however, because his supervisor threatened that doing so would constitute an unexcused absence. *Id.* at 1110. Although it was not explored in the case, it seems as if Bauer should have had an estoppel-based method of meeting the three-absence requirement. He was placed in a position where he had to essentially choose whether he wanted to treat his illness or keep his job. Given the position his supervisor put him in, it was reasonable for Bauer to stay at work and cancel the procedure. The company should be estopped from using a defense that Bauer had not met the statutory requirement. Had the supervisor not told him that taking part in the procedure would lead to an unexcused absence, Bauer would have attended the procedure and met the prerequisites for FMLA qualification.

¹⁴²Looking at these three cases, there has been confusion about whether legislative intent should be a factor in determining who qualifies for FMLA coverage. *See generally Miller*, 250 F.3d at 820; *Hodgens*, 144 F.3d at 151. Further, an employee with the flu that made frequent visits to the doctor was given leave. *Miller*, 250 F.3d at 820. An employee with rectal bleeding who stayed at work was denied leave. *Bauer*, 118 F.3d at 1109. Such mixed standards will inevitably result in a failure to achieve the goals of the FMLA to “balance the demands of the workplace with the needs of families...to entitle employees to take reasonable leave for medical reasons.” 29 U.S.C. § 2601(b)(1) (1993).

¹⁴³897 F. Supp. 1028 (M.D. Tenn. 1995).

covered by the FMLA.¹⁴⁴ In *Brannon*, Plaintiff argued that the absences she took to care for her ill daughter, Miranda, were protected by 29 U.S.C. § 2612(a)(1)(C).¹⁴⁵ Miranda was suffering from flu-like symptoms and was taken to see a doctor.¹⁴⁶ She was diagnosed with acute pharyngitis (infected throat) and an upper respiratory infection.¹⁴⁷ The doctor gave her a prescription and recommended over-the-counter medication.¹⁴⁸ As a result, Mrs. Brannon took two days off of work to care for her daughter.¹⁴⁹ When Mrs. Brannon returned to work, she was terminated for excessive absences.¹⁵⁰ Her suit claimed that her absences to care for her daughter were protected by the FMLA.¹⁵¹

In determining that the FMLA protected Miranda's illness, the court admitted that doing so was contrary to Congressional intent.¹⁵² However, the court noted that Miranda's illness did meet the "serious health condition" requirement as it is defined pursuant to 29 C.F.R. § 825.114.¹⁵³ Thus, the decision of Mrs. Brannon to remain at home to care for her child met the regulatory requirement set out to define the "serious health condition" of an employee's child.¹⁵⁴ Like the *Miller* court, the court in *Brannon* determined that legislative intent should not dictate the outcome of a case defining an employee's "serious health condition."¹⁵⁵

¹⁴⁴*Id.* at 1037.

¹⁴⁵*Id.* at 1034. The text of the statute that the Plaintiff was referring to states that an employee has a right to take leave "[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition" (emphasis added). 29 U.S.C. § 2612(a)(1)(C).

¹⁴⁶*Id.* at 1032.

¹⁴⁷*Id.*

¹⁴⁸*Brannon*, 897 F. Supp. at 1032.

¹⁴⁹*Id.* at 1033.

¹⁵⁰*Id.*

¹⁵¹*Id.* at 1030.

¹⁵²*Id.* at 1035. Here, the court stated "an upper respiratory infection, gastroenteritis and pharyngitis seem more akin to 'minor illness[es] which last only a few days,' something Congress sought to exclude from FMLA coverage." *Id.* at 1036. The court was referring to the intent of Congress that was discussed in detail throughout the FMLA's legislative history. *See* S. REP. NO. 3, 103rd Cong., 1st Sess. 1993, 1993 U.S.C.C.A.N. 3, at pp. 30-31.

¹⁵³*Brannon*, 897 F. Supp. at 1037. The provision states "[f]or purposes of FMLA, 'serious health condition' entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves...[a] period of incapacity (i.e., inability to ... attend school) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: ... (B) [t]reatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider." 29 C.F.R. § 825.114 (a)(2)(i)(B). 29 C.F.R. § 825.114 (b) adds "[u]nder paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic)."

¹⁵⁴*Brannon*, 897 F. Supp. at 1037.

¹⁵⁵*Id.*

b. Martyszenko v. Safeway, Inc.

In *Martyszenko v. Safeway, Inc.*,¹⁵⁶ the Eighth Circuit of the United States Court of Appeals affirmed a decision by the lower court holding that the sexual abuse of an employee's son was not a "serious health condition."¹⁵⁷ As a result, the employee was not entitled to take leave under the FMLA.¹⁵⁸ In *Martyszenko*, Plaintiff was working at Safeway grocery store when she was informed that the police believed her two children had been sexually molested.¹⁵⁹ A psychiatrist then examined her son and found "no evidence of distractibility, psychosis or hallucinations."¹⁶⁰ The doctor determined that Martyszenko's son should be supervised and taken back for follow-up appointments.¹⁶¹ After additional visits, the psychiatrist concluded, "I think from a diagnostic point of view, I would be hard pressed to say he clearly is a victim of sexual abuse or that he even has a diagnosable psychiatric problem at this point" and advised Martyszenko that she could return to work.¹⁶²

Safeway terminated Martyszenko after she refused to return to work.¹⁶³ She brought suit claiming that Safeway failed to inform her of her right to take leave under the FMLA.¹⁶⁴ Safeway argued, and the trial court agreed, that the alleged sexual abuse of her son was not a "serious health condition" under the FMLA.¹⁶⁵ In reaching this conclusion, the court held that there must be incapacity for the FMLA to apply.¹⁶⁶ The appellate court found that legislative history and case law supported the trial court's decision that a sexually abused child would have to experience a period of incapacity to qualify a parent for leave under FMLA.¹⁶⁷ Although the strict

¹⁵⁶120 F.3d 120 (8th Cir. 1997).

¹⁵⁷*Id.* at 124.

¹⁵⁸*Id.*

¹⁵⁹*Id.* at 121, n.2. It was soon determined that Martyszenko's daughter had not been molested. As a result, the case focused on the "serious health condition" of her son, whom the authorities believed had been the victim of molestation. *Id.*

¹⁶⁰*Id.*

¹⁶¹*Martyszenko*, 120 F.3d at 121.

¹⁶²*Id.* at 122, n.3.

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵*Id.*

¹⁶⁶*Martyszenko*, 120 F.3d at 123.

¹⁶⁷*Id.* The court cited the following case law to support its position: *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102, 106 (D.R.I. 1997) (holding no FMLA breach where employee's "condition did not prevent him from performing his job"); *Boyce v. New York City Mission Soc'y*, 963 F. Supp. 290, 299 (S.D.N.Y. 1997) (recognizing the requirement of incapacity; holding plaintiff's shortness of breath and chest pains failed to meet the FMLA standard); *Rhoads v. FDIC*, 956 F. Supp. 1239, 1255 (D. Md. 1997) (denying employer's summary judgment motion where the plaintiff's "well documented chronic health condition" caused "episodic periods of incapacity"); *Kaylor v. Fannin Reg'l Hosp.*, 946 F. Supp. 988, 997-98 (N.D. Ga. 1996) (finding plaintiff's back injury to be a "serious health condition")

language of the regulatory criteria for the FMLA creates a quasi-bright line rule for qualification through the requirement of incapacity for three days, the end result creates a zone of protection that frustrates the original legislative intent to provide protection only for employees and relatives of employees who have a “serious health condition.”¹⁶⁸

The judicial interpretations of “serious health condition” have created results that frustrate the legislative purpose behind the FMLA. Although there seems to be a “bright line” rule for determining who qualifies for coverage, application of this rule creates a system where people with relatively minor illnesses are given leave far before people with potentially life threatening illnesses. Through this system, a mother can easily stay at home to care for a child with the flu, while a mother who has found out that her child was sexually abused must stay at work to avoid losing her job. The desire of judges to follow precedent and to establish a rule that is easy to use has created a blurred effect that overlooks the purpose of the FMLA. As a result, implementation of paid leave will require a clear determination of how to avoid these inherently unfair results while promoting the legislative intent.

B. Avoiding Abuse: A “Bright Line” Rule for Paid Leave

Since the current FMLA is susceptible to abuse, adding paid leave will likely cause an excessive number of employees with relatively minor illnesses to “cash in”

because it “incapacitated [him] for three weeks”); *George v. Associated Stationers*, 932 F. Supp. 1012, 1015-16 (N.D. Ohio 1996) (finding a “serious health condition” where the plaintiff’s communicable chicken pox prevented him from working for over three days); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1128 (W.D. Va. 1996) (noting incapacity requirement and granting employer summary judgment where condition would last ten days but where “the plaintiff was able to perform the functions of her position”); *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 474-76 (D. Kan. 1996) (holding employer’s refusal to grant leave did not violate the FMLA where the employee failed to prove that her condition “kept her from performing the functions of her job”); *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 310-11 (E.D. Ky. 1996) (finding no FMLA violation upon no showing of requisite incapacity period); *Brannon v. OshKosh B’Gosh, Inc.*, 897 F. Supp. 1028, 1036-37 (M.D. Tenn. 1995) (holding employee’s condition did not require FMLA leave because she was not “incapacitated” for more than three calendar days,” but employee’s daughter’s fever qualified because it kept her from day care); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 243 (E.D. Pa. 1994) (requiring employee to demonstrate her child underwent “a period of incapacity requiring absence from his day care center for *more than* three days”). *Id.* at 123.

¹⁶⁸Arguably, the current legislation represents a poor fit between the ends (to allow employees to take time off of work if they or their children have serious health conditions) and the means (establishing a regulatory requirement that will focus on visits to the doctor and relative incapacity rather than the illness itself). As the aforementioned case law indicates, the current criteria for FMLA qualification is in some ways underinclusive (because people who have conditions that most people would consider to be “serious,” i.e. rectal bleeding, do not qualify for coverage unless they make frequent visits to the doctor) and in other ways overinclusive (by allowing employees with illnesses clearly not intended to be covered to obtain protection through the regulatory criteria). As a result, the intention of the legislature is effectively frustrated while people who were not meant to be covered are finding legislative loopholes that create gray areas which must be defined more clearly for paid leave to be effective.

on the flexibility of the system currently in place. Under the current standard for qualification, a person with the flu could make frequent trips to the doctor with the hopes of obtaining a paid vacation.¹⁶⁹ The aforementioned case law has clearly shown that FMLA interpretation is inconsistent at best.

As a result of the potential for abuse that has arisen from the varied judicial interpretations of the FMLA, it will be necessary to create a “bright line” rule that will separate the current FMLA requirements from the paid provisions. The paid provision of the FMLA, therefore, should limit “serious health conditions” to those conditions that were acknowledged under the Senate Report for the original FMLA. These include: heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe, nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.¹⁷⁰ Thus, the eligibility criteria under the current FMLA, “an illness, injury, impairment, or physical or mental condition that involves continuing treatment by a health care provider,” will not be sufficient to obtain qualification for paid leave under the new Act.¹⁷¹

With this new standard for paid leave, a higher threshold will be in place that will minimize the possibility of judicial interpretation and expansion. As a result, it will be difficult for an employee to obtain paid leave without a truly serious health condition. Certainly, courts will not have room to interpret the paid leave provision to include coverage for employees with the flu or other relatively minor illnesses. Therefore, only the employees that truly have a debilitating condition will be afforded the opportunity to receive paid leave.¹⁷² This new standard will align with the clear legislative intent of the FMLA.¹⁷³

By creating a stricter threshold for qualification for paid leave while maintaining the current threshold for unpaid leave, the new provision will provide financial

¹⁶⁹See generally *Miller*, 250 F.3d 820.

¹⁷⁰See generally S. REP. NO. 3, 103-3, at 5 (1993), *reprinted in*, 1993 U.S.C.C.A.N. 3.

¹⁷¹However, people who meet the current FMLA qualification threshold by having continuing treatment by a health care provider will still be eligible for *unpaid* leave. Thus, current protection will not be diminished by the paid leave requirements.

¹⁷²With this strict threshold in place, less people will qualify for paid leave. As a result, money paid into the fund will diminish slowly and there will be a higher likelihood of a surplus of funds. Therefore, it will be possible to lower the amount of money that employees are required to pay into the fund while still maintaining sufficient funds to both maintain the program and provide the educational opportunities outlined, *supra*, note 72.

¹⁷³See S. REP. NO. 103-3 (stating “[t]he term ‘serious health condition’ is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period.”).

protection for employees suffering from truly serious health conditions while effectively deterring the majority of claims made by people who were simply not meant to be given protection under the existing program.

In summary, the implementation of a paid leave program will require numerous elements to be successful. Congress should create a program with a 55% salary cap similar to California Senate Bill No. 1661. This amount would protect employees without encouraging excessive leave participation. Next, Congress should adjust the definition of who is a qualified employee by requiring three months of employment with a company before receiving paid leave. Then, it will be necessary to place most or the entire financial burden on the employees. This burden shifting will provide employees with protection without threatening an employer's financial security.

Finally, Congress must define what illnesses constitute "serious health conditions" for paid leave. Adopting the illnesses defined by Congress during the implementation of the FMLA will establish a "bright line" rule for qualification that will avoid the procedural loopholes that have led to judicial confusion. Further, adopting these definitions of "serious health conditions" will ensure that Congress's intent will be respected. If all of these elements are adopted, employees will enjoy some financial protection in case of an emergency while employers will be able to avoid an excessive financial burden.

VI. CONCLUSION

While the current Family and Medical Leave Act provides job protection to employees that meet its qualification, few people can afford to miss up to twelve weeks of work without pay. As a result, the goals of the Act have not been met. Numerous foreign countries have adopted generous paid leave provisions, yet the United States has not implemented similar programs. In September of 2002, California passed the first comprehensive paid family leave law to be adopted in the United States, California Senate Bill No. 1661. This Bill was passed because California recognized the need for a paid leave program that would protect the State's workers.

Although California's paid leave program seems to be a panacea for the injured employee, its provisions leave room for abuse by employees and will be costly for business owners. A federal paid leave program will require numerous alterations to the California model in order to be successful. Employees should be required to work for a business for at least three months before qualifying for paid leave, most or all of the cost of the program should be put on the employee, and the threshold requirement for qualification should be stricter. With these changes in place, Shannon could spend time with her newborn, John could enjoy a full recovery, and Lindsay could be with her mother before she passes away. As a result, the goal of the FMLA, "to balance the demands of the workplace with the needs of families," would be achieved.

ERIC DANIEL