




CSU
College of Law Library

1987

H.R. 4300, the Family and Medical Leave Act of 1986: Congress' Response to the Changing American Family

Amy K. Berman

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)
[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Note, H.R. 4300, the Family and Medical Leave Act of 1986: Congress' Response to the Changing American Family, 35 Clev. St. L. Rev. 455 (1987)

This Note is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

H.R. 4300, THE FAMILY AND MEDICAL LEAVE ACT OF 1986: CONGRESS' RESPONSE TO THE CHANGING AMERICAN FAMILY

I.	INTRODUCTION	455
II.	THE DEMOGRAPHIC RATIONALE	456
	A. <i>Demographic Changes in Society</i>	456
	B. <i>The Current Availability of Parental Leave</i>	460
III.	PROGRESSION AND CURRENT STATE OF THE LAW	463
	A. <i>Federal Law</i>	463
	B. <i>State Law</i>	471
IV.	OVERVIEW OF H.R. 4300	477
V.	ARGUMENTS AGAINST H.R. 4300	479
VI.	CONCLUSION	482

I. INTRODUCTION

On March 4, 1986, H.R. 4300, The Family & Medical Leave Act of 1986¹ was introduced in the United States House of Representatives.² The purpose of the bill is "to entitle employees to parental leave in

¹ H.R. 4300, 99th Cong., 2d Sess. (1986)[hereinafter H.R. 4300].

² Representative William Clay, (D-Missouri), introduced the bill which was originally titled the Parental and Medical Leave Act. The bill was referred jointly to the Committee on Education and Labor and the Committee on Post Office and Civil Service. Both Committees ordered that the bill be favorably reported. No further action was taken before the close of the second session of the 99th Congress. *Family and Medical Leave Act of 1986: Hearing on H.R. 4300 Before the Committee on Education and Labor*, 99th Cong., 2d Sess. 99-699 Part 2 12-14 (1986)[hereinafter *Committee Report*].

Since the original writing of this Note, H.R. 4300 has been reintroduced in the 100th Congress and is now known as H.R. 925. Representative Patricia Schroeder (D-Colorado) reintroduced the bill on February 3, 1987. As with H.R. 4300, the bill was referred jointly to the House Committee on Education and Labor Subcommittees on Labor-Management Relations and Labor Standards as well as the House Committee on Post Office and Civil Service Subcommittees on Civil Service and Compensation and Employee Benefits. The Subcommittee on Labor Management Relations and the subcommittee on Labor Standards have held two joint meetings on H.R. 925. On May 13, 1987, the subcommittee on Labor Management Relations passed the bill and reported it to the full committee on Education and Labor. On April 2, 1987, the subcommittee on Civil Service and Compensation and Employee Benefits held a joint hearing and both subcommittees passed the bill and reported it to the full committee. While H.R. 4300 has been reintroduced as H.R. 925 the bill remains

cases involving the birth, adoption, or serious health condition of a son or daughter³ and temporary medical leave in cases involving the inability [of an employee] to work because of a serious health condition."⁴ The bill requires an employer to provide up to 18 weeks job-protected family leave and up to 26 weeks job protected medical leave for all temporarily disabled employees.⁵

The scope of this Note is limited to an examination of the family leave provisions of H.R. 4300.⁶ The examination will begin with a study of the demographic rationale for implementing a national policy of this magnitude. This demographic rationale encompasses demographic changes in society and the interplay between those changes and current employment policies. This will be followed by an analysis of the existing law beginning with the Pregnancy Discrimination Act⁷ and continuing through the recent Supreme Court decision in *California Federal Savings and Loan v. Guerra*.⁸ Next, this Note will present an overview of H.R. 4300's provisions for family leave. Finally, this Note will examine some of the arguments which have been raised in opposition to H.R. 4300.

The purpose of this Note is to educate the reader on the current status of the law regarding maternity leave and family leave⁹ and to demonstrate the need for H.R. 4300 based upon recent demographic changes, current employment policies, and the inability of current law to adequately address the needs of the modern American family.

II. THE DEMOGRAPHIC RATIONALE

A. Demographic Changes in Society

Over the past twenty five years the United States has experienced a demographic revolution.¹⁰ The "typical American family," i.e. father wage earner, mother at home, has become atypical. Such situations currently represent less than 10% of all American families.¹¹ To a great

the same. Accordingly, because of the references used when this Note was originally written, this Note will continue to refer to the bill as H.R. 4300.

³ The Committee on Education and Labor revised the bill to include an entitlement to family leave to care for a dependent parent with a serious health condition. See *Committee Report*, *supra* note 2 at 51.

⁴ *Committee Report*, *supra* note 2 at 12.

⁵ H.R. 4300, *supra* note 1 §§ 103 and 104.

⁶ Hereinafter "H.R. 4300" refers only to those provisions of the bill applicable to family leave.

⁷ 42 U.S.C. 2000e(k)(1982)[hereinafter the PDA].

⁸ 107 S. Ct. 683 (1987).

⁹ While related, the terms family leave and maternity leave are not synonymous. For an explanation of the distinction, see *infra* note 39.

¹⁰ *Committee Report*, *supra* note 2, at 15.

¹¹ N.Y. Times, July 29, 1986 § 12A, col. 4.

extent this change is a result of the large influx of women into the labor force.¹² However, there are other factors which have contributed to this change.¹³

Currently, 96% of all fathers and over 60% of all mothers are in the labor force.¹⁴ Between 1950 and 1981 the number of women in the labor force has tripled.¹⁵ By 1981, the percentage of women with preschool aged children who worked outside the home was greater than the percentage of married women with no minor children who worked outside the home in 1950, and greater than the percentage of all women in the labor force in 1900.¹⁶ Further, almost 50% of all mothers with children under one work outside the home¹⁷ and 67% of women with children under three are in the labor force.¹⁸ Of all the women in the work force, 70% are in their prime child bearing years.¹⁹ It is estimated that 85% of those women will have at least one child while they are in the labor force.²⁰

The majority of women work out of economic necessity and are not able to choose between staying home with their children and earning a living.²¹ The most recent statistics reveal that 27% of married women have husbands who make less than \$10,000 a year and 41% of married women are married to men who make less than \$15,000 a year.²² Additionally, due to the high divorce rate and the increase in the number of births out of wedlock, the percentage of households headed by females is increasing. In 1984 women headed 10.3 million or 16% of all American families.²³

In addition to the changes outlined above, there are two other demographic changes at which H.R. 4300 is aimed. The first is the aging of our population and the unique problems associated with this phenomenon.²⁴

¹² See *Committee Report*, *supra* note 2.

¹³ The high divorce rate and increase in number of births out of wedlock have also contributed to the demographic changes. *Committee Report*, *Id.* at 15.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ PARENTAL AND MEDICAL LEAVE H.R. 4300 BRIEFING PAPER, 99th Cong., 2d Sess. 3 (1986)[hereinafter BRIEFING PAPER].

¹⁹ Newsletter, Congressional Caucus for Women's Issues, The Family and Medical Leave Act of 1986: H.R. 4300 (1986)(available from Congressional Caucus for Women's Issues, Washington, D.C.)(hereinafter Caucus Newsletter).

²⁰ 9 to 5 National Association of Working Women, Fact Sheet on Parental Leave (1986)(available from 9 to 5 National Headquarters, Cleveland, Ohio). Additionally, the Congressional Budget Office estimates that by 1990 more than 91% of all women of childbearing years will be in the workforce. *Id.*

²¹ Caucus Newsletter, *supra* note 19.

²² *Id.*

²³ See *Committee Report*, *supra* note 2, at 15.

²⁴ *Id.*

Presently, there are over 2.2 million people who render unpaid care to ailing family members.²⁵ Thirty-eight percent of the care givers are the children of the elderly while 35% are their spouses. The average age of the care giver is 57.²⁶ Further, it is estimated that by the year 2025 the number of elderly needing health care in this country will be twice the number of children under five years old.²⁷ Thus, it is imperative that any legislation aimed at addressing the needs of the American family makes provisions for an employee to take leave to care for the elderly as well as the young.

The second trend which H.R. 4300 attempts to address is the deinstitutionalization of the physically and mentally handicapped.²⁸ An increasing number of families are caring for their handicapped members at home.²⁹ The reason for the move toward home health care is twofold. The first is the expense of institutionalization and the second is the belief that in some instances institutionalization is not in the best interest of the patient or the family.³⁰ The proponents of H.R. 4300 hope that its provision will help ease the enormous burden of caring for a handicapped person.

These demographic changes have had a profound impact on the American family and the role of the family in society. Traditionally, the family, and more specifically the wife, has cared for the children, elderly and ill in our society. However, with the majority of women in the labor force, the family is becoming increasingly unable to perform its caregiving function. Thus, we now have a void in our society which we have only begun to study and understand.³¹ However, the studies which have been conducted thus far indicate that if the United States refuses to adapt its policies to this changing reality the societal costs could be enormous.³²

Before recommending the passage of H.R. 4300, the Committee on Education and Labor heard testimony from a number of individuals who testified as to the frustration they felt and the compromises they made when forced to choose between their families and their jobs.³³

Lorraine Poole, an employee of a large municipality, was unable to accept a long awaited adoptive baby due to her employer's leave policy. The adoption agency told Poole that she would not be able to adopt the child unless she could assure the agency that she would be able to take time off from work to be with the baby. Poole's employer, however, told

²⁵ See Caucus Newsletter, *supra* note 19.

²⁶ See Committee Report, *supra* note 2, at 15.

²⁷ *Id.* at 51.

²⁸ *Id.* at 15.

²⁹ Committee Report, *supra* note 2, at 15.

³⁰ *Id.*

³¹ *Id.* at 15-16.

³² See Committee Report, *supra* note 2, at 12.

³³ *Id.* at 13-14.

her she would lose her job if she took any time off from work. Thus, Ms. Poole had no choice but to forego adopting her long awaited child.³⁴

Iris Elliot, a working mother with a preschool aged child and an infant, testified as to the problems she faced when her infant became seriously ill. Elliot's employer, a major corporation, had no family leave policy, when Elliot asked for leave to care for her seriously ill infant she was offered 90 days personal leave without pay and without job protection. However, Elliot was unable to utilize the leave because she could not risk losing her job or her benefits as she was the sole medical insurance carrier for the family. At the end of her testimony, Ms. Poole stated, "No parent should ever have to be torn between nurturing their seriously ill child and reporting to work like I did."³⁵

The above are merely two examples of the difficult choices which must be made every day by working parents. However, it is important to remember that these problems are not merely the problems of isolated individuals, but rather are representative of a much broader societal problem. As the Committee reports:

Society has long depended on the family to [meet] these needs and being able to provide such care has supported and strengthened families. Depriving families of their ability to meet such needs seriously undermines the stability of families and the well being of individuals with both economic and social costs.³⁶

Additionally, a number of experts testified as to the extent of the problem and the need for a solution. Meryl Frank, director of the Infant Care Leave Project of the Yale Bush Center in Child Development and Social Policy, reporting on the findings of the Projects Advisory Committee on Infant Care Leave stated that the "infant care leave problem in the United States is of a magnitude and urgency to require immediate national attention."³⁷ The Advisory Committee recommended six months minimum leave, with partial wage replacement for the first three months, and benefit continuation and job protection for the entire period.³⁸

Dr. T. Barry Brazelton, associate professor of pediatrics at Harvard University and Dr. Eleanor S. Szanton, Executive Director of the National Center for Clinical Infant Programs testified as to the importance of parental leave³⁹ in the development of the child. Dr. Szanton stated:

³⁴ *Id.* at 16.

³⁵ *Id.*

³⁶ *Committee Report, supra* note 2 at 16.

³⁷ *Id.* at 17.

³⁸ *Id.*

³⁹ Parental leave or family leave, is a leave of absence designed to allow parents time with the new child in their lives. Unlike "maternity leave [which] consists of a period of

While children require careful nurturing throughout their development, the formation of loving attachments in the earliest months and years of life creates an emotional "root system" for future growth and development . . . In short, these factors affect the baby's cognitive, emotional, social, and physical development . . . Once parents and babies develop a solid attachment . . . the transition to work and child care is likely to be easier for parent and child.⁴⁰

Thus, one can see that inadequate parenting leave has ramifications beyond the individual. First, it is obviously in the best interest of society to provide a period of time during which this "root system" can be developed as well adjusted and productive children are crucial to our future. Second, it is in the best interest of the employer to have their employees feel comfortable with their child and their child's day care as this is likely to lower the number of employees who do not return to work, and the rate of absenteeism among those who do.⁴¹

In reaching its decision, the Committee also considered the findings of the Economic Policy Council of the United Nations Association of the United States of America which consisted of corporate executives, union presidents, and academics.⁴² The Economic Policy Council studied the economic and demographic trends affecting the American family and labor force.⁴³ It was recommended that six to eight weeks job protected maternity leave be given with partial wage replacement; six months job protected unpaid parental leave; job protected disability leave; temporary disability insurance for all workers; and the establishment of a national commission on contemporary work and family patterns.⁴⁴

B. *The Current Availability of Parental Leave*

Over 100 countries, including many developing countries and every industrialized country in the world, except the United States, provide job

leave from work to accommodate the woman's physical recuperation and to allow some time for early infant care, [parental] leave is a broader and more equitable concept for both men and women." Caucus Newsletter, *supra* note 19, at 2. Separating childbearing from childrearing is more equitable for a number of reasons. First, it allows fathers to actively participate in parenting. Similarly, it allows parents who adopt or become foster parents to take the time needed to adjust to their new child. Finally, separating childbearing from the role as primary care giver frees women from the role of primary care giver which in many instances has forced them to choose between their child and economic livelihood. *Id.*

⁴⁰ *Committee Report, supra* note 2, at 17.

⁴¹ *See infra* note 53 and accompanying text.

⁴² *Committee Report, supra* note 2, at 17.

⁴³ The Economic Policy Council published their finding in a report issued in December 1985 entitled, *Work and Family in the United States: A Policy Initiative*.

⁴⁴ *Committee Report, supra* note 2, at 17.

protected leave with partial or full wage replacement.⁴⁵ In the United States, the granting of leave rests entirely within the discretion of the employer. As a result, while some employees are adequately covered many are not.

Recently, a number of studies have been conducted which examine the leave policies of various employers in the United State. However, there is presently no comprehensive study of the range of family leaves offered by U.S. employers.⁴⁶ Catalyst, a nonprofit research organization, conducted a study of the leave policies of Fortune 1500 companies and published their findings in Report on a National Study of Parental Leave.⁴⁷ Catalyst reported that of the companies which responded, 51.8% offered some unpaid, job protected leave for women. The majority offered leave of three months or less. Additionally, only 37% provided unpaid job protected leave for men.⁴⁸ However, only nine companies reported that men had taken advantage of these leaves.⁴⁹ This should not be surprising, however, since 62.8% of the companies reported they did not think it was appropriate for men to take any type of parental leave.⁵⁰ Additionally, only 27.5% offered parental leave when adopting.⁵¹

Surprisingly, the majority of firms (86.4%) considered it relatively easy to arrange leave periods and benefit continuation.⁵² As Jeanne F. Kardos,

⁴⁵ *Id.* at 21; Among the more industrialized countries, the average minimum paid leave is twelve to fourteen weeks with many also providing the right to unpaid, job-protected leaves for at least one year. *Id.*

⁴⁶ *Id.* at 17.

⁴⁷ The results of the survey were based on 384 responses to a questionnaire sent to Fortune 1500 companies. BRIEFING PAPER, *supra* note 18, at 11.

⁴⁸ *Amount of Leave*

7.7% offered 1-2 weeks

21% offered 1 month

11.6% offered 2 months

24.3% offered 2 months

28.3% offered 4-6 months

7.2% offered over 6 months

Source: Catalyst Career and Family Center, A 1986 Nationwide Survey of Maternity/Parental Leaves, BRIEFING PAPER, *supra* note 18, at 11.

⁴⁹ BRIEFING PAPER, *supra* note 18, at 11.

⁵⁰ *Id.* at 11.

⁵¹ *Id.* at 12.

⁵² *Committee Report*, *supra* note 2, at 19. The survey results indicate that most companies reroute the work of the employee on leave:

79.8% rerouted managerial work

73.8% rerouted nonmanagerial work

Additionally, many companies used temporaries; For managerial work:

32.1% hired outside temporaries

50.9% used internal temporaries

For nonmanagerial work:

77.5% hired outside temporaries

Director of Employee Benefits at Southern New England Telephone explained at the Committee hearings, an increasing number of companies are realizing the advantage of providing adequate employee benefits. Ms. Kardos stated:

There are several factors which caused us to develop our benefit philosophy with regard to maternity and parental care. Along with many leading companies in the country, we recognize that women with children are in the workforce to stay. . . . [T]hey have special needs involving pregnancy and childrearing. We've also responded to a heretofore ignored group—fathers who want to be involved in full time child-rearing at some point after birth or adoption. The special needs of these parents, and more than that, the benefits which accrue to them and their children from this early participation in child-rearing cannot be ignored any more than the widely accepted need for medical or pension benefits.

In addition, one of the most important concerns we share with our employees is an interest in their careers. It is clear that forcing them to choose between the children and their jobs, or to compromise on either produces at least one loser—maybe two. Adequate disability and parenting leave can solve these problems. The employee returns to the company when he or she is prepared to do so, and the company retains an important asset.⁵³

While the findings of the Catalyst survey are encouraging, they can be misleading. As stated, Catalyst surveyed only Fortune 1500 companies.⁵⁴ Traditionally, large companies have offered more comprehensive employee benefits.⁵⁵ Thus, the Catalyst survey results may tend to overstate the availability of parenting leave.

In 1981, a survey of small and medium sized firms was conducted by the Columbia University School of Social Work.⁵⁶ The results of the survey indicate that less than 40% of working women received paid disability leave for the period of recovery after childbirth; 88% of the firms provided some type of maternity leave, but only 72% of those guaranteed the employee's job and allowed retention of seniority. Thirty-three percent (33%) provided less than two months leave which is merely enough time to physically recover after childbirth. Further, only 25% of

63.9% used internal temporaries

The survey revealed that work force size had little effect on which method a company used. Source: Catalyst Career and Family Center, A 1986 Nationwide Survey of Maternity/Parental Leaves, BRIEFING PAPER, *supra* note 18, at 12.

⁵³ *Committee Report*, *supra* note 2, at 19-20.

⁵⁴ *Supra* note 47 and accompanying text.

⁵⁵ See BRIEFING PAPER, *supra* note 18, at 6-7.

⁵⁶ *Id.* at 12. The results of this survey were based on 250 responses to a questionnaire sent to a random sample of 1000 small and medium sized firms.

those responding permitted men to take parental leave. Additionally, of the firms which allowed men leave, many only permitted the employee to take a few days off at the time of childbirth.⁵⁷

These two studies indicate that there is a large variation among employers as to the parental leave they provide. The variations exist not only between firms of different size, but also between firms of the same size. However, the larger the firm, the more adequate the benefits including parental leave, and, the higher the wages.⁵⁸ Most women, as well as the large percentage of all workers, however, are employed by small firms.⁵⁹ More than two-fifths of all employees work for businesses with less than 100 people, and 33.3% (close to 18 million workers) are employed by firms with less than 25 employees.⁶⁰ In short, statistics indicate that almost one-third of all American workers are employed by businesses with less than 25 employees.⁶¹ And yet, it is these small businesses which have been proven to be the least likely to provide not only parental leave, but also sick leave, disability leave, health insurance and pension plans.⁶²

The demographic changes and current employment policies outlined above present a strong case for the passage of H.R. 4300. However, in order to fully understand the need for H.R. 4300 it is also necessary to have an understanding of the current state of the law as it relates to pregnancy in the workforce for it is these factors combined which clearly indicate a change is needed.

III. PROGRESSION AND CURRENT STATE OF THE LAW

A. Federal Law

The Pregnancy Discrimination Act⁶³ was passed in 1978 as an amendment to Title VII of the Civil Rights Act of 1964.⁶⁴ Congress' purpose in enacting the PDA was to legislatively overrule the Supreme Court's decisions in *General Electric Co. v. Gilbert*⁶⁵ and *Nashville Gas Co. v. Satty*⁶⁶ and to make clear that Title VII's prohibition

⁵⁷ *Committee Report*, *supra* note 2, at 20; For a more detailed breakdown of these statistics see BRIEFING PAPER, *supra* note 18, at 13.

⁵⁸ See BRIEFING PAPER, *supra* note 18, at 6-7.

⁵⁹ *Id.* at 5-6.

⁶⁰ *Id.* at 5.

⁶¹ *Id.*

⁶² *Id.* at 5-6.

⁶³ 42 U.S.C. § 2000e(k)(1982)[hereinafter PDA].

⁶⁴ 42 U.S.C. §§ 20000e-2000e-17 (1982).

⁶⁵ 429 U.S. 125 (1976).

⁶⁶ 434 U.S. 136 (1977).

against sex discrimination included discrimination on the basis of pregnancy.⁶⁷

In *Gilbert*, the Court per Justice Rehnquist, held that General Electric Co. had not violated Title VII when it failed to include pregnancy in its otherwise all inclusive disability plan. The Court reasoned that the denial of pregnancy benefits did not constitute sex discrimination because the benefit plan distinguished between pregnant and nonpregnant persons rather than between men and women.⁶⁸

In reaching its decision, the Court entirely disregarded the Equal Employment Opportunity Commissions Guidelines, as well as the decisions of eighteen federal district courts and all seven federal courts of appeals which had considered the issue.⁶⁹

Nashville Gas Co. v. Satty,⁷⁰ which was decided one year later, held that Nashville Gas's policy regarding accumulated seniority violated Title VII. It was Nashville Gas's policy to deny accumulated seniority to employees returning from maternity leave while allowing employees returning from other nonoccupational leaves to retain their accumulated seniority.⁷¹ The court distinguished *Satty* from *Gilbert* on the ground that in *Satty*:

[The] petitioner ha[d] not merely refused to extend to women a benefit that men cannot and do not receive, but ha[d] imposed on women a substantial burden that men need not suffer. The

⁶⁷ H.R. REP. NO. 95-948, 95th Cong., 2d Sess. reprinted in 1978 U.S. CODE CONG & ADMIN. NEWS 4749-4751 [hereinafter H.R. REP. NO. 95-948].

⁶⁸ The Court based its decision in *Gilbert* on its decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), which held that a similar benefit plan did not violate the equal protection clause of the fourteenth amendment. It was in *Geduldig's* famous footnote 20 that the Court first divided the world into pregnant and nonpregnant persons. *Geduldig* at 496 n.20. The *Gilbert* Court stated that discrimination on the basis of pregnancy may be actionable if the plaintiff can prove the exclusion of pregnancy is merely a pretext for sex discrimination. In *Gilbert*, the Court found no such pretext. However, it is interesting to note, as Justice Brennan points out in his dissent, that when determining the issue of pretext the majority entirely disregarded General Electric's history of sex discrimination which, according to Brennan, had served to undercut women's opportunities in the past. *Gilbert* at 149. Justice Brennan contends that General Electric had a history of discriminating against women with regard to benefits which dated back to 1926 when General Electric's employee manual stated that no benefits were given to women because "women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company." *Gilbert* at 149-50 n.1.

In a separate dissent, Justice Stevens took issue with the Court's logic in determining that the benefit plan distinguished between pregnant and nonpregnant persons. "Insurance programs, company policies, and employment contracts all deal with future risks rather than historical facts. The classification is between persons who face a risk of pregnancy and those who do not." *Gilbert* at 161 n.5 (emphasis in original).

⁶⁹ H.R. REP. NO. 95-948, *supra* note 67 at 4750.

⁷⁰ 434 U.S. 136 (1977).

⁷¹ *Id.* at 138, 140.

distinction between benefits and burdens is more than one of semantics.⁷²

Unfortunately, the court never made clear what the basis for this distinction was, if not semantics.⁷³

Displeased with the Court's decisions in *Gilbert* and *Satty*, Congress passed the PDA to make it clear that Title VII's prohibition against sex discrimination was intended to include discrimination on the basis of pregnancy.⁷⁴ In so doing Congress explicitly adopted the dissenting Justices' interpretation of Title VII.⁷⁵

The terms because of sex or on the basis of sex include, but are not limited to because of or on the basis of pregnancy, childbirth, or related medical condition; and women affected by pregnancy, childbirth or related medical condition shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work.⁷⁶

While the language of the PDA appears clear, its proper interpretation has been the subject of great debate both among the courts and among feminists.⁷⁷ An in depth analysis of this debate is not within the scope of this discussion. However, a basic understanding of the issues involved will aid in understanding the development of the law in this area and H.R. 4300's place in this development.

The issue at the heart of the debate is whether the PDA requires employers to treat pregnancy exactly the same as any other disability and thus precludes any employment policy which provides special benefits for pregnant workers; or whether an employer may provide special

⁷² *Id.* at 142.

⁷³ At first blush, the Court's analysis appears to be logical as the disability insurance at issue in *Gilbert* is commonly referred to as a benefit. However, upon further examination it becomes clear that the Court could have characterized Nashville Gas' policy as a benefit as well. The Court could have stated that by allowing certain employees to retain their seniority, Nashville Gas was doing no more than conferring a benefit on certain employees. However, in *Satty* the employment policy was a bit more dubious and thus, the Court needed to distinguish it from *Gilbert* lest it appear to be condoning this type of discrimination.

⁷⁴ See H.R. REP. NO. 95-948, *supra* note 67.

⁷⁵ *Id.* at 4750.

⁷⁶ 42 U.S.C. § 2000e(k).

⁷⁷ See, e.g., Kay, *Models of Equity*, 1985 U. ILL. L. REV. 39 (discussing the positive action versus equal treatment approach to sex discrimination as compared to race discrimination); Krieger and Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983)(discussing the proper interpretation of the PDA as it applies to the issue of federal preemption); Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983)(discussing the proper interpretation of the PDA). See also Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work*, in DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME (W. Chavkin ed. 1984)(discussing feminist reaction to the passage of the PDA).

benefits for pregnant workers based on the fact that men do not suffer any analogous disability.⁷⁸ Andrew Weissman, in his Note entitled *Sexual Equality Under the Pregnancy Discrimination Act*,⁷⁹ contends that the language of the act can support either interpretation. According to Weissman, it can be argued that the second clause, which states that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . ."⁸⁰ is the substantive clause of the Act,⁸¹ while the first clause, which states that "[t]he terms because of sex or on the basis of sex include but are not limited to because of or on the basis of pregnancy . . .,"⁸² is merely definitional.⁸³ Alternatively, Weissman contends that when the first clause is read in conjunction with Congress' specific purpose in enacting the PDA,⁸⁴ it can be argued that the first clause was intended as a complete bar against any discrimination on the basis of pregnancy regardless of how men are treated.⁸⁵

At the time the PDA was passed, many feminists were afraid that if they emphasized the special needs of pregnant women it would endanger the gains which had been achieved thus far and discourage employers from hiring women.⁸⁶ This fear was particularly strong because traditionally the female reproductive role had been used to suppress women and keep them out of the work force and public life.⁸⁷ Thus, these feminists lobbied for what one commentator has termed the "medical model."⁸⁸ The medical model is premised on the belief that pregnancy is

⁷⁸ See *California Savings and Loan v. Guerra*, 107 S.Ct. 683 (1987); *Miller-Wohl Co. v. Com'r of Labor and Industry*, 692 P.2d 1243 (Mont. 1984). The issue of the proper means to achieve sexual equity in the workplace has also been the subject of a number of thoughtful articles and essays. See *supra* note 77.

⁷⁹ 83 COLUM. L. REV. 690 (1983).

⁸⁰ 42 U.S.C. § 2000e(k).

⁸¹ Note, *supra* note 79, at 694-95.

⁸² 42 U.S.C. § 2000e(k).

⁸³ Note, *supra* note 79, at 695.

⁸⁴ *Id.* at 695-96.

⁸⁵ Note, *supra* note 79, at 694-96.

⁸⁶ Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work* in DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME, 202 (W. Chavkin, ed. 1984). Interestingly, this same argument is currently being raised by those who oppose H.R. 4300. See *infra* note 179 and accompanying text.

⁸⁷ *Id.* at 202.

⁸⁸ In her article *Walking a Tightrope: Pregnancy, Parenting and Work*, *supra* note 86, Chavkin identifies this interpretation of the PDA as the medical model. This same interpretation has also been termed the "assimilationist view" (as in Kay, *supra* note 77 and Note, *supra* note 79), as well as the "equality model" (as in Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982)). I prefer to use Chavkin's medical model to describe this interpretation as I believe this term best describes the basis of the view, i.e., that pregnancy is nothing more than a temporary physical disability indistinguishable from any other temporary physical disability. The

no different than any other temporary disability and thus employers are required to do no more than treat pregnancy as they do any other disability.⁸⁹ This means that if an employer provides no disability leave to men, it is not a violation of the PDA to provide no leave for pregnant workers, even though 85% of working women are likely to become pregnant during their working lives.⁹⁰ It is this interpretation of the PDA which has been adopted by the EEOC and is reflected in the EEOC guidelines.⁹¹ Additionally, a number of courts have adopted this interpretation.⁹²

While deficient in many respects, the medical model does prevent employers from treating pregnant employees less favorably than other temporarily disabled workers.⁹³ However, the medical model is a double

term itself shows the emphasis on the physical act of childbirth and the deemphasis on the emotional and psychological ramifications of parenting.

⁸⁹ See Chavkin, *supra* note 86.

⁹⁰ 9 to 5 National Association of Working Women, Fact Sheet on Parental Leave (available from 9 to 5 National Association of Working Women, National Headquarters, Cleveland, Ohio).

⁹¹ Guidelines on Discrimination Because of Sex 29 C.F.R. § 1604.10 (1986) which provides in pertinent part:

Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions . . . Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement . . . shall be applied to disability due to pregnancy, childbirth or related medical condition on the same terms and conditions as they are applied to other disabilities.

See also, Questions and Answers on the Pregnancy Discrimination, Act 29 C.F.R. at 136.

⁹² See *Clanton v. Orleans Parish School Bd.*, 649 F.2d 1084 (5th Cir. 1981); *In Re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845 (8th Cir. 1979); *Pennington v. Lexington School Dist.*, 578 F.2d 546 (4th Cir. 1978).

⁹³ In *Clanton*, 649 F.2d 1084 (5th Cir. 1981), the Fifth Circuit held that the school board had violated Title VII by allowing the superintendent to determine when a teacher could return from maternity leave, while granting him no concomitant discretion with respect to teachers returning from sick leave. Similarly, in *In Re Southwestern Bell Telephone Co. Maternity Benefits Litig.*, 602 F.2d 845 (8th Cir. 1979), the Eighth Circuit found Southwestern Bells reemployment policy to be violative of Title VII. The reemployment policy stated that an employee returning from a disability leave, i.e. leave for nonoccupational illness or injury other than pregnancy, was guaranteed reemployment while employees returning from leaves of absence, including maternity were not guaranteed reemployment. The court reasoned that although the policy was neutral on its face, in that it treated males and females returning from disability leave equally, it was discriminatory in effect because it failed to recognize pregnancy as a disability. *Southwestern Bell* at 849. Another example of this type of analysis can be found in *Pennington v. Lexington School Dist.*, 578 F.2d 546 (4th Cir. 1978), in which the court held the school's policy of denying employment for the remainder of the year to teachers taking maternity leave, while allowing teachers who had taken sick leave to return for the remainder of the year was a violation of Title VII.

edged sword. Under the medical model's "comparison analysis" pregnant workers are not entitled to disability leave or any other employment benefit unless it can be demonstrated that a similarly situated employee who is temporarily disabled by reason other than pregnancy is being treated more favorably. Taken to its extreme, this "comparison analysis" can produce absurd results as in *James v. Delta Airlines*.⁹⁴ In *James*, female flight attendants brought suit against Delta alleging that they had been the victims of sexual discrimination which resulted in the loss of seniority. Pursuant to Delta's policy, the female flight attendants took a mandatory maternity leave of absence.⁹⁵ During that time it was Delta's policy to allow seniority for bidding and pay purposes to accrue only for the first three months of leave. The flight attendants' mandatory leave was in excess of three months. Thus, every flight attendant lost seniority as a result of her mandatory leave. The court held that the plaintiffs could not have been the victims of sexual discrimination because Delta employed no male flight attendants at the time.

⁹⁴ 571 F.2d 1376 (5th Cir. 1978), *cert. denied*, 439 U.S. 864 (1978).

⁹⁵ Whether an employer can force a pregnant employee to take a mandatory maternity leave commencing on a specific date is a frequently litigated issue, particularly in teaching and in the airline industry. The only Supreme Court case to address this issue is *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). In *LaFleur*, the Court held the Board's policy of requiring pregnant teachers to take leave without pay at least five months prior to their delivery date violated the due process clause of the fourteenth amendment. The court stated that such a policy constituted an irrebuttable presumption that pregnant teachers were physically unable to teach, even when medical evidence indicated that the teacher was in fact physically capable. *Id.* at 644-46. Further, the court held that while the school board may have an interest in the administrative ease which a uniform termination date would provide, this interest was insufficient to justify the policy and the school board must adopt alternative administrative policies. *Id.* at 647.

The Supreme Court has never addressed the issue of whether mandatory maternity leaves violates Title VII. As a result, the judiciary is split on the issue. However, an overview of the case law indicates that, generally, when the employer can prove that the mandatory leave is justified either as a BFOQ (*see* 42 U.S.C. 2000(e)-2(e)(1982)) or on the basis of business necessity, (*see infra* note 119), the court will uphold the policy. *See, e.g., Levin v. Delta Airlines, Inc.*, 730 F.2d 994 (5th Cir. 1984)(Delta's policy of grounding all flight attendants upon discovery of pregnancy justified on grounds of business necessity as policy was related to airline's safety concerns); *Condit v. United Air Lines Inc.*, 358 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978)(United's policy of grounding flight attendants upon discovery of pregnancy justified as evidence showed pregnancy could incapacitate flight attendants in way that might threaten safe operation of aircraft and therefore pregnancy was a bona fide occupational qualification, (BFOQ)), *but see Burwell v. Eastern Airlines*, 458 F. Supp. 474 (1978), *aff'd in part, rev'd in part on other grounds*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981)(Eastern's policy of grounding flight attendants upon discovery of pregnancy violated Title VII because Eastern did not have compelling business interest in the health of its employees or its employees' unborn children, and whether a woman should cease work is a decision for the employee and her physician); *Stansell v. Sherwin-Williams Company*, 404 F. Supp. 696 (1975)(requirement that employee take maternity leave before date suggested by her physician violates Title VII).

Additionally, the medical model is entirely unable to deal with the issues of prenatal care⁹⁶ and breastfeeding. *Board of School Directors v. Rossetti*⁹⁷ is an excellent example of the medical model's inability to deal with breastfeeding. Cheryl Rossetti, a fifth grade teacher, was granted a maternity leave prior to the birth of her child. Upon expiration of her maternity leave, plaintiff requested a leave of absence in order to continue breastfeeding her child. She requested the leave based upon her physician's opinion that, due to a history of allergy problems, it would be in the best interest of the baby if plaintiff would continue to breastfeed. The school board denied her request. On appeal, the Secretary of Education and the lower court both found in her favor.⁹⁸ In its opinion, the lower court stated:

[S]ince the development of the law in this area has been based upon the unique position of the female confronted with the prospect of childbirth, it follows that the request for additional leave for breastfeeding purposes under the circumstances of this case is merely a logical and natural extension of that concept. Consequently, the refusal of the Board to grant respondent's request for an unpaid leave of absence . . . amounted to an unlawful discriminatory practice.⁹⁹

However, the Supreme Court of Pennsylvania¹⁰⁰ reversed on the ground that plaintiff had been treated no differently than any male teacher would have been treated, had he requested leave to care for an ill newborn.¹⁰¹ The problem with this logic is clear. As the dissent points out, the majority's position "ignores the obvious reality that only women can perform the breastfeeding function."¹⁰² Despite the majority's view, Mrs. Rossetti was not in the same situation as any male teacher

⁹⁶ Chavkin, *supra* note 86, contends that the medical model is unable to deal with prenatal care because prenatal care is preventative rather than curative and therefore does not fit neatly into the disability model. *Id.* at 203. As a result, many women are unable to receive proper prenatal care which is of utmost importance to the health of the baby and the mother. *Id.* Chavkin relates the difficulties a surgical intern had regarding prenatal care:

I had difficulty getting to appointments with my obstetrician. When I was in my ninth month I travelled uptown to the doctor after being on call all night and then was chewed out for not returning to the hospital . . . after the appointment. I was supposed to see the doctor once a week in my last month, but I didn't go, 'cause I couldn't leave. I couldn't go to childbirth classes either.

Id. at 203-04.

⁹⁷ 488 Pa. 125, 411 A.2d 486 (1979).

⁹⁸ 36 Pa. Commw. 105, 387 A.2d 957 (1978).

⁹⁹ *Id.* at 112-13, 387 A.2d at 960.

¹⁰⁰ 488 Pa. 125, 411 A.2d 486 (1979).

¹⁰¹ *Id.* at 131, 411 A.2d at 489.

¹⁰² *Id.* at 133, 411 A.2d at 489.

requesting leave to stay home with an ill child. It is possible for a parent with an ill child to have someone else care for the child. However, only one person can breastfeed the child.¹⁰³

The above discussion clearly illustrates the inherent deficiencies of the medical model. The underlying premise of the medical model is that equity in the workforce can be achieved by treating men and women exactly alike. While this premise may be valid when applied to race discrimination,¹⁰⁴ it simply is not valid when applied to an analysis of pregnancy discrimination. Simply put, men and women are not the same. Each has a different reproductive role. When addressing issues involving the relationship between employment and reproduction, it is entirely unrealistic to argue that by ignoring the unique role of each sex we can attain equity.

While many courts subscribe to the medical model, some courts have adopted what has been termed by some commentators as the "pluralist view."¹⁰⁵ Unlike the medical model, the pluralist view recognizes and accepts the different reproductive roles of men and women and seeks equity through policies which reflect this reality.¹⁰⁶ Thus, under the pluralist view, equal treatment is not necessarily equitable treatment and employers may be held to be in violation of the PDA even though their employment policies treat men and women exactly the same. The

¹⁰³ In her article *Walking a Tightrope: Pregnancy, Parenting and Work*, *supra* note 86, Chavkin discusses the problems faced by women who choose to breastfeed:

The medical model is completely at a loss when faced with the issue of breastfeeding. The breastfeeding worker is neither ill nor temporarily disabled. She is a fully capable worker who merely requires facilities at work to enable her to pump her breasts and refrigerate the milk until she takes it home for the baby. If she is denied the opportunity to pump her breasts, they may become engorged and her milk supply may drop.

Id. at 205.

Chavkin contends that the hostility toward working mothers can be seen in employers' refusals to accommodate the needs of breastfeeding employees at work. One employer stated, "To allow a nursing mother to work would foist upon the company a burden to bear the resulting inefficiencies of lost product from time spent away from her job." *Id.* Chavkin does report that in that particular case, the union grieved and won, and that the policy was changed. Unfortunately, many women are not covered by union contracts. *See infra* note 170.

¹⁰⁴ For an excellent discussion of why the medical model or assimilationist view may be applicable to race discrimination, but not sex discrimination, *see Kay, supra* note 77.

¹⁰⁵ Andrew Weissman's Note, entitled *Sexual Equality Under the Pregnancy Discrimination Act* utilizes the term "pluralist view". *See supra* note 79 and accompanying text. However, this same view has also been termed the "positive action approach" (*see Krieger & Cooney, supra* note 77), and the "equal opportunity model," (*see Kay, supra* note 77 at n.11., p. 40).

¹⁰⁶ *See generally Kay, supra* note 77; Krieger and Cooney, *supra* note 77; and Note, *supra* note 79.

adoption of the pluralist view has resulted in thoughtful and equitable decisions by the courts which have utilized it.

Abraham v. Graphic Arts International Union,¹⁰⁷ is an excellent example of the pluralist view. Abraham was employed by the union as a temporary full time employee. Pursuant to a contract between the union and the Department of Labor, persons in this position were entitled to ten days sick leave and ten days vacation time. Approximately one year after Abraham began working for the union she became pregnant. Eventually Abraham lost her job and filed suit alleging that she was unlawfully discharged because of her pregnancy. The Circuit Court of Appeals for the District of Columbia held, *inter alia*, that the Union's ten day leave policy violated Title VII because it had a disparate impact on women.¹⁰⁸

The court stated that while a ten day leave is sufficient for a number of temporary disabilities, it is obviously too short to accommodate disability caused by pregnancy. "Oncoming motherhood was virtually tantamount to dismissal, though other dispositions might well and usually would pose no threat to continued employment. In short, the ten day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter."¹⁰⁹ The court further stated that an employer could violate Title VII by offering inadequate leave to the same extent as applying adequate leave in a discriminatory manner. Thus, the *Abraham* court refused to uphold the employment policy simply because it was applied equally to men and women.

This reasoning is not only more consistent with Title VII and the PDA, but also much more realistic in its approach to achieving equity between the sexes. Had the court applied the medical model in *Abraham*, it would have had to find the ten day leave policy legal, thus "permit[ting] an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different [reproductive] role."¹¹⁰ Surely such a result could not have been intended by Congress, the EEOC, or anyone who originally supported the medical model.

B. State Law

While cases like *Abraham*¹¹¹ are encouraging to those in favor of a more enlightened approach to the problem of pregnancy in the workplace, most of the real progress has been made at the state level. Presently,

¹⁰⁷ 660 F.2d 811 (D.C. Cir. 1981).

¹⁰⁸ Disparate impact is a term of art under Title VII. It refers to an analysis used to invalidate facially neutral employment policies where the policy's result is to disproportionately burden a protected class.

¹⁰⁹ 660 F.2d 811, 819 (D.C. Cir. 1981).

¹¹⁰ *Id.* at 818 (quoting *Nashville Gas Co. v. Satty*, 434 U.S. at 142 (1977)).

¹¹¹ 660 F.2d 811 (D.C. Cir. 1981).

there are at least eight states¹¹² which have passed legislation which requires employers to provide a reasonable maternity leave period and to guarantee reinstatement upon expiration of the leave. These statutes are quite similar. However, there are some variances between the states which are noteworthy.

Only two states, California and Massachusetts, set a ceiling on the amount of time which may be taken.¹¹³ The other statutes provide that an employee is entitled to a reasonable leave.¹¹⁴ A reasonable leave is usually defined as that period of time during which the employee is physically disabled due to pregnancy, childbirth, or related condition.¹¹⁵ Some statutes specifically state that a leave of absence for child rearing is not required.¹¹⁶ However, Massachusetts has taken the opposite approach by requiring an employer to grant a leave of absence with guaranteed reinstatement to a female employee, even if adopting a child.¹¹⁷ While this provision is certainly progressive, it is unclear why this benefit was not extended to men, as the leave is no longer predicated upon pregnancy.¹¹⁸ Additionally, the majority of the states provide a statutory defense for failure to reinstate.¹¹⁹

¹¹² California, CAL. GOV'T CODE § 12945(b)(2)(West 1980); Connecticut, CONN. GEN. STAT. § 46a-60 (1985); Hawaii, Hawaii Fair Employment Practice Laws § 12-23-58, *reprinted in* [8A Fair Empl. Prac. Man.] LAB. REL. REP. (BNA) 453:2328-2329 (1983); Illinois, Illinois Fair Empl. Prac. Comm. Guidelines § 2.10, *reprinted in* [8A Fair Empl. Prac. Man.] LAB. REL. REP. (BNA) 453:2753 (1977); Massachusetts, MASS. GEN. LAWS ANN. ch. 149 § 105D (West 1982); Montana, MONT. CODE ANN. § 41-2602 (1985); New Hampshire, Fair Employment Practice Laws HUM 402.03, *reprinted in* [8A Fair Empl. Prac. Man.] LAB. REL. REP. (BNA) 455:2464 (1983); Washington, Fair Employment Practice Laws, *reprinted in* [8A Fair Empl. Prac. Man.] LAB. REL. REP. (BNA) 457:2951 (1977).

¹¹³ The California Law entitles a woman to a reasonable leave of absence not to exceed four months, CAL. GOV'T CODE § 12945(b)(2)(West 1980); while the Massachusetts statute provides for a maximum leave of eight weeks, MASS. GEN. LAWS ANN. ch. 149 § 105D (West 1982).

¹¹⁴ See Connecticut, Hawaii, Illinois, Montana, New Hampshire, Washington, *supra* note 112.

¹¹⁵ See, e.g., California, Hawaii, Washington, *supra* note 112.

¹¹⁶ See, e.g., Hawaii, Illinois, *id.*

¹¹⁷ MASS. GEN. LAWS ANN. ch. 149 § 105D (West 1982).

¹¹⁸ Undoubtedly, the legislature for all its "progressive" ideas is still somewhat traditional.

¹¹⁹ See Connecticut, Illinois, Montana, New Hampshire, Washington, *supra* note 112. The defense most frequently allowed is "business necessity" or a variation thereof.

"Business necessity" is a term of art which refers to a nonstatutory defense to an allegation of disparate impact. The courts have interpreted the business necessity defense very narrowly. Generally, a claim of business necessity will only be successful if the defendant can prove the challenged practice is necessary for the safe operation of the business or is somehow related to the essence of the business operation. As was stated in *Diaz v. Pan Am. World Airlines, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971), "we apply a business necessity test, not a business convenience test . . . [D]iscrimination . . . is valid only when the essence of the business operation would be under-

The major issues regarding state legislation has been whether it is preempted by the PDA and/or whether it violates the equal protection clause. The first case to address these issues was *Miller-Wohl Company v. Commissioner of Labor and Industry*.¹²⁰ Plaintiff, Miller-Wohl brought suit alleging that the Montana Maternity Leave Act¹²¹ violated the equal protection clause and that it was preempted by the PDA. The district court¹²² held, *inter alia*, that the MMLA did not violate the equal protection clause, nor was it preempted by the PDA. The court stated that the equal protection clause is not violated when pregnancy is given preferential treatment. Rather, by removing pregnancy as a grounds for dismissal the MMLA places men and women on more equal terms.¹²³

The Supreme Court of Montana¹²⁴ concurred with the district court's

mined . . ." 442 F.2d at 388 (emphasis in the original). Cost alone is not a defense to a Title VII action and does not constitute business necessity. See, e.g., *Hutchison v. Lake Oswego*, 519 F.2d 961 (9th Cir. 1975) (costs which may be defense to equal protection claim would not necessarily be defense for Title VII purposes); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975) (absent showing that increase in premium due to inclusion of pregnancy benefits would be "devastating", cost is no defense); *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp. 784 (D. Iowa 1975) (employer must accept any increase in cost as merely a cost of production).

It is unclear what standard the state courts would use to determine whether failure to reemploy a woman returning from maternity leave is justified as business necessity. Given the narrow interpretation of the business necessity test under Title VII it seems clear that if the courts use a Title VII analysis an employer will have to show more than the inconvenience or cost of holding a job open.

¹²⁰ 696 P.2d 1243 (Mont. 1984).

¹²¹ MONT. CODE ANN. §41-2602 (1985) [hereinafter MMLA]. The MMLA provides in pertinent part that:

- 1) It shall be unlawful for an employer or his agent:
 - (b) to refuse to grant to the employee a reasonable leave of absence for . . . pregnancy
- 2) Upon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits . . .

¹²² 515 F. Supp. 1264 (D. Mont. 1981).

¹²³ *Id.* at 1266. Ironically, in response to Miller-Wohl's assertion that the MMLA creates a sex based classification by singling out pregnancy, the court cites Geduldig's famous footnote 20 (*Geduldig v. Aiello*, 496 U.S. 484, 496 n.20, *supra* note 68) for the proposition that a classification based on pregnancy is not necessarily a sex based classification. Is this evidence of the adage "what goes around comes around"?

¹²⁴ 692 P.2d 1243 (Mont. 1984). *Miller-Wohl* has an interesting procedural history which resulted in the case being adjudicated by the Montana Supreme Court after having been originally filed in the United States District Court for Montana. On October 3, 1980, the Montana Commission on Labor and Industry found that Miller-Wohl had violated the MMLA. Miller-Wohl appealed the finding to the United States District Court for Montana which concurred with the Commissioner's findings. 515 F. Supp. 1264 (D. Mont. 1981). Miller-Wohl then appealed to the United States Court of Appeals for the Ninth Circuit which dismissed the action stating that Miller-Wohl's claims were in substance defenses to

decision regarding the equal protection clause and expanded on the issue of whether the MMLA was preempted by the PDA. The supreme court stated that the legislative history of the PDA clearly indicates Congress' intent to permit state action consistent with the PDA.¹²⁵ Additionally, the court found the MMLA's affirmative protection to be entirely consistent with the purpose of the PDA.¹²⁶ The court's reasoning was simple and logical. The purpose of the PDA is to ensure that men and women are treated equally with regard to employment. When a woman is discharged solely on the basis of pregnancy she is not being treated equitably because a man can never be discharged for that reason. Further, the court commented that if there were any doubt as to whether the PDA preempted the MMLA, the way to resolve that doubt would be to extend the protection of the MMLA to all temporarily disabled employees.¹²⁷

Additionally, as did the court in *Abraham*,¹²⁸ the Montana court found Miller-Wohl's "no leave" policy to be in violation of the PDA. The court held that while Miller-Wohl's policy was facially neutral, it had a disparate impact on women and therefore violated Title VII.

The issues of federal preemption as well as the proper interpretation of the PDA were finally decided by the United States Supreme Court in *California Federal Savings and Loan Association v. Guerra*.¹²⁹ Like *Miller-Wohl*,¹³⁰ *California Federal* was brought by an employer seeking a declaration that California Government Code section 12945(b)(2)¹³¹ was preempted by the Title VII as amended by the PDA. However, unlike *Miller-Wohl*, *California Federal* did not decide the issue of equal protection. The case arose as follows.

Lillian Garland was employed as a receptionist by California Federal

the employee's state claims and therefore, Miller-Wohl failed to present an affirmative federal claim over which the court could assert jurisdiction. 685 F.2d 1088 (9th Cir. 1982). This dismissal left the district court decision without precedential effect. 692 P.2d at 1243.

At this point, Miller-Wohl petitioned the state court for review of the Commissioner's findings. The state court reversed the decision of the Commissioner and held that the MMLA is discriminatory, violates the equal protection clause and is preempted by Title VII. 692 P.2d at 1246. The case was then appealed through the state court system, and eventually was decided by the Montana Supreme Court. 692 P.2d 1243.

¹²⁵ 692 P.2d at 1247.

¹²⁶ *Id.* at 1254.

¹²⁷ *Id.* at 1255.

¹²⁸ 660 F.2d 811 (D.C. Cir. 1981).

¹²⁹ 107 S. Ct. 683 (1987).

¹³⁰ 602 P.2d 1243 (Mont. 1984).

¹³¹ CALIFORNIA GOV'T CODE § 129459b)(2)(West 1980) provides in pertinent part:

It shall be unlawful employment practices unless based upon a bona fide occupational qualification:

(b) For an employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical condition . . .

(2) To take a leave on account of pregnancy for a reasonable period of time . . .

Savings and Loan. In 1982, Garland took a pregnancy disability leave as provided in California Government Code section 12945(b)(2). Upon notifying her employer that she was able to return to work, Garland was told that her job had been filled and that there were no comparable positions available. Garland filed a complaint with the Department of Fair Employment and Housing which charged California Federal with violating section 12945(b)(2). Before any further administrative action was taken, California Federal instituted suit seeking declaratory and injunctive relief.

The district court granted summary judgment in favor of California Federal holding, *inter alia*, that section 12945(b)(2) discriminated against men on the basis of pregnancy.¹³² However, the Ninth Circuit Court of Appeals reversed stating, "the district court's conclusion that section 12945(b)(2) discriminates against men on the basis of pregnancy defies common sense, misinterprets case law and flouts Title VII and the PDA."¹³³

The Supreme Court affirmed the decision of the court of appeals. The Court reasoned that section 1104 of Title XI of the Civil Rights Act¹³⁴ clearly indicates that there are only two ways in which section 12945(b)(2) can be preempted. The first is if "compliance with federal and state legislation [is] a physical impossibility."¹³⁵ The second is if the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³⁶ In the instant case, the Court found neither of these two principles had been violated.

The Court stated that Title VII and section 12945(b)(2) share a common goal. Both seek to achieve equality of employment opportunity by removing barriers which have operated in the past to the detriment of a particular group.¹³⁷ By requiring reinstatement, the California law promotes equal employment opportunity. This requirement ensures that women will not lose their jobs because of pregnancy and allows women as well as men to have families without having to give up their jobs.¹³⁸

The Court also specifically addressed the issue of the proper interpretation of the PDA.¹³⁹ California Federal argued that the second clause of the PDA made it clear that pregnancy could not be singled out for special

¹³² [34 Fair Empl. Prac. Cases] LAB. REL. REP. (BNA) 562 (C.D. Cal. 1984).

¹³³ 758 F.2d 390, 393 (9th Cir. 1984)(footnotes omitted).

¹³⁴ 42 U.S.C. § 2000n-4, 1964. Title XI is applicable to all titles of the Civil Rights Act and provides in part that "[no] provision of this Act [shall] be construed as invalidating any provision of state law unless such provision is inconsistent with any of the purposes of this Act or any provision thereof."

¹³⁵ 107 S. Ct. at 689 (quoting *Florida Lime and Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

¹³⁶ 107 S. Ct. at 689 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹³⁷ 107 S. Ct. at 693 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

¹³⁸ *California Federal*, 107 S. Ct. at 694.

¹³⁹ Justice Scalia, who concurred in the judgment, chastised the majority for interpreting

treatment. However, the Court rejected this argument reasoning that the language of the PDA must be interpreted within its historical context and legislative history. Thus, the Court held, "[r]ather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied."¹⁴⁰ The Court went on to say that, "if Congress had intended to *prohibit* preferential treatment, it would have been the height of understatement to say only that the legislation would not require such conduct."¹⁴¹

Finally, the Court stated that even if it agree with California Federal's construction of the PDA, it did not follow that California Federal was prevented from complying with both the California Law and the PDA. In the Courts opinion, the California statute merely establishes a benefit which at the minimum must be provided. It does not, however, prevent California Federal from providing the same benefit to all employees.¹⁴²

The *California Federal* decision is important for a number of reasons. First, it puts to rest the long debated issue of the proper interpretations of the PDA.¹⁴³ By adopting the pluralist interpretation rather than the medical model, the Court makes it clear that pregnant employees are not treated equitably when they are treated the same as men. The Court recognizes that the purpose of the PDA is to provide equal employment opportunity and that, to ensure such opportunity, employers must be required to provide special accommodations for women as they face a burden which men do not share.

This decision is also a recognition of the difficulties and discrimination women have faced trying to fulfill their dual role in society. It goes even further, in that it is a recognition that each half of this dual role is important to society and women should not be forced to sacrifice one for the other.

While *California Federal* is certainly a victory for those who believe in both equal employment opportunity and guaranteed reinstatement, it should not be viewed as the end. It is merely a stepping stone toward job protected parental leave for all employees regardless of their sex. In *California Federal*, the Court made it clear that the purpose of the PDA is not merely to prevent discrimination on the basis of pregnancy, but to

the PDA. He believed that was not the issue before the Court. Justice Scalia stated, "I am fully aware that it is more convenient for the employers of California and the California Legislature to have us interpret the PDA prematurely. It has never been suggested, however, that the constitutional prohibition upon our rendering advisory opinions is doctrine of convenience." *California Federal*, 107 S. Ct. at 698.

¹⁴⁰ *Id.* at 691.

¹⁴¹ *Id.* at 692 (emphasis in original).

¹⁴² *Id.* at 694-95.

¹⁴³ See *supra* note 77 and accompanying text (discussing the various interpretations of the PDA).

allow a woman to become a parent without risking her job. "The entire thrust . . . behind [the PDA] is to guarantee women the basic right to participate fully and equally in the workforce without denying them the fundamental right to full participation in family life."¹⁴⁴ H.R. 4300 finally extends this right to men as well as women and thus is the logical next step in the evolution of employment law.

Once it is conceded that the purpose of these laws is to allow an individual to earn a living and at the same time have a family, then there is no reason to apply the law to women only. The time has come to cease viewing the problem of balancing work and family as a women's issue. We must start understanding that infant care and child care is an issue which effects every member of society. Traditional sex roles are inapplicable to modern American society and, regardless of whether one believes this is desirable, the statistics prove the days of "Ozzie and Harriet" are gone.¹⁴⁵ Thus, family leave laws which apply to women only are simply antiquated and inadequate.

The development of the law in this area reveals a logical progression of thought. Beginning with Title VII and continuing through *California Federal*, the law has developed, albeit slowly, to meet the changing needs of society. While the law has progressed significantly in the past 23 years, the development will not be complete until the right to family leave is recognized as a right in and of itself and is no longer tied to laws prohibiting sex discrimination.

H.R. 4300 will complete this development by entitling all employees, regardless of sex, to family leave. Unlike all previous legislation which has addressed this issue, H.R. 4300 seeks a solution not by prohibiting discrimination against women, but by conferring a benefit to all employees. In so doing, H.R. 4300 eradicates the problems with the medical model and provides for truly equitable treatment.

IV. OVERVIEW OF H.R. 4300

The provisions of H.R. 4300 apply to employers with 15 or more employees.¹⁴⁶ For the purposes of this bill, an employer is deemed to

¹⁴⁴ 107 S.Ct at 694 (quoting 123 Cong. Rec. 29658 (1977)).

¹⁴⁵ See text, *supra* § IIA. *Demographic Changes in Society*.

¹⁴⁶ H.R. 4300 99th Cong., 2d Sess. § 102 [hereinafter H.R. 4300]. Originally the bill was applicable to all employers with 5 or more employees. However, the Committee on Labor and Education [hereinafter the Committee] raised the small employer exemption to 15, the same number of employees needed to be covered by Title VII. By raising the small employer exemption, the Committee excluded more than one-fifth of the private sector workforce. The Committee viewed this as a "substantial concession" to the needs of small businesses. *Family and Medical Leave Act of 1986: Hearing on H.R. 4300 Before the Committee on Education and Labor, 99th Cong., 2d Sess. 99-699 Part 2 26 (1986)* [hereinafter *Committee Report*].

employ 15 or more persons if the combined number of employees within a two hundred mile radius of any facility of the employer is 15 or more.¹⁴⁷

Section 103 of the bill provides that an employee is entitled to up to eighteen work weeks of family leave within a 24 month period.¹⁴⁸ Family leave may be taken for the birth of a child, placement of a child, adoption of a child, or serious illness of a dependent child or parent.¹⁴⁹ The provisions of section 103 are not found in any other legislation which addresses maternity leave. This is because H.R. 4300 is the first legislation which addresses the needs of the family as a whole and does not merely single out pregnancy as the only time when an employee may require a leave of absence to attend to a family matter.¹⁵⁰ Further, H.R. 4300 is the first legislation which entitled men as well as women to family leave.

The leave which is mandated is unpaid. However, nothing in the bill is intended to prevent an employer from granting paid leave.¹⁵¹ Additionally, any paid vacation leave, personal leave, or family leave may be substituted for the family leave provided in the bill at the election of the employer or employee.¹⁵²

An important provision of H.R. 4300 is the provision for reduced leave.¹⁵³ The reduced leave option allows an employee to take his or her leave on a reduced basis over a period not to exceed 36 consecutive work weeks.¹⁵⁴ Any employee who chooses to exercise this option must schedule the leave so as not to "disrupt unduly the operations of the employer."¹⁵⁵ An employee who wishes to take a reduced leave must adhere to a regular schedule arranged in advance.¹⁵⁶

The reduced leave option is important for several reasons. Many families cannot afford to forego the sole income, or even one income for 18 weeks. Without the provision for reduced leave, many people would be unable to take advantage of the benefits provided by H.R. 4300. It is

¹⁴⁷ H.R. 4300, *supra* note 146, § 102. This geographic limitation was also added by the Committee in an effort to accommodate small business. *Committee Report, supra* note 146 at 26.

¹⁴⁸ H.R. 4300, *supra* note 146, § 103.

¹⁴⁹ *Id.* If the leave is taken for the birth or placement of a child, the leave must be taken within 12 months of the birth or placement. This provision was also added by the Committee to accommodate business. *Committee Report, supra* note 146, at 26.

¹⁵⁰ There is however, one limited exception to this. A Massachusetts statute entitles an employee to take a leave of absence if the employee adopts a child under the age of 3. However, this provision is applicable to women only. See MASS. GEN. LAWS ANN. ch. 149 § 105D (West 1982). See also text, *supra* § IIIB *State Laws*.

¹⁵¹ H.R. 4300, *supra* note 146, § 103.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* Thus, an employee may choose to work a half day five days a week or perhaps three full days out of a five day workweek.

¹⁵⁵ *Id.*

¹⁵⁶ *Committee Report, supra* note 146 at 28-29.

hoped that by providing reduced leave more people will be able to take family leave when needed.¹⁵⁷ Additionally, an employee may not always need 18 consecutive weeks. For example, an employee whose child has cancer may only need time off when the child undergoes treatment. Finally, reduced leave can benefit the employer by allowing him to retain experienced workers rather than hiring temporaries.¹⁵⁸

Perhaps the most important provision of H.R. 4300 is section 107 which provides for employment and benefits protection.¹⁵⁹ This provision provides that upon termination of leave, the employee is entitled to be reinstated to his previous position or an equivalent position with equivalent pay, benefits and other terms and conditions of employment.¹⁶⁰ Additionally, section 107 provides that during an employee's leave of absence the employer must continue to provide any health insurance which was provided by the employer prior to the leave.¹⁶¹ Similarly, an employee may not be deprived of any benefits which have accrued prior to leave.¹⁶² However, an employee is not entitled to accrue any additional benefits while on leave.¹⁶³

Finally, H.R. 4300 mandates the establishment of a bipartisan commission to examine the possibility of wage replacement during leave.¹⁶⁴

V. ARGUMENTS AGAINST H.R. 4300

As with any legislation of this magnitude, its passage faces strong opposition.¹⁶⁵ Not surprisingly, two major opponents of H.R. 4300 are the

¹⁵⁷ *Id.* at 29.

¹⁵⁸ *Id.*

¹⁵⁹ H.R. 4300, *supra* note 146, § 107.

¹⁶⁰ *Id.* In its report, the Committee on Education and Labor makes it clear that the standard to be used is equivalency and not comparability or similarity. The Committee stressed the use of equivalency standard because it fears that individuals will be deterred from taking leave if they are not assured of a truly equivalent position. Further, the Committee states that the standard for determining equivalency shall be the same standard used for determining discrimination under Title VII. *Committee Report, supra* note 146, at 33.

¹⁶¹ In her article *Walking a Tightrope: Pregnancy, Parenting and Work, supra* note 86, Chavkin reports that a survey conducted by a midwife in a New Haven Connecticut hospital revealed that many women continued to work longer during pregnancy if their job provided health insurance. *Id.* at 203. Section 107 will help ensure that women do not work longer than is advisable during pregnancy solely to continue health insurance.

¹⁶² H.R. 4300, *supra* note 146 § 107.

¹⁶³ *Id.*

¹⁶⁴ H.R. 4300, *supra* note 146, § 301.

¹⁶⁵ A list of organizations which oppose H.R. 4300 is available from the United States Chamber of Commerce [hereinafter the Chamber of Commerce] Washington, D.C. This list includes such members as General Motors Corp., Georgia-Pacific, Hewlett-Packard, Marriott Corporation and Rockwell International and totals nearly 70 organizations.

United States Chamber of Commerce¹⁶⁶ and the National Federation of Independent Business.¹⁶⁷ These opponents raise four basic arguments in support of their position.¹⁶⁸

First, it is argued that employee benefits should be the subject of negotiations between individual employees and employers or between labor and management and not mandated by the federal government.¹⁶⁹ The problem with this argument is that it entirely ignores the reality of the American workplace. In order to have truly meaningful negotiations the two parties must have equal bargaining power. In many employment situations this simply is not the case. This is particularly true in small firms where unionization is less common.¹⁷⁰ The suggestion that an individual should negotiate family leave with his employer is unrealistic. The testimony before the Committee is replete with examples of the outcome of these "negotiations".¹⁷¹ As Marsha Levnick, Executive Director of Now Legal Defense & Education Fund states; "An employer-by-employer approach to leave policies has failed to solve the problems of working parents. A new federal minimum standard must be established."¹⁷²

Next it is argued that mandating family leave will force employers to cut back on other benefits.¹⁷³ However, it is not clear why the mandating of leave would force this result, particularly in light of the fact that

¹⁶⁶ The Chamber of Commerce is convinced that if H.R. 4300 is passed it will raise labor costs an inordinate amount and damage the United States' ability to compete abroad. See, e.g., *60 Second Debate*, N.Y. Times, July 29, 1986 § 12A, col. 4; *Required Employee Leave?*, Houston Chronicle, July 28, 1986 § 1, at 11; Washington Watch: The Business Action Network, 7 Reasons to Say 'No' to Parental Leave June 1986 (published by and available from the Chamber of Commerce). Apparently, the Chamber of Commerce has been raising the same objections for quite some time. As far back as 1937, the Chamber of Commerce has criticized pro labor/employee legislation arguing it would increase the cost of labor and unduly burden business. See Forsythe, *Legislative History of the F.L.S.A.*, 6 LAW & CONTEMP. PROBS., 464, 468 (1939).

¹⁶⁷ The National Federation of Independent Business [hereinafter NFIB] represents more than 500,000 small and independent businesses. NFIB, Letter to Representative E. Thomas Coleman, June 23, 1986 (discussing NFIB's reasons for opposing H.R. 4300)(available from NFIB, Washington, D.C.).

¹⁶⁸ For a good summary of arguments against H.R. 4300, see *Committee Report*, *supra* note 146 dissenting and separate dissenting views.

¹⁶⁹ See, e.g., United States Chamber of Commerce Action Call, August 13, 1986 (available from The Chamber of Commerce, Washington, D.C.); *60 Second Debate*, *supra* note 166.

¹⁷⁰ In 1979, less than 5% of workers employed at firms with less than 25 employees were covered by a union contract as compared with 30% of employees who worked at firms with over 500 employees. Further, in 1983 only 1.9% of women employed by firms with less than 25 employees were under union contract. See PARENTAL AND MEDICAL LEAVE H.R. 4300 BRIEFING PAPER, 99th Cong., 2d Sess. 6 (1986).

¹⁷¹ See *Committee Report*, *supra* note 146 at 15-16.

¹⁷² *60 Second Debate*, *supra* note 166.

¹⁷³ Washington Watch: The Business Action Network, Parental Leave Fight Not Over,

employees on leave do not receive any wage replacement.¹⁷⁴ Therefore, even if an employer had to hire a temporary employee he would still be paying only one salary and thus there is no basis for claiming that family leave will divert money from other benefits. Further, current studies indicate that the majority of employers reroute work or use internal temporaries while an employee is on leave.¹⁷⁵

Closely tied to this argument is the argument put forth by small businesses, to wit: many small businesses are already operating on a slim margin, and therefore any additional fixed costs may put them out of business.¹⁷⁶ However, the proponents of this argument fail to demonstrate how H.R. 4300 will raise fixed costs. Again, the mandated leave is unpaid.¹⁷⁷ There is no reason to believe that employing a temporary, if needed, would cost any more than employing the regular worker.¹⁷⁸

Finally, it is argued that H.R. 4300 will discourage employers from hiring young employees, particularly women of childbearing years.¹⁷⁹ The answer to this argument is simple. The PDA was passed in 1978 amidst objections that it would force an undue burden on employers¹⁸⁰ and discourage them from hiring women.¹⁸¹ Additionally, there are state

October, 1986 (published by and available from the Chamber of Commerce, Washington, D.C.).

¹⁷⁴ H.R. 4300, *supra* note 146, § 103. The Chamber of Commerce claims that an informal survey indicates that the net cost of a word processor taking a 4½ month leave would be \$5,186 in Washington, D.C.; \$3,363 in Houston; and \$4,913 in Chicago. Washington Watch: The Business Action Network Parental Leave Fight Not Over, October 1986. However, the Chamber does not state how these figures were arrived at nor does it indicate what these costs represent. This is typical of the manner in which the Chamber of Commerce presents its arguments, i.e., sweeping proclamations with no evidence to support them.

¹⁷⁵ See *supra* note 52 and accompanying text.

¹⁷⁶ *Committee Report, supra* note 146, at 50.

¹⁷⁷ H.R. 4300, *supra* note 146, § 103.

¹⁷⁸ It seems rather telling that the opponents of H.R. 4300 can produce no evidence as to the effect it will have on business. It must be remembered that at least eight states already have legislation which entitles women to take a leave of absence and which guarantees that they can return to their job after the leave. One would think therefore, that if this type of legislation is as damaging to business as claimed the Chamber of Commerce or like organizations in these states would have been able to provide ample evidence as to the cost of such leaves.

¹⁷⁹ *Committee Report, supra* note 146, at 56.

¹⁸⁰ Not surprisingly, when the PDA was being debated the Chamber of Commerce was one of the legislation's chief opponents. Equally predictable was the nature of their argument: Opponents of this legislation have argued that it will be too costly; but the committee is convinced that the costs, although not negligible can be sustained without any undue burden on employers. Written testimony submitted by the Chamber of Commerce of the United States . . . indicate the total cost of this bill might be as high as 1.7 Billion [dollars].

S. REP. NO. 95-331 95th Cong., 1st Sess. 9 (1977).

¹⁸¹ W. CHAVKIN, *Walking a Tightrope: Pregnancy, Parenting and Work*, in DOUBLE EXPOSURE WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME 202 (W. Chavkin ed. 1984).

statutes which provide for guaranteed reinstatement after maternity leave which pre-date the PDA.¹⁸² Yet, women continue to be the largest growing segment of the labor force.¹⁸³ Further, it is counterproductive to argue that a law should not be passed because it may encourage some people to act illegally.¹⁸⁴ This argument appears to be an emotional ploy aimed at intimidating those people whom H.R. 4300 seeks to protect. The statistics prove that this type of legislation does not "backfire".¹⁸⁵

The arguments against H.R. 4300 are specious. At first blush they appear strong, however, further examination reveals that they are often without merit. The opponents have been unable to produce evidence in support of their arguments, and, at least one argument is directly refuted by the empirical data.¹⁸⁶ It is clear that on balance the benefits conferred by H.R. 4300 far outweigh any harm of an actual nature.

VI. CONCLUSION

Over the past twenty-five years the United States has undergone a demographic revolution. These demographic changes have had a profound impact on the family and the family's role in society. Due to the steadily growing number of women in the workforce, the family is becoming increasingly unable to perform its caregiving function. If this problem is not remedied, the societal costs could be enormous.

Current law is unable to provide the needed remedy. The PDA does nothing more than prohibit discrimination on the basis of pregnancy and, it is questionable whether it has even accomplished this goal. Additionally, while a small number of states have enacted state legislation, these laws have not gone far enough. First, the state laws are applicable to women only and, therefore, are really nothing more than extensions of anti-discrimination statutes. Further, the vast majority of states provide no further protection than that afforded by the PDA.

H.R. 4300 addresses the inadequacies in the present law and provides for an equitable remedy to the problems facing the contemporary American family. The time has come for the United States to join the rest of the industrialized world by ensuring adequate family leave benefits.

AMY K. BERMAN

¹⁸² See, e.g., Connecticut, CONN. GEN. STAT. § 46a-60(a)(7)(1985); Montana, MONT. CODE ANN. § 41-2602 (1985).

¹⁸³ PARENTAL AND MEDICAL LEAVE H.R. 4300 BRIEFING PAPER, 99th Cong., 2d Sess 5 (1986)[hereinafter BRIEFING PAPER].

¹⁸⁴ Failure to hire a woman on the basis of sex is a violation of Title VII.

¹⁸⁵ See BRIEFING PAPER, *supra* note 183.

¹⁸⁶ *Id.*