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Is More Parental Leave Always Better?: An Analysis of Potential Employee Protections for Leave Offered Outside the FMLA

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IS MORE PARENTAL LEAVE ALWAYS BETTER?: AN ANALYSIS OF POTENTIAL EMPLOYEE PROTECTIONS FOR LEAVE OFFERED OUTSIDE THE FMLA

NATALIE BUCCIARELLI PEDERSEN*

ABSTRACT

In the past few years, many large companies, including Netflix, Amazon and Facebook have implemented expanded—and very generous—parental leave policies. While on the surface these policies seem employee-friendly and even big-hearted, when one explores the potential consequences of taking such leave, the policies are fraught with potential dangers for employees. In a groundbreaking new study, researchers have found that employers view time off or flexible work arrangements made for an employee’s personal reasons as negatively reflecting on an employee’s work commitment. But what happens if a company decides to terminate an employee because they have taken leave and are viewed as less dedicated to the firm? Are any legal protections available for an employee in that position? This Article is the first to explore this timely and relevant topic. As it turns out, any legal protections an employee may have vary by state and, consequently, are largely inconsistent. Even where a cause of action is recognized, the contours of the protections vary greatly by the actual wording of the policies. This Article reviews such protections and suggests new theories under which employees could be protected from adverse consequences stemming from using a company’s parental leave. Ultimately, this Article concludes that viewing the policy as a type of unilateral contract potentially provides the most comprehensive protection for employees in this circumstance.

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I. INTRODUCTION

Netflix did it.¹ Amazon did it.² Google, Twitter, Adobe, and Facebook have all done it.³ It's trendy, popular, and enticing, but also incredibly important for employees and society. Expanded parental leave appears to be an obvious win for employees. It offers parents the prospect of time off (often paid) to bond with their family's new addition knowing that their jobs await them when their leave expires. Employers who offer them also find these leave policies advantageous, garnering copious, positive praise in the media and likely attracting more candidates for open positions.⁴

However, beneath the surface lies a peril that has, until now, remained virtually unexplored in legal scholarship: what legal protections does an employee have if the very act of taking parental leave is later used against him or her? A groundbreaking study has found that employers perceive employees who use flexible work arrangements as less committed when the arrangements are made for personal reasons.⁵ Therefore, an employer would negatively view taking extended time off after the arrival of a baby for purely personal reasons. Even an employer who offers the policy is not immune to judging an employee's commitment by their willingness to use the generous leave.⁶ Is there any way in which the law protects new parents who happily enjoy the extra bonding time with their babies from later being labeled as uncommitted, subsequently terminated, or treated adversely in some other way on the job? This Article seeks to answer this currently unexplored question. Unfortunately, any protections offered to employees are far from clear, as too often they are rooted in unsettled legal principles that vary by jurisdiction. These protections also offer little comfort to the employee facing the decision of whether or not to take advantage of a company's expanded parental leave policy.

This Article will explore the question of legal protection for those who have taken advantage of a company's expanded parental leave policy. First, the Article will discuss traditional federal protections that employees enjoy under the Family and Medical Leave Act. Next, the Article will examine what expanded leave policies look

¹ Alicia Adamczyk, *These Are the Companies with the Best Parental Leave Policies*, TIME (Nov. 4, 2015), <http://time.com/money/4098469/paid-parental-leave-google-amazon-apple-facebook/>.

² *Id.*

³ *Id.*

⁴ *See infra* notes 25–26.

⁵ Lisa M. Leslie et al., *Flexible Work Practices: A Source of Career Premiums or Penalties?*, 55 ACAD. MGMT. J. 1407, 1422 (2012).

⁶ *Id.* at 1408.

like at some prominent companies. The Article will then analyze potential legal protections for employees who may be retaliated against for using parental leave and will examine why such protections are important not only for employees, but for the greater benefit of society. Finally, the Article will propose greater protections for employees using a company's parental leave to add more certainty and predictability to these important policies. Specifically, the Article will argue that courts should treat parental leave policies as unilateral contracts that are accepted upon performance by the employee. In that way, once the employee takes leave, the company would become contractually bound not to retaliate against that employee.

II. FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act ("FMLA" or "Act"), enacted in 1993, entitles eligible employees to a total of twelve work weeks of unpaid leave during any twelve-month period for events including the birth or adoption of a child.⁷ The Act ensures that employers restore eligible employees to their original position or an equivalent position upon their return to work.⁸ The other principal benefit of the Act is that employers must maintain employees' benefits during their leave, including health insurance.⁹ However, employees still have to pay their share of those benefits.¹⁰

The FMLA was an important step forward in allowing working parents the time to not only recover from childbirth, but also to bond with their children. The Act "provide[d] a national policy that supports families in their efforts to strike a workable balance between the competing demands of the workplace and the home."¹¹ Before the Act, new parents could only take leave under "[v]oluntary or collectively bargained employer policies [or] [p]olicies required by state leave statutes."¹² No comprehensive federal leave statute existed, and under state or voluntary employer policies, "[l]eave was often handled on a case by case basis, for a shorter duration, and health insurance and other benefits were not necessarily maintained" as compared with the FMLA mandates.¹³

The benefits of the FMLA are clear. Employer resistance to employees using provided leave certainly was a concern when the statute was drafted.¹⁴ Therefore, one

⁷ 29 U.S.C. § 2612(a)(1)(A)–(B) (2017).

⁸ *Id.* § 2614(a)(1)(A)–(B).

⁹ *Id.* § 2614(c)(1).

¹⁰ *Id.*; see U.S. DEP'T OF LABOR, WAGE & HOUR DIVISION, FACT SHEET #28A: EMPLOYEE PROTECTIONS UNDER THE FAMILY AND MEDICAL LEAVE ACT (2012), <https://www.dol.gov/whd/regs/compliance/whdfs28a.htm>.

¹¹ U.S. DEP'T OF LABOR, WAGE & HOUR DIVISION, FAMILIES AND EMPLOYERS IN A CHANGING ECONOMY (2016), <https://www.dol.gov/whd/fmla/1995Report/summary.htm>.

¹² *Id.*

¹³ *Id.*

¹⁴ See *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001) ("[T]he established understanding at the time the FMLA was enacted was that employer actions that deter employees' participation in protected activities constitute 'interference' or 'restraint' with the employees' exercise of their rights.").

of the most important provisions of the FMLA is the anti-retaliation provision.¹⁵ The FMLA and Section 825.220 of the FMLA regulations prohibit the following actions:

An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.¹⁶

[A]n employer [is prohibited] from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights.¹⁷

An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.¹⁸

All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has: [f]iled any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act; [g]iven, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act; [or] [t]estified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.¹⁹

The anti-retaliation provision protects employees who wish to take FMLA leave without fear of reprisal and encourages those who have been retaliated against to come forward.²⁰ Such anti-retaliation provisions are crucial to the effective functioning of statutes such as the FMLA, ensuring that employees are free to engage in protected activity without fear of retaliation, such as job loss.

III. VOLUNTARY EXPANDED PARENTAL LEAVE POLICIES

One of the key sources of criticism of the FMLA is that the statutorily required leave is unpaid. Because of this, the class of workers able to take FMLA leave is limited.²¹ Recently, companies have begun to expand parental leave options on a voluntary basis, both in terms of duration and payment. In the past few years, several large U.S. companies have revised their parental leave policies to be much more generous. This Article will discuss some of these companies and their policies.

¹⁵ 29 U.S.C. § 2615(a)(2) (2017).

¹⁶ 29 C.F.R. § 825.220(a)(1) (2013); *see* 29 U.S.C. § 2615(a)(1) (2017) (“It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.”).

¹⁷ 29 C.F.R. § 825.220(c) (2017); *see* 29 U.S.C. § 2615(a)(2) (2017) (“It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA].”).

¹⁸ 29 C.F.R. § 825.220(a)(2) (2017).

¹⁹ *Id.* § 825.220(a)(3), (3)(i)–(iii).

²⁰ *Id.* § 825.220(e).

²¹ TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW PRIVATE ORDERING AND ITS LIMITATIONS* 736 (2d ed. 2011).

Arguably, the most radical transformation has occurred at Netflix. In August 2015, the company introduced its “unlimited leave policy,” allowing new parents to take off as much time as they want during “the first year after the birth or adoption of a child.”²² The policy allows parents to return part-time or full-time, or return and then take additional leave as needed.²³ Netflix’s position is that they will “just keep paying them normally, eliminating the headache of switching to state or disability pay. Each employee gets to figure out what’s best for them and their family, and then works with their managers for coverage during their absences.”²⁴

Netflix’s announcement was big news and widely celebrated in the press.²⁵ While certainly offering one of the most generous leave policies in the United States, Netflix is not the only company to voluntarily offer paid parental leave to its employees. Similar to Netflix, the media lauded Adobe’s leave policy.²⁶ Through the combination of medical and parental leave, Adobe offers up to twenty-six weeks of paid time to birth mothers and sixteen weeks of paid time for primary caregivers, allowing new parents more time to spend bonding with their children.²⁷ This benefit is available to “moms and dads who have become parents through childbirth, surrogacy, adoption,

²² Emily Steel, *Netflix Offers Expanded Maternity and Paternity Leave*, N.Y. TIMES (Aug. 4, 2015), http://www.nytimes.com/2015/08/05/business/netflix-offers-expanded-maternity-and-paternity-leave.html?_r=1.

²³ *Id.*

²⁴ Tawni Cranz, *Starting Now at Netflix: Unlimited Maternity and Paternity Leave*, NETFLIX U.S. & CAN. BLOG (Aug. 4, 2015, 1:42 PM), <http://blog.netflix.com/2015/08/starting-now-at-netflix-unlimited.html>. Note that this policy only applies to certain employees. Shane Ferro, *Netflix Just Made Another Huge Stride on Parental Leave*, HUFFINGTON POST (Jan. 16, 2017), http://www.huffingtonpost.com/entry/netflix-paid-parental-leave-hourly-workers_us_56685ae1e4b009377b233a79. Employees involved in the DVD and call center aspects of the company (generally, the hourly employees) are subject to a different, less generous policy. *Id.*

²⁵ See, e.g., Steel, *supra* note 22; Rachel Gillett, *Netflix, Google, Facebook, and 13 Other Companies with Extremely Generous Parental Leave Policies in America*, BUS. INSIDER (Aug. 5, 2015) [hereinafter Gillett, *Netflix, Google, Facebook*], <http://www.businessinsider.com/generous-parental-leave-policies-in-america-2015-8>; Julia Greenberg, *Netflix Hit with House of Cards Spoof over Parental Leave*, WIRED (Aug. 28, 2015), <https://www.wired.com/2015/08/netflix-hit-house-cards-spoof-parental-leave/>; Julia Greenberg, *Netflix Will Let New Moms and Dads Take a Year of Leave*, WIRED (Aug. 4, 2015), <http://www.wired.com/2015/08/netflix-will-let-new-moms-dads-take-year-leave/>; Kia Kokalitcheva, *Netflix Just Announced a Game-Changing Parental Leave Policy*, FORTUNE (Aug. 4, 2015), <http://fortune.com/2015/08/04/netflix-maternity-paternity-leave/>; Kim Lachance Shandrow, *10 U.S. Companies with Radically Awesome Parental Leave Policies*, FOX NEWS U.S. (Aug. 11, 2015), <http://www.foxnews.com/us/2015/08/11/10-us-companies-with-radically-awesome-parental-leave-policies.html>; Matt Straz, *Netflix Sets a New Standard with Unlimited Parental Leave*, ENTREPRENEUR (Aug. 5, 2015), <http://www.entrepreneur.com/article/249261>.

²⁶ See, e.g., John Kell, *Yet Another Tech Giant Expands Parental Leave*, FORTUNE (Aug. 10, 2015), <http://fortune.com/2015/08/10/adobe-parental-leave/>; Barbara Ortutay, *After Netflix, Adobe Extends Parental Leave Policy*, AOL (Aug. 10, 2015), <https://apnews.com/2efd63143097441bbd55bc4d5206420c>; Shandrow, *supra* note 25.

²⁷ Kell, *supra* note 26.

or foster care.”²⁸ Twitter’s parental leave policy also earned the company news attention.²⁹ “Twitter provides [twenty] weeks of paid maternity leave for birth mothers and [ten] paid weeks for paternity leave or adoptive parents.”³⁰

Many more companies have expanded parental leave. “At Google, biological mothers are given [eighteen] weeks of paid maternity leave and [twenty-two] if there are complications. New parents, regardless of gender, can receive up to [twelve] weeks of paid baby bonding time, including adoptive or surrogate caregivers. Non-primary caregivers are eligible for [seven] weeks paid leave.”³¹ Facebook gives employees who are new parents seventeen weeks of paid leave in addition to “a \$4,000 ‘baby cash’ stipend for each child adopted or born.”³² Johnson and Johnson’s leave policy states that “*all* new parents—maternal, paternal, and adoptive—will have the opportunity to take eight weeks of paid leave during the first year of the family’s birth or adoption.”³³ The company’s new policy adds to its “current leave policies, which means moms who give birth can take up to [seventeen] paid weeks off.”³⁴ Goldman Sachs provides sixteen weeks “fully paid maternity leave which includes four weeks of parenting leave at full pay if the employee is the primary caregiver (two weeks for a secondary care giver).”³⁵ The firm also “provide[s] fully paid adoption leave of up to [eight] weeks.”³⁶ YouTube offers birth mothers “[eighteen] weeks of paid maternity leave (during which their stock shares continue to vest)” and an additional four weeks for

²⁸ Donna Morris, *Helping Our Employees Care for Their Families*, ADOBE NEWS (Aug. 10, 2015), <http://blogs.adobe.com/conversations/2015/08/donna-morris-enhanced-leave.html>.

²⁹ See, e.g., Jena McGregor, *How Do You Erase the Taboo of Paternity Leave? These Companies Have an Idea*, WASH. POST (June 18, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/06/18/companies-try-to-erase-the-taboo-of-paternity-leave/>; Shandrow, *supra* note 25; Steel, *supra* note 22; Lauren Walker, *Hours After Netflix’s Parental Leave Announcement, Microsoft Makes Its Own*, NEWSWEEK (Aug. 5, 2015), <http://www.newsweek.com/following-netflixs-lead-microsoft-updates-parental-leave-policy-360080>.

³⁰ Rebecca Grant, *Silicon Valley’s Best and Worst Jobs for New Moms (and Dads)*, ATLANTIC (Mar. 2, 2015), <http://www.theatlantic.com/technology/archive/2015/03/the-best-and-worst-companies-for-new-moms-and-dads-in-silicon-valley/386384/>.

³¹ *Id.*

³² Shandrow, *supra* note 25; see Jennifer Alsever, *Which Tech Company Offers the Best Child Care?*, FORTUNE (Oct. 14, 2013), <http://fortune.com/2013/10/14/which-tech-company-offers-the-best-child-care/>; Gillett, *Netflix, Google, Facebook*, *supra* note 25; Dana Liebelson, *Can Facebook and Reddit Fix America’s Maternity Leave Problem?*, MOTHER JONES (May 28, 2013), <http://www.motherjones.com/politics/2013/05/silicon-valley-maternity-leave-paternity-leave/>; Nina Zipkin, *Facebook, Apple to Begin Paying for Employees to Freeze Their Eggs*, ENTREPRENEUR (Oct. 14, 2014), <http://www.entrepreneur.com/article/238524>.

³³ Peter Fasolo & Lisa Blair Davis, *J&J and the 21st Century Working Family*, JOHNSON & JOHNSON (Apr. 29, 2015), <https://www.jnj.com/work-life-balance/j-j-and-the-21st-century-working-family>.

³⁴ *Id.*

³⁵ *Compensation and Benefits*, GOLDMAN SACHS (2015), <http://www.goldmansachs.com/careers/why-goldman-sachs/compensation-and-benefits/compensation-and-benefits-us.html>.

³⁶ *Id.*

mothers who experience complications during childbirth.³⁷ The policy also provides that the “primary caregiver (gender neutral, includes adoptive parents and surrogates) is given up to [twelve] weeks paid ‘baby-bonding leave.’ The non-primary caregiver receives up to seven weeks of paid leave.”³⁸ At Apple, “[e]xpectant mothers can take up to four weeks before giving birth and [fourteen] weeks after. Fathers and other non-birth parents can take six-week paid leaves.”³⁹ Yahoo provides its employees with sixteen weeks of “paid maternity leave [for birth mothers] and eight weeks for fathers and non-birth parents.”⁴⁰

Amazon’s expansion of parental leave provided benefits beyond those for its employees. There, mothers receive “four weeks of paid leave before giving birth and [ten] weeks after, plus an additional six weeks that any new parent . . . can take, for a total of up to [twenty] weeks (during which their stock shares continue to vest). Fathers and adoptive parents get six weeks.”⁴¹ Given Amazon’s recent public relations issues, this revised policy, and all the press it received, helped to repair the company’s public image.⁴²

These examples are not an exclusive list of employers who have expanded parental leave. A number of other companies offer expanded leave as well.⁴³

³⁷ Adamczyk, *supra* note 1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Kristen Bellstrom, *Amazon Extends Paid Parental Leave, Covering Dads for the First Time*, FORTUNE (Nov. 2, 2015), <http://fortune.com/2015/11/02/amazon-extends-paid-parental-leave-covering-dads-for-the-first-time/>; Todd Bishop, *Amazon Boosts Maternity Leave, Offers Paid Paternity Leave for First Time, and Creates ‘Leave Share’ Program for Spouses*, GEEKWIRE (Nov. 2, 2015), <http://www.geekwire.com/2015/amazon-boosts-maternity-leave-offers-paid-paternity-leave-for-first-time-and-creates-leave-share-program-for-spouses/>; Jacob Demmitt, *As Criticism Mounts, Amazon Discloses Parental Leave Policy that Trails Tech Industry Peers*, GEEKWIRE (Aug. 19, 2015), <http://www.geekwire.com/2015/as-criticism-mounts-amazon-discloses-parental-leave-policy-that-trails-tech-industry-peers/>; Rachel Gillett, *Amazon’s New Parental Leave Policy Probably Won’t Fix the Company’s ‘Bruising’ Workplace Culture*, BUS. INSIDER (Nov. 4, 2015), <http://www.businessinsider.com/how-amazons-parental-leave-policy-affects-its-culture-2015-11>; Julia Greenberg, *Amazon’s New Parental Leave Policy Is Good—and Good PR*, WIRED (Nov. 2, 2015), <http://www.wired.com/2015/11/amazons-new-parental-leave-policy-is-good-and-good-pr/>; Nitish Kulkarni, *Amazon Revamps Parental Leave Policy*, TECHCRUNCH (Nov. 2, 2015), <http://techcrunch.com/2015/11/02/amazon-revamps-parental-leave-policy/>; Anna Merlan, *Here’s Amazon’s New Parental Leave Policy, Designed to Combat All Their Bad Press*, JEZEBEL (Nov. 2, 2015), <http://jezebel.com/heres-amazons-new-parental-leave-policy-designed-to-co-1740082884>; Katie Sola, *Amazon Delivers Prime Parental Leave Policy*, FORBES (Nov. 2, 2015), <http://www.forbes.com/sites/katiesola/2015/11/02/amazon-delivers-prime-parental-leave-policy/>.

⁴³ Reddit’s leave policy allows “new mothers and fathers [seventeen] weeks of paid parenting leave,” which may “be taken within the first year in two-week stretches at minimum.” Shandrow, *supra* note 25. Employees who have worked at Bank of America for one year “can take up to [sixteen] weeks of paid maternity, paternity and adoption leave.” *Benefits and Advantages*, BANK OF AMERICA (2015), <http://careers.bankofamerica.com/us/working-here/benefits-advantages.aspx#tab-life-management-benefits>. Microsoft affords “eight weeks

IV. DOES LEAVE BENEFIT SOCIETY?

As discussed *supra*, expanded parental leave policies can certainly benefit employers. Such policies almost always garner media attention and help to attract employees who are interested in doing excellent work while simultaneously balancing a healthy family life.⁴⁴ Increased retention is another potential benefit to employers of paid parental leave.⁴⁵ Paid family leave additionally indicates to employees that their

of fully paid maternity disability leave for new mothers, plus [twelve] weeks of Parental Leave for all parents of new children, of which four are paid and eight unpaid.” Kathleen Hogan, *The Employee Experience at Microsoft: Aligning Benefits to Our Culture*, OFFICIAL MICROSOFT BLOG (Aug. 5, 2015), <https://blogs.microsoft.com/blog/2015/08/05/the-employee-experience-at-microsoft-aligning-benefits-to-our-culture/>. The Change.org company “offers [eighteen] weeks paid maternity, paternity, and adoption leave.” Adamczyk, *supra* note 1. At Pinterest, while “[n]ew mothers receive [twelve] weeks paid leave, dads get four weeks.” *Id.* The Bill & Melinda Gates Foundation allows for fifty-two weeks of “paid maternity and paternity leave.” *Id.* Bloomberg affords eighteen weeks “full paid leave for [the] primary caregiver” and four weeks for the “non-primary caregiver.” *Id.* At Patagonia, employees receive eight weeks of “paid maternity, paternity, and adoption leave.” *Id.* Genentech’s policy “offers new parents six weeks of paid leave,” after which “parents may take an additional six weeks of unpaid leave over the course of the new child’s first [twelve] months.” Rachel Gillett, *15 Companies with the Most Generous Parental Leave Policies*, BUS. INSIDER (Aug. 7, 2015) [hereinafter Gillett, *Generous Parental Leave Policies*], <http://www.inc.com/business-insider/16-companies-with-generous-parental-leave-policies.html>. Arnold & Porter LLP provides eighteen weeks “paid leave for the primary caretaker (including for adoption)” and six weeks “paid parental leave for the secondary caretaker.” Adamczyk, *supra* note 1. At Ernst & Young,

[b]irth mothers . . . receive . . . [twelve] weeks of fully paid time off following the birth of a child and can receive an additional two weeks of paid leave before the birth if a doctor suggests it. All other parents that are the primary caregiver can receive up to six weeks paid leave, and non-primary caregivers get two weeks of parental leave after the baby arrives.

Gillett, *Generous Parental Leave Policies, supra*. “New moms at the international management consulting firm [Oliver Wyman] can receive up to [twelve] weeks of full pay while they’re away. New dads and adoptive parents receive up to [six] weeks.” *Id.* The U.S. Navy provides eighteen weeks of “paid maternity leave.” Adamczyk, *supra* note 1.

⁴⁴ COUNCIL OF ECON. ADVISERS, THE ECONOMICS OF PAID AND UNPAID LEAVE 17 (2014) [hereinafter COUNCIL OF ECON. ADVISERS, ECONOMICS] (footnotes omitted) (“Paid leave policies can help business [sic] recruit talented workers who plan to stay with a firm after having children. In a survey of two hundred human resource managers, two-thirds cited family-supportive policies, including flexible schedules, as the single most important factor in attracting and retaining employees. Paid leave has been shown to increase the probability that women continue in their job after having a child, rather than quitting permanently, saving employers the expense of recruiting and training additional employees.”); Julia Greenberg, *Tech’s Selfish Reasons for Offering More Parental Leave*, WIRED (Aug. 13, 2015), <http://www.wired.com/2015/08/techs-selfish-reasons-offering-parental-leave/> (“[T]he new policies are not just for the good of hard workers. After all, tech companies are competitive—and they’re competing for many of the same potential employees. They’re also increasingly concerned about the diversity of their workforces. By offering improved parenting benefits, especially those that help support women (and men), they’re hoping to not only catch the attention of their current employees, but attract the best, most diverse talent, too.”).

⁴⁵ Susan Wojcicki, *Paid Maternity Leave Is Good for Business*, WALL ST. J. (Dec. 16, 2014), <http://www.wsj.com/articles/susan-wojcicki-paid-maternity-leave-is-good-for->

company is invested in them.⁴⁶ Instead of inciting fear in employees that they will become expendable after choosing to have a child, the company that offers generous family leave communicates a commitment to their employees' futures.⁴⁷

Through expanded leave policies, the company demonstrates to employees that it values their happiness and well-being more than short-term profits.⁴⁸ Companies that allow the employee time to enjoy and adjust to parenthood help the employee be more productive and engaged when they return.⁴⁹ By not forcing employees to choose between work and home in the early stages of parenthood, employers also may increase productivity and employee loyalty.⁵⁰

Despite the strides some companies have made, “[o]nly [twelve] percent of U.S. private sector workers have access to paid family leave through their employer.”⁵¹ Given the relative scarcity in the number of workers covered by paid leave, the remaining question is whether such leave matters. Does extended leave make a difference for workers and society? The research on this issue seems to point to the conclusion that paid leave benefits society as a whole.⁵²

First, paid leave benefits children themselves.⁵³ Paid leave programs have been shown to “substantially reduce infant mortality rates”⁵⁴ The decreased rates occur because “paid and sufficiently long leaves are associated with increased breastfeeding, . . . higher rates of immunizations and health visits for babies, and lower risk of postpartum depression.”⁵⁵ According to the Centers for Disease Control and

business-1418773756 (“When we increased paid leave at Google to [eighteen] weeks, the rate at which new mothers left fell by 50%.”); Ann O’Leary, *Paid Parental Leave Helps Families and the Economy*, CTR. FOR AM. PROGRESS (June 4, 2009), <https://www.americanprogress.org/issues/labor/news/2009/06/04/6253/paid-parental-leave-helps-families-and-the-economy/> (“Paid parental leave will help the government recruit and retain the brightest minds to deal with our country’s most challenging problems.”).

⁴⁶ See NAT’L P’SHP WOMEN & FAMILIES, FACT SHEET: PAID FAMILY AND MEDICAL LEAVE 2 (2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/paid-leave-good-for-business.pdf>.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ *Id.*; see Leslie et al., *supra* note 5, at 1407.

⁵⁰ NAT’L P’SHP WOMEN & FAMILIES, *supra* note 46, at 2.

⁵¹ U.S. DEP’T OF LABOR, DOL FACTSHEET: PAID FAMILY AND MEDICAL LEAVE (2015) https://www.dol.gov/wb/resources/paid_leave_fact_sheet.pdf.

⁵² See, e.g., COUNCIL OF ECON. ADVISORS, ECONOMICS, *supra* note 44, at 22.

⁵³ Rachel Gillett, *The Science Behind Why Paid Parental Leave Is Good for Everyone*, BUS. INSIDER (Aug. 5, 2015) [hereinafter Gillett, *Science Behind Paid Parental Leave*], <http://www.businessinsider.com/scientific-proof-paid-parental-leave-is-good-for-everyone>.

⁵⁴ *Id.*

⁵⁵ US: *Lack of Paid Leave Harms Workers, Children*, HUM. RTS. WATCH (Feb. 23, 2011), <https://www.hrw.org/news/2011/02/23/us-lack-paid-leave-harms-workers-children>; see Liza Mundy, *Daddy Track: The Case for Paternity Leave*, ATLANTIC (Dec. 22, 2013), <http://www.theatlantic.com/magazine/archive/2014/01/the-daddy-track/355746/> (“Studies

Prevention (“CDC”), babies who are breastfed are less likely to get a variety of infections and “are [also] at lower risk [for] asthma, obesity, and sudden infant death syndrome”⁵⁶ Increased time to breastfeed benefits mothers as well. According to the CDC, “women who breast-feed are less likely to get breast cancer, ovarian cancer, type 2 diabetes and heart disease”⁵⁷ Increasing the health of the infant and women population is undeniably a positive advance for society.

Next, paid parental leave is not only good for infants, but also for children in the long-term as they become adults.⁵⁸ Studies have shown that paid leave is linked to increased education levels, IQ, and income level in adulthood for children whose mothers took advantage of it.⁵⁹ Additionally, the largest effect of parental leave is found in children from lower-educated households, indicating that paid leave could help reduce the existing education gap.⁶⁰ Studies have also shown “lower teen pregnancy rates . . . for children whose mothers used maternity leave.”⁶¹

More broadly, research demonstrates that paid parental leave is good for the economy because it increases families’ economic stability and decreases reliance on social welfare programs.⁶² As Rachel Gillett notes:

[W]omen who had taken advantage of New Jersey’s paid-family-leave policy were far more likely than mothers who hadn’t to be working nine to [twelve] months after the birth of their child. . . . [T]hese women [were also thirty-nine percent] less likely to receive public assistance and [forty percent] less likely to receive food stamps in the year following a child’s birth compared to those who didn’t take any leave.⁶³

The United States Department of Labor observed:

Paid maternity leave can increase female labor force participation by making it easier for women to stay in the workplace after giving birth, which contributes to economic growth. When parents are better supported at work through paid family and medical leave, they are also less likely to rely on public assistance benefits.⁶⁴

have confirmed that when women take maternity leave, babies get breast-fed longer and infant-mortality rates go down.”)

⁵⁶ *Breastfeeding Support Improves in Many U.S. Hospitals*, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 6, 2015), <https://www.cdc.gov/media/releases/2015/p1006-breastfeeding-support.html>.

⁵⁷ Kelly Wallace & Jen Christensen, *The Benefits of Paid Leave for Children Are Real, Majority of Research Says*, CNN (Oct. 29, 2015) (alteration from original), <http://www.cnn.com/2015/10/29/health/paid-leave-benefits-to-children-research>.

⁵⁸ Gillett, *Science Behind Paid Parental Leave*, *supra* note 53.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ COUNCIL OF ECON. ADVISERS, ECONOMICS, *supra* note 44, at 8.

⁶² Gillett, *Science Behind Paid Parental Leave*, *supra* note 53.

⁶³ *Id.*

⁶⁴ U.S. DEP’T OF LABOR, *supra* note 51.

In sum, paid parental leave seems to be a win for all involved. The increases in labor market attachment, economic security, and the health and welfare of families and children benefit employers, employees, and society as a whole.⁶⁵ Paid leave helps to decrease reliance (and thus spending) on public benefits programs and promote economic independence for families.⁶⁶ However, the threat remains that companies stigmatize and punish employees who elect to take such leave. The next section discusses this issue.

V. POTENTIAL NEGATIVE CONSEQUENCES OF TAKING LEAVE

In spite of the benefits of paid leave, mounting evidence signals that employers may view leave-takers in a negative way.⁶⁷ In fact, some evidence suggests employers may use an employee's decision to take paid leave as a signal of low work commitment.⁶⁸ This section will discuss a groundbreaking study in this area, as well as some of the anecdotal evidence about work culture and its effects on leave in the United States.

A. Leave as It Relates to Employers' Perceptions of Employee Commitment

In an article entitled "Flexible Work Practices: A Source of Career Premiums or Penalties?," Lisa M. Leslie and her co-authors examine whether an employee's use of flexible work practices affect career success.⁶⁹ The authors' motivation for undertaking this study was that "[i]n spite of their potential benefits, surprisingly few clear conclusions exist regarding how [flexible work practices] affect employees' extrinsic career success"⁷⁰

The authors define flexible work practices to include flexible schedules (control over starting and stopping times), telecommuting, compressed work weeks, job sharing, and part-time work.⁷¹ The authors also define career success as "easily observable work outcomes that are indicative of employee effectiveness, such as

⁶⁵ *Id.*

⁶⁶ BARBARA GAULT ET AL., INST. WOMEN'S POL'Y RES., PAID PARENTAL LEAVE IN THE UNITED STATES 1 (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B334-Paid%20Parental%20Leave%20in%20the%20United%20States.pdf>. Of course, such leave can also be very costly to a company. The main costs come from paying the employee's salary and benefits while out on leave, hiring a temporary worker to cover for the employee who is on leave, and "[a] potential decrease in productivity due to the fact that other [employees] may need to cover for the person" who is on leave or assist the temporary worker hired to take the employee's place. Lydia Dishman, *The Real Cost of Paid Parental Leave for Businesses*, FAST CO. (Jan. 28, 2016), <https://www.fastcompany.com/3055977/the-real-cost-of-paid-parental-leave-for-business>; see James F. Peltz, *Why Paid Parental Leave Won't Go National*, N.Y. TIMES (Apr. 28, 2016), <http://www.latimes.com/business/la-fi-qa-parental-leave-20160428-story.html>.

⁶⁷ Leslie et al., *supra* note 5, at 1408.

⁶⁸ *Id.* at 1409.

⁶⁹ *Id.* at 1407.

⁷⁰ *Id.*

⁷¹ *Id.* at 1412.

salary or job level”⁷² During the study, the authors surveyed 482 employees and 366 managers regarding flexible work practices at their workplaces.⁷³ Additionally, the authors inquired about employee commitment, career success, and why employees took advantage of flexible work practices offered by the employer.⁷⁴

After analyzing the study’s data, the authors found that “[flexible work practice] users were perceived as less committed than . . . nonusers when [flexible work practice] use was attributed to a desire for personal life accommodation. Perceived commitment, in turn, was positively related to reward recommendations, an indicator of career success.”⁷⁵ The study differentiated personal life accommodation attributions by managers from productivity attributions in the following way:

We define productivity attributions as perceptions that an employee uses [flexible work practices] to increase work performance and efficiency, for example by structuring work around business needs (e.g., making international calls during nonstandard work hours). Alternatively, we define personal life attributions as perceptions that an employee uses [flexible work practices] to accommodate nonwork activities, for example by structuring work around childcare.⁷⁶

Based on the results of this study, in a company that offers flexible work practices, managers who believe employees are using such practices to accomplish more work may actually reward those employees.⁷⁷ Conversely, those managers who believe employees are using flexible work practices to accommodate their personal lives likely will view those employees as less committed and more deserving of penalties for taking leave.⁷⁸

Paid leave offered by an employer is one of the most extreme forms of flexible work practice and its usage can only be attributed to personal life accommodation.⁷⁹ This study is dire news for employees whose companies offer such leave. Although seemingly endorsed by the workplace, the leave could actually be signaling low work commitment to managers and an employee’s willingness to take the leave could result in career penalties.⁸⁰

B. Anecdotal Evidence of Employer’s Negative Response to Employee Leave Usage

The narrative described above seems to be borne out by the anecdotal evidence. As described in Section III *supra*, several large, well-known companies recently have

⁷² *Id.* at 1407.

⁷³ *Id.* at 1411.

⁷⁴ *Id.* at 1412–13.

⁷⁵ *Id.* at 1422.

⁷⁶ *Id.* at 1409.

⁷⁷ *Id.* at 1422.

⁷⁸ *Id.*

⁷⁹ See COUNCIL OF ECON. ADVISORS, WORK LIFE BALANCE AND THE ECONOMICS OF WORKPLACE FLEXIBILITY 14 (2014) (contrasting the importance of paid leave with employees limited access to paid leave as a benefit).

⁸⁰ Leslie et al., *supra* note 5, at 1409.

voluntarily expanded their parental leave policies to paid leave beyond that required by the FMLA.⁸¹ Despite the positive press these companies receive for such actions, the media is replete with articles discussing employee reticence to take such leave because of a workplace culture that equates leave-taking with lack of commitment.⁸²

A recent New York Times article details the expansion of leave at several of the companies discussed in this Article.⁸³ After noting how advantageous leave can be for new parents, the New York Times article poses the inevitable question: will these new benefits “be more talked up than actually taken?”⁸⁴ For, as the authors state, “[a]t many companies, the new benefits are at odds with a highly demanding, 24/7 workplace culture—a culture that starts from the top.”⁸⁵

Leave is only valuable if it is actually an option—something that is embraced and encouraged by the employer and workplace culture.⁸⁶ Many times, the text of a company’s leave policy is not in line with the actions of the company executives.⁸⁷ For instance, when Marissa Mayer, the CEO of Yahoo, announced she was pregnant with twins, she stated, “I plan to approach the pregnancy and delivery as I did with my son three years ago, taking limited time away and working throughout.”⁸⁸ Mayer made this statement despite the fact that Yahoo provides sixteen weeks of “paid maternity leave and eight weeks for fathers and non-birth parents.”⁸⁹ Such actions by an executive set a tone that commitment equals being present all the time, and leave simply does not fit into that narrative.⁹⁰ Similarly, Facebook offers new parents seventeen weeks of paid leave.⁹¹ However, when Facebook founder and CEO Mark

⁸¹ Gillett, *Netflix, Google, Facebook*, *supra* note 25.

⁸² See, e.g., Jason Hall, *Why Men Don’t Take Paternity Leave*, FORBES (June 14, 2013), <http://www.forbes.com/sites/learnvest/2013/06/14/why-men-dont-take-paternity-leave/#602a3c183270>; Claire Cain Miller & David Streitfeld, *Big Leaps for Parental Leave, if Workers Actually Take It*, N.Y. TIMES (Sept. 1, 2015), http://www.nytimes.com/2015/09/02/upshot/big-leaps-for-parental-leave-if-workers-actually-follow-through.html?_r=0; Claire Cain Miller, *How Mark Zuckerberg’s Example Helps Fight Stigma of Family Leave*, N.Y. TIMES (Dec. 2, 2015), http://www.nytimes.com/2015/12/03/upshot/how-mark-zuckerbergs-example-helps-fight-stigma-of-family-leave.html?_r=0; Claire Cain Miller, *Paternity Leave: The Rewards and the Remaining Stigma*, N.Y. TIMES (Nov. 7, 2014) [hereinafter Miller, *Paternity Leave*], <http://www.nytimes.com/2014/11/09/upshot/paternity-leave-the-rewards-and-the-remaining-stigma.html>; Lauren Weber, *Why Dads Don’t Take Paternity Leave*, WALL ST. J. (June 12, 2013), <http://www.wsj.com/articles/SB10001424127887324049504578541633708283670>.

⁸³ Miller & Streitfeld, *supra* note 82.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (quoting a statement by Yahoo CEO Marissa Mayer).

⁸⁹ Adamczyk, *supra* note 1.

⁹⁰ Miller & Streitfeld, *supra* note 82.

⁹¹ Shandrow, *supra* note 25.

Zuckerberg recently had his first child, he decided to take only two months of leave.⁹² Unsurprisingly, given the high-demand culture of the tech industry, the media praised him as a trailblazer and champion of parental rights for taking only half the time available to him to bond with his baby.⁹³

Taking leave can be particularly problematic for new fathers. According to Scott Coltrane, a sociologist at the University of Oregon, “[t]here’s still a stigma associated with men who put parenting on an equal footing with their jobs Most employers assume that work comes first for men, while women do all the childcare.”⁹⁴ Coltrane further explains, “[t]here is still some stigma about men who say, ‘[m]y kids are more important than my work,’ . . . [a]nd basically that’s the message when men take [leave].”⁹⁵ Social scientists present “a more ominous message. Taking time off for family obligations, including paternity leave, could have long-term negative effects on a man’s career—like lower pay or being passed over for promotions.”⁹⁶

VI. CURRENT LEGAL PROTECTIONS

The concerning research and anecdotal evidence seems to make clear that employees who choose to utilize an employer’s expanded leave policy could face retribution for such choice. The question then becomes: what is the law currently doing to protect employees who find themselves in that situation? Unfortunately, the answer seems to be: very little. In general, expanded leave usually is set out as a policy in an employee handbook.⁹⁷ This means courts rarely treat such leave as part of an express contract between an employee and an employer.⁹⁸ An employee hoping to sue an employer who has retaliated against him or her for taking leave often must look outside

⁹² Emily Peck, *Why Mark Zuckerberg’s Paternity Leave Is a Win for Women*, HUFFINGTON POST (Nov. 24, 2015), http://www.huffingtonpost.com/entry/mark-zuckerberg-paternity-leave_us_56532428e4b0258edb320a15.

⁹³ Patricia Garcia, *Why Mark Zuckerberg’s Paternity Leave Is Beneficial for All Working Dads—and Moms*, VOGUE (Jan. 7, 2016), <http://www.vogue.com/13385201/mark-zuckerberg-paternity-leave/>; Rachel Gillett, *Facebook Is at the Forefront of a Radical Workplace Shift—and Every Business in America Should Take Notice*, BUS. INSIDER (Aug. 19, 2015) [hereinafter Gillett, *Facebook Is at the Forefront*], <http://www.businessinsider.com/facebook-parental-leave-policy-2015-8>; Jena McGregor, *How Mark Zuckerberg’s Paternity Leave Affects the Rest of Us*, L.A. TIMES (Dec. 6, 2015), <http://www.latimes.com/business/la-fi-on-leadership-zuckerberg-20151206-story.html>; Peck, *supra* note 92; Kim Lachance Shandrow, *Facebook Expands Parental Leave Ahead of the Birth of Mark Zuckerberg’s Baby*, ENTREPRENEUR (Nov. 30, 2015), <http://www.entrepreneur.com/article/253363>; Taylor Tepper, *Facebook Workers Just Got a Better Parental Leave Policy. Here’s When You’ll Get Yours*, TIME (Dec. 3, 2015), <http://time.com/money/4129990/facebook-paid-parental-leave/>; Julia Zorthian, *Facebook Expanding Worldwide Parental Leave to Four Months*, TIME (Nov. 29, 2015), <http://time.com/4128702/facebook-expanding-parental-leave-four-months/>.

⁹⁴ Weber, *supra* note 82 (quoting a statement made by sociologist Scott Coltrane).

⁹⁵ Miller, *Paternity Leave*, *supra* note 82 (quoting a statement made by sociologist Scott Coltrane).

⁹⁶ *Id.*

⁹⁷ DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, EMPLOYMENT LAW FOR BUSINESS 26 (4th ed. 2004).

⁹⁸ *Id.*

traditional contract measures to find relief.⁹⁹ Even then, the relief is inconsistent and unpredictable.¹⁰⁰ The two most utilized avenues for such employees seem to be a suit either for breach of an implied contract or wrongful termination in violation of public policy.¹⁰¹ This Article will discuss each in turn and will explain why both avenues are insufficient to protect employees in a comprehensive way that allows them to feel confident they will not face retaliation for taking expanded leave.

A. Breach of Implied Contract

Breach of an implied contract is a judicially-created exception to employment at-will that allows an at-will employee to enjoy certain protections as if he or she were contractually protected.¹⁰² Courts generally imply contractual protections from the acts of the parties, but such contracts can arise from other circumstances as well.¹⁰³ Courts have found contracts implied from off-hand statements of employers during interviews and also the text in employee handbooks.¹⁰⁴

One of the first cases to recognize that an employee handbook could create an implied contract was *Woolley v. Hoffmann-La Roche, Inc.*¹⁰⁵ In that case, the plaintiff was hired without a written employment contract, but received an employee handbook one month after being hired.¹⁰⁶ After the company fired the employee, he sued his former employer.¹⁰⁷ The employee handbook contained termination clauses requiring the company to follow certain processes before an employee could be fired.¹⁰⁸ The employee claimed the provisions in the handbook were contractually enforceable.¹⁰⁹ The New Jersey Supreme Court agreed, holding:

[W]hen an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of “grudgingly” conceding the enforceability of those provisions . . . should construe them in accordance with the reasonable expectations of the employees.¹¹⁰

⁹⁹ See *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985); *Lapidoth v. Telcordia Techs., Inc.*, 22 A.3d 11 (N.J. Super. Ct. App. Div. 2011).

¹⁰⁰ Compare *Woolley*, 491 A.2d at 1257, with *Tomlinson v. Qualcomm, Inc.*, 97 Cal. App. 4th 934 (Cal. Ct. App. 2002).

¹⁰¹ Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 4.

¹⁰² *Burk v. K-Mart Corp.*, 770 P.2d 24, 28 (Okla. 1989).

¹⁰³ BENNETT-ALEXANDER & HARTMAN, *supra* note 97, at 24.

¹⁰⁴ *Id.*

¹⁰⁵ *Woolley*, 491 A.2d at 1257.

¹⁰⁶ *Id.* at 1258.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1258 n.2.

¹⁰⁹ *Id.* at 1258.

¹¹⁰ *Id.* at 1264 (citations omitted).

Using this implied contract reasoning, some courts have held companies accountable for their maternity leave policies set out either in their employee handbooks or by managers.¹¹¹ As the next pair of cases helps illustrate, these instances are rare, and courts treat them inconsistently.

1. *Lapidoth v. Telcordia Technologies, Inc.*

In *Lapidoth v. Telcordia Technologies, Inc.*,¹¹² the Appellate Division of the Superior Court of New Jersey reversed the grant of summary judgment to the defendant on the plaintiff's contract claim.¹¹³ The plaintiff, Sara Lapidoth, was a part-time release manager working for the defendant, Telcordia Technologies.¹¹⁴ In April 2005, she requested a six-month maternity leave when she found out she was expecting her tenth child.¹¹⁵ The company granted her such leaves for the births of her previous children.¹¹⁶ On June 1, 2005, Lapidoth stopped working and gave birth to her son eight days later.¹¹⁷ On June 20, 2005, Telcordia sent the plaintiff a letter, confirming her maternity leave.¹¹⁸ That letter stated, in relevant part:

[Y]our unpaid Family Care Leave of Absence from July 22, 2005 through January 22, 2006 is approved and will be counted towards your [twelve] weeks of 2005 and 2006 Family and Medical Leave Act (FMLA) entitlement. . . . This leave is granted with a guarantee of reinstatement up to [twelve] months to the same or comparable job, including the number of hours and days worked during the week, salary, and benefits prior to the Leave starting. Reinstatement is not guaranteed if your job is declared surplus or the number of hours you request to work at the time of reinstatement is different than when the Leave commenced.¹¹⁹

In January 2006, Lapidoth requested another six-month leave, which extended her maternity leave through July 2006.¹²⁰ Telecordia again approved her request, subject to the same conditions as in the letter above.¹²¹

Lapidoth returned to work on July 20, 2006, but was soon terminated after Telecordia determined it only needed one person in Lapidoth's position.¹²² Lapidoth's manager compared her evaluations with those of the other employee and decided that

¹¹¹ *Lapidoth v. Telcordia Techs., Inc.*, 22 A.3d 11, 13 (N.J. Super. Ct. App. Div. 2011).

¹¹² *Id.* at 11.

¹¹³ *Id.* at 13.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 13–14.

¹²⁰ *Id.* at 14.

¹²¹ *Id.* at 14.

¹²² *Id.*

the other employee should remain in the position.¹²³ Telcordia felt justified in terminating Lapidoth's employment because it believed Lapidoth to be an employee at-will.¹²⁴ Telcordia's Code of Business Ethics stated as follows:

This Code of Business Ethics as well as each of the policies, practices, and procedures contained in it and every other Telcordia document, is not a contract of employment and does not create any contractual rights, either expressed or implied, between the companies and its employees. The policies, practices, and procedures described in this Code may be changed, altered, modified, or deleted at any time, with or without prior notice from information in this code when making decisions related to employment with Telcordia.

Telcordia employees are employees-at-will. This means that employees have the right to terminate employment at any time, with or without grounds, just cause or reason and without giving prior notice. Likewise, Telcordia has the right to terminate the employment of any of its employees at any time with or without grounds, just cause or reason and without giving prior notice.¹²⁵

The defendant posted this Code on its website and annually distributed it to all employees.¹²⁶ Additionally, Lapidoth's employment application included a provision acknowledging that "acceptance of an offer of employment does not create any contractual rights, either express or implied, between the company and me."¹²⁷

After being terminated upon the expiration of her maternity leave, Lapidoth filed suit against Telcordia alleging, among other things, breach of contract.¹²⁸ "The trial court found that [the] Code provided a clear disclaimer that all employment was at-will, and plaintiff presented no evidence to alter that relationship or policy."¹²⁹ The trial court further held that the letters confirming her maternity leave did not alter her at-will status because they were sent to Lapidoth personally and "were not policy letters or form letters applicable to all employees."¹³⁰

The appellate court disagreed, noting that the letters relating to the employer's policy on maternity leave (which stated that such leave was granted with a reinstatement guarantee), in addition to Telcordia's previous reinstatement of Lapidoth after her other maternity leaves, could lead a reasonable person to conclude that the company's policy promised reinstatement.¹³¹

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* (quoting a provision of Lapidoth's employment application).

¹²⁸ *Id.* at 15.

¹²⁹ *Id.*

¹³⁰ *Id.* at 19 (quoting a finding by the trial court).

¹³¹ *Id.* at 19–22.

The appellate court focused on the reasonable expectation of employees and, in particular, this employee, based on her prior interactions with the employer regarding maternity leave.¹³² This case almost directly contrasts another appellate court case, *Tomlinson v. Qualcomm, Inc.*¹³³

2. *Tomlinson v. Qualcomm, Inc.*

In *Tomlinson v. Qualcomm, Inc.*, Tomlinson applied to be a manager of business development with Qualcomm in 1997.¹³⁴ “Her employment application specified that, if hired,” she would be an employee at-will.¹³⁵ Once hired, she signed an employment contract, which reiterated this at-will status, stating “[e]mployment with [Qualcomm] will be at-will, terminable by the employee or the company with or without cause or notice. This supersedes all other agreements on this subject and can be modified only in writing and signed by the Chairman of the Board”¹³⁶

Approximately one year after beginning her employment with Qualcomm, Tomlinson submitted her request for maternity and family leave.¹³⁷ She requested a six-week maternity leave, followed by additional leave during which she would work at home part-time for three months.¹³⁸ Qualcomm responded in writing as follows:

So long as you return before the expiration of your FMLA entitlement, you will be returned to your position or an equivalent job with equivalent pay, benefits and terms and conditions of employment. . . . Your family leave begins on December 28, 1998, your job is guaranteed if you return to work by June 14, 1999, based on a [twenty] hour per week, reduced work schedule Family Leave. . . . Based on this arrangement, you will be returning to active status, [thirty] hours per week commencing March 22, 1999.¹³⁹

Qualcomm later laid off Tomlinson as part of a workforce reduction and informed her of its termination decision on February 2, 1999.¹⁴⁰ She brought suit alleging, *inter alia*, breach of contract.¹⁴¹ The court granted Qualcomm’s motion for nonsuit on the claim.¹⁴² The appellate court affirmed, holding that Qualcomm’s policies did not support Tomlinson’s breach of contract claim.¹⁴³ The appellate court noted:

¹³² *Id.* at 20.

¹³³ *Tomlinson v. Qualcomm, Inc.*, 97 Cal. App. 4th 934 (Cal. Dist. Ct. App. 2002).

¹³⁴ *Id.* at 938.

¹³⁵ *Id.*

¹³⁶ *Id.* (alteration in original) (quoting the Qualcomm employment contract).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 938–39 (quoting Qualcomm’s written response approving her request for family leave).

¹⁴⁰ *Id.* at 939.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 948.

Tomlinson argues that the family leave policy contained in Qualcomm's personnel manual created an implied-in-fact agreement of continued employment. Although the California courts will under some circumstances imply an agreement contrary to the statutorily presumed at-will status, the courts will not imply an agreement if doing so necessarily varies the terms of an express at-will employment agreement signed by the employee. . . . "There cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results."

. . . .
Tomlinson signed an employment application and an employment agreement expressly stating that her employment was on an at-will basis. Tomlinson now argues the statements on family leave contained in Qualcomm's personnel handbooks created an implied agreement that her employment was not terminable at will. Even assuming the statements cited by Tomlinson contradicted the express agreement by guaranteeing her continued employment . . . under well-established case law, "[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results." The express term is controlling even if it is not contained in an integrated employment contract. Thus, the . . . express at-will agreement precluded the existence of an implied contract"144

The contrast between *Lapidoth* and *Tomlinson* is striking. The two cases revolved around a nearly identical set of facts and yet reached opposite legal conclusions.¹⁴⁵ The New Jersey court was quick to look to the reasonable expectations of the employee and noted that, given the written guarantee in the letters to the plaintiff, a reasonable person could think she had added protection above at-will employment.¹⁴⁶ The court reached this conclusion despite the clear contradiction between the maternity leave policy and the at-will provisions.¹⁴⁷ Alternatively, in *Tomlinson*, the California court pointed immediately to the contradictions between the policy and the at-will provisions, concluding that the express at-will provisions controlled over any potentially implied promises in the maternity leave policy.¹⁴⁸ Clearly, a breach of implied contract action is not a predictable cause of action for employees who believe they were fired for using company-provided maternity leave.¹⁴⁹

¹⁴⁴ *Id.* at 944–45 (citations omitted).

¹⁴⁵ Compare *Lapidoth v. Telcordia Tech.*, 22 A.3d 11, 13–15 (N.J. Super. Ct. App. Div. 2011), with *Tomlinson*, 97 Cal. App. 4th at 937–39.

¹⁴⁶ *Lapidoth*, 22 A.3d at 18.

¹⁴⁷ *Id.* at 20.

¹⁴⁸ *Tomlinson*, 97 Cal. App. 4th at 943.

¹⁴⁹ Note that other courts have held in the same way as New Jersey, but the claims are too infrequent and the law too unclear to believe there is any predictability. See, e.g., *Flower v. City of Chicago*, 850 F. Supp. 2d 941, 946 (N.D. Ill. 2012) (denying defendant's motion to dismiss plaintiff's breach of contract claim based on its own maternity leave policy); but see *Koch v. Lightning Transp. LLC*, No. 3:13-0225, 2015 WL 66971, 2015 U.S. Dist. LEXIS 707 at *11 (M.D. Tenn. Jan. 6, 2015) (granting defendant's summary judgment motion based on plaintiff's

B. Wrongful Termination in Violation of Public Policy

At least forty-four states recognize an exception to employment-at-will for wrongful termination in violation of public policy.¹⁵⁰ “Violations of public policy usually arise when the employee is terminated for acts such as refusing to violate a criminal statute on behalf of the employer, exercising a statutory right, fulfilling a statutory duty, or reporting violations of statutes by an employer.”¹⁵¹ Interestingly, courts have been clear that “being there for one’s family is not a sufficient public policy interest”¹⁵² As one can imagine, this position makes very difficult an employee’s ability to bring a suit for wrongful termination in violation of public policy based on a company’s denial or punishment of the use of maternity leave. Few cases even discuss this issue; however, *Alamo v. Practice Management Information Corp.* is one case that involved such a claim.

In *Alamo v. Practice Management Corp.*,¹⁵³ the plaintiff, Lorena Alamo, sued her employer for *inter alia* wrongful termination in violation of public policy.¹⁵⁴ Alamo took three months and one week of maternity leave, during which time her supervisor did not try to interfere with the leave but did contact her twice about work.¹⁵⁵ Both exchanges were very brief.¹⁵⁶ Alamo claimed that her supervisor’s tone and manner made her feel as if her supervisor disliked that she was pregnant and taking maternity leave.¹⁵⁷ The court found that Alamo had performance problems before going on maternity leave, although not significant enough to warrant her termination.¹⁵⁸ However, during Alamo’s leave, her employer discovered additional performance issues and eventually decided to terminate her employment for insubordination.¹⁵⁹ Alamo had apparently disobeyed her supervisor’s orders and returned to work earlier than planned.¹⁶⁰ Thus, the court found that defendant was neither discriminating nor retaliating against Alamo when it terminated her employment.¹⁶¹ The court also found

claim for breach of contract on the basis of an oral agreement promising her a position when she returned from eight weeks of company-offered maternity leave).

¹⁵⁰ BENNETT-ALEXANDER & HARTMAN, *supra* note 97, at 51.

¹⁵¹ *Id.*

¹⁵² *Id.* at 52.

¹⁵³ *Alamo v. Practice Mgmt. Info. Corp.*, No. BC416196, 2010 Cal Super. LEXIS 1512, at *4 (Cal. App. Dep’t Super. Ct. June 8, 2010).

¹⁵⁴ *Id.* at *1.

¹⁵⁵ *Id.* at *5.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at *6.

¹⁵⁸ *Id.* at *7.

¹⁵⁹ *Id.* at *7–8.

¹⁶⁰ *Id.* at *8.

¹⁶¹ *Id.* at *13.

that because the employer did not discriminate or retaliate against her, no violation of public policy occurred.¹⁶²

C. Discrimination Under Title VII

Of course, if a company consistently discriminates against one sex for using voluntarily-offered company parental leave, employees would certainly have a sex discrimination claim pursuant to Title VII of the Civil Rights Act of 1964.¹⁶³ Title VII makes illegal any discrimination against an employee based on race, sex, religion, color, or national origin.¹⁶⁴ In *Price Waterhouse v. Hopkins*, the Supreme Court recognized what would come to be known as sex-stereotyping claims.¹⁶⁵ An employer cannot discriminate against an employee for acting in a way the employer deems to be inconsistent with the employee's sex.¹⁶⁶ For instance, this claim is likely if a man was penalized for using company-offered parental leave because the employer believed women should be the caretakers of children. However, these types of claims under Title VII are not sufficient protection for employees to feel assured in utilizing parental leave because such claims require that the employer target a particular sex.¹⁶⁷ Instead, consider a scenario where the employer penalizes all employees, regardless of sex, who utilized extended parental leave. Neither Title VII nor other federal anti-discrimination laws provide protection in this scenario.

While Title VII claims fall short because they fail to protect employees from the "equal opportunity" discriminator, breach of implied contract and wrongful termination of public policy claims fall short because courts reach unpredictable conclusions, and such claims rely on a termination of employment in response to parental leave before a court will even consider them.¹⁶⁸ What of the employee who is denied a promotion or put on a less prestigious track—but still retained by the company—after extended leave? These claims offer little hope to such workers.

VII. WHAT CAN BE DONE?

What is clear when examining the current legal protections for employer retaliation against employees utilizing company-offered parental leave is that these protections are far from adequate. How to remedy the problem is unclear; however, several potential remedies may solve the problem, although each has its own advantages and drawbacks.

One potential remedy, and the one that seems to best address this issue, is for courts to hold that all company-offered parental leave policies automatically constitute an offer for a unilateral contract between the employer and the employee. A unilateral

¹⁶² *Id.* at *15.

¹⁶³ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40 (1989).

¹⁶⁴ 42 U.S.C. § 2000e-2(a)(1) (2017).

¹⁶⁵ *See Price Waterhouse*, 490 U.S. at 251.

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* at 232.

¹⁶⁸ *See, e.g., Lapidoth v. Telcordia Tech.*, 22 A.3d 11, 13–15 (N.J. Super. Ct. App. Div. 2011); *Tomlinson v. Qualcomm, Inc.*, 97 Cal. App. 4th 934, 937–39 (Cal. Dist. Ct. App. 2002).

contract is one in which acceptance takes the form of performance.¹⁶⁹ This remedy would eliminate any uncertainty in determining whether a particular policy was intended to be contractual by an employer. Courts could reason that the employer's parental leave policy is an offer that an employee accepts upon taking parental leave; thus, if an employer later decides to fire an employee for taking leave, the employer would breach the contract.

This would have the obvious benefit of allowing employees to feel much more secure about enjoying parental leave. Because unilateral contracts are not formed until an act constituting acceptance (here, the employee taking leave), the employer would be free to modify leave policies when necessary without having to renegotiate with employees who would someday like to take such leave.¹⁷⁰ However, this proposal is a limitation on freedom of contract.¹⁷¹ Critics would likely stress that no matter how clearly the employer retains the right to terminate employment at any time for any reason, termination for taking parental leave would be an exception. But, given the importance of parental leave and the potential confusion surrounding employee protections for taking a company's voluntary leave, such limitation is warranted. Additionally, this proposal really only seems to protect employees who are fired for taking parental leave. If any other type of adverse employment action—such as failure to promote—were to stem from an employee taking leave, the employee would have difficulty arguing that the action constitutes a breach of contract.

Alternatively, the law could require that all voluntarily-offered parental leave policies include an anti-retaliation provision that courts could enforce. This requirement would allow employees to bring suit for any type of adverse employment action caused by the taking of parental leave, not just termination. Employees would feel much more comfortable taking parental leave, but protections would again have to be rooted in contract to be enforceable.

Another potential solution would be for courts to enforce the provisions of parental leave policies under the doctrine of promissory estoppel. The Restatement (Second) of Contracts § 90 outlines the contours of promissory estoppel as follows: “A promise which the promisor should reasonably expect to induce action or forbearance [of a definite and substantial character] on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.”¹⁷² A court could certainly find that employees foreseeably rely on the promise of parental leave without retribution and hold employers liable should they decide to terminate that employee.¹⁷³ Proving

¹⁶⁹ 2 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 6:2 (4th ed. 1990); see RESTATEMENT OF EMPLOYMENT LAW § 2.05 cmt. b (AM. LAW INST. 2015). The Restatement (Second) of Contracts stopped separately defining unilateral and bilateral contracts, instead listing them as two among multiple types of contracts. RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

¹⁷⁰ RESTATEMENT OF EMPLOYMENT LAW § 2.05.

¹⁷¹ For a critique regarding limitations on freedom to contract, see David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. J. 51 (2014).

¹⁷² RESTATEMENT (SECOND) OF CONTRACTS § 90.

¹⁷³ See generally Christine Cooper, *The Basics of Employment Contracts*, AM. B., May 2007,

reliance on a promise here is easier than proving an actual case in contract for the employee because it does not require all the elements of contract to be met.¹⁷⁴ This approach also is in line with behavioral realism, as it acknowledges the reasonableness of the reliance on both sides despite the absence of an actual contract.¹⁷⁵ Conversely, employees have much less certainty when bringing their cases under promissory estoppel because the court is not enforcing an actual contract.¹⁷⁶ Just as in the case of an implied contract discussed *supra*, results could vary by jurisdiction and even by the wording used in companies' policies.¹⁷⁷

Another possibility is to require employers to have employees sign an agreement whereby employees acknowledge that companies are not bound by voluntary parental leave policies. This requirement is more powerful than a general disclaimer that employment still remains at-will because it specifically alerts employees to the possibility that they could be fired or otherwise retaliated against for taking such leave.¹⁷⁸

The obvious benefit of such a requirement is that employees would be aware of the possibility of retaliation from the beginning of their employment. Thus, employees could make their parental leave decisions while incorporating this possibility. Employers would be dissatisfied with such a rule, as it would likely not engender much good will or loyalty from employees.¹⁷⁹ However, this solution seems to be the best because it forces employers to consider how they will perceive an employee's use of parental leave. This regime encourages employers that may want to take retaliatory action based on such leave to refrain from offering expanded leave or reframe their thinking. This framework would also incentivize employers to train managers who might be likely to punish employees for taking such leave for the reasons explained in Section V *supra*.¹⁸⁰

https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_news_letter_home/0705_litigation_employmentcontracts.html.

¹⁷⁴ Orit Gan, *The Justice Element of Promissory Estoppel*, 89 ST. JOHN'S L. REV. 55, 56 (2015).

¹⁷⁵ Behavioral realism is the notion that law should be consistent with the contemporary understanding of behavioral science. Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 455 (2008).

¹⁷⁶ See Gan, *supra* note 174, at 56–59.

¹⁷⁷ See, e.g., *Lapidoth v. Telcordia Tech.*, 22 A.3d 11, 13–15 (N.J. Super. Ct. App. Div. 2011); *Tomlinson v. Qualcomm, Inc.*, 97 Cal. App. 4th 934, 937–39 (Cal. Dist. Ct. App. 2002).

¹⁷⁸ See Lisa Guerin, *Should I Sign the Handbook Acknowledgement Form Saying I Work at Will?*, EMPLOYMENT LAW FIRMS, <https://www.employmentlawfirms.com/resources/should-i-sign-handbook-acknowledgment-form-saying-i-work> (last visited Jan. 23, 2018).

¹⁷⁹ See Henry Bagdasarian, *The Impact of At-Will Employment on Business*, LINKEDIN (Oct. 14, 2015), <https://www.linkedin.com/pulse/impact-at-will-employment-business-henry-bagdasarian>.

¹⁸⁰ See *supra* notes 69–80 and accompanying text.

VIII. CONCLUSION

Many large companies are expanding their parental leave on a voluntary basis and are garnering much praise from both employees and the media for their actions.¹⁸¹ The question that remains is whether these policies are the panacea they appear to be. Recent studies have evidenced the tendency of managers to equate extended leave with an employee's lack of commitment to the job.¹⁸² Therefore, employees need some legal protection to feel secure in their decision to take advantage of this company-offered benefit. Unfortunately, the current legal safeguards that exist—in the form of suits for breach of implied contract, wrongful termination in violation of public policy, and sex discrimination under Title VII—are inconsistent in their results and inadequate in their protection.¹⁸³

More needs to be done to protect employees who want to use their employer's parental leave policies. Either employers need to be held contractually accountable for such policies and any retaliation that stems from them or employers must be required to have employees acknowledge in writing that the use of such policies could be used against them in future employment decisions. In an ideal world, the first option would prevail and employees could take extended leave secure in the knowledge that their careers will be unaffected by their decision. Whether this can translate into a realistic operational structure remains to be seen.

¹⁸¹ See Adamczyk, *supra* note 1.

¹⁸² See WILLEM ADEMA ET AL., OECD, BACKGROUND BRIEF ON FATHERS' LEAVE AND ITS USE 13 (2016), <https://www.oecd.org/els/family/Backgrounder-fathers-use-of-leave.pdf>.

¹⁸³ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Lapidoth v. Telcordia Tech.*, 22 A.3d 11 (N.J. Super. Ct. App. Div. 2011); *Tomlinson v. Qualcomm, Inc.*, 97 Cal. App. 4th 934 (Cal. Dist. Ct. App. 2002).

IX. APPENDIX A

Company	Leave Policy
Reddit	Allows new mothers and fathers seventeen weeks of paid parenting leave. ¹⁸⁴
Bank of America	“After working one year for Bank of America, employees can take up to [sixteen] weeks of paid maternity, paternity and adoption leave.” ¹⁸⁵
Microsoft	Allows eight weeks of fully paid maternity disability leave for new mothers and twelve weeks of Parental Leave for all parents of new children, of which four are paid and eight unpaid. ¹⁸⁶
The Change.org Company	Eighteen weeks paid maternity, paternity, and adoption leave. ¹⁸⁷
Pinterest	Twelve weeks paid leave for new mothers, four weeks paid for new fathers. ¹⁸⁸
Bill & Melinda Gates Foundation	Fifty-two weeks of paid maternity and paternity leave. ¹⁸⁹
Bloomberg	“[Eighteen] weeks full paid leave for primary caregiver, [four] weeks for non-primary caregiver.” ¹⁹⁰
Patagonia	“[Eight] weeks of paid maternity, paternity, and adoption leave.” ¹⁹¹
Genentech	“[N]ew parents [receive] six weeks of paid leave,” after which “parents may take an additional six weeks of unpaid leave over the course of the new child’s first [twelve] months.” ¹⁹²

¹⁸⁴ Adamczyk, *supra* note 1.

¹⁸⁵ Bank of America, *supra* note 43.

¹⁸⁶ Adamczyk, *supra* note 1.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Gillett, *Netflix, Google, Facebook, supra* note 25.

Company	Leave Policy
Arnold & Porter LLP	“[Eighteen] weeks paid leave for the primary caretaker (including for adoption), [six] weeks paid parental leave for the secondary caretaker.” ¹⁹³
Ernst & Young	“Birth mothers . . . receive [twelve] weeks of fully paid time off following the birth of a child and can receive an additional two weeks of paid leave before the birth if a doctor suggests it. All other parents that are the primary caregiver can receive up to six weeks paid leave, and non-primary caregivers get two weeks of parental leave after the baby arrives.” ¹⁹⁴
Oliver Wyman	New mothers “receive . . . [twelve] weeks of full pay while they’re away. New dads and adoptive parents receive up to [six] weeks.” ¹⁹⁵
The U.S. Navy	Eighteen weeks of paid maternity leave. ¹⁹⁶

¹⁹³ Adamczyk, *supra* note 1.

¹⁹⁴ Gillett, *Netflix, Google, Facebook*, *supra* note 25.

¹⁹⁵ *Id.*

¹⁹⁶ Adamczyk, *supra* note 1.