

# ARTICLE

## LIFE, LIBERTY, AND THE PURSUIT OF PAID PARENTAL LEAVE: HOW THE UNITED STATES HAS DISADVANTAGED WORKING FAMILIES

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### ABSTRACT

*This article argues the critical need for the United States to pass a comprehensive paid parental leave program, specifically, the FAMILY Act, to support all families' financial and caregiving needs and eliminate gender bias in the workplace. First, this article explains the current state of federal parental leave in the United States. Next, it details what an ideal parental leave policy should look like. Finally, it explores current paid parental leave options on the state level as well as proposed federal legislation.*

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## INTRODUCTION

Picture this: You are pregnant and your company does not provide paid parental leave. You save up as much of your sick and vacation days as you can, forfeiting taking days off while you are pregnant and exhausted to get at least one paycheck during your leave. Once you are on maternity leave, you are filled with anxiety about your financial situation because you need two paychecks to support the family and your partner's income is not enough. You are forced to go back to work before you are physically and emotionally ready. This is the reality for many parents in the United States.<sup>1</sup>

As of 2018, the United States is the only industrialized nation without a federal paid parental leave policy in place.<sup>2</sup> To put that statistic into perspective, of the 193 countries in the United Nations, only the United States, New Guinea, Suriname, and a few South Pacific Islands do not offer paid parental leave.<sup>3</sup> This article argues that the United States should implement a federal paid leave policy that covers parental, family, and medical leave. Specifically, this article argues for the importance of establishing a federal parental leave policy that is paid, gender-neutral, and covers all employees. Part I of this article explains the current state of federal parental leave in the United States, including which workers benefit from paid leave, and public support for paid leave policy among Americans. Part II of this article details what an ideal parental leave policy should look like. Part III explores the current paid parental leave options in California, New Jersey, New York, Rhode Island, Washington, and Washington D.C., as well as two pieces of proposed legislation on the federal level. Overall, this article argues that it is critical for the United States to pass a comprehensive paid parental leave program, specifically the FAMILY

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1. See, e.g., MOMSRISING, STORIES FROM THE FRONT LINES OF MOTHERHOOD 2, 32, 51 (2013), <https://www.momsrising.org/uploads/files/2013%20FINAL%20Paid%20Leave%20Book%20Story%20Book%20%28low%20res%20version%29.pdf> [https://perma.cc/PDR8-96FU] (chronicling stories from parents in every state about their experiences taking parental leave).

2. See AMY RAUB ET AL., WORLD POLICY ANALYSIS CTR., PAID PARENTAL LEAVE: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES 1 (2018), [https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Parental%20Leave%20OECD%20Country%20Approaches\\_0.pdf](https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Parental%20Leave%20OECD%20Country%20Approaches_0.pdf) [https://perma.cc/7ESN-GZ3S] (noting that the United States is “the only OECD country without a national-level guarantee of paid leave”).

3. *Fast Facts: Maternity Leave Policies Across the Globe*, VITAL REC. (Jan. 23, 2018), <https://vitalrecord.tamhsc.edu/fast-facts-maternity-leave-policies-across-globe/> [https://perma.cc/DF53-GZ2X].

Act, to eliminate gender bias in the workplace and support all families' financial and caregiving needs.

## I. CURRENT STATE OF FEDERAL PARENTAL LEAVE IN THE UNITED STATES

### A. *The Family and Medical Leave Act*

The United States' current, and only, policy that relates to parental leave is the Family and Medical Leave Act ("FMLA"),<sup>4</sup> which was signed into law by President Bill Clinton in 1993.<sup>5</sup> The FMLA provides eligible employees with up to twelve weeks of unpaid, job-protected leave for specified parental, family, or medical issues.<sup>6</sup> Employees are considered eligible if they have been employed for at least twelve months by the employer and worked at least 1250 hours with that employer during the previous twelve-month period.<sup>7</sup> Additionally, in order to qualify under the FMLA, the employer must employ fifty or more employees for twenty or more calendar workweeks in the current or preceding calendar year.<sup>8</sup>

The FMLA provides three types of leave for employees: parental, family, and medical. Parental leave is defined as leave for new parents to take care of or bond with a new child after birth or adoption.<sup>9</sup> The FMLA also includes foster care within the definition of parental leave.<sup>10</sup> Family leave is leave taken to provide care for a seriously ill or injured family member.<sup>11</sup> The FMLA provides family leave to care for a spouse, son, daughter, or parent of the employee.<sup>12</sup> Medical leave, sometimes referred to as personal medical leave, is leave taken by the employee to address their own serious

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4. 29 U.S.C. §§ 2601–2654 (2012 & Supp. V 2018).

5. Arianne Renan Barzilay, *Back to the Future Introducing Constructive Feminism for the Twenty-First Century—a New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407, 412 (2012).

6. 29 U.S.C. § 2612.

7. *Id.* § 2611.

8. *Id.*

9. *See, e.g.*, SARAH JANE GLYNN ET AL., NAT'L P'SHIP FOR WOMEN & FAMILIES, AN UNMET, GROWING NEED: THE CASE FOR COMPREHENSIVE PAID FAMILY AND MEDICAL LEAVE IN THE UNITED STATES 2 (2018), <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/an-unmet-growing-need-the-case-for-comprehensive-paid-leave-unit-ed-states.pdf> [<https://perma.cc/3KNT-TWFN>].

10. 29 U.S.C. § 2612(a)(1)(B) (2012).

11. *See, e.g.*, GLYNN ET AL., *supra* note 9, at 2.

12. 29 U.S.C. § 2612(a)(1)(C).

health condition.<sup>13</sup> While creating a policy that addresses all three types of leave is critical, this article's focus will be solely on the importance of parental leave.

### B. *Who Has Access to Paid Leave?*

The individuals covered under paid leave tend to be full-time workers in management-level positions in large companies with higher wages.<sup>14</sup> As of March 2018, only 17% of workers in the United States have paid leave through their employers.<sup>15</sup> Full-time workers are more likely to have access to paid leave than part-time workers.<sup>16</sup> The workers most likely to have access to paid leave work in management, business, or financial positions.<sup>17</sup> Additionally, teachers and registered nurses are more likely to have access to paid leave through their employer.<sup>18</sup> Individuals who work in the service industry are less likely to have paid leave, with 11% reporting access to paid leave through their employer.<sup>19</sup> Additionally, only 7% of individuals who work in industries involving construction, farming, fishing, forestry, and extraction have access to paid leave.<sup>20</sup>

Larger companies tend to provide more access to paid leave. Twenty-five percent of workers in companies with 500 people or more have access to paid leave.<sup>21</sup> Twenty-two percent of workers in companies with 100 people or more have access to paid leave.<sup>22</sup> Smaller companies provide less paid leave than their larger counterparts, with 12% of workers in companies with under fifty employees receiving paid leave.<sup>23</sup> However, the starkest contrast in access to paid leave lies in employee's earnings. Of the top 25% of wage earners in the United States, 28% report having access to

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13. See, e.g., GLYNN ET AL., *supra* note 9, at 2; see also 29 U.S.C. § 2612(a)(1)(D).

14. See U.S. DEP'T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 2789, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2018 tbl.32 (2018), <https://www.bls.gov/ncs/ebs/benefits/2018/employee-benefits-in-the-unit-ed-states-march-2018.pdf> [<https://perma.cc/LC6J-CUAK>].

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

paid leave.<sup>24</sup> Compare that to the lowest 25% of wage earners, where 8% of employees report having access to paid leave.<sup>25</sup> The difference is even greater between the highest 10% of wage earners—at 30% with access to paid leave—and the lowest 10% of wage earners—at 5% with access.<sup>26</sup>

While these numbers have risen over the past year, the most notable gains in access to paid leave have benefited more professional workers and higher-wage earners.<sup>27</sup> Compared to 2017, the highest-paid private sector worker went up by seven percentage points, while the lowest-paid private sector worker only went up four percentage points.<sup>28</sup> This trend is not limited to this past year. Since 2012, top wage earners have increased their access to paid leave by eleven percentage points while the lowest-wage earners have only increased by just one percentage point.<sup>29</sup> Overall, this data reflects a theme. If you are a higher-wage earner with a professional or management job, you are more likely to get paid leave. If you are a lower-wage earner at a service or construction job, you are less likely to get paid leave. This inherent inequity among workers receiving paid leave is one of the many reasons advocates believe passing a paid parental leave plan is critical.

### C. *The Shortcomings of the FMLA*

Workers' rights advocates are critical of the FMLA because they do not believe it provides adequate leave for the majority of employees.<sup>30</sup> Specifically, the FMLA is not an ideal policy for workers because it is unpaid and does not cover small businesses or part-

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24. *Id.*

25. *Id.*

26. *Id.*

27. Press Release, Nat'l P'ship for Women & Families, New Paid Leave Data: Despite Some Success, Vast Majority of Working People Still Left Behind (Sept. 21, 2018), <http://www.nationalpartnership.org/our-impact/news-room/press-statements/new-paid-leave-data-despite-some-success-cast-majority-of-workers-left-behind.html> [https://perma.cc/95ZF-3EQL].

28. *Id.*

29. *Id.*

30. See Marc Mory & Lia Pistilli, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689, 689 (2001); see also FAMILY Act Coalition Letter to Congress, Nat'l P'ship for Women & Families (Jan. 16, 2019), <http://www.nationalpartnership.org/our-work/resources/workplace/coalition/family-act-coalition-letter.pdf> [https://perma.cc/G6Z4-4DKQ].

time workers. This disproportionately impacts low-wage workers who suffer the most without a federal paid leave plan.<sup>31</sup>

One of the primary problems advocates have with the FMLA is that it only provides unpaid leave. Unpaid leave is not feasible for many workers because they cannot afford to lose a paycheck.<sup>32</sup> In a survey of workers covered under the FMLA, the top reason for not taking leave was the response “could not afford.”<sup>33</sup> This is especially problematic as many families cite a baby as the most expensive health event during their childbearing years.<sup>34</sup> Not being able to afford leave causes a domino effect of problems for workers, specifically women and low-wage workers. Under the FMLA, low-wage and part-time workers are more likely to be granted unpaid leave or no leave at all.<sup>35</sup> This can cause major financial problems for low-wage families who are more dependent on their paycheck and less likely to be able to afford childcare.<sup>36</sup>

Another issue labor advocates have with the FMLA is the number of workers not covered by the current law.<sup>37</sup> As stated above, the FMLA only covers larger businesses with fifty or more employees and full-time workers.<sup>38</sup> Employees of small businesses with fewer than fifty workers and part-time employees are excluded from the FMLA.<sup>39</sup> Additionally, an employee has to work for the employer for at least twelve months, for at least 1250 hours in those twelve months before they qualify, meaning newer employees could be excluded.<sup>40</sup> While small private-sector businesses can choose to provide paid leave for their employees, there is no requirement they do so.<sup>41</sup> Because of these exclusions under the

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31. See NAT'L P'SHIP FOR WOMEN & FAMILIES, PAID LEAVE PROTECTS THE ECONOMIC SECURITY OF WORKING FAMILIES: FACT SHEET 1 (2010) [hereinafter PAID LEAVE FACT SHEET], <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/paid-leave-protects.pdf> [<https://perma.cc/XL6J-VWJD>].

32. ABT ASSOC. INC., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 127 (2012), <https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf> [<https://perma.cc/EYL4-K7YV>].

33. *Id.*

34. See PAID LEAVE FACT SHEET, *supra* note 31, at 1.

35. HEATHER BOUSHEY ET AL., CTR. FOR AM. PROGRESS, CTR. FOR ECON. & POLICY RESEARCH, JOB PROTECTION ISN'T ENOUGH: WHY AMERICA NEEDS PAID PARENTAL LEAVE 6–13 (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/12/ParentalLeave-report-updated-2.pdf> [<https://perma.cc/W7K3-JBB2>].

36. PAID LEAVE FACT SHEET, *supra* note 31, at 1.

37. See BOUSHEY ET AL., *supra* note 35, at 1.

38. 29 U.S.C. § 2611 (2012).

39. *Id.*

40. *Id.*

41. SARAH A. DONOVAN, CONG. RESEARCH SERV., R44835, PAID FAMILY LEAVE IN THE

FMLA, it is estimated that 40% of workers do not receive any type of FMLA protections.<sup>42</sup> The number of individuals excluded from the FMLA is particularly concerning due to the rise of low-wage and “gig” economy jobs in the past decade.<sup>43</sup>

Overall, the unpaid and exclusionary nature of the FMLA disadvantages many families who could greatly benefit from paid leave. This is even more troubling considering the low-wage workforce is growing and tends to be primarily people of color and women.<sup>44</sup> However, while the economic consequences of the FMLA are bleak for many workers, voters and legislators believe it is time to make a change and create a federal paid leave policy.

#### D. *Support for Paid Leave Among Voters and Legislators*

Labor advocates are not the only supporters of a paid parental leave policy. Studies have shown that voters widely support paid leave. According to a 2018 survey commissioned by National Partnership for Women & Families, 84% of voters support a comprehensive national paid family and medical leave policy for all employees.<sup>45</sup> Of that group, 94% are Democrats, 83% are Independents, and 74% are Republicans, showing that this idea has high bipartisan support.<sup>46</sup> Support for paid leave has been consistently high over the past couple of years. For example, a Fortune-Morning Consult poll taken in 2016 showed that 74% of voters supported requiring employers to offer paid parental leave for new parents.<sup>47</sup> Additionally, a 2015 *New York Times* survey on income inequality and workers’ rights reported 80% of respondents

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UNITED STATES 2 (2018).

42. NAT’L P’SHP FOR WOMEN & FAMILIES, UPDATING THE FAMILY AND MEDICAL LEAVE ACT: FACT SHEET 2 (2016) [hereinafter FMLA FACT SHEET], <http://www.nationalpartnership.org/our-work/resources/workplace/fmla/updating-the-fmla.pdf> [https://perma.cc/XK88-K4HY].

43. GLYNN ET AL., *supra* note 9, at 2.

44. *Id.*; see also NAT’L P’SHP FOR WOMEN & FAMILIES, PAID FAMILY AND MEDICAL LEAVE: A RACIAL JUSTICE ISSUE—AND OPPORTUNITY 2, 4 (2018) [hereinafter RACIAL JUSTICE ISSUE BRIEF], <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf> [https://perma.cc/66LD-PVG3].

45. NAT’L P’SHP FOR WOMEN & FAMILIES, VOTERS’ VIEWS ON PAID FAMILY & MEDICAL LEAVE 3 (2018), <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf> [https://perma.cc/KU4F-DMUH].

46. *Id.*

47. Claire Groden, *An Overwhelming Majority of Americans Support Paid Parental Leave*, FORTUNE (Apr. 15, 2016), <http://fortune.com/2016/04/15/an-overwhelming-majority->



avored requiring employers to offer paid leave to parents of new children and employees caring for sick family members.<sup>48</sup> Of those respondents, 88% were Democrats, 80% were Independents, and 71% were Republicans.<sup>49</sup>

The high-level of support for paid leave among voters was reflected in the platforms of the candidates in the 2016 presidential election. Candidates Donald Trump, Marco Rubio, Hillary Clinton, and Bernie Sanders all proposed paid leave policies during their campaigns.<sup>50</sup> Although each of these plans ranged in length, with Rubio supporting four weeks of paid leave and Clinton and Sanders favoring twelve weeks, it showed that each candidate felt paid leave was important enough to discuss on the campaign trail.<sup>51</sup> This is a significant change for Republicans, who have not always been supportive of paid leave.<sup>52</sup>

Former Republican President George H.W. Bush vetoed the FMLA twice.<sup>53</sup> Although Bush had been supportive of paid leave during his 1988 presidential campaign, he vetoed the FMLA in 1990 because he did not believe the federal government should mandate companies to provide certain benefits.<sup>54</sup> In 1992, he vetoed the FMLA again, claiming it would impose a burden on businesses and dampen the growth of the economy and new jobs.<sup>55</sup> Former Republican President George W. Bush expanded FMLA protections to include families of wounded military personnel, but made no effort to create a paid leave plan for workers covered under the FMLA.<sup>56</sup> The attitude among Republicans has changed sig-

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of-americans-support-paid-parental-leave [https://perma.cc/UDV5-JKS2].

48. *Americans' Views on Income Inequality and Workers' Rights*, N.Y. TIMES (June 3, 2015), <https://www.nytimes.com/interactive/2015/06/03/business/income-inequality-workers-rights-international-trade-poll.html> [https://perma.cc/C75P-NBGB].

49. *Id.*

50. JULIA ISAACS ET AL., URBAN INST., PAID FAMILY LEAVE IN THE UNITED STATES: TIME FOR A NEW NATIONAL POLICY 1 (2017), [https://www.urban.org/sites/default/files/publication/90201/paid\\_family\\_leave\\_0.pdf](https://www.urban.org/sites/default/files/publication/90201/paid_family_leave_0.pdf) [https://perma.cc/7DRD-6MHR].

51. *Id.*

52. *Id.* at 2.

53. *Id.*

54. Steven A. Holmes, *House Backs Bush Veto of Family Leave Bill*, N.Y. TIMES (July 26, 1990), <https://www.nytimes.com/1990/07/26/us/house-backs-bush-veto-of-family-leave-bill.html> [https://perma.cc/5EYH-H7K7].

55. Michael Wines, *Bush Vetoes Bill Making Employers Give Family Leave*, N.Y. TIMES (Sept. 23, 1992), <https://www.nytimes.com/1992/09/23/us/bush-vetoes-bill-making-employers-give-family-leave.html> [https://perma.cc/S9X4-RGAD].

56. Press Release, Nat'l P'ship for Women & Families, First-Ever Expansion of Family and Medical Leave Act Becomes Law (Jan. 29, 2008), <http://www.nationalpartnership.org/>

nificantly since both Bush presidencies. In September 2015, Senator Rubio became the only Republican primary candidate to support paid leave.<sup>57</sup> His proposal involved a tax credit for employers who offered at least four weeks of paid leave.<sup>58</sup> President Trump also called for paid leave on the campaign trail, proposing six weeks of paid maternity leave for mothers who did not already receive leave from employers.<sup>59</sup> He also mentioned the need for paid leave in his 2018 State of the Union address, which shows it was more than a campaign talking point.<sup>60</sup>

## II. WHAT DOES AN IDEAL PAID PARENTAL LEAVE PROGRAM LOOK LIKE?

As shown above, paid parental leave has strong support from labor advocates, voters, and legislators. However, it is critical to determine what a paid leave plan should look like and how it would be executed. While many Americans are generally supportive of paid leave, they are rarely asked to detail who should be covered and how the funding should be managed. According to many labor advocates, an ideal paid leave plan pays all employees equally, is gender-neutral, affordable, and provides job protection.<sup>61</sup> Because affordability and providing job protection are clearly beneficial without detailed explanation, this article will only detail the importance of inclusivity of all employees and gender-neutrality.

### A. *An Ideal Policy Pays All Employees Equally*

An ideal policy must both pay employees and provide appropriate compensation for all levels of employees. As stated in an earlier

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our-impact/news-room/press-statements/first-ever-expansion-of-fmla.html [https://perma.cc/67CP-L5PL].

57. Megan A. Sholar, *Donald Trump and Hillary Clinton Both Support Paid Family Leave. That's a Breakthrough.*, WASH. POST (Sept. 22, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/22/donald-trump-and-hillary-clinton-both-support-paid-family-leave-thats-a-breakthrough> [https://perma.cc/4VBW-CKN8].

58. *Id.*

59. Sean Sullivan & Robert Costa, *Donald Trump Unveils Child-Care Policy Influenced by Ivanka Trump*, WASH. POST (Sept. 13, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/09/13/donald-trump-joined-by-ivanka-trump-to-outline-child-care-policy> [https://perma.cc/6TZY-ANFB].

60. President Donald J. Trump, *State of the Union Address* (Jan. 30, 2018).

61. CTR. FOR AM. PROGRESS, *PAID FAMILY AND MEDICAL LEAVE: BY THE NUMBERS 3* (2017), <https://cdn.americanprogress.org/content/uploads/2017/09/26120405/PaidFamilyMedicalLeave-factSheet.pdf> [https://perma.cc/UPC7-M3L8].

part, full-time, high-wage employees tend to benefit the most under various companies current paid leave structures while part-time and low-wage employees are left in the dark.<sup>62</sup> A study by the Pew Research Center found that 62% of households with income under \$30,000 received no pay while on leave.<sup>63</sup> Compare that number to the 26% of households with income over \$75,000 that received no paid leave.<sup>64</sup> This gap in who is covered by paid leave policies is created because there is no federal paid leave plan, causing many businesses to design their own.<sup>65</sup> It is not uncommon for corporate employees at larger companies to boast amazing paid leave policies, while hourly employees receive little to no paid leave.<sup>66</sup>

For example, the Ford Motor Company provides six to eight weeks of paid leave for corporate employees while offering zero weeks of paid leave to hourly employees.<sup>67</sup> There is also a divide between full-time and part-time workers, with many part-time workers receiving zero weeks of paid leave. Full-time female workers at the company Amazon can receive up to twenty weeks of paid leave, whereas part-time female workers receive zero.<sup>68</sup> This provides little protection to low-wage workers, who are often seen as easily replaceable in the workforce.<sup>69</sup>

Creating a policy that covers all workers equally is critical to solving the inherent economic inequity in our paid leave system.

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62. See *supra* Part I.B.

63. JULIANA MENASCE HOROWITZ ET AL., PEW RESEARCH CTR., AMERICANS WIDELY SUPPORT PAID FAMILY AND MEDICAL LEAVE, BUT DIFFER OVER SPECIFIC POLICIES 15 (2017), <http://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies> [<https://perma.cc/EN78-5XSY>].

64. *Id.*

65. Aparna Mathur & Cody Kallen, *Low-Wage Workers Are Falling Through the Cracks of Paid Leave Coverage*, AEIDEAS (Feb. 26, 2018, 10:55 AM), <http://www.aei.org/publication/low-wage-workers-are-falling-through-the-cracks-of-paid-leave-coverage/> [<https://perma.cc/V4EX-EJJJ>]; see also Judith Warner & Danielle Corley, *In the Absence of U.S. Action on Paid Leave, Multinationals Make Their Own Policies*, CTR. FOR AM. PROGRESS (Nov. 17, 2016, 6:00 AM), <https://www.americanprogress.org/issues/women/reports/2016/11/17/292501/in-the-absence-of-u-s-action-on-paid-leave-multinationals-make-their-own-policies/> [<https://perma.cc/ST8H-C72H>].

66. See *PL+US 2018 Employer Scorecard*, PL+US, <https://paidleave.us/topemployerpolicies> [<https://perma.cc/LUJ5-4K4H>] (last visited Apr. 1, 2019) (showing that employers such as Walmart, Amazon, Gap, and Target provide paid leave for salaried or full-time employees, while failing to provide paid leave for hourly or part-time employees).

67. *Id.*

68. *Id.*

69. See Warner & Corley, *supra* note 65.

Under the FMLA, more than half of low-wage workers report losing all of their income while on leave.<sup>70</sup> As many as 95% of low-wage workers report having no access to any type of paid leave in their workplace.<sup>71</sup> Anita, a veterinary technician, stated that when she took leave, her family's debt increased and they fell behind on bills.<sup>72</sup> Logically, it does not make sense to compensate high-wage workers while leaving low-wage workers penniless. Low-wage workers are more likely to work in jobs with fewer benefits to rely on to make up for a lack of paid leave.<sup>73</sup> They also have limited flexibility within their jobs and fewer financial resources.<sup>74</sup> The lack of access to paid leave for low-wage workers also tends to exacerbate the racial wealth gap, creating an even bigger divide between white families and families of color.<sup>75</sup>

A lack of paid leave tends to negatively impact workers, particularly low-wage workers. Meanwhile, access to paid leave provides improved child and parental well-being and greater economic security for low-wage workers.<sup>76</sup> A federal paid leave policy should be created with equality in accessibility in mind. The current imbalance between high-wage and low-wage workers' access to leave has created further divides in our economy. All employees should have equal access to paid leave.

### B. *An Ideal Policy Is Gender-Neutral*

A federal paid leave policy must be gender-neutral, meaning any person regardless of their gender is allowed to take leave if they

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70. LIZ BEN-ISHAH, CLASP, WAGES LOST, JOBS AT RISK: THE SERIOUS CONSEQUENCES OF LACK OF PAID LEAVE 2 (2015), <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/2015-02-03-FMLA-Anniversary-Brief.pdf> [<https://perma.cc/39WC-3BV7>].

71. *Id.*

72. *Failing Its Families: Lack of Paid Leave and Work-Family Support in the US*, HUM. RTS. WATCH (Feb. 23, 2011), <https://www.hrw.org/report/2011/02/23/failing-its-families/lack-paid-leave-and-work-family-supports-us> [<https://perma.cc/2GBZ-TBUE>].

73. See SARAH FOSS, NAT'L CTR. FOR CHILDREN IN POVERTY, PAID LEAVE IN THE STATES: A CRITICAL SUPPORT FOR LOW-WAGE WORKERS AND THEIR FAMILIES 3 (2009), <https://academiccommons.columbia.edu/doi/10.7916/D8XH00VS> [<https://perma.cc/2X56-ACMR>].

74. *Id.*

75. See RACIAL JUSTICE ISSUE BRIEF, *supra* note 44, at 2–3 (noting that “families of color have, on average, fewer resources than white families to plan for and absorb the effects of a serious personal or family medical issue”).

76. PAMELA WINSTON, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, WORK-FAMILY SUPPORTS FOR LOW-INCOME FAMILIES: KEY RESEARCH FINDINGS AND POLICY TRENDS 4–9 (2014), [https://aspe.hhs.gov/system/files/pdf/76856/rpt\\_WorkFamily.pdf](https://aspe.hhs.gov/system/files/pdf/76856/rpt_WorkFamily.pdf) [<https://perma.cc/Y79W-FQTL>].

meet all the requirements. It is critical that parental leave is gender-neutral for several reasons. First, it prevents discrimination against LGBTQ couples who may otherwise be excluded from “mothers only” or birth parent policies.<sup>77</sup> Second, it benefits the health and financial future of women and prevents hiring discrimination. Third, it allows fathers to take leave and leads to more equitable divisions of the caregiving responsibilities.

## 1. LGBTQ Families

LGBTQ parents can face discrimination if their employer’s parental leave policy is not gender-neutral. Employers may only provide paid leave for new birth mothers as opposed to new parents.<sup>78</sup> This type of policy can discriminate against dual-father households and adoptive parents because neither are covered under that policy.<sup>79</sup> In a 2018 survey of LGBTQ employees, only 45% indicated that their employers have LGBTQ-inclusive leave policies.<sup>80</sup> Additionally, fewer than one-third of respondents have access to any form of paid parental leave.<sup>81</sup>

For example, Brent Wright and his husband welcomed their first daughter in 2009.<sup>82</sup> Because they are both men, neither had access to their company’s paid maternity leave policy.<sup>83</sup> Wright and his husband had to patch together sick and vacation days.<sup>84</sup> Wright eventually had to negotiate a leave of absence to take care of their new daughter.<sup>85</sup>

Wright is not alone. Niko Walker, a Starbucks employee, discovered that the company’s leave policy provided six weeks of paid

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77. See MARY BETH MAXWELL ET AL., HUMAN RIGHTS CAMPAIGN FOUND., 2018 U.S. LGBTQ PAID LEAVE SURVEY 17 (2018), <https://assets2.hrc.org/files/assets/resources/2018-HRC-LGBTQ-Paid-Leave-Survey.pdf> [<https://perma.cc/UTN6-9G8A>] (stating that “[s]ome company policies guarantee paid time off for new birth mothers but provide little or no time off for other new parents”).

78. *Id.*

79. PL+US, LEFT OUT: HOW CORPORATE AMERICA’S PARENTAL LEAVE POLICIES DISCRIMINATE AGAINST DADS, LGBTQ+, AND ADOPTIVE PARENTS 2 (2017) [hereinafter LEFT OUT REPORT], [https://actionnetwork.org/user\\_files/user\\_files/000/018/898/original/plus\\_left\\_outreport\\_2017-7-11.pdf](https://actionnetwork.org/user_files/user_files/000/018/898/original/plus_left_outreport_2017-7-11.pdf) [<https://perma.cc/L9E4-GSX6>].

80. MAXWELL ET AL., *supra* note 77, at 4.

81. *Id.*

82. Alison Bowen, *How Gay Dads Manage Without Paid Paternity Leave*, CHI. TRIB. (Sept. 26, 2017, 9:35 AM), <https://www.chicagotribune.com/lifestyles/parenting/sc-fam-gay-dads-paternity-leave-1003-story.html> [<https://perma.cc/X843-7MAV>].

83. *Id.*

84. *Id.*

85. *Id.*

leave for new birth mothers but none for fathers or adoptive parents.<sup>86</sup> He was shocked considering he had transitioned while employed by Starbucks and was happily supported by managers and the company.<sup>87</sup> He stated it was the first time as an employee when he had felt something “was overlooked” by corporate.<sup>88</sup>

Starbucks is not the only company with this policy; there is a pattern of companies providing discriminatorily gendered paid leave. In a survey of forty-four of the largest employers in the United States, seventeen of the companies left out all or some fathers and adoptive parents in their paid leave policies.<sup>89</sup> Additionally, seven of the forty-four companies provided significantly less paid leave for fathers and adoptive parents compared to birth mothers.<sup>90</sup>

These policies discriminate against dual-father households, they also discriminate against adoptive parents. LGBTQ families are more likely to adopt or foster children.<sup>91</sup> Same-sex couples are four times more likely than different-sex couples to raise an adopted child and six times more likely to raise a foster child.<sup>92</sup> If adoptive and foster parents are not covered under a company’s paid leave policy, it can prevent new parents from taking much needed leave. In a 2018 survey of LGBTQ employees, 65% of the respondents stated their primary concern about taking leave was the financial burden of taking unpaid time off.<sup>93</sup> This is even more of a concern for LGBTQ working people of color.<sup>94</sup> Seventy-one percent of respondents of color stated taking time off without pay is not financially possible for them.<sup>95</sup> As demonstrated above, unpaid leave is more likely to be a reality for LGBTQ employees as companies are

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86. Rebecca Gale, *How Paid Leave Policies Can Negatively Affect LGBTQ Families*, WASH. POST (June 12, 2017, 10:02 AM), <https://www.washingtonpost.com/news/parenting/wp/2017/06/12/how-paid-leave-policies-can-negatively-affect-lgbtq-families> [https://perma.cc/2JDQ-DWTK].

87. *Id.*

88. *Id.*

89. LEFT OUT REPORT, *supra* note 79, at 3.

90. *Id.* at 4.

91. GARY J. GATES, WILLIAMS INST., *LGBT PARENTING IN THE UNITED STATES 1* (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf> [https://perma.cc/7RCW-HAE4].

92. *Id.*

93. MAXWELL ET AL., *supra* note 77, at 13.

94. HUMAN RIGHTS CAMPAIGN FOUND., *LGBTQ WORKING PEOPLE OF COLOR NEED PAID LEAVE: STORIES AND FINDINGS FROM THE 2018 U.S. LGBTQ PAID LEAVE SURVEY 3* (2018), <https://assets2.hrc.org/files/assets/resources/HRC-PaidLeave-POCReport-FINAL.pdf> [https://perma.cc/EVK6-LGX7].

95. *Id.* at 6.

more likely to exclude fathers and adoptive parents from paid leave policies. Therefore, a lack of gender-neutral policies disproportionately impacts whether LGBTQ parents are able to take time off when they have, adopt, or foster children.

## 2. Women

When parental leave policies are not gender-neutral, women disproportionately face health issues, financial problems, and hiring discrimination. Deep cultural biases about who should take leave still exist in today's world. According to the Pew Research Center, 82% of Americans believe mothers should receive paid leave following the birth or adoption of a child.<sup>96</sup> However, only 69% believe fathers should receive the same benefit.<sup>97</sup> These cultural biases seep into the workplace and create a stigma that women are more likely to use leave after the birth or adoption of a child and therefore should be the primary beneficiaries.

### a. Health

Without paid leave, women can be forced to choose between their health or their paycheck.<sup>98</sup> Studies have shown an ideal amount of paid parental leave for mothers ranges from three to six months.<sup>99</sup> However, 23% of mothers are back at work within two weeks of having or adopting a child because they cannot afford to take several weeks off.<sup>100</sup> This quick turnaround has negative health effects on both mothers and their children. Research suggests longer periods of leave lead to increased duration of breastfeeding, lowers

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96. HOROWITZ ET AL., *supra* note 63, at 4.

97. *Id.*

98. See Tammy Duckworth, *2018 Is Past Time to Get Real on Paid Leave*, CNN (Feb. 5, 2018, 5:17 PM ET), <https://www.cnn.com/2018/02/05/opinions/paid-leave-fmlla-congress-tammy-duckworth-opinion/index.html> [<https://perma.cc/U9RS-C2A7>] (arguing that lack of access to paid leave forces people to choose between caring for family members and losing their job).

99. Press Release, WORLD Policy Analysis Ctr., *Paid Family Medical Leave in the U.S.: Good for Families, Good for the Economy* (Feb. 28, 2018), <https://ph.ucla.edu/news/press-release/2018/feb/paid-family-medical-leave-us-good-families-good-economy> [<https://perma.cc/72PR-MCVU>].

100. Sharon Lerner, *The Real War on Families: Why the U.S. Needs Paid Leave Now*, IN THESE TIMES (Aug. 18, 2015), [http://inthesetimes.com/article/18151/the-real-war-on-families?fb\\_action\\_ids=10204879351840116&fb\\_action\\_types=og.likes](http://inthesetimes.com/article/18151/the-real-war-on-families?fb_action_ids=10204879351840116&fb_action_types=og.likes) [<https://perma.cc/G4G5-PJZT>].

the risk of infant mortality, and increases the likelihood of the baby receiving vaccinations.<sup>101</sup>

Every major medical organization encourages women to exclusively breastfeed their children for the first six months.<sup>102</sup> However, short amounts of leave and inflexible work schedules impact a mother's ability to breastfeed their child.<sup>103</sup> In a survey of new mothers, almost half stated their employment impacted their decision to breastfeed.<sup>104</sup> Additionally, mothers who return to work before six weeks postpartum are three times more likely to stop breastfeeding than women who return later.<sup>105</sup> This has a disproportionate effect on low-wage workers and mothers of color.<sup>106</sup> Low-wage workers are the least likely to have access to paid leave and most likely to have inflexible schedules, making breastfeeding difficult.<sup>107</sup> Additionally, black and Latina mothers are less likely to have access to paid leave, which means they are less likely to breastfeed.<sup>108</sup> Fifty percent of white women are likely to have access to paid leave while only 43% of black women and 25% of Latina women have access.<sup>109</sup>

While statistics are critical for analyzing the depth of these issues, real life examples tend to help people understand just how traumatizing short breastfeeding cycles can be. Natasha Long was back at work three weeks after having her third child but she was determined to breastfeed.<sup>110</sup> She worked in a factory that offered no lactation room, regularly forcing her to go to her truck multiple times a day to pump.<sup>111</sup> She sobbed while sitting in her truck because she wanted to be bonding with her child rather than fearing

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101. BARBARA GAULT ET AL., INST. FOR WOMEN'S POLICY RESEARCH, PAID PARENTAL LEAVE IN THE UNITED STATES 14 (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B334-Paid%20Parental%20Leave%20in%20the%20United%20States.pdf> [https://perma.cc/HZF8-G45H].

102. CLASP, PAID FAMILY LEAVE: A CRUCIAL SUPPORT FOR BREASTFEEDING (2013), <https://www.clasp.org/sites/default/files/public/resources-and-publications/files/Breastfeeding-Paid-Leave.pdf> [https://perma.cc/YLZ4-9KM9].

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. RACIAL JUSTICE ISSUE BRIEF, *supra* note 44, at 5.

109. *Id.*

110. Lerner, *supra* note 100.

111. *Id.*



a co-worker seeing her exposed in the cab of her truck.<sup>112</sup> The emotional strain of returning to work so quickly after having her child deeply affected Long and led to other health problems.<sup>113</sup>

Paid leave and breastfeeding are linked. Research has shown that paid leave has a significant impact on the length of time mothers breastfeed.<sup>114</sup> In a study of California's paid leave program, mothers who participated in the program breastfed for twice as long as mothers who did not.<sup>115</sup> Access to paid leave increases the amount of leave mothers take, which in turn increases breastfeeding duration.<sup>116</sup> Breastfeeding carries many benefits for families, such as increased bonding between new mothers and children, strengthening a child's immune system, and reducing the risk of several health problems.<sup>117</sup>

In addition to breastfeeding, longer periods of leave lead to lower infant mortality and increases in necessary vaccinations.<sup>118</sup> When children's parents have access to leave, they are more likely to experience better health outcomes due to individualized care from their parents and increased parental awareness and education.<sup>119</sup> Parents are more likely than health care professionals to notice slight differences in their child, which could head off future health care problems if illnesses are caught early.<sup>120</sup> Lastly, when discussing the advantage of paid leave on women's maternal health, the disparate maternal mortality rate for black mothers cannot be overstated. Black women face much higher rates of maternal mortality and complications due to pregnancy than white women.<sup>121</sup> Additionally, black women are much less likely to take longer periods of leave, meaning their children also miss out on the many health benefits paid leave can provide.<sup>122</sup>

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112. *Id.*

113. *Id.*

114. GAULT ET AL., *supra* note 101, at 14.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 14–15.

119. NAT'L P'SHIP FOR WOMEN & FAMILIES, CHILDREN BENEFIT WHEN PARENTS HAVE ACCESS TO PAID LEAVE: FACT SHEET 1–2 (2015), <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/children-benefit-when-parents.pdf> [https://perma.cc/HF5R-4WJD].

120. *See id.*

121. RACIAL JUSTICE ISSUE BRIEF, *supra* note 44, at 5.

122. *Id.*

## b. Financial

In addition to the series of health issues stemming from a lack of paid leave, women face financial disadvantages without access to paid leave.<sup>123</sup> The labor force has changed dramatically over the past fifty years, while our stigmas about women and caregiving remain the same. Women's participation in the labor force—specifically, mothers of young children—has increased, meaning the number of stay-at-home mothers has decreased.<sup>124</sup> However, policies providing only women with paid leave remain constant.<sup>125</sup> This places an automatic assumption on mothers that they will take leave, regardless of pay, and take up the majority of the caregiving responsibilities during leave and upon returning to work.<sup>126</sup> This leads to decreased workforce engagement as well as fewer opportunities for promotions and raises.<sup>127</sup>

A key reason paid leave policies should be gender-neutral is the division of caregiving responsibilities, which can affect women's long-term professional goals. According to a recent report by Lean In and McKinsey research, women are more likely to believe they participate more in housework and childcare than their partner.<sup>128</sup> This phenomenon is exacerbated by the fact that women are the primary takers of parental leave and expected to maintain their caregiving responsibilities upon returning to work.<sup>129</sup> But the negative effects of gendered paid leave do not stop there. After coming back from leave, women are more likely to continue shouldering the bulk of caregiving responsibilities, which leaves less time for advancing in the workplace.<sup>130</sup> Alison Woods Brooks, a Harvard

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123. See BEN-ISHAI, *supra* note 70, at 2 (highlighting a variety of ways that women are uniquely financially and professionally disadvantaged by taking parental leave).

124. AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, PAID FAMILY AND MEDICAL LEAVE: AN ISSUE WHOSE TIME HAS COME 4 (2017) [hereinafter AEI-BROOKINGS STUDY], [https://www.brookings.edu/wp-content/uploads/2017/06/es\\_20170606\\_paidfamilyleave.pdf](https://www.brookings.edu/wp-content/uploads/2017/06/es_20170606_paidfamilyleave.pdf) [<https://perma.cc/PJD5-N3PZ>]; see also GLYNN ET AL., *supra* note 9, at 4 (noting that despite the increasing prevalence of women in the workforce, labor force participation rates for American women in their 20s, 30s, and 40s are lower than those rates of similarly aged men and women working in other developed economies).

125. See *supra* Part II.B.1.

126. AEI-BROOKINGS STUDY, *supra* note 124, at 20.

127. See BEN-ISHAI, *supra* note 70, at 2.

128. Nikki Waller, *How Men & Women See the Workplace Differently*, WALL STREET J. (Sept. 27, 2016, 4:12 AM ET), <http://graphics.wsj.com/how-men-and-women-see-the-workplace-differently/> [<https://perma.cc/P6KA-F99K>].

129. *Id.*

130. *Id.*

Business School professor, says, “Practically speaking, if you’re doing more at home, you can’t do more at work.”<sup>131</sup>

Providing gender-neutral paid leave will help prevent the imbalance in leave take-up and caregiving responsibilities. For example, when the company Etsy implemented a gender-neutral paid leave policy, it discovered that equal numbers of men and women were using the policy.<sup>132</sup> Similarly, when California implemented a state-wide gender-neutral paid leave policy, new fathers taking parental leave doubled.<sup>133</sup> Furthermore, when fathers take parental leave, they are more likely to participate in childcare and household chores both during leave and throughout the child’s life.<sup>134</sup>

In addition to more equitable division of caregiving responsibilities, paid leave keeps mothers in the workforce and provides more hours and higher wages.<sup>135</sup> If mothers have access to paid leave, they are more likely to return to their previous employer and maintain their current salary.<sup>136</sup> Women who have access to paid leave are 40% to 69% more likely to return to work after giving birth.<sup>137</sup> This increases life-time earnings and retirement savings because women are returning to their same jobs and maintaining their salaries.<sup>138</sup> This is critical as many mothers, especially mothers of color, are likely to be the primary breadwinners in their families.<sup>139</sup> In 2013, nearly two-thirds of families relied entirely or in part on a mother’s income.<sup>140</sup> Having access to paid leave helps mothers

131. *Id.*

132. Madeline Farber, *Etsy Just Reported the First Results of Its Gender-Neutral Parental Leave*, FORTUNE (Jan. 31, 2017), <http://fortune.com/2017/01/31/etsy-parental-leave-first-results/> [https://perma.cc/V2WJ-3LHJ].

133. LINDA HOUSER & THOMAS P. VARTANIAN, RUTGERS CTR. FOR WOMEN AND WORK, POLICY MATTERS: PUBLIC POLICY, PAID LEAVE FOR NEW PARENTS, AND ECONOMIC SECURITY FOR U.S. WORKERS 2 (2012), <http://www.nationalpartnership.org/our-work/resources/workplace/other/policy-matters.pdf> [https://perma.cc/W9VJ-2DQS].

134. RAUB ET AL., *supra* note 2, at 7.

135. Claire Cain Miller, *The Economic Benefits of Paid Parental Leave*, N.Y. TIMES (Jan. 30, 2015), <https://www.nytimes.com/2015/02/01/upshot/the-economic-benefits-of-paid-parental-leave.html> [https://perma.cc/RMA6-H52K].

136. BEN-ISHAI, *supra* note 70, at 3.

137. GAULT ET AL., *supra* note 101, at 8.

138. MARY AMELIA DOUGLAS-WHITED CMTY. WOMEN’S HEALTH EDUC. CTR., PAID FAMILY AND MEDICAL LEAVE 1 (2019), <https://womenshealth.tulane.edu/sites/womenshealth.tulane.edu/files/Family%20leave%20brief-2019%201.pdf> [https://perma.cc/6Z7C-8VD5].

139. Tanya L. Goldman, *The Economic Necessity of Paid Family and Medical Leave*, CLASP (Mar. 30, 2018), <https://www.clasp.org/blog/economic-necessity-paid-family-and-medical-leave> [https://perma.cc/6N25-J89F].

140. JOINT ECON. COMM., U.S. CONGRESS, THE ECONOMIC BENEFITS OF PAID LEAVE: FACT SHEET 2 (2015), [https://www.jec.senate.gov/public/\\_cache/files/646d2340-dcd4-4614-ada9-be5b1c3f445c/jec-fact-sheet---economic-benefits-of-paid-leave.pdf](https://www.jec.senate.gov/public/_cache/files/646d2340-dcd4-4614-ada9-be5b1c3f445c/jec-fact-sheet---economic-benefits-of-paid-leave.pdf) [https://perma.cc/5H

stay in the workforce and provide for their families.<sup>141</sup> In short, providing paid leave to women leads to increased labor participation, higher wages, and helps eliminate gendered caregiving bias.

### c. Hiring and Employment Discrimination

When employers view women as the primary users of paid leave policies, they are more likely to discriminate against women in hiring and employment decisions.<sup>142</sup> Women have said that revealing their pregnancy to their supervisors caused employers to cut their hours or demote them.<sup>143</sup> Although pregnancy discrimination is illegal, it is widespread across all sectors of the workforce.<sup>144</sup> However, gendered leave policies can affect women even when they are not pregnant. If employers view women as the primary users of a leave policy, this could lead them to hire a man over a woman because it is less likely they will take leave.<sup>145</sup> Having a gender-neutral leave policy eliminates the desire for employers to discriminate against female workers because all workers are entitled to paid leave.

### 3. Men

Similar to women, men also face gender bias and unfair stigmas that affects their ability to take parental leave.<sup>146</sup> Men tend to take shorter periods of paid leave to avoid workplace stigma and lessen the financial burden on their families.<sup>147</sup> Additionally, men are much less likely to have access to paid leave, or sometimes any

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141. *See id.*

142. AEI-BROOKINGS STUDY, *supra* note 124, at 20.

143. HUMAN RIGHTS WATCH, FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE US 1 (2011), <https://www.hrw.org/report/2011/02/23/failing-its-families/lack-paid-leave-and-work-family-supports-us#> [<https://perma.cc/36P3-NSUQ>].

144. *See generally* Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html> [<https://perma.cc/GKM9-EV9E>] (discussing that due to widespread discrimination it does not matter “[w]hether women work at Walmart or on Wall Street, getting pregnant is often the moment they are knocked off the professional ladder”).

145. *See* AEI-BROOKINGS STUDY, *supra* note 124, at 20.

146. NAT'L P'SHIP FOR WOMEN & FAMILIES, FATHERS NEED PAID FAMILY AND MEDICAL LEAVE 1 (2018) [hereinafter NAT'L P'SHIP, FATHERS], <http://www.nationalpartnership.org/research-library/work-family/paid-leave/fathers-need-paid-family-and-medical-leave.pdf> [<https://perma.cc/4HJE-Y4JJ>].

147. *Id.*

leave at all.<sup>148</sup> This creates an imbalance in the caregiving responsibilities between parents, which can remain throughout the child's life.<sup>149</sup> Additionally, there are several long-term benefits to men taking parental leave.<sup>150</sup>

Men often face workplace stigma when they take parental leave; as discussed earlier, Americans are more likely to support women receiving paid parental leave than men.<sup>151</sup> However, even Americans who are supportive of men and women receiving paid leave believe women should receive considerably more time off than men.<sup>152</sup> This belief leads to both outdated workplace policies providing leave for mothers only or more leave for mothers than fathers. According to a study by the Department of Labor, men are less likely to have paid parental leave policies than women.<sup>153</sup> As discussed earlier, it is common practice for many employers to provide paid parental leave for mothers and unpaid parental leave for fathers.<sup>154</sup> Only 20% of private sector workers are employed by companies that offer paid parental leave to most male employees.<sup>155</sup> Because fathers are less likely to have paid parental leave, they tend to take shorter amounts of leave to avoid financial troubles.<sup>156</sup> According to the Department of Labor, 70% of fathers take ten days or less of parental leave.<sup>157</sup> Another study found that only one in twenty fathers took more than two weeks off after the birth of a child with 60% of low-income fathers reporting they took zero days off.<sup>158</sup>

In addition to the lack of availability of leave, fathers feel pressured not to take time off because of bias in the workplace.<sup>159</sup> While women feel an inherent pressure to take time off work to care for

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148. *Id.*

149. *See id.*

150. *See generally* U.S. DEP'T OF LABOR, PATERNITY LEAVE: WHY PARENTAL LEAVE FOR FATHERS IS SO IMPORTANT FOR WORKING FAMILIES 2–3 (2016) [hereinafter DOL FATHERS], [https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2604&context=key\\_workplace](https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2604&context=key_workplace) [<https://perma.cc/2FNQ-3TUJ>] (discussing that when fathers take paternity leave “it can lead to better outcomes for their children and the whole family”).

151. HOROWITZ ET AL., *supra* note 63, at 13.

152. *Id.* at 23.

153. DOL FATHERS, *supra* note 150, at 1.

154. *See supra* Part II.B.1.

155. *See* NAT'L P'SHIP, FATHERS, *supra* note 146, at 1.

156. DOL FATHERS, *supra* note 150, at 2.

157. *Id.*

158. NAT'L P'SHIP, FATHERS, *supra* note 146, at 1.

159. DOL FATHERS, *supra* note 150, at 3.

their children, men feel pressure to take as little time off as possible. In a survey of highly educated professional fathers who had access to paid parental leave, a large number did not take their full amount of leave.<sup>160</sup> When asked why they choose not to take all of their designated paid time off, they cited workplace pressures and/or a fear of being perceived as less dedicated employees.<sup>161</sup>

Men taking parental leave can lead to lifetime benefits for themselves and their families. Similar to maternity leave, longer paternity leave leads to increased bonding and engagement between father and child.<sup>162</sup> Fathers who took leave for two weeks or longer were more likely to be involved in their child's care nine months after birth.<sup>163</sup> This can lead to improved educational attainment for the child and reduce maternal stress.<sup>164</sup> Additionally, longer paternity leave increases a father's involvement with the child and caregiving responsibilities.<sup>165</sup> Fathers who take longer leave are more likely to divide household chores and caregiving equally with their spouse and consider themselves to be active co-parents.<sup>166</sup>

It is critical to have a gender-neutral policy because it provides more equitable parenting opportunities for LGBTQ families as well as mothers and fathers.

### III. CURRENT STATE AND FEDERAL PAID LEAVE LEGISLATION

As of 2018, California, Massachusetts, New Jersey, New York, Rhode Island, Washington, and Washington, D.C., all have some form of paid parental leave. On the federal level, two bills in the 115th Congress related to paid parental leave. The Economic Security for New Parents Act is sponsored by Senator Marco Rubio (R-FL) and Congresswoman Ann Wagner (R-MO).<sup>167</sup> It allows new parents to postpone collecting Social Security payments for three to six months in exchange for two months of paid parental leave.<sup>168</sup>

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160. *Id.*

161. *Id.*

162. *Id.* at 2.

163. *Id.*

164. NAT'L P'SHIP, FATHERS, *supra* note 146, at 2.

165. AEI-BROOKINGS STUDY, *supra* note 124, at 6–7.

166. NAT'L P'SHIP, FATHERS, *supra* note 146, at 2.

167. Economic Security for New Parents Act, S. 3345, 115th Cong. (2018); *Rubio, Wagner Introduce Paid Family Leave Legislation*, HR POL'Y ASS'N (Aug. 3, 2018), <http://www.hrpoli cy.org/news/story/rubio-wagner-introduce-paid-family-leave-legislation-14913> [<https://per ma.cc/A5TL-FQY7>] [hereinafter *Rubio & Wagner*].

168. Economic Security for New Parents Act, S. 3345.

The Family and Medical Insurance Leave Act (“FAMILY Act”) is sponsored by Senator Kirsten Gillibrand (D-NY) and Congresswoman Rose DeLauro (D-Conn.).<sup>169</sup> It would provide workers with up to twelve weeks of partial income for parental, family, and medical leave purposes.<sup>170</sup> This part seeks to summarize each of the state paid leave plans, explain the shortcomings of Senator Rubio’s plan, and describe why the FAMILY Act should be passed in the 116th Congress.

### A. *State Parental Leave Plans*

#### 1. California

California was the first state to pass a paid parental leave policy.<sup>171</sup> It was enacted in 2002 but became effective in July 2004.<sup>172</sup> The policy offers up to six weeks of partially paid leave to bond with a newborn or recently placed adopted or foster child.<sup>173</sup> Approximately 18.7 million Californians are covered under the program and almost 2.8 million have filed paid leave claims since its implementation in 2004.<sup>174</sup> More than 2.4 million of the claims filed were parents seeking time off to spend with their new child.<sup>175</sup> The program is gender-neutral, providing both mothers and fathers with up to six weeks of partially paid leave.<sup>176</sup>

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169. FAMILY Act, S. 337, 115th Cong. (2017); NAT’L P’SHP FOR WOMEN & FAMILIES, THE FAMILY AND MEDICAL INSURANCE LEAVE (FAMILY) ACT 1 (2018) [hereinafter NAT’L P’SHP, FAMILY ACT], <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/family-act-fact-sheet.pdf> [https://perma.cc/ZQ5K-UKUY].

170. NAT’L P’SHP, FAMILY ACT, *supra* note 169, at 1.

171. NAT’L P’SHP FOR WOMEN & FAMILIES, STATE PAID FAMILY MEDICAL LEAVE INSURANCE LAWS 1 (2018) [hereinafter PAID FAMILY MEDICAL LEAVE INSURANCE LAWS], <http://www.nationalpartnership.org/research-library/work-family/paid-leave/state-paid-family-leave-laws.pdf> [https://perma.cc/2QEC-UKU6].

172. *Id.*; Maya Rossin-Slater et al., *The Effects of California’s Paid Family Leave Program on Mothers’ Leave-Taking and Subsequent Labor Market Outcomes* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 17715, 2011), <https://www.nber.org/papers/w17715.pdf> [https://perma.cc/URB6-N45Q].

173. Rossin-Slater et al., *supra* note 172, at 3.

174. *About Paid Family Leave (PFL)*, EMP. DEV. DEP’T, ST. CAL., [https://www.edd.ca.gov/disability/About\\_PFL.htm](https://www.edd.ca.gov/disability/About_PFL.htm) [https://perma.cc/DU5K-KAAQ] (last visited Apr. 1, 2019); NAT’L P’SHP FOR WOMEN & FAMILIES, PAID LEAVE WORKS IN CALIFORNIA, NEW JERSEY, AND RHODE ISLAND 1 (2018) [hereinafter PAID LEAVE WORKS IN CALIFORNIA, NEW JERSEY, AND RHODE ISLAND], <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/paid-leave-works-in-california-new-jersey-and-rhode-island.pdf> [https://perma.cc/9M MF-BM4A].

175. PAID LEAVE WORKS IN CALIFORNIA, NEW JERSEY, AND RHODE ISLAND, *supra* note 174, at 1.

176. ANN BARTEL ET AL., U.S. DEP’T OF LABOR, CALIFORNIA’S PAID FAMILY LEAVE LAW:

The program is funded through a payroll tax on employees and is part of California's Temporary Disability Insurance program.<sup>177</sup> California's leave program is a partial leave program meaning workers' salaries are not replaced in full. Initially, individuals received 55% of their usual pay.<sup>178</sup> However, the income replacement rate has steadily increased from 60% to 70% depending on the individual's salary.<sup>179</sup> Workers who make up to 33% of California average weekly wages now have an income replacement rate of 70%, while those who make more than 33% have a 60% replacement rate.<sup>180</sup> Essentially, the lower your income, the higher your income replacement rate. Labor advocates in California praised this change, as it allows workers with lower incomes, who need paid leave most, to benefit from the program.<sup>181</sup> The law has been lauded as a success for California families. It has increased the leave new mothers take by three weeks, it has positively impacted children and families by increasing breastfeeding and bonding time, and 90% of employers have reported positive or no effects from the program.<sup>182</sup>

## 2. Massachusetts

Massachusetts's paid leave plan was enacted in 2018 but will not become effective until July 2019.<sup>183</sup> Starting January 2021, the law will provide workers with up to twelve weeks of paid leave to take care of a newborn.<sup>184</sup> Individuals with medical complications post-pregnancy will be entitled to twenty-six weeks of leave.<sup>185</sup> The policy applies to all employers with at least one employee working in

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LESSONS FROM THE FIRST DECADE 2 (2014) [hereinafter CALIFORNIA LESSONS], <https://www.dol.gov/asp/evaluation/reports/PaidLeaveDeliverable.pdf> [<https://perma.cc/CE9C-ACVR>].

177. *Id.*

178. *Id.*

179. See CAL. UNEMP. INS. CODE § 2655 (2016); *About Paid Family Leave (PFL)*, *supra* note 174.

180. CAL. UNEMP. INS. CODE § 2655.

181. Mitch Seaman, *Victory for Working Families—Governor Brown Signs AB 908 to Expand Paid Family Leave!*, CAL. LAB. FED'N (Apr. 11, 2016), [https://calaborfed.org/victory\\_for\\_working\\_families\\_governor\\_brown\\_signs\\_ab\\_908\\_to\\_expand\\_paid\\_fam/](https://calaborfed.org/victory_for_working_families_governor_brown_signs_ab_908_to_expand_paid_fam/) [<https://perma.cc/8KMV-KXQ5>].

182. CALIFORNIA LESSONS, *supra* note 176, at 4–5, 9.

183. H.B. 4640 § 29, 190th Gen. Court, Reg. Sess. (Mass. 2018) (enacted); PAID FAMILY MEDICAL LEAVE INSURANCE LAWS, *supra* note 171, at 1.

184. Foley Hoag, LLP, *Massachusetts Establishes Paid Family Leave and Raises Minimum Wage*, JD SUPRA (July 2, 2018), <https://www.jdsupra.com/legalnews/massachusetts-establishes-paid-family-68984/> [<https://perma.cc/R6AU-7FSQ>].

185. Audrey Goodson Kingo, *Massachusetts Just Passed the Most Generous Paid Family Leave Law in the Country*, WORKING MOTHER (June 28, 2018), <https://www.workingmother.com>.



Massachusetts.<sup>186</sup> The program has a unique funding mechanism. As opposed to other plans that are supported entirely through employee payroll taxes, employers and employees will split a 0.63% payroll tax.<sup>187</sup> Workers will earn 80% of their wages, capped at 50% of the state average weekly wage, and 50% of their wages beyond that amount capped at \$850 per week.<sup>188</sup> While the policy does not begin to provide leave until January 2021, employers are expected to begin implementing the payroll tax and other requirements in July 2019.<sup>189</sup> Similar to the Rhode Island and New York policies, the leave is job protected.<sup>190</sup> The eligibility requirements are unclear as the statute does not mention any requirements for taking leave such as length of employment or financial eligibility.<sup>191</sup>

### 3. New Jersey

In 2008, New Jersey passed the New Jersey Family Leave Insurance program to provide wage replacement for new parents and family caregiving.<sup>192</sup> New Jersey was the second state after California, to provide a statewide paid parental leave plan.<sup>193</sup> The program provides up to six weeks of leave to bond with a newborn, adopted, or fostered child.<sup>194</sup> In order to qualify, employees must have worked for their employer for twenty weeks and earned a minimum of \$169 or more per week.<sup>195</sup> Claimants are paid two-thirds of their weekly average wage with a maximum weekly benefit of \$650 for 2019.<sup>196</sup> The individual's weekly average is based

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com/massachusetts-just-passed-most-generous-paid-family-leave-law-in-country [https://perma.cc/4Y4K-L2WU].

186. Foley Hoag, LLP, *supra* note 184.

187. *Id.*

188. *Id.*

189. *Id.*

190. PAID FAMILY MEDICAL LEAVE INSURANCE LAWS, *supra* note 171, at 10.

191. *Id.*

192. N.J. STAT. ANN. § 43:21–38 (2019); SHARON LERNER & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, BUSINESS AS USUAL: NEW JERSEY EMPLOYERS' EXPERIENCES WITH FAMILY LEAVE INSURANCE 6 (2014), <http://cepr.net/documents/nj-fli-2014-06.pdf> [https://perma.cc/TG7H-L7AX].

193. LERNER & APPELBAUM, *supra* note 192, at 7.

194. *Family Leave Insurance*, DEP'T LAB. & WORKFORCE DEV., OFFICIAL SITE OF THE ST. OF N.J., <https://myleavebenefits.nj.gov/worker/fli/> [https://perma.cc/R9V3-L939] (last visited Apr. 1, 2019); *Your Guide to Family Leave Insurance in New Jersey*, DEP'T LAB. & WORKFORCE DEV., OFFICIAL SITE ST. N.J., [https://www.nj.gov/labor/forms\\_pdfs/tdi/WPR-119%20\(1-18\).pdf](https://www.nj.gov/labor/forms_pdfs/tdi/WPR-119%20(1-18).pdf) [https://perma.cc/M78B-BN5W] (last visited Apr. 1, 2019) [hereinafter *Your Guide*].

195. *Your Guide*, *supra* note 194.

196. *Family Leave Insurance*, *supra* note 194.

on the individual's wages eight weeks before taking leave.<sup>197</sup> The program is funded entirely through worker payroll deductions.<sup>198</sup> New Jersey's program is designed for an economic benefit and does not provide job protection during, or upon return from, leave.<sup>199</sup> Since its implementation in 2009, New Jersey residents have filed more than 255,000 claims with more than 205,000 using leave to bond with their new child.<sup>200</sup> Over 75% of workers and the majority of businesses, both large and small, view the program favorably.<sup>201</sup>

#### 4. New York

In 2016, Governor Andrew Cuomo signed New York's Paid Family Leave policy into law.<sup>202</sup> The law became effective in January 2018 and provides paid leave for parents to bond with a newborn, adopted, or fostered child.<sup>203</sup> Employees who work twenty hours or more per week are eligible for leave after twenty-six weeks of employment while employees who work less than twenty hours a week are eligible after 175 days worked.<sup>204</sup> Workers will receive a partial wage replacement, starting at 50% of their average weekly wage in 2018, and slowly increasing to 67% by 2021.<sup>205</sup> However, wages are capped at 50% of the state average wage.<sup>206</sup> The amount of leave will also steadily grow from eight weeks in 2018 to twelve weeks in 2021.<sup>207</sup> New York offers job protected leave meaning an employer cannot discriminate against employees for taking leave or terminate their employment while on leave.<sup>208</sup>

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197. *Id.*

198. *Id.*

199. *Your Guide*, *supra* note 194.

200. PAID LEAVE WORKS IN CALIFORNIA, NEW JERSEY, AND RHODE ISLAND, *supra* note 174, at 1.

201. *Id.*

202. N.Y. WORKERS' COMP. LAW § 200–242 (2019); *The Nation's Strongest Paid Family Leave Policy*, N.Y. ST., <https://paidfamilyleave.ny.gov> [<https://perma.cc/D2ZH-4SKL>] (last visited Apr. 1, 2019).

203. *New York State Paid Family Leave: Employee Facts*, N.Y. ST., [https://www.ny.gov/sites/ny.gov/files/atoms/files/PaidFamilyLeave\\_EmployeeFactSheet.pdf](https://www.ny.gov/sites/ny.gov/files/atoms/files/PaidFamilyLeave_EmployeeFactSheet.pdf) [<https://perma.cc/EZ9R-BNQE>] (last visited Apr. 1, 2019).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

## 5. Rhode Island

In 2014, Rhode Island became the third state to implement a statewide paid leave family policy.<sup>209</sup> Rhode Island's Temporary Caregiver Insurance (TCI) Act provides up to four weeks of paid leave for workers to spend time with a newborn, adopted, or fostered child.<sup>210</sup> TCI offers partial wage replacement with workers receiving up to 60% of their wages replaced and a maximum of \$795 per week.<sup>211</sup> In order to qualify, workers must work in Rhode Island, paid into the TCI or TDI (temporary disability insurance) fund, and earn at least \$11,520 in their base period or an alternate base period.<sup>212</sup> If an employee does not earn that much, there are some exceptions that apply.<sup>213</sup> Rhode Island's plan is funded entirely through employee payroll deductions.<sup>214</sup> It also provides job-protected leave, meaning an employer must either hold an employee's position while taking TCI leave or offer a comparable position upon return.<sup>215</sup> Since its implementation in 2014, 34,000 individuals have used the TCI program.<sup>216</sup> Parents note that TCI has a positive effect on their ability to care for their children and find childcare.<sup>217</sup> Additionally, businesses note few, if any, significant effects on productivity or related metrics.<sup>218</sup> Some have noted that Rhode Island's plan is an improvement upon the California and New Jersey plans because it provides job-protected leave.<sup>219</sup>

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209. ANN BARTEL ET AL., U.S. DEP'T OF LABOR, ACCESSING RHODE ISLAND'S TEMPORARY CAREGIVER INSURANCE ACT: INSIGHTS FROM A SURVEY OF EMPLOYERS 3 (2016) [hereinafter SURVEY OF EMPLOYERS], [https://www.dol.gov/asp/evaluation/completed-studies/AssessingRhodeIslandTemporaryCaregiverInsuranceAct\\_InsightsFromSurveyOfEmployers.pdf](https://www.dol.gov/asp/evaluation/completed-studies/AssessingRhodeIslandTemporaryCaregiverInsuranceAct_InsightsFromSurveyOfEmployers.pdf) [<https://perma.cc/8TT4-TR9B>].

210. *Id.*

211. R.I. DEP'T OF LABOR & TRAINING, FAST FACTS ABOUT TCI: TEMPORARY CAREGIVER INSURANCE (2016), <http://ripaidleave.net/wp-content/uploads/2016/09/Fast-Facts-for-Workers-about-RI-TCI.pdf> [<https://perma.cc/8SJ2-57NT>].

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. PAID LEAVE WORKS IN CALIFORNIA, NEW JERSEY, AND RHODE ISLAND, *supra* note 174, at 1.

217. *Id.* at 3.

218. SURVEY OF EMPLOYERS, *supra* note 209, at 5.

219. PAID LEAVE WORKS IN CALIFORNIA, NEW JERSEY, AND RHODE ISLAND, *supra* note 174, at 1–2.

## 6. Washington

In 2017, Washington state enacted its paid family and medical leave program, which became effective in January 2019 for premiums and will become effective in January 2020 for benefits.<sup>220</sup> The policy provides twelve weeks of paid leave for individuals to bond with their newborn, adopted, or fostered child.<sup>221</sup> Individuals are eligible for up to eighteen weeks if they experience a serious health condition related to pregnancy.<sup>222</sup> Employees are eligible once they have worked 820 hours for a Washington-based employer.<sup>223</sup> Eligible employees are entitled to twelve weeks of wage replacement, with a maximum of \$1,000 per week, dependent upon earnings.<sup>224</sup> Workers paid 50% or less of the statewide average weekly wage will receive 90% of their average weekly wage.<sup>225</sup> For workers paid more than 50% of the statewide average weekly wage, the weekly benefit rate is 90% of the employee's average weekly wage up to 50% of the statewide average weekly wage, plus 50% of the employee's average weekly wage that is more than 50% of the statewide average weekly wage.<sup>226</sup> The first year of the program is funded partially by employees and partially by employers.<sup>227</sup> The premium for employees is set at 0.4% per paycheck, meaning an employee earning \$50,000 pays around \$2.40 a week to contribute to the fund.<sup>228</sup>

While each state plan differs in its implementation, length, and coverage of leave, it is clear that state leave policies have become more expansive since California's policy was implemented. For example, job protection is now a key factor in paid leave since Rhode Island included it in their statewide policy. It should also be noted that all of the statewide leave policies listed are gender-neutral and provide relatively equal coverage for all employees, with some providing better wage replacement for lower-wage employees.

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220. PAID FAMILY MEDICAL LEAVE INSURANCE LAWS, *supra* note 171, at 1.

221. *Id.* at 2–3.

222. *Id.* at 3.

223. *Id.* at 4.

224. *Id.* at 8.

225. *Id.* at 7–8.

226. *Id.* at 8.

227. WASHINGTON'S PAID FAMILY AND MEDICAL LEAVE PROGRAM, EMP. SEC. DEP'T, WASH. ST., <https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/paid-family-medical-leave/2018.PFML.Infographic.pdf> [<https://perma.cc/VM4E-LSF5>] (last visited Apr. 1, 2019).

228. *Id.*

## 7. District of Columbia

In 2017, the District of Columbia passed the Universal Paid Leave Act, which will become effective in July 2020.<sup>229</sup> The plan covers eight weeks of parental leave for bonding with a newborn, adopted, or fostered child.<sup>230</sup> The plan is funded by a 0.62% increase in employer payroll taxes, which differs from plans such as California and New Jersey that rely on employee payroll taxes.<sup>231</sup> In order to be eligible, employees must spend 50% of their work time in D.C. for a covered employer or be based in D.C. and spend substantial amounts of work time there.<sup>232</sup> The benefit amount differs depending on salary.<sup>233</sup> Lastly, the leave is job protected.<sup>234</sup>

### B. Proposed Federal Parental Leave Plans

#### 1. Rubio Plan

One of two paid leave plans introduced in the 115th Congress was Senator Marco Rubio's (R-FL) Economic Security for New Parents Act.<sup>235</sup> The plan allows new parents to use a portion of their Social Security benefits as paid leave after the birth or adoption of a child.<sup>236</sup> This would cause a three to six-month delay in collection of Social Security benefits upon retirement.<sup>237</sup> Parents must use the leave for at least two months.<sup>238</sup> Employees in two-parent households would be able to transfer the benefit to their spouse.<sup>239</sup>

Some are critical of Rubio's plan because it only provides parental leave and leaves out family and medical leave.<sup>240</sup> The majority

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229. Universal Paid Leave Act, D.C. Law 21-265 (D.C. 2016); PAID FAMILY MEDICAL LEAVE INSURANCE LAWS, *supra* note 171, at 1.

230. PAID FAMILY MEDICAL LEAVE INSURANCE LAWS, *supra* note 171, at 2.

231. S. Libby Henninger & Eunju Park, *District of Columbia Enacts the Universal Paid Leave Act*, LITTLER (Apr. 24, 2017), <https://www.littler.com/publication-press/publication/district-columbia-enacts-universal-paid-leave-act> [<https://perma.cc/R655-YA4L>].

232. PAID FAMILY MEDICAL LEAVE INSURANCE LAWS, *supra* note 171, at 4.

233. *See id.* at 7.

234. *See id.* at 10.

235. *Rubio & Wagner*, *supra* note 167.

236. *Id.*

237. Naomi Jagoda, *Rubio Rolls Out Paid Parental Leave Bill*, HILL (Aug. 2, 2018), <https://thehill.com/policy/finance/400147-rubio-rolls-out-paid-parental-leave-bill> [<https://perma.cc/T44B-G5C9>].

238. *Rubio & Wagner*, *supra* note 167.

239. *See Economic Security for New Parents Act*, S. 3345, § 235 (c)(1)(B), 115th Cong. (2018).

240. Jagoda, *supra* note 237.

of individuals who take leave do so for family and medical leave purposes, meaning the plan only covers a minority of leave takers.<sup>241</sup> Others fear that relying on Social Security will affect people's retirement, especially women who are more likely to rely on both paid leave and retirement benefits.<sup>242</sup> A study of Rubio's plan concluded that taking Social Security benefits as paid leave would delay collecting benefits for twice as many weeks as they collected paid leave.<sup>243</sup> I spoke with Letty Mederos, Congresswoman Rosa DeLauro's Chief of Staff, who stated, "Rubio's plan would never work because it's robbing Peter to pay Paul."<sup>244</sup> The research agrees with that statement, as individuals would be forced to delay collecting Social Security if they used it for paid leave. Lastly, individuals are critical of the wage replacement offered by Rubio's plan because it would not adequately provide for low-wage and middle-class workers.<sup>245</sup> For these reasons, I do not recommend Rubio's paid leave plan as it is limited in scope, causes problems upon retirement, and does not provide enough wage replacement for the average worker.

## 2. FAMILY Act

Another far superior paid family leave plan in the 115th Congress is the Family and Medical Insurance Leave Act (FAMILY Act) sponsored by Senator Kirsten Gillibrand and Congresswoman Rose DeLauro.<sup>246</sup> The FAMILY Act is widely supported by hundreds of labor, health, and education advocates.<sup>247</sup> The FAMILY

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241. Press Release, Nat'l P'ship for Women & Families, Rubio Paid Leave Plan is 'Wrong for America.' It Excludes Most Workers, Jeopardizes Essential Social Security Benefits (Aug. 1, 2018) [hereinafter Wrong for America], <http://www.nationalpartnership.org/newsroom/press-releases/rubio-paid-leave-plan-is-wrong-for-america-excludes-most-workers-jeopardizes-social-security.html> [https://perma.cc/XKT7-5RB9].

242. Amy K. Matsui, *As If We Need It, Evidence That Delaying Social Security to Get Paid Leave Benefits Is a Terrible Idea*, NAT'L WOMEN'S L. CTR. (Apr. 20, 2018), <https://nwlc.org/blog/as-if-we-needed-it-evidence-that-delaying-social-security-to-get-paid-leave-benefits-is-a-terrible-idea/> [https://perma.cc/D6AS-LMBY].

243. MELISSA M. FAVREAU & RICHARD W. JOHNSON, URBAN INST., PAYING FOR PARENTAL LEAVE WITH FUTURE SOCIAL SECURITY BENEFITS 1 (2018), [https://www.urban.org/sites/default/files/publication/98101/paying\\_for\\_parental\\_leave\\_with\\_future\\_social\\_security\\_benefits\\_0.pdf](https://www.urban.org/sites/default/files/publication/98101/paying_for_parental_leave_with_future_social_security_benefits_0.pdf) [https://perma.cc/RSW8-MVC8].

244. Telephone Interview with Leticia Mederos, Chief of Staff, Congresswoman Rosa DeLauro (D-Ct 3rd Dist.) (Oct. 17, 2018).

245. See Wrong for America, *supra* note 241.

246. FAMILY Act, S. 337, 115th Cong. (2017).

247. See generally FAMILY Act Coalition Letter to Congress, *supra* note 30 (listing hundreds of national organizations supporting this piece of legislation).

Act would provide up to twelve weeks of partial income for parental, family, medical, and military caregiving purposes.<sup>248</sup> Employees would earn up to 66% of their monthly wages capped at \$1000 per week in the first year.<sup>249</sup> The Act would cover all employees, including part-time, lower-wage, and self-employed workers.<sup>250</sup> It would be funded by small employee and employer payroll contributions of two cents for every \$10 in wages, or less than \$2.00 per week for the average worker.<sup>251</sup> It has been calculated that full-time employees making the minimum wage would contribute \$1.36 per week.<sup>252</sup> The leave would be job-protected, and would prevent employers from discriminating against workers for taking paid leave.<sup>253</sup> Lastly, the FAMILY Act would establish an Office of Paid Family and Medical Leave to administer payments.<sup>254</sup> This new office would be housed in the Social Security Administration and would use funds collected from the Act to sustain itself.<sup>255</sup>

Advocates are supportive of the FAMILY Act because it uses the California program which has proven effective as a model for paid leave.<sup>256</sup> Additionally, it is inclusive of all workers, and, importantly, provides support for low-wage and part-time employees.<sup>257</sup> As stated earlier, it is critical that paid leave programs provide support for all workers, as those excluded from paid leave programs are often those most in need of paid leave. The FAMILY Act is also cost effective, costing employees an average of less than \$5 a week and less than \$2 a week for low-wage workers.<sup>258</sup> Having every employee pay into the program is effective because it covers parental, family, and medical leave, which everyone will likely use

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248. FAMILY Act, S. 337; *see* NAT'L P'SHIP, FAMILY ACT, *supra* note 169, at 1.

249. Jane Farrell & Sarah Jane Glynn, *The FAMILY Act: Facts and Frequently Asked Questions*, CTR. FOR AM. PROGRESS (Dec. 12, 2013), <https://www.americanprogress.org/issues/economy/reports/2013/12/12/81037/the-family-act-facts-and-frequently-asked-questions/> [<https://perma.cc/26HZ-VGNR>].

250. NAT'L P'SHIP, FAMILY ACT, *supra* note 169, at 1.

251. *Id.*

252. *See* INST. FOR WOMEN'S POLICY RESEARCH, PAID FAMILY AND MEDICAL LEAVE INSURANCE: MODEST COSTS ARE A GOOD INVESTMENT IN AMERICA'S ECONOMY 2–3 (2018), [https://iwpr.org/wp-content/uploads/2018/02/B368\\_Paid-Leave-Fact-Sheet-1.pdf](https://iwpr.org/wp-content/uploads/2018/02/B368_Paid-Leave-Fact-Sheet-1.pdf) [<https://perma.cc/M2DP-QVW9>].

253. *Id.*

254. NAT'L P'SHIP, FAMILY ACT, *supra* note 169, at 1.

255. Farrell & Glynn, *supra* note 249.

256. NAT'L P'SHIP FOR WOMEN & FAMILIES, THE CASE FOR A NATIONAL FAMILY AND MEDICAL LEAVE INSURANCE PROGRAM 3 (2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/the-case-for-the-family-act.pdf> [<https://perma.cc/TEXT-2-MEM3>].

257. FAMILY Act Coalition Letter to Congress, *supra* note 30.

258. INST. FOR WOMEN'S POLICY RESEARCH, *supra* note 252, at 1.

at some point during their time with a company. Plans that only cover parental leave tend to cause bitter feelings among employees who contribute financially to the program but do not plan to have children or have stopped having children.

Its high wage replacement rate as well as its inclusive and gender-neutral nature makes the FAMILY Act the ideal paid leave plan proposed in the 115th Congress.

#### CONCLUSION

While the United States has yet to succeed in passing paid leave on the federal level, I believe a comprehensive paid federal parental leave plan will pass within the next ten years. Not only is paid parental leave critical for families, especially low-wage families, but it has wide support among voters. Candidates have started to discuss paid leave with more vigor and the major candidates in the 2016 presidential election mentioned paid leave on the campaign trail. This is becoming an issue that legislators can no longer ignore. With the rise in minimum wage and paid sick laws on the state level, paid parental leave is likely next. It is critical that any paid parental leave plan include all employees, be gender-neutral, and provide job protection. Plans should reflect the proven success of state plans by providing funding through small employee payroll taxes or a mix of employee and employer payroll taxes, similar to Washington state's plan. If the United States wants to support working families, help decrease the wage gap, and create a healthier America, they will pass paid leave in the next Congress.