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NOTE

Rewriting the FMLA: Introducing Intermittent Bonding Leave to Combat Gender Norms Facing Working Mothers

Melissa Latini*

INTRODUCTION

“[C]aregiving discrimination is the strongest form of gender discrimination by far.”¹ Joan Williams, the founder of the Center for WorkLife Law, was corroborated by Chief Justice Rehnquist, who stated, “The fault line between work and family [is] precisely where sex-based overgeneralization has been and remains strongest”² The Family Medical Leave Act (hereinafter “FMLA” or “Act”) was signed into law by President Bill Clinton on February 5, 1993, to target that fault line.³ Congress passed the law to balance workplace demands with the needs of families.⁴ The FMLA was politically symbolic for its admirable goals of promoting equal employment opportunities for women and men⁵ and for recognizing that caretaking responsibilities negatively impact women’s careers.⁶ However, in the two decades since its adoption, the FMLA has been criticized for failing to effectuate these lofty goals.⁷

While this Note joins the criticism of the FMLA’s inability to combat stereotypes and gender norms against women in the workplace, it also offers a potential solution to one of the Act’s shortcomings: a statutory entitlement to intermittent leave under the “bonding leave” provision of the FMLA. This addition can help diminish caregiver discrimination and reduce the imposition of caregiving gender norms against working mothers.

* J.D. Candidate, 2018, Indiana University Maurer School of Law. This Note would not have been possible without the guidance and insight of Professor Deborah Widiss and the hard work of all members of the *Indiana Journal of Law & Social Equality*.

1 *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Hearing Before the U.S. Equal Emp’t Opportunity Comm’n* (2012), (statement of Joan Williams, Founding Director, Center for WorkLife Law), <http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm>.

2 Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).

3 Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2012).

4 § 2601(b)(1).

5 § 2601(b)(5).

6 § 2601(a)(5).

7 See generally Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 149 (1998) (“Ironically, the protections afforded under the FMLA largely ignore the broad interests discussed in the Act’s preamble.”); Michael Selmi, *The Family and Medical Leave Act of 1993: Ten Years of Experience: Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL’Y 65, 67 (2004) (“[I]t is clear that the statute has not accomplished its goals with respect to combating stereotypes or discrimination against women in the workplace.”).

This Note proceeds in four parts. Part I provides background information about the FMLA's structure and purpose, and notes some common criticisms and calls for reform. Part II discusses intermittent leave generally and provides an overview of the different types of FMLA leave. Part III details the proposal for intermittent leave. It explains how the absence of intermittent leave hurts working parents—especially mothers—while highlighting the benefits of a reform. Finally, Part IV explains why the introduction of intermittent leave is a feasible and effective reform and addresses some likely concerns. This Note concludes by reiterating that Congress's purpose in enacting the FMLA can be better effectuated with the implementation of intermittent bonding leave.

I. FAMILY MEDICAL LEAVE ACT OF 1993

A. *Background and Statutory Entitlements*

In the 1960s, women began to enter the paid labor force in unprecedented numbers to supplement the earnings of their husbands, whose income alone could no longer cover all household expenses.⁸ By the 1980s, women accounted for nearly half of the nation's workforce.⁹ This increased participation of women in the paid labor market created significant social changes in the United States.¹⁰ Working women were no longer a select minority,¹¹ and their rights as employees were no longer just a matter of "campus theory."¹² A care vacuum developed, creating problems in the affordability and availability of child care.¹³ The family structure, centered around a male breadwinner, while "so long thought to be typical," was reduced to only one-third of all married couples.¹⁴ However, because of parallel stereotypes presuming both women's affinity for domestic roles and men's aversion to domestic roles, women were still primarily responsible for caretaking.¹⁵

Balancing work and caregiving had (and continues to have) deleterious effects on women's labor market prospects and fostered caregiver discrimination in the workplace. Employment decisions were often influenced by gendered biases about women and caregivers.¹⁶ Accordingly, employers were hesitant to hire women with young children or women who may become pregnant in the near future because they were viewed as "less dependable" and "less committed" to work than their male

8 *E.g.*, RONALD D. ELVING, CONFLICT AND COMPROMISE 12 (1995).

9 *Id.* at 17.

10 H.R. REP. NO. 103-08, pt. 2, at 11 (1993).

11 *Id.* at 12.

12 ELVING, *supra* note 8, at 12.

13 H.R. REP. NO. 103-08, at 12–13.

14 *Id.* at 12.

15 29 U.S.C. § 2601(a)(5).

16 U.S. EQUAL EMP. OPPORTUNITY COMM'N, WOMEN'S WORK GROUP REPORT 14 (2013), https://www.eeoc.gov/federal/reports/women_workgroup_report.cfm [hereinafter WOMEN'S WORK REPORT].

counterparts.¹⁷ This contributed to the creation of “traditional” female positions such as clerical staff, nurses, and teachers—all of which are paid considerably less than male-dominated positions, such as accountants, bankers, and attorneys.¹⁸ Employers’ inflexible workplace policies made it difficult to balance work and caregiving obligations, thereby limiting women’s potential career growth.¹⁹ For example, absences due to caregiver responsibilities affected women’s training and experience needed for career advancement.²⁰ Absences also made women appear to be less committed to work than other employees, so they were less likely to be invited to networking opportunities and events, less likely to have mentoring relationships with management, and less likely to be “groomed” for management positions.²¹ Unsurprisingly, it was therefore harder for women to obtain high-level management positions,²² and when women did achieve these high-level positions, they had to work tirelessly to “prove themselves” worthy of their position.²³

Feminists and feminist rights groups sought to combat these issues, and the push for family leave laws originated with their efforts.²⁴ Family leave gained traction on a national level during the 1992 presidential campaign, where a candidate’s views on family leave were used to measure his awareness of the changing dynamic between work and family.²⁵ In addition to these local political pressures, Congress also faced international pressure: in 1993, the United States was the only industrialized Western country that did not have a federal policy regarding family leave.²⁶ In light of these political pressures, widespread workplace discrimination, and the continuously changing dynamics of work and home, Congress passed the Family Medical Leave Act of 1993. The Act’s stated purposes were to “balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity” and to “promote the goal of equal employment opportunity for women and men.”²⁷ More generally, Congress sought to combat gender stereotypes and reduce gender-based workplace discrimination.²⁸

To effectuate these goals, the FMLA entitles eligible employees to twelve weeks of unpaid, job-protected leave.²⁹ To be eligible, an employee must have worked for that employer for at least twelve months and must have worked at least 1,250 hours

17 *Id.* at 4.

18 *See id.* at 15.

19 *See id.* at 2–3.

20 *Id.* at 5.

21 *Id.* at 7–8.

22 *Id.* at 6.

23 *Id.* at 15.

24 ELVING, *supra* note 8, at 105.

25 *See id.* at 255.

26 H.R. REP. NO. 103-08, at 12 (noting that all Western and Eastern European countries all provide for leave longer than the twelve weeks proposed by the U.S.).

27 29 U.S.C. § 2601(b)(1)–(5).

28 *See Hibbs*, 538 U.S. at 728–34.

29 29 U.S.C. § 2612.

during the previous twelve-month period.³⁰ Furthermore, the employer must employ fifty or more employees within seventy-five miles of the employee's worksite.³¹ Once deemed eligible, employees are entitled to a total of twelve workweeks of leave during any twelve-month period for any of five stated reasons.³² The first three provisions entitle leave: (A) because of the birth of a son or daughter of the employee and in order to care for such son or daughter, (B) because of the placement of a son or daughter with the employee for adoption or foster care, or (C) in order to care for the employee, or a spouse, son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.³³ When an employee seeks FMLA leave for the birth or adoption of a child, the leave must be taken within twelve months of the birth or placement; otherwise, the leave expires and the employer has no federal obligation to afford job-protected leave.³⁴

Notably, the FMLA does not mandate paid leave.³⁵ At best, it provides job-protected leave with continued benefits for the duration of the leave.³⁶ Upon returning from FMLA leave, employees are entitled to restoration either to their previous position or to an equivalent position with equivalent benefits and pay.³⁷ However, Congress only intended for the FMLA's twelve-week, unpaid leave to set a floor.³⁸ States can, and indeed some have, provided more generous family leave to their residents.³⁹ Many businesses also voluntarily exceed statutory minimums by providing longer leave, more flexible leave, or paid leave.⁴⁰

B. Common Criticisms and Calls for Reform

While the FMLA has been lauded by some for influencing workplace culture and employer norms, there is still widespread criticism regarding the Act's failure to

30 § 2611(2)(A).

31 See § 2611(2)(B)(ii).

32 § 2612(a)(1).

33 § 2612(a)(1) (The other two leave entitlements are not relevant to this paper but provide leave: (D) because of the employee's own serious health condition, or (E) because the employee's spouse, child, or parent is on covered active duty in the Armed Forces).

34 § 2612(a)(2).

35 See § 2612(c).

36 See § 2614(c).

37 See § 2614(a).

38 See § 2651(b).

39 See, e.g., NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF LAWS THAT HELP EXPECTING AND NEW PARENTS (4th ed. 2016), <http://www.nationalpartnership.org/research-library/work-family/expecting-better-2016.pdf> (noting that some states have dropped the employer threshold to cover more workers, expanded the definition of family, and allowed leave for more reasons). Furthermore, California, Rhode Island, New Jersey, and New York provide paid family leave under state temporary disability insurance programs. See *id.* at 17–18.

40 See generally 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/> (noting that in Silicon Valley, paid parental leave is becoming the norm rather than the exception).

achieve its stated goals.⁴¹ The bulk of these criticisms and accompanying calls for reform fall into two broad categories: criticisms regarding coverage and eligibility, and criticisms regarding the nature of the leave provided.

The stringent eligibility requirements for FMLA leave categorically exclude a large portion of workers who may need leave. Specifically, because the FMLA restricts leave entitlement to employers with fifty or more employees, the government estimates that a meager 9.7 percent of all worksites are actually covered by the FMLA.⁴² Because of the further restrictions based on tenure and working hour requirements, only 59.2 percent of private-sector employees are both covered and eligible for FMLA leave.⁴³ These eligibility requirements primarily benefit those employees who work full-time, for long periods, and for a large employer. This work pattern favors the traditional male breadwinner.⁴⁴ Therefore, it is unsurprising that almost two-thirds of workers who report an unmet need for leave are women.⁴⁵ In particular, single mothers are often ineligible for FMLA leave.⁴⁶ This “mutes the effectiveness of the FMLA because it denies access to job-protected leave to so many of those Congress intended to help.”⁴⁷ The coverage requirements also exclude nontraditional families; those who rely on non-immediate family to provide care, like aunts or uncles, are not eligible for FMLA leave.⁴⁸

Even more damaging, the FMLA fails to provide paid leave. Among eligible employees who needed leave but did not take it, the most commonly cited reason for not taking leave was financial constraints (46 percent), followed by fear of losing one’s job (17 percent).⁴⁹ Unpaid leave tends to economically preclude certain groups from taking leave, like low-wage workers and single parents.⁵⁰ While statutory paid leave has generally failed to gain traction in the United States, it has long been the norm in other industrialized nations.⁵¹ However, some employees do receive paid leave at

41 See, e.g., Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 38 (2007) (noting that an increasing number of employers who are not covered by the FMLA have nonetheless created policies that provide family and maternity leave).

42 JACOB ALEX KLERMAN, KELLY DALEY & ALYSSA POZNIAK, ABT ASSOCIATES INC., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 17 (2012), <https://www.dol.gov/whd/fmla/survey/>.

43 *Id.* at 20–21.

44 Rona Kaufman Kitchen, *Missing the Mark: How FMLA’s Bonding Leave Fails Mothers*, 31 HOFSTRA L. & EMP. L.J. 303, 309–10 (2014).

45 KLERMAN ET AL., *supra* note 42, at 117–18.

46 Kitchen, *supra* note 44, at 312.

47 *Id.*

48 JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS & CTR. FOR WORKLIFE L., THE THREE-FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 65 (2010), <https://www.americanprogress.org/issues/economy/reports/2010/01/25/7194/the-three-faces-of-work-family-conflict/>. Fortunately, the Supreme Court’s formal recognition of same-sex marriage in *Obergefell v. Hodges* substantially mitigated concern about the FMLA’s exclusion of nontraditional families. 135 S. Ct. 2584, 2607–08 (2015).

49 KLERMAN ET AL., *supra* note 42, at 127.

50 See O’Leary, *supra* note 41, at 45 (finding low-wage workers are unlikely to be covered by the FMLA, but when they are covered, they are economically precluded from taking leave).

51 S. REP. NO. 103-3 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 21, 1993 WL 22195 (noting that 127 countries provide parental leave with wage replacement and that France, Great Britain, and Italy have had paid maternity benefits since before World War I).

the hands of benevolent employer policies or by utilizing other leave options, like vacation time.⁵²

While this Note also supports an expansion of the FMLA to provide leave entitlement for more workers for longer periods of time and to provide paid leave, it focuses on a different kind of FMLA reform; this Note advocates for an amendment to the bonding leave provision to allow for intermittent leave. This amendment will reduce the imposition of caregiving gender norms against working mothers and promote a more egalitarian approach to childcare for working parents.

II. INTERMITTENT LEAVE GENERALLY

Intermittent leave is leave taken in separate blocks of time, while a reduced leave schedule simply reduces an employee's usual number of working hours per week or hours per workday.⁵³ A reduced leave schedule often drops the employee from full-time to part-time employment.⁵⁴ Under either formulation, the employee may be temporarily transferred to another position that better accommodates the leave schedule, provided the employee receives equivalent pay and benefits.⁵⁵ Leave taken intermittently or on a reduced schedule is subtracted on an hour-for-hour basis from the employee's overall FMLA leave balance.⁵⁶ Throughout this Note, the term "intermittent leave" accounts for both types of leave.

Intermittent leave offers benefits for both employers and employees. It recognizes that "full-time, year-round, and continuous labor to the exclusion of other needs" is not a reality for all of the workforce.⁵⁷ Its strongest benefit to employees is flexibility; it allows workers to adjust their work schedules to incorporate caregiving obligations without having to change jobs or employers.⁵⁸ It also allows employers to retain trained and experienced employees, albeit on a temporary, part-time basis, rather than incurring the costs of hiring and training a full-time temporary replacement during the employee's FMLA leave.⁵⁹ Despite these benefits,

52 KLERMAN ET AL., *supra* note 42, at ii (finding that 48% of employees receive full pay during leave and 17 percent receive partial pay via other leave entitlements, like vacation or sick leave. However, 40 percent of leave takers still report that the inability to afford further leave is why they returned to work).

53 29 C.F.R. § 825.202(a) (2015) (providing an example to further distinguish between the two: a pregnant employee takes intermittent leave for prenatal exams and for periods of severe morning sickness, whereas an employee takes leave on a reduced leave schedule when he is recovering from a serious health condition and is not strong enough to work a full-time schedule).

54 *Id.*

55 29 U.S.C. § 2612(b)(2) (2012). Alternatively, pay may be proportionally reduced in conjunction with reduced hours. At the end of the intermittent leave, the employee must be reinstated to the same or an equivalent position as before the FMLA leave began. § 2614(a).

56 29 C.F.R. § 825.205.

57 CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT 136 (2010).

58 *See generally* REBECCA RAY, JANET C. GORNICK & JOHN SCMITT, CENT. FOR ECON. AND POLICY RESEARCH, PARENTAL LEAVE POLICIES IN 21 COUNTIES: ASSESSING GENEROSITY AND GENDER EQUALITY (2009).

59 S. REP. NO. 103-3.

intermittent leave is not guaranteed for all FMLA leave: only those taking medical leave have a statutory entitlement to intermittent leave.⁶⁰ An eligible employee seeking bonding leave may only take leave on an intermittent or reduced-schedule basis if the employer explicitly agrees to it.⁶¹

Courts have interpreted the intermittent leave provision narrowly to afford employers wide latitude in denying such leave.⁶² Employee handbooks that contain a categorical rule denying all employees intermittent bonding leave have been upheld, even where the plaintiff-employee only took a meager two days of leave for the birth of his son.⁶³ However, the Department of Labor has found that it is the employer's responsibility to determine the applicability of the FMLA and to consider all requested leave as FLMA leave.⁶⁴ Accordingly, when an employer approves an employee's request for intermittent leave for adoption, the employee is entitled to the full twelve weeks of leave.⁶⁵

Because intermittent leave for new parents is conditioned on employer approval while intermittent leave for medical issues is statutorily protected, the FMLA de-prioritizes parenting. Despite the nation's cry for a *family* leave policy, the FMLA actually gives more favorable treatment to medical leave.⁶⁶ Indeed, the majority of FMLA leave in 2012 was taken to tend to the employee's own medical condition.⁶⁷ The FMLA has been heavily criticized for this discrepancy, as "[t]he law here does not simply create a hierarchy of interest in which medical needs are privileged over other interests; instead, it completely disregards other needs, deeming medical needs the only ones worthy of legal protection."⁶⁸ However, the exclusion of a statutory entitlement to intermittent leave was necessary to ensure the passage of the FMLA in the House; two previous amendments and days of debate had failed to secure the Republican votes required for passage.⁶⁹ Republicans worried that a statutorily-protected reduced leave schedule would allow employees to simply set their own schedule for whatever they pleased.⁷⁰ Limiting intermittent leave allowed the FMLA to pass in the House with a 223–209 vote.⁷¹ However, in the two decades since its implementation, the FMLA has failed to achieve its stated purpose of

60 29 U.S.C. § 2612(b)(1).

61 § 2612(b)(1). Notably, intermittent leave does *not* require the employer's approval for the serious health condition of an expectant mother or newborn child. 29 C.F.R. § 825.120(b).

62 *See, e.g.,* Dotson v. Pfizer, Inc., 558 F.3d 284, 293 (4th Cir. 2009); Beyst v. Pinnacle Airlines, Inc., No. 07-10927, 2008 WL 2433201, (E.D. Mich. June 11, 2008).

63 Beyst v. Pinnacle Airlines, Inc., No. 07-10927, 2008 WL 2433201, at *7–8 (E.D. Mich. June 11, 2008).

64 *See* 29 C.F.R. § 825.303(b).

65 *See* Dotson v. Pfizer, Inc., 558 F.3d 284, 293 (4th Cir. 2009).

66 *See* Eichner, *supra* note 7, at 149–50.

67 KLERMAN ET AL., *supra* note 42, at 69 (finding 54.6% of employees took leave for their own illness).

68 Eichner, *supra* note 7, at 150.

69 ELVING, *supra* note 8, at 265–70. The first amendment was a "cafeteria-style benefit plan" where employees got to choose which benefit package best suited their needs, but they had to sacrifice other benefits to get family leave. The second amendment exempted employees from leave who would cause economic injury or endanger the public.

70 *Id.* at 269.

71 *Id.* at 270.

reducing workplace discrimination against women; therefore, it is time to revisit the issue of intermittent leave.

III. FMLA BONDING LEAVE SHOULD PROVIDE FOR INTERMITTENT LEAVE

The manner in which family leave policies allocate time and money to parents affects how child care is divided in the household. Thus, generous, egalitarian family leave policies can counteract traditional gender norms and labor market pressures that would bind the mother to a domestic role.⁷² It is certainly cause for concern that since employers currently have the discretion to award intermittent bonding leave, employers play a big role—if not the biggest role—in shaping parental leave and child care divisions in the home.⁷³ Bonding leave currently exists as a “use it or lose it” twelve-week block of time. Allowing those same twelve weeks to be taken intermittently will allow the bonding leave to be meaningfully utilized to address each family’s individualized needs.

A. *Intermittent Bonding Leave Can Increase FMLA Participation Rates*

While intermittent bonding leave is technically available under the FMLA, it is scarcely used. In fact, the FMLA as a whole is being underutilized. Between 2011 and 2012, only 13.1 percent of eligible employees took FMLA leave.⁷⁴ Intermittent leave (medical and bonding combined) accounts for 24.2 percent of all FMLA leave.⁷⁵ Of those individuals taking intermittent leave, only 16.7 percent used it to care for a new child.⁷⁶ Combined, this amounts to only 0.53 percent of all FMLA-eligible employees who took intermittent bonding leave. These slim participation rates are unsurprising since intermittent bonding leave is currently entirely conditioned on employer approval. Employers are free to create blanket policies that explicitly exclude *all* employees from intermittent leave and leave no room for a case-by-case analysis.⁷⁷ Employers may also be reluctant to grant intermittent bonding leave if they associate it with the abuse that permeates intermittent medical leave.⁷⁸

Understandably, even with the introduction of intermittent bonding leave, some new mothers may still prefer to take their FMLA bonding leave for the full twelve weeks to recover from the birth itself, breastfeed, and establish healthy

72 See RAY ET AL., *supra* note 58, at 3–4 (finding that scheduling flexibility is one of the five best practices for promoting gender equality in parental leave).

73 See *id.* at 7.

74 See KLERMAN ET AL., *supra* note 42, at 60.

75 See *id.* at 76.

76 See *id.* at 78 (showing 39.8 percent of intermittent leave was taken to care for the employee’s own illness and 41.6 percent was taken to care for a family member’s illness).

77 See *Beyst*, No. 07-10927, 2008 WL 2433201, at *8.

78 See PETER A. SUSSER, ON AGAIN, OFF AGAIN: INTERMITTENT LEAVE UNDER THE FMLA 1 (2007), http://www.thompson.com/images/thompson/reports/hr042007_leave.pdf.

mother-infant bonding and attachment.⁷⁹ However, many new parents cannot afford the luxury of twelve weeks without pay and would benefit from the scheduling flexibility that intermittent bonding leave provides.⁸⁰ Therefore, in order to attain more widespread use of intermittent bonding leave, it should be a statutory entitlement, not a mere availability contingent on employer approval.

B. Intermittent Bonding Leave Can Reduce Economic Forces that Push Women into Caregiving

Despite the Congressional finding that “the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men,” the FMLA failed to remedy this gender-based disparity.⁸¹ In fact, the current status of bonding leave contributes to it. Because FMLA leave is unpaid, many families cannot afford for both parents to enjoy the full twelve weeks of bonding leave with their new child.⁸² Therefore, for many two-parent families, FMLA leave supports a division of labor where one parent works full time and the other provides caregiving full time.⁸³ It seems fairly obvious that the lower paid earner will move into caregiving full time. This allows the higher paid earner to stay in the workforce and maintain the family’s economic stability.⁸⁴ While this reasoning sounds innocuous enough, the gender wage gap distorts its simplicity.⁸⁵ In 2014, the Department of Labor reported that on average, women who worked full-time, salaried jobs only earned 83 percent of a comparable male’s salary.⁸⁶ This disparity in pay reinforces and supports the traditional division of labor where women are confined to domestic and caregiving roles because it is not economically prudent for them to work outside the home.⁸⁷ This problem is exacerbated by the

79 See Kitchen, *supra* note 44, at 315–18 (arguing that even a twelve-week bonding leave is insufficient to establish healthy mother-infant bonding and attachment).

80 See generally Erin M. Grabe, Note, *Gradual Return to Work: Maximizing Benefits to Corporations and Their Caregiver Employees*, 37 J. CORP. L. 699 (2012).

81 29 U.S.C. § 2601(a)(5).

82 See KLERMAN ET AL., *supra* note 42, at 127 (finding that 46 percent of workers who needed leave but were unable to take it due to financial constraints).

83 *E.g.*, WILLIAMS & BOUSHEY, *supra* note 48, at 65.

84 *Id.*

85 The gender wage gap is the difference between women’s and men’s median weekly income for full-time, salaried positions, expressed as a percentage of men’s earnings. See, *e.g.*, INST. FOR WOMEN’S POLICY RESEARCH, *THE GENDER WAGE GAP: 2015* (2016) [hereinafter GENDER WAGE GAP].

86 See Bureau of Labor Statistics, U.S. Dep’t of Labor, *Women’s Earnings 83 Percent of Men’s, But Vary by Occupation*, THE ECON. DAILY (2016), <https://www.bls.gov/opub/ted/2016/womens-earnings-83-percent-of-mens-but-vary-by-occupation.htm>.

87 See RAY ET AL., *supra* note 58, at 3–4 (arguing that because women are paid less than men, responsibility for child care is “heavily” shifted to mothers); Ankita Patnaik, *Reserving Time for Daddy: The Consequences of Fathers’ Quotas 12* (May 14, 2016) (unpublished manuscript) (on file with Cornell University) (arguing that since the father is usually the higher earning parent, fathers are less likely to take leave when the leave is unpaid).

enormous costs of childcare⁸⁸ and the societal expectation that women bear responsibility for childcare.⁸⁹

However, the introduction of intermittent bonding leave can help change these economic calculations. While the gender wage gap and the enormous costs of child care will persist, the reconfiguration of bonding leave provides flexibility for families to balance their financial needs with childcare. For families who cannot afford to take bonding leave as a twelve-week block of unpaid leave, they can coordinate with their partner or another caregiver to stagger that leave out and still receive partial pay. Intermittent bonding leave can also help address the difficulty in finding adequate and affordable child care, particularly for newborns. It allows parents to stretch out the need for out-of-home child care until twenty-four weeks after the birth or adoption of a child, compared to the current leave system where one parent (likely the mother) will provide caregiving full-time for twelve weeks and then return to work.

Some parents may find it helpful to use a portion of their leave together immediately following the birth or adoption of their child, and then alternate the remaining allotment of their leave schedules. Under this formulation, both parents can provide meaningful child care and both parents can receive partial pay and stay “relevant” in their careers. Instead of the current “use it or lose it” scheme, two-parent families would have twenty-four weeks of leave to be utilized according to their personal needs and their employers’ needs. This changes the childcare equation from “which role will you fill for the next twelve weeks” to “what role will you fill this week.” While other economic forces may persist that support a traditional division of labor, introducing intermittent bonding leave can reduce the weight of those economic forces and begin to chip away at deep-rooted gender norms that promote caregiving roles for women.

C. Intermittent Bonding Leave Can Improve Women’s Long-Term Career Prospects

When new mothers assume a caregiving role for their children, the effects of that decision persist long after the twelve weeks of FMLA leave. In fact, just by becoming mothers, women pay both short- and long-term penalties and face worse overall labor market prospects.⁹⁰ Specifically, working mothers face a “motherhood wage penalty,” under which mothers earn about 5 percent less than other workers.⁹¹

88 See BRIGID SCHULTE & ALIEZA DURANA, THE NEW AMERICA CARE REPORT (Sept. 28, 2016), <https://www.newamerica.org/in-depth/care-report/introduction/> (finding that child care now costs more than college tuition; the average cost of full-time child care for children aged 0–4 is \$9,589 a year, whereas the average cost of in-state college tuition is \$9,410).

89 See RAY ET AL., *supra* note 58, at 3–4.

90 See Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1359 (2007).

91 *Id.* (finding that the motherhood wage penalty exists even after statistically controlling for education, work experience, race, whether an individual works full- or part-time, and other variables).

This penalty is in addition to the gender wage gap and includes an additional 5 percent wage deduction for each child a woman has.⁹²

Leaves of absence due to caregiver responsibilities negatively affect women's career prospects. The "glass ceiling" is an invisible obstacle that prevents women from reaching the highest degrees of workplace achievement, despite their accomplishments and merits.⁹³ Women with caregiving responsibilities are regarded as less dependable, less competent, and less committed to work than male counterparts, so employers may deny female caregivers opportunities for advancement.⁹⁴ Such adverse employment decisions grounded on sex-based assumptions violate Title VII, yet the labor force tells a different story: women today account for roughly half the workforce, earn Bachelor's and Master's Degrees at a higher rate than men,⁹⁵ and still hold a disproportionately small portion of managerial positions.⁹⁶ For example, women account for only 4.2 percent of Fortune 500 CEOs.⁹⁷ When women are passed over for career advancement, their pay, seniority, pension, and insurance benefits are detrimentally affected. Women's inferior pay and benefits then perpetuate the cycle of keeping women in domestic roles and part-time work.⁹⁸

Eliminating the glass ceiling would require much more than an amendment to federal family leave laws. While a statutory entitlement to intermittent bonding leave would certainly not remedy the problem singlehandedly, it would acknowledge that gender-based disparities in the workforce still exist and that women's long-term career prospects and economic wellbeing suffer as a result. It would acknowledge the value of mothers' careers and promote the flexible schedules they need while tending to a newborn or newly adopted child. Furthermore, a statutory entitlement to scheduling flexibility can reduce obstacles to leave, diminish employer resistance, and reduce hiring discrimination against potential caregivers.⁹⁹

Intermittent bonding leave could work to de-stigmatize bonding leave for all parents in the workplace. In particular, it could make it easier for men to take bonding leave. There is good reason to assume that men would actually utilize the leave, aside from the economic reasons above, because new fathers are already making an effort to participate in child care. Over 45 percent of all eligible fathers

92 *See id.*

93 WOMEN'S WORK REPORT, *supra* note 16, at 6.

94 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007).

95 WOMEN'S WORK REPORT, *supra* note 16, at 12.

96 *See id.*

97 *See* Valentina Zarya, *The Percentage of Female CEOs in the Fortune 500 Drops to 4%*, FORTUNE (June 6, 2016), <http://fortune.com/2016/06/06/women-ceos-fortune-500-2016>.

98 *See* Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 486 (2008) ("Thus, if women are harmed more by the FMLA's failings, the harms are not just short-term; women can expect lower lifetime career achievements as a result of their extra burdens at home. This then affects their pay, seniority, pensions, insurance benefits, and social standing, resulting in a cyclical process whereby women's work inequalities push them further away from decent work and into the home and part-time work, which then further limits their employment prospects and opportunities.").

99 *See id.*

took FMLA bonding leave to care for a new child¹⁰⁰ and men's overall usage of FMLA leave has steadily increased since the Act's inception.¹⁰¹ Furthermore, men across all income groups utilize bonding leave.¹⁰² A statutory entitlement to intermittent bonding leave could therefore normalize leave-taking for both parents—particularly for fathers—so that men and women could take bonding leave in equal numbers. This would help combat employer beliefs that because women are caregivers, they are less committed to their work. Combating these employer beliefs could then help weaken the glass ceiling by removing at least one obstacle to women's advancement.

By changing the caregiving expectation and allowing fathers to provide substantial and meaningful child care, working mothers' careers will be legitimized, instead of being viewed as supplemental to domestic roles. There will be a decreased expectation that mothers' careers should yield to caregiving responsibilities. Furthermore, mothers who take intermittent leave and stay in the workforce part-time would maintain a flow of income, albeit reduced income. This would enhance mothers' financial security in terms of both current cash flow to the family and match-based benefit contributions, like retirement and health plans.¹⁰³ Mothers who work part-time would also experience heightened job security and decrease their time spent out of the labor market, improving their long-term career prospects and lifetime earnings.¹⁰⁴ Improving the long-term economic health of women is especially important given the possibility of divorce.¹⁰⁵

D. *Intermittent Bonding Leave Could Provide for More Meaningful Leave*

Currently, almost half of all FMLA leave is ten days or fewer.¹⁰⁶ This hardly seems like a sufficient amount of time for new parents to adjust to life with a newborn and to create a meaningful bond with their child, particularly for mothers who have to recover from childbirth.

Intermittent bonding leave would allow for a more meaningful leave for both parents. Flexible, part-time leave allows parents to strike the appropriate balance between their work schedules and family obligations with an arrangement that fits their specific needs.¹⁰⁷ This allows parents to provide childcare without severing their

100 Jane Waldfogel, Bureau of Labor Statistics, *Family and Medical Leave: Evidence from the 2000 Surveys*, 2001 MONTHLY LAB. REV. 17, 21 (2001). Notably, this data is from the 2000 report, as the 2012 update did not include data regarding the gender breakdown of employees taking bonding leave.

101 See KLERMAN ET AL., *supra* note 42, at 139 (finding that 12.7 percent of men took leave in 1995, 13.5 percent took leave in 2000, and 16 percent took leave in 2012).

102 See Waldfogel, *supra* note 100, at 21. Again, the 2012 update did not touch on this specific data point, but it did reiterate that there are no statistically significant differences in leave taking by education or family income. See KLERMAN ET AL., *supra* note 42, at 64.

103 See RAY ET AL., *supra* note 58, at 10.

104 *See id.*

105 *See id.*

106 KLERMAN ET AL., *supra* note 42, at 67 (finding that 42.4% of FMLA leave is ten days or fewer).

107 See RAY ET AL., *supra* note 58, at 20–21.

relationship with an employer or disrupting their income stream.¹⁰⁸ This has long-term benefits for both parents' career prospects and the family's economic stability.

As detailed above, intermittent bonding leave can help increase paternal participation rates for FMLA bonding leave and increase the length of such leave. Currently, seventy percent of men's FMLA leave is ten days or fewer.¹⁰⁹ Demonstrated research shows that a father's involvement in childcare has positive effects on his child's social, emotional, physical, and cognitive development.¹¹⁰ Specifically, infants of "highly involved" fathers are more cognitively competent at six months, are better problem-solvers as toddlers, and have higher IQs by age three.¹¹¹ Having an involved father also has important long-term effects on a child's development and success; children with involved fathers have better verbal skills, perform better on standardized assessments, reach higher levels of educational achievement, and have better social skills.¹¹² Father involvement has intrinsic benefits for fathers themselves¹¹³ and promotes long-term marital stability and satisfaction.¹¹⁴

IV. INTERMITTENT LEAVE COULD BE FEASIBLY IMPLEMENTED

The FMLA is often criticized for setting the federal standard for family leave too low, especially when compared to other industrialized nations.¹¹⁵ However, most of the proposed reforms—especially the proposed statutory entitlement to paid leave—have failed to gain traction in the United States, often because of the high costs associated with implementation. Admittedly, amending the FMLA to provide a statutory entitlement for intermittent bonding leave is not a perfect fix; it will not address any of the coverage or eligibility concerns, and it will not provide paid leave

108 *Id.* at 20.

109 KLERMAN ET AL., *supra* note 42, at 141 (noting that a mere six percent of men's FMLA leave is sixty days or more).

110 *See generally* SARAH ALLEN & KERRY DALY, CENTRE FOR FAMILIES, WORK & WELL-BEING, THE EFFECTS OF FATHER INVOLVEMENT: AN UPDATED RESEARCH SUMMARY OF THE EVIDENCE (2007). Because this report is a summarized compilation of approximately 150 independent studies of father involvement, the report is "unable to provide methodological detail in such a succinct summary." *Id.* at 1. While it does make an effort to disentangle father involvement from the effects of social class and family structure, it is unclear whether these factors are specifically controlled for in all studies. *Id.* The report advises readers to consider the "multidimensionality" of father involvement with other relationships, social class issues, and other direct and indirect influences on children. *Id.* at 27.

111 *Id.* at 1 (A father is "highly involved" based on the amount of interaction, including levels of play and caregiving activities).

112 *See id.* at 2–4.

113 *See id.* at 11–12 (finding that men who are involved fathers are more satisfied with their lives and feel less psychological distress).

114 *Id.* at 12 (finding that involved fathers are more likely to feel happily married ten to twenty years after the birth of their first child and are more likely to feel connected to their family).

115 *See generally*, RAY ET AL., *supra* note 58, at 1 (noting that among major industrialized countries, the average minimum paid leave is between twelve and fourteen weeks, and that Sweden, as an example of a country with very generous family leave policies, guarantees eighteen months of leave at about ninety percent of gross pay).

or even partial income replacement. While other reforms would yield pronounced benefits to parental leave, they ask a lot of employers and Congress—so much in fact, that they would require the FMLA to be completely re-written or would require stark reforms to child care and welfare systems. However, intermittent leave, which merely entitles scheduling flexibility for new parents, would be a feasible, effective, and efficient option to reform the FMLA.

A. Intermittent Leave is More Palatable to Businesses than Other Reforms

The biggest indicator that intermittent bonding leave could be easily implemented is that employers are already required to permit twelve weeks of intermittent leave under the medical leave prong of the FMLA.¹¹⁶ Unfortunately, medical intermittent leave has traditionally been a source of contention for some employers.¹¹⁷ Though employees are required to give both advance notice and medical certification if the leave is foreseeable,¹¹⁸ many serious medical conditions (like migraines or depression) can occur sporadically and without warning, making intermittent medical leave ripe for abuse by employees with such conditions.¹¹⁹ This unpredictability creates issues for the employer in creating schedules, staffing projects, reaching deadlines, and ensuring productivity. However, despite this possibility for abuse, a tiny fraction of worksites—only 2.5 percent—report even suspicion of FMLA misuse.¹²⁰ Confirmed misuse at those worksites is a mere 1.6 percent.¹²¹ Clearly, FMLA misuse and abuse are hardly a widespread phenomenon, even in the medical leave context.

These abuse concerns are not implicated to the same degree in the bonding leave context. First and foremost, the element of unpredictability is dramatically reduced.¹²² Adoptions and foster care placements are notoriously drawn-out, time-consuming processes. Even for unplanned pregnancies, gestation usually provides ample time for employers and expecting parents to collaborate and create a schedule that accommodates both their needs. Parents seeking bonding leave will need to provide advance notice of their anticipated leave schedule to employers. Parents should also be instructed that any leave taken outside their pre-determined schedule should not qualify as FMLA bonding leave, but will have to be deducted from sick leave, vacation time, or other leave entitlements. The leave will still expire within twelve months of the child's birth or adoption, so parents cannot unduly spread it out. Second, concern about the legitimacy of the leave is not implicated for bonding leave.

116 29 U.S.C. § 2612(b). Intermittent leave is also statutorily guaranteed for an employee whose spouse, son, daughter, or parent is on covered active duty in the Armed Forces. *Id.*

117 See SUSSER, *supra* note 77, at 1 (deeming intermittent leave the “number one frustration” that employers voice about the FMLA).

118 *Id.* at 6, 8.

119 Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 21 (2010).

120 KLERMAN ET AL., *supra* note 42, at 156.

121 *Id.*

122 See Suk, *supra* note 119, at 20.

Episodic medical conditions can often only be verified by a healthcare provider, and obtaining and monitoring this medical certification can be time consuming for human resource departments, and thus costly for employers.¹²³ Unlike these episodic medical conditions, pregnancy can be easily verified upon sight.¹²⁴ Therefore, employer concerns about abuse, while perhaps still valid for intermittent medical leave, are largely baseless in the bonding leave context.

Because employers are already required to provide intermittent leave, it is unlikely there will be significant additional costs associated with intermittent bonding leave.¹²⁵ Its effects on business operations would likely be minimal, as intermittent bonding leave does not require employer to completely reformulate how they treat and finance leave, but simply requires scheduling flexibility for new parents.¹²⁶ In fact, the FMLA is already easy to comply with; the majority of FMLA covered establishments report that the FMLA had “no noticeable effect” on their business in regard to “employee productivity, absenteeism, turnover, career advancement and morale, as well as the business’ profitability.”¹²⁷ One-third of employers actually reported “somewhat positive” effects from complying with the FMLA for the same categories.¹²⁸ When asked specifically about intermittent leave, only 0.4 percent of employers reported a negative impact on productivity.¹²⁹ Most importantly, over two-thirds of worksites reported that planned intermittent leave was easy to comply with.¹³⁰

Unsurprisingly, Congress and academics alike have found that generous leave policies can actually *benefit* employers. Congress has noted that “[a] program that brings employees back to work before they are rested and ready may actually be more deleterious to productivity than allowing an extended leave. The odds are good that leave takers who return too soon will not be fully productive or will make costly and needless mistakes.”¹³¹ Furthermore, “family and medical leave encourages loyal and skilled employees to remain with the company—improving employee morale, reducing turnover, and saving costs for recruitment, hiring, and training.”¹³² The Department of Labor has found that “[f]amily-friendly policies are part of the bottom line. They are about smart business. Employers who respect the legitimate needs of

123 *Id.* at 20–21.

124 *Id.* at 21.

125 *See* Grabe, *supra* note 80, at 715 (noting that a gradual return to work program would have relatively low costs).

126 *Id.* at 713 (agreeing that scheduling flexibility would possibly be the “easiest and most effective option” at reforming the FMLA, and that it would be easier to institute than paid leave or other substantial reforms).

127 KLERMAN ET AL., *supra* note 42, at 156–57, ex. 8.5.1 (finding 54 percent of employers found no noticeable effect from complying with the FMLA).

128 *See id.* at 157.

129 *See id.* at 158 (finding 48.1 percent of employers found no noticeable effect of intermittent leave on productivity).

130 *See id.* at 153 (finding that 15.5 percent said it was very easy to comply with and that 53.8 percent found that it was somewhat easy to comply with).

131 H.R. REP. NO. 103-08, at 13.

132 H.R. REP. NO. 103-08, at 29.

their employees are rewarded by increased loyalty and increased productivity.”¹³³ However, some employers have failed to take advantage of these benefits, and instead have maintained the same outdated policies, practices, and structures that existed when most employees were male breadwinners who worked full time at forty hours per week.¹³⁴

B. A Demonstrated Success Story: University of Michigan’s Department of Business and Finance

Conscientious and responsive employers have already acknowledged the concerns and needs of new parents and have implemented return-to-work programs to address those needs. For example, the University of Michigan’s Department of Business and Finance implemented a “Gradual Return to Work” policy in 2008 after formal requests were made for scheduling flexibility following childbirth or adoption.¹³⁵ The policy is available to all staff members regardless of gender and allows employees to come back at fifty to eighty percent of their normal workload for up to six months following the birth or adoption of a child.¹³⁶ While leave entitlement is at the discretion of the department supervisor, the department will “make every effort to accommodate requests” and supervisors are “strongly encouraged to approve such requests unless there are business and/or documented performance reasons for denial.”¹³⁷

The program has been a success at the university. Demonstrated benefits include: enhanced ability to recruit skilled employees; enhanced retention and decreased turnover costs; reduced absenteeism; reduced stress and corresponding health care costs; and increased profits through engagement, productivity, and loyalty.¹³⁸ The university also noted benefits to employees, including lower stress, stronger family relationships, and decreased economic strain.¹³⁹ One mother utilized the program by working 6.5 hour days for two months, and then working 7.5 hour days for another month.¹⁴⁰ Though the impact on the department was minimal, the employee found the modified schedule to be “very helpful during an emotional and

133 U.S. DEP’T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE (2001), <https://www.dol.gov/whd/fmla/cover-statement.pdf>.

134 See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-35, WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS 58–59 (2003), <http://www.gao.gov/assets/250/240547.pdf>.

135 UNIV. OF MICH., BUS. & FIN. HUMAN RES. STEERING COMM., B & F GRADUAL RETURN TO WORK POLICY: SUPERVISOR GUIDE 1 (2008) [hereinafter SUPERVISOR GUIDE], http://www.bf.umich.edu/wp-content/uploads/2016/09/Gradual_Return_to_Work-RollOutDocuments.pdf. (identifying similar policies offered at Borders Group, Ford World Headquarters, and a slew of comparable universities, including University of California-Berkeley and Northwestern University).

136 UNIV. OF MICH., BUS. & FIN. HUMAN RES. GRP., BUSINESS AND FINANCE POLICY ON GRADUAL RETURN TO WORK AFTER CHILDBIRTH OR ADOPTION (2008), http://www.bf.umich.edu/wp-content/uploads/2016/09/Gradual_Return_to_Work-Policy-100808.pdf.

137 *Id.*

138 SUPERVISOR GUIDE, *supra note* 135, at 2.

139 *Id.*

140 *Id.*

sleep deprived time” and it encouraged her to be more committed to the university.¹⁴¹ The University of Michigan example demonstrates that employers who have taken initiative and implemented intermittent leave schedules following childbirth or adoption have found it to be mutually beneficial for the employer and the employee.

CONCLUSION

In enacting the FMLA, Congress found that it is “important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing,” yet also found that “the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting.”¹⁴² As it stands, the FMLA does little to ensure that parents are not faced with this difficult choice. However, the introduction of intermittent bonding leave can work to fill the gap by ensuring that both parents can effectively participate in childrearing and still provide for their family.

Furthermore, intermittent bonding leave can help rid the FMLA of the gendered undertones and traditional gender norms that permeate its leave entitlements. While it would be unrealistic to expect immediate, drastic improvements, a statutory entitlement to intermittent bonding leave can help chip away at deeply-rooted and deeply-held gender norms. Currently, one-quarter of FMLA leave takers ended their leave prematurely because they felt pressure to return to work.¹⁴³ However, when both parents are offered flexible leave that can be customized to their unique needs instead of taken as a single block, it encourages both parents to use their full leave allotment—especially when using the full leave allowance can postpone paying for childcare. If both parents use all twelve weeks of leave, it is more likely that they will share caregiving responsibilities equitably and spend comparable time away from work. This egalitarian division helps challenge normative expectations of caregiving. Whereas caregiving and provider roles have traditionally been viewed as completely distinct spheres, intermittent bonding leave can help blend them together and alter these traditional notions of “appropriate” male and female roles.

Intermittent bonding leave can also be an important step in acknowledging the legitimacy of women’s careers after women become mothers. It can help reduce the likelihood that working mothers will be forced into domestic roles because of economic necessity and lack of viable childcare options for newborns. Intermittent bonding leave also supports an egalitarian division of childcare that dually promotes children’s cognitive, social, and emotional wellbeing. Most importantly, introducing the *choice* of intermittent bonding leave allows families to balance the needs of work and family obligations, which is what Congress intended all along.

141 *Id.* (statement from PACWI report) (“[K]nowing the University is willing to support my family stewardship only helps me invest more of myself in being a better steward of the University.”).

142 29 U.S.C. § 2601(a).

143 KLERMAN ET AL., *supra* note 42, at 109.