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## CARE IN THE TIME OF COVID: ADDRESSING THE STATE OF FAMILY AND MEDICAL LEAVE IN LIGHT OF THE COVID-19 PANDEMIC

*Emily Kowalik\**

### INTRODUCTION

Family caregiving is a responsibility that millions of working Americans bear.<sup>1</sup> Every American is bound to encounter a situation necessitating the use of sick days, time off, or a more significant period of leave at some point during their years in the labor force, whether it be for the birth or adoption of one's child; one's own serious health issue; or the health issue of one's child, spouse, parent, or grandparent.<sup>2</sup> As of 2019, roughly 53 million—one in five—Americans acted as unpaid employee-caregivers, that is, workers encumbered with family caregiving obligations to family members suffering from sickness or disability.<sup>3</sup> These caregivers spent approximately twenty-four hours a week providing care,<sup>4</sup> an unpaid duty which many of them carried on top of their full-time, paid jobs.<sup>5</sup>

Although much of the caregiving Americans provide is for elderly family members, a substantial proportion is also provided to children.<sup>6</sup> In 2019, around a quarter of caregivers, or 14.1 million, provided care to children aged zero to seventeen years old.<sup>7</sup> Caregiving is often necessitated when children encounter “chronic or acute serious medical needs, such as those related to a disability, illness, or accident.”<sup>8</sup>

Caregiving responsibilities are universal, affecting residents of every state, at every income level, whether hourly or salaried, and in every industry or profession, in both the public and private sectors.<sup>9</sup> These responsibilities span all demographics,

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<sup>1</sup> 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 1, 7 (2018).

<sup>2</sup> *Id.* at 7, 11.

<sup>3</sup> AARP & THE NAT'L ALL. FOR CAREGIVING, CAREGIVING IN THE U.S. 2020 1, 4 (2020).

<sup>4</sup> *Id.* at 30.

<sup>5</sup> GLYNN ET AL., *supra* note 1, at 7.

<sup>6</sup> AARP & THE NAT'L ALL. FOR CAREGIVING, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> GLYNN ET AL., *supra* note 1, at 8.

<sup>9</sup> AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, CHARTING A PATH FORWARD (2018).

as caregiving “remains an activity that occurs among all generations, racial [or] ethnic groups, income or educational levels, family types, gender identities, and sexual orientations.”<sup>10</sup> Nevertheless, access to the financial supports and job protections that allow workers to care for themselves and their ailing family members depend heavily on these factors, with highly compensated, salaried, and white workers having much more reliable access to time off, sick days, vacation days, and paid leave.<sup>11</sup> Meanwhile, low compensated workers, hourly workers, and employees of color are often excluded from such benefits, and are therefore left to suffer dire consequences—such as job loss; loss or reduction of wages, retirement savings, and Social Security benefits; demotion and similar career trajectory downturns; and emotional and mental strain—simply through the misfortune of having a family member fall ill.<sup>12</sup>

This was the state of play even before the Covid-19 pandemic hit America with full force. Americans have long been suffering under the weight of their dual caregiving and employee roles; the Covid-19 pandemic has simply added fuel to the fire. This was partly due to the fact that the Covid-19 pandemic has placed the employment of millions nationwide into a state of turmoil.<sup>13</sup> Many workers have experienced—or may eventually suffer—layoffs, furloughs, cut hours, or other precarious employment situations due to the economic fallout of the pandemic.<sup>14</sup> Those especially hard-hit are the millions of American workers acting as caregivers to children. This group includes the working parents or guardians of school-aged children, many of whom have had to juggle school, summer camp, and daycare closures while their employers simultaneously call them back to work, either remotely or in-person.<sup>15</sup> Many childcare providers have had to temporarily shutter their businesses, and many more may be forced to permanently shut down due to the harsh economic conditions imposed by the pandemic.<sup>16</sup> This situation will likely cause the already insufficient childcare resources in the United States to shrink even further.<sup>17</sup> Moreover, childcare options will almost certainly remain limited until the Covid-19 vaccines have been widely distributed and other nation-wide health measures can be

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<sup>10</sup> AARP & THE NAT’L ALL. FOR CAREGIVING, *supra* note 3, at 5.

<sup>11</sup> AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, *supra* note 9.

<sup>12</sup> *Id.*; Sharon Terman, *Protecting Workers’ Jobs and Income During COVID-19*, in BOSTON: PUBLIC HEALTH WATCH, ASSESSING LEGAL RESPONSES TO COVID-19 2020 (S. Burris et al. eds., 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3675811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675811); *Caregiver Statistics: Work and Caregiving*, FAMILY CAREGIVER ALLIANCE, <https://www.caregiver.org/resource/caregiver-statistics-work-and-caregiving/> (last visited Apr. 10, 2021).

<sup>13</sup> David E. Gottlieb, *Childcare Accommodations and Legal Ramifications During COVID-19*, N.Y. L.J. (Mar. 19, 2020), <https://www.law.com/newyorklawjournal/2020/03/19/childcare-accommodations-and-legal-ramifications-during-covid-19/?slreturn=20200814231727>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Robert Iafolla, *Without Child Care, Back-to-Work Parents Have Few Legal Options*, BLOOMBERG L. (July 7, 2020, 5:31 AM), <https://news.bloomberglaw.com/us-law-week/without-child-care-back-to-work-parents-have-few-legal-options>.

<sup>17</sup> Abby Vesoulis, *COVID-19 Has Nearly Destroyed the Childcare Industry—And It Might Be Too Late to Save It*, TIME (Sept. 8, 2020), <https://time.com/5886491/covid-childcare-daycare/>.

implemented.<sup>18</sup> Thus, with their childcare options crumbling, many parents have been forced to cut their hours or quit their jobs entirely in order to bridge the gap.<sup>19</sup>

These contemporary caregiving issues have exposed and intensified decades-old employment inequities, such as disparate workplace norms, inflexible workplace schedules, the expectation of full-time and completely in-person work, the difficulty in temporarily interrupting one's career,<sup>20</sup> and unequal access to workplace supports (such as paid leave, leaves of absence, and unemployment benefits).<sup>21</sup> The pandemic has also widened the gap between caregivers with differing sorts of work: low-wage workers are more likely to have jobs which cannot be accomplished from home and in which paid leave is not available,<sup>22</sup> while higher-wage workers are more likely to be able to work remotely and have access to paid leave.<sup>23</sup> Similarly, certain employers are more willing than others to allow employee-caregivers to care for their children during working hours.<sup>24</sup> Lastly, the pandemic has "exacerbated persistent, long-standing racial, ethnic, and gender inequalities, further eroding families' economic stability."<sup>25</sup>

In the short term, parents who were forced to quit their jobs due to their childcare responsibilities might have been unable to qualify for certain unemployment benefits.<sup>26</sup> Thus, families without much savings are likely to be placed into dire financial straits. And, in the long run, given that the pandemic's economic impact could remain long after the pandemic-induced economic recession ends,<sup>27</sup> caregivers who left their employment might not be able to return to their former jobs. These workers might instead have to compete for the shrunken number of positions available in the recovering economy.<sup>28</sup>

The best option for many employee-caregivers would be access to comprehensive paid family and medical leave policies, which would provide them with the time and financial resources they need to care for their children. Such leave would allow these caregivers to receive "partially or fully compensated time away from work for specific and generally significant family caregiving needs."<sup>29</sup>

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<sup>18</sup> *Id.*; Christine Lehmann, *CDC Says Schools Can Safely Reopen, But Will They?*, WEBMD: HEALTH NEWS (Feb. 12, 2021), <https://www.webmd.com/lung/news/20210212/cdc-says-schools-can-safely-reopen-but-will-they>.

<sup>19</sup> Laura Santhanam, 'This is not working.' Parents juggling jobs and child care under COVID-19 see no good solutions, PBS NEWSHOUR (July 23, 2020, 4:15 PM), <https://www.pbs.org/newshour/health/this-is-not-working-parents-juggling-jobs-and-child-care-under-covid-19-see-no-good-solutions>.

<sup>20</sup> Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 966 (2014).

<sup>21</sup> Terman, *supra* note 12, at 205.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Iafolla, *supra* note 16.

<sup>25</sup> Diana Boesch, *The Urgent Case for Permanent Paid Leave: Lessons Learned From the COVID-19 Response*, CTR. FOR AM. PROGRESS (Sept. 1, 2020, 9:00 AM), <https://www.americanprogress.org/issues/women/reports/2020/09/01/489914/urgent-case-permanent-paid-leave/>.

<sup>26</sup> Iafolla, *supra* note 16.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> SARAH A. DONOVAN, CONG. RSCH. SERV., R44835, PAID FAMILY AND MEDICAL LEAVE IN THE UNITED STATES 1 (2020).

However, this type of leave is unattainable for the vast majority of Americans, since the United States is one of the few developed nations which does not offer long-term “universal, guaranteed, job-protected paid leave.”<sup>30</sup> Though some states have enacted laws around paid leave,<sup>31</sup> the United States has no permanent “federal law requir[ing] private-sector employers to provide paid leave of any kind.”<sup>32</sup> While the Family and Medical Leave Act of 1993 provides certain workers with a federal entitlement to take leave from work for a restricted list of family caregiving needs, this leave is almost always *unpaid*.<sup>33</sup> And, while Congress enacted temporary emergency paid family leave legislation in March 2020 via the Families First Coronavirus Response Act (“FFCRA”), this program was enacted with serious shortfalls that left many marginalized workers inadequately covered.<sup>34</sup> Moreover, the FFCRA was only a temporary measure, and expired at the end of 2020.<sup>35</sup> The current hodgepodge of federal, state, and local laws concerning paid and unpaid leave leaves many employee-caregivers uncertain about their entitlement to these benefits.<sup>36</sup>

Since many employee-caregivers have little to no local or state-level entitlement to paid leave, and since few employers have provided their own policies or the flexibility necessary to allow employee-caregivers to carry out their dual responsibilities, many such caregivers have been forced to cut their hours, quit their jobs, or have been laid off.<sup>37</sup> More robust legislation is needed to permanently safeguard employee-caregivers. In addition, the Covid-19-era flexibility regarding childcare, created by temporary legislation and innovative workplace adjustments, should remain in place after the pandemic subsides since it could help to permanently relieve the structural workplace norms burdening employee-caregivers. Above all, the United States should not remain the only industrialized country without a national paid leave program.<sup>38</sup>

While there are many types of leave that can be focused on, such as parental leave, personal medical leave, and caregiving for older adults, this Note will mainly address leave taken by parents and guardians in order to provide caregiving for their children. This Note will proceed in two parts. Part I will briefly provide background information on the paid and unpaid family leave landscape in existence before the Covid-19 pandemic. Part I will also describe the Covid-19-era landscape of family leave and unemployment benefits statutes introduced to help employee-caregivers manage their dueling childcare responsibilities and remote or in-person work responsibilities. Part II will address the likely post-pandemic gaps in family leave legislation and examine potential family leave policy solutions.

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<sup>30</sup> Terman, *supra* note 12, at 205.

<sup>31</sup> *Id.*

<sup>32</sup> DONOVAN, *supra* note 29.

<sup>33</sup> MOLLY F. SHERLOCK ET AL., CONG. RSCH. SERV., R46390, PAID FAMILY AND MEDICAL LEAVE: CURRENT POLICY AND LEGISLATIVE PROPOSALS IN THE 116TH CONGRESS 1–28 (2020).

<sup>34</sup> Terman, *supra* note 12, at 207.

<sup>35</sup> SHERLOCK ET AL., *supra* note 33.

<sup>36</sup> Iafolia, *supra* note 16.

<sup>37</sup> Santhanam, *supra* note 19.

<sup>38</sup> Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>.

## I. INTRODUCTION TO THE CHILDCARE CRISIS IN AMERICA

Long before the Covid-19 pandemic, U.S. workers endured childcare and medical care calamities without a federal safety net. Workers have been forced to risk their jobs and income due to common, ordinary life experiences such as having a child, needing to care for ill or injured family members, or experiencing a severe health issue themselves.<sup>39</sup>

On average, more than half of children experience some time away from school every year due to illness; for example, 15% of elementary school students miss over one week of school.<sup>40</sup> Additionally, approximately 15% of children have serious or chronic conditions which require ongoing care.<sup>41</sup> In the present day, most families with children are headed by a working single parent or married dual-earner parents, ergo most families do not have a stay-at-home parent available to handle the family's ongoing caregiving responsibilities.<sup>42</sup> Thus, modern-day working parents are, unlike previous generations, likely to be encumbered with minor childcare responsibilities that will require time off from work and major childcare responsibilities necessitating family leave (which will afford caregivers time to care for their child's chronic or acute medical needs).<sup>43</sup> Several factors in the decade leading up to the pandemic exacerbated the need for national paid leave, including a "shrinking number of family caregivers," "rising labor force participation rate among women who are likely to give birth," and "job growth in low-wage industries and occupations."<sup>44</sup>

The historical context behind caregiving makes the modern-day situation clearer. In the first half of the twentieth century, men were more often the breadwinners, and their wages were sufficient to support their family's needs.<sup>45</sup> Women, "as wives and mothers, performed unpaid domestic labor in the home."<sup>46</sup> Those traditional gender norms receded in the mid-twentieth century, as more and more women entered the workforce while more men took on childcare responsibilities.<sup>47</sup> Dual-earner and single-parent families have become much more prevalent in the past fifty years<sup>48</sup>: as of 2019, the proportion of mothers working either full- or part-time had "increased over the past half-century from 51% to 72%, and almost half of two-parent families . . . include[d] two full-time working parents."<sup>49</sup> Over the past twenty years, the rate of mothers of young children who participate in the labor force has also increased,<sup>50</sup> as women who give birth "are more likely to be working and to maintain their ties to the labor force than in years past."<sup>51</sup> And though

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<sup>39</sup> Terman, *supra* note 12; GLYNN ET AL., *supra* note 1, at 1.

<sup>40</sup> AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, *supra* note 9, at 8.

<sup>41</sup> *Id.*

<sup>42</sup> GLYNN ET AL., *supra* note 1, at 8.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2.

<sup>45</sup> Anna Faber et al., *Family and Medical Leave Act*, 19 GEO. J. GENDER & L. 305, 306 (2018).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 307; Livingston & Thomas, *supra* note 38.

<sup>48</sup> AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, *supra* note 9, at 8.

<sup>49</sup> Livingston & Thomas, *supra* note 38.

<sup>50</sup> GLYNN ET AL., *supra* note 1, at 4.

<sup>51</sup> *Id.*

fathers—almost all of whom are working—have taken on more childcare responsibilities, they are significantly less likely to take time from work to care for their children.<sup>52</sup> Accordingly, as more women have entered the workforce, more households lack a full-time caregiver able to devote their time to their family members' needs.<sup>53</sup>

Finding a manageable balance between the ever-shifting demands of work and family life is a struggle for many families, given that vestiges of the largely outdated “male breadwinner and . . . female homemaker” paradigm remain firmly entrenched in workplace norms.<sup>54</sup> Employers still expect their employees to live up to their image of an “ideal worker,” i.e., a worker free from family obligations.<sup>55</sup> Workers are often expected to work full-time, abide by a typical nine-to-five work schedule, work in-person, be available for overtime work, and refrain from putting their careers on hold to care for family needs.<sup>56</sup>

Today, as in past generations, it is women who shoulder the burdens of the family caregiver role, and in turn bear the brunt of career downturns and the loss of economic prospects.<sup>57</sup> As of 2015, women made up almost half of the United States workforce, yet devoted “more time than men on average to . . . child care and fewer hours to paid work.”<sup>58</sup> In other words, even when they are employed outside the home, women are more likely to devote time to unpaid family caregiving than men.<sup>59</sup> Additionally, “[w]omen most often are the ones who adjust their schedules and make compromises when the needs of children and other family members collide with work.”<sup>60</sup> Women were also more likely than men to experience substantial career interruptions while caring for their family's needs, and are twice as likely to suffer overall negative career impacts from these interruptions.<sup>61</sup>

Beyond the evident gender inequities posed by women's disproportionate share of caregiving responsibilities, further problems arise from the fact that “labor force participation rates are anticipated to rise for older women over the next decade” and that, generally speaking, the United States population is rapidly aging.<sup>62</sup> As women begin to remain in the workforce longer, the demand for family and medical leave will increase.<sup>63</sup>

*Unpaid* leave, such as the leave provided under the Family and Medical Leave Act of 1993 (“FMLA”), does not go far enough toward bridging families' caregiving gaps. Moreover, women are by far the most likely to take advantage of

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<sup>52</sup> AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, *supra* note 9; Porter, *supra* note 20.

<sup>53</sup> Faber et al., *supra* note 45, at 307–08.

<sup>54</sup> *Id.* at 307; see also Porter, *supra* note 20, at 965, 981.

<sup>55</sup> Porter, *supra* note 20, at 981.

<sup>56</sup> *Id.* at 965–66.

<sup>57</sup> *On Pay Gap, Millennial Women Near Parity – For Now*, PEW RSCH CTR. (Dec. 11, 2013), <https://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now/>.

<sup>58</sup> Kim Parker, *Women More than Men Adjust Their Careers for Family Life*, PEW RSCH CTR.: FACT TANK (Oct. 1, 2015), <https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/>.

<sup>59</sup> GLYNN ET AL., *supra* note 1, at 8.

<sup>60</sup> Parker, *supra* note 58.

<sup>61</sup> *Id.*

<sup>62</sup> GLYNN ET AL., *supra* note 1, at 8–9.

<sup>63</sup> *Id.* at 9.

unpaid leave,<sup>64</sup> which perpetuates the trend of workplace gender inequality. *Paid* leave, on the other hand, can make a positive impact on these trends. Mothers with access to paid leave, compared with those without, are substantially less likely to resort to public assistance, more likely to return to work after taking leave, more likely to return to work in a shorter period of time after taking leave, and less likely to have their hours and wages cut by their employers.<sup>65</sup> Unfortunately, access to paid leave is extremely hard to come by.

A. THE STATE OF FAMILY & MEDICAL LEAVE POLICIES,  
UNEMPLOYMENT BENEFITS & RELATED PROTECTIONS PRIOR TO  
THE PANDEMIC

Part I.A will discuss the leave policies in existence prior to the Covid-19 pandemic. Specifically, it will address five key issues: (1) federal, state, and employer-based leave policies; (2) the Family and Medical Leave Act of 1993; (3) employee-caregivers' lack of protection against discrimination, retaliation, and termination; (4) unemployment benefits; and (5) workers' views on the availability of family and medical leave policies prior to the start of the pandemic.

*i. Federal, State & Employer-Based Policies*

The United States is the only industrialized nation which fails to offer “universal, guaranteed, job-protected paid leave.”<sup>66</sup> The U.S. also does not offer a national right to vacation time, parental leave, or sick days.<sup>67</sup> In effect, an American worker's access to and ability to take advantage of family and medical leave varies depending on their wage level, geographic location, industry, and pay type (i.e., hourly, salaried, etc.).<sup>68</sup> The FMLA—a federal, *unpaid* family leave program—provides the bare minimum protection for workers.<sup>69</sup> A slim minority of states, localities, and private sector employers have filled in the FMLA's gaps by creating their own paid family and medical leave programs.<sup>70</sup>

Even on the state level, workers typically have no access to leave. As of early 2021, a handful of states had state FMLAs, which are *unpaid* leave laws similar to the national FMLA,<sup>71</sup> and only nine states and the District of Columbia had enacted *paid* family and medical leave programs.<sup>72</sup> The paid family and medical leave laws

<sup>64</sup> Nathaniel Popper, *Paternity Leave Has Long-Lasting Benefits. So Why Don't More American Men Take It?*, N.Y. TIMES (April 17, 2020), <https://www.nytimes.com/2020/04/17/parenting/paternity-leave.html>.

<sup>65</sup> Rebecca A. Brusca, *A Comprehensive Analysis of the Effects of Paid Parental Leave in the U.S.*, 19 DUQ. BUS. L.J. 75 (2017).

<sup>66</sup> Terman, *supra* note 12; see Brendan Williams, *The Slow Crawl of Paid Family Leave Laws*, 55 CAL. W. L. REV. 423, 424 (2019).

<sup>67</sup> Molly Weston Williamson, *The Meaning of Leave: Understanding Workplace Leave Rights*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 197, 198 (2019).

<sup>68</sup> SHERLOCK ET AL., *supra* note 33, at 1.

<sup>69</sup> 29 U.S.C.A. § 2651 (West, Westlaw through Pub. L. No. 116-5); Williams, *supra* note 66, at 424.

<sup>70</sup> Terman, *supra* note 12; SHERLOCK ET AL., *supra* note 33, at 1.

<sup>71</sup> Williamson, *supra* note 67, at 199–200.

<sup>72</sup> *State Paid Family Leave Laws Across the U.S.*, BIPARTISAN POL'Y CTR. (last updated Feb. 10, 2021), <https://bipartisanpolicy.org/explainer/state-paid-family-leave-laws-across-the-u-s/>. California,



“provide a right to pay (in the form of partial wage replacement) to those unable to work in certain situations through a social insurance system.”<sup>73</sup> Each of those laws provides a certain level of wage replacement for workers tending to their own serious health condition, to a family member’s serious health condition, or providing care to a newborn child or newly placed foster or adopted child.<sup>74</sup> However, a right to pay in those laws is not necessarily tied in with a legal right for the worker to return to their job after completing their period of leave.<sup>75</sup> In addition, only a handful of states have enacted paid sick time laws, though many localities have mandated more sick days than are required under their respective state’s law.<sup>76</sup> Sick time laws allow workers to leave work for short periods of time when the worker or their family members are sick, injured, or seeking medical treatment.<sup>77</sup>

There is a similar dearth of leave policies among private sector employers. For a brief period of time, pandemic-era legislation made positive change in this area. In response to the pandemic, temporary paid leave entitlements, which impacted private sector employers, were created.<sup>78</sup> However, beyond those laws, which expired at the end of 2020, “no federal law requires private-sector employers to provide paid leave of any kind.”<sup>79</sup> And, unfortunately, few private sector employers voluntarily provide paid family leave to workers who will need leave for an extended period of time.<sup>80</sup> Indeed, as of 2018, “[o]nly 13[%] of private sector workers . . . ha[d] paid family leave through their employers.”<sup>81</sup>

There are many factors influencing a worker’s access to employer-provided leave programs. For example, workers with larger employers and those in management or professional fields are more likely to have access to these programs.<sup>82</sup> There is also a “sharp income divide” in access to leave, as “[m]iddle- and higher-income leave takers are much more likely than their lower-income counterparts to have access to paid time off—whether through a specific employer-provided paid leave benefit or by using accrued time off.”<sup>83</sup> For example, as of 2019, only around 5% of hourly workers, who constitute more than half the workforce and many of whom are African-American or Latinx, could access paid family leave.<sup>84</sup> The disparity between unpaid, partially paid, and fully paid leave makes a vital difference to these workers. In a 2017 Pew Research Center study, many leave takers with lower

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Massachusetts, New Jersey, New York, Rhode Island, Washington, and the District of Columbia have active paid family leave programs, while Colorado, Connecticut, and Oregon have enacted paid family leave policies which have not yet gone into effect. *Id.*

<sup>73</sup> Williamson, *supra* note 67, at 200.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 200–01.

<sup>77</sup> *Id.*

<sup>78</sup> SHERLOCK ET AL., *supra* note 33, at 2.

<sup>79</sup> JULIE M. WHITTAKER ET AL., CONG. RSCH. SERV., IN1123, WORKPLACE LEAVE AND UNEMPLOYMENT INSURANCE FOR INDIVIDUALS AFFECTED BY COVID-19, 1 (2020).

<sup>80</sup> GLYNN ET AL., *supra* note 1, at 1.

<sup>81</sup> *Id.*

<sup>82</sup> SHERLOCK ET AL., *supra* note 33, at 1.

<sup>83</sup> JULIANA HOROWITZ ET AL., PEW RSCH. CTR., AMERICANS WIDELY SUPPORT PAID FAMILY AND MEDICAL LEAVE, BUT DIFFER OVER SPECIFIC POLICIES: PERSONAL EXPERIENCES WITH LEAVE VARY SHARPLY BY INCOME 5 (2017), <https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/03/22152556/Paid-Leave-Report-3-17-17-FINAL.pdf>.

<sup>84</sup> Williams, *supra* note 66, at 438–39.

incomes reported facing “difficult financial tradeoffs during time away from work, including 48% among those who took unpaid or partially paid parental leave who sa[id] they went on public assistance in order to cover lost wages or salary.”<sup>85</sup> In contrast, in 2019, 30% of the highest earners had access to leave benefits.<sup>86</sup> On a similar note, as of 2019, 31% of the lowest paid private sector workers had access to paid sick days for short-term medical needs, while 90% of the highest paid private sector workers did.<sup>87</sup>

A worker’s access to employer-provided paid leave programs also depends on the worker’s field. For example, service industry workers are much less likely to be provided paid leave benefits than professional or managerial workers.<sup>88</sup> Additionally, only 7% of private sector service workers have access to paid family leave, while 54% of professionals and 24% of managerial workers have access.<sup>89</sup> Similarly, contingent or freelance workers in the gig economy, which made up at least 10% of the U.S. workforce in the years before the Covid-19 pandemic, are rarely offered paid leave (since they are not viewed as traditional employees).<sup>90</sup>

The scarcity of employer-provided paid leave programs is a trend that is likely to worsen with time.<sup>91</sup> This is because the types of jobs that are currently expected to grow in the near future are in categories that are unlikely to offer paid leave.<sup>92</sup> The majority of these positions are in women-dominated fields, are in the service industry, have a pay rate below the national median, are contingent or freelance positions in the gig economy, or have a combination of these factors.<sup>93</sup>

Thus, despite the existence of some employer-based, local, and state family and medical leave coverage, millions of U.S. workers are either not covered, covered but unable to afford taking advantage of these benefits, or face administrative or societal hurdles which prevent them from accessing these benefits.<sup>94</sup>

## ii. *Family & Medical Leave Act of 1993*

The Family and Medical Leave Act of 1993 (“FMLA”) was the first major federal policy regarding family and medical leave.<sup>95</sup> Before its enactment, employees could be—and often were—terminated for absences from work caused by the employee’s own serious health condition, their family member’s illness, or the birth of their child.<sup>96</sup> The FMLA provides eligible workers with a federal entitlement to *unpaid*, job-protected leave, during which workers are able to retain their preexisting

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<sup>85</sup> HOROWITZ ET AL., *supra* note 83, at 5–6.

<sup>86</sup> Terman, *supra* note 12, at 205.

<sup>87</sup> *Id.*

<sup>88</sup> GLYNN ET AL., *supra* note 1, at 11.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 9.

<sup>93</sup> *Id.* at 11.

<sup>94</sup> Terman, *supra* note 12, at 205.

<sup>95</sup> SHERLOCK ET AL., *supra* note 33, at 1.

<sup>96</sup> Williams, *supra* note 66, at 424.

group health plan benefits.<sup>97</sup> Workers are entitled to up to twelve weeks of unpaid leave within a twelve-month period.<sup>98</sup> The FMLA covers a narrow range of personal and family caregiving and medical needs: tending to one's own serious health condition, provided that condition results in the worker's inability to perform their required job functions (medical leave); tending to a spouse, minor child, or parent with a serious health condition (family leave); or parental leave for a newborn, adopted, or fostered child, if the leave is taken within twelve months of the child's birth or placement (parental leave).<sup>99</sup> Military service members and their families are entitled to additional coverage.<sup>100</sup> Since the FMLA provides a leave entitlement, employers must grant eligible employees their requested leave, provided the employee provides notice as soon as possible.<sup>101</sup> If the employee is taking leave for an expected birth or scheduled medical treatment, they must provide thirty days advance notice.<sup>102</sup> Employers may require employees to substitute their accrued paid leave for unpaid FMLA leave.<sup>103</sup> Since FMLA leave is job-protected, the employer must allow the employee to return to their same position or an equivalent position ("in terms of pay, benefits, working conditions, and responsibilities").<sup>104</sup>

There are several drawbacks to FMLA leave. This leave is not only *unpaid*, but its stringent prerequisites also result in approximately 40% of the American workforce being excluded from its use because they are "employed by small businesses, work part-time, or do not have sufficient job tenure."<sup>105</sup> For a worker to be entitled to unpaid leave, the FMLA requires them to have worked at least one year for the employer and at least 1,250 hours in the year prior to taking leave, and it requires the employer to have fifty or more workers within seventy-five miles of the employee's worksite.<sup>106</sup> Data from 2012 indicates that 13% of workers had taken leave in the previous year.<sup>107</sup> Of the leaves taken, 55% were for personal health issues, 21% were for pregnancy and parenting needs, and only 18% were for family caregiving.<sup>108</sup>

Beyond its strict eligibility requirements, as a practical matter the FMLA bars many low-wage and minority workers from its use.<sup>109</sup> Even if a worker qualifies for benefits, many cannot afford to take a leave that is unpaid.<sup>110</sup> This results in low-wage workers being among those least likely to benefit from the FMLA.<sup>111</sup> In 2012, around 5% of workers (approximately seven million people) "reported needing leave but being unable to access it," mainly because they could not afford it.<sup>112</sup> Of worker

<sup>97</sup> Terman, *supra* note 12, at 205; SHERLOCK ET AL., *supra* note 33, at 2.

<sup>98</sup> SHERLOCK ET AL., *supra* note 33, at 2.

<sup>99</sup> Terman, *supra* note 12, at 205; SHERLOCK ET AL., *supra* note 33, at 2; AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, *supra* note 9, at 4–5.

<sup>100</sup> SHERLOCK ET AL., *supra* note 33, at 2.

<sup>101</sup> *Id.* at 3.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> GLYNN ET AL., *supra* note 1, at 2.

<sup>106</sup> Terman, *supra* note 12, at 205; SHERLOCK ET AL., *supra* note 33, at 3.

<sup>107</sup> GLYNN ET AL., *supra* note 1, at 2.

<sup>108</sup> *Id.*

<sup>109</sup> Williams, *supra* note 66, at 424.

<sup>110</sup> Terman, *supra* note 12, at 205.

<sup>111</sup> *Id.*

<sup>112</sup> GLYNN ET AL., *supra* note 1, at 2.

data taken from 2014 to 2017, 61% “of Black adults, 67% of American Indian and Alaska Native adults, and 71% of Latinx adults [were] either ineligible or [could not] afford to take unpaid FMLA leave, compared to 59% of white adults.”<sup>113</sup>

In 2017, approximately 64% of workers who had taken leave in the two years prior reported receiving some pay during their time off from work.<sup>114</sup> Of those workers, 79% reported that part or all of their pay came out of other types of time they had accrued before their leave (including vacation days, sick leave, and paid time off).<sup>115</sup>

Since the FMLA did not envision the issues that have arisen in the current national health crisis, this Act does not provide coverage for current worker needs, such as bereavement leave or the need to provide caregiving due to school closures.<sup>116</sup>

### *iii. Various Anti-Discrimination Laws & the Lack of Protection for Caregivers*

Employee-caregivers often have little protection against “workplace discrimination, retaliation, and termination” because they are not a federally protected class.<sup>117</sup> Additionally, few states and cities protect this class of worker—there are approximately 100 states and cities with laws prohibiting caregiver, or “family responsibilities,” discrimination.<sup>118</sup>

Federal and state anti-discrimination laws provide workers with some relief, to the extent that they “prohibit discrimination based on sex, pregnancy, and association with people who have disabilities.”<sup>119</sup> Under the Americans with Disabilities Act, eligible employees are protected when caring for a disabled spouse or child.<sup>120</sup> Additionally, under the Pregnancy Discrimination Act, female employees are protected against discrimination “on the basis of pregnancy, childbirth, or related medical conditions.”<sup>121</sup> In localities and states where “caregiver” is not a protected status, gender discrimination laws can sometimes act to protect employee-caregivers that are discriminated against in the workplace, provided that the employee can show that discrimination is occurring to “employees of a certain gender with the additional shared characteristic of being a caregiver.”<sup>122</sup> These various protections are limited, though, and thus do not provide comprehensive relief to employee-caregivers.

### *iv. Unemployment Benefits*

When employee-caregivers are forced out of the workforce due to the overwhelming cost of childcare or unmanageable care responsibilities, they may be

<sup>113</sup> Terman, *supra* note 12, at 205.

<sup>114</sup> HOROWITZ ET AL., *supra* note 83, at 5.

<sup>115</sup> *Id.*

<sup>116</sup> Terman, *supra* note 12, at 205.

<sup>117</sup> Leanne Fuith & Susan Trombley, *COVID-19 and the Caregiving Crisis*, 77 BENCH & B. MINN. 27, 28 (2020).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

able to collect unemployment benefits for a period of time. The unemployment insurance system “provides temporary, partial wage replacement benefits to people who are unemployed or underemployed through no fault of their own.”<sup>123</sup> However, the unemployment benefits system in place before the pandemic (which, like today, varies from state to state) often left large gaps in coverage. For example, undocumented immigrants were excluded, and burdensome rules and administrative hurdles (such as “antiquated systems, confusing forms, language barriers, and a system that incentivizes employers to contest benefits to avoid higher tax rates”) prevented many others from accessing benefits.<sup>124</sup> Furthermore, the benefits themselves, which also varied from state to state, often covered only a fraction of the worker’s prior wages.<sup>125</sup>

#### v. *Workers Views on Leave Pre-Pandemic*

Even in the years leading up to the pandemic, workers reported an unmet need for family and medical leave. One 2017 Pew Research study provides a glimpse into workers’ perceptions of leave in the United States. That study found that approximately 62% of Americans “ha[d] taken or [were] very likely to take time off from work for family or medical reasons at some point.”<sup>126</sup> Additionally, *paid* leave—rather than the *unpaid* leave provided in the FMLA—remained a highly favored solution to that need in the years leading up to the pandemic.<sup>127</sup> A large proportion of Americans also favored multiple types of paid leave, including paid maternity leave (82%), paid paternity leave (69%), paid leave for workers with serious health issues (85%), and paid leave for workers caring for family members with serious health issues (67%).<sup>128</sup>

### B. POLICY RESPONSES TO THE PANDEMIC

Part I.B will address the U.S. government’s major policy responses in the wake of the Covid-19 pandemic. The first portion will address the CARES Act, while the second and third portions will address the Families First Coronavirus Response Act.

#### i. *CARES Act: Employer Relief & Unemployment insurance Enhancements*

One measure put into place to combat the harsh impact of the Covid-19 pandemic on businesses and the American workforce was the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).<sup>129</sup> This Act was signed into law

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<sup>123</sup> Terman, *supra* note 12, at 205–06.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 206.

<sup>126</sup> HOROWITZ ET AL., *supra* note 83, at 6.

<sup>127</sup> *Id.* at 4.

<sup>128</sup> *Id.* at 4–5.

<sup>129</sup> Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified at 42 U.S.C. § 290dd-2).

on March 27, 2020.<sup>130</sup> As many of the relief programs were on the brink of expiring at the end of 2020,<sup>131</sup> Congress passed the Consolidated Appropriations Act of 2021 (“CAA”) (enacted on December 27, 2020) on December 21, 2020.<sup>132</sup> Among other things, the CAA extended certain CARES Act unemployment benefit programs until mid-March of 2021 and added a new optional benefit program to aid “mixed earners.”<sup>133</sup>

Many of the key provisions of the CARES Act—such as the Paycheck Protection Program,<sup>134</sup> Loan Forgiveness Program,<sup>135</sup> and \$10,000 grants dispersed via the Small Business Administration<sup>136</sup>—provided relief to employers. However, the CARES Act also provided direct, albeit short-lived, relief for Americans placed into precarious employment or financial situations in the aftershocks of the pandemic. This was mainly accomplished via the expansion of three unemployment insurance benefits programs: (1) the Federal Pandemic Unemployment Compensation program (“FPUC”); (2) the Pandemic Emergency Unemployment Compensation program (“PEUC”); and (3) the Pandemic Unemployment Assistance program (“PUA”).<sup>137</sup>

The FPUC added an additional \$600 per week to the benefits an individual was already entitled to receive under state law, but only for the weeks of employment between April 5, 2020 and July 31, 2020.<sup>138</sup> The CAA revived this benefit beginning on December 26, 2020, but cut the weekly benefit in half.<sup>139</sup> Thus, eligible individuals were only entitled to \$300 in benefits per week between December 26, 2020 and March 14, 2021.<sup>140</sup> Individuals were not eligible to receive payments for weeks of unemployment they encountered during the gap between the programs (i.e., for weeks of unemployment after July 31, 2020 through December 26, 2020).<sup>141</sup>

<sup>130</sup> *Unemployment Insurance Relief During COVID-19 Outbreak*, DEP’T OF LABOR [hereinafter *Unemployment Insurance Relief*], <https://www.dol.gov/coronavirus/unemployment-insurance> (last visited Feb. 15, 2021).

<sup>131</sup> Evandro C. Gigante et al., *Congress Seeks to Extend Many CARES Act Unemployment Benefits in Pandemic Relief Package*, NAT’L L. REV. (Dec. 22, 2020), <https://www.natlawreview.com/article/congress-seeks-to-extend-many-cares-act-unemployment-benefits-pandemic-relief>.

<sup>132</sup> Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2020).

<sup>133</sup> Jillian de Chavez-Lau & Jenna Russell, *The 2021 Consolidated Appropriations Act Extends Pandemic Unemployment Benefits*, WORKFORCE BULL. (Jan. 25, 2021), <https://www.workforcebulletin.com/2021/01/25/the-2021-consolidated-appropriations-act-extends-pandemic-unemployment-benefits/>.

<sup>134</sup> CARES Act § 1102, 134 Stat. at 286; D. Paul Holdsworth, *Employment Law*, 55 U. RICH. L. REV. 113, 117 (2020).

<sup>135</sup> CARES Act § 1106, 134 Stat. at 297.

<sup>136</sup> *Id.*; *Id.* § 1110, 134 Stat. at 306.

<sup>137</sup> *Unemployment Insurance Relief*, *supra* note 130; Gigante et al., *supra* note 131.

<sup>138</sup> *Unemployment Insurance Relief*, *supra* note 130. See GREGORY ACS & MICHAEL KARPMAN, URB. INST., EMPLOYMENT, INCOME, AND UNEMPLOYMENT INSURANCE DURING THE COVID-19 PANDEMIC 1–11 (2020), <https://www.urban.org/sites/default/files/publication/102485/employment-income-and-unemployment-insurance-during-the-covid-19-pandemic.pdf>.

<sup>139</sup> Gigante et al., *supra* note 131; Chavez-Lau & Russell, *supra* note 133.

<sup>140</sup> *U.S. Department of Labor Issues Guidance on Federal Pandemic Unemployment Compensation and Mixed Earner Unemployment Compensation*, DEP’T OF LABOR (Jan. 5, 2021) [hereinafter DEP’T OF LABOR], <https://www.dol.gov/newsroom/releases/eta/eta20210105>; Chavez-Lau & Russell, *supra* note 133; Gigante et al., *supra* note 131.

<sup>141</sup> DEP’T OF LABOR, *supra* note 140.

Additionally, the PEUC allowed workers who had depleted their state unemployment benefits to obtain 13 additional weeks of unemployment benefits.<sup>142</sup> States typically cap benefits at twenty-six weeks.<sup>143</sup> The PEUC was originally set to expire by the end of December 2020.<sup>144</sup> However, the CAA provided for another eleven weeks of benefits for eligible workers, bringing the total amount of benefits that eligible workers could obtain under their state program and the PEUC program to 50 weeks on average.<sup>145</sup>

In addition, the PUA expanded unemployment benefits to include workers that were “traditionally not eligible for unemployment benefits under state law,” including workers that were new to the workforce, independent contractors, or self-employed workers.<sup>146</sup> The PUA was originally set to end at the end of December 2020,<sup>147</sup> but the CAA extended PUA benefits until March 14, 2021.<sup>148</sup>

Finally, the CAA includes a new program, entitled the Mixed Earner Unemployment Compensation (“MEUC”) program, which pulls in a category of workers (“mixed earners”) that had previously been excluded under the CARES Act.<sup>149</sup> This program is optional, however; therefore, an individual cannot benefit unless their state of residence chooses to opt in.<sup>150</sup> “Mixed earners” are “workers who receive some income on a W-2 basis and other income on a 1099 basis, typically those such as freelancers, artists, independent contractors, Uber drivers and, the like, who earn most of their living through gigs and who supplement their income by working part-time in traditional employment.”<sup>151</sup> Under the CARES Act, mixed earners had to choose whether to claim traditional unemployment benefits based on their W-2 income or PUA benefits based on their self-employment income.<sup>152</sup> For states that choose to participate in the MEUC, “mixed earners” that “reported at least \$5,000 of self-employment income in the last taxable year” and who received “at least \$1 of unemployment insurance in any program other than the PUA (i.e., state unemployment insurance or PEUC extended benefits)” might be eligible to receive an additional weekly benefit of \$100 in addition to their FPUC benefit of \$300 per week.<sup>153</sup>

## ii. Families First Coronavirus Response Act

On March 18, 2020, soon after verified cases of Covid-19 began to be identified in the United States,<sup>154</sup> the Families First Coronavirus Response Act

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<sup>142</sup> Gigante et al., *supra* note 131.

<sup>143</sup> Chavez-Lau & Russell, *supra* note 133.

<sup>144</sup> Gigante et al., *supra* note 131.

<sup>145</sup> *Id.*; Chavez-Lau & Russell, *supra* note 133.

<sup>146</sup> Gigante et al., *supra* note 131; *see also* Terman, *supra* note 12, at 206.

<sup>147</sup> Gigante et al., *supra* note 131.

<sup>148</sup> *Id.*

<sup>149</sup> Chavez-Lau & Russell, *supra* note 133.

<sup>150</sup> DEP’T OF LABOR, *supra* note 140; Chavez-Lau & Russell, *supra* note 133.

<sup>151</sup> Chavez-Lau & Russell, *supra* note 133.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Meg Anderson, *U.S. Sees Exponential Growth in Coronavirus Death Toll*, NAT’L PUB. RADIO (Mar. 29, 2020, 10:33 AM), <http://www.npr.org/sections/coronavirus-live-updates/2020/03/29/823497607/u-s-sees-exponential-growth-in-coronavirus-death-toll>.

(“FFCRA”), an “economic stimulus plan designed to address the impact of the C[ovid]-19,”<sup>155</sup> was signed into law.<sup>156</sup> It went into effect on April 1, 2020.<sup>157</sup> The FFCRA provides a temporary expansion of unemployment benefits and access to paid leave.<sup>158</sup> Through the FFCRA, employees had a right to access paid leave via two other acts: the Emergency Paid Sick Leave Act (“EPSLA”), a “new federal paid sick leave obligation,” and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”), an emergency augmentation of the FMLA.<sup>159</sup> These acts expanded the reasons for taking leave under the FMLA<sup>160</sup> and “provide[d] workers at organizations with fewer than 500 employees and covered public sector employers with paid, job-protected leave for specific C[ovid]-19-related reasons.”<sup>161</sup> Employees were only entitled to paid leave taken between April 1 and the end of 2020, as both programs expired on December 31, 2020.<sup>162</sup> Since the Consolidated Appropriations Act did not extend workers’ entitlement to FFCRA leave into 2021, employers with fewer than 500 employees are no longer legally required to provide their employees with leave under the Emergency Paid Sick Leave Act (“EPSLA”) or the Emergency Family and Medical Leave Expansion Act (“EFMLEA”).<sup>163</sup> However, “covered employers [could] voluntarily decide to allow their eligible employees to ask for and receive leave benefits under either or both the EPSLA or the EFMLEA and take the available tax credits” during the first calendar quarter of 2021.<sup>164</sup>

The EPSLA covered employees who worked for employers with fewer than 500 employees.<sup>165</sup> Unlike the FMLA, EPSLA covered employees regardless of how long they had worked for their employer (though the amount of their pay did depend on whether they were full- or part-time employees).<sup>166</sup> There were six qualifying reasons that made an employee eligible for the EPSLA: they had to have been (1) “subject to a federal, state or local quarantine or isolation order related to C[ovid]-19”; (2) “advised by a health care provider to self-quarantine due to C[ovid]-19

<sup>155</sup> Jaklyn Wrigley, *Summary of the Impact of the Families First Coronavirus Response Act*, 66 MISS. LAW. 31, 31 (2020).

<sup>156</sup> Jaclyn Kugell & Jaclyn McNeely, *Your Guide to the Temporary Rule on the Families First Coronavirus Response Act*, 39 LEGAL MGMT. 26, 26 (2020).

<sup>157</sup> 29 C.F.R. § 826.10(b)(ii) (2020); 29 C.F.R. § 826.20(a)(vi) (2020).

<sup>158</sup> Fuith & Trombley, *supra* note 117, at 28.

<sup>159</sup> Wrigley, *supra* note 155, at 31.

<sup>160</sup> Grant C. Killoran et al., *The New Wave of Litigation: An Early Report on COVID-19 Claims*, WIS. LAWYER, STATE BAR OF WIS. (June 3, 2020), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=6&ArticleID=27783>.

<sup>161</sup> Kugell & McNeely, *supra* note 156.

<sup>162</sup> 29 C.F.R. § 826.10(b)(ii) (2020); 29 C.F.R. § 826.20(a)(vi) (2020).

<sup>163</sup> News Release, *U.S. Department of Labor Publishes Guidance on Expiration of Paid Sick Leave and Expanded Family and Medical Leave for Coronavirus*, DEP’T OF LABOR, (Dec. 31, 2020), <https://www.dol.gov/newsroom/releases/whd/whd20201231-1>; see also Jon Zimring & Ellen M. Bandel, *FFCRA Leaves Sunset, but Employer Obligations and Considerations Continue*, NAT’L L. REV. (Dec. 31, 2020), <https://www.natlawreview.com/article/ffcra-leaves-sunset-employer-obligations-and-considerations-continue>.

<sup>164</sup> Zimring & Bandel, *supra* note 163.

<sup>165</sup> Wrigley, *supra* note 155.

<sup>166</sup> *Id.*



concerns”; (3) “experiencing C[ovid]-19 symptoms and seeking medical diagnosis”; (4) “caring for an individual subject to a federal, state or local quarantine or isolation order or who [wa]s advised by a health care provider to self-quarantine due to C[ovid]-19 concerns”; (5) “caring for the employee’s son or daughter if the child’s school or place of care [wa]s closed or the child’s care provider [wa]s unavailable due to public health emergency”; or (6) “experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.”<sup>167</sup> Employees who qualified for reasons one through three received their regular pay rate, while employees who qualified for reasons four through six received two-thirds their regular rate.<sup>168</sup> Full-time employees who met one of these qualifying reasons and who worked for a covered employer could obtain up to eighty hours of paid leave under the EPSLA.<sup>169</sup> The quantity of hours of leave to which part-time employees were entitled was based on the average number of hours the employee worked over a two-week period.<sup>170</sup>

The EPSLA had two main exclusions. First, employers of healthcare providers or emergency responders could elect to exempt those employees.<sup>171</sup> Second, the Secretary of Labor could choose to exempt small businesses with fewer than fifty employees “if the imposition of the leave requirement would jeopardize the viability of the employer’s business.”<sup>172</sup>

The FFCRA also temporarily expanded the FMLA via the EFMLEA.<sup>173</sup> This expansion allowed for “thousands of employers not previously subject to the FMLA” to be “required to provide job-protected leave to employees for a coronavirus-designated reason.”<sup>174</sup> The EFMLEA shifted the FMLA’s employee threshold from 50 or more employees to 500 employees or fewer.<sup>175</sup> Unlike the FMLA, which restricts leave to employees who have worked at least 1,250 hours in the twelve months prior to taking leave,<sup>176</sup> the EFMLEA extended eligibility to employees who had worked at least thirty days prior to the day they took leave.<sup>177</sup> Only one qualifying reason permitted employees to take leave under the EFMLEA: “[e]ligible employees [could] take leave under the Emergency FMLA where they [we]re unable to work or telework because of a need to care for the employee’s son or daughter if the child’s school or place of care [wa]s closed or the childcare provider [wa]s unavailable due to a public health emergency.”<sup>178</sup>

The EFMLEA provided up to twelve weeks of paid leave.<sup>179</sup> The employee’s first ten days of leave could be unpaid (though the employee could elect to substitute

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Kugell & McNeely, *supra* note 156.

<sup>170</sup> Fuith & Trombley, *supra* note 117, at 28; Wrigley, *supra* note 155, at 31.

<sup>171</sup> Wrigley, *supra* note 155, at 31.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> 29 C.F.R. § 826.60(b) (2021).

<sup>177</sup> Wrigley, *supra* note 155, at 32.

<sup>178</sup> *Id.*

<sup>179</sup> Kugell & McNeely, *supra* note 156.

paid leave that they had accrued, such as vacation or sick leave, to cover that time).<sup>180</sup> After ten days, the employer ordinarily had to cover full-time employees' wages at two-thirds their normal pay rate for the number of hours they would have been scheduled to work.<sup>181</sup> The pay entitlement of employees with part-time or irregular work schedules was based on the average number of hours the employee worked in the six months prior to taking leave, or based on the employee's reasonable expectation of the average number of hours they would have been scheduled to work, respectively.<sup>182</sup>

Additionally, the EFMLEA carried over the FMLA's job restoration obligation for employers with twenty-five or more employees.<sup>183</sup> Those employers were "required to return any employee who has taken Emergency FMLA to the same or equivalent position upon return to work."<sup>184</sup> Employers whose employee count fell below the twenty-five employee threshold were generally excluded from that requirement if the employee's position no longer existed after their leave because of an economic downturn, or for another public health emergency-related reason.<sup>185</sup> However, that employer had to make reasonable efforts to return the employee to an equivalent position for a year after that employee's leave.<sup>186</sup> Moreover, employees who chose to take advantage of leave under the FFCRA were also afforded some protection against employer discrimination and retaliation.<sup>187</sup>

Just as in the EPSLA, the EFMLEA had two exceptions: (1) employers of healthcare providers or emergency responders could elect to exempt those employees<sup>188</sup>; and (2) the Secretary of Labor could choose to exempt small businesses with fewer than fifty employees "if the imposition of the leave requirement would [have] jeopardize[d] the viability of the employer's business."<sup>189</sup>

### iii. Tax Credits

The FFCRA also provided a series of refundable payroll tax credits for employers who were required to provide paid leave under EFMLEA or EPSLA.<sup>190</sup> These tax credits, which were effective for pay periods through 2020, were meant to incentivize private-sector employers to provide their workers with paid family and medical leave.<sup>191</sup> For each calendar quarter that employers remained in adherence with the EPCLA, they "[we]re entitled to a refundable tax credit equal to 100% of the qualified sick leave wages" they had paid.<sup>192</sup> Additionally, employers could claim a

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<sup>180</sup> 29 C.F.R. § 826.60(b).

<sup>181</sup> *Id.* § 826.25.

<sup>182</sup> *Id.* § 826.21(b).

<sup>183</sup> *Id.* § 826.130(b).

<sup>184</sup> Wrigley, *supra* note 155, at 32.

<sup>185</sup> 29 C.F.R. § 826.130(b).

<sup>186</sup> *Id.* § 826.130(b).

<sup>187</sup> Fuith & McNeely, *supra* note 117, at 28.

<sup>188</sup> 29 C.F.R. § 826.30(c) (expired).

<sup>189</sup> Wrigley, *supra* note 155.

<sup>190</sup> Families First Coronavirus Response Act, Pub. L. No. 116-27, Div. G. (2020).

<sup>191</sup> SHERLOCK ET AL., *supra* note 33, at 2.

<sup>192</sup> Wrigley, *supra* note 155, at 32.

refundable tax credit amounting to “100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency FMLA Family and Medical Leave Expansion Act.”<sup>193</sup>

## II. FILLING THE GAPS IN FAMILY AND MEDICAL LEAVE

Now that the childcare crisis as well as the landscape of pre- and post-pandemic policies relating to family and medical leave have been examined, potential solutions to the gaps in the American family and medical leave system can now be addressed. This Section will first evaluate the current and likely post-pandemic gaps in family and medical leave legislation, and then examine several ways in which the American family and medical leave system can be improved.

### A. ADDRESSING POST-PANDEMIC GAPS IN THE CURRENT FAMILY & MEDICAL LEAVE SYSTEM

The influx of Covid-19 cases in 2020 quickly turned roughly one in three Americans into caregivers, as parents across the nation faced daycare closures and the switch from in-person schooling to a remote or hybrid model.<sup>194</sup> And even as Americans enter into 2021, the pandemic is still in full force in America, leaving many families in desperate need of extended time away from their jobs.<sup>195</sup>

This calamitous situation has left approximately two in three parents and guardians without safe and affordable childcare options.<sup>196</sup> The lack of feasible childcare options in turn forces many parents to reduce their working hours or quit their jobs entirely, a trend that “threaten[s] to extend the economic crisis and erode decades of gains for women in the workplace.”<sup>197</sup> These career interruptions disproportionately burden women, who are “more likely to have been laid off, to have left the labor market or to be considering quitting their jobs so they can manage family responsibilities.”<sup>198</sup>

To make matters worse, increased expenses, decreased capacity for children (given the necessary social distancing protocols), and decreased revenue associated with the pandemic has led many childcare providers to go out of business

<sup>193</sup> *Id.*

<sup>194</sup> Kathryn Mayer, *How COVID-19 is Aggravating the Caregiving Crisis*, HUM. RES. EXECUTIVE (Aug. 31, 2020), <https://hrexecutive.com/how-covid-19-is-aggravating-the-caregiving-crisis/>; Jessica A. Liebau, *Beyond COVID-19: Not All of Us Want a Return to Normal*, 93 WIS. L. 48, 49 (2020); Katherine Harmon Courage, *Day Care, Grandparent, Pod Or Nanny? How to Manage The Risks Of Pandemic Child Care*, NAT’L PUB. RADIO (Aug. 21, 2020), <https://www.npr.org/sections/health-shots/2020/08/21/902613282/daycare-grandparent-pod-or-nanny-how-to-manage-the-risks-of-pandemic-child-care>.

<sup>195</sup> Amelia Nierenberg & Adam Pasick, *K-12: The Spring Semester to Come*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/us/k-12-the-spring-semester-to-come.html>; Christine Fernando, *Coronavirus Takes Toll on Black, Latino Child Care Providers*, ASSOCIATED PRESS (Dec. 7, 2020), <https://apnews.com/article/race-and-ethnicity-child-care-coronavirus-pandemic-a0e9c01e7961e1d144c480e2ac5be903>.

<sup>196</sup> Courage, *supra* note 194.

<sup>197</sup> Megan Cassella & Eleanor Mueller, *A Lack of Child Care is Keeping Women on Unemployment Rolls*, POLITICO (June 25, 2020), <https://www.politico.com/news/2020/06/25/child-care-women-unemployment-339012>.

<sup>198</sup> *Id.*

permanently.<sup>199</sup> In the long run, these issues could leave the U.S. with long-lasting decreased childcare capacity.<sup>200</sup> Given that more than “33 million American families have children under the age of [eighteen]” and that among almost two-thirds of married couples with kids, both parents work, a substantial amount of Americans will be impacted by the current dearth of childcare options.<sup>201</sup>

And yet, for many working parents, the pandemic has merely exacerbated a decades-long childcare and medical care crisis.<sup>202</sup> In the year before the pandemic became widespread in America,<sup>203</sup> approximately half of American families struggled to find affordable childcare,<sup>204</sup> and “two-thirds of families with children under 18 rel[ie]d on both parents to work.”<sup>205</sup> Naturally, the demand for childcare was, in turn, quite high.<sup>206</sup> Parents quickly exhausted their limited allotment of personal and sick days, and struggled to find affordable sources of care for their children.<sup>207</sup> And when childcare options became too expensive, one parent—usually the mother—would be forced to cut their work hours or leave their job entirely.<sup>208</sup> In 2016—four years before the outbreak of the pandemic in America<sup>209</sup>—“[n]early 2 million parents had to leave work, change jobs or turn down a job offer because of childcare obligations.”<sup>210</sup>

The U.S. Department of Health and Human Services sets the bar of “affordable” childcare at 7% or less of a family’s income.<sup>211</sup> Yet this rate is hard to meet—in 2018, 63% of parents working full-time and 95% of low-income parents exceeded that threshold.<sup>212</sup> Indeed, many parents spend a huge proportion of their income on childcare. For example, “[i]n [twenty-eight] states and the District of Columbia, one year of infant care, on average, sets parents back as much as a year at a four-year public college, and nationally childcare costs on average between \$9,000 and \$9,600 annually.”<sup>213</sup> To add to that burden, the more impoverished a family is, the more difficult it is to find affordable childcare.<sup>214</sup>

The inefficient childcare system in America is not merely a strain on American families, it is a strain on the U.S. economy in general, “costing it \$57 billion every year in lost earnings, productivity[,] and revenue.”<sup>215</sup> Childcare burdens lead

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See Liebau, *supra* note 194, at 49.

<sup>203</sup> Grace Hauck et al., *Five Months In: A Timeline of How COVID-19 Has Unfolded in the US*, USA TODAY (Apr. 21, 2020, 5:57 PM), <https://www.usatoday.com/in-depth/news/nation/2020/04/21/coronavirus-updates-how-covid-19-unfolded-u-s-timeline/2990956001/>.

<sup>204</sup> Courage, *supra* note 194.

<sup>205</sup> Katie Reilly & Belinda Luscombe, *The Childcare Crisis*, TIME, <https://time.com/child-care-crisis/> (last visited Apr. 14, 2021).

<sup>206</sup> *Id.*

<sup>207</sup> Liebau, *supra* note 194; Reilly & Luscombe, *supra* note 205.

<sup>208</sup> *Id.*

<sup>209</sup> Hauck et al., *supra* note 203.

<sup>210</sup> Reilly & Luscombe, *supra* note 205.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

to less productive citizens and more Americans forced onto programs such as the Supplemental Nutrition Assistance Program (“SNAP”), the Special Supplemental Nutrition Program for Women, Infants, and Children (“WIC”), and the Temporary Assistance for Needy Families program (“TANF”).<sup>216</sup>

Caregivers have long felt a need for a universal, guaranteed, job-protected, paid federal family and medical leave program.<sup>217</sup> However, until the Covid-19 induced collapse of the U.S. childcare and schooling systems, the U.S. had never offered a nation-wide entitlement to paid sick days or paid leave.<sup>218</sup> The lack of a uniform, federal paid leave program has left many American workers and families struggling to care for themselves and their families for decades.<sup>219</sup> And, in all likelihood, this situation will continue once the temporary aid provided by pandemic relief efforts comes to a halt, leaving many American families saddled with the weight of their caregiving duties.<sup>220</sup>

#### B. POTENTIAL SOLUTION: GUARANTEED PAID FEDERAL LEAVE FOR ALL WORKERS

Americans urgently need the federal government to heed the lessons of the pandemic and provide a sustainable, guaranteed, job-protected, paid federal family and medical leave program. The shortcomings of America’s federal family and medical leave system exposed during the Covid-19 pandemic—including the pre-pandemic challenges employee-caregivers faced in accessing affordable childcare, the successes and failures of the FMLA and the FFCRA, and the continuing challenges caregivers face as the pandemic continues (as well as those that will last well after the pandemic subsides)—have shed light on which features must be put in place in order to enhance the system.

##### *i. Universal, Federal Leave*

The caregiver crisis in the United States is universal, as it affects all Americans in all paths of life. The solution to the caregiver crisis should be universal as well. Americans desperately need a federally provided family and medical leave program with truly universal coverage.

Individual states, localities, and private employers have not stepped in to fill the gap left by the lack of a federal leave program. Although a small minority of these entities have enacted their own family leave laws, these policies are few and far between.<sup>221</sup> And while the pandemic spurred some new or altered leave programs, these programs were specifically meant to handle the exigencies of the pandemic, and many of them expired at the end of 2020.<sup>222</sup>

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<sup>216</sup> *Id.*

<sup>217</sup> Terman, *supra* note 12.

<sup>218</sup> *Id.*; see also Killoran et al., *supra* note 160.

<sup>219</sup> *Id.*

<sup>220</sup> JULIA ISAACS ET AL., URB. INST., PAID FAMILY LEAVE IN THE UNITED STATES 1–2 (2017).

<sup>221</sup> See Williams, *supra* note 66, at 440.

<sup>222</sup> Fuith & Trombly, *supra* note 117, at 28 (“But the time-limited relief offered by FFCRA failed to take into account the duration of the [C]ovid-19 crisis. The FFCRA, which under current law will be continued only until the end of 2020.”).

The U.S. cannot rely on private sector employers to voluntarily create paid family and medical leave policies at their own discretion, since the result will be an imbalance in access to leave among the various classes of employees.<sup>223</sup> As previously discussed, the unequal development of private sector leave programs has resulted in vast inequities, as there have been “gaps in access and significant disparities by region, industry, occupation and wage level, as well as disparities in access by race and ethnicity.”<sup>224</sup> Whether a family is covered has largely been dependent on the industry they work in, their pay rate, the size of their employer, their work history, and the state they live in.<sup>225</sup> Many workers already had very limited, if any, access to *paid* leave before 2020, especially low-wage workers, immigrants, and people of color.<sup>226</sup> This lack of equal access resulted in “working people who [were] least likely to be able to afford to take unpaid time away from their jobs for family or medical reasons . . . also [being] the least likely to have access to paid time off.”<sup>227</sup> And although paid leave programs have cropped up among some leading businesses in recent years, this progress has been extremely slow.<sup>228</sup> Workers’ demands for paid leave have far outpaced these efforts, and recent trends give no indication that the private sector will gear up to meet workers’ needs any time soon.<sup>229</sup>

Due to the difficulty involved in navigating competing employee and business community concerns, it is unlikely that many states, localities, or business entities will create paid or unpaid leave programs of their own accord, despite the benefits that could be shared by both employees and businesses through such policies.<sup>230</sup> Additionally, even in progressive workplaces, localities, and states where paid family leave has become a reality, inequities remain among the types of workers able to access the leave that is offered.<sup>231</sup>

Because progress on family and medical leave legislation has been so slow to develop, and because of the inequities caused by certain states, localities, and workplaces offering various leave programs and benefits while others do not, it would be more equitable and fairer for there to be a single federal leave policy providing universal coverage. In order to provide Americans access to leave on an equal basis, paid leave must be provided on a federal basis.

*ii. Paid Leave & Reconsidering the Right to Pay as a Percentage of the Worker’s Regular Wages*

As previously discussed, *unpaid* family and medical leave can be an untenable option for low-income workers who do not have the savings needed to last several days or weeks without regular income. While the FMLA provides guaranteed *unpaid* leave for certain qualified workers, studies have shown that this program is

<sup>223</sup> GLYNN ET AL, *supra* note 1, at 9; Boesch, *supra* note 25.

<sup>224</sup> GLYNN ET AL, *supra* note 1, at 9.

<sup>225</sup> ISAACS ET AL., *supra* note 220; Terman, *supra* note 12, at 205.

<sup>226</sup> Nierenberg & Pasick, *supra* note 195.

<sup>227</sup> GLYNN ET AL, *supra* note 1.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Williams, *supra* note 66, at 440.

<sup>231</sup> *Id.*

inadequate to cover the many workers who cannot afford to take unpaid leave.<sup>232</sup> The current lack of a paid federal leave policy not only “impose[s] significant costs on working people and families,” but also on “businesses and the economy.”<sup>233</sup> Thus, the ideal family and medical leave program will also need to provide pay entitlements.

On a similar note, just as *unpaid* family and medical leave through the FMLA can be an unsustainable option for low-income workers, a *paid* family and medical leave program can be just as unfeasible if the pay benefits offered are too low to provide adequate financial support to families. Paid leave programs that pay all workers, regardless of their income level, a fraction of their regular level of income will continue to exclude low-income workers, since workers with low-wage jobs and little savings will still be unable to afford taking advantage of that leave program.<sup>234</sup> This is especially true of single-earner households, where only one parent is the sole source of income for the family.<sup>235</sup> In this way, paid leave programs with low pay entitlements continue to exclude low-income workers, and instead merely “subsidiz[es] [paid leave] for the more affluent.”<sup>236</sup> For these reasons, lawmakers should consider creating a paid leave program that does not necessitate that the worker’s pay entitlement be proportional to the amount of their regular income.<sup>237</sup>

Lastly, pay entitlements should not be provided to caregivers and non-caregivers on an unequal basis. Certain pieces of pandemic-era legislation made this distinction. The pay entitlements in the FFCRA, in their effect, discriminated against employee-caregivers that used leave to provide care to a family member, while providing greater pay benefits to workers that took leave to tend to their own illness. In terms of pay entitlements, the FFCRA provided that employees taking leave due to their own Covid-19 related quarantine, illness, or health treatments be paid the higher of the applicable minimum wage or that employee’s regular pay rate.<sup>238</sup> Those employees included workers “subject to a federal, state, or local quarantine or isolation order related to [C]ovid-19, or . . . [who had] been advised by a health care provider to self-quarantine [for reasons] related to [C]ovid-19, . . . or [who were] experiencing [C]ovid-19 symptoms and [were] seeking a medical diagnosis.”<sup>239</sup> Caregivers, on the other hand, were merely entitled to compensation at two-thirds the amount of their regular rate of pay (or to two-thirds the applicable minimum wage, if that amount was greater).<sup>240</sup> Under the FFCRA, those considered “caregivers” were employees that took leave due to the need to care for others who were subject to quarantine or isolation orders, or who were experiencing Covid-19 symptoms, or employees taking care of a child whose school or care center was shut down or otherwise unavailable for Covid-19 related reasons.<sup>241</sup>

Such a policy unfairly discriminates against caregivers and penalizes them for their responsibility to come to the aid of ill family members by affording them a

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<sup>232</sup> HOROWITZ ET AL., *supra* note 83.

<sup>233</sup> GLYNN ET AL, *supra* note 1, at 3.

<sup>234</sup> Williams, *supra* note 66, at 442.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Fuith & Trombly, *supra* note 117, at 28.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

lower pay entitlement. Ideally, the pay entitlements in a nationwide leave policy would not create a double standard between employee-caregivers and employees without caregiving responsibilities.

*iii. Gender-Neutral Leave*

Additionally, family and medical leave programs should strive to be gender neutral.<sup>242</sup> Such a policy would prevent discrimination against LGBTQ couples, would prevent detriments to female caregivers' long-term careers (by making it more likely that women will return to the workplace after their leave and by reducing hiring discrimination), and would help to even out women's disproportionate share of family caregiving responsibilities.<sup>243</sup>

The FMLA, states' family and medical leave programs, and private employers' family and medical leave policies have not caught up with the reality that, in many households, both parents (or the single parent) work full-time. Employers perceive "ideal" workers as ones who work full-time and are able to consider their job as their first priority, because they have another household member—traditionally their wife—whose role is to remain in the household to care for their spouse's needs and for the couple's children.<sup>244</sup> This "ideal" worker would not need access to paid leave very often because they do not need time off to care for their children or ill family members. However, unlike in past decades, many households in the modern day lack a full-time caregiver able to devote their time to their family members' needs. Nevertheless, certain employers "might have different expectations and judgments about men and women workers because of the historically gendered relationship between caregiving and work"; they might adopt the stereotype that "women in the paid labor force struggle with work-family conflict and . . . working mothers are transient and uncommitted participants in the workforce."<sup>245</sup> These stereotypes and traditional expectations pose barriers to the equal treatment of women entering the workforce and, to the extent possible, should be avoided in new policies and rooted out of workplace norms.<sup>246</sup>

*iv. Leave Without a Minimum Hours Worked Requirement*

Employees would also benefit from a policy that does not require them to have worked a certain amount of hours for their current employer in order to obtain leave.<sup>247</sup> Under the FMLA, employees are required to work at least one year and at least 1,250 hours in the year prior to taking leave in order to take advantage of that leave program.<sup>248</sup> However, employees often do not have control over life events requiring leave (e.g., having children, caring for elderly or ill family members, and

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<sup>242</sup> See Cassella & Mueller, *supra* note 197.

<sup>243</sup> *Id.*

<sup>244</sup> Catherine Albiston & Lindsey Trimble O'Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 36 (2016).

<sup>245</sup> *Id.* at 28, 37.

<sup>246</sup> *Id.*

<sup>247</sup> See Terman, *supra* note 12; SHERLOCK ET AL., *supra* note 33, at 3.

<sup>248</sup> *Id.*



caring for one's own illness).<sup>249</sup> A more beneficial policy would not carry these minimum time commitments, and would thus remove the inequity facing workers who have just entered the workforce or who have recently begun a new position. This alteration would be especially beneficial to workers during and immediately after the pandemic, since a massive number of employees have lost their jobs and, under the FMLA's requirements, would thus be ineligible for the program until they had worked at least one year for their new employer.

This change in policy would also help to even out the disparity between high-earners and low-earners in terms of what leave is available to them. Studies have shown that “[p]rofessional and managerial employees . . . have more control over their schedules . . . than do lower-wage workers.”<sup>250</sup> Lower-paid and hourly workers, on the other hand, have less flexibility and are thus less able to take advantage of formal (or informal) leaves through their private employers.<sup>251</sup> Also, workers who have more “contingent” or “precarious” jobs are less likely to “accumulate the long tenures or high pay that facilitate leave taking.”<sup>252</sup> People of color and foreign-born workers are especially disadvantaged by the FMLA's policy of unpaid leave and minimum tenure and hours worked requirements, as they are “overrepresented in contingent, precarious jobs.”<sup>253</sup>

#### v. *Leave that Covers Hourly Workers*

As previously discussed, a large proportion of salaried and higher-paid employees have access to paid leave, while only a small fraction of hourly workers—approximately 5%—share that access.<sup>254</sup> This disparity creates a double standard in terms of the access to leave that hourly workers and non-hourly workers face. Some of these hourly workers may be eligible for the FMLA's *unpaid* leave program—though the FMLA only covers 60% of the workforce.<sup>255</sup> However, even if they are eligible for the program, many hourly workers do not have the financial resources necessary to take advantage of unpaid leave. Accordingly, an ideal paid family leave program would cover hourly workers.

#### vi. *Leave with the Right to Reinstatement*

Leave programs are largely toothless if they do not provide the worker with some degree of job security. Thus, the ideal leave policy would have an explicit right to reinstatement. The current hodgepodge of local, state, federal, and employer-based leave programs have differing approaches to the right of reinstatement that often vary based on the period of time in which the employee will be absent from the workplace.<sup>256</sup> One positive aspect of both the FMLA and the FFCRA are their

<sup>249</sup> See Albiston & O'Connor, *supra* note 244, at 4.

<sup>250</sup> *Id.* at 46.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 47.

<sup>253</sup> *Id.*

<sup>254</sup> Williams, *supra* note 66, at 438–39.

<sup>255</sup> Diane Mehta, *How to Ask for Parental Leave When You're an Hourly Worker*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/article/parental-leave-hourly-worker.html>.

<sup>256</sup> Williamson, *supra* note 67, at 211–14.

requirements that employers make certain types of efforts to return the worker back to their previous position, i.e., restore or reinstate them,<sup>257</sup> once they return from their period of leave.<sup>258</sup> This right, however, has many exceptions.<sup>259</sup> Thus, with regard to the right to reinstatement, policymakers should look to, and consider providing an expanded version of, the reinstatement provisions of the FMLA and the FFCRA when crafting a nationwide leave program.

*vii. Leave with the Right not to be Retaliated Against*

Employees would benefit from the ability to participate in leave programs without the fear that they will face retaliation in their workplace. The right to take leave without facing retaliation generally means that “employers cannot take adverse actions against employees . . . [solely] because the employees engaged in protected activity.”<sup>260</sup> For workers who utilize leave policies, such a right could protect them against termination, fines, suspension, discipline, or other forms of discrimination.<sup>261</sup> Both the FMLA and FFCRA provide that employees who decide to take advantage of leave must not be retaliated against.<sup>262</sup> With regard to the right not to be retaliated against, policymakers should look to the right against retaliation provisions of the FMLA and the FFCRA when crafting a nationwide leave program.

*viii. Expanding Access to Unemployment Benefits*

Currently, the U.S. is “experiencing its highest levels of unemployment since the Great Depression.”<sup>263</sup> As of June 2020, “[m]ore than 20 million American workers [were] receiving jobless benefits.”<sup>264</sup> And, even “as the economy reopens and people are called back to work, many will be working reduced schedules.”<sup>265</sup> In the meantime, many Americans are left with depleted savings and little access to work.<sup>266</sup> These workers need access to a robust unemployment benefits system that allows access to traditional workers, non-traditional workers, and “mixed earners” (i.e., workers who receive both W-2 wages and self-employment income).

As previously discussed, the CARES Act’s PUA program expanded unemployment benefits to include workers that were “traditionally not eligible for unemployment benefits under state law,” including workers that were new to the

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<sup>257</sup> *Id.* at 209.

<sup>258</sup> Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19326 (Apr. 6, 2020) (to be codified at 29 C.F.R. § 826.130(b)); Fuith & Trombley, *supra* note 117, at 28; Wrigley, *supra* note 155, at 32.

<sup>259</sup> Fuith & Trombley, *supra* note 117, at 28.

<sup>260</sup> Williamson, *supra* note 67, at 238.

<sup>261</sup> *Id.* at 239.

<sup>262</sup> Fuith & Trombley, *supra* note 117, at 28.

<sup>263</sup> Cassella & Mueller, *supra* note 197.

<sup>264</sup> *Id.*

<sup>265</sup> Terman, *supra* note 12, at 208.

<sup>266</sup> *Id.*; GENE FALK ET AL., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC: IN BRIEF (2020); James Royal, *Survey: Nearly 3 Times as Many Americans Say They Have Less Emergency Savings Versus More Since Pandemic*, BANKRATE (Aug. 20, 2020), <https://www.bankrate.com/banking/savings/emergency-savings-survey-2020/>.

workforce, independent contractors, and self-employed workers.<sup>267</sup> The CAA improved the CARES Act by allowing states to opt into a program that would allow “mixed earners” to receive unemployment benefits based on both their W-2 income and their self-employment income. Both the PUA’s and CAA’s programs, however, are temporary.<sup>268</sup>

This expansion of unemployment benefits to cover traditionally excluded workers should be permanent and mandated nationwide. Doing otherwise would make it impossible to provide Americans with financial security on an equitable basis, as it would deny a safety net to certain workers merely because they do not fall into the traditional worker category.

*ix. Various Modifications to Workplace Norms*

There are numerous support measures that employers can implement to provide more support and job security to their workers, in the absence of—or in addition to—a nationwide family and medical leave program. These measures are especially significant given that, in all likelihood, American lawmakers will not implement a solution to the caregiving crisis or the family and medical leave crisis any time soon. Since, as of early 2021, Covid-19 infections are still occurring at high rates, many schools are functioning at least partially remotely and many childcare centers have reduced capacity or are shutdown altogether.<sup>269</sup> In the meantime, families must tackle daunting choices regarding the unstable nature of their work and family life balance. Therefore, policymakers should encourage businesses to support their workers by steering away from antiquated workplace norms and affording their workers more flexibility. Such changes would provide employee-caregivers more stability and job security by allowing some of them to avoid the need to reduce their hours or take time off from work.<sup>270</sup>

Typically, American workers are expected to work full-time, abide by a nine-to-five work schedule, work in-person, be available for overtime work, and refrain from putting their careers on hold to attend to family needs.<sup>271</sup> However, in adapting to restrictions necessitated by the pandemic, some employers have hit upon advantageous nontraditional working arrangements.<sup>272</sup> For example, many employers have made substantial investments in “virtual meeting technology and cloud-based resources such as Zoom and Microsoft Teams.”<sup>273</sup> This technology allows for workers to work from home and attend meetings, training, conferences, and myriad other events remotely. Such alterations are not only popular with workers but also may not necessarily be detrimental to employers, given that employers can forego renting office space while maintaining worker productivity.<sup>274</sup> Employers

<sup>267</sup> Gigante, *supra* note 131. See Terman, *supra* note 12, at 206.

<sup>268</sup> Gigante, *supra* note 131.

<sup>269</sup> Fuith & Trombley, *supra* note 117, at 30.

<sup>270</sup> *Id.*

<sup>271</sup> Porter, *supra* note 20, at 965–66.

<sup>272</sup> Joshua C. Black, *Employment Law and the Shift Toward Remote Working*, 57 ARIZ. ATT’Y 28 (2021).

<sup>273</sup> *Id.*

<sup>274</sup> William Arruda, *6 Ways COVID-19 Will Change The Workplace Forever*, FORBES (May 7, 2020), <https://www.forbes.com/sites/williamarruda/2020/05/07/6-ways-covid-19-will-change-the-workplace-forever/?sh=4bb99320323e>.

who have harnessed these workplace modifications as a method of profits-boosting (and increasing worker happiness) will likely be incentivized to continue such flexible policies post-pandemic. Several major American employers, such as Google, Uber, and Salesforce, have already committed to maintaining this worker-friendly arrangement indefinitely.<sup>275</sup> In this way, work-from-home policies and similar worker-friendly arrangements appear to be the harbinger of new, more flexible workplace norms. These slow transitions away from inflexible workplace environments can be particularly beneficial to parents, especially parents fortunate enough to have positions that would allow them to work from home. Parents and guardians who have the option to telework can often work more efficiently, since they are allotted more flexibility in deciding how to split their time between their work and childcare responsibilities.<sup>276</sup>

Shifting rigid, pre-pandemic workplace norms could also include allowing workers more autonomy in choosing when to work. This adjustment would make it possible, both during the current pandemic-related caregiving crisis and in the future, for workers to more easily avoid taking leave or extended time off.<sup>277</sup> Furthermore, employers can provide additional mental health and support services.<sup>278</sup> Such support services could include access to virtual medicine, childcare options, and wellness programs.<sup>279</sup> Moreover, since these support services can be provided both to workers who are able to telework and those with positions requiring in-person work, they can be provided on a more equitable basis.<sup>280</sup> Lastly, employers can openly communicate with their employees regarding their needs and concerns, and educate their employees about workplace programs that might be of use to them in their time of need.<sup>281</sup>

#### CONCLUSION

Illness, disease, and disability are universal concerns; they affect every American, regardless of their walk of life. Every American is likely to require family and medical leave at some point during their working years, whether for the birth or adoption of a child, a personal health need, or the need to care for an ailing family member. And yet, the majority of Americans' leave needs have been left unmet. Moreover, the Covid-19 pandemic, a quickly aging U.S. population, declining numbers of younger people able to care for family members, and general trends in Americans' health are factors that, combined, indicate that the need for family caregiving will only continue to increase in the future.<sup>282</sup> These caregiving gaps must be filled, and the most viable solution will be found in policies which allow all American workers with guaranteed access to leave.

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<sup>275</sup> Black, *supra* note 272, at 28.

<sup>276</sup> Fuith & Trombley, *supra* note 117, at 30.

<sup>277</sup> *Id.*

<sup>278</sup> Darla Mercado, *How Workplace Benefits Might Reflect the New Reality of Covid-19*, CNBC (Oct. 13, 2020), <https://www.cnbc.com/2020/10/13/how-workplace-benefits-might-reflect-the-new-reality-of-covid-19.html>.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Fuith & Trombley, *supra* note 117, at 30.

<sup>282</sup> Glynn, *supra* note 1, at 7.

The paid leave crisis in America has a nationwide effect, and therefore necessitates a nationwide policy change. The patchwork of local, state, and employer-based leave policies have led to some positive reforms, but that change has been inequitable and sluggish. Instead of the fragmented access to leave that workers currently face, policymakers should develop a universal, *paid* leave policy available to all workers, regardless of their level of income or gender, whether they are hourly or salaried, whether they are part of the service sector or gig economy, or how long they have served their employer. Only a national family and medical leave policy would have the force necessary to meet the needs of American workers.