

## Workplace Fairness

June 2015

*"There is intense support for strengthening policies to prevent employers from firing or demoting women when they get pregnant or take maternity leave...A policy to protect pregnant workers and mothers from being fired or demoted when they become pregnant or take maternity leave is strikingly powerful. Among all voters, a remarkable 91 percent favor this policy, 70 percent strongly. Among unmarried women, 93 percent favor this policy, 82 percent strongly."*

*--"The Women's Economic Agenda: Unmarried women focused on critical economic issues."  
Memo on 7/2013 Survey by Greenberg Quinlan Rosner for Women's Voices Women Vote Action Fund and Democracy Corps*

### Background

A 2010 WVVV/Center for American Progress report noted the tremendous changes that had taken place over the past half-century with respect to unmarried women and the workplace.

*Today nearly half of women are unmarried<sup>1</sup>—a transformational societal change from 1960 when only one-third of women were unmarried. And today virtually every woman will spend at least part of her adult life as the sole supporter of herself or her family...Unfortunately, the economic circumstances of unmarried women are troubling...Most women today work to support themselves and their families—overall they make up half of the workforce...Unmarried women workers are often the sole breadwinner for their households and families, and many have children, elderly parents, or other relatives to support financially and through caregiving. But they are challenged to support themselves and their families on their own income for several reasons...[including] a lack of family-friendly workplace policies.<sup>2</sup>*

In 1948, just 32.7% of all women 16 and over were in the civilian labor force (employed or actively seeking employment) and they comprised 28.6% of the labor force (17.3 million out of 60.6 million) and 28.5% of the employed population (16.6 million out of 58.3 million). By 2013, those figures had risen to 57.2% of women in the labor force, representing 46.8% of the labor force (72.7 million out of 155.4 million) and 47.0% of the employed (67.6 million out of 143.9 million). (The high point for women's participation in the labor force was 60.0%, reached in 1999.)<sup>3</sup> The results for April 2015 are similar (women 16 and over: 56.6% participation rate; 46.8% of the labor force, 46.8% of the employed).<sup>4</sup>

## Workplace Fairness

Women who have never married have consistently had a higher labor force participation rate (56.8% in 1970, 63.3% in 2010) than married women (40.5% in 1970, 61.0 in 2010), with widowed, divorced or separated women having the lowest rate (40.3% in 1970, 48.8% in 2010).<sup>5</sup> The lower participation rate for this latter category, however, is entirely due to the very low labor force participation level of widowed women (most of whom are elderly). In 2013, unmarried women comprised 23.5% of the civilian labor force (36.6 million out of 155.4 million), with a participation rate of 55.7%, compared to 58.9% among married women with spouse present (36.1 million, representing 23.3% of the labor force). However, the participation rates were significantly higher for divorced (64.7%), never married (63.0%) and separated women (63.0%), while being much lower for widows (18.6%).<sup>6</sup> Single mothers are particularly likely to be in the workplace, with over 72% of them employed in 2011.<sup>7</sup>

In 1974, just 7.9% of all American families, and only 14.6% of families with children, were headed by single mothers. By 2012, these proportions had risen to 12.4% of all families and 26.1% of families with children.<sup>8</sup>

A May 2013 study by the Pew Research Center documented a sea-change in the role of “breadwinner moms” who are the sole or primary providers in households with children. Among its findings:

- In 2011, 40.4% (a record high) of all households with children under 18 (representing a total of 13.7 million households) were headed by women who are either the sole or primary source of family income, compared to just 11% in 1960.
- Of these “breadwinner moms,” 37% (5.1 million) were married mothers with higher incomes than their husbands, whereas 63% (8.6 million) were single mothers. Both groups have grown considerably over the past half-century, with the proportion of married mothers out-earning their husbands rising from 4% of all households with children under 18 in 1960 to 15% in 2011, and the share of such families headed by a single mother increasing from 7% in 1960 to 25% in 2011.
- “The income gap between the two groups is quite large. The median total family income of married mothers who earn more than their husbands was nearly \$80,000 in 2011, well above the national median of \$57,100 for all families with children, and nearly four times the \$23,000 median for families led by a single mother.”
- Compared with all mothers with children under 18, “single mothers...are younger, more likely to be black or Hispanic, and less likely to have a college degree.”
- “Today’s single mothers are much more likely to be never married than were single mothers in the past. The share of never married mothers among all single mothers has increased from 4% in 1960 to 44% in 2011. During the same period, the share of

## Workplace Fairness

single mothers who had children from previous marriages has gone down from 82% to 50%.”

- “Never married mothers have a distinctive profile. Compared with single mothers who are divorced, widowed or separated, never married mothers are significantly younger, disproportionately non-white, and have lower education and income. Close to half of never married mothers in 2011 (46%) are ages 30 and younger, six-in-ten are either black (40%) or Hispanic (24%), and nearly half (49%) have a high school education or less. Their median family income was \$17,400 in 2011, the lowest among all families with children.”<sup>9</sup>

A separate 2014 study by the Center for American Progress placed the proportion of “breadwinner moms” between the ages of 18 and 60 who are the sole or primary earners (earning at least as much as their spouse) in families with children under 18 at 40.9% in 2012, with another 22.4% of such mothers bringing home between 25% and half of family income. It also found that, compared to their married counterparts, single mother breadwinners had lower incomes (46.7% of single breadwinner moms were in the lowest income quintile versus just 8.5% of married breadwinner moms), were more diverse (44.3% white, 26.9% African American, 22.5% Hispanic versus 63.3% white, 12.1% African American, 16% Hispanic), had somewhat lower levels of formal education (39% with high school or less, 35.6% with college degrees versus 37.7% with high school or less, 45.9% with college degrees), and were younger (24.6% under 30 versus 10.3% under 30).<sup>10</sup>

In April 2014, the Pew Research Center released a report on those mothers who do not work outside the home (“stay-at-home moms”) because they are at home to care for their families, are unable to find work, are disabled, or are enrolled in school. The analysis found that in 2012 these mothers represented 29% of all mothers with children younger than 18, which was up from the modern-era low of 23% in 1999, and 26% in 2008 during the height of the recession. Furthermore, the proportion of these stay-at-home moms who are unmarried rose from 8% (1.1 million women) in 1970 to 20% (two million) in 2012 (though they represented 29% in 1993). When asked to indicate why they are not working, stay-at-home single mothers cite: caring for the home and family (41%, but down from 76% in 1970), being ill or disabled (27%), being unable to find work (14%), and attending school (13%). Compared to single working mothers, unmarried stay-at-home mothers:

- Have less education (64% attaining a high school diploma or less versus 40% of single working mothers)
- Are more likely to live in poverty (71% versus 27% of single working mothers)
- Are more likely to receive welfare income (20% versus 4% of single working mothers)

- Are more likely to have a child age five or younger (47% versus 39% of single working mothers).<sup>11</sup>

# 1. Pregnancy Discrimination

## Background

*“Just a few decades ago, pushing pregnant women out of the workplace was both legal and commonplace. Not surprisingly, many fewer pregnant women worked at that time than today. Between 1961 and 1965, for example, 44 percent of first-time mothers worked during their pregnancies; in contrast, between 2006 and 2008, nearly two-thirds of first-time mothers worked while pregnant. Women are also working later in their pregnancies. Between 1961 and 1965, less than 35 percent of working first-time mothers were still on the job one month or less before giving birth. But times have changed. Now an overwhelming majority of first-time mothers are working late into their pregnancies. Almost nine out of ten (88 percent) first time mothers who worked while pregnant worked into their last two months of pregnancy in 2006-2008, and more than eight out of ten (82 percent) worked into their last month of pregnancy. One reason women are working through their pregnancies in greater numbers is that women’s income is more likely to be critically important to today’s families.”*

*--National Women’s Law Center and A Better Balance, “It shouldn’t be a heavy lift: fair treatment for pregnant workers,” June 18, 2013.<sup>12</sup>*

The question of pregnancy protections in the workplace is an important one for many unmarried women. The birth rate for unmarried women fell in 2013 for the fifth straight year (to 44.3 per 1,000 unmarried women ages 15-44), but 40.6% of all births in the U.S. in that year (amounting to 1.6 million births) were to unmarried women.<sup>13</sup> Most of the births to unmarried women are to women cohabiting with the father. Between 2006 and 2010, 58% of non-marital births were to cohabiting couples, whereas 42% were to unmarried women not living with a partner.<sup>14</sup>

Among the types of discriminatory treatment faced by pregnant workers are:

- Refusal of employers to provide such accommodations as assistance with heavy lifting, more frequent breaks or the ability to sit, rather than stand, during a long shift for women in physically demanding jobs.
- Harassment, discrimination based on gender stereotypes, hostility and suspicion for women in jobs traditionally held by men.

## Workplace Fairness

- Being forced to prematurely go on leave, even when they are willing and able to continue working (thus exhausting their available leave time prior to birth) with temporary adjustments to their work routine.
- Getting fired upon a request for a workplace accommodation (with employers citing such a request as evidence the worker is unable to continue doing her job).<sup>15</sup>

A 2013 survey of expecting and new mothers documented the obstacles they face in the workplace. Most pregnant women are employed: 61% of respondents reported working during their pregnancy, with over 50% indicating they worked full time. The most common needed accommodation (cited by 71%) was simply more frequent breaks on the job, but of those reporting the need for such breaks, 42% did not ask for them (“with many likely fearing repercussions, refusal or uncertainty about how the request would be received”). Over a quarter of the new mothers surveyed reported “discrimination and lost pay, hours, promotions and responsibilities upon returning to work” because of employer perceptions of their “desire, ability or commitment” to doing their job.<sup>16</sup>

Women are almost half of the labor force, and three-quarters of these women will, at some point, be pregnant while employed,<sup>17</sup> but accommodating pregnant workers would impose minimal cost to employers because women workers who give birth in a given year represent only a tiny fraction of all workers (just 1.6% in 2009-2011, and 4.7% of all employed women of childbearing age), and many pregnant women do not require any special accommodations.<sup>18</sup> Furthermore, the experience of employers providing workplace accommodations to people with disabilities demonstrates that most accommodations for pregnant workers are likely to be low cost, and that certain employer benefits are also likely to occur, including improved recruitment and retention of workers, increased employee job commitment and satisfaction, increased productivity, reduced absenteeism, improved workplace safety and increased diversity.<sup>19</sup>

Three existing federal statutes provide some protections for pregnant women: the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (to be discussed in the following section).

The **Pregnancy Discrimination Act of 1978** was enacted in the aftermath of the 1976 Supreme Court decision in *General Electric Company v. Gilbert* holding that discrimination on the basis of pregnancy was not sex discrimination, but rather discrimination between pregnant and non-pregnant persons, and thus not covered by the sex discrimination protections of the Civil Rights Act.<sup>20</sup> The 1978 law aimed to specifically prohibit sex discrimination on the basis of pregnancy<sup>21</sup> and provided “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work.” This was clarified in 2007 guidelines issued by the Equal Employment Opportunity Commission (EEOC).

## Workplace Fairness

*An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example...if other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.<sup>22</sup>*

Court decisions have tended to narrow the scope of the PDA. In the case of *Young v. UPS* a federal district court ruled in 2011 that the law did not require UPS to provide Peggy Young, who was a UPS truck driver, with a temporary reassignment to a light duty position so she could avoid lifting heavy packages as prescribed by her doctor. Though the evidence made clear that the company had provided a similar accommodation for employees who suffered on-the-job injuries, and disabled employees covered by the ADA, the court ruled that Young's situation was not comparable, and the UPS policy was "pregnancy-blind." A federal district court of appeals upheld the lower court's ruling on January 9, 2013.<sup>23</sup> However, in an important victory for pregnant workers, on March 25, 2015, the U.S. Supreme Court overturned (by a 6-3 margin) the lower court ruling, finding that employers may not refuse to provide accommodations to pregnant workers based solely on considerations of cost or convenience. On the other hand, the Court did not rule in Ms. Young's favor, but remanded the case back to the appeals court for further proceedings under guidelines contained in its decision. An analysis of the ruling by the National Women's Law Center stated:

*The Supreme Court declined UPS's invitation to read a key piece of the Pregnancy Discrimination Act completely out of the statute books. This decision should put employers on notice that when they exclude pregnant workers with medical needs from accommodations that they make for workers with disabilities or injuries, they do so at their legal peril. Nevertheless, the Court's decision also requires a somewhat unpredictable and fact-intensive analysis of these sorts of pregnancy discrimination claims. As a result, individual pregnant women may still face real uncertainty as to their workplace rights, and individual employers may choose to take their chances in litigation rather than promptly providing accommodations to the women who need them.<sup>24</sup>*

The **Americans with Disabilities Act of 1990** was designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to require employers to make reasonable accommodations for disabled employees as long as the accommodations do not impose an undue hardship on the employer. The key question in interpreting and enforcing the law has been over the determination as to whether an individual alleging discrimination under the act does possess a disability. A series of Supreme Court decisions over the years have generally served to limit the applicability of disability status.<sup>25</sup> According to the National Women's Law Center (NWLC), "Pregnancy itself is not a disability under the ADA—but 'pregnancy-

## Workplace Fairness

related impairments' can be disabilities, if they substantially limit a major activity such as walking, lifting, or digesting." The courts have tended to allow a determination of disability in such cases only if the condition was deemed sufficiently severe, with many pregnancy-related complaints dismissed because they represented temporary conditions.<sup>26</sup> Thus, the original ADA afforded relatively limited redress for pregnant workers.

In response to the court decisions that limited the applicability of the ADA, the Congress enacted the ADA Amendments Act (ADAAA) of 2008 (PL 110-325). Although the measure generally retained the original law's definitions, it provided more detailed guidance on how the definition of disability was to be interpreted, including the instruction that the definition should be construed in favor of broad coverage to the maximum extent permitted by the terms of the act.<sup>27</sup> Of particular importance to pregnancy-related cases, the 2008 legislation brought temporary and less severe impairments under the purview of the ADA. Turning again to the NWLC,

*As a result [of the 2008 amendments] individuals with pregnancy-related impairments such as hypertension, severe nausea, sciatica, or gestational diabetes should now be protected by the ADA, and entitled to reasonable accommodations under the ADA. Unfortunately, very few courts have yet had the opportunity to apply the new ADAAA standard to pregnancy-related impairments. The Equal Employment Opportunity Commission (EEOC) has not specifically addressed employers' obligation to accommodate pregnancy-related impairments beyond noting that pregnancy-related impairments can constitute disabilities. Some employers thus mistakenly conclude that pregnancy-related impairments need not be accommodated under the ADAAA because pregnancy itself is not a disability.<sup>28</sup>*

It had also been hoped that the ADAAA's inclusion of certain temporary disabilities under ADA protection would expand the applicability of the Pregnancy Discrimination Act, which requires that pregnant workers be treated as well as non-pregnant workers who are similar in their ability to work. Thus, when an injured non-pregnant worker is granted an accommodation under ADA because he or she is temporarily unable to lift heavy packages, a pregnant worker should be entitled to similar consideration. Thus far, the courts have not enforced such an interpretation.<sup>29</sup>

**EEOC.** In addition to seeking redress through the court system, victims of pregnancy discrimination may file complaints with the federal EEOC or with state and local Fair Employment Practices Agencies. However, there are limitations in the effectiveness of this source of redress. The level of such complains has risen from 3,977 in FY 1997 to 5,797 in FY 2011.<sup>30</sup> In FY 2014, the EEOC alone received 3,400 complaints, and there were a total of 3,221 "resolutions" of cases (including those carried over from previous years). In well over half of these (59.0%), EEOC found "no reasonable cause to believe that discrimination had occurred" and over one-sixth (18.2%) were closed administratively. Just under a fourth (22.9%) of the cases resulted in "merit resolutions" (defined as outcomes favorable to the

## Workplace Fairness

charging party and/or charges with meritorious allegations, and includes negotiated settlements, withdrawal of charges after receipt of desired benefits and successful and unsuccessful conciliations). A total of \$14.4 million in monetary benefits was obtained for victims of pregnancy discrimination.<sup>31</sup>

**State and local laws.** Laws in fourteen states (AK, CA, CT, DE, HI, IL, LA, MD, MN, NE, NJ, ND, TX and WV) provide for certain types of protections for pregnant workers. CA, DE, HI, IL, MD, MN, NE, NJ, ND and WV laws cover private and public sector employers and require them to provide “reasonable accommodations” for pregnant workers needing such accommodations. The AK and TX statutes apply to public sector employers only and direct them to allow workers to be granted temporary transfers when necessary during pregnancies. CA, CT and LA allow pregnant workers to transfer to a suitable vacant position and require employers to provide reasonable unpaid leave during a temporary, pregnancy-related disability. Since New York City’s adoption of the Pregnant Workers Fairness Act in 2013, significant pregnancy accommodation measures have also been passed in Philadelphia and Pittsburgh, PA, Central Falls and Providence, RI and Washington, DC.<sup>32</sup>

**Polling.** Support for providing job protections for pregnant workers is widespread. In a September 2013 poll for *The Shriver Report*, 87% of all respondents favored (including 67% strongly favor) “protecting pregnant women and new mothers so they can’t get fired or be demoted when they become pregnant or take maternity leave.” Women overall (88% favor, including 68% strongly favor) and unmarried women (90% favor, including 72% strongly favor) reflect the general trend.<sup>33</sup>

## Recent Actions

**1. EEOC Enforcement.** The EEOC Strategic Enforcement Plan FY 2013 – 2016 was issued in December 2012 and identified six national priorities “to ensure that agency resources are targeted to prevent and remedy discriminatory practices where government enforcement is most likely to achieve broad and lasting impact. The Commission anticipates that each of these priorities will require the development of a multi-pronged response to include enforcement, education and outreach, research, and policy development.” The priorities are: eliminating barriers in recruitment and hiring; protecting immigrant, migrant and other vulnerable workers; addressing emerging and developing issues; enforcing equal pay laws; preserving access to the legal system; and preventing harassment through systematic enforcement and targeted outreach.” Within the “addressing emerging and developing issues” priority, the plan cited, as one example, “accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAA) and the Pregnancy Discrimination Act (PDA).”<sup>34</sup>

While acknowledging that “EEOC’s recognition of the importance of pregnancy-related accommodations is a great victory for pregnant workers and a crucial first step,” the



## Workplace Fairness

National Women's Law Center and A Better Balance called for additional action by the Commission.

*In order to follow through on this commitment, given the misapplication and misunderstanding of current legal requirements on the job and in the courts, the EEOC must now issue strong and clear guidance on employers' legal obligation to accommodate pregnant workers. The EEOC should explain to employers, employees, practitioners, and the courts that a duty to accommodate arises based on the interaction between the amended ADA and the PDA: employers have to accommodate employees with limitations arising out of pregnancy just as they would treat those with a similar limitation arising out of disability. It should also clarify that pregnancy-related impairments that rise to the level of disability must be accommodated under the ADA. Finally, the EEOC must prioritize investigations of complaints alleging that pregnant workers have been unlawfully denied accommodations on the job and should bring cases on behalf of these workers—especially given that the low-wage workers at particular risk of harm from denial of pregnancy accommodations have few resources to bring these cases on their own.<sup>35</sup>*

On July 14, 2014, EEOC issued its "Enforcement Guidance: Pregnancy Discrimination and Related Issues," its first comprehensive guidance on the subject since 1983.<sup>36</sup> The guidance

*Updates prior guidance on this subject in light of legal developments over the past thirty years...[and] includes discussions of: when employer actions may constitute unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978 (PDA); the obligation of employers under the PDA to provide pregnant workers equal access to benefits of employment such as leave, light duty, and health benefits; and how Title I of the Americans with Disabilities Act (ADA), which went into effect over a decade after the PDA and was amended in 2008 to broaden the definition of disability, applies to individuals with pregnancy-related impairments.<sup>37</sup>*

In a statement released on the day the new guidance was announced, the National Women's Law Center commented, "Today's EEOC guidance shines a welcome spotlight on an insidious problem in the workplace. All too often, women are forced out of jobs simply because they are pregnant. If a pregnant worker has a medical need for a temporary change of work, too many employers refuse to comply, even as they provide accommodations for workers who need them because of disability or injury. As a result, too many pregnant workers are forced to choose between risking their own health and pregnancy to keep their jobs or losing their income at the moment their families can least afford it...Today's enforcement guidance makes clear that current law provides the solution to this seemingly intractable problem and employers need to abide by it. And it is a wake-up call to employers who force pregnant workers off the job: you are violating the law."<sup>38</sup>

**2. The Pregnant Workers Fairness Act**, which was first introduced in 2012, was re-introduced in the last session of Congress by Rep. Jerrold Nadler (D-NY) in the House (H.R. 1975, which had 142 co-sponsors) and by Sen. Robert Casey (D-PA) in the Senate (S. 942, which had 33 co-sponsors). Both bills were referred to committee upon their introduction on 5/14/13, but no further action occurred on either measure.<sup>39</sup>

The legislation is expected to be re-introduced in the 114<sup>th</sup> Congress in the near future. On March 30, 2015, the U.S. Senate unanimously approved a Casey Amendment to the Budget Resolution (Record Vote#113—Yes: 54 Republicans, 44 Democrats, 2 Independents). The Casey Amendment was based on the Pregnant Workers Fairness Act, and would establish a deficit-neutral reserve fund through which to provide pregnant workers with a right to workplace accommodations, and ensure that employers comply with requirements regarding such accommodations. However, the amendment was not retained in the final version of the budget resolution and was, in any case, not binding.<sup>40</sup>

The Pregnant Workers Fairness Act (PWFA) would

- Require employers to make reasonable accommodations for employees who have limitations stemming from pregnancy, childbirth or a related medical condition, unless the accommodation would impose an undue hardship on the employer;
- Prohibit employers from discriminating against pregnant workers requiring some type of reasonable accommodation;
- Prohibit employers from requiring pregnant employees to accept unwanted changes in their working conditions;
- Prohibit employers from forcing pregnant employees to take paid or unpaid leave when another reasonable accommodation would allow the employee to continue to work;
- Prohibit employers from taking adverse employment actions against an employee requesting or using an accommodation; and
- Direct the EEOC to issue regulations to carry out the act, including the identification of reasonable accommodations addressing known limitations relating to pregnancy, childbirth or related medical conditions.<sup>41</sup>

The existence of clear standards for pregnancy workplace protections can help not only the worker, but the employer as well by limiting the likely recourse to time-consuming administrative and legal actions. For example, there have been fewer pregnancy discrimination lawsuits in California since that state enacted explicit pregnancy accommodation requirements in 1999.<sup>42</sup>

At the June 23, 2014 **White House Summit on Working Families**, President Obama announced his support for the Pregnant Workers Fairness Act, stating, “21<sup>st</sup> century families deserve 21<sup>st</sup> century workplaces...It means treating pregnant workers fairly, because too many are forced to choose between their health and their job. Right now, if you’re pregnant you could potentially get fired for taking too many bathroom breaks or forced [into] unpaid leave. That makes no sense.”<sup>43</sup> In addition, the President directed the Department of Labor to provide pregnant workers with better information about their rights by providing

*a new online map that will be a one-stop shop where working families can learn about the rights of pregnant workers in each state. The map will also allow families to see which states are leading the charge in protecting their rights and which are lagging behind. This live map will continue to reflect any future changes in state and federal policy.*<sup>44</sup>

(The DOL online map is available at <http://www.dol.gov/wb/map/>)

## Family and Medical Leave and Sick Pay

### Background

*“Since Congress passed the Pregnancy Discrimination amendments in 1978, if not before, the feminist legal community had been acutely aware that traditional maternity-leave programs were woefully inadequate. First, they were state- or employer-specific: there was no national policy; indeed the United States stood alone among industrialized nations in not guaranteeing women their jobs after they had babies. Second, maternity-only leave programs might run afoul of principles of equality for which we had fought dearly. And finally, such programs did not address women’s (and men’s) needs for family leave beyond periods of childbirth-related disability. The opportunity for the establishment of comprehensive, gender-neutral family and medical leave on a national basis came in 1984 when a federal district court struck down California’s maternity leave law as sex discrimination against men...The FMLA was conceived both as a way of ensuring that women would not lose their job when newborns’ care or other family caregiving responsibilities took them out of the workforce temporarily and as a way to establish protections that would apply equally to women and men who were dealing with certain family circumstances or serious personal health conditions. The FMLA’s gender neutrality was built in so that the act would pass muster legally; women would not be the only ones taking time off from work to care for new children or seriously ill relatives, and employers would not have women’s need to take leave time as an excuse not to hire or promote them. The best way of accommodating these concerns was to create a new minimum labor standard applicable to male and female employees equally.”*

## Workplace Fairness

--Donna R. Lenhoff and Lissa Bell, *National Partnership for Women & Families, "Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study."*<sup>45</sup>

What became the **Family and Medical Leave Act (FMLA)** was first developed in 1984, but it was not enacted until the beginning of the 103<sup>rd</sup> Congress in 1993, with newly elected President Bill Clinton signing it into law as PL 103-3 on February 3, 1993. In brief, the law entitles eligible employees to take unpaid, job-protected leave for specified family and medical reasons. More specifically, it applies only to employers who: a) are in the private sector and employ 50 or more workers in 20 or more workweeks in the current or preceding calendar year; b) are any federal, state or local government agency; or c) are public or private elementary or secondary schools.

To be eligible for FMLA benefits, a worker must: a) work for a covered employer for at least 12 (not necessarily consecutive) months; b) have accrued at least 1,250 hours of service (excluding any paid or unpaid leave time) for the employer during the 12 months immediately preceding the leave; and c) work at a location where the employer has at least 50 employees within 75 miles.

Eligible employees are entitled under the law to take up to 12 workweeks of leave in a 12-month period for one or more of the following:

- The birth of a child, care for a newborn child within one year of birth, or placement of a child with the employee for adoption or foster care.
- Care for a spouse,<sup>46</sup> child, or parent who has a serious health condition.
- Care for the employee's own serious health condition (including maternity-related disability) that makes them unable to perform the essential functions of their job.<sup>47</sup>

In addition, FMLA coverage extends to certain cases involving domestic violence. According to the Department of Labor's Wage and Hour Division, "FMLA leave may be available to address health-related issues resulting from domestic violence. An eligible employee may take FMLA leave because of his or her own serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence. For example, an eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence."<sup>48</sup>

In some circumstances, eligible employees may take their leave in separate blocks of time or by reducing their daily or weekly work hours, and under certain conditions, employees may choose, or employers may require employees, to substitute paid leave accrued under their terms of employment.<sup>49</sup>

## Workplace Fairness

A June 2012 survey of employers and workers commissioned by the Department of Labor indicated that *59% of workers met FMLA's eligibility requirements*. Other highlights pointed to both successes and limitations of the current law.

- Just 17% of worksites reported they are covered by the FMLA (but 30% were unsure).
- 66% of all employees had heard of FMLA (71% at covered worksites, 53% at uncovered worksites).
- 13% of all employees had taken leave for an FMLA-qualifying reason in the previous year (the same proportion as in a similar 2000 survey).
- 55% of the leave taken was for the employee's own illness, whereas 21% was for pregnancy or a new child and 18% was for illness of a spouse, child or parent.
- 42% of all leave was for 10 days or less, while just 17% was for more than 60 days.
- 48% of workers on leave reported receiving full pay, and 17% received partial pay (primarily through regular paid vacation leave, sick leave or other "paid time off" hours).
- Only 5% of all employees reported that they needed leave but were unable to take it over the preceding year, but this rate was double the reported rate in 2000. Furthermore, 46% of those citing an unmet need indicated that the inability to afford it was the reason they didn't take leave.
- Just 15% of all covered worksites reported difficulty in complying with FMLA (1% very difficult, 14% somewhat difficult), with 32% of larger worksites indicating some degree of difficulty (3% very difficult, 29% somewhat difficult). And less than 10% of all covered worksites reported negative effects from FMLA on "employee productivity, absenteeism, turnover, career advancement, and morale, as well as the business's profitability."

The authors of the survey report concluded, "It appears that employees' use of leave and employers' granting and administration of leave, have achieved a level of stability. Employees actively make use of the intended benefits established by the Act, but appear to have limited knowledge of what the Act specifically entails and covers. At the same time, most employers report that complying with the FMLA imposes minimal burden on their operations, although a subset of employers reported difficulty complying."<sup>50</sup>

In spite of its limitations, it is estimated that women and men have made use of the FMLA over 200 million times since its enactment in 1993 in order to provide care for themselves or their families.<sup>51</sup>

## Workplace Fairness

A cross-national comparison of the United States and sixteen other high-income countries<sup>52</sup> reported all countries but the U.S. provide legal entitlement to paid leave for at least a portion of job-protected leave.<sup>53</sup> A March 2014 survey by the Bureau of Labor Statistics found that just 37% of the U.S. workforce had access to paid personal medical leave for serious illnesses through employer-provided temporary disability insurance programs. The figure was even lower for certain professions in which women predominate (for example, 20% for primary, secondary and special education teachers, and 21% for service industry workers) and for low-income workers (13% for those in the lowest 10% of wages received).<sup>54</sup> Furthermore, only 13% of all workers (18% of primary, secondary and special education teachers, just 7% of service industry workers) had access to paid family leave through their employers, with the rate again lower among low-wage workers (4% of those in the lowest 10% of wages received).<sup>55</sup> Lastly, only 11% of all workers (11% of primary, secondary and special education teachers and 8% of service industry workers) had access to workplace programs that provide for either the full or partial cost of childcare for the employee's children, and 6% (1% of primary, secondary and special education teachers, and 1% of service industry workers) were in workplaces with flexible scheduling.<sup>56</sup>

Given the increasing importance of women, including unmarried women, to family incomes, the inadequacies in current U.S. family leave policy are particularly problematic. As reported by the Center for American Progress,

*At present, women are more likely than men to leave a job or shift from full-time to part-time work when a new child arrives. Women are also more likely to leave a job or make the shift from full- to part-time work in order to provide ongoing care to an elderly, ailing parent...Rather than forcing workers to reduce their hours (if that is even possible with their employer) or leave their job altogether, paid family and medical leave would enable these workers to provide care for those in need while still allowing them to return to work once they were able...National data consistently show that any form of parental leave, paid or unpaid, makes women more likely to return to work after giving birth. Among new mothers who worked while pregnant and were able to take paid leave, 9 in 10 (87.4 percent) returned to work within one year after giving birth. In contrast, among new mothers who quit their jobs, just less than half (48.2 percent) returned to work within a year, and among new mothers who were let go, more than half (55.7 percent) returned to work within a year. On top of these benefits, mothers who were able to take paid leave after the birth of their first child also have present-day wages...that are 9 percent higher than other mothers, even after controlling for personal and job-related variables.<sup>57</sup>*

With their combined economic and care-giving responsibilities, working women are particularly impacted by the absence of paid sick and family care leave. Fully forty-three percent (43%) of women working in the private sector are unable to take a single day of paid sick leave, and 54% of all working mothers have less than five paid sick days per year for use in caring for their sick children. In a 2007 survey, 20% of women with children indicated they or a family member had been fired or disciplined by an employer for taking

## Workplace Fairness

time off to care for their own illness or that of a sick child or other family member.<sup>58</sup> For families with children headed by a single parent (the vast majority of whom are female) the effects of unpaid sick leave are especially severe. An absence from work of just four days in a month would place a two-child family with a single parent earning the average wage for workers without paid sick leave (\$10 an hour) below the federal poverty line.<sup>59</sup>

A study for the Rutgers University Center for Women and Work found that paid family leave programs increase labor force participation rates and decrease reliance on public assistance programs.<sup>60</sup> The White House Council on Economic Advisers reported that a survey of employers impacted by California's paid family leave program found the "vast majority" reported either a positive or minimal effect on profitability, turnover and morale, and a survey of Connecticut employers revealed that their employees "did not abuse the [paid sick leave] policy by taking unnecessary sick leave...[and] about two-thirds of employers reported no increase in cost (47 percent) or an increase of less than 2 percent (19 percent) [from implementing the program]."<sup>61</sup>

**State and local laws.** A total of 11 states (CA, CT, HI, ME, MN, NJ, OR, RI, VT, WA, WI) and the District of Columbia) have adopted laws that expand upon the federal FMLA, generally by increasing the amount of leave available or the categories of persons for whom leave may be taken.<sup>62</sup> California (in 2002), New Jersey (2008) and Rhode Island (2013) have enacted laws for paid family leave insurance to provide partial pay to workers for maternity leave or to care for a seriously ill family member. In all three cases, the program is part of the state's existing temporary disability insurance program, and workers finance it through small employee payroll deductions. Only the Rhode Island law provides job protection for those who take advantage of the program. The state of Washington passed a paid family leave law covering care after the birth or adoption of a child, but budgetary constraints have delayed implementation until the fall of 2015 at the earliest.<sup>63</sup> In 2011, Connecticut became the first state with a law providing workers an opportunity to earn paid sick leave.<sup>64</sup> On September 10, 2014, the State of California adopted a new law (which goes into effect on 7/1/15) allowing workers to accrue sick pay,<sup>65</sup> and voters in Massachusetts approved a similar ballot initiative in November 2014, making that state the third with a paid sick leave policy. The municipalities of Oakland, CA, Montclair, NJ and Trenton, NJ also adopted paid sick leave in the November 2014 General Election (with the Oakland measure providing more generous benefits than the statewide law),<sup>66</sup> and joined a number of other municipalities in guaranteeing this right, including Oakland, CA; San Francisco, CA; Washington, DC; Bloomfield, NJ; East Orange, NJ; Irvington, NJ; Jersey City, NJ; Montclair, NJ; Newark, NJ; Passaic, NJ; Paterson, NJ; Trenton, NJ; New York City, NY; Eugene, OR; Portland, OR; Philadelphia, PA; Seattle, WA; and Tacoma, WA.<sup>67</sup>

**Polling.** Approximately 90% of Americans believe that the provision of paid sick and family and medical leave would be helpful in improving workers' lives. Specifically, a September 2013 survey for *The Shriver Report* asked respondents how useful certain workplace policies

would be in bettering the lives of employees. Ninety-one percent (91%) indicated that “providing up to ten days a year of paid time off if you are sick or have to take care of a family member” would be useful, with fully 78% responding that it would be very useful. Support was a bit stronger among women overall (93% useful, including 82% very useful) and unmarried women (93% useful, including 84% very useful). Similarly, 91% answered that “providing workers with paid time off after the birth of a child, to care for a seriously ill family member, or to recover from their own serious illness” would be useful (including 74% very useful), with women (93% useful, including 78% very useful) and unmarried women (94% useful, including 73% very useful) again slightly more affirmative.<sup>68</sup> More recently, a January 2015 survey by Lake Research Partners found that 88% of voters favor ensuring that all workers are able to earn paid sick days to care for themselves or family members, and 79% support requiring employers to provide paid sick days.<sup>69</sup>

## Recent actions

**1. The Healthy Families Act** was introduced on 2/20/15 by Rep. Rosa DeLauro (D-CT) in the House (H.R. 932, which has 109 co-sponsors as of 6/2/15) and by Sen. Patty Murray (D-WA) in the Senate (S. 497, which has 26 co-sponsors as of 6/2/15). Both bills were referred to committee but no further action has been taken on either bill.<sup>70</sup> On March 26, 2015, the U.S. Senate approved a Murray Amendment to the Budget Resolution by a vote of 61-39 (Record Vote#98—Yes: 15 Republicans, 44 Democrats, 2 Independents; No: 39 Republicans). The Murray Amendment was based on the Healthy Families Act, and would establish a deficit-neutral reserve fund through which to provide for legislation allowing Americans to earn paid sick time. However, the amendment was not retained in the final version of the budget resolution and was, in any case, not binding.<sup>71</sup>

The Healthy Families Act would establish a national standard for sick pay by:

- Requiring employers of 15 or more employees to permit workers to earn up to seven job-protected paid sick leave days per year (and requiring smaller employers to permit workers to earn up to seven unpaid sick days per year);
- Authorizing the use of such paid sick leave to recover from their own illness or seek preventive care for themselves; care for the medical needs of family members; attend school meetings related to a child’s health condition or disability; or seek medical attention, assist a related person, take legal action or provide other assistance in cases of domestic violence, sexual assault or stalking;
- Establishing a simple method for calculating accrued sick time under which workers earn a minimum of one hour of paid sick time for every 30 hours worked, up to 56 hours (seven days) per year, unless the employer sets a higher limit;



## Workplace Fairness

- Permitting employers to require certification of an employee's absence if the employee uses more than three paid sick days in a row (with law enforcement officers or victim advocates authorized to provide such certification in cases of domestic violence); and
- Allowing employers to use their existing policies, as long as they meet the minimum standards contained in the act.<sup>72</sup>

The benefits of providing paid sick days include enhancing the economic security of families (with 23% of adults in the U.S. reporting a job loss or threat of job loss for taking sick leave), reducing the practice of “presenteeism” (working while sick) – estimated to cost the economy \$160 billion a year in lost productivity, and decreasing health care costs (with an estimated saving of \$1.1 billion a year from reductions in emergency room visits).<sup>73</sup> Additional savings would result from reduced workplace contagion (adults without paid sick leave are 1.5 times more likely to go to work with contagious diseases than those with paid sick leave) and fewer workplace injuries (workers who have access to paid sick leave are 28% less likely to be injured on the job than those without such access).<sup>74</sup>

**2. The Family and Medical Insurance Leave Act** was introduced on 3/18/15 by Rep Rosa DeLauro (D-CT) in the House (H.R. 1439, which has 91 co-sponsors as of 6/2/15), and Sen. Kirsten Gillibrand (D-NY) in the Senate (S. 786, which has 13 co-sponsors as of 6/2/15). Both bills were referred to committee but no further action has been taken on either bill.<sup>75</sup>

**H.R. 1439/S. 786** contain the following major provisions.

- Extend coverage to workers regardless of the size of the company they work for (because funds are not tied to specific employers), with eligibility extended to all workers who qualify for Social Security disability benefits, even if they are young, part-time or low-wage.
- Provide eligible employees with up to 12 weeks of paid leave for their own serious health condition, including pregnancy or childbirth; the serious health condition of a child, parent or spouse (including a domestic partner); the birth or adoption of a child; the injury of a family member in the military; or dealing with circumstances arising from a service member's deployment.
- Insure individuals for benefits equal to 66 percent of their typical monthly wages, up to a capped monthly maximum, with the costs paid through a self-sustaining national insurance fund financed by employee and employer payroll contributions of two-tenths of one percent of a worker's wages.<sup>76</sup>

The benefits of establishing a national paid leave program span a range of economic, health and other gains, including the following.

## Workplace Fairness

- Increases income stability for families with newborns. (At present 13% of such families report becoming poor within a month of the birth.)
- Encourages greater workforce attachment (with new mothers who utilize paid leave more likely than other mothers to be employed within 9-12 months following birth).
- Promotes financial independence. (In the year after a birth, new mothers who take paid leave are 54% more likely to report wage increases and 39% less likely to need public assistance than those who do not.)
- Contributes to improved health for newborns and other children. (An extra 10 weeks of paid leave reduces post-neonatal mortality by up to 4.5%.<sup>77</sup>)

**3. White House initiatives.** At the June 23, 2014 White House Summit on Working Families, it was announced that the Department of Labor would be providing Paid Leave Analysis Grants to up to five states “to conduct research and feasibility studies that could support the development or implementation of state paid leave programs...The selection process will give priority to states that can demonstrate commitment to building a knowledge base needed to implement paid leave programs.”<sup>78</sup> On January 15, 2015, President Obama built on that initiative by announcing a series of steps to boost paid leave for American workers:

- Called on Congress to pass the Healthy Families Act.
- Encouraged states and localities to adopt their own paid sick leave laws, and proposed \$2.2 billion in his FY 2016 budget to reimburse up to five states for three years for the administrative costs and approximately half of the benefit costs associated with implementing a paid sick leave program. His FY 2016 budget also included \$35 million in competitive grants to assist states in creating the necessary administrative structure to launch paid leave programs in the future.
- Used existing funds to provide \$1 million in funding for competitive grants to states and municipalities for conducting paid leave feasibility studies.
- Proposed legislation to provide six weeks of paid administrative leave to federal workers for birth, adoption or foster placement of a child.
- Signed a Presidential memorandum directing federal agencies to allow for the advance of six weeks of paid sick leave for parents with a new child, employees caring for ill family members, and any other sick leave-eligible uses, even if the employee has not yet accrued that amount of sick leave.<sup>79</sup>

<sup>1</sup> As of 2014, 51.0% of women 15 years and older (66.3 million out of 129.9 million) were unmarried (widowed, divorced, separated or never married). Census Bureau, “America’s Families and Living Arrangements: 2014, Table A1. Marital Status of People 15 Years and Over, by Age, Sex, Personal Earnings, Race, and Hispanic Origin, 2014,” January 2015, <http://www.census.gov/hhes/families/data/cps2014.html>.

<sup>2</sup> Liz Weiss and Page Gardner, “Advancing the Economic Security of Unmarried Women,” March 2010, pp. 1, 3; [http://www.americanprogress.org/wp\\_content/uploads/issues/2010/03/pdf/unmarried\\_women.pdf](http://www.americanprogress.org/wp_content/uploads/issues/2010/03/pdf/unmarried_women.pdf).

<sup>3</sup> Bureau of Labor Statistics, “Women in the Labor Force: A Databook, Table 2. Employment status of the civilian noninstitutional population 16 years and older by gender, 1948-2013 annual averages,” December 2014, <http://www.bls.gov/opub/reports/cps/women-in-the-labor-force-a-databook-2014.pdf>.

<sup>4</sup> Bureau of Labor Statistics, “The Employment Situation—April 2015, Table A-1. Employment status of the civilian population by sex and age,” May 8, 2015, <http://www.bls.gov/news.release/pdf/empst.pdf>.

<sup>5</sup> Bureau of the Census, “Statistical Abstract of the United States: 2012,” Table 598. Marital Status of Women in the Civilian Labor Force: 1970 to 2010, <http://www.census.gov/compendia/statab/2012/tables/12s0597.pdf>.

<sup>6</sup> Bureau of Labor Statistics, “Women in the Labor Force: A Databook, Table 4. Employment status, by marital status and gender, 2013 annual averages,” December 2014, <http://www.bls.gov/opub/reports/cps/women-in-the-labor-force-a-databook-2014.pdf>.

<sup>7</sup> National Women’s Law Center and A Better Balance, “It shouldn’t be a heavy lift: fair treatment for pregnant workers,” June 18, 2013, p. 3, [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_worker](http://www.nwlc.org/sites/default/files/pdfs/pregnant_worker).

<sup>8</sup> Sarah Jane Glynn, “Breadwinning Mothers, Then and Now,” Center for American Progress, June 2014, p. 4, <http://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf>.

<sup>9</sup> Wendy Wang, Kim Parker and Paul Taylor, “Breadwinner Moms,” Pew Research Center, May 29, 2013, pp. 1, 4-5, [http://www.pewsocialtrends.org/files/2013/05/Breadwinner\\_moms\\_final.pdf](http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf).

<sup>10</sup> Sarah Jane Glynn, “Breadwinning Mothers, Then and Now,” Center for American Progress, June 2014, pp. 6, 8, 11-12, <http://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf>.

<sup>11</sup> D’Vera Cohn, Gretchen Livingston and Wendy Wang, “After Decades of Decline, A Rise in Stay-at-Home Mothers,” Pew Research Center’s Social & Demographic Trends project, April 2014, pp. 5-7, 13-14, [http://www.pewsocialtrends.org/files/2014/04/Moms-At-Home\\_04-08-2014.pdf](http://www.pewsocialtrends.org/files/2014/04/Moms-At-Home_04-08-2014.pdf).

<sup>12</sup> National Women’s Law Center and A Better Balance, “It shouldn’t be a heavy lift: fair treatment for pregnant workers,” June 18, 2013, p. 3, [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_worker](http://www.nwlc.org/sites/default/files/pdfs/pregnant_worker).

<sup>13</sup> Centers for Disease Control and Prevention, “Births: Final Data for 2013,” National Vital Statistics Reports, Volume 64, number 1, January 15, 2015, p. 2, [http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf).

<sup>14</sup> Ann O’Leary, “Marriage, Motherhood, and Men,” in *The Shriver Report: A Woman’s Nation Pushes Back from the Brink*, January 2014, Rosetta Books.

<sup>15</sup> National Women’s Law Center and A Better Balance, “It shouldn’t be a heavy lift: fair treatment for pregnant workers,” June 18, 2013, pp. 5-10, [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_worker](http://www.nwlc.org/sites/default/files/pdfs/pregnant_worker).

<sup>16</sup> National Partnership for Women & Families, “Expecting and New Mothers Face Avoidable Challenges in the Workplace, Survey Shows,” January 30, 2014, <http://www.nationalpartnership.org/news-room/press-releases/expecting-and-new-mothers-face-avoidable-challenges-in-the-workplace-survey.html>.

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- <sup>23</sup> Annamarya Scaccia, “The Face of Pregnancy Discrimination,” RH Reality Check, May 1, 2013, <http://rhrealitycheck.org/article/2013/05/01/the-face-of-pregnancy-discrimination/>
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<sup>33</sup> "The Shriver Report/CAP/AARP Frequency Questionnaire," [http://www.americanprogress.org/wp-content/uploads/2014/01/Women\\_fq.pdf](http://www.americanprogress.org/wp-content/uploads/2014/01/Women_fq.pdf); and "Open Field Foundation," [http://www.americanprogress.org/wp-content/uploads/2014/01/OpenField\\_bbk\\_091113\\_supplement\\_GenderRaceUNWT.pdf](http://www.americanprogress.org/wp-content/uploads/2014/01/OpenField_bbk_091113_supplement_GenderRaceUNWT.pdf).

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<sup>36</sup> U.S. Equal Employment Opportunity Commission, "Enforcement Guidance: Pregnancy Discrimination and Related Issues," July 14, 2014, [http://www1.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm?renderforprint=1](http://www1.eeoc.gov/laws/guidance/pregnancy_guidance.cfm?renderforprint=1).

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<sup>43</sup> White House, "Remarks by President Obama at the White House Summit on Working Families, June 23, 2014," <http://www.whitehouse.gov/the-press-office/2014/06/23/remarks-president-obama-white-house-summit-working-families-june-23-2014>.

<sup>44</sup> White House, "Fact Sheet: The White House Summit on Working Families," June 23, 2014, <http://www.whitehouse.gov/the-press-office/2014/06/23/fact-sheet-white-house-summit-working-families>.

<sup>45</sup> Donna R. Lenhoff and Lissa Bell, National Partnership for Women & Families, "Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study," <http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf>.

<sup>46</sup> On February 23, 2015, the U.S. Department of Labor announced a rule change under which workers in legal, same-sex marriages are entitled to the same rights as those in separate-sex marriages to job-protected leave under the FMLA to care for a spouse with a serious health condition. U.S. Department of Labor, “Federal job-protected family and medical leave rights extended to eligible workers in same-sex marriages,” press release, February 23, 2015, <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20150223.xml>.

<sup>47</sup> Amendments to the FMLA in 2008 and 2009 made special provisions for coverage and benefits for family members of regular and reserve members of the armed forces. Congressional Research Service, “The Family and Medical Leave Act: Current Legislative Activity,” February 14, 2011, p. 1, [http://assets.opencrs.com/rpts/RL31760\\_20110214.pdf](http://assets.opencrs.com/rpts/RL31760_20110214.pdf).

<sup>48</sup> U.S. Department of Labor, Wage and Hour Division, “FMLA Frequently Asked Questions.” Accessed on 12/18/13 at <http://www.dol.gov/whd/fmla/fmla-faqs.htm>.

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