

---

## A Unique Path to Nationwide Paid Family and Medical Leave: Through the U.S. States

Yan Goodwin

Follow this and additional works at: <https://via.library.depaul.edu/law-review>



Part of the [Law Commons](#)

---

### Recommended Citation

Yan Goodwin, *A Unique Path to Nationwide Paid Family and Medical Leave: Through the U.S. States*, 72 DePaul L. Rev. 107 (2023)

Available at: <https://via.library.depaul.edu/law-review/vol72/iss1/6>

This Article is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# A UNIQUE PATH TO NATIONWIDE *PAID* FAMILY AND MEDICAL LEAVE: THROUGH THE U.S. STATES

## I. INTRODUCTION

The United States (U.S.) is the “only industrialized country in the world” that does not have a national *paid* family and medical leave (PFML) system.<sup>1</sup> The federal Family and Medical Leave Act (FMLA), passed in January 1993, provides only *unpaid* family and medical leave to just over half of the U.S. workforce.<sup>2</sup> Without PFML, American workers are forced to choose between paychecks and health.<sup>3</sup> To help American workers strike a balance between life and work, federal and state legislators have proposed and enacted laws related to PFML.<sup>4</sup> However, there has yet to be any major success on the federal level even though there is strong public support for national PFML.<sup>5</sup> While on the state level, as of the date of this Article, thirteen states and the District of Columbia have passed PFML or alternative legislation, with more states actively considering the same.<sup>6</sup> In light of the success of passing PFML legislation on the state level,

---

1. See Emery Winter, *Yes, the US is the only ‘industrialized country’ to not guarantee paid family leave*, ABC10, <https://www.abc10.com/article/news/verify/government-verify/paid-family-maternity-leave-united-states-one-of-handful-countries-without-guarantee/536-d24f5921-835a-4c48-ae90-a0bbb00c5b77> (Nov. 4, 2021, 12:13 PM) (emphasis added); see also *Paid Family & Medical Leave*, A BETTER BALANCE, <https://www.abetterbalance.org/our-issues/paid-family-medical-leave/> (last visited Nov. 12, 2022).

2. See 29 U.S.C. § 2612(c) (emphasis added); see also *History of the FMLA*, NAT’L P’SHIP FOR WOMEN & FAMS., <https://www.nationalpartnership.org/our-work/economic-justice/family-medical-leave-act/history-of-the-fmla.html> (last visited Nov. 13, 2022); see also Michelle Long & Usha Ranji, *Universal Paid Family and Medical Leave Under Consideration in Congress*, KAISER FAM. FOUND. (Oct. 1, 2021), <https://www.kff.org/policy-watch/universal-paid-family-medical-leave-under-consideration-congress/>.

3. See, e.g., *Paid Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 17, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/paid-leave-in-u-s/>.

4. *Id.*

5. See Long & Ranji, *supra* note 2.

6. See *States With Paid Family Leave*, THE STANDARD, <https://www.standard.com/employer/products-services/insurance-benefits/states-paid-family-leave> (last visited Nov. 12, 2022) (PFML programs in California, Connecticut, Massachusetts, New Jersey, New York, Rhode Island, Washington, and Washington D.C. are in force; PFML programs in Oregon, Colorado, New Hampshire, Maryland, Delaware have been passed but not yet in force; and South Carolina has passed paid parental leave, effective Oct. 1, 2022).

the U.S. may need to take a different path toward achieving a nationwide PFML system.

Part II of this Article identifies the subject of this Article and introduces where the U.S. stands on the federal and state levels regarding the PFML legislation.<sup>7</sup> Part III of this Article argues that the federal PFML legislation is far from being passed due to historical, economic, and political reasons.<sup>8</sup> The Article then proposes a reasonable approach for the U.S. to push the PFML legislation nationwide—through the states.<sup>9</sup> Thereafter, the Article compares and discusses the significant aspects of the existing PFML policies in the states, including the reasons for taking PFML, the definitions of “family,” the maximum lengths of PFML, the employee eligibility requirements, the funding methods, the types of employers covered, the benefit amounts, and the job protections while on leave, to help further push forward the state PFML legislation.<sup>10</sup> Part IV of this Article discusses the impact of the Author’s analyses and proposals.<sup>11</sup> Part V of the Article concludes and summarizes the arguments.<sup>12</sup>

## II. BACKGROUND

As part of employee benefits, family and medical leave serves as an incentive to maintain a healthy and productive workforce.<sup>13</sup> Generally, employee leave benefits in the U.S. include three main categories of leave: “sick leave, family leave, and medical leave.”<sup>14</sup> Sick leave refers to a short-term absence.<sup>15</sup> An employee is eligible for short-term sick leave after having worked for an employer for a certain amount of time.<sup>16</sup> On the other hand, family and medical leave refers to a long-term absence taken by an employee to care for his or her family and himself or herself due to severe illness.<sup>17</sup> This Article focuses on the family and medical leave only, particularly, the *paid* family and medical leave.

---

7. *See infra* Part II.

8. *See infra* Part III.A.

9. *See infra* Part III.B.

10. *See infra* Part III.B.1–8.

11. *See infra* Part IV.

12. *See infra* Part V.

13. Caroline M. Gelinne, *A Trip Down Legislative Memory Lane: How the FMLA Charts a Path for Post-COVID-19 Paid Leave Reform*, 62 B.C. L. REV. 2515, 2524 (2021).

14. *Id.* at 2522.

15. *Id.* at 2522–23.

16. *Id.*

17. *Id.*

A. *Where PFML Stands on the Federal Level.*

Federally, the FMLA is the only major piece of legislation that provides family and medical leave in the U.S., under which eligible employees are entitled to up to twelve weeks of job-protected unpaid leave to care for a new child, to care for their children, spouse, or parent with a severe health condition, or to attend to one's own serious medical condition.<sup>18</sup> “[A]s the first gender neutral family and medical leave benefits package,” FMLA was introduced to Congress six times and vetoed twice by the President before it was finally signed into law.<sup>19</sup> FMLA covers private-sector employers with a minimum of fifty employees and public agencies of all sizes.<sup>20</sup> Eligible employees include those who have worked for the covered employers for at least twelve months and for at least 1,250 hours during the twelve months immediately preceding the commencement of the leave.<sup>21</sup> Due to hesitancy from policymakers and pressure from business interests, FMLA did not include the wage replacement benefit, which resulted in its failure to cover a substantial number of American families.<sup>22</sup> The most recent FMLA surveys reveal that only ten percent of the employers in the private sector “are large enough to be covered by FMLA,” “56 percent of U.S. employees are eligible for FMLA,” “15 percent of U.S. employees report taking leave for a qualifying FMLA reason,” and “[t]wo-thirds (67 percent) of employees who receive partial or no pay while on leave report experiencing financial difficulty in making ends meet.”<sup>23</sup> Since the passage of FMLA, people have expected the wage replacement benefit to be added to FMLA at some point.<sup>24</sup> However, almost thirty years have passed, and except for

---

18. See 29 U.S.C. § 2612(a)–(c).

19. See, e.g., Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 84 (2004).

20. See 29 U.S.C. § 2611(4); see also *The Employee's Guide to The Family And Medical Leave Act*, U.S. DEP'T OF LAB. 2, <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/employeeguide.pdf> (noting that “public agencies” include local, state, and federal employers as well as elementary and secondary schools).

21. See 29 U.S.C. § 2611(2)(A).

22. See Gelinne, *supra* note 13, at 2530; see also Thompson, *supra* note 19, at 86; See also K. Nicole Harms, *Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's New Paid Family Leave Law*, 10 WM. & MARY J. WOMEN & L. 69, 73 (2003).

23. Scott Brown et al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Executive Summary for Results from the 2018 Surveys*, ABT ASSOCS. (Jul. 2020), [https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHd\\_FMLA2018SurveyResults\\_ExecutiveSummary\\_Aug2020.pdf](https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHd_FMLA2018SurveyResults_ExecutiveSummary_Aug2020.pdf).

24. Megan A. Sholar, *The History of Family Leave Policies in the United States*, THE AM. HISTORIAN (2016), <https://www.oah.org/tah/issues/2016/november/the-history-of-family-leave-policies-in-the-united-states/>.

some minor amendments, there have been no major changes to the FMLA.<sup>25</sup>

The Family and Medical Insurance Leave (FAMILY) Act is one of the most prominent federal proposals for a national paid leave program.<sup>26</sup> It proposed an advanced social insurance program providing the PFML benefit, which would be financed through a payroll tax.<sup>27</sup> The FAMILY Act would be compatible with FMLA as employees would be qualified for the PFML benefit under the FAMILY Act if they are entitled to leave for a qualifying reason under FMLA.<sup>28</sup> The FAMILY Act would provide a maximum payment period of sixty days, excluding the five-day waiting period if applicable.<sup>29</sup> Under the FAMILY Act, the PFML benefit amount would be the greater of: (1) 1/18 of an employee's yearly income based on the employee's highest yearly income within the last three years; or (2) the predetermined minimum benefit amount multiplied by a calculated quotient that is not greater than one.<sup>30</sup> The monthly benefit would not exceed \$4,000 or fall below \$580 and be subject to a yearly adjustment.<sup>31</sup> Significantly, the FAMILY ACT would not preempt any existing state legislation concerning PFML.<sup>32</sup> Rather, the benefit received under the FAMILY Act would be reduced on account of receipt of certain state benefits and would coordinate in a manner with the benefits received from temporary disability insurance or family leave insurance programs under the existing states' PFML policies.<sup>33</sup> Notably, the FAMILY Act was introduced for consideration three times but stalled twice in Committee.<sup>34</sup> After the FAMILY Act was introduced for the third time in February 2021, it was referred to the Committees of Jurisdiction for consideration.<sup>35</sup>

The lack of national PFML has made the COVID-19 pandemic more difficult for families.<sup>36</sup> In response to the pandemic, Congress

---

25. *Id.*

26. See generally S. 248, 117th Cong. § 1 (2021); see also Kathleen Romig & Kathleen Bryant, *A National Paid Leave Program Would Help Workers, Families*, *CTR. ON BUDGET AND POL'Y PRIORITIES* (Apr. 27, 2021), <https://www.cbpp.org/research/economy/a-national-paid-leave-program-would-help-workers-families>.

27. See S. 248, 117th Cong. § 6; see also Romig & Bryant, *supra* note 26.

28. See S. 248, 117th Cong. § 2(6).

29. *Id.* § 2(10).

30. *Id.* § 4(b)(1).

31. *Id.* § 4(b)(2).

32. *Id.* § 4(g).

33. *Id.* § 4(b)(4)–(5).

34. See *FAMILY Act*, WIKIPEDIA, [https://en.wikipedia.org/wiki/FAMILY\\_Act](https://en.wikipedia.org/wiki/FAMILY_Act) (last visited Mar. 31, 2022).

35. *Id.*

36. See Gelinne, *supra* note 13, at 2516.

passed the Families First Coronavirus Response Act (FFCRA) with strong bipartisan support.<sup>37</sup> Although temporary and limited only to COVID-19-related reasons, FFCRA is the first federally recognized paid leave program.<sup>38</sup> FFCRA provides a historic opportunity and moves the U.S. a step closer to enacting a permanent federal PFML law.<sup>39</sup> FFCRA provided up to twelve weeks of paid sick, family, and medical leave to those caring for a child due to school or daycare center closings impacted by COVID-19, and provided up to eighty hours of leave for other reasons due to COVID-19.<sup>40</sup> Covered employers who provided eligible employees with paid sick leave would be reimbursed through refundable tax credits.<sup>41</sup> FFCRA was only temporary and expired on December 31, 2020, with the tax credits extended through September 30, 2021, following the enactment of the American Rescue Plan Act (ARPA).<sup>42</sup>

The COVID-19 pandemic indeed renewed the public's interest in national PFML legislation.<sup>43</sup> The Biden administration has attempted to create a national PFML program that will permanently fill the gap of FMLA.<sup>44</sup> Biden's American Families Plan (AFP) promised to ensure that workers in U.S. receive wage replacement, compensating them for the time taken to bond with their newborns, care for their seriously ill families, deal with family situations due to a family member's military deployment, "find safety from sexual assault, stalking, or domestic violence, heal from their serious illness," or deal with their family member's death.<sup>45</sup> It would guarantee twelve weeks of PFML by the tenth year after implementing the program and give workers three days of bereavement leave per year starting in the first year.<sup>46</sup> The program would provide workers with up to \$4,000 a month when they take paid leave, but no lower than two-thirds of average

---

37. See generally Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 57677-01 (Sept. 16, 2020) (to be codified at 29 C.F.R. pt. 826); see also Romig & Bryant, *supra* note 26.

38. *Id.*; see also Gelinne, *supra* note 13, at 2519.

39. See Gelinne, *supra* note 13, at 2519.

40. *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> (last visited Nov. 13, 2022).

41. See Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 57677-01, 57677 (Sept. 16, 2020) (to be codified at 29 C.F.R. pt. 826).

42. *Id.*; see 15 U.S.C. § 4001(a).

43. See Gelinne, *supra* note 13, at 2515.

44. *Fact Sheet: The American Families Plan*, THE WHITE HOUSE (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/>.

45. *Id.*

46. *Id.*

weekly wages replaced, and up to eighty percent for the lowest-wage workers.<sup>47</sup> To fund the program, the President plans on increasing the tax rates of wealthier citizens and profitable companies.<sup>48</sup>

The House of Representatives passed such a proposal as part of the Build Back Better package with the following major terms.<sup>49</sup> First, all workers, including independent contractors and public-sector workers, regardless of the size of their employers, would be covered by the proposed national PFML program.<sup>50</sup> Second, workers would become eligible if they worked for a certain time period immediately preceding the commencement of the benefits and earned at least \$2,000 during a designated two-year period.<sup>51</sup> Third, workers could take the leave if they need to attend to their own serious health condition, care for a seriously ill family member, or bond with their newborn.<sup>52</sup> Fourth, the maximum payment period would be four weeks.<sup>53</sup> Fifth, the payment amount would follow a sliding-scale approach, in which workers who earn less than \$290 per week would receive around ninety percent of their income, and the maximum benefit would be about \$814 per week, subject to the annual adjustment.<sup>54</sup> Sixth, the program would not provide new job protections in addition to the existing protections under federal and state laws, except that it would offer job protections to workers who receive benefits from a reimbursed employer program.<sup>55</sup> Seventh, the proposed national PFML legislation would not preempt existing state leave programs and would coordinate with the states to provide federal reimbursements if the states meet certain criteria.<sup>56</sup> Even with strong public support, the Senate did not pass the proposed national PFML legislation.<sup>57</sup> The

---

47. *Id.*

48. See Tony Romm, *Who Would Pay More and Less in Taxes Under The House Bill*, THE WASH. POST (Nov. 19, 2021), [https://www.washingtonpost.com/us-policy/2021/11/19/taxes-biden-spending-bill/?itid=co\\_bidenspending\\_4](https://www.washingtonpost.com/us-policy/2021/11/19/taxes-biden-spending-bill/?itid=co_bidenspending_4); see also Stephen Miller, *How President Biden's Paid FMLA Proposal Would Work*, SHRM (May 4, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/how-bidens-paid-fmla-proposal-would-work.aspx>.

49. *Paid Leave in Build Back Better: What You Need to Know*, A BETTER BALANCE (Nov. 19, 2021), <https://www.abetterbalance.org/resources/paid-leave-in-build-back-better-what-you-need-to-know/>.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Paid Leave in Build Back Better: What You Need to Know*, *supra* note 49.

56. *Id.*

57. See, e.g., Jill Filipovic, *Joe Manchin Single-Handedly Denied U.S. Families Paid Leave. That's Just Cruel*, THE GUARDIAN (Oct. 29, 2021), <https://www.theguardian.com/commentisfree/2021/oct/29/joe-manchin-denied-us-families-paid-parental-leave>.

reason was partially political as Senator Manchin said, “America is truly a center-right country.”<sup>58</sup> However, the most compelling reason was the high cost of the program, on which the parties could not reach a deal.<sup>59</sup>

### B. *Where PFML Stands on the State Level*

To bridge the gap left by FMLA, state policymakers have worked towards implementing their own PFML programs.<sup>60</sup> In fact, as of the date of this Article, thirteen states and the District of Columbia have passed PFML or alternative programs, and eight of the states and the District of Columbia are operating the PFML programs in full force.<sup>61</sup> In 2002, California was the first state to pass the PFML program through its Senate Bill 1661.<sup>62</sup> Following California, PFML or alternative programs were passed in New Jersey, Rhode Island, New York, Washington, the District of Columbia, Massachusetts, Connecticut, Oregon, Colorado, New Hampshire, Maryland, Delaware, and South Carolina.<sup>63</sup>

States’ PFML programs vary significantly in detail regarding the reasons for PFML, definitions of “Family,” types of employers covered, employee eligibilities, funding methods, benefit amounts,

58. Hayes Brown, *Joe Manchin’s Paid Family Leave Stance is Selfish and Misguided*, MSNBC (Nov. 5, 2021), <https://www.msnbc.com/opinion/joe-manchin-s-paid-family-leave-stance-selfish-misguided-n1283293>.

59. See Lorie Konish, *House passes bill including paid family leave. Advocates call it a ‘once-in-a-generation change’*, CNBC (Nov. 19, 2021), <https://www.cnbc.com/2021/11/19/house-passes-bill-with-once-in-a-generation-paid-family-leave.html>; see also Erich Wagner, *Bill to Provide Paid Family Leave for Feds Could Cost \$20 Billion By 2027*, GOV’T EXEC. (Oct. 8, 2021), <https://www.govexec.com/pay-benefits/2021/10/bill-provide-paid-family-leave-feds-could-cost-20-billion-2027/185984/> (noting that the estimated cost for a twelve-week paid family leave program for federal workers would be around \$20 billion over the next five years).

60. Annie Gieseke & Kathleen Grossman, *The “State” of Family and Medical Leave Laws in the Wake of COVID-19*, LOCKE LORD LLP (Mar. 4, 2022), <https://www.jdsupra.com/legalnews/the-state-of-family-and-medical-leave-9735993/>.

61. See *States With Paid Family Leave*, *supra* note 6 (noting that the PFML programs in California, Connecticut, Massachusetts, New Jersey, New York, Rhode Island, Washington, and Washington D.C. are in force, while the PFML programs in Oregon, Colorado, New Hampshire, Maryland, Delaware have been passed but not yet in force; South Carolina has passed paid parental leave, effective Oct. 1, 2022).

62. See *Features of State Family Leave Programs, 2022*, BIPARTISAN POL’Y CTR., <https://bipartisanpolicy.org/download/?file=/Wp-content/uploads/2022/03/2022-01-Features-of-State-PFL-Programs.pdf> (last visited Mar. 31, 2022); see also Thompson, *supra* note 19, at 78.

63. Note that PFML programs were passed in New Jersey in 2008, in Rhode Island in 2013, in New York in 2016, in Washington and the District of Columbia in 2017, in Massachusetts in 2018, in Connecticut and Oregon in 2019, in Colorado in 2020, in New Hampshire in 2021, in Maryland and Delaware in 2022. South Carolina has passed paid parental leave, effective Oct. 1, 2022. See *Features of State Family Leave Programs, 2022*, *supra* note 62; see also *States With Paid Family Leave*, *supra* note 6.



lengths of the payments, and job protections.<sup>64</sup> On top of the existing state PFML programs, some cities, like San Francisco, provide supplemental PFML benefits to employees who work in certain geographical boundaries.<sup>65</sup> Accordingly, employers with businesses in multiple states and cities that have implemented PFML programs often face challenges in complying with the different PFML standards in those states and cities, which translates to increased costs.<sup>66</sup>

Although the details of the PFML programs among the states differ significantly, the major structures of the states' PFML programs are often similar.<sup>67</sup> Paid family leave is commonly referred to as "family caregiver leave" or "family leave insurance," while paid medical leave is commonly referred to as "temporary disability insurance" or "short-term disability."<sup>68</sup> Together, PFML is known as "family and medical leave insurance," which essentially operates as an insurance program, where workers and/or employers contribute a minimal percentage of their pay to fund the program.<sup>69</sup> When eligible workers take leave, they receive wage replacement benefits from the funded program, which equates to a certain percentage of their pay.<sup>70</sup>

Due to PFML acting as an insurance program, there are "no carve-outs or exemptions for small employers."<sup>71</sup> However, depending on whether the employer is in the private or public sector or is unionized or nonunionized, the employer or its employees may not be automatically covered.<sup>72</sup> Self-employed workers are sometimes not automatically covered by the state PFML programs but may opt in.<sup>73</sup> A covered worker must work for a certain amount of time or earn a certain income to be eligible for paid leave benefits.<sup>74</sup>

---

64. See generally *State Paid Family & Medical Leave Insurance Laws*, NAT'L P'SHIP FOR WOMEN & FAMS. (Oct. 2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf>.

65. *Id.* at 14; see generally S.F., CAL. POLICE CODE art. 33H (2016).

66. See Gelinne, *supra* note 13, at 2538–39.

67. Jackson Brainerd, *Paid Family Leave in the States*, NCSL (Aug. 2017), <https://www.ncsl.org/research/labor-and-employment/paid-family-leave-in-the-states.aspx>.

68. *What's the Difference? Paid Sick Leave, FMLA, and Paid Family and Medical Leave*, U.S. DEP'T OF LAB. 1 (Sept. 2016), <https://www.dol.gov/sites/dolgov/files/oasp/legacy/files/paidleavefinalrulecomparison.pdf>.

69. *Id.*

70. *Id.*

71. *Id.* at 2.

72. *Overview of Paid Family & Medical Leave Laws in the United States*, A BETTER BALANCE 2 (Jul. 1, 2020), <https://www.buncombcounty.org/common/Commissioners/20201117/FMLA%20%26%20Parental%20Chart.pdf>.

73. *Id.* at 3.

74. *Id.* at 3–4.

Generally, workers can take PFML to take care of an immediate family member, including but not limited to a spouse, parent, or child.<sup>75</sup> Some states extend the benefits to caring for extended family members such as grandparents, grandchildren, siblings, or parents-in-law.<sup>76</sup> Although job protection policies under the states' PFML legislations vary significantly, the federal FMLA job protection still applies to eligible state workers.<sup>77</sup> The benefit length among the states ranges from six to twelve weeks for partially paid family leave and twenty-six to fifty-two weeks for paid medical leave.<sup>78</sup>

Besides the thirteen states and the District of Columbia, a recent survey shows that about twenty other states have proposed PFML legislation or have actively studied the implementation of PFML programs.<sup>79</sup> Although, many states have not implemented PFML programs.<sup>80</sup>

### III. ANALYSIS

In the almost thirty years since the passage of FMLA, we have yet to make any major progress in passing the national PFML legislation on the federal level, and the situation will not improve amid the current partisan politics in Congress.<sup>81</sup> On the state level, while only thirteen states out of the fifty states and the District of Columbia have passed PFML or alternative programs as of the date of this Article,<sup>82</sup> we saw progress in the implementation of PFML programs over the past twenty years since the first passage of PFML legislation in California.<sup>83</sup> Moreover, the speed of states adopting PFML programs has rapidly increased in recent years.<sup>84</sup> The failure in the PFML legislation on the federal level contrasted with the success concerning the same on the state level indicates a viable path for the U.S. to achieve a nationwide PFML system.

---

75. *What's the Difference? Paid Sick Leave, FMLA, and Paid Family and Medical Leave*, *supra* note 68, at 2.

76. *Id.*

77. *Id.*

78. *Id.* at 3.

79. *See States With Paid Family Leave*, *supra* note 6.

80. *Id.*

81. *See* Sholar, *supra* note 24; *see also* Susan Milligan, *How Partisan Politics Threatened Even Must-Pass Legislation in Congress*, U.S. NEWS (Oct. 1, 2021), <https://www.usnews.com/news/the-report/articles/2021-10-01/how-partisan-politics-threatened-even-must-pass-legislation-in-congress>.

82. *See States With Paid Family Leave*, *supra* note 6.

83. *Supra* note 63.

84. *Id.*; *see Features of State Family Leave Programs, 2022*, *supra* note 62.

A. *A Federal PFML Program is Not Happening Any Time Soon Due to Historical, Economic, And Political Reasons*

Biden's national PFML bill, as part of the Build Back Better package, for the most part, is dead.<sup>85</sup> FFCRA was essentially temporary in response to COVID-19.<sup>86</sup> The FMLA, a federally approved legislation concerning family and medical leave, is limited in protecting American families because of its lack of wage replacement.<sup>87</sup> The prominent FAMILY Act was introduced three times but has stalled twice in Committee and is destined to fail for the third time as over a year has passed since its third introduction to the Committee.<sup>88</sup> The reasons behind these failures are complicated but they can be summarized as the following historical, economic, and political reasons.

1. *The Legislative History Behind FMLA Suggests the Fate of the National PFML Legislation.*

One of the most compelling reasons that a national PFML policy has yet to be passed is still the opposition from business interests.<sup>89</sup> At the early stage of FMLA, due to significant concerns from the business community that FMLA would harm small businesses and "restrict the employers' right to contract," conservative lawmakers insisted on further limiting the scope of FMLA "to cover only employers with more than one hundred employees, as opposed to the fifteen-employee threshold" originally proposed.<sup>90</sup> Historically, businesses, whether large or small, play a pivotal role in policymaking in employee benefits.<sup>91</sup> It is not only because most people receive employee benefits through their employers but also because employers are great contributors to employee benefits like Social Security and Medicare programs.<sup>92</sup> Small businesses nowadays still make up 99.9% of U.S. businesses, and thus their lobbying power over lawmakers remains essential, and their perceived interests are always protected.<sup>93</sup> Small

---

85. Ari Natter & Erik Wasson, *Manchin Suggests He's Ready to Start Talks on Climate, Tax Bill*, BLOOMBERG (Mar. 25, 2022), <https://www.bloomberg.com/news/articles/2022-03-25/manchin-suggests-he-s-ready-to-start-talks-on-climate-tax-bill>.

86. See *Families First Coronavirus Response Act: Employee Paid Leave Rights*, *supra* note 40; see also 15 U.S.C. § 4001(a).

87. See Gelinne, *supra* note 13, at 2529–30; Thompson, *supra* note 19, at 86; Harms, *supra* note 22.

88. See *FAMILY Act*, *supra* note 34.

89. See Sholar, *supra* note 24.

90. See Gelinne, *supra* note 13, at 2531–32.

91. *Id.* at 2523–24.

92. *Id.* at 2522–24.

93. See *Small Business Statistics*, SMALL BUS. TRENDS, <https://smallbiztrends.com/tag/small-business-statistics> (Jul. 9, 2021); see also Sholar, *supra* note 24.

businesses' fear of profit loss and lowered ability to compete, though unfounded, still exists to prevent FMLA from including the wage replacement benefit.<sup>94</sup>

Even though recent surveys show that the majority of the small businesses actually favor a national PFML policy, they are to some degree misleading as the sampled businesses may not represent the interest of the majority small businesses.<sup>95</sup> Specifically, one survey shows that 71% of small companies were “very or somewhat supportive of paid family leave,” though the sampled small companies were only from New York and New Jersey.<sup>96</sup> Thus, these small companies were not representative of the interest of the majority small businesses. Furthermore, another survey shows that a vast 71% of respondents supported legislation that would establish a national paid family and medical leave insurance program, which was based on opinions from a total number of 539 small businesses that were not evenly spread among all the areas of the U.S., compared to a total number of over thirty million small businesses across the U.S.<sup>97</sup> Therefore, without convincing evidence that small businesses are actually in support of the national PFML policy, opposition from business interests poses a big threat to the passage of the national PFML legislation.<sup>98</sup>

## 2. *The Current Economic Condition of the U.S. Does Not Favor a Big Expense Incurred by PFML.*

The U.S.'s current economic condition does not help the passage of the federal PFML legislation. Due to the COVID-19 pandemic, the U.S. federal budget deficits escalated to levels not seen since World War II.<sup>99</sup> In addition, Biden signed the Infrastructure and Jobs Act, which will cost \$1.2 trillion dollars to fix “hard” infrastructure like bridges and roads.<sup>100</sup> With the huge deficit and other big expenses,

94. See Sholar, *supra* note 24.

95. See Kelsey Butler & Bloomberg, *Small Businesses Are Ready to Embrace Paid Family Leave*, FORTUNE (Nov. 16, 2021), <https://fortune.com/2021/11/16/small-businesses-are-ready-to-embrace-paid-family-leave/>; see also Small Business Majority, *Opinion Poll: Small Businesses Support Paid Family Leave Programs*, CTR. FOR AM. PROGRESS (Mar. 30, 2017), <https://smallbusinessmajority.org/sites/default/files/research-reports/033017-paid-leave-poll.pdf>.

96. See Butler & Bloomberg, *supra* note 95.

97. See Small Business Majority, *supra* note 95; see also *How Many Small Businesses Are There in The US in 2022?*, OBERLO, <https://www.oberlo.com/statistics/number-of-small-business-in-the-us> (Sept. 2022).

98. See Sholar, *supra* note 24; see Gelinne, *supra* note 13, at 2531–32.

99. See *Deficit Tracker*, BIPARTISAN POL'Y CTR. (Jul. 12, 2022), <https://bipartisanpolicy.org/report/deficit-tracker/>.

100. See Maegan Vazquez et al., *5 Significant Bills and 5 Executive Orders Biden Signed in His First Year — And His 5 Biggest Priorities for 2022*, CNN POL. (Jan. 20, 2022), <https://>

some people are less willing to incur additional large expenses to further increase the deficit.<sup>101</sup> Even though the parties negotiated to cut the paid leave length from a generous twelve-week period to a four-week period, it would still cost an estimated \$205 billion over the next ten years.<sup>102</sup>

Also, the proposed national PFML program under the Biden Administration would be funded by increasing the tax rates for wealthier Americans and profitable companies, which would create less consensus.<sup>103</sup> “The proposal targets the wealthiest Americans to keep with Biden’s pledge not to raise taxes on families with annual incomes below \$400,000.”<sup>104</sup> Specifically, the proposal would tax unrealized capital gains for households worth at least \$100 million, which was strongly opposed by certain lawmakers, mainly Joe Manchin.<sup>105</sup> As Senator Manchin said, a person cannot be taxed “on things [that person does] not have,” and “[t]here are other ways for people to pay their fair share, and [ ] everyone should pay.”<sup>106</sup>

### 3. *The Ongoing Partisan Polarization in Congress Does Not Help the Passage of the National PFML Legislation.*

Another big issue is the current partisan polarization in Congress.<sup>107</sup> According to Pew Research Center, “Democrats and Republicans are farther apart today than any time in the past fifty years.”<sup>108</sup> The evidence that further supports this is that the thirteen states thus far that enacted PFML are almost all liberal states.<sup>109</sup> Without bipartisan sup-

---

[www.cnn.com/2022/01/20/politics/biden-laws-passed-priorities-to-get-done-executive-orders/index.html](http://www.cnn.com/2022/01/20/politics/biden-laws-passed-priorities-to-get-done-executive-orders/index.html)

101. See Lorie Konish, *With Paid Family Leave Still Up for Debate, Here’s One Way Lawmakers Could Compromise*, CNBC (Nov. 23, 2021), <https://www.cnbc.com/2021/11/23/paid-family-leave-how-lawmakers-could-compromise-on-build-back-better.html> (Senator Joe Manchin pointed out that “spending trillions more on new and expanded government programs, when we can’t even pay for the essential social programs, like Social Security and Medicare, is the definition of fiscal insanity”).

102. *Id.*

103. See Romm, *supra* note 48.

104. *Id.*

105. See Erik Wasson & Steven T. Dennis, *Manchin Pans Biden’s Proposed Tax on Unrealized Gains of Wealthy*, BLOOMBERG (Mar. 28, 2022), <https://www.bloomberg.com/news/articles/2022-03-28/manchin-pans-biden-s-proposed-tax-on-unrealized-gains-of-wealthy>.

106. *Id.*

107. Drew Desilver, *The Polarization in Today’s Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/>.

108. *Id.*

109. See *States With Paid Family Leave*, *supra* note 6 (noting that the PFML programs in California, Connecticut, Massachusetts, New Jersey, New York, Rhode Island, Washington, and Washington D.C. are in force, while the PFML programs in Oregon, Colorado, New Hampshire,

port, the passage of federal PFML legislation is unlikely.<sup>110</sup> Two possible futures lie ahead of the partisan polarization: it will continue to increase due to its “self-reinforcing cycle,” or it has reached its apex.<sup>111</sup> It is undetermined which future is more likely; however, the evidence shows that partisan attitudes have grown further apart across the issues of welfare and helping the needy.<sup>112</sup> Since the issue concerning PFML legislation is within the scope of those two issues, the passage of the national PFML legislation on the federal level may be far from realization.

*B. The Successful Progression of PFML Legislation Among the States Shows the Hope of Achieving a Nationwide PFML System.*

Most states with existing PFML programs will incur changes to their PFML policies in 2022.<sup>113</sup> In addition, about twenty states that have not adopted PFML programs have proposed relevant legislation or actively discussed the PFML legislation.<sup>114</sup> The success on the state level for PFML legislation is undoubtedly encouraging, and thus drives the nation to explore a completely different path toward achieving a nationwide PFML system: through the states. Nonetheless, it is not enough that the nation only has an idea of pushing the birth of a nationwide PFML system by spreading emotional stories that resulted from its lack of it. It is critical that policymakers come up with feasible terms that make economic sense for PFML programs. Therefore, it is worthwhile to study the existing state models regarding PFML programs to lay out a general guideline or trend for the rest of the states that show interest in the implementation of PFML programs to follow.

---

Maryland, Delaware have been passed but not yet in force; South Carolina has passed paid parental leave, effective Oct. 1, 2022). See *Most Liberal States 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/most-liberal-states> (last visited Apr. 2, 2022) (indicating that except for Colorado, which might still be considered a swing state, other states that have passed the PFML legislation, namely, California, New Jersey, Rhode Island, New York, Washington, Massachusetts, Connecticut, Oregon, and New Hampshire, are all considered to be liberal states).

110. See Milligan, *supra* note 81.

111. See Gordon Heltzel & Kristin Laurin, *Polarization in America: Two Possible Futures*, PUBMED CENT. (May 6, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7201237/>.

112. *Id.*

113. Alan Goforth, *With Fate of Federal Paid Family Leave Uncertain, Look for Continued Legislation on State Level in 2022*, BENEFITSPRO (Nov. 19, 2021), <https://www.benefitspro.com/2021/11/19/with-fate-of-federal-paid-family-medical-leave-uncertain-look-for-continued-legislation-on-state-level-in-2022/?slreturn=20220106203600>.

114. See *States With Paid Family Leave*, *supra* note 6.

This Article compares the most significant aspects of existing PFML programs among the states, based on which the Article proposes a series of essential terms for the states to consider.<sup>115</sup> First, the term “family” should incorporate “chosen family” to accommodate the needs of the modern family.<sup>116</sup> Second, the public should be educated on the qualifying reasons for PFML, which include various reasons beyond mere pregnancy and child birth.<sup>117</sup> Third, the exemptions on coverage granted to certain employers should be limited for cost spreading among the majority population to make the programs affordable.<sup>118</sup> Fourth, the employee eligibility should be based on the amount of time an employee has worked rather than the amount of income an employee has earned.<sup>119</sup> Fifth, a default state fund method should be favored, with the funding costs split between the employees and the employers.<sup>120</sup> Sixth, a sliding-scale payment system should be adopted to protect low-income families.<sup>121</sup> Seventh, a state should start with a comparatively shorter length of maximum payment period with a steady increase to maintain a healthy state fund.<sup>122</sup> Eighth and lastly, compromises should be limited regarding the job protections offered to the employees who are on leave.<sup>123</sup>

### 1. “Family” Should Include “Chosen Family.”

People support a policy primarily because it is beneficial to them. With family structures rapidly evolving in modern times, PFML policies should adapt to the new definition of “family” to appeal to a wider variety of people.<sup>124</sup> States typically adopt an objective definition of “family” to include immediate family members like a child, a parent, and a spouse or a domestic partner; families related by blood but not immediate family members like a grandparent, a grandchild, and a sibling; and extended families like a parent-in-law, a grandchild’s spouse, and a sibling’s spouse.<sup>125</sup> However, almost half of

---

115. See *infra* Part III.B.

116. See *infra* Part III.B.1.

117. See *infra* Part III.B.2.

118. See *infra* Part III.B.3.

119. See *infra* Part III.B.4.

120. See *infra* Part III.B.5.

121. See *infra* Part III.B.6.

122. See *infra* Part III.B.7.

123. See *infra* Part III.B.8.

124. J. Wittwer, *Modern Family: Evolving Family Structures in the West*, SUCCESS ACROSS CULTURES (Mar. 8, 2019), <https://successacrosscultures.com/2019/03/08/869/>.

125. See, e.g., CAL. UNEMP. INS. CODE § 3302(f)–(j) (West 2021); N.J. STAT. ANN. § 43:21-27(n) (West 2020); Assemb. 3975, 218th Leg., Reg. Sess. (N.J. 2019); 28 R.I. GEN. LAWS ANN. § 28-41-35(a) (West 2022); N.Y. WORKERS’ COMP. LAW § 201(16)–(17), (19)–(21) (McKinney

the states with existing PFML programs include a subjective definition of "family" in addition to an objective definition.<sup>126</sup> For instance, the following persons count as a family member: any person equivalent to a family member, regardless of biological or legal relationship;<sup>127</sup> people who regularly reside in the same household and have the expectation that one will care for the other when ill;<sup>128</sup> or any person whose relationship with the employee creates an expectation that the employee will care for the person, and that person depends on the employee for care.<sup>129</sup> A subjective approach lets people choose their own family.<sup>130</sup> Accordingly, the subjective definition of "family" is also called "chosen family," namely, an individual who was chosen as a family member by a covered employee due to their significant personal bond with such employee, regardless of the biological or legal relationship.<sup>131</sup>

It is certainly meaningful and necessary to expand the definition of "family" to include chosen family because it covers more people with diverse backgrounds, including, but not limited to, LGBTQ individuals, who usually have less access to paid family leave due to strained relationships their traditional families and who prefer to turn to their chosen family for care when ill.<sup>132</sup> Expanding the definition also appeals to people who choose to cohabit rather than marry. Studies show that "[a]mong adults ages 18 to 44, 59% have lived with an unmarried partner at some point in their lives, while 50% have ever been married."<sup>133</sup> Accordingly, broadening the definition of "family" to in-

---

2022); 2016 D.C. Sess. L. Serv. 21-264 § 101(7) (West); S.B. 5975 § 2, 65th Leg., 3d Spec. Sess. (Wash. 2017); H. 4640 § 29(1), 190th Gen. Ct., Reg. Sess. (Mass. 2018); S.B. 1 § 17(6), 2019 Leg., Reg. Sess. (Conn.); H.B. 2005 § 2(18), 80th Leg. Assemb., Reg. Sess. (Or. 2019); COLO. REV. STAT. ANN. § 8-13.3-503(11) (West 2020); see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 5–6.

126. *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 5–6; see Paul R. Amato, *What Is a Family?*, NAT'L COUNCIL ON FAM. RELS. (June 1, 2014), <https://www.ncfr.org/ncfr-report/past-issues/summer-2014/what-family> ("A key feature of an objective definition is that it specifies (and restricts) who is (and who is not) in a person's family. An alternative, subjective approach is to let people make their own decisions about who is in their families.")

127. See *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 5–6.

128. *Id.* at 6.

129. *Id.*

130. See Amato, *supra* note 126.

131. Lindsay Mahowald & Diana Boesch, *Making the Case for Chosen Family in Paid Family and Medical Leave Policies*, CTR. FOR AM. PROGRESS (Feb. 16, 2021), <https://www.americanprogress.org/article/making-case-chosen-family-paid-family-medical-leave-policies/>.

132. *Id.*

133. Nikki Graf, *Key Findings on Marriage and Cohabitation in The U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/>.



clude chosen family will benefit more people in modern times and, in turn, help the passage of PFML programs by drawing in more interest.

## 2. *Family Leave Is Beyond Mere Maternity Leave.*

Paid maternity leave, overly promoted by PFML advocates, decreases the interest among people who do not plan to have children and among male workers who are usually not responsible for caring for newborns. To draw more interest in PFML, policymakers should ensure that all qualifying reasons for taking PFML are equally promoted. According to Pew Research Center, “about eight-in-ten Americans (82%) say mothers should have paid maternity leave, while fewer (69%) support paid paternity leave.”<sup>134</sup> Even though more and more fathers acknowledge the importance of bonding with their newborns, people still resist and criticize paternity leave.<sup>135</sup> Studies show that paternity leave significantly improves mothers’ mental health by freeing up more time for mothers to recover from childbirth, and it also improves family economic security, and thus should be an equally important paid leave policy.<sup>136</sup> With that in mind, more support should be lent to advocating for paid paternity leave.

Besides paid parental leave, there are other typical reasons for an employee to take paid leave. One is medical leave to deal with their own severe health condition or to care for a family member with a severe health condition.<sup>137</sup> In addition to typical PFML reasons, a few states have also recognized paid leave for employees, when there is an exigency arising out of the employees’ immediate family members being on active duty.<sup>138</sup> Some states also recognize the need to care for family members who are victims of domestic or sexual violence.<sup>139</sup> Connecticut even recognizes leave taken by an individual “in order to serve as an organ or bone marrow donor.”<sup>140</sup> Starting in 2022, in re-

---

134. Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RSCH. CTR. (Mar. 23, 2017), <https://www.pewresearch.org/social-trends/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>.

135. See, e.g., Ian Duncan, Mariana Alfaro, & Eugene Scott, *Republicans Fault Buttigieg for Time Off With Newborns. Democrats Say He’s Showing the Need for Paid Parental Leave*, THE WASH. POST (Oct. 15, 2021), <https://www.washingtonpost.com/transportation/2021/10/15/pete-buttigieg-time-off-parental-leave/>.

136. See Romig & Bryant, *supra* note 26.

137. See Menasce Horowitz et al., *supra* note 134 (indicating that 85% of Americans support paid medical leave and 75% of Americans support paid family leave, not counting in the paid parental leave).

138. See also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 3–4.

139. *Id.* at 3.

140. S.B. 1 § 18(a)(2)(e), 2019 Leg., Reg. Sess. (Conn.); see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 4.

sponse to COVID-19, Oregon allows eligible employees to care for children whose schools or childcare providers have closed due to a public health emergency.<sup>141</sup> As of December 24, 2021, New York City employees, who are parents or legal guardians of a child, are entitled to “four hours of paid COVID-19 child vaccination time, per injection and per child.”<sup>142</sup> These reasons are creative and reasonable solutions to certain public issues but are lesser known.

Accordingly, to draw in as much interest as possible in PFML, governments and advocates should try to familiarize Americans with the wide variety of PFML reasons. In addition to an overload of websites that advocate for paid maternity leave,<sup>143</sup> more efforts and creative ideas are needed in advocating for other qualifying reasons for taking paid leave. For example, mental health issues are among the biggest health issues plaguing Americans nowadays.<sup>144</sup> Even though paid leave covers serious mental health issues, people are afraid to use paid leave for their mental health issues, which leaves more room to promote such reasons for taking paid leave.<sup>145</sup>

### 3. *All Types of Employers Should be Covered With Limited Exemptions.*

The fact that an employer is covered does not mean that its employees are automatically eligible to receive PFML benefits.<sup>146</sup> There are other requirements that employees must meet before they can receive benefits.<sup>147</sup>

Depending on whether an employer is a public or private entity, the coverage is different—almost all private-sector employers in the states

141. H.B. 2474 § 6, 81st Leg. Assemb., Reg. Sess. (Or. 2021). See also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 4.

142. Lindsay Colvin Stone & Maria Gomez, *UPDATED: NYC Council Passes Bill Granting Paid Sick Leave To Parents Vaccinating Children Against COVID-19*, SHEPPARDMULLIN (Jan. 27, 2022), <https://www.laboremploymentlawblog.com/2022/01/articles/coronavirus/updated-nyc-council-passes-bill-granting-paid-sick-leave-to-parents-vaccinating-children-against-covid-19/>.

143. See, e.g., typical websites that advocate paid maternity leave include but are not limited to: PL+US (<https://paidleave.us/>), MOMSRISING (<https://www.momsrising.org/>), and NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES (<https://www.nationalpartnership.org/>).

144. See *About Mental Health*, CTRES. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/mentalhealth/learn/index.htm> (last visited Feb. 3, 2022).

145. See Bryan Robinson, *American Workers Are Afraid To Take Time Off, New Study Finds*, FORBES (May 13, 2021), <https://www.forbes.com/sites/bryanrobinson/2021/05/13/american-workers-are-afraid-to-take-time-off-new-study-finds/?sh=17e69c952e71>.

146. See, e.g., *Am I Eligible for Paid Family Leave Benefits?*, EMP. DEV. DEP’T, STATE OF CAL., [https://edd.ca.gov/en/disability/Am\\_I\\_Eligible\\_for\\_PFL\\_Benefits/](https://edd.ca.gov/en/disability/Am_I_Eligible_for_PFL_Benefits/) (last visited Mar. 4, 2022).

147. *Id.*

are covered by PFML programs regardless of size, while most public-sector employers are not.<sup>148</sup> Specifically, in some states, all private and public-sector employers are automatically covered by PFML programs, while in other states, only private-sector employers are automatically covered.<sup>149</sup> Those public-sector employers who are not automatically covered can opt in to be covered.<sup>150</sup> States also differentiate coverage among different types of public-sector employers. For example, in Massachusetts, all state employees are covered, while local government employees are not covered unless they opt in.<sup>151</sup> In Oregon, almost all employees are covered except the federal and tribal government employees, but the tribal government employees can opt in.<sup>152</sup> Nevertheless, all states besides New Jersey or Rhode Island consistently cover self-employed workers, who are not automatically covered but can opt in.<sup>153</sup>

There are two main reasons that most states do not automatically cover public-sector employers. First, unionized public employees must negotiate into the program in their collective bargaining agreement before paying or receiving benefits.<sup>154</sup> Second, states are not legally authorized to tax certain public entities.<sup>155</sup> Despite the two reasons, except for certain mandatory preemptions, public-sector employers should be automatically covered under state PFML programs. The costs incurred by potential collective bargaining are temporary and minimal compared to permanent PFML benefits that union workers would enjoy. Including as many employers and employees as possible could eventually spread the costs to make the program more affordable for everyone. Studies show that public workers, who are primarily unionized, are more likely to use paid leave than non-union workers.<sup>156</sup> Thus, it is unfair to exclude union workers from PFML coverage only because they work for public-sector employers. Public and

---

148. See *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 2.

149. *Id.*

150. See *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 15–16.

151. *Id.* at 16.

152. *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 2.

153. *Id.* at 3.

154. See Marc E. Fitch, *State Unions, Municipal Employees Exempt from Paid FMLA Program*, YANKEE INST. (Mar. 18, 2019), <https://yankeeinstitute.org/2019/03/18/state-unions-municipal-employees-exempt-from-paid-fmla-program/>.

155. See, e.g., 2016 D.C. Sess. L. Serv. 21-264 § 101(4) (D.C.) (noting that covered employer does not “include the United States, the District of Columbia, or any employer that the District of Columbia is not authorized to tax under federal law or treaty”).

156. See Elissa McBride, *Unions Push for “Grade A” Paid Parental Leave*, AFSCME (Oct. 17, 2018), <https://www.afscme.org/blog/unions-push-for-grade-a-paid-parental-leave>.

private-sector workers should be treated equally since most have similar day-to-day jobs and families or sicknesses to attend to.

Therefore, legally and economically, union workers should be automatically covered by state PFML programs through the state mandate. The requirement that union workers opt into the programs by modifying existing union contracts through collective bargaining would be rendered unnecessary. The safest way to protect union or public-sector employees' rights is to grant a default right to paid leave benefits with an individual opt-out choice because individuals have limited power when going up against a large union or employer.<sup>157</sup> Nonetheless, self-employed workers and independent contractors should be left out of automatic coverage with a choice to opt in. It is obvious that most of them work for themselves and have independent control of their work schedules and incomes so that they can make better decisions for themselves.

#### 4. *Employee Eligibilities Should be Fair.*

A covered employee must meet specific employee eligibility before receiving paid leave benefits.<sup>158</sup> Employee eligibility indicates how much an employee must contribute before being entitled to paid leave benefits, which is directly associated with how much income an employee has earned because the contribution of the premium comes from the income deduction.<sup>159</sup> Some states, however, set eligibility based on how much time an employee has worked.<sup>160</sup> A time-based standard is recommended because it rewards an employee's hard work regardless of the value of the work, since the amount of income each employee makes within the same amount of time is quite different, and to some degree, out of the employee's control. So long as an employee contributes sufficient labor or intelligence to society by putting in a certain amount of time, they should be awarded basic social benefits, rather than being punished by their limited ability to negotiate a high salary.

---

157. See Gordon Lafer & Lola Loustaunau, *Fear at Work: An inside account of how employers threaten, intimidate, and harass workers to stop them from exercising their right to collective bargaining*, ECON. POL'Y INST. (Jul. 23, 2020), <https://www.epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing/> (this article talks about union workers' limited power in collective bargaining).

158. See generally *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 10.

159. *Id.*

160. See, e.g., N.Y. WORKERS' COMP. LAW § 203 (Consol. 2016) (noting that in New York, if an employee takes leave to care for a sick family member, the worker must have been employed by their current employer for at least twenty-six consecutive weeks).

Moreover, most states allow income to be combined from different employers to meet eligibility, meaning an individual may work for multiple employers to meet eligibility.<sup>161</sup> However, in some states, an employee must work for a single employer for a certain period time to meet eligibility requirements.<sup>162</sup> States should set flexible employee eligibility to accommodate workers in different situations. New York adopted a stringent requirement stating that an employee must be employed by a covered employer for twenty-six or more consecutive weeks before he or she is eligible for the payment.<sup>163</sup> This will easily exclude many workers who do not typically work for a single employer, and it is against public policy to make those workers lose paid leave benefits solely due to the nature of their jobs. Fortunately, most states with existing PFML programs do not have the “single” employer requirement.<sup>164</sup>

States should also set employee eligibilities that most people can quickly meet, then adjust the benefit amounts in correspondence with the levels of the contributions made by the employees. In this way, most workers who have contributed to the PFML fund would receive some benefits. In the meantime, a healthy PFML fund would also be maintained. For example, California allows an employee who has “earned at least \$300 from which State Disability Insurance deductions were withheld” during the base period to enjoy the benefit of paid leave if they meet all other requirements.<sup>165</sup> However, this low eligibility also corresponds with a low benefit amount, for example, California workers with quarterly earnings less than \$929 will receive a weekly benefit of only \$50.<sup>166</sup> On top of the above, states should constantly adjust employee eligibility based on any public emergency to better accommodate the people’s needs at a particular time. For instance, during a public health emergency, like COVID-19, employees in Oregon only need to work thirty days at an average of at least twenty-five hours per week to be eligible to receive PFML benefits, as opposed to the standard requirement of working 180 days at an average of at least twenty-four hours per week.<sup>167</sup> Furthermore, there is no

---

161. See *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 3–4.

162. *Id.* (noting that in New York, workers generally must have been employed by their current employer for at least twenty-six consecutive weeks to be eligible).

163. N.Y. WORKERS’ COMP. LAW § 203 (Consol. 2016).

164. See *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 3–4.

165. See, e.g., *Am I Eligible for Paid Family Leave Benefits?*, *supra* note 146.

166. *Id.*

167. OR. REV. STAT. ANN. § 659.156 (West 2022); see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 11.

hourly requirement for an employee to take paid leave to care for a newborn.<sup>168</sup>

### 5. *Funding Methods Should be Flexible.*

The existing state PFML funding methods are structured after three major models: default state fund, monopolistic state fund, and employer insurance mandate.<sup>169</sup> A default state fund model uses the state fund by default but also allows employers and/or employees to use private insurance or self-insurance when those benefits are *greater* than or at least *equivalent* to the ones available through the state.<sup>170</sup> Under a monopolistic state fund, all covered employers and/or employees must contribute to a singular state-run fund.<sup>171</sup> An employer insurance mandate, the third major Temporary Disability Insurance (TDI) model, requires employers to provide paid leave through insurance purchases or by self-insuring.<sup>172</sup> New York is the first state that rejected the state fund approach and adopted the employer insurance mandate model based on its worker's compensation system.<sup>173</sup> Notably, New York still lists purchasing from the state fund as one of the insurance options.<sup>174</sup>

Among the three funding structural models, the winner is certainly the default state fund model. It allows employees and/or employers to contribute to the state fund by default, and if there is a private insurance plan greater than or as good as the state plan, they can choose to contribute to a private plan.<sup>175</sup> Unlike the employer insurance mandate model, which allows employers to shop among private insurance carriers, the default state fund method controls the amount of the premiums through the state governments,<sup>176</sup> which will to some degree, avoid unfair competition or monopolies in the private market to some degree. Specifically, states are better positioned to budget and adjust payroll taxes by closely monitoring the funding performance.<sup>177</sup> After all, as opposed to states, private companies are established for

---

168. *Id.*

169. See Molly Weston Williamson, *Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance*, 17 CONN. PUB. INT. L.J. 1, 7–8 (2017).

170. *Id.* at 8, 24 n.204 (noting that California, New Jersey, Washington adopt the default state fund model) (emphasis added).

171. *Id.* at 7–8 (noting that Rhode Island and Washington D.C. adopt the monopolistic state fund model).

172. *Id.* at 8 (noting that New York adopts the employer insurance mandate model).

173. *Id.*

174. *Id.*

175. *Id.* at 24 n.204.

176. *Id.* at 7–8.

177. *Id.*

profit.<sup>178</sup> Moreover, unlike the monopolistic state fund model that does not allow employers to pick a private plan, the default state fund model will enable employers to select a private plan if a private insurance plan is greater than or as good as the state plan.<sup>179</sup> That will, to some degree, guarantee that no public or private entities take advantage of the general public because it sets a fair competition between the two sectors. In short, the monopolistic state fund and the employer insurance mandate models are two extreme funding structural methods. Compared to them, a default state fund model is moderately balanced and thus is a much better choice.

There are three ways programs are funded: by employees only, by employers only, or jointly by employees and employers. Most states require joint funding by employees and employers for PFML programs.<sup>180</sup> The District of Columbia is the only jurisdiction where employers fully fund both the medical and family leave programs.<sup>181</sup> While in Rhode Island, California, and Connecticut, employees are responsible for fully funding PFML programs.<sup>182</sup> Among the three types of funding, the winner is certainly the joint funding method. However, if the states lean more towards protecting business interests, they may have to adopt the employee-only funding method to pass the statewide PFML legislation. Alternatively, suppose states are only concerned about the small business interest. In that case, they can still adopt the joint funding method but exempt certain small businesses that meet designated criteria from contributing to the paid leave fund. Though rare, an employer-only funding method might pass with enough political support.

Nevertheless, no matter which funding split is adopted, states should constantly adjust the tax rates for the pooling parties based on the program's actual performance. From the existing data, the combined contribution tax rates from both the employers and employees are around 1% or lower, which is less than half of the Medicare tax rate that is presently set at 2.9%.<sup>183</sup> Within a reasonable range, the Author recommends that states start the funding tax rates close to the high end of the range and can slowly reduce the rates once the pro-

---

178. See, e.g., Kimberlee Leonard, *What Are the Goals of a Private Corporation?*, CHRON, <https://smallbusiness.chron.com/goals-private-corporation-3971.html> (last visited Nov. 14, 2022).

179. See Weston Williamson, *supra* note 169, at 7–8, 24 n.204.

180. See *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 5.

181. *Id.*

182. *Id.*

183. *Id.*; see *Topic No. 751 Social Security and Medicare Withholding Rates*, IRS, <https://www.irs.gov/taxtopics/tc751> (Aug. 29, 2022).

gram funds tend to be stable enough to accommodate a public emergency. News reported that Washington's PFML program was running short on cash, and state lawmakers attributed it to the impacts of COVID-19.<sup>184</sup> Washington's paid leave program started benefits payments in January 2020, right before COVID-19 hit.<sup>185</sup> There were delays in benefits when the paid leave program was first launched in January 2020, right before COVID-19 hit.<sup>186</sup> However, in the first six weeks, Washington received benefit applications from over triple the amount of people expected, and the high demands continued.<sup>187</sup> Miscalculation or crisis happens; therefore, states should fund PFML programs sufficiently with slightly higher contribution rates before the initial benefit payments start, considering all possible situations that could lead to a shortage of funds. It is also better to have a backup plan to correspond with an unforeseen shortage of funds, similar to Washington's plan, which involved a temporary movement of some funds from marijuana sales to make up the deficit of the paid leave program.<sup>188</sup> Additionally, in 2022, Washington also increased its funding rate to 0.6% of the gross wages compared to the previous funding rate of 0.4%.<sup>189</sup> However, not all states have backup plans, especially states that have filed for bankruptcy. Accordingly, a higher initial funding rate is critical for these states to maintain a healthy and long-term performance program fund.

#### 6. *Sliding-Scale Benefit Payment Method Should be Favored.*

Some states that have adopted PFML policies calculate the benefit payment amounts based on fixed percentages of the worker's typical wages.<sup>190</sup> For example, in New Jersey, an eligible employee's weekly benefit rate is 85% of the employee's average weekly wage (AWW), with the maximum weekly benefit equal to \$993 in 2022.<sup>191</sup> The Dis-

---

184. See Associated Press, *Washington's Paid Family Leave Program Running Short on Cash*, KING5 (Jan. 27, 2022), <https://www.king5.com/article/news/politics/state-politics/washingtons-paid-family-leave-short-cash/281-15bfcc7-7d7e-495c-ab52-2e87e9a3b2ad>.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Karen Hooper, *Washington Increases PFML Rates and Weekly Benefit for 2022*, NEWFRONT (Oct. 27, 2021), <https://www.newfront.com/blog/washington-increases-pfml-rates-and-weekly-benefit-for-2022>.

190. See *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 17 (noting that New Jersey, New York, and Rhode Island adopt the fix-rate percentage method for calculating the benefit amounts).

191. *Family Leave Insurance*, DIV. OF TEMP. DISABILITY AND FAM. LEAVE INS., <https://nj.gov/labor/myleavebenefits/worker/fli/index.shtml> (last visited Nov. 12, 2022).



trict of Columbia and newer programs have adopted a sliding-scale payment approach that provides a higher wage replacement to lower-wage states workers to “help[ ] to make PFML more affordable and accessible to people who are often living paycheck to paycheck.”<sup>192</sup> For example, Oregon will provide its low-wage workers with payment benefits for 100% of their wages.<sup>193</sup> While for high-wage workers, the weekly benefit rate is 65% of the state AWW plus 50% of the employee’s wages above the state AWW.<sup>194</sup> Most states also designate minimum and maximum benefit amounts.<sup>195</sup> In Oregon, the minimum weekly benefit is 5% of the statewide AWW, while the maximum weekly benefit is 120% of the statewide AWW.<sup>196</sup>

A sliding-scale approach for payment of benefits with designated minimum and maximum payment is undoubtedly the most popular approach for states to consider adopting. It is not as rigid as the fixed-rate approach that provides excessive support for high-income earners but not enough support for low-income workers.<sup>197</sup>

Also, starting with comparatively lower benefit payment rates is an effective way to maintain a healthy program fund. States can slowly increase the payment percentage rates to provide more benefits to eligible workers once the programs stabilize. For example, as a fixed-rate benefit distribution state, New Jersey set its weekly benefit rate as 66% of a worker’s AWW in 2019, which was increased to 85% of a worker’s AWW in 2020.<sup>198</sup>

### 7. *Maximum Lengths of Paid Leave Should Slowly Increase.*

Some states do not generally distinguish the payment lengths between medical leave and family leave.<sup>199</sup> Other states distinguish the

192. See Vicki Shabo, *Explainer: Paid Leave Benefits and Funding in the United States*, NEW AM. (Dec. 17, 2021), <https://www.newamerica.org/better-life-lab/briefs/explainer-paid-leave-benefits-and-funding-in-the-united-states/>.

193. See PAID LEAVE OREGON: RESOURCES: STATE OF OREGON, OFLA, FMLA, PAID LEAVE COMPARISON CHART, <https://paidleave.oregon.gov/Documents/Paid-Leave-OFLA-FMLA-Chart-EN.pdf>. (noting that workers paid 65% or less of the statewide AWW in Oregon are low-income workers).

194. *Id.* (noting that workers paid more than 65% of the state AWW are high-wage workers).

195. See *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 7–9.

196. See H.B. 2005 § 7, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

197. See Chris Marr, *State-Run Paid Leave Evolves to Emphasize Low-Income Workers (1)*, BLOOMBERG (Dec. 14, 2021), <https://news.bloomberglaw.com/daily-labor-report/state-made-paid-leave-evolves-to-emphasize-low-income-workers>.

198. See *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 17.

199. See *id.* at 7–8 (noting that Washington, Connecticut, Oregon, and Colorado offer the paid medical or paid family leave of the same maximum lengths of twelve weeks, with an additional two to four weeks granted to employees taking leave due to pregnancy-related reasons); S.B. 5975 § 6, 65th Leg., 3d Spec. Sess. (Wash. 2017); S.B. 1 § 18, 2019 Leg., Reg. Sess. (Conn.); H.B.

payment lengths for employees taking medical leave or family leave, and usually grant a significantly longer length of leave payments to employees taking medical leave.<sup>200</sup> For example, California falls into the latter category, where employees are entitled to up to eight weeks of payment if they take leave to care for their family.<sup>201</sup> However, if they take leave to recover from their own illnesses, they are entitled to up to fifty-two weeks of payment.<sup>202</sup> In addition, states such as Massachusetts, offer a longer length of leave payment, twenty-six-week payment, to employees who take family leave to care for a covered servicemember, compared to an only twelve-week payment to employees who take family leave to care for a non-servicemember.<sup>203</sup>

The amount and the length of leave payments directly affect the solvency of the leave funds, especially in the first few years when the payments just start. States should always begin with a relatively short maximum length of leave payment and then slowly increase the length if the fund performs healthily. News reported that Connecticut started paying its leave benefits on January 1, 2022.<sup>204</sup> “Connecticut received more than 5,655 initial paid leave benefit applications in December” 2021, before the January 1st start date, which continued serious concerns for the long-term solvency of the leave fund.<sup>205</sup> Both Connecticut and Washington began granting their benefits with a generous twelve-week maximum payment period, and both states ran into solvency issues.<sup>206</sup>

Like Connecticut and Washington, Massachusetts also recently started paying family leave benefits with a generous maximum twelve-week payment period.<sup>207</sup> However, unlike Connecticut and Washington, Massachusetts’s funding topped \$1 billion in unspent money as of

---

2005 § 4, 80th Leg. Assemb., Reg. Sess. (Or. 2019); COLO. REV. STAT. ANN. § 8-13.3-505 (West 2020).

200. See *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 7–8.

201. See CAL. UNEMP. INS. CODE § 3301(c); S.B. 83, 2019-2020 Leg., Reg. Sess. (Cal. 2019); see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 7.

202. See CAL. UNEMP. INS. CODE § 2653; see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 7.

203. See H. 4640 § 29(2)(c)(1), 190th Gen. Ct., Reg. Sess. (Mass. 2018); see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 8.

204. See Eric Gjede, *The Math Doesn't Work on Connecticut Paid Leave*, CBIA (Jan. 18, 2022), <https://www.cbia.com/news/inside-the-capitol/paid-leave-math-doesnt-work/>.

205. *Id.*

206. See S.B. 1 § 18, 2019 Leg., Reg. Sess. (Conn.); S.B. 5975 § 6, 65th Leg., 3d Spec. Sess. (Wash. 2017); *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 7–8; Associated Press, *supra* note 184; see also Gjede, *supra* note 204.

207. See H. 4640 § 29(2)(c)(1), 190th Gen. Ct., Reg. Sess. (Mass. 2018); see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 7–8.

mid-September 2021, representing a massive surplus.<sup>208</sup> For 2022, Massachusetts has decreased its funding rate from 0.75% to 0.68% of eligible wages.<sup>209</sup> Massachusetts has the same generous maximum length of payment as Connecticut and Washington, but it managed to maintain a more healthy fund than the other two states, which may have something to do with Massachusetts's comparatively higher funding contribution rates.<sup>210</sup>

Accordingly, if a state's funding contribution rate is set low, it should not start with the most generous maximum length of paid leave. Rather, it should start with a shorter maximum length of payment, like four to six weeks, and slowly increase the length of the paid leave based on the program's actual performance to avoid any solvency issues. For example, California increased its paid family leave from six weeks to eight weeks in 2020.<sup>211</sup> Rhode Island increased its length from four weeks to five weeks in 2022 and to six weeks in 2023.<sup>212</sup> PFML programs that are too ambitious initially will often cause more trouble in the long run, especially if a national health emergency hits.

#### 8. *Job Protections Should be Guaranteed with Minimum Compromise.*

The good news is that every state that has adopted paid leave has some degree of job protection, at least based on the protection offered under FMLA, for their employees who take paid leave.<sup>213</sup> The job protections may be based on the states' PFML legislation, states' other legislation related to family and medical leave, or federal FMLA.<sup>214</sup> Workers in all states have job protections under the federal

208. Greg Ryan, *Massachusetts' Paid-Leave Fund Has Over \$1 Billion in Unspent Money*, Bos. Bus. J. (Oct. 6, 2021), [https://www.bizjournals.com/boston/news/2021/10/06/massachusetts-pfml-fund-unspent-money.html?utm\\_source=st&utm\\_medium=EN&utm\\_campaign=ME\\_nonsub&utm\\_content=bo&ana=e\\_bo\\_me\\_nonsub&j=25248869&senddate=2021-10-06](https://www.bizjournals.com/boston/news/2021/10/06/massachusetts-pfml-fund-unspent-money.html?utm_source=st&utm_medium=EN&utm_campaign=ME_nonsub&utm_content=bo&ana=e_bo_me_nonsub&j=25248869&senddate=2021-10-06).

209. See Laurielle Howe, *Massachusetts Paid Family and Medical Leave: 2021 End-of-Year Update*, OGLETREE DEAKINS (Dec. 1, 2021), <https://ogletree.com/insights/massachusetts-paid-family-and-medical-leave-2021-end-of-year-update/>.

210. Massachusetts's initial total funding rate for medical and family leave was 0.75%. In contrast, Connecticut's funding rate was less than 0.5% and Washington's was only 0.4%. See *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 5.

211. See CAL. UNEMP. INS. CODE § 3301(c); S.B. 83, 2019-2020 Leg., Reg. Sess. (Cal. 2019); see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 7.

212. See 28 R.I. GEN. LAWS § 28-41-35(d)(2)-(3); H.B. 6090, § 1, 2021-2022 Leg. Sess. (R.I. 2021); see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 7.

213. See *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 9; see also, *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 20.

214. *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 20.

FMLA as long as they are eligible.<sup>215</sup> Depending on the states' non-PFML legislation, eligible workers are entitled to certain job protections.<sup>216</sup> On top of the above two bases, some states offer job protections to eligible workers in the *paid* family and medical leave legislation.<sup>217</sup> Among the states that offer job protections in PFML legislation on top of FMLA and other relevant state legislation, part of them only provide job protections to people to take family leave, while part of them offer full protections for both paid medical and family leave.<sup>218</sup> Most recently, states that adopt PFML programs have all unanimously selected the full-job-protection approach, meaning job protections are offered to people to take both paid family and medical leave.<sup>219</sup> Notably, among the states that offer robust full job protections to their workers, some place certain conditions that the workers must meet before they can claim the job protections.<sup>220</sup> For instance, in Connecticut, if an employee has been employed for at least three months immediately preceding the request for paid leave, the employee is entitled to job protection no matter whether the employee takes paid medical or family leave.<sup>221</sup>

The bad news is that if states do not offer robust job protections in PFML legislation, an employee who takes paid leave would not be guaranteed a job when the employee returns, which will deter the worker from taking a full length of leave. For example, in California, job protections are not guaranteed in PFML legislation, but workers are entitled to job protections under FMLA and the California Family Rights Act (CFRA).<sup>222</sup> Further, parental leave is protected for individuals who work for employers with twenty or more employees, and leave for pregnancy disability is protected for individuals who work for employers with five or more employees.<sup>223</sup> In this situation, workers in California who take parental leave and work for employers with fewer than twenty employees do not have job protections under Cali-

---

215. See 29 U.S.C. § 2614.

216. *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 20.

217. *Id.* (emphasis added).

218. *Id.* (noting that Rhode Island and New York only offer PFML based job protections to workers who take paid family leave but not to workers who take paid medical leave; in contrast, Massachusetts, Connecticut, Oregon, and Colorado offer PFML based job protections to people who take both paid medical and family leave).

219. *Id.*

220. *Id.*

221. *Id.*; S.B. 1 § 17, 2019 Leg., Reg. Sess. (Conn.).

222. See *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 9.

223. See *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 20.

fornia's paid leave program.<sup>224</sup> Those who take family leave that have worked less than 1,250 hours during the past twelve months are not guaranteed job protection under FMLA.<sup>225</sup>

To encourage employees to take a full term of medical and family leave and reduce fears of retaliation, states should implement complete job protection for workers who take paid leave, no matter paid medical or family leave. Otherwise, many workers will still be afraid to take paid leave and suffer in the original dilemma. On top of that, states may place certain conditions for employees to meet before they are entitled to the robust job protections, just like Connecticut and Colorado, which offer full job protections to employees who have worked for their employers for a certain period of time preceding requesting the leave.<sup>226</sup> States can also outright exempt small businesses from offering job protections to the employees who take paid leave if such measures are needed to protect small business interests.<sup>227</sup> Significantly, some states may need to modify their maximum lengths for paid medical leave, as it may be a significant reason why some states hesitate to offer job protections for people taking medical leave. A state's medical leave length can be over fifty weeks, which many employers cannot sustain if they offer job protections.

#### IV. IMPACT

Undoubtedly, paid family leave helps families have healthier children and build stronger marriages.<sup>228</sup> Paid leave also benefits the workforce by maintaining a female workforce and improving gender equality.<sup>229</sup> Eventually, it will also benefit the national economy.<sup>230</sup> While more and more people and businesses agree that this country needs paid leave, they disagree about how it should function.<sup>231</sup> People with different backgrounds or political positions will have differing views on a national PFML policy.<sup>232</sup> The disagreement on who will pay for the enormous costs of implementing a national PFML pro-

---

224. *Id.*

225. See 29 U.S.C. § 2611(2)(A).

226. S.B. 1 § 17, 2019 Leg., Reg. Sess. (Conn.); COLO. REV. STAT. ANN. § 8-13.3-509 (West 2020).

227. See *Overview of Paid Family & Medical Leave Laws in the United States*, *supra* note 72, at 9; see also *State Paid Family & Medical Leave Insurance Laws*, *supra* note 64, at 20.

228. See Filipovic, *supra* note 57.

229. *Id.*

230. *Id.*

231. See Claire Cain Miller, *Americans Agree on Paid Leave, but Not on Who Should Pay*, N.Y. TIMES (Mar. 23, 2017), <https://www.nytimes.com/2017/03/23/upshot/americans-agree-on-paid-leave-but-not-on-who-should-pay.html>.

232. *Id.*

gram slows down its progress.<sup>233</sup> In contrast, these concerns are more manageable within a state. With similarly grouped people supporting similar policies, states are in a better position to pass their own versions of PFML legislation tailored to their citizen's needs. With successful models from states that have passed the PFML legislation, American people should be confident that this country is marching toward a nationwide PFML system, although the path will differ from passing federal PFML legislation.

Besides the states that have passed PFML legislation, about twenty other states have actively considered passing their own versions of PFML legislation.<sup>234</sup> These states should carefully study the existing state PFML models to adopt functional PFML plans that will prevent costs resulting from failures that would have been avoided with diligent study. In this regard, this Article has compared the most significant aspects of PFML policies effective in the states in detail and analyzed their advantages and disadvantages for future states to consider. By carefully following the trends of state PFML programs, more success stories will be told in the near future to expedite the process of state PFML legislation. After that, a nationwide PFML system will be achieved. Also, by studying the trends of state PFML policies, states will enforce similarly structured programs to avoid additional costs for employers who operate businesses across the states, which forces them to comply with the PFML regulations of multiple states.

## V. CONCLUSION

This Article argues that a viable path to achieving a nationwide PFML system in the U.S. is through the states. With pressure from business interests, and due to the devastating economic and political situations, the U.S. is farther than expected from passing federal PFML legislation.<sup>235</sup> The U.S. has a voice for a paid leave policy; however, it needs a practical proposal that fits the majority of people.<sup>236</sup> Therefore, instead of advocating that this country needs paid leave by telling emotional stories, I argue that scholars and governments should study the paid leave policies that are already effective in the states to expedite the adoption of such policies among the remaining states to expedite the progress of achieving a nationwide PFML system.

---

233. *Id.*

234. *See States With Paid Family Leave, supra* note 6.

235. *See supra* Part III.A.

236. *See* Cain Miller, *supra* note 231.

In terms of the most significant aspects of a PFML plan, states should incorporate “chosen family” in the meaning of the term “family” to accommodate the needs of modern families;<sup>237</sup> educate the public on the qualifying reasons for PFML, which include a variety of reasons that are beyond mere pregnancy and childbirth;<sup>238</sup> grant limited exemptions on coverage to certain employers for cost spreading among the majority population to make the programs affordable;<sup>239</sup> set the employee eligibilities based on the amount of time an employee has worked rather than the amount of income an employee has earned;<sup>240</sup> favor and adopt a default state fund method for the program funding and split the funding between employees and employers;<sup>241</sup> adopt a sliding-scale payment system to protect low-income families;<sup>242</sup> start with a comparatively shorter length of maximum payment period with a steady increase to maintain a healthy program fund;<sup>243</sup> and limit the compromises regarding the job protections offered to the employees on leave.<sup>244</sup>

---

237. *See supra* Part III.B.1.

238. *See supra* Part III.B.2.

239. *See supra* Part III.B.3.

240. *See supra* Part III.B.4.

241. *See supra* Part III.B.5.

242. *See supra* Part III.B.6.

243. *See supra* Part III.B.7.

244. *See supra* Part III.B.8.