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# Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation

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# FAMILY AND MEDICAL LEAVE FOR THE 21ST CENTURY?: A FIRST GLANCE AT CALIFORNIA'S PAID FAMILY LEAVE LEGISLATION

JENNIFER THOMPSON\*

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## I. INTRODUCTION

For decades workers were forced to choose between their careers and their families, or maintain a delicate balance in order to have both. Over the past thirty years, legislators proposed and enacted laws designed to give all workers an opportunity to take family or medical leave if it was necessary. The legislation, however, is problematic because it often does not allow enough time or provide any income during the leave. Affordability is often a key factor considered in whether to take family or medical leave, and it often dissuades many employees, who are eligible and genuinely in need of time away from work.<sup>1</sup> Thus, the promise of time off from work for family and medical purposes is illusory if a worker cannot afford to actually take the time off.

Failure to provide wage replacement for employees who need to take family and medical leave is a serious problem, but it has not gone unnoticed. There have been several efforts made on the state and federal level to remedy the affordability factor of family and medical leave. Most recently,

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\* J.D., University of Miami School of Law, 2003; B.A., Stetson University, 2000. Special thanks to my mother, Joan Thompson, for her unwavering support of all my endeavors. I would also like to thank Professor Mary Coombs for her insight and guidance throughout the course of this article.

<sup>1</sup> See Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 229, 230-31 (1999).

California enacted Senate Bill 1661 (SB 1661),<sup>2</sup> which is California's solution to the affordability issues left behind by federal legislation. It is the first bill of its kind to be passed at the state level.

The purpose of this article is to explore the modern family leave policy on a national level, and then to take a closer look at California's SB 1661. Part II of this article discusses the foundations of family leave legislation, including the Pregnancy Discrimination Act (PDA) of 1978 and the Family and Medical Leave Act (FMLA) of 1993. Part III discusses California's SB 1661 in detail, including its general provisions, effect on business, and remaining problems. Most importantly, SB 1661 will be compared to previous family legislation, such as the FMLA.

SB 1661 provides greater protections than the PDA, FMLA, and other legislative acts that were designed for employees who need to take leave; more specifically, SB 1661 provides for paid family and medical leave. SB 1661 is California's attempt to cure the problems left in the aftermath of previous federal and California state legislation, which granted certain protections to those who needed to take time away from work, but failed to focus on the problems created by unpaid leave. To address the affordability issue left behind by previous legislation, SB 1661 provides some paid family and medical leave for eligible employees. While SB 1661 attempts to fix problems left behind by previous legislation, upon closer examination it is apparent that many problems were not remedied. In Part V, this article makes a comparison between the family and medical leave terms of SB 1661 and the extensive family leave program used in Sweden. Even though California took great strides in providing the only paid family and medical leave available in the United States, California's program is dwarfed by the elaborate pro-parenting strategy of Sweden. Finally, SB 1661 will be studied in light of other state plans to determine where family and medical leave is heading in the United States. The article concludes that California has taken a huge step forward and its program should be viewed as a model for the entire nation.

## II. BACKGROUND LEGISLATION

*General Electric Co. v. Gilbert*<sup>3</sup> is the instigator of many current family and medical leave protections. As a benefit to its employees, General Electric voluntarily offered a disability plan ("Plan") that was intended to pay its employees, who became totally disabled as a result of a "non-occupational

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<sup>2</sup> Now codified as CAL. UNEMP. INS. CODE §§ 3300-3305 (2003).

<sup>3</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

sickness or accident.”<sup>4</sup> Employees who filed claims would receive 60 percent of their weekly earnings starting on the eighth day of their leave.<sup>5</sup> A dispute arose when Martha Gilbert and several other female employees at the General Electric plant in Salem, Virginia became pregnant and filed a claim for disability benefits under the Plan. The employees were seeking to recover wages for the period when they were unable to attend work due to their pregnancy.<sup>6</sup> The claims were denied on the grounds that the Plan did not provide benefits for absence due to pregnancy.<sup>7</sup> The General Electric employees then sought judicial involvement alleging gender-based discrimination under Title VII for failing to include pregnancy as a disability.<sup>8</sup> Although the District Court for the Eastern District of Virginia found that failure to include pregnancy as a disability violated Title VII and the Court of Appeals affirmed, the Supreme Court ultimately reversed, finding against Gilbert and the other General Electric Employees.<sup>9</sup> The Supreme Court’s holding stated that the exclusion of pregnancy as a disability was not a violation of Title VII, and that pregnancy was a condition, not a disease, which an employer could opt out of and cover at its discretion without breaking any employment laws.<sup>10</sup> In short, *Gilbert* is an example of a failed attempt to use Title VII to classify pregnancy as a disability.

The Pregnancy Discrimination Act of 1978<sup>11</sup> (PDA) was passed soon after the Supreme Court’s decision in *Gilbert*, and was the first successful federal attempt at securing protections for those employees who had to leave work for family and medical purposes, particularly maternity. By passing the PDA, Congress amended the Civil Rights Act of 1964 to specifically include pregnancy and pregnancy-related disabilities.<sup>12</sup> The modification ensured that pregnancy and pregnancy-related disabilities would be treated like all other disabilities under the Act for employment-related purposes, and to exclude pregnancy and pregnancy-related disabilities would constitute a violation of federal law.<sup>13</sup> The PDA specifically stated that a company’s fringe benefit plan, which covers disabilities, must include pregnancy as a

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

<sup>5</sup> *See id.* at 128.

<sup>6</sup> *See id.* at 128-29.

<sup>7</sup> *See id.* at 129.

<sup>8</sup> *See id.* at 127-28.

<sup>9</sup> *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976).

<sup>10</sup> *See id.* at 145-46.

<sup>11</sup> 42 U.S.C. § 2000e(k) (2003).

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

disability.<sup>14</sup> In other words, the PDA provided for women to be treated like all other non-pregnant employees; thus, affirming their rights to be hired, to enter training courses, and to maintain employment while pregnant.<sup>15</sup> Essentially, the PDA attempted to make all employees, including men, women, and pregnant women, equal in the workplace; however, the PDA did not grant any affirmative right for pregnant women to demand special accommodations in the workplace.<sup>16</sup>

While definitely a step in the right direction, the PDA was not without its drawbacks. The PDA merely stated that pregnancy and pregnancy-related disabilities were treated the same as any other disability for employment-related purposes, but it did not mandate any disability leave time for pregnant employees. The PDA only required that if an employer provided its employees with disability leave, then pregnancy must be included as a disability. Additionally, the PDA only covered pregnancy and it provided no compensation other than what an employer's fringe benefit plan was willing to provide. The PDA is also a part of Title VII, and therefore, it only applied to companies with 15 or more employees.<sup>17</sup> Many women working for smaller businesses were left completely unaffected by the newly passed legislation. Moreover, they were left with no recourse when an employer decided not to include pregnancy as a disability in his or her employee benefit packages.

*California Federal Savings & Loan Association v. Guerra*<sup>18</sup> pushed the family and medical leave movement even further. In September 1978, in an effort to provide more protections to pregnant employees than afforded under the PDA, California amended its Fair Employment and Housing Act to prohibit discrimination against pregnancy and provide other protections for pregnant employees.<sup>19</sup> More specifically, California Government Code section 12945(b)(2) required that all employers provide pregnant employees with up to four months of unpaid pregnancy disability leave.<sup>20</sup> The Fair Housing and Employment Commission interpreted this section to mean that an employer needs to give pregnant employees time off of work and to reinstate them to their previous position upon their return if their previous

<sup>14</sup> See *id.*

<sup>15</sup> See Marc Mory & Lisa Pistilli, *The Failure of the Family and Medical Leave Act: Alternative Proposals For Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689, 692 (2001).

<sup>16</sup> See D'Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1417 (1996).

<sup>17</sup> See 42 U.S.C. § 2000e(b) (2003).

<sup>18</sup> Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

<sup>19</sup> See CAL. GOV'T CODE ANN. § 12945(b)(2) (West 1980).

<sup>20</sup> See *id.*

position is still available.<sup>21</sup> An employer may fill a job out of business necessity while the pregnant employee is away on leave, but upon return of the pregnant employee the employer must make a reasonable and good faith effort to find the employee a similar position.<sup>22</sup> It should be noted that section (b)(2) is the only portion of the California statute that applies to employers covered by Title VII.<sup>23</sup>

In *Guerra*, the dispute first arose between Lillian Garland and her employer, California Federal Savings & Loan Association (Cal Fed), when she returned from pregnancy disability leave and was told that her old position as a receptionist had been filled and no other similar positions were available.<sup>24</sup> Garland was then terminated.<sup>25</sup> Cal Fed argued that it expressly reserved the right to terminate an employee who takes leave and returns to find that their old position has been filled and no similar position is available.<sup>26</sup> Garland filed a complaint with the Fair Employment and Housing Commission alleging a violation of section 12945(b)(2). The commission later issued an administrative accusation against Cal Fed on her behalf.<sup>27</sup> Cal Fed brought suit in the federal district court for declaratory and injunctive relief based on the fact that section 12945(b)(2) was inconsistent with Title VII and that Title VII preempted section 12945(b)(2).<sup>28</sup> The Supreme Court in *Guerra* found that section 12945 and Title VII had a common goal and the state statute did not prevent employers from complying with Title VII; thus, there was no inconsistency present.<sup>29</sup> Further, the Supreme court stated that Title VII, as amended by the PDA, did not preempt the California statute and agreed that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."<sup>30</sup> Ultimately, the Court upheld California's section 12945(b)(2) against the challenge that it was preempted by the PDA.

*Guerra* is an important case because it demonstrates that the Supreme Court was not going to prevent states from reaching beyond the limits of the PDA to provide additional leave benefits for their pregnant and disabled employees. *Guerra* demonstrates a judicial understanding that more

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<sup>21</sup> See *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 276.

<sup>22</sup> See CAL GOV'T CODE ANN. §§ 12935(a)(1), 12935(h) (West 1980).

<sup>23</sup> See *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 275.

<sup>24</sup> See *id.* at 278.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 279.

<sup>29</sup> See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290-91 (1987).

<sup>30</sup> *Id.* at 285.

protections for pregnant employees at the state level may be necessary and should not be thwarted by the courts. Perhaps *Guerra* was a foreshadowing of judicial acceptance for more comprehensive family and medical leave legislation that was on the horizon. Finally, section 12945(b)(2) is important because it is one of the first examples of California's lead in family and medical leave legislation.

Unlike the PDA, the Family and Medical Leave Act of 1993<sup>31</sup> (FMLA) provides affirmative rights to those who need to take family leave. The FMLA affords eligible employees with twelve weeks of unpaid leave during any twelve-month period to: 1) care for a new child (birth, adopted, or foster placed), 2) tend to their own serious health condition which makes the employee unable to perform job functions, or 3) care for a serious health condition of their spouse, child, or parent.<sup>32</sup> The FMLA defines *eligible employee* as an employee who has worked 1250 hours or more for their employer in the one-year period before the leave period commences.<sup>33</sup> To be an *eligible employee*, however, one must work for a company with at least fifty employees.<sup>34</sup>

Under the FMLA, when a serious health condition is personal, employees must assert to their employer that they are unable to perform any one of the essential functions of their job.<sup>35</sup> The FMLA allows employers, at their discretion, to require the employee to provide certification (i.e., a doctor's note) from his or her health care provider.<sup>36</sup> The employer may also ask for this type of certification from the health care provider of a spouse, child, or parent when the employee requests leave to care for another's serious health condition.<sup>37</sup> The FMLA also dictates that leave does not need to be taken all at once; rather, it may be used intermittently or on a reduced schedule as long as the employer and employee agree.<sup>38</sup>

Employers have certain required duties under the FMLA. First, employers must give their employees notice of their benefits. In order to be

<sup>31</sup> 29 U.S.C. §§ 2601-2654 (2003).

<sup>32</sup> See 29 U.S.C. § 2612(a)(1)(A-D).

<sup>33</sup> See 29 U.S.C. § 2611(2)(A)(i-ii). Courts in both *Eldridge v. Northrop Grumman Corp.*, 81 F.Supp. 2d 600, 601 n.1 (D. Md. 1999) and *Sepe v. McDonnell Douglas Corp.*, 176 F.3d 1113, 1115 (8th Cir. 1999) deemed employees who had worked for their employers for over a year but had not met the 1250 hour requirement did not qualify for FMLA leave.

<sup>34</sup> See 29 U.S.C. § 2611(2)(B)(i-ii) (stating that the employer need not employ 50 or more employees year round; if an employer has 50 or more employees for 20 weeks a year or more, then they are subject to the requirements of the FMLA).

<sup>35</sup> See 29 U.S.C. § 2612(a)(1)(D).

<sup>36</sup> See 29 U.S.C. § 2614(c)(3)(ii).

<sup>37</sup> See 29 U.S.C. § 2614(c)(3)(i) (2003).

<sup>38</sup> See 29 U.S.C. § 2612(b)(1).

in compliance with the FMLA, employers must post, and keep posted, information on how to file a claim for FMLA leave.<sup>39</sup> This information must consist of summaries or excerpts of the FMLA itself, and must also be placed in a location where employment notices are usually placed for employees and applicants to view.<sup>40</sup> Failure to abide by FMLA notice provisions can cost an employer up to \$100 per violation.<sup>41</sup> Second, the FMLA requires an employer to maintain an employee's health care coverage, if the employee had such coverage before taking leave.<sup>42</sup> The employee should receive the same health care coverage during his or her leave period as if the leave never took place.<sup>43</sup> Third, the employer must maintain all of the employee's benefits accrued prior to the commencement date of leave while the employee is away from work.<sup>44</sup> These benefits include pensions, disability insurance, group life insurance, and educational benefits.<sup>45</sup> Finally, when an employee returns from leave the FMLA requires the employer to restore the employee to the same position he or she held prior to commencement of the leave or the employer must find an equivalent position.<sup>46</sup> An employer may only deny restoration to a salaried employee who is among the highest paid 10 percent of employees,<sup>47</sup> but the employer must follow specific procedures in order to legally deny restoration. For example, the employer must first assert that restoration would create "substantial and grievous economic injury"<sup>48</sup> to the employer and then notify the employee of the potential harm, and finally after receiving the notice the employee must elect not to return to work.

Duties are also delegated to employees under the FMLA. Most importantly, the FMLA requires that employees follow instructions posted by their employer when the need to take FMLA leave arises. Where leave is foreseeable, the FMLA requires employees to give their employer thirty days notice of their need to take FMLA leave.<sup>49</sup> Where such leave is not foreseeable, then employees should give notice as soon as practicable.<sup>50</sup> When the need to take leave is based on planned medical treatment, the

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<sup>39</sup> See 29 U.S.C. § 2619(a).

<sup>40</sup> See *id.*

<sup>41</sup> See 29 U.S.C. § 2619(b).

<sup>42</sup> See 29 U.S.C. § 2614(c)(1).

<sup>43</sup> See 29 U.S.C. § 2614(c)(1) (2003).

<sup>44</sup> See 29 U.S.C. § 2614(a)(2).

<sup>45</sup> See 29 U.S.C. § 2611(5).

<sup>46</sup> See 29 U.S.C. § 2614(a)(1)(A-B).

<sup>47</sup> See 29 U.S.C. § 2614(b)(2).

<sup>48</sup> 29 U.S.C. § 2614(b)(1)(A).

<sup>49</sup> See 29 U.S.C. § 2612(e)(1) (2003).

<sup>50</sup> See *id.*



employee must make reasonable efforts to schedule such treatments in a way that does not disrupt the operations of his or her employer.<sup>51</sup> Employees also have a duty to return from leave if they are able to do so. An employer may seek to recover health insurance premiums for the leave period from an employee if he or she fails to return from work.<sup>52</sup> The FMLA allows employers to recoup this loss if the employee fails to return to work for any reason other than the persistence of his or her own serious health condition, the persistence of the serious health condition of an employee's spouse, child, or parent, or any other circumstances beyond the employee's control.<sup>53</sup>

Despite the FMLA's innovation and importance as the first gender neutral family and medical leave benefits package, the legislation did not pass through Congress without much debate and compromise. The FMLA was introduced for consideration six times and vetoed twice by President Bush before it was signed into law.<sup>54</sup>

Legal scholars have proposed two reasons for the long delay in the passage of the FMLA. First, owners of small businesses accumulated significant political power, which created a politically hostile environment.<sup>55</sup> This hostile environment prevented the passage of the FMLA or any other legislation of its kind.<sup>56</sup> Possession of this strong lobby power helped small businesses obtain great political compromises, such as the requirement that an employee work for a company with at least fifty employees.<sup>57</sup> Although, a lower employee requirement was originally suggested, the fifty-employee compromise was reached because the impact that the FMLA would have on small businesses was uncertain.<sup>58</sup> Second, despite recent family values scandals, political families continue to adhere to the traditional family structure.<sup>59</sup> Critics allege that congressmen and women allowed their

<sup>51</sup> See 29 U.S.C. § 2612(c)(2)(A).

<sup>52</sup> See 29 U.S.C. § 2614(c)(2).

<sup>53</sup> See 29 U.S.C. § 2614(c)(2)(B)(i-ii).

<sup>54</sup> See Michele Ashmalla, *A Swedish Lesson in Parental Leave Policy*, 10 B.U. INT'L L.J. 241, 247 (1994) ("Federal parental leave legislation, however, was slow in following state precedents. The Family and Medical Leave Act of 1993 (formerly of 1987, 1988, 1989, 1990, 1991, and 1992) is the first step in the right direction. Former President Bush, utilizing his veto power, held back this legislation. On February 5, 1993, newly-elected President Clinton signed the Family and Medical Leave Act of 1993.").

<sup>55</sup> See Mory & Pistilli, *supra* note 15, at 699.

<sup>56</sup> See *id.*

<sup>57</sup> This lobby power was able to convince members of Congress that the ramifications of a general package that affected all employers could destroy many small businesses, even though no numerical research was presented to prove this. Small businesses and other critics claimed the Act mandated one-size-fits-all benefit without taking into account vital specifics. See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See generally Ashamalla, *supra* note 54, at 248 (defining *traditional family* in this context is

traditional family backgrounds to interfere with their voting for the rest of the nation.<sup>60</sup>

### III. FLAWS IN THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

The FMLA's purpose is to provide workers with a federally guaranteed entitlement to take job-secure time off work for family and medical reasons, and thereby, create a careful balance between the demands of the workplace and the importance of family.<sup>61</sup> Despite these purposes, the FMLA is far from a perfect solution. The lack of wage replacement and the failure to acknowledge non-traditional family units are two of the bigger flaws left in the aftermath of the FMLA's passage, but additional problems are apparent upon further examination of the Act. For example, arbitrary employee number caps, inadequate amount of leave time, failure to provide leave to attend a child's extracurricular activities, and the requirement of a serious health condition rank highly when considering the flaws in the FMLA. These flaws have not gone unnoticed. There have been several attempts to remedy these problems, but given Congress's difficulty in approving the FMLA, one can understand that a current modification of the Act to address these flaws may be unlikely.

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intended to be that there are two parents in the home that are involved with the child's life, and if at all possible one of those parents will not work outside the home, but instead tend to the affairs of the household. At the time the FMLA was passed only eleven of the forty-one Congressmen with children under the age of fourteen had wives that worked outside the home).

<sup>60</sup> See *id.*

<sup>61</sup> It is the purpose of this Act –

- (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
- (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
- (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
- (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity related disability) and for compelling family reasons, on a gender-neutral basis; and
- (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

The lack of wage replacement causes an inequality between those families who can afford to take leave and those who cannot.<sup>62</sup> Single parents and their children suffer the most because while parents have the right to take up to twelve weeks of leave, most cannot afford to do so.<sup>63</sup> In 1990, approximately 7.7 million households were headed by single mothers, of which 3.5 million lived on incomes lower than the designated poverty line.<sup>64</sup> Considering that these single parents rarely have savings or alternative financial resources available to them, these families are virtually excluded from the benefits of the FMLA solely based on affordability.<sup>65</sup> Even dual income families may not be able to sacrifice three months of pay for one parent to stay home and nurture a new child; very few families in our society are that financially secure.<sup>66</sup> Moreover, a study conducted by the Department of Labor in 2001 found that 88 percent of those household members eligible for family leave do not take the full amount of time off from work because they cannot afford it.<sup>67</sup>

Legal scholars claim that the FMLA is inadequate because it fails to provide wage replacement. This claim seems to have some merit when one considers that Ghana and Haiti, both third-world nations, have paid family leave available on the national level.<sup>68</sup> Of course, one must also consider that while these nations officially provide this benefit, actual employer practice within the countries may be quite the contrary. The high unemployment rate of these third-world nations cannot be ignored because these rates make the offer of family and medical leave essentially irrelevant. Naturally, there is no need to take family leave if one is unemployed. Although the FMLA provides leave to eligible employees, a more thorough analysis suggests that affordability concerns stemming from the lack of wage replacement often makes the FMLA's assurance of leave a hollow offer.

The FMLA's lack of wage replacement is just one of its many flaws. Another important criticism of the FMLA is that it fails to cover many *real* American families because of their non-traditional nature.<sup>69</sup> The FMLA

<sup>62</sup> See Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work, Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 141 (1998).

<sup>63</sup> See *id.* at 142.

<sup>64</sup> See Christina Duarte, *The Family and Medical Leave Act of 1993: Paying the Price for an Imperfect Solution*, 32 U. LOUISVILLE J. FAM. L. 833, 850 (1994) (citing U.S. Census Bureau, CPR Series, Female-Headed Families with Children, 60n.175, Table 18).

<sup>65</sup> See *id.*

<sup>66</sup> See Young, *supra* note 62, at 141.

<sup>67</sup> See Mory & Pistilli, *supra* note 15, at 689 (citing 147 Cong. Rec. H188-89 (daily ed. Feb. 6, 2001) (statement of Rep. Woolsey)).

<sup>68</sup> See Ruth Colter, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61,71 (1997).

<sup>69</sup> See Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral*

allows an employee to take leave to care for his or her spouse, son, daughter, or parent.<sup>70</sup> The terms son and daughter are defined according to the child's familial relationship (e.g., biology, adoption, foster placement, stepchild, or legal ward).<sup>71</sup> Parent is based on biology or *in loco parentis*<sup>72</sup> and spouse is based on a legally binding marriage.<sup>73</sup> Under this scheme, non-marital partners, grandparents, in-laws, and extended family are completely unrecognized.<sup>74</sup> For example, an employee cannot take FMLA leave to care for a non-marital partner or their non-marital partner's children. Furthermore, under the outlined definitions of the FMLA a grandparent may not take time to care for a child who is in his or her care, nor may a grandchild take family leave time off to care for a grandparent who is seriously ill.<sup>75</sup> There are currently 4 million children residing with a grandparent in the United States, and many of these grandparents are wage earners. The children living with and being cared for by these wage-earning grandparents will never see the FMLA benefits, at least not under the present scheme.<sup>76</sup> Aunts, uncles, and cousins are also ineligible for FMLA leave benefits, although they may be the only family that a child has ever known. There is also an *in loco parentis* provision in the FMLA,<sup>77</sup> but the clause is specifically reserved for individuals who are responsible for the daily care-taking of the child and does not ensure that individuals, who are not legally related, will in fact be able to take leave.<sup>78</sup> If there is a dispute regarding whether the employee is eligible to take leave under the FMLA, the employer has discretion to determine the eligibility of the employee.<sup>79</sup> While the FMLA was intended to give eligible employees time away from work for family purposes, a large portion of what constitutes a family is actually excluded under the Act's definitions. Perhaps the FMLA was limited in its verbiage to simplify its implications on everyday business activities; however, these limitations seem to have caused more problems in the long-term.

Gay and lesbian populations also suffer under the terms of the FMLA. The Defense of Marriage Act<sup>80</sup> (DOMA) prohibits state acknowledgment of

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Code Embedded in the Family and Medical Leave Act, 10 COLUM. J. GENDER & L. 77, 109 (2000).

<sup>70</sup> 29 U.S.C. § 2612(a)(1)(C) (2003).

<sup>71</sup> See generally 29 U.S.C. § 2611 (2003).

<sup>72</sup> See 29 U.S.C. § 2611(7) (2003).

<sup>73</sup> See 29 U.S.C. § 2611(13) (2003).

<sup>74</sup> See Bornstein, *supra* note 69, at 112.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See generally 29 U.S.C. § 2611(7), (12) (2003).

<sup>78</sup> See Bornstein, *supra* note 69, at 111.

<sup>79</sup> See *id.*

<sup>80</sup> The Defense of Marriage Act, Pub. L. Co. 104-199, 110 Stat. 2419 (1999) (codified at 1

same sex marriages, and thus, homosexuals cannot be considered spouses under the FMLA. Homosexuals may take FMLA leave to tend to their own serious health condition, or the serious health condition of their parent or child, but not the serious health condition of their partner because a partner is not a spouse as defined by the FMLA.<sup>81</sup> Homosexuals are also prohibited from taking FMLA leave time to care for their partner's children who are suffering from a serious health condition. The denial of leave occurs because the partner is not considered a stepparent since there is no legally binding marriage. The situation becomes even more complicated when one partner is expecting a child. Since only one partner can be biologically related to the child and some state laws, such as those in Florida, limit adoption by gay couples, there may be no relief for these couples when expecting a child. Only the homosexual partner, who is biologically related to the child, can take FMLA leave to spend time with the child, even though the child is actually raised by both partners. Finally, the FMLA's failure to classify homosexuals as spouses, prohibits one partner from taking FMLA leave time off of work to help care for the other partner. This is particularly problematic in AIDS cases. AIDS is a terminal disease that would definitely qualify as a serious health condition under the FMLA, but because a homosexual partner does not fit within the definition of spouse under the Act, the AIDS patient may have to find someone else to care for him or her in time of need.

Limiting FMLA leave to family members of one degree of separation seems like the easiest solution for avoiding abuse of the system, but the bottom line is that the United States is full of alternative living situations that are currently going unrecognized under the Act. The refusal to recognize alternative living arrangements, such as non-marital partners and extended family, is costing families precious leave time. Adhering to the traditional nuclear family composition demonstrates that the legislature is unwilling accept the composition of today's society, which includes cohabitants and extended family. While the intent of the FMLA is to provide employees with job secure time off from work for family and medical reasons, some employees may be excluded from this entitlement if they do not satisfy the Act's black and white definitions of son, daughter, or parent. On the other hand, to establish more flexible definitions may create more problems in the long run. It would be too costly and time consuming for employers to examine each individual employee's situation to determine if he or she can qualify for FMLA leave based on his or her personal family

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U.S.C. § 7 and 28 U.S.C. § 1738(C).

<sup>81</sup> See Bornstein, *supra* note 69, at 112.

composition and individual circumstances. Broader definitions would also open the FMLA to more abuse. For example, if the FMLA definitions were expanded to permit an employee to take time off from work to tend to sick friends, then the employee could take virtually any day off from work they desire.

Besides the lack of wage replacement and limited definitions, there are several smaller problems with the structure of the FMLA. First, the fifty-employee minimum for a company is insufficient because it leaves far too much of the general public unaffected by the FMLA.<sup>82</sup> On the other hand, lowering the employee minimum to twenty-five or fifteen, as covered by Title VII, could create detrimental results for an employers' profits and the overall economy. Businesses of twenty-five employees or less are often unable to allow employees twelve weeks off of from work without creating a significant economic hardship. Small businesses consisting of only two or three employees could be financially devastated if an employee took a full twelve weeks off. It is interesting that the FMLA provides protection for fewer employees than the PDA, when in fact the passage of the FMLA was intended to afford more benefits and fill the imperfections of the PDA. However, the FMLA does come at a cost to employers, whereas the PDA is free. The PDA only requires that employers treat pregnancy as they would any other disability; discrimination against pregnant employees is expressly prohibited under the PDA.<sup>83</sup> The FMLA, on the other hand, requires the employer to give an eligible employee time away from work,<sup>84</sup> and thus, creates a cost for the employer. When all of these comparisons are considered it makes sense that while the FMLA was designed to provide more benefits, the costs of such a program leads to more uncovered employees.

A second problem is that the FMLA provides only three months of family leave, which may be inadequate in certain situations, such as pregnancy and the subsequent care of a newborn child.<sup>85</sup> Although pregnancy alone may not render an employee unable to work for three full months, the total effect of pregnancy and newborn care may do so. In addition, it is suggested that by allowing women only three months to disperse between pregnancy and post-pregnancy, infants are being deprived

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<sup>82</sup> On January 16, 1999 Rep. William Clay proposed changing the FMLA to cover businesses that employ twenty-five employees or more, thus increasing the number of eligible persons. Rep. Clay's efforts have proved unsuccessful thus far. See Mory & Pistilli, *supra* note 15, at 700.

<sup>83</sup> See *supra* note 11.

<sup>84</sup> See 29 U.S.C. §2612 (2003).

<sup>85</sup> See Young, *supra* note 62, at 142.

of sufficient bonding time with their parents.<sup>86</sup> Further, the FMLA provides no mechanism to extend leave past the three month maximum for special situations that require more care and attention, such as a newborn child with disabilities.

A third problem with the FMLA is that it fails to allow parents short periods of leave to attend their child's extracurricular activities or care for their child's minor illnesses.<sup>87</sup> While a child's educational and extracurricular activities are family-related, they are not a health condition. Since the FMLA fails to cover these family events, a parent must struggle to squeeze in school plays, soccer games, and field trips amid their busy work schedule. Also, children who are sick but not suffering from a serious health condition do not satisfy the FMLA requirements for leave.<sup>88</sup> The FMLA only allows parents to take family leave when their spouse, child, or family member has a serious health condition, and a child with a cold or the chicken pox will not suffice.<sup>89</sup> Children with colds may not require a parent to stay at home with them for several days, but children with the chicken pox could be at home for over a week. While one of the enumerated purposes of the FMLA is to balance the demands of the family and the needs of the family,<sup>90</sup> these short-term needs were overlooked. The FMLA may not be the best resource for parents to take short periods of leave, and therefore, parents may need to look to their individual company policies and state laws to find a remedy.

Several attempts on the federal and state level were made to fix these flaws. Senator Tom Daschle (D-SD), as well as Representatives Lynn Woolsey (D-CA) and Carolyn Maloney (D-NY), were at the forefront of addressing FMLA flaws.<sup>91</sup> In 2001, Senator Daschle brought the Right to Start Act to the Senate for consideration.<sup>92</sup> The Act's provisions were designed to amend the FMLA by reducing the fifty-employee minimum to twenty-five, granting employees twenty-four hours of leave per year for a

<sup>86</sup> Scholars and psychologists have asserted that a child needs anywhere between three to six months to bond with their parents after birth. Under the current terms of the FMLA this necessary bonding period is impossible. Of course, it could always be asserted that by both parents utilizing and coordinating their FMLA leave the child could have this six month bonding period with their parents, but this ignores single parent households and possibilities of complications during the pregnancy that may require a mother to take leave before the due date. *Id.*

<sup>87</sup> See Mory & Pistilli, *supra* note 15, at 700.

<sup>88</sup> See Young, *supra* note 62, at 142.

<sup>89</sup> Of course it could always be argued that illnesses suffered by a child such as a cold or the chicken pox are short-term illnesses that a parent could use their own accrued sick leave to home to take care of the child and perhaps even be paid for the day missed. See generally *id.*

<sup>90</sup> See 29 U.S.C. §2601(b)(1) (2003).

<sup>91</sup> See generally Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 20 (2002).

<sup>92</sup> See *id.*

parent to attend a child's extracurricular events, and including unpaid leave time to participate in activities related to domestic violence, such as hearings and counseling.<sup>93</sup> Representative Woolsey's plan, Family Income to Respond to Significant Transitions Insurance Act, involved the use of federally funded grants given to states.<sup>94</sup> With the grants, states could offer paid leave through the use of private disability or other insurance programs.<sup>95</sup> Finally, Representative Maloney introduced several proposals to expand FMLA benefits to grandparents, in-laws, adult dependent children, and domestic partners.<sup>96</sup> Although all of these proposals have been introduced and debated in Congress, none of these changes have been adopted.<sup>97</sup>

Some states enacted legislation to bridge the gaps left behind by the FMLA and now afford more protections for employees within their borders. For example, Minnesota provides each employee in the state with sixteen hours of job-protected leave per year to participate in his or her child's extracurricular or academic activities, provided that these activities cannot be rescheduled to non-work hours.<sup>98</sup> Oregon allows parents to take unpaid leave with little or no advance notice to their employer when their child is unable to attend school or daycare as the result of any health condition, even a non-serious one.<sup>99</sup> The Massachusetts' Maternity Leave Act grants leave benefits similar to the FMLA to those employees of companies with six or more employees.<sup>100</sup> The statute also reduces the trigger of these FMLA-like benefits to the end of the employee's probationary period or three months of work, whichever occurs first.<sup>101</sup> State provisions are particularly important because a state that provides greater rights than the federal system permits an employee to receive the best of both worlds.<sup>102</sup>

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<sup>93</sup> See *id.*

<sup>94</sup> See *id.* at 19.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 20.

<sup>97</sup> See *id.*

<sup>98</sup> See MINN. STAT. § 181.9412 (2002).

<sup>99</sup> See OR. REV. STAT. § 659A.159(1)(d) (2001).

<sup>100</sup> See MA. ST. 149, § 105D (2003).

<sup>101</sup> See *id.*

<sup>102</sup> See generally Shelly B. Kroll, *An Employee's Perspective on the Family and Medical Leave Act*, 38-OCT B. B.J. 4, 23 (1994).



#### IV. CALIFORNIA'S SENATE BILL 1661 (SB 1661)

On September 23, 2002, California took another step to ensure a family friendly work place when Governor Gray Davis signed SB 1661 into law.<sup>103</sup> With an express purpose to provide wage replacement for those employees who genuinely need time off from work, but who cannot afford to take the unpaid leave granted to them under the FMLA, SB 1661 goes to great lengths to balance the demands of family and the workplace.<sup>104</sup>

##### A. General Provisions

SB 1661 is made up of several components. First, SB 1661 declares that any California employee who cannot perform his or her regular, customary work is eligible for temporary disability insurance benefits.<sup>105</sup> In other words, SB 1661 applies to all California businesses, large and small; there is no minimum employee requirement. All California employees are covered.

Second, SB 1661 provides employees with time off to care for family; namely, a newborn child, a newly adopted child, or a seriously ill family member.<sup>106</sup> SB 1661 broadens several definitions, thereby providing benefits to more of the employee's relatives. For example, the definition of family member includes children, spouses, parents, and domestic partners.<sup>107</sup> The term child includes not only those related to the employee through biology, adoption, or foster placement, but also incorporates step children, legal wards, and children of the employee's domestic partner.<sup>108</sup> SB 1661 also contains an *in loco parentis* provision allowing family leave benefits to flow to a child where the employee stands *in loco parentis*.<sup>109</sup>

Third, and perhaps most importantly, SB 1661 provides an employee with six weeks of paid family leave per year.<sup>110</sup> During their family leave California employees are able to collect 55 percent of their average weekly

<sup>103</sup> The bill was first introduced by Senator Sheila Kuehl (D-Los Angeles) in February 21, 2002. The bill was subject to numerous amendments, but was passed by the Assembly on August 27, 2002 and passed by the Senate on August 30, 2002. It took Governor Gray Davis less than a month to sign the bill into law. See NAMI-SCC, *Governor Signs SB 1661 Family Leave Act*, at <http://www.namisc.org/Advocacy/2002/CA-Bills/FamilyLeaveAct.htm> (last visited Apr. 8, 2004).

<sup>104</sup> See CAL. UNEMP. INS. CODE § 3300(c), (e) (2003).

<sup>105</sup> See CAL. UNEMP. INS. CODE § 3303(a) (2003).

<sup>106</sup> See *id.*

<sup>107</sup> See CAL. UNEMP. INS. CODE § 3302(e) (2003).

<sup>108</sup> See CAL. UNEMP. INS. CODE § 3302(a) (2003).

<sup>109</sup> See *id.*

<sup>110</sup> See CAL. UNEMP. INS. CODE § 3301(a) (2003).

income;<sup>111</sup> however, there are limits. For example, SB 1661 only provides wage replacement for annual salaries up to \$65,000.<sup>112</sup> Any employee making more than \$65,000 annually is limited. They may only receive 55 percent of \$65,000 for their six weeks of leave, rather than 55 percent of their actual income. SB 1661 also allows employers to require employees to use two weeks of previously accrued vacation time before receiving paid leave.<sup>113</sup> Other than possibly having to relinquish some of his or her vacation time, an employee on family leave maintains all of his or her previously accrued benefits for the duration of their leave, including health insurance.<sup>114</sup> While one of SB 1661's enumerated purposes is to provide employees with time away from work for family purposes, and thereby, reconcile the needs of the workplace with the needs of the family,<sup>115</sup> SB 1661 does not specifically require reinstatement. This is of little concern, however, because the FMLA provides reinstatement to all eligible employees taking family leave. After all, when state and federal laws both apply the employee is given the best of both worlds. The only employees who stand to lose are those that work for companies that employ less than fifty employees.

Finally, the benefits available under SB 1661 are completely funded by employee contributions. Employees will have to pay anywhere between 0.1 percent and 1.5 percent of their income into a State Disability Insurance Fund (SDI), with the percentage paid depending on the individual's income.<sup>116</sup> In 2004 and 2005, the employee contribution will be increased by at least 0.08 percent to cover the initial costs of the SB 1661 family leave benefits.<sup>117</sup> Each year thereafter the Director of Employment Development (the Director) shall calculate the amount of the yearly employee contribution to maintain the SDI, and may increase or decrease the amount of employee contribution as necessary.<sup>118</sup> The employee contribution rate may never exceed 1.5 percent of the employee's annual income.<sup>119</sup> Employee contributions will reach the SDI from payroll deductions taken directly out of the employee's paycheck. Those who are self-employed must also make payments to the SDI as soon as the Director makes them aware of the annual contribution.<sup>120</sup> Contributions to the SDI will begin on January 2004 when

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<sup>111</sup> See CAL. UNEMP. INS. CODE § 2655 (2003).

<sup>112</sup> See *id.*

<sup>113</sup> See CAL. UNEMP. INS. CODE § 3303(g) (2003).

<sup>114</sup> See CAL. UNEMP. INS. CODE § 3304 (2003).

<sup>115</sup> See CAL. UNEMP. INS. CODE § 3300(f) (2003).

<sup>116</sup> See CAL. UNEMP. INS. CODE § 984(a)(3) (2003).

<sup>117</sup> See CAL. UNEMP. INS. CODE § 984(a)(2)(B) (2003).

<sup>118</sup> See CAL. UNEMP. INS. CODE § 984(b) (2003).

<sup>119</sup> See CAL. UNEMP. INS. CODE § 984(d) (2003).

<sup>120</sup> See CAL. UNEMP. INS. CODE § 984(b).

the legislation becomes operative,<sup>121</sup> and employees will be able to collect the benefits of SB 1661 in July 2004.<sup>122</sup>

### B. *Small Business Concerns*

By enacting SB 1661, California became the first state in the country to successfully implement a paid family leave program.<sup>123</sup> Nonetheless, some groups are apprehensive about the new legislation. Small businesses are one of the biggest groups to express their apprehension of SB 1661. Although small businesses are already covered by disability leave legislation, which allows workers to take paid leave for their personal non-work-related illnesses and injuries,<sup>124</sup> small businesses are concerned about SB 1661's affect on them. SB 1661 is the first family leave legislation to affect small businesses because they are exempt from the FMLA. More specifically, small businesses worry about how they are going to cover the loss of an employee for six weeks; after all, small businesses are just that - small. Often there is no way to spread out the work of the departing employee because there may not be any other worker to perform the employee's work in his or her absence. In that case, a temporary worker will need to do the work of the employee on leave. He or she will require training and assistance that the employee on leave would not have required, which forces the employer to take time away from other pending tasks, and may ultimately result in lower productivity. By the time the temporary worker is properly trained and no longer needs assistance, the original employee is back from his or her family leave. This is all assuming that a temporary worker could even do the work of the employee on leave. If the work of the employee on leave is too complicated or difficult, it could take weeks for an employer to find an adequate replacement.

Small businesses are also apprehensive about the possible costs they might incur if the SDI fund does not generate enough money.<sup>125</sup> As the law is currently written, the SDI fund is maintained solely through employee contribution, and requires no additional money from employers. Despite this clear language, however, businesses have expressed concern over the possibility of the costs eventually being shifted to them if the amounts generated by the employees prove not to be enough to maintain the SDI.

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<sup>121</sup> See CAL. UNEMP. INS. CODE § 3300, Legislative Note ("This act shall become operative on January 1, 2004.").

<sup>122</sup> See *id.*

<sup>123</sup> See Miguel Bustillo, *Paid Leave Bill Ignites Emotions*, L.A. TIMES, July 29, 2002, at A1.

<sup>124</sup> See CAL. UNEMP. INS. CODE § 3300(d) (2003).

<sup>125</sup> See Bustillo, *supra* note 123, at A1.

These businesses believe that they cannot contribute to a SDI fund and still remain competitive with bigger businesses in a global economy.<sup>126</sup> State Senator Bruce McPherson (Republican-Santa Cruz) also fears that over the years the state legislature will try to shift the cost to businesses with little resistance.<sup>127</sup> This fear, however, seems anticipatory and illusory at the very best. First, the law requires no employer contribution at all. Second, given the political power held by small businesses, as demonstrated in the negotiations regarding the FMLA, there is little chance that the costs of the program could be shifted to them without resistance. Third, even if employers eventually had to contribute to the SDI, the contributions now required (between 0.1 percent and 1.5 percent of each employee's annual income) are too small to interfere with a company's ability to compete in the global economy.

Small businesses are also nervous about possible abuses that could occur because of a paid leave period. Paid family leave could possibly create an incentive for people to stay home unnecessarily.<sup>128</sup> SB 1661 does not ignore this fear. An employer may require an employee to provide certification of a medical condition, and the penalties for falsely certifying a medical condition are strict.<sup>129</sup> A person who falsely certifies a medical condition with the intent to defraud in order to receive the family leave benefits under SB 1661 will be assessed a penalty in the amount of 25 percent of the benefits paid.<sup>130</sup> In order to levy the penalty, the employer must bring the fraud to the Director's attention, and the Director will assess the fee.<sup>131</sup> Although there will always be employees trying to cheat the system, SB 1661 provides a remedy for employees fraudulently trying to obtain leave.

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<sup>126</sup> See *id.*

<sup>127</sup> See Gregg Jones, *Davis to Sign Bill Allowing Paid Family Leave Benefits: Measure grants most workers time off to care for a new child or sick family members. Supporters see it as a model for the nation*, L.A. TIMES, Sept. 23, 2002, at A1.

<sup>128</sup> One Texas business owner who employs 2,000 workers at a plant in California claimed that 150 employees at his plant had taken a total of 311 family leave absences in the past fourteen months. Although the business owner said that the leaves were generally without notice and for less than a day, this does not seem to fit the definition under the FMLA for family leave. Under the FMLA, leave must be noticed if foreseeable, and must also be for more than three days. See Lisa Girion & Megan Garvey, *Davis OKs Family Leave Bill Benefits: Governor wins praise from advocates and strong criticism from business groups*, L.A. TIMES, Sept. 24, 2002, at B1.

<sup>129</sup> See CAL. UNEMP. INS. CODE § 2708 (2003).

<sup>130</sup> See CAL. UNEMP. INS. CODE § 3305 (2003).

<sup>131</sup> If the director finds that any individual falsely certifies the medical condition of any person in order to obtain family temporary disability insurance benefits, with the intent to defraud, whether for the maker or for any other person, the director shall assess a penalty against the individual in the amount of 25 percent of the benefits paid as a result of the false certification.

*C. Differences between SB 1661 and the FMLA*

SB 1661 provides significant benefits to California workers. For example, it covers domestic partners and their children. Domestic partners are included in the definition of family member,<sup>132</sup> and the term “child” includes “a son or daughter of a domestic partner.”<sup>133</sup> According to these definitions, a domestic partner may not only take paid family leave to care for his or her partner suffering from a serious illness, but he or she may also take paid time off to care for his or her domestic partner’s children. It must be noted that under California law, only couples consisting of two people of the same sex or two people of the opposite sex over the age of sixty-two qualify as domestic partners.<sup>134</sup> Considering that those over the age of sixty-two are often enjoying retirement and have less need for family leave, the domestic partner provision of SB 1661 almost directly speaks to homosexual couples. For these reasons, SB 1661 seems to be at least one-step past gender neutrality, creating precedent for sexual orientation equality. The state not only recognized domestic partners, but it also gave them the benefits previously held only by heterosexual couples. This aspect of the law seems to reflect a better understanding of today’s society by respecting both heterosexual and homosexual couples.

Also, the definition of employer and employee are much different in the FMLA and SB 1661. The FMLA applies to all private employers who engage in interstate commerce and have fifty or more employees, while SB 1661 contains no minimum employee or interstate commerce requirement. This is understandable because valid federal legislation requires a relation to interstate commerce, whereas state legislation does not. For eligibility under the FMLA, an employee must have worked one year and a total of 1,250 hours, but under SB 1661, “an individual shall be deemed eligible for family temporary disability insurance benefits equal to one-seventh of his or her weekly benefit amount on any day in which he or she is unable to perform his or her regular customary work.”<sup>135</sup> Furthermore, SB 1661 does not require an employee to wait one year before being eligible for family leave, but the FMLA does contain this requirement. A California employee may apply for paid family leave after just one week of employment. Additionally, an employee in California must be “unable to perform his or her regular or customary work for a seven-day waiting period during each disability benefit

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<sup>132</sup> CAL. UNEMP. INS. CODE § 3302(f).

<sup>133</sup> CAL. UNEMP. INS. CODE § 3302(c).

<sup>134</sup> See CAL. FAM. CODE § 297(b)(6)(A-B) (2003).

<sup>135</sup> CAL. UNEMP. INS. CODE § 3300.

period, with respect to which waiting period no family temporary disability insurance benefits are available.”<sup>136</sup> Although this seems to be a very family friendly approach, it also seems wide open to abuse. People can apply for a job, work for a week, and then apply for six weeks of paid leave. They can also take six weeks paid leave from the SDI fund when they only contributed for one week. Of course, so long as an employee returns to work after his or her leave, the fund will eventually receive a contribution.

SB 1661 requires all employers, whether public or private, to provide six weeks of paid leave to their employees. It refers to an eligible employee as an individual, but never specifies whether the employee has to work for a public or private employer.<sup>137</sup> In other words, all employees in the state of California are eligible for the benefits conveyed by the law. This is a great contrast to the FMLA which specifically excludes “any Federal officer or employee covered under subchapter V of chapter 63 of Title 5,”<sup>138</sup> from unpaid family leave benefits. Once again, where federal and state laws govern the same area the employee receives the best of both worlds. SB 1661 has essentially provided paid family leave to all California employees, regardless of whom they work for and whether they ever had such a benefit.

#### *D. Problems Remaining after SB 1661*

SB 1661 has awarded workers greater rights than ever before, but several problems still remain. Under SB 1661 an employee is deemed eligible for paid family leave on

any day in which he or she is unable to perform his or her regular or customary work because he or she is bonding with a minor child during the first year after birth or placement of the child in connection with foster care or adoption or caring for a seriously ill child, parent, spouse or domestic partner.<sup>139</sup>

Parents are allowed to take intermittent leave under the law as signaled by the words “any day,” thus freeing them of the FMLA requirement for consecutive leave days “unless the employee and the employer of the employee agree otherwise.”<sup>140</sup> While SB 1661 provides employees with the ability to take their leave intermittently without requiring the employer

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<sup>136</sup> CAL. UNEMP. INS. CODE § 3303(b).

<sup>137</sup> CAL. UNEMP. INS. CODE § 3303.

<sup>138</sup> 29 U.S.C. § 2611(2)(B) (2003).

<sup>139</sup> CAL. UNEMP. INS. CODE § 3303 (2003).

<sup>140</sup> 29 U.S.C. § 2612(b)(1) (2003).

consent, it is not without limitations. By including the language “during the first year after birth or placement,”<sup>141</sup> parents receive a new restriction. After the one-year time period has expired an employee can no longer take time off to bond with his or her child.

The one-year bonding limit demonstrates that SB 1661 fails to provide enough paid leave time. As previously stated, a child often needs more than the twelve weeks allowed by the FMLA to bond, and a seriously ill relative could require months of care. Illnesses, such as cancer, require an employee to take weeks, possibly months, off of work. Unfortunately, the law cannot assess each individual’s situation, but must set a fixed rule. Since the fixed rule is not set on personal circumstances, it is always going to be somewhat arbitrary, but it is the only way to provide family leave for everyone. Also, the more leave an employee gives, the more expensive the law becomes to employees, who have to contribute through payroll deductions, and employers, who may lose profits due to an employee on leave.

On the same note, SB 1661 provides no mechanism for parents to attend a child’s extracurricular activities, or stay home with a child who is sick, but does not have a “serious health condition”<sup>142</sup> after the child has been with the employee for over a year. Of course, SB 1661 may not be the best mechanism for providing leave to attend a child’s academic functions or extracurricular activities. Other states, like Minnesota,<sup>143</sup> have enacted legislations specifically designed at providing this type of leave. Oregon<sup>144</sup> even provides for a parent who needs to stay home to care for a child with a non-serious health condition. Also, if SB 1661 provided paid leave for a child’s extracurricular activities or non-serious health conditions, it would greatly increase the cost of the program and the corresponding employee contributions.

While including domestic partners is a tremendous step, SB 1661 still excludes grandparents, in-laws, and extended family members that may need to take leave to care for a family member. The only hope these family members have to receive benefits is if the *in loco parentis* provisions are read in a more liberal way than the *in loco parentis* provisions of the FMLA; however, this is unlikely. Unfortunately, SB 1661 only refers to *in loco parentis* in a provision providing the definition of child, stating that child is “the person to whom the employee stands *in loco parentis*.”<sup>145</sup> This is much like the FMLA definition of son or daughter, which closes with, “or a child

<sup>141</sup> CAL. UNEMP. INS. CODE § 3303 (2003).

<sup>142</sup> 29 U.S.C. §2612 (a)(1)(C) (2003).

<sup>143</sup> See *supra* note 98.

<sup>144</sup> See *supra* note 99.

<sup>145</sup> CAL. UNEMP. INS. CODE § 3302(c).

of a person standing in *loco parentis*.<sup>146</sup> Other than these two very brief, vague references there is no criteria specified in either text on how to qualify for *in loco parentis*. It seems logical that since the courts across the nation have been limited in determining who qualifies for *in loco parentis* under the FMLA, California courts would use a similar interpretation for SB 1661. It is understandable that California courts would want to adopt this same attitude, given the tremendous potential for abuse with a liberal construction. If construed liberally, *in loco parentis* could allow anyone, regardless of his or her actual relation to the child, to take advantage of paid leave. For employers and employees, such fraudulent claims would cost them a tremendous amount of money.

### V. AN INTERNATIONAL COMPARISON

The following international comparison questions whether SB 1661 is really as progressive as claimed, or if it is another example of the United States granting its employees a limited family leave. The family leave laws and policies of Sweden are explored because, like California, Sweden has been recognized for its progressive family leave policies. Sweden attacked parental and medical leave much earlier than many other countries.<sup>147</sup> After experiencing the lowest birthrate of any western democracy in the 1930s, Sweden quickly implemented a program focused on the goals of expanding female participation in the workforce and increasing reproduction.<sup>148</sup> It implemented unpaid leave in 1939, and paid leave in the early 1960s.<sup>149</sup> Sweden's family leave policy is one of the most comprehensive family leave programs.<sup>150</sup> Parents are allowed fifteen months of family leave to be used within the first eight years of the child's life.<sup>151</sup> Those who take leave are given 90 percent of their income (up to \$35,000) for the first 360 days of the leave period, and a flat rate of \$8 a day thereafter.<sup>152</sup> Parents who decide to return to work can choose to work full-time, half-time, or quarter-time.<sup>153</sup>

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<sup>146</sup> 29 U.S.C. §2611(12) (2003).

<sup>147</sup> Germany was the first to institute paid maternity leave in 1884. See Lesley J. Wiseman, *A Place for "Maternity" in the Global Workplace: International Case Studies and Recommendations for International Labor Policy*, 28 OHIO N.U. L. REV. 195, 220 (2001); Elizabeth A. Kenny, *Birth of Family and Medical Leave Legislation—Is It Time for Uncle Sam to Mandate Adoption?*, 16 SETON HALL LEGIS. J. 209, 219 (1992).

<sup>148</sup> See Wiseman, *supra* note 147, at 220-21.

<sup>149</sup> See *id.* at 220.

<sup>150</sup> See Ashmalla, *supra* note 54, at 243.

<sup>151</sup> See Sabra Craig, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 77 (1995).

<sup>152</sup> See *id.* at 77-78.

<sup>153</sup> See *id.* at 78.



Because few men utilized the family leave allowances, Sweden made it mandatory for all men to take at least one month off after the birth of their child.<sup>154</sup> Hence, Sweden has become the only nation to increase a father's role in a child's life through government planning.<sup>155</sup> Also, parents are granted sixty paid days off per year to care for ill children.<sup>156</sup>

Swedes credit their family leave policy as the reason for their high infant health care rates, which are among the highest in the world. Consequently, it is not surprising that the Swedish infant mortality rates are among the lowest. The real praise for these achievements probably belongs to Sweden's free, comprehensive medical care, rather than its family leave policies. Sweden not only provides employees with free prenatal and maternity health care, but once the child is born he or she also receives free medical and dental care.<sup>157</sup> Due to subsidized prices on medical services and prescription drugs, the maximum that any adult can spend out-of-pocket on health care is approximately \$200.<sup>158</sup> Adults and children are allowed to choose their own doctors and hospitals.<sup>159</sup>

Even though California has taken one of the biggest steps towards a family-friendly workplace in American history, the Swedish system dwarfs California's efforts. Simply put, Sweden grants its citizens more leave time, pays for a longer period of time, and mandates that employers offer more options after the leave period ends. Sweden also provides more services for the child once he or she is born, such as free health and dental care, child living allowances, and housing allowances for families with kids. These are all programs that are not found in California or in any other state in America. The vast amount of social programs available in Sweden, including family leave, have resulted in high taxes<sup>160</sup> and increased costs to employers. The Swedish system places a significant burden on employers, who may have to go without vital employees for over a year in order to comply with family leave laws. This would probably not be well received in the United States. While Sweden's system is ideal in providing employees plenty of family leave, it is not without significant cost to employers. On the other

<sup>154</sup> See Mikel A. Glavinovich, *International Suggestions for Improving Parental Leave Legislation in the United States*, 13 ARIZ. J. INT'L & COMP. L. 147, 172 (1996).

<sup>155</sup> See Duarte, *supra* note 64, at 846.

<sup>156</sup> See Glavinovich, *supra* note 154, at 172 (indicating that the state bears the burden of funding the sixty days off rather than the worker having to go without a paycheck).

<sup>157</sup> See generally Stephanie Westhuis, *Social Welfare and the Family: Examining the Policy Considerations, Similarities and Differences in the State of Wisconsin and Sweden*, 9 TULSA J. COMP. & INT'L L. 213, 228 (2001).

<sup>158</sup> See *id.*

<sup>159</sup> See *id.* at 229.

<sup>160</sup> See *id.* at 230 (stating that in 2000, Swedish taxpayers paid between 29 and 46 percent in annual income taxes).

hand, SB 1661 only requires an employer to go without an employee for six weeks.

## VI. CONCLUSION

Family and medical leave is not a new issue. For over twenty-five years, the United States has dealt with employees who need to leave work for family or medical purposes but cannot do so because of workplace demands. Legislation like the PDA provided only a guarantee that pregnancy would be treated like any other disability under Title VII, but greater rights were on the horizon. The FMLA was a big step forward in granting employees the affirmative right to family and medical leave, but it too was not without flaws. Because the FMLA only provides unpaid family and medical leave, many employees cannot afford to take advantage of the benefit. While several states have enacted legislation to cure the flaws of the FMLA, California has been the first and only state to enact a paid family leave law. Although SB 1661 is definitely an improvement over the FMLA, it is not without its own flaws. Unfortunately, it is impossible to draft perfect legislation. Citizens, legislators, and political groups will always find flaws in new legislation that they would like to remedy.

Approximately twenty-four states have in the past or are currently considering paid family leave legislation.<sup>161</sup> The success or failure of SB 1661 may be the turning point for family leave legislation in the United States. Using SB 1661 and California as an example, other states may be more willing to consider paid family leave if they are sure that it will succeed. The success of SB 1661 would make it a model for the federal government to follow, but failure could send the concept back to the drawing board. To date, California's paid family leave program has proceeded without any major glitches; however, the true test will come in July 2004 when the first payments are made. There is no doubt that the country will be watching intently.

Currently, it remains unclear whether California's innovative legislation signals the future of family leave policy in the United States, or just an aberration from the norm. Even taking into account the many states trying to pass paid family and medical leave legislation, these state proposals have yet to become valid legislation. It is amazing that out of the 130 countries that provide some type of family leave in the world, only three (the United States, Ethiopia, and Australia) provide no compensation.<sup>162</sup> California

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<sup>161</sup> See generally Arline Friscia, *Reflections on Legislation: The Worker-Funded Leave Act: The Time is Now to Help Build Stronger Families with a More Stable Economy*, 26 SETON HALL LEGIS. J. 73, 79 (2001).

<sup>162</sup> See *id.*

seems to be pulling itself out of this category. What is the excuse of the other forty-nine states?