



Overview of Leave Policies Prior to the Passage of the Family and Medical Leave Act

Before examining current family and medical leave policies and how they have changed since the passage of the Family and Medical Leave Act, a summary of policies that existed before 1993 is needed to create a baseline for comparison. Pre-existing leave policies essentially fall into two categories: first, voluntary leave policies by businesses as part of their broader benefits package for employees; second, laws enacted on the state level that provide one or more of the kinds of leave covered by the FMLA. For the most part, these voluntary policies and statutes emerged in the 1980's. This chapter will summarize what the research literature - from government, academic and business sources - can tell us about the nature of these laws and policies, and what we know about employee access and utilization up to 1993.

A. Voluntary Leave Policies

Research studies from the 1980's and early 1990's help shed light on a number of different questions regarding voluntary employer policies: 1) what types of leave policies existed before FMLA?; 2) to what extent did employers provide leave with job-protection and continuation of benefits?; 3) to what extent did employers provide leave with full or partial wage replacement?; and 4) what have been the costs and benefits to employers of voluntarily providing leave?

1. Types of Voluntary Leave Policies

It is difficult to summarize the scope and nature of voluntary family and medical leave policies before the Act for two reasons. First, there are several component parts of family and medical leave - including traditional benefits like sick days and maternity leave, as well as newer benefits like parental leave and family leave. The specific combinations of these elements vary widely when adopted as formal policy, and data are not always available for all types of leave. Second, the last decade has been a period of tremendous innovation and experimentation in the employee



benefits field as employers try to accommodate the needs of a rapidly changing workforce. This has meant that the type and prevalence of leave has been changing and expanding over the last decade - especially in the five years immediately preceding the passage of the FMLA - making it difficult to keep track of the leave policies of particular companies, no less the leave policies of firms in broader size and industry groupings.

The best source of information on voluntary employer leave policies before the FMLA are the routine surveys conducted by the Bureau of Labor Statistics (BLS) called the Employee Benefits Survey (EBS).¹ The survey provides data on the availability of maternity leave, paternity leave and sick leave.² These surveys alternately cover small (fewer than 100 employees) and medium/large (with 100 employees or more) employers, and are based on representative samples for all private sector, non-farm establishments. Additionally, these data are combined in two-year increments in order to give an overall picture of access to leave for employees regardless of the size of firm for which they work.

Aggregated data is available for the two years prior to the passage of the Family and Medical Leave Act. For the years 1992 to 1993, the EBS combined information on all employees in private and public sector establishments of all sizes. At that time, 37 percent of all employees had access to unpaid maternity leave and 28 percent had paternity leave.³ Paid parental leave was very rare, with only two percent of employees having access to paid maternity leave, and only one percent having access to paid paternity leave.

The Employee Benefits Survey shows that paid sick leave was much more common than paid parental leave. According to the 1992-93 data for all private and public sector employees, 56 percent of all employees had access to paid sick leave.

¹ Before 1993, the EBS provided data on some, but not all, of the components of family and medical leave. The survey was revised at the end of 1993 to reflect the new provisions of the FMLA. Before 1993, the survey requested information on fully paid, partially paid, and unpaid days of paternity and maternity leave. The current survey tabulates paid and unpaid parental leave separately and asks if leave may be used for the birth of a child, adoption of a child, to care for a sick child, or to care for a sick adult relative. See "BLS Employee Benefits Survey Revised to Account for New Family Leave Law," *Daily Labor Report*, (January 1, 1993).

² The EBS survey defines parental leave as unpaid or paid maternity and paternity leave, for a mother or father to care for a newborn/adopted child. It does not include maternity disability leave used for disability surrounding pregnancy and childbirth. These provisions are separate from an employee's other leave plans, such as sick leave and paid vacation, which might also be used to care for a newborn child. The parental leave described in the EBS is job-protected but continuation of benefits during leave is not guaranteed.

³ For private sector establishments, there were very similar percentages; 34 percent of employees had maternity leave and 26 percent had paternity leave. However, in the public sector (state and local governments), 56 percent of workers had access to maternity leave and 42 percent had paternity leave.

Interesting differences in access to parental and sick leave policies were evident depending on size of firm and employees' occupations. For example, the 1993 Employee Benefits Survey of medium and large firms shows that 59 percent of full-time employees were eligible for unpaid maternity leave and 52 percent were eligible to take unpaid paternity leave.⁴ In contrast, for employees working in small establishments, 18 percent had unpaid maternity leave, and only eight percent had unpaid paternity leave.⁵ In both small and larger establishments, paid maternity or paternity leave was very rare; only between one and three percent of employees had access to such a policy. The EBS further found that the length of time employers permitted their workers to take parental leave varied quite a bit by size of establishment, with smaller establishments offering less time off for these types of leave.⁶

In medium to large establishments, professional and technical workers had a slightly higher level of access to unpaid parental leave⁷ (63 percent had access to unpaid maternity leave, while 55 percent had access to unpaid paternity leave) than clerical and sales workers (60 percent had access to maternity leave and 51 percent had access to paternity leave) or blue-collar and service workers (59 percent had access to maternity leave and 52 percent had access to paternity leave). Access to parental leave by occupational group was more varied in smaller establishments. According to the 1992 EBS on small establishments, 27 percent of professional and technical workers had unpaid maternity leave available to them as opposed to only 13 percent of blue-collar and service employees, and 20 percent of clerical and sales employees. Unpaid paternity leave was available to 13 percent of professional and technical workers in small establishments, while only six percent of blue-collar and service workers, and nine percent of clerical and sales employees in small establishments had access to unpaid paternity leave.

⁴ Bureau of Labor Statistics, *Employee Benefits in Medium and Large Private Establishments, 1993*, (Washington, DC: U.S. Department of Labor, November 1994), Bulletin No. 2456, p. 22.

⁵ Bureau of Labor Statistics, *Employee Benefits in Small Private Establishments, 1992*, (Washington, DC: U.S. Department of Labor, May 1994), Bulletin No. 2441, p. 5.

⁶ In medium to large firms, the maximum allowable length of leave averaged 4.3 months. For small establishments the average maximum allowable length of leave was 3.5 months. Differences in length of maternity leave by size of worksite were evident as well. In medium and large firms, 15 percent of employees had access to fewer than two months, an additional 41 percent of employees had leave that was more than two months and up to three months. In contrast, 37 percent of employees in small firms only had access to fewer than two months and an additional 25 percent had leave that was two to three months. For paternity leave, the permitted time off was shorter than maternity leave in medium, large and small firms - just over half had fewer than three months off.

⁷ Includes plans providing maternity leave only, paternity leave only and both maternity and paternity leave.

The Employee Benefits Survey data concerning the availability of sick leave provisions also showed differences in coverage by size of establishment and occupation. According to the 1993 EBS, which covers medium and large establishments, 65 percent of full-time employees had access to a specified number of paid sick days per year.⁸ However, 53 percent of all employees in small establishments had paid sick leave. Annual sick days were available to more professional and technical employees in larger establishments (85 percent) than clerical and sales employees (80 percent) and blue-collar and service employees (45 percent).⁹ This pattern of access to paid sick leave held true for smaller establishments as well, where 74 percent of professionals, 70 percent of clerical and sales workers and 35 percent of blue-collar and service employees had paid sick leave.¹⁰

There are also studies on pre-FMLA voluntary leave policies conducted by business trade associations, industry-based membership associations and human resources consulting firms. While these studies provided useful insights into the policies of particular subgroups of firms, usually the response rates were low and the samples, especially those conducted with membership lists, were not representative of comparable private-sector firms in the United States.

For example, in December 1990 the National Association of Wholesalers surveyed its 2,000 direct company members as well as its national association members which represent all wholesale distribution commodity lines. In total 3,460 companies were surveyed. Sixty-six percent of these companies employed fewer than 50 employees. The survey asked if the company offered any kind of policy which permitted employees to take either paid or unpaid leave for the birth or adoption of a child or the care of an ill child, including disability coverage. Fifty-four percent said they did have such a policy.¹¹

When the National Foundation of Women Business Owners (NFWBO) surveyed its membership in 1992¹², 84 percent of firms offered one or more benefits to their employees, including 95 percent of those with five employees or more and 59 percent of those with fewer than five employees.¹³ In the NFWBO survey, 48 percent

⁸ *Employee Benefits Survey*, November 1994, p. 8.

⁹ *Employee Benefits Survey*, November 1994, p. 8.

¹⁰ *Employee Benefits Survey*, May 1994, p. 5.

¹¹ National Association of Wholesalers, *Employee Benefits Survey*, (Washington DC: National Association of Wholesalers, October, 1990).

¹² National Foundation for Women Business Owners, *Employee Benefits Offered by Women-Owned Businesses: A Framework for Compassion*, (Washington, DC: The National Foundation for Women Business Owners, 1994).

¹³ These businesses represented a portion of the total membership of the National Association of Women Business Owners and are not representative of all women business owners.

offered health benefits, 36 percent offered unpaid family and medical leave opportunities, seven percent offered paid maternity leave and two percent offered paid paternity leave.

As is evident from these brief descriptions of business association surveys, it is difficult to make any generalizations based on their findings. The statistics from government surveys indicate a greater prevalence of some types of family and medical leave, such as parental leave, than the business surveys indicate. By and large, the medium and large companies seemed more likely to have provided family and medical leave and to have provided more comprehensive policies. For full-time workers in those firms, paid sick days were accessible to three-quarters of the workforce, maternity and paternity leave to a little less than two-thirds of the workforce. For workers in small firms or who work part-time, these benefits were less likely, especially parental leave, maternity and paternity leave. Family leave appeared uncommon across firm size categories, but there is so little data available, it is difficult to make an assessment.

2. Job Protection and Continuation of Benefits

In addition to the type and length of family and medical leave, another important aspect of leave policies is whether they include a job-guarantee provision, and if health benefits are continued while the employee is taking leave. The availability of these provisions has implications for employees' ability to actually take advantage of leave policies when they are voluntarily provided. Determining whether companies offered leave with some level of job protection and continuation of health benefits is complicated by how companies define family and medical leave, and by the limited data that has been collected on these elements of leave policies.

Scientific data concerning job guarantees and benefits during leave is found in the U.S. Small Business Administration (SBA) Employee Leave Survey commissioned in 1988.¹⁴ This survey provided representative data from 1,730 businesses on the extent of coverage of family and medical leave, including length of leave, benefits and job guarantees provided during leave and the costs of leave to firms. The survey was a national random sample of firms and looked at leave taken by managers and non-manager employees in firms of various sizes. Data was broken down

¹⁴ Eileen Trzcinski and William T. Alpert, *Leave Policies in Small Business Findings from the U.S. Small Business Administration Employee Leave Survey*, (Washington, DC: U.S. Small Business Administration, 1990).

into four firm size categories, firms with one to 15 employees, 16 to 49, 50 to 99 and 100 employees or more.¹⁵

The SBA study collected data on job guarantee and continuation of health benefits for three types of leave: a) unpaid sick leave, b) paid sick leave, and c) paid or unpaid maternity leave, defined as leave for pregnancy or childbirth-related disabilities. Data about the incidence of job guarantee and health benefits continuation for parental leave, that is, care of a newborn or newly-adopted child was not collected.

Unpaid sick leave: In the smallest firm size category, almost 40 percent of employers reported providing unpaid sick leave with a job guarantee for employees. The proportion rose to more than 60 percent for all firm sizes greater than 15 employees reaching a maximum of 69.7 percent in the second largest firm size. The same pattern occurred for the continuance of health insurance payments. For example, 26 percent of firms with one to 15 employees continued to pay health insurance during leave. In contrast, almost 62 percent of those firms with 50 to 99 employees offered this provision.

Paid sick leave: Among employers offering paid sick leave, the incidence of job guarantee and continuation of health benefits was smaller than in firms where the leave was unpaid, and this was true among all firm sizes. In particular, in the smallest firm size category, less than one-quarter of employees received paid sick leave with job protection. In firms of 50 to 99, the percentage who offered job protection with paid sick leave rose to 59 percent but was still lower than the 70 percent of firms that offered unpaid leave. Health insurance continuation for employees who received paid sick leave was also lower in all firm size categories than for employees who only had unpaid sick leave.

Paid or unpaid maternity leave: According to the SBA study, very small numbers of firms had separate maternity leave policies.¹⁶ The data show that even when firms offered a separate maternity leave policy, very few provided job guarantees, or health insurance continuance as part of the leave provision. Less than five percent of the smallest firms surveyed offered their employees a separate maternity leave

¹⁵ A random sample of 10,000 firms was obtained from the Small Business Administration's Small Business Data Base which covered 3.8 million businesses and represented 93 percent of private employment in the United States.

¹⁶ Leave for mothers to care for a newborn child.

plan with either a job guarantee or continuance of health insurance while on leave. In the largest firm size category, those with 100 employees or more, only 16.8 percent of firms offered a job guarantee with maternity leave and only 11.4 percent continued to pay health insurance when a leave-taker was away.

In sum, the data show that a substantial percentage of firms (between 35 and 70 percent), who provided sick and maternity leave did so without providing a job guarantee and without providing for health benefit continuation. In most cases, as firm size increased, the likelihood of employees having access to job-protected leave with continuation of health care benefits increased, but was still less than 70 percent. There were no significant differences in the availability of job and health care insurance protections to manager and non-manager employees.

3. Paid and Unpaid Leave Policies

It is difficult to capture an overall picture of what was available before the FMLA in terms of paid leave policies. As was discussed above, several major types of leave are combined in the concept of family and medical leave, and some are traditionally associated with wage replacement while others are not. In addition, there was little systematic data collection on the national level. Pre-1993 studies varied in quality and showed a range of estimates concerning the availability of paid leave.

This section will review data on three separate types of leave - sick leave, maternity and paternity leave - and look at what was known about wage replacement provisions for these types of leave.¹⁷ Even though estimates of the availability of paid leave vary widely, it is clear that sick leave and maternity leave were the most likely kinds of leave to involve some wage replacement, while leave to take care of newborn children by a mother or father or to take care of an ill family member was paid only very rarely.

Data show that paid sick leave was the most common form of paid leave and was available to most workers. Referred to earlier, the Employee Benefits Survey (EBS), conducted by the Bureau of Labor Statistics, is one of the best sources of information regarding voluntary employer policies. According to the 1993 EBS data, 65 percent of employees were allowed a fixed number of sick days per year. (Sick

¹⁷ This subsection uses the same definitions for these leave categories as the Employee Benefits Survey (EBS). Maternity and paternity leave is time off for mothers or fathers to care for a newborn or adopted child. Maternity leave does not include time off for childbirth or pregnancy-related disabilities.

leave usually provides 100 percent of a worker's normal earnings for a fixed period of time.) The survey also shows that professional employees were slightly more likely than clerical and sales employees to have paid sick leave and twice as likely as blue-collar and service employees to have paid sick leave provisions.¹⁸ For example, in 1989-90, 78 percent of white-collar, private-sector employees had paid sick leave compared with 36 percent of blue-collar workers.¹⁹

Consistent estimates of the provision of paid time-off for pregnancy and maternity leave are hard to find. For example, a 1987 study of 357 firms conducted by the American Society of Personnel Administrators found that 65 percent of responding companies had some sort of formal maternity leave, of which five percent offered paid leave.²⁰ Similarly, another study found that two percent of companies with fewer than 100 employees offered paid maternity leave, compared with three percent of firms with 100 employees or more.²¹ In contrast, a large survey conducted by the National Conference of Jewish Women, covering almost 4,000 firms of different sizes, found that 38 percent of those respondents who had formal leave policies said they offered some sort of wage replacement.²² Finally, a benefits survey conducted by the U.S. Chamber of Commerce in 1985 found that among the smaller and medium-sized companies in its sample, only 19 percent claimed to have formal pregnancy or maternal leave plans, and, of that 19 percent, about a quarter stated that the leave was paid.²³

Information concerning the number of employees who were covered by paid maternity leave also showed low levels of coverage. The Bureau of Labor Statistics reports that in 1991 and 1992 paid maternity leave was available to one percent of all employees, two percent of private sector employees, one percent of public sector workers, two percent of full-time employees and less than one percent of part-time employees. Paid paternity leave was also only available to a small percentage of workers.²⁴ To the extent that it is possible to generalize across the public and private sectors, it appears that paid maternity leave was more available to

¹⁸ *Employee Benefits Survey*, November, 1994, p. 8.

¹⁹ Bureau of Labor Statistics, *Employee Benefits Survey, A BLS Reader*, (Washington, DC: U.S. Department of Labor, 1995), p. 14, Table 1.

²⁰ American Society of Personnel Administrators, *The Resource Survey of Membership*, (Alexandria, VA: American Society of Personnel Administrators, 1987).

²¹ Cynthia Costello and Anne Stone, Ed.s, *The American Woman 1994-1995*, (New York: Norton, 1994).

²² National Council on Jewish Women, Center for the Child, *Medical and Family Leave: Benefits Available to Female Workers in the United States* (New York: National Council of Jewish Women, 1987).

²³ U.S. Chamber of Commerce, *1985 Employee Benefits Survey*, (Washington, DC: U.S. Chamber of Commerce Research Center, Economic Policy Division, 1986).

²⁴ Ann C. Foster, "Employee Benefits in the United States, 1991-92" in *Employee Benefits Survey: A BLS Reader*, (Washington DC: U.S. Department of Labor, 1995), p. 9.

employees with relatively high levels of skills and incomes. In 1993, only one percent of full-time blue-collar and service employees in medium and large establishments had access to paid maternity leave compared with four percent of professional and administrative employees.²⁵

In sum, maternity leave and leave for personal illness were the most likely types of leave to be accompanied by at least some wage replacement. Full wage replacement was offered most commonly for sick leave, while fully-paid maternity leave was available to a very small number of employees. It also seems that employees with higher skill and income levels had greater access to paid leave policies. Paying employees while they were on leave to take care of sick family members was rare even among the largest and most “family-friendly” companies.

4. Costs, Cost Savings and Benefits

Many of the studies assessing the costs and benefits of providing voluntary leave policies were based on the experience of single companies or the members of an industry sub-group. However, the Small Business Administration survey described above, which was based on a nationally representative sample of firms, provides useful data on this issue.²⁶

In the SBA study, firms reported that the cost of covering for a worker on leave was roughly equal to the sum of wages and benefits of the worker on leave. Differences in cost by firm size were not statistically significant. The SBA survey also found that these leave policies had an overall cost savings effect for firms, because termination rates were substantially lower for firms providing job-guaranteed, unpaid medical leave.

The National Federation of Independent Businesses (NFIB) commissioned a study of small businesses.²⁷ Utilizing data collected by Gallup in 1991 from a random sample of NFIB’s membership of 600,000 businesses, stratified to insure representation of larger employers, the study found that workers would bear the brunt of changes if family and medical leave legislation were enacted because costs would

²⁵ *Employee Benefits Survey*, November, 1994, p. 8.

²⁶ For a full description of the SBA sample, please see section 2 - Job Protection and Continuation of Benefits.

²⁷ Steven W. Barnett and Gerald L. Musgrave, *The Economic Impact of Mandated Family Leave on Small Businesses and Their Employees*, (Washington, DC: The National Federation of Independent Businesses Survey, 1991).

be passed on to them. It was projected that such a law would also reduce the number of jobs for low-skilled workers, and employers would be more reluctant to hire women, especially of childbearing age. NFIB concluded that employers would view a federal family and medical leave standard as increasing the cost of women employees relative to men, and that employers would pay women less, or hire fewer women as a result.

In contrast, most other studies on cost supported the thrust of the SBA study. In January 1993, Hewitt Associates, a consulting firm, surveyed 524 benefits managers about their companies' experience with family and medical leave (and their reaction to the anticipated passage of FMLA law).²⁸ The companies in this survey were large; 96 percent had more than 500 employees. The survey found that the majority of companies already had some type of unpaid family or medical leave policy in place. Sixty percent indicated that less than one percent of their employees took unpaid family or medical leave in a year, typically for less than 12 weeks. Seventy percent perceived the cost of providing leave as insignificant, and the benefits of providing leave included creating goodwill (93 percent), boosting morale (59 percent) and decreasing turnover (54 percent). Companies had concerns that once FMLA was enacted, paid leave would be the next step (64 percent), and they were also concerned about the cost of continuing health insurance (46 percent) and covering the work of employees on leave (44 percent).

In March 1993, Towers Perrin conducted a survey of its readership, including 701 medium and large employers from 44 states, 69 percent of whom offered some form of family and medical leave voluntarily.²⁹ Over 90 percent of the employers who offered some form of family leave said costs of providing family and medical leave were not significant, even though 50 percent continued health benefits while employees were on leave. Most employers found that providing leave brought about benefits to their companies. Almost all (97 percent) said their leave program had met key objectives. It had improved employee morale, enhanced loyalty to the company and improved the retention rate of experienced employees.

²⁸ Hewitt Associates, "Employer Response to Family and Medical Leave Legislation," *On Employee Benefits*, (Lincolnshire, IL: Hewitt Associates, February, 1993).

²⁹ Towers Perrin, *Family and Medical Leave Programs: Before and After the New Federal Law*, (New York: Towers Perrin, July 1993). Although 69 percent said they had family and medical leave policies, only 15 percent said they were already in compliance with the proposed federal statute.

In a state-level study on parental leave,³⁰ the Families and Work Institute found that the majority of employers reported no increase in cost for training (71 percent), administration (55 percent), health insurance costs (73 percent) or unemployment insurance (81 percent) related to compliance with legislation. Only a small minority reported significant cost increases in training (four percent), administration (six percent), or unemployment insurance (two percent). “On closer analysis the employer perception of these increased costs, reflect, in part, general cost increases, rather than new costs associated with leave statutes.”³¹

Data on the experience of Aetna Life Insurance Company, collected by the consulting firm Work/Family Directions, shows that there were quantifiable benefits for the company starting from the time the company introduced a family-leave policy in 1987. Aetna offered parental and family leave of up to six months, including benefits, but without pay. It found that the return rate for women after childbirth jumped from 77 percent in 1986 to between 88 and 91 percent in the five years following their maternity leave. By allowing employees to meet both work and family demands, Aetna found that its employees were less stressed, which in turn lowered company health care costs and increased productivity.³²

B. State Statutes

By the time of the enactment of FMLA, thirty-four states, Puerto Rico and Washington, D.C., had enacted some type of maternity/family leave law. Sources show the diversity of state level initiatives - most more narrow in coverage than the proposed federal statute, and some broader - as well as how the earlier laws enacted differed from those enacted closer to the passage of FMLA itself. Pressures to provide such job protections had been building in a number of states, leading to enactment of these laws.

The most complete information on state laws is found in the Women’s Legal Defense Fund’s publication, *State Laws and Regulations Guaranteeing Employees Their*

³⁰ John T. Bond, Ellen Galinsky, et al., *Beyond the Parental Leave Debate: The Impact of Laws in Four States*, (New York: Families and Work Institute, 1991). Only one of the four states included in the study had a leave law co-extensive with the FMLA.

³¹ *Ibid.*, Executive Summary, p. iii.

³² Work Family Directions, *Recommitting the Work Force: Maximizing Employee Contribution in an Environment of Constant Change*, (Boston:Work/Family Direction, Inc., 1993) p. 43.

Jobs After Family and Medical Leaves,³³ and the Women's Bureau's 1993 publication *State Maternity and Family Leave Law*.³⁴

1. Provisions of State Leave Laws³⁵

By early 1993, twenty-three states had leave laws covering both private and state employees, while in 11 the law only covered state workers. The early state statutes provided leave primarily for pregnancy and childbirth, but in later statutes the reasons for leave were broadened to include care of newborn and newly-adopted infants, elderly parents or other relatives.

The amount of leave a worker could take varied widely in state law - from 16 hours to one year. Some states only required a "reasonable period," while in others the amount was not specified. Eligibility requirements, related to number of hours worked and length of service, also varied. In most cases, employees were eligible for leave when they had worked full-time for a year without a break in service. However, there were states that allowed much lower levels of hours and service and still provided leave benefits. For example, Colorado's leave law covered both state and private sector employees and there was no length of service requirement. And in Oklahoma, a state employee only had to have six months of continuous service to be eligible to take family leave.³⁶

Most of the laws exempted small businesses, but "small" was defined in a variety of ways. In three states the threshold for covered employers was set high - including only companies with more than 100 employees - while in Colorado and Montana companies with just one employee were covered. Firm size exemptions tended to be the lowest in states with very narrowly specified leave laws.³⁷ States also adopted different policies concerning the utilization of other types of leave, such as sick leave, to provide pay for unpaid family leave. The definitions of "family," which affected the number of relatives covered by family leave provisions, also varied

³³ Women's Legal Defense Fund, *State Laws and Regulations Guaranteeing Employees Their Jobs After Family and Medical Leaves*, (Washington, DC: Women's Legal Defense Fund, 1993).

³⁴ Women's Bureau, U.S. Department of Labor, *State Maternity/Family Leave Law*, (Washington, DC: U.S. Department of Labor, June, 1993).

³⁵ The discussion of state statutes in this section covers the pre-FMLA period, however, these statutes still exist today and the FMLA statute specifies that more generous state laws cannot be superseded by the provisions of the FMLA.

³⁶ *Ibid.*

³⁷ Eileen Trzcinski, "The Use and Abuse of Neoclassical Theory in the Political Arena: The Example of Family and Medical Leave in the United States," in *Out of the Margin: Feminist Perspectives on Economics*, Edith Kuiper and Jolan Sap, (London: Routledge, 1993), p. 233.

state-by-state. There were further differences regarding the continuation of benefits, particularly health insurance. In Vermont and Rhode Island, for example, employees were entitled to the same or comparable jobs, at the same level of compensation, employment benefits and seniority when they returned to work, and the employer was required to continue health benefits. However, in Minnesota employers were not required to pay the cost of insurance or health care during leave, and in Oregon, unless otherwise specified under an agreement between the employer and the employee, a collective bargaining agreement, or an employer policy, benefits were not required to continue during the leave.

2. Provisions of State Temporary Disability Insurance Laws

In 1978, an amendment to Title VII of the Civil Rights Act was passed called the Pregnancy Discrimination Act (PDA). It required employers to treat the disability of an employee resulting from pregnancy or childbirth in the same manner as they would treat any other disability. The PDA further specified that if an employer voluntarily provided temporary disability leave, they must allow employees to use this leave for pregnancy or childbirth-related disabilities. However, this only affected those employees whose companies already voluntarily provided this type of leave.

Five states (New York, New Jersey, Rhode Island, California and Hawaii)³⁸ and Puerto Rico had their own Temporary Disability Insurance laws (TDI) that covered all employers with at least one employee. Employee eligibility for these plans varied from state to state. In most cases, an employee must have worked at least 14 to 20 weeks for a covered employer, although in New York employees were only required to have worked four consecutive weeks to be eligible for TDI.³⁹ These laws provided partial salary replacement for any worker with a non-work related disability, including women who had pregnancy- and childbirth-related disabilities. TDI laws complement Workers Compensation (applicable to persons with work-related illnesses and injuries) and Unemployment Compensation (applicable to persons who are laid-off and available for work).

³⁸ It should be noted that approximately 20 percent of the U.S. population resides in New York, New Jersey, and California (according to 1995 Census Bureau population data).

³⁹ Institute for Women's Policy Research, *Research in Brief: What is Temporary Disability Insurance?* (Washington, DC: Institute for Women's Policy Research, May 1993).

These state laws have extended the universe of employees who have access to paid parental leave, however, they did not provide for job reinstatement. Wage replacement rates were based on the employee's salary, although minimum and maximum benefit levels were set in all the states. The percentage of salary paid varied from 50 to 65 percent of an employee's weekly wages, and the duration of disability pay varied from 26 to 52 weeks.⁴⁰ Data from a 1989 study by the Institute for Women's Policy Research showed that the average duration of claims was between five and 13 weeks and the average weekly benefit to employees was between \$170 and \$200.⁴¹ TDI programs operated (and continue to operate) in the black, generally with low overhead rates. The research also indicates that TDI plans covered a wide range of workers at a relatively low cost for both employers and employees.⁴²

3. Impact of State Laws on Employers and Employees

Several studies attempted to evaluate the impact of state family and medical leave mandates pre-FMLA. For example, in 1988, the Families and Work Institute (FWI) conducted a state level study called "Beyond the Parental Leave Debate: The Impact of Laws in Four States,"⁴³ with random samples of employers and employees in four states that had enacted their own parental leave laws two to three years before data collection: Minnesota, Oregon, Rhode Island and Wisconsin. Apart from the leave policies in the four states, Rhode Island also had mandated wage replacement by TDI coverage for most employees.

The survey found that the majority of the employers surveyed reported "no increases" in the cost of training (71 percent), administration (55 percent), health insurance costs (73 percent) or unemployment insurance (81 percent) because of compliance with the state legislation. The survey also found that the state legislation in the four states had no effect on the proportion of mothers taking maternity leave (78.6 percent took leave before the enactment and 78.4 percent after the enactment) or on the length of such leave (12.6 weeks before and 12.1 weeks after). Also, lower-income women tended to take shorter leaves. But in Rhode Island, which also provided partial wage replacement, the proportion of women in low-income households who took less than six weeks of leave fell to zero percent

⁴⁰ Women's Bureau, *State Maternity/Family Leave Law*.

⁴¹ Institute for Women's Policy Research, *Research in Brief: What is Temporary Disability Insurance?*

⁴² More recent research by the Institute for Women's Policy Research which estimates the cost of replicating TDI plans in five additional states modelling several different levels of eligibility requirements and benefits confirms that TDI plans are cost-effective. See Institute for Women's Policy Research, *Expanding Social Insurance to Include Paid Family Care Leaves*, (Washington, DC: Institute for Women's Policy Research, 1995).

⁴³ Bond, Galinsky, et al.

after enactment of the legislation in July 1990, compared with 19 percent of lower-income women who took less than six weeks in the other three states studied. Leave taken by fathers for newborns increased slightly after enactment of the laws (from 70 percent before to 75 percent after), and the amount of leave they took also increased slightly (3.7 days before to 4.7 days after).

Several other studies have attempted to evaluate the impact of leave statutes in a single state. For example, the New Jersey Business and Industry Association conducted a survey of 200 of its members to assess the costs related to New Jersey's family leave law.⁴⁴ Sixty-five percent of the respondents were employers with fewer than 500 employees. In about half the firms, less than one percent of the employees were on leave, and another 40 percent had one to three percent of their employees on leave. This study also pointed out the low cost of implementing leave policies and found a low level of post-leave turnover, which employers viewed as a positive.

The Institute of Industrial Relations at the University of California at Berkeley and William M. Mercer, Inc., an international benefits consulting firm, conducted a survey from Mercer's client list to assess employer experience with the California leave law and the potential impact of FMLA.⁴⁵ They obtained 299 responses (a 30.5 percent response rate). Two-thirds of the employers said that less than one percent of their workers had taken leave under the California law, while only 6.7 percent reported utilization rates of more than two percent. More than half the respondents reported that costs associated with the mandated state law were insignificant, only seven percent reported moderate to major costs.

C. Employee Utilization and Experience

Again, there are a small number of statistically valid data sources on employee utilization. The best sources appear to be government surveys, such as the Employee Benefits Survey and the Small Business Administration survey, and two studies based on secondary data analysis of representative longitudinal data sets. There is, in addition, a nationally representative survey of employees done by the

⁴⁴ M.H. McSweeney, *Costing State Family Leave Legislation: The Case of New Jersey Small Business*, unpublished manuscript. (Rutherford, N.J.: Fairleigh Dickinson University, August 1993).

⁴⁵ William M. Mercer, Inc. and University of California, Berkeley, *Survey Results: Family and Medical Leave Act*, (San Francisco, CA and Berkeley, CA: William M. Mercer, Inc., and University of California, 1994).

Families and Work Institute called the “National Study of the Changing Work Force.” Each of these illuminates an important aspect of employees’ experience with leave before the FMLA.

1. Extent of Employee Utilization of Leave

As discussed earlier, in 1988 the Small Business Administration⁴⁶ conducted a random sample survey of firms that covered nearly five million establishments, and represented 93 percent of private employment in the U.S. Findings included a higher incidence of family and medical leave utilization in the following types of firms: firms with a formal unpaid leave policy; firms that included pay or continuation of health benefits during leave; and firms with a higher proportion of female workers between the ages of 14 and 44, or workers 55 or older. In the 12 months prior to the survey, less than one percent of employees had taken parental leave - 0.73 percent of managers and 0.34 percent of non-managers. Non-managers were more likely than managers to take leave that was unpaid. Industry, firm size and sales volume were not found to affect the amount of leave-taking.

In 1990, the Bush Center in Child Development and Social Policy at Yale University commissioned a study by Trzcinski and Stevenson to evaluate employees’ utilization of leave in the state of Connecticut.⁴⁷ This study surveyed 1,900 Connecticut firms about the extent of parental leave-taking among their employees. The main finding was that the level of utilization of leave was low - between one percent and three percent of employees for maternity and similar rates for disability leave. In firms with fewer than 50 employees, utilization of maternity leave was the lowest, at 1.3 percent, while only two percent of employees used sick leave. The highest rate of maternity leave utilization was in firms of 100 to 499 workers, where 2.6 percent of employees used this leave, and 2.8 percent used sick leave. For the largest firms (more than 500 workers), 2.2 percent of employees took maternity leave and 2.7 percent used sick leave. A 1993 survey of family leave policies among readers of the Towers Perrin Monitor, described above (see part 4 of section A), also focused on utilization.⁴⁸ The survey found that the level of utilization of leave was low. Over half the firms offering leave found they had fewer than

⁴⁶ Trzcinski and Alpert.

⁴⁷ Eileen Trzcinski and M. Finn-Stevenson, “A response to Arguments Against Parental Leave: Findings From the Connecticut Survey of Parental Leave Policies,” *Journal of Marriage and Family*, Vol 52:3, pp. 445-60.

⁴⁸ Towers Perrin, *Family and Medical Leave Programs: Before and After the New Federal Law*, (New York: Towers Perrin, July 1993).

ten leave-takers per year, and 20 percent of the firms had fewer than two leave-takers. Eighty-five percent of the leave-takers were women, and childbirth was by far the most common reason for taking leave.

2. Differences in Employee Access to Leave

The “National Study of the Changing Workforce,” conducted by the Families and Work Institute, is scheduled to be done every four years. The first survey was conducted in 1992 based on a nationally representative sample of almost 3,000 wage and salaried workers, in addition to self-employed workers and women who were voluntarily out of the paid workforce raising children. The findings from this survey which are relevant to leave utilization show that about 45 percent of employees were eligible for family and medical leave at the time data was collected.

The survey found some important differences in access among different groups of employees. For example, men had greater access to leave than women; older workers had greater access than younger workers; better educated workers had greater access than less educated workers; and workers in professional and managerial occupations had greater access than other workers. In a paper discussing these findings,⁴⁹ report co-author James T. Bond offers a variety of explanations related to the ways in which the labor market is structured around differential rewards to employees on the basis of gender, education, skill and so on.

Similar findings have been reported by the authors of the 1990 National Child Care Survey.⁵⁰ They reported that lower-income individuals were less likely to take parental leave, were less likely to be paid during their periods of leave and were less likely to keep their health insurance during leave than workers with higher incomes.

3. Gender and the Economic Impact of Leave

Several studies have attempted to evaluate the particular effect of leave policies on women workers, given that women are the bearers of children and still the primary caretakers of children, elders and other family members.

⁴⁹ James T. Bond, *Access to Leave Benefits Under the Family and Medical Leave Act of 1993*, unpublished paper, (New York: Families and Work Institute, April 1995).

⁵⁰ S. L. Hofferth, et al., *National Child Care Survey, 1990*. (Washington, DC: Urban Institute Press, 1990), Report 91-5.

A 1987 study by the National Council for Jewish Women found that women whose employers offered parental leave and other personal and family accommodations were more satisfied with their jobs, took fewer sick days and were more likely to return to their jobs than other workers without access to such policies.⁵¹ Additional analyses of these data showed that particular policies such as health insurance, paid sick days and job-protected leave all had a positive effect on how long pregnant women remained at work, their plans to return to work and job satisfaction. For example, 80 percent of women with paid sick leave days worked into their ninth month of pregnancy compared with 52 percent of women without such a benefit. And those who had job-protected leave stopped work later and planned to return to work sooner than those women without job-protected leave.⁵²

In 1988, the Institute for Women's Policy Research (IWPR) conducted a study using data from a longitudinal study by the Institute for Social Research, University of Michigan (1974 to 1988 Panel Study of Income Dynamics). The sample of nearly 7,000 households provides annual data on labor force participation, hours worked, absences from work, earnings, other sources of income and basic demographic information. IWPR looked at the costs to workers of not having family and medical leave and found that the cost to women was indeed high.⁵³ Specifically, they estimated that employed women who did not have some form of leave beyond vacation days, had substantially lower annual earnings when they returned to work after childbirth or adoption compared with women who had leave. For example, in the three-year period after childbirth, women who did not have leave lost an estimated \$9,279 compared with a loss of \$8,191 for women who had leave. These additional losses occurred because those without any form of leave experienced more unemployment and lower relative wages when they returned to work after childbirth. In addition, IWPR estimated that tax payers paid more than \$4 billion annually for programs such as welfare, unemployment compensation, food stamps and Medicaid to support workers who lost jobs because they did not have job-protected family and medical leave.

⁵¹ National Council for Jewish Women, *Medical and Family Leave: Benefits Available to Female Workers in the United States*. (New York: National Council of Jewish Women, 1987).

⁵² National Council for Jewish Women, *The Experience of Childbearing Women in the Workplace: The Impact of Family Friendly Policies and Practices*, (Report prepared for the Women's Bureau: U.S. Department of Labor, February 1993).

⁵³ Roberta Spalter-Roth and Heidi Hartmann, *Unnecessary Losses: Costs to Americans of the Lack of Family and Medical Leave*, (Washington, DC: Institute for Women's Policy Research, 1988).

Recently Jane Waldfogel, a scholar from Columbia University, used data from the National Longitudinal Study of Youth (NLSY)⁵⁴ to investigate the persistent gender gap in pay in both United States and the United Kingdom.⁵⁵ This investigation led her to an analysis of differences in work patterns between the genders due to having and caring for children. Waldfogel concluded that there was not simply one factor causing the gender gap in wages. She hypothesized that one-third to one-half of the gap was the result of mothers taking more time out of the labor market and receiving lower returns to work than did other women or men. Job-protected maternity leave was found to have a large positive effect for mothers in both the U.S. and U.K. because it allowed mothers to keep their job while taking needed time away from the workforce. Waldfogel calculated that if women who severed their ties to the paid labor market due to childbirth took job-protected maternity leave in the future, the returns would be substantial. She estimated that it would close an estimated 43 percent of the gender gap for affected women in the U.S. and 37 percent in the U.K.

4. Impact of Leave-Taking on Children and Families

Two important studies focus on the effect of parental leave, (an aspect of family and medical leave), on children and families. These studies were started before the passage of FMLA and are on-going. Over time they will provide a unique opportunity to understand patterns of leave-taking among working families with young children and their impact on family well-being.

The National Institute of Child Health and Development (NICHD) Study of Early Child Care⁵⁶ is a ten-site longitudinal study that began in January, 1991. The study is based on a non-random sample of 1,267 children, 53 percent of whom had mothers who planned to go back to work full-time (30+ hours per week), 23 percent of whom had mothers who planned to go back to work part-time (20 to 30 hours per week) and 24 percent of whom had mothers who planned to stay home for the child's first year of life. Children will be assessed at one, six, 15, 24 and 36

⁵⁴ The NLSY provides a national, representative sample of 12,686 young men and women who were 14 to 22 years of age in 1979 (first survey). This survey has been conducted every year and is useful for data on women taking leave for children and parenting.

⁵⁵ Waldfogel found that women earned 88 percent of what men earned at age 21, but only 82 percent by age 30. While women without children earned 95 percent of men's pay at age 30, women with children earned only 75 percent. Jane Waldfogel, *The Family Gap for Young Women in the U.S. and UK: Can Maternity Leave Make a Difference*, (Cambridge, MA: Kennedy School of Government, Harvard University, May 1994).

⁵⁶ National Institute of Child Health and Human Development, *Study of Early Child Care* (January, 1991 - on going).

months. Although the sample is not representative, it will provide data for examining the impact of different work and leave-taking patterns on children's development and on parents' well-being.⁵⁷

Finally, the Wisconsin Maternity Leave and Health Project is a longitudinal study of women, their families and the maternity leave experience. Based on a non-representative sample of 570 women and 550 of their husbands/partners, this study's interviews and observations provide extensive demographic information and employment data, as well as data on child development and parent/child interaction.⁵⁸ The first wave of data collection took place in 1990-91.

The study found that, on average, mothers took nine weeks of leave and 71 percent of women had returned to work by 12 weeks. The majority of women (66 percent) said the leave they took was too short, but they could not afford additional unpaid leave. Fathers, on average, took five days off at the time of birth and used vacation or sick days to gain paid leave. The data also showed that short maternity leave (six weeks or less) was a risk factor, when combined with another risk factor, such as a troubled marriage, for elevated levels of depression four months postpartum. Additionally, at four months after birth women who worked full-time showed elevated levels of anxiety compared to those who worked part-time or were full-time homemakers. The authors concluded that this was probably due to role overload.

D. Summary

The picture of family and medical leave policies before the passage of the FMLA is difficult to draw with great accuracy, because systematic data gathering was rare and/or was done only for particular aspects of leave. The best data available - on public and private sector employees across all firm sizes - concerns the provision of sick leave. It was provided to a small majority of employees (56 percent) and was usually paid. There was fairly good data on maternity and paternity leave. Maternity leave was available to about 37 percent of employees and paternity leave to 28 percent of employees. However, data indicated that it was very rarely paid; estimates of wage replacement for this type of leave fell in the one to two percent

⁵⁷ A study summarizing the findings to date is due out in the summer of 1996.

⁵⁸ Janet Hyde and Marilyn Essex, *Wisconsin Maternity Leave and Health Project, Wisconsin Study of Families and Work*, (University of Wisconsin, 1993).

range. The provisions of job guarantee and continuation of health benefits were common for sick leave, but much less common for maternity, paternity and parental leave, especially for employees in small establishments. Finally, data on family leave was highly anecdotal and the availability of family leave appeared rare.

Overall estimates of employee utilization of leave, other than traditional sick leave, were low, usually in the one to three percent range, although these estimates did not usually differentiate utilization by type of leave. There were few reliable studies of the cost and benefits of voluntary leave policies. Among those companies who did such an evaluation, most reported that costs were low, with the exception of one study, and a few even reported cost savings. Of those employers who reported benefits due to the provision of leave policies, they associated their policies with low turnover (cited several times), good will, enhanced loyalty and morale and increased retention of experienced workers.

State statutes appear to have expanded leave options for some employees, especially in the area of maternity and parental leave. However, even in those states the employee eligibility restrictions and employer exemptions meant that employees in small establishments and those who had short service and/or work part-time were still left without many leave options. Most state leave laws provide for unpaid forms of leave, except for state TDI laws, which provided partial wage replacement for maternity disability leave for biological mothers and disability leave for employees' own temporary disability.

In sum, a minority of employers and states provided all the kinds of leave covered by the FMLA or the degree of job protection and continuation of benefits required by the FMLA. Best estimates suggest that perhaps one-quarter to one-third of full-time private and public sector employees had the kind of leave options provided by the FMLA available to them before 1993, while perhaps less than 20 percent of employees in small establishments had access to these kinds of leave policies. Approximately another third of employees had access to only one or two kinds of leave (sick leave and maternity leave), and usually without pay, continuation of benefits or job protection. In general, the extent of leave available to employees prior to 1993 increased with firm size and for employees with higher levels of skill and income.