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Family and Medical Leave in the U.S.: Incremental Policy and State Legislative Action

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Introduction

In his January 2015 State of the Union address, President Barack Obama urged Congress to pass legislation giving all workers access to seven paid sick days per year. He referred to it as “the right thing to do” for the 43 million workers without such leave. The United States is one of only a few countries in the world that does not provide paid maternity leave or paid sick leave. The Family and Medical Leave Act (FMLA) of 1993 remains the only federal policy providing job-protected leave for workers. However, the leave is unpaid, and its restrictive eligibility requirements mean that an estimated 41 percent of the U.S. workforce does not have access to leave under the law.¹

The FMLA’s shortcomings are in part due to compromises made in its journey through five congressional sessions. It passed Congress twice only to be vetoed by President George H. W. Bush each time. When the FMLA was finally signed into law by President Bill Clinton, it had the support of many of its original advocates. While cognizant of the law’s limitations, advocates viewed it as a first step in establishing policy that could be expanded with subsequent legislation.² At the federal level, this has not happened.

At the state level, however, some laws are more generous, offering paid leave, covering more workers, lengthening leave durations, or expanding definitions of “family” for the purposes of caregiving leave. This policy brief examines state legislative histories, pre- and post-FMLA and asks: Has state-level activity realized the FMLA as incremental policy? Which states have continued the family and medical leave project?

Since 1993, 12 states have passed 19 leave laws that establish paid leave programs or expand access to job-protected leave. An additional 10 states provide more generous leave than afforded under the FMLA but do so under laws passed before 1993.

¹ U.S. Department of Labor. 2014. *Family and Medical Leave in 2012: Technical Report*. Cambridge, MA: Abt Associates Inc. Available at: <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>.

² Bernstein A. 2001. *The Moderation Dilemma: Legislative Coalitions and the Politics of Family and Medical Leave*. Pittsburgh, PA: University of Pittsburgh Press; Elving R. 1995. *Conflict and Compromise: How Congress Makes the Law*. New York: Simon & Schuster.

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Most of these laws, however, cover only females for the purposes of pregnancy and childbirth. Although such limited legislative activity suggests that the FMLA has not been substantially expanded, a recent increase in state legislative activity and national attention to the issue suggests that family and medical leave is once again gaining momentum as a policy issue.

Family and Medical Leave in the U.S.: Aspirations and Limitations

By 2000, more than 35 million workers had taken leave under the FMLA.³ However, many workers remain beyond the law’s reach. The law limits leave to address serious illnesses or medical conditions and in addition to self-care, limits family care to spouses, parents, and children. To be eligible, workers must have worked 1,250 hours in the year prior to leave and must be employed in establishments with 50 or more employees. According to a recent study commissioned by the U.S. Department of Labor, broadening coverage to smaller establishments (with 20 or more employees) or decreasing requisite hours on-the-job prior to leave (from 1,250 hours to 780) would increase eligibility from 59% of the workforce to approximately two-thirds of the workforce.⁴ It additionally found that among workers reporting an unmet need for leave, a majority cited an inability to afford unpaid time-off as the reason for not taking leave.

For states that want to expand access to job-protected family and medical leave, there are several options. They can provide paid leave programs, lengthen leave duration (i.e., provide more than 12 weeks of leave), loosen eligibility requirements to cover more workers, or cover care for additional family members, such as domestic partners, siblings, grandparents, or parents-in-law (see Figure 1).

Figure 1. Provisions of the FMLA and Approaches for Expansion

Provisions of the FMLA	Potential Expansions
Up to 12 weeks,	Lengthen leave duration.
Of unpaid, job-protected leave,	Create paid leave programs to provide wage replacement during leave periods.
To address personal serious health condition or to care for a parent, spouse, or child with a serious health condition.	Include care for additional family members, such as domestic partners, grandparents, parents-in-law, or siblings.
Eligibility is limited to employees in establishments of 50 or more employees.	Broaden coverage to employees in smaller establishments.
Eligibility is limited to employees who have worked at least 1,250 hours in the 12-month period preceding leave.	Broaden coverage to part-time employees or employees with less than 12 months tenure.

³ U.S. Department of Labor. 2001. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*. Rockville, MD: Westat.

⁴ U.S. Department of Labor. 2014. *Family and Medical Leave in 2012: Technical Report*. Cambridge, MA: Abt Associates Inc. Available at: <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>.

While many states have adopted various types of workplace leave legislation, this report focuses on the provision of job-protected workplace leave and paid leave programs that cover the private sector. Included in this report are laws that extended family care for same-sex spouses or domestic partners when such changes are made directly to family and medical leave law.⁵ Excluded from this report is unpaid, job-protected leave for small necessities, which covers leave, usually given in hours, for very specific needs. Such laws provide leave, for example, to bereave the loss of a family member killed in active military duty, to accompany a family member to a medical appointment, or to attend a child's school activities. It also includes leave for victims of domestic violence, sexual assault, and stalking to address matters related to such abuse. Because these laws vary so widely from each other and cover so few people, they are not included in this report.⁶

Incremental Policy Realized? A Look at State Legislative Histories

This section reports states as *incremental*, *idle*, and *inactive* based on their workplace leave legislative activity before and after passage of the FMLA. *Incremental states* passed at least one law after 1993 to create paid leave programs or expand coverage of existing unpaid leave, therefore acting as FMLA advocates envisioned. Such laws have created paid leave programs or expanded existing programs by covering smaller employers (i.e., less than 50 employees) or decreasing tenure or hours-worked eligibility requirements. These changes remove some of the largest obstacles to leave-taking. Other laws have lengthened leave durations (i.e., provided additional weeks of leave) or broadened definitions of family to include more members.

There are 12 *incremental states* (see Figure 2). These states have passed a total of 19 leave laws since 1993.⁷ While some states, such as California, have been particularly active on the issue of workplace leave, only six states have passed more than one law. Only nine states have made the types of changes that make workplace leave accessible to a greater proportion of the workforce (i.e., offering paid leave, covering smaller employers, and reducing tenure eligibility requirements). However, most legislative activity has been relatively recent – occurring in the last six years – suggesting some momentum behind this issue.

⁵ Family leave laws in some states cover same-sex spouses as a direct result of the legalization of same-sex marriage or widely applicable laws that recognize civil unions and domestic partnerships as equivalents to marriage under state law. Because such laws are the result of different political processes than amendments to family leave laws, they were not included in this report.

⁶ For a detailed report of state laws regarding paid leave and job-protected leave, including small necessities laws as well as workplace accommodations for pregnant and lactating women, see National Partnership for Women and Families (NPWF). 2014. *Expecting Better: A State-by-State Analysis of Laws that Help New Parents*. Washington, DC: NPWF. Available at: <http://www.nationalpartnership.org/research-library/work-family/expecting-better-2014.pdf>.

⁷ This includes paid family leave, paid sick leave, job-protected leave, and expansions of these programs. It includes Massachusetts' paid sick leave law that passed by ballot measure and Washington's paid family leave program, which is not in effect. It does not include small necessities laws or laws that apply only to state employees.

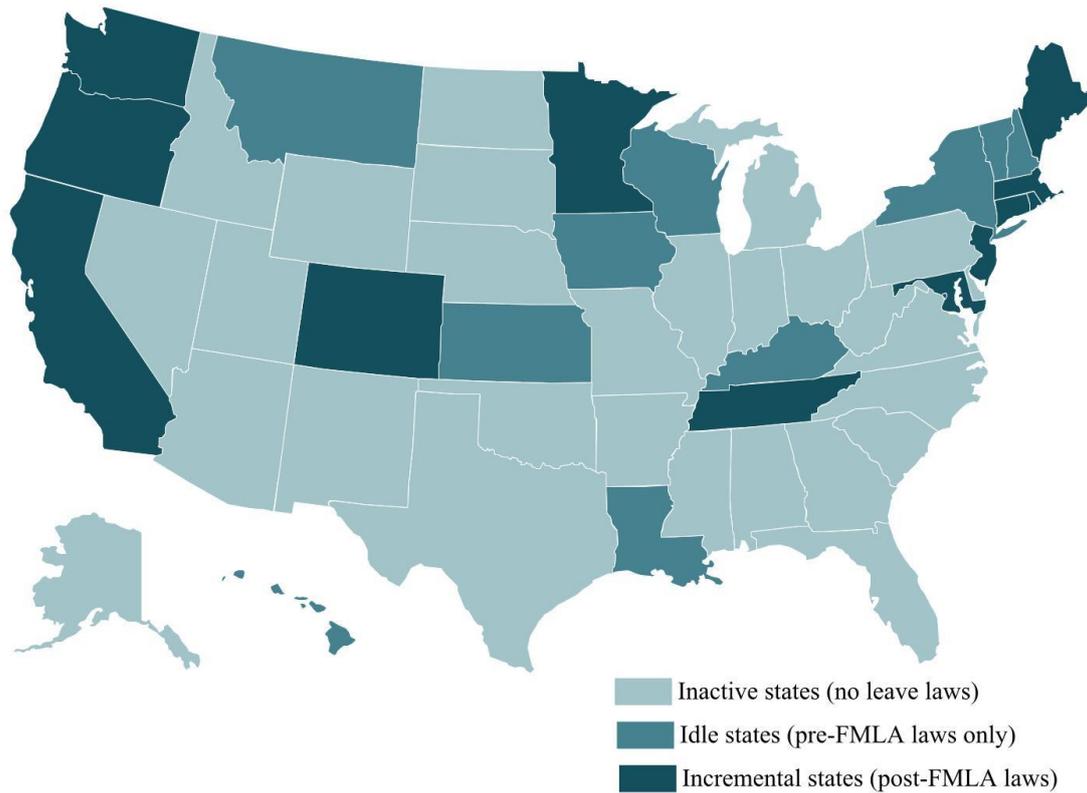


Figure 2. Incremental, Idle, and Inactive States: States that passed leave laws after the FMLA of 1993 (incremental); states that passed leave laws prior to but not after the FMLA of 1993 (idle); and states that have not passed any leave laws, pre- or post-FMLA (inactive).

Idle states adopted leave laws prior to 1993 but have not since broadened their reach. Ten states fit this category. Laws in these states are still in-effect and offer more generous leave than provided under the FMLA. Because such states already offer paid leave, cover smaller establishments, or have lower or no eligibility requirements, it is possible that they have less of an imperative to expand their laws further. However, six out of ten of these laws cover only females. Rather than granting particularly broad coverage, these state laws are remnants of earlier debates surrounding the FMLA regarding men’s and women’s roles and their responsibilities to work and family.

This section summarizes the legislative histories in *incremental* and *idle* states. While it discusses the shortcomings of some of these laws, it is important to note that most states – twenty-eight of them – have been wholly *inactive*, adopting no workplace leave legislation prior to or proceeding the FMLA.⁸

Incremental states

There are 12 *incremental states*: California, Colorado, Connecticut, Maryland, Maine, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Tennessee, and Washington.

⁸ These states are: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wyoming. While there have been active workplace leave campaigns within some states, the states themselves have been inactive.

Nine of the 12 *incremental states* created paid leave programs and/or loosened eligibility requirements, thus removing the largest barriers to leave. After 1993, five states passed laws to provide some form of paid leave. Three of these states – California, Connecticut, and Massachusetts – recently passed laws mandating employers to allow workers to accrue paid sick time.⁹ California and two other states – New Jersey and Rhode Island – created paid family leave programs by expanding their state’s temporary disability insurance (TDI) programs to cover family care.¹⁰

In the post-FMLA period, only three states passed laws to loosen eligibility requirements. Maryland and Maine extended coverage of their state leave laws to include establishments of 15 or more employees. Oregon, with the creation of its own family and medical leave program in 1995, covered establishments with 25 or more employees as well as workers with 180 days on-the-job. Prior to this, Oregon provided pregnancy disability leave under a law it passed in 1989. In practice, it provides up to 12 weeks of job-protected leave to address pregnancy- and childbirth-related disabilities. Because Oregon’s family and medical leave does not run concurrent with its pregnancy disability leave, pregnant women have an additional 12 weeks of leave.

Two states that previously excluded male employees from their leave law included them with post-FMLA amendments. In 2005, Tennessee created parental leave by extending its 1988 maternity leave law.¹¹ This year, Massachusetts passed a law to extend job-protected leave to male caregivers as well. Prior to these changes, fathers in Massachusetts and Tennessee could take unpaid, job-protected leave under the FMLA. With these changes, fathers were able to take advantage of more generous state leave laws: Tennessee provides additional time-off,¹² and Massachusetts covers more workers.¹³

Other states made minor changes to leave programs, lengthening leave periods or, most often, including additional family members. When Minnesota amended its state leave law last year, it already covered establishments of 21 or more employees, but the amendment lengthened leave from six weeks to twelve and extended leave to cover pregnancy- and childbirth-related medical conditions.

⁹ In Massachusetts, the paid sick days law passed by ballot measure.

¹⁰ TDI programs exist in only two other states – Hawaii and New York. In 1977, New York extended its TDI program to cover pregnancy- and childbirth-related disabilities, and with the passage of the Pregnancy Discrimination Act the following year, all TDI programs were required to do this. Unlike California, New Jersey, and Rhode Island, TDI programs in Hawaii and New York do not cover family care. In 2007, Washington passed “family leave insurance” legislation, but without a pre-existing TDI program, it lacks a funding mechanism and is not in operation. For more information on the history of TDI programs, see: Berkeley Center on Health, Economic & Family Security and Georgetown Law Workplace Flexibility 2010. 2010. Family Security Insurance: A New Foundation for Economic Security. Available at: http://www.law.berkeley.edu/files/chefs/family_security_insurance_2010_Final_web.pdf.

¹¹ The original law passed in Tennessee in 1987, providing leave for “pregnancy, childbirth, and nursing” and allowed time for bonding, but a law passed the following year removed the time for bonding to clarify it would only cover female employees (see Berstein A. 2001. *The Moderation Dilemma: Legislative Coalitions and the Politics of Family and Medical Leave*. Pittsburgh, PA: University of Pittsburgh Press).

¹² Tennessee’s leave law is more restrictive than the FMLA in its eligibility requirements: it covers establishments of 100 or more employees. However, eligible employees are granted four months of leave as opposed to the FMLA’s 12 weeks.

¹³ With its Massachusetts Maternity Leave Act (MMLA) of 1972, Massachusetts became the first state to provide job-protected leave. Employees in small establishments (six or more employees) could take up to eight weeks of leave after working for three months. However, the original law was only for childbirth, limiting its scope to female employees. Though it was later amended to include adoption and care for mentally disabled children, it was not until this year that Massachusetts extended its leave to cover fathers.

Seven states amended their laws to be more inclusive in their definitions of “family” by including, for example, domestic partners, siblings, grandparents, grandchildren, and parents-in-law.¹⁴ These states include: California, Colorado, Maine, Oregon, Rhode Island, Tennessee, and Washington. California amended its paid family leave program to include care for grandparents, grandchildren or siblings. Colorado, which does not have its own state leave program, granted eligibility for federal FMLA leave to care for civil union and domestic partners. Maine, in addition to adding domestic partners and their children, added adopted children, non-dependent adult children, and cohabitating siblings. Oregon included nondependent adult children, grandparents, grandchildren, and parents-in-law. Rhode Island’s paid family leave program includes care for parents-in-law, grandparents, and domestic partners. Tennessee added leave for newly adopted children. Washington expanded its pre-FMLA parental leave to include care for family, effectively creating a family leave program.

Incremental states also vary in their level of legislative activity. California’s post-FMLA legislative activity is by far the most notable. In 2002, California became the first state to create a paid family leave program, and in 2013, it added care for grandparents, grandchildren, and siblings. Although California created pregnancy disability leave in the 1970s, employers were not required to continue health insurance benefits during this particularly vulnerable time for workers. In 2011, California corrected this issue by requiring businesses to continue health benefits during pregnancy disability leave. Most recently, in 2014, California joined Connecticut and Massachusetts in providing paid sick days.¹⁵

Few states come close to this level of legislative activity. Rhode Island and Washington each passed laws to create paid family leave programs – in 2013 and 2007, respectively. Rhode Island in 2006 amended its 1990 law providing job-protected family leave to include care for domestic partners. Although Washington’s paid family leave program remains unfunded and thus, not in-effect, it created a family leave program in 2006 by extending its 1989 parental leave law to include care for family.

Most legislative activity has been relatively recent. Of the 19 leave laws passed at the state level since 1993, over half passed in the last five years. This increased activity suggests momentum behind workplace leave issues and greater potential to affirm the FMLA as incremental policy.

Idle states

Idle states passed leave laws leading up to the FMLA but have not been active on leave legislation since the federal law passed. Included in this category are ten states: Hawaii, Iowa, Kansas, Kentucky, Louisiana, Montana, New Hampshire, New York, Vermont, and Wisconsin.

Each of these laws is still in effect, and because they have looser eligibility requirements than the FMLA, they continue to provide greater access to leave than many other states. All states in this category, except Wisconsin, have laws that cover more employers. Wisconsin’s law covers establishments with 50 or more employees, the same as the FMLA. Louisiana’s law covers mid-sized establishments (i.e., 25 or more employees) while all others cover establishments with fewer than

¹⁴ Other states, not reported here, cover same-sex spouses due to legalization of same-sex marriage or cover civil union or domestic partnerships due to laws that require such partnerships be treated the same as marriage under state laws and statutes. Because such laws are part of a different political process, they are not included in this report.

¹⁵ For an in-depth examination of California’s leave laws and their impacts, see Milkman R, Appelbaum E. 2013. *Unfinished Business: Paid Family Leave in California and the Future of U.S. Work-Family Policy*. Ithaca, NY: ILR Press.

25 employees. Hawaii's family leave law covers establishments with 100 or more employees, but the state provides paid and job-protected pregnancy disability leave that covers all employers. In all but four states, workers are eligible regardless of tenure or hours worked.¹⁶ In this regard, Vermont is the only state that is more restrictive than the FMLA, requiring employees to have worked an average of 30 hours per week in one year prior to leave. Paid leave is provided in Hawaii and New York through their TDI programs, which cover pregnancy- and childbirth-related health conditions but not leave to care for family.

Because leave laws in *idle states* are in some respects more generous than the FMLA, they may lack imperative to adopt additional laws. This may be especially true for Hawaii and Vermont. Although Hawaii could do as California, New Jersey, and Rhode Island and extend its state TDI program to offer paid family leave, it does provide paid leave to address disabilities related to pregnancy and childbirth, and all employers must provide job-protected pregnancy disability leave. Similarly, while Vermont could loosen its eligibility requirements to better match the FMLA, it already provides job-protected family leave covering establishments of 15 or more employees. However, laws in six other states – Iowa, Kansas, Louisiana, Montana, New Hampshire, and New York – cover only females. None of these laws allow time for bonding. They cover only disability related to pregnancy and/or childbirth. In addition to Vermont, Kentucky is the only other *idle state* that has gender-neutral laws and provides time for bonding. However, Kentucky is uniquely limiting in that it provides only time-off to care for newly adopted children, excluding bonding leave for biologically-related children or leave to address pregnancy- or childbirth-related medical conditions.

These state laws denote the historical political context surrounding family and medical leave leading up to the passage of the FMLA. As potential amendments to the FMLA were being considered in Congress, advocates fought efforts to limit the law to maternity leave, fearing that such limitation would result in gender discrimination in employment practices. They framed pregnancy and childbirth as medical conditions, and argued that all workers – women and men – need time-off to address serious health needs. They also defended a gender-neutral notion of caregiving and included care for spouses and parents, which had more gender-neutral appeal than bonding with newborns and had special resonance among aging workers. At both the federal and state levels, advocates built support for job-protected leave by appealing to “family values” conservatives. Job-protected leave for women workers was particularly appealing, because it encouraged women to leave work for family care, and some conservative lawmakers believed that job-protected leave would lead to a decrease in the number of abortions by removing the fear of job loss for pregnant workers. At the state level, some advocates felt that gender-neutral family leave was untenable given their state's specific political context and opted instead to pass more moderate maternity disability leave laws that would at least provide some relief for workers.¹⁷ Rather than providing a base for incremental expansions, such laws instead reflect the particular political context leading up to passage of the FMLA.

States have been moving out of this *idle* category with recent policy changes. Massachusetts and Minnesota became *incremental states* with laws passed last year. New York is currently considering legislation that would place it among *incremental states*. Following examples from California, New

¹⁶ These states include: Hawaii, New York (four weeks/52 days), Wisconsin (52 weeks and 1000 hours), and Vermont (an average of 30 hours/week for one year). While Hawaii's job-protected pregnancy disability leave does not have tenure or hours-worked eligibility requirements, eligibility for its family leave requires six months of employment and wage replacement during pregnancy disability leave requires 14 weeks of employment.

¹⁷ Berstein A. 2001. *The Moderation Dilemma: Legislative Coalitions and the Politics of Family and Medical Leave*. Pittsburgh, PA: University of Pittsburgh Press; Elving R. 1995. *Conflict and Compromise: How Congress Makes the Law*. New York: Simon & Schuster.

Jersey, and Rhode Island, the proposed legislation would create paid family leave by expanding the state's TDI program to cover family care. The bill, first introduced in 2009, was approved by state assembly last month and, at the time of this report, had been referred to committee in the State Senate (as S.3004). However, New York Governor Andrew Cuomo has signaled that family leave insurance is not a priority.¹⁸

Conclusion

Given that only 12 states have passed workplace leave laws after the FMLA and only nine of these offer paid leave or have looser eligibility requirements, it would appear that the FMLA has not been as incremental as envisioned. However, many states have active campaigns for family and medical leave, and many have only recently adopted leave laws, suggesting momentum behind the issue.

Additionally, family and medical leave is receiving more attention at the national level. Two bills have been introduced in Congress that would open access to workplace leave: the Healthy Families Act (H.R.932) and the Family and Medical Insurance Leave (FAMILY) Act (S.786). The Healthy Families Act, first introduced in 2004, would allow workers to accrue up to 56 hours of paid leave per year. The FAMILY Act, first introduced in December 2013, would create a federal paid leave program funded by employer and employee contributions and administered through the Social Security Administration. With no eligibility requirements, it would provide partial wage replacement for up to 12 weeks of family leave. At the time of this report, both bills had been referred to committees.

President Barack Obama has been outspoken in his support for workplace leave policies that would bring the U.S. on-par with other countries. Last June, the White House hosted a high profile Summit on Working Families in which paid leave was one of the key issues. In his June 15 weekly address, the President stated that paid family leave "should be available to everyone, because all Americans should be able to afford to care for a family member in need." His 2016 budget proposal included funds to help states establish paid leave programs - \$2.2 billion to reimburse state administrative costs and \$35 million to aid states in building infrastructure for paid leave programs.¹⁹ This support from the Administration grants important salience to state-level efforts.

¹⁸ Schulte B. 2015. National Women's Groups to New York Gov. Cuomo: Pass Paid Leave. *Washington Post* (March 16). Available at: <http://www.washingtonpost.com/blogs/govbeat/wp/2015/03/16/national-womens-groups-to-new-york-gov-cuomo-pass-paid-leave/>

¹⁹ Mufson S., Eilperin J. 2015. Obama Expands Parental Leave for Federal Workers, *Washington Post* (January 15). Available at: <http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/14/obama-to-propose-seven-days-paid-sick-leave-for-workers/>; Schulte B. 2015. National Women's Groups to New York Gov. Cuomo: Pass Paid Leave. *Washington Post* (March 16). Available at: <http://www.washingtonpost.com/blogs/govbeat/wp/2015/03/16/national-womens-groups-to-new-york-gov-cuomo-pass-paid-leave/>