

STATE-LEGISLATED FAMILY LEAVE: THE FMLA'S PANACEA OR ERISA'S SCOURGE?

I. INTRODUCTION

Consideration of an employee's right to take leave for family or medical emergencies raises familiar issues for many state lawmakers.¹ Over the years, states have enacted varying degrees of legislation aimed at protecting workers in numerous situations involving parental and familial emergencies.² Approximately thirty states and the District of Columbia³ have adopted some form of state family or medical leave legislation.⁴ However, the broad preemption language of the Employee Retirement Income Security Act (ERISA)⁵ has foreclosed the effectiveness of virtually every state's attempt to provide medical or family benefits for its workforce.⁶

1. This issue has received increased attention in recent years as the number of single parent households and dual income households increases. HELEN D. IRVIN & RALPH M. SILBERMAN, *FAMILY AND MEDICAL LEAVES: THE NEW FEDERAL STATUTE AND STATE LAWS* 54 (1993) (citing *The Family and Medical Leave Act*, 29 U.S.C.A. § 2601 (1993)).

2. See PETER A. SUSSER, *FAMILY AND MEDICAL LEAVE HANDBOOK* ¶ 1000 (summarizing existing family and medical leave laws in 50 states and the District of Columbia). The Ohio and Washington statutes are among the oldest, although not necessarily the most comprehensive, state legislation concerning anti-discrimination maternity leave. OHIO ADMIN. CODE § 4112-5-05-(G) (1994) (originally enacted in 1971); WASH. ADMIN. CODE § 162-30-020(5)(b)-(c) (1990) (originally enacted in 1973).

3. D.C. CODE ANN. §§ 36-1301 to 1317 (1993).

4. SUSSER, *supra* note 2, ¶ 1000. States differ as to whether they have any family or medical leave legislation and whether it applies to private or public employees; no two states have identical requirements concerning the minimum necessary leave allowed. In other words, there is absolutely no uniformity among state laws. *Id.*

5. ERISA is located at 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993). At the time of ERISA's passage, Representative Dent stated that "the crowning achievement of this legislation . . . [is that it reserves] to federal authority the sole power to regulate the field of employee benefit plans." 120 CONG. REC. 29, 197 (1974). This sweeping scope is reflected in the language of ERISA, which provides that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a) (1988) (emphasis added). For a state statute to be preempted, it must "relate to" a benefit plan that ERISA already covers. *Id.*

6. Courts deciding challenges to this type of legislation frequently deem such laws preempted by ERISA's broad reach. See, e.g., *New Jersey Business & Indus. Ass'n v. State*, 592 A.2d 660 (N.J. Super. Ct. Law Div. 1991); *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498 (9th Cir. 1993); cf. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (holding that ERISA preempted Pennsylvania Motor Vehicle Financial Responsibility Law); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (holding that ERISA preempts New York's Human Rights Law); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (holding that ERISA preempts workers' compensation laws); *Franchise Tax Bd. v. Construction Laborers*

In August 1993, following years of controversy over the need to federalize family and medical leave in the United States,⁷ the Family and Medical Leave Act (FMLA)⁸ went into effect.⁹ The FMLA sets minimum standards that employers must meet in providing for employee leave.¹⁰ As federal legislation, the FMLA is not preempted by ERISA.¹¹ However, the FMLA sets only a minimum benefit standard¹² and in no way displaces or discourages state family or medical leave legislation that provides more generous benefits to a state's employees.¹³ As a result, a conflict has developed between Congress' attempt to regulate employee benefits and its simultaneous efforts to provide increased family and medical leave benefits.¹⁴ Although the FMLA includes a specific provision encouraging

Vacation Trust, 679 F.2d 1307 (9th Cir. 1982) (holding that ERISA preempts California's attempt to levy on Vacation Trust Fund), *vacated on jurisdictional grounds*, 463 U.S. 1 (1983); American Tel. & Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979) (holding that ERISA preempts attempt to garnish pension plan).

7. Representatives Patricia Schroeder (D-Colo.) and William Clay (D-Mo.) and Senator Christopher Dodd (D-Conn.) first introduced the FMLA in 1985. David K. Haase, *Evaluating the Desirability of Federally Mandated Parental Leave*, 22 FAM. L.Q. 341, 342 (1988). President Bush vetoed the bill twice and it did not have the requisite congressional votes to keep it alive. However, amongst increasing controversy, Congress reintroduced and quickly passed the bill in 1993 and President Clinton signed it into law. Brian Robertson, *The Dark Side of Family Leave*, INSIGHT, Mar. 22, 1993, at 6.

8. 29 U.S.C. §§ 2601-2654 (Supp. V 1993).

9. Congress passed the FMLA on February 4, 1993; President Clinton signed the FMLA on February 5, and the Act went into effect on August 5, 1993. IRVIN & SILBERMAN, *supra* note 1, at 5.

10. Generally, the FMLA requires that all employers with 50 or more employees provide up to 12 workweeks of unpaid leave during any 12-month period for employees at the time of the birth or adoption of a child or at the time of a serious health condition affecting the employee or a family member. 29 U.S.C. § 2612 (Supp. V 1993); *see also infra* notes 56-60 and accompanying text.

11. Section 514(d) of ERISA states: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (1988).

12. The FMLA explicitly protects leave benefits that are more generous than the federal law requires and protects the federally granted rights against interference by private agreements. Section 2652 provides:

(a) Nothing in this Act . . . shall be construed to diminish the obligation of an employer to comply with . . . any employment benefit program or plan that provides greater family or medical leave rights to employees

(b) The rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

29 U.S.C. § 2652 (Supp. V 1993).

13. "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act" 29 U.S.C. § 2651(b) (Supp. V 1993).

14. An example of this conflict is apparent in the legislative history of Wisconsin's Family and Medical Leave Act. The drafters were aware of the potential ERISA preemption problems but could not

benefit plans that provide more generous family and medical leave,¹⁵ ERISA's broad preemption language invalidates any state legislation with leave requirements beyond the FLMA's minimum requirements.¹⁶

This Note examines the preemption of state family and medical leave legislation by ERISA and the inherent conflict between the FMLA and ERISA. Part II considers ERISA's general objectives and focuses specifically on its preemption clause. Part III examines the goals of the FMLA, its possible preemption of other legislation, and its encouragement of state family and medical benefit regulation. Part IV analyzes the interaction of the two statutes and the inherent conflict between them. Finally, Part V proposes that Congress amend the FMLA to eliminate its encouragement of state legislation and bring it into conformity with ERISA.

II. THE EMPLOYEE RETIREMENT INCOME AND SECURITY ACT

A. ERISA's Goals

Congress enacted ERISA in response to the enormous growth of employee benefit plans¹⁷ and the increasing risk that the lack of vesting provisions in these plans would deprive long-term employees of their anticipated benefits.¹⁸ Congress designed ERISA to subject these plans to federal regulation and to prescribe minimum vesting and accrual standards.¹⁹ In order to protect interstate commerce and employees' bene-

resolve the vast uncertainty that surrounded the preemption issue. As a result, the legislature dropped the issue and passed the Act without attempting to address the preemption problem. Gabrielle Lessard, Comment, *Conflicting Demands Meet Conflict of Laws: ERISA Preemption of Wisconsin's Family and Medical Leave Act*, 1992 WIS. L. REV. 809, 819-20 & nn.62-66.

15. Although the provision is entitled "Encouragement of more generous leave policies," the actual statutory language is worded negatively: "Nothing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act . . ." 29 U.S.C. § 2653 (Supp. V 1993).

16. See *supra* notes 5-6 and accompanying text.

17. In the mid 1940s, private employer pension plans emerged and began a slow development. After World War II, attitudes regarding retirement security changed and the growth of private pension plans accelerated drastically. H.R. REP. NO. 533, 93d Cong., 1st Sess. 2 (1974).

18. "[M]any employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans . . ." 29 U.S.C. § 1001(a) (1988).

19. "[I]t is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness." *Id.*

ERISA does not mandate the provision of particular benefits nor does it proscribe discrimination in the provision of employee benefits. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). It does, however, set forth minimum standards with which an employer must comply when offering such a

fits,²⁰ ERISA compels employers to disclose financial information regarding benefit plans and brings the fiduciary relationship between employees and employers under federal regulation.²¹ ERISA also specifies particular levels of fiduciary responsibility and obligation regarding pensions and employee benefit plans.²²

Congress sought to achieve two primary goals through ERISA: protection of earned employee pensions and benefits²³ and uniformity of laws regulating benefit plans.²⁴ Congress' primary goal was to protect employees' rights to benefits and pensions promised by employers.²⁵ Overwhelming evidence of fraud and abuse in the management of employee pension and benefit plans created the impetus for ERISA.²⁶ The resulting federal legislation imposed a comprehensive set of standards for the establishment, operation and management of pensions and employee

qualifying plan. Title I of ERISA sets forth a five-part regulatory structure to be administered and enforced by the Secretary of Labor. Parts one and four impose reporting, disclosure and fiduciary obligations on employers. 29 U.S.C. §§ 1021-1031, 1101-1114 (1988). Parts two and three apply only to pension plans and establish minimum standards with respect to participation, vesting, benefit accrual, and funding. *Id.* §§ 1051-1061, 1081-1086. Part five sets forth ERISA's preemption provisions in the form of substantive complements to Title I's intricate system of public and private enforcement. *Id.* §§ 1131-1145.

20. ERISA explicitly declares that "the policy of this chapter [is] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . ." 29 U.S.C. § 1001(b) (1988).

21. ERISA requires "disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto," establishes "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," and provides "appropriate remedies, sanctions, and ready access to the Federal courts." *Id.*

22. *Id.*

23. *Id.*

24. Prior to ERISA's enactment, there were three federal laws covering employee benefit plans: the Welfare and Pension Plans Disclosure Act, Law of Aug. 28, 1958, § 2, 72 Stat. 997 (repealed 1974); the Labor-Management Relations Act, 29 U.S.C. §§ 141-187 (1988); and the Internal Revenue Code, I.R.C. §§ 401-404, 501-503 (1954). Further, many states provided statutory protection of employee pension and welfare benefit plans. However, at the federal level, the programs all had different purposes and were vested within different federal authorities. At the state level, the laws were similar in nature to ERISA but eventually were found to be inefficient. H.R. REP. NO. 533, *supra* note 17, at 3-5.

25. See 29 U.S.C. § 1001(a) (1988); see also *Shaw*, 463 U.S. at 90 (citations omitted) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.").

26. Citing the results of a comprehensive, three-year study of pension plans conducted for Congress, Senator Williams, the Senate sponsor of ERISA, stated that these standards would safeguard employees for whom "the expectation of retirement benefits has proven to be built on sand." 119 CONG. REC. 30,003 (1973). Representative Dent, the House sponsor, stated that ERISA's fiduciary standards "will prevent abuses of the special responsibilities borne by those dealing with the plans." 120 CONG. REC. 29,197 (1974); see also *id.* 4277-80.

welfare benefit plans.²⁷ Among other things, ERISA creates reporting mandates, fiduciary responsibilities, disclosure requirements and a federal cause of action for employees wronged by the management, or mismanagement, of a benefit or pension plan.²⁸

A second goal of ERISA, not unrelated to employee protection, is to ensure uniformity of the laws regulating pension and employee benefit plans across the United States.²⁹ Congress deemed this goal essential for two reasons. First, uniformity protects and ensures the free flow of interstate commerce and freedom of movement for citizens of the United States.³⁰ By establishing a single set of federal regulations for the management of employee benefit plans, and at the same time explicitly limiting the ability of states to regulate this area,³¹ Congress ensured freedom of interstate travel. ERISA guarantees that employees in one state are afforded the same minimum protection with regard to their pension or employee benefit plan as are employees in every other state.³² If an employee does relocate, the employee does not have to risk losing any previously earned benefits or pensions in which the employee has earned a vested interest.³³ Thus, employees are no longer compelled to remain in certain states solely to protect earned employment benefits and pensions. Similarly, because of ERISA, employers can no longer seek to relocate in states that require less fiduciary responsibility in the maintenance of an employee benefit plan.

Uniformity in employee benefits regulations also encourages the efficient and manageable implementation and continuance of employee pension and benefit plans.³⁴ With the enactment of ERISA, interstate employers no

27. See 29 U.S.C. §§ 1051-1061, 1081-1086 (1988). These provisions include participation, funding and vesting requirements on pension plans. See *supra* note 19.

28. See *id.* § 1132 (1988).

29. Representative Dent stated that “[i]n electing deliberately to preclude state authority over these plans, Congress acted to insure uniformity of regulation with respect to their activities.” H.R. REP. NO. 1785, 94th Cong., 2d Sess. 46 (1977).

Discussing the rationale behind the breadth of ERISA’s “relate to” clause, Senator Jacob Javits stated that “the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required but for certain exceptions the displacement of State action in the field of private employee benefit programs.” 120 CONG. REC. 29,942 (1974).

30. 29 U.S.C. § 1001 (1988).

31. See *id.* § 1144(a).

32. See *id.* § 1001; see also H.R. REP. NO. 533, *supra* note 17, at 3-5.

33. H.R. REP. NO. 533, *supra* note 17, at 4.

34. The Supreme Court has recognized the employers’ need for uniformity: “To require plan providers to design their programs in an environment of differing State regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with

longer face the administrative nightmare created by inconsistent state and local regulations of employee pension and benefit plans.³⁵ Thus, interstate employers who wish to provide benefits but would otherwise be precluded or discouraged from doing so by the cost inefficiency of tailoring any plan to meet the individual legislation of each of the fifty states³⁶ are encouraged to establish such a plan.³⁷ Ultimately, employees, as well as employers, benefit from the uniformity of federal regulation.

B. ERISA's Preemption of State Legislation

In order to effectuate its goal of uniformity, Congress included a broad preemption clause in ERISA.³⁸ ERISA explicitly preempts any state laws that "relate to" employee benefit plans covered by ERISA.³⁹ The statute specifically exempts from this preemption provision state laws regulating insurance, banking, or securities, as well as applicable state criminal laws.⁴⁰ This expansive preemption language, coupled with the limited list of specific exceptions, demonstrates the congressional intent to make ERISA's preemption extremely far-reaching.⁴¹ Moreover, ERISA's legislative history leaves no doubt that this broad preemption of state regulations was both intentional and necessary to ensure accomplishment of the goal of uniform federal regulation within the realm of employee pension and welfare benefit plans.⁴² The House of Representatives and the

decreased benefits." *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10) (1987)). "[W]here a 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit programs,' we have applied the [ERISA] preemption clause to ensure that benefit plans will be governed by only a single set of regulations." *Id.*

35. "By establishing benefit plan regulation 'as exclusively a federal concern,' Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees." *Shaw*, 463 U.S. at 105 (citations omitted).

36. The inefficiency of tailoring pension and employee welfare benefit plans to comply with individual state regulations "presumably would be paid for by lowering benefit levels." *Id.*

37. "Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws . . . would make administration of a uniform nationwide plan more difficult . . . ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with the administration of employee benefit plans." *Id.* at 105 n.25.

38. 29 U.S.C. § 1144(a) (1988). See *supra* note 5 for the text of ERISA's preemption clause.

39. 29 U.S.C. § 1144(a) (1988).

40. *Id.* § 1144(b)(2), (4).

41. The Supreme Court has commented on this clause, calling it "conspicuous for its breadth" and "virtually unique." *FMC Corp.*, 498 U.S. at 58; *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n.26 (1982).

42. Senator Williams stated:

It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for

Senate each considered narrowing the reach of ERISA's preemption, yet both ultimately opted for the expansive provisions.⁴³

In keeping with congressional intent,⁴⁴ the courts have interpreted ERISA's preemption clause, specifically its "relate to" language, to reach beyond state laws that directly conflict⁴⁵ with ERISA's provisions.⁴⁶ In *Shaw v. Delta Air Lines, Inc.*,⁴⁷ the Supreme Court established that the phrase "relate to" should be interpreted broadly.⁴⁸ Relying on the plain meaning of the words⁴⁹ as defined in *Black's Law Dictionary*⁵⁰ and ERISA's extensive legislative history,⁵¹ the *Shaw* Court had "no difficulty" finding that ERISA preempted New York's Human Rights Law.⁵² In fact, the Court noted that to interpret ERISA's preemption clause to preempt only state laws specifically designed to affect employee benefit plans would completely ignore the specific exemptions to preemption set

Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments

120 CONG. REC. 29,933 (1974); see also *id.* at 29,942 (remarks of Sen. Javits).

43. The bill that became ERISA originally contained a limited preemption clause that would have applied only to state laws relating to the specific subjects covered by ERISA. H.R. 2, 93d Cong., 2d Sess., §§ 514(a), 699(a) (1974). The Conference Committee rejected these provisions in favor of the broader language found in the statute. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 383 (1974); S. CONF. REP. NO. 1090, 93d Cong., 2d Sess. 383 (1974).

44. Initially, there was uncertainty among courts as to just how far Congress intended to go with its preemption of state legislation affecting employee benefit plans. William J. Kilberg & Paul D. Inman, *Observation: Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313, 1316 (1984); see also *Bucyrus-Erie Co. v. Department of Indus., Labor, & Human Relations*, 599 F.2d 205 (7th Cir. 1979) (interpreting ERISA's "relate to" clause narrowly); *Gast v. State*, 585 P.2d 12 (Or. Ct. App. 1978) (same).

45. "[G]iven the legislative history, [ERISA] can[not] be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA." *Shaw*, 463 U.S. at 98.

46. In determining whether a state law is preempted by ERISA, courts focus on whether the employee benefits affected are provided under an ERISA-qualified plan. See Lessard, *supra* note 14, at 823 (discussing the three-part test used by the majority of courts); see also 29 U.S.C. § 1002(1) (1988). ERISA covers "employee benefit plans," which it defines as plans that are either "an employee welfare benefit plan," an "employee pension benefit plan," or both. *Id.* § 1002(3).

47. 463 U.S. 85 (1983).

48. *Id.* at 96-98. "In fact . . . Congress used the words 'relate to' in § 514(a) in their broad sense." *Id.* at 98.

49. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Id.* at 97.

50. BLACK'S LAW DICTIONARY 1158 (6th ed. 1990) ("Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.").

51. See *supra* notes 26-29, 42-43 and accompanying text.

52. *Shaw*, 463 U.S. at 96 (discussing N.Y. EXEC. LAW §§ 290-301 (McKinney 1982 & Supp. 1982-83)).

out in the remainder of the section.⁵³ Although this interpretation has met with some opposition,⁵⁴ the Supreme Court has consistently reaffirmed its broad interpretation of the ERISA preemption language.⁵⁵

III. THE FAMILY AND MEDICAL LEAVE ACT

Congress enacted the FMLA in August 1993 to prevent Americans from being forced to choose between keeping their jobs and caring for a sick loved one or infant.⁵⁶ The growing participation of women in the workforce over the past forty years has forced more families to juggle work and child care.⁵⁷ The FMLA sets the minimum standards that qualifying employers must meet in their maintenance of family and medical leave

53. *Shaw*, 463 U.S. at 98; *see also supra* notes 38-41.

54. *FMC Corp. v. Holliday*, 498 U.S. 52, 66 (1990) (Stevens, J., dissenting) (describing the majority's interpretation of the "relates to" language as "an unnecessarily broad reading"); *see also* Leon E. Irish & Harrison J. Cohen, *ERISA Pre-Emption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109, 114-16 (1985) (arguing that legislators never intended the preemption clause to be so pervasive).

55. *See, e.g.,* *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (holding that a state law may "relate to" a benefit plan, and thereby be preempted by ERISA, even if law is not specifically designed to affect such plans or the effect is only indirect); *FMC Corp.*, 498 U.S. at 58 (holding that ERISA's preemption clause broadly preempts every state law that "relates to" a covered employee benefit plan); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) (holding that ERISA's "relates to" language should be construed expansively).

56. *SUSSER, supra* note 2, ¶ 102. The purposes of the FMLA are:

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 . . . and for compelling family reasons, on a gender-neutral basis; and

5) to promote the goal of equal employment opportunity for women and men

29 U.S.C. § 2601(b) (Supp. V 1993). Legislators also claimed that the FMLA would increase the cost effectiveness of companies to which it applies. S. REP. NO. 3, 103d Cong., 1st Sess. 507 (1993).

57. *See* S. REP. NO. 3, *supra* note 56, at 16-17. "Efforts to enact a federal family and medical leave law arose from several socio-economic trends, including the growing work force participation of women, the growth in single-parent families and the growth in households with two working parents, among other factors." *SUSSER, supra* note 2, ¶ 110.

Prior to the enactment of the FLMA, the United States was one of the only industrialized countries without national legislation requiring employers to provide for maternal and parental leave. S. REP. NO. 3, *supra* note 56, at 19.

plans for their employees.⁵⁸ In general, the FMLA covers all employers “who employ[] 50 or more employees for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar year.”⁵⁹ The FMLA requires these employers to provide twelve workweeks of unpaid leave during any twelve-month period for any employee who gives birth, adopts a child, becomes seriously ill, or must care for a child, spouse or parent afflicted with a serious health condition.⁶⁰

A. *The FMLA's Effect on Other Federal Laws*

Title IV of the FMLA explicitly provides that the Act does not modify or affect any federal law “prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability.”⁶¹ Therefore, the FMLA does not alter or affect Title VII of the Civil Rights Act, the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990 (ADA).⁶² The Department of Labor’s regulations require employers to comply with whichever of these statutes provides greater rights to employees.⁶³ If an employer violates the FMLA along with an anti-discrimination law, the affected employee can recover under either or both statutes.⁶⁴

In contrast to the attention given to anti-discrimination laws, the FMLA and its accompanying regulations do not address the FMLA’s effect on other federal regulations.⁶⁵ This absence suggests that Congress did not foresee any conflicts between the FMLA and legislation not pertaining to discrimination.

58 S. REP. NO. 3, *supra* note 56, at 16-17.

59. 29 U.S.C. § 2611(4) (Supp. V 1993).

60. *Id.* § 2612(a)(1).

61. *Id.* § 2651(a).

62. In fact, the FMLA actually enhances employee rights and benefits provided by the ADA and the Pregnancy Discrimination Act of 1978 by filling the gaps and extending the benefits required under those acts. IRVIN & SILBERMAN, *supra* note 1, at 29. “Although the FMLA does not modify or affect any federal discrimination laws, it does, in some cases, provide benefits greater than those in other laws.” SUSSER, *supra* note 2, ¶ 132.

63. “An employer must . . . comply with whichever statute provides the greater rights to employees.” 29 C.F.R. § 825.702(a) (1993); *see also* IRVIN & SILBERMAN, *supra* note 1, at 27 (“The sole purpose of the FMLA is to provide eligible employees with family and medical leave, not to limit any existing rights and protections.”).

64. IRVIN & SILBERMAN, *supra* note 1, at 27.

65. Any discussion of FMLA’s interaction with other federal laws is conspicuously absent from the Act. *See* 29 U.S.C. §§ 2651-2653 (Supp. V 1993).

B. The FMLA's Effect on State Legislation

The FMLA does not preempt any state family or medical leave law that provides greater family or medical benefits than the FMLA requires.⁶⁶ The Act simply sets forth minimum standards to which qualifying employers must adhere.⁶⁷ Thus, if any state enacts or has in place legislation more rigorous than the FMLA, the state statute will control and the FMLA will not come into play.⁶⁸ The Department of Labor has drawn a clear separation between state and federal family and medical leave laws. The Department's regulations provide that it will not enforce state family leave laws and, conversely, that states may not enforce the FMLA.⁶⁹

In enacting the FMLA, Congress focused solely upon protecting employees.⁷⁰ Thus, Congress did not want to discourage the provision of even greater protection from job loss or displacement related to important family events than required by the FMLA.⁷¹ In fact, Congress went so far as to codify language encouraging individual employers to provide more generous family medical leave benefits on their own.⁷² Section 2653, entitled "Encouragement of more generous leave policies," states: "[N]othing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act"

This explicit encouragement of greater protection for employees, along with the nondisplacement of more generous state and local laws, suggests an implicit congressional expectation that individual states would have the ability to pass legislation providing employees with greater rights and benefits than the FMLA requires. This expectation is directly at odds with

66. Section 265(b) provides: "Nothing in this Act . . . shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act" *Id.* § 2651(b).

67. Possible penalties for noncompliance include: compensatory damages, restitution, equitable remedies (including employment, reinstatement, or promotion), interest, and attorney's fees. *Id.* § 2617(a)(1).

68. *SUSSER, supra note 2, ¶ 120.*

69. 29 C.F.R. § 825.701(a) (1993).

70. *See supra note 56 and accompanying text.* Congress clearly did not intend to achieve uniformity through the FLMA. *See supra notes 62-64 and accompanying text.*

71. "[S]tate or local family and medical leave laws and state pregnancy leave laws may provide longer leave periods, paid leave, or greater benefit protection during leave." *SUSSER, supra note 2, ¶ 120.*

72. 29 U.S.C. § 2653 (Supp. V 1993).

the congressional policy behind ERISA's broad preemption⁷³ and creates a tension between two otherwise complementary federal statutes.⁷⁴

IV. ANALYSIS OF CONFLICTING OBJECTIVES

Evidence of the underlying conflict between ERISA and the FMLA has surfaced in states where business owners have challenged their state's authority to mandate employee family and medical leave in the face of a probable ERISA conflict.⁷⁵ The legislature of New Jersey, responding to the perceived needs of the state's employees,⁷⁶ enacted the New Jersey Family Leave Act (NJFLA)⁷⁷ in January 1990.⁷⁸ The NJFLA provided for security of job position⁷⁹ and retention of job benefits⁸⁰ in the event

73. See *supra* notes 38-55 and accompanying text (discussing the broad reach of ERISA's preemption provision).

74. Specifically, the conflict is between ERISA's goal of uniformity and FMLA's laudable, but nearsighted, goal of maximizing employee benefits through any available means.

75. Because of the recent proliferation of state family and medical leave regulations and the fact that employers typically comply with minimum state regulations without a fight (if for no other reason than to compete for the limited number of workers), there are only a few examples of challenges to state family leave statutes. Thus far, challenges have arisen in Hawaii, New Jersey and Wisconsin. See *supra* note 6 and accompanying text. However, it is important to note that ERISA has preempted every state medical leave law that has been challenged. Many other state statutes, not dealing specifically with family leave but nonetheless "relating to" employee benefit plans, have also fallen prey to ERISA's broad preemption provisions. See cases cited *supra* note 6.

It is well established that federal courts have jurisdiction over suits brought by companies subject to ERISA regulation to enjoin state officials from interfering with federal rights. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983) (citing *Ex parte Young*, 209 U.S. 123, 160-62 (1908)). This is not necessarily the case if, for example, the action at bar seeks a declaration that ERISA does not preempt a state law. *Shaw*, 463 U.S. at 96 (citing *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)).

76. In findings very similar to those set forth in the FMLA, the New Jersey legislature cited the increasing number of single parent and dual income households and a need for job security as primary factors necessitating family and medical leave legislation. N.J. STAT. ANN. § 34:11B-2 (West Supp. 1994).

77. N.J. STAT. ANN. §§ 34:11B-1 to 16 (West Supp. 1994). The NJFLA went into effect in May 1990.

78. Although the New Jersey Family Leave Act (NJFLA) went into effect approximately three years prior to the FMLA, an understanding of the subsequent preemption of the NJFLA's provision requiring employers to continue existing health benefit plans for absent employees during authorized periods of family leave is vital to the discussion of possible future ERISA preemption of similar state legislation. See generally *New Jersey Business & Indus. Ass'n v. State*, 592 A.2d 660 (N.J. Super. Ct. Law Div. 1991).

79. N.J. STAT. ANN. § 34:11B-7 (West Supp. 1994). Upon expiration of leave, employees were entitled to return to their prior job or an equivalent position. *Id.*

80. The NJFLA required that an employer, during family leave, maintain and continue to provide any and all health coverage that would have been provided had the employee continued working. *Id.* § 34:11B-8(a).

that an employee chose to take family or medical leave. Specifically, the Act required certain public and private employers⁸¹ to provide up to twelve weeks of leave⁸² to eligible employees⁸³ for the birth or adoption of a child, or serious illness of a family member.⁸⁴ The leave could be paid or unpaid⁸⁵ and the employee was entitled to return either to the same job or its equivalent.⁸⁶

Less than a year after the NJFLA went into effect, the Superior Court of New Jersey, in *New Jersey Business & Industry Ass'n v. State*,⁸⁷ held that ERISA preempts and bars enforcement of the NJFLA⁸⁸ provision that required employers to continue existing health insurance benefit plans⁸⁹ for absent employees during authorized periods of family leave.⁹⁰ This holding was limited to those employers who maintained employee welfare benefit plans regulated under ERISA.⁹¹ Relying on United States Supreme Court precedent,⁹² the New Jersey court reasoned that although ERISA

81. The NJFLA applied to public and private employers with 50 or more employees. *Id.*

82. *Id.* § 34:11B-3(e). The potential problem of employee abuse of combined state and federally mandated leave is beyond the scope of this Note. For a discussion of this issue, see SUSSER, *supra* note 2, ¶ 1000, and Roberta Maynard, *Meet the New Law on Family Leave*, NATION'S BUSINESS, Apr. 1993, at 26.

83. The Act defines an eligible employee as one who is employed for at least one year and for at least 1,000 base hours during the previous 12-month period. N.J. STAT. ANN. § 34:11B-3(e) (West Supp. 1994).

84. "[E]mployees should be entitled to take a period of leave upon the birth or placement for adoption of a child or serious health condition of a family member without risk of termination of employment or retaliation by employers and loss of . . . benefits." *Id.* § 34:11B-2.

85. Whether leave was paid or unpaid was left to the discretion of the employer. *Id.* § 34:11B-4(d).

86. *See supra* note 80 and accompanying text.

87. 592 A.2d 660 (N.J. Super. Ct. Law Div. 1991). *New Jersey Business & Indus. Ass'n* involved New Jersey private employers and various trade associations whose members were employers subject to the NJFLA. *Id.* at 661. The associations sought a declaratory judgment that the portion of the Act requiring employers to maintain benefits during leave was an unconstitutional State exercise of state control over a subject matter exclusively regulated by the federal government. The plaintiff associations also sought equitable relief enjoining enforcement by the state of the pertinent sections of the NJFLA. *Id.*

88. *Id.* at 664.

89. *See supra* note 81 and accompanying text.

90. Authorized periods of family leave are those not in excess of twelve weeks per year taken by an employee whose pregnancy, adoption or relative's illness qualifies under the NJFLA's specifications. *See* N.J. STAT. ANN. § 34:11B-4 (West Supp. 1994).

91. The possibility of conflict and subsequent ERISA preemption only arises if ERISA regulates the employee welfare benefit plan. *See supra* note 46. If the benefit plan is not regulated by ERISA, the state family or medical leave regulation, to the extent that it exceeds the FMLA requirements, will stand. *See New Jersey Business & Indus. Ass'n*, 592 A.2d at 664.

92. *New Jersey Business & Indus. Ass'n*, 592 A.2d at 664 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Fort Halifax Packing Co.*

does not mandate that employers provide any particular welfare benefits,⁹³ and does not itself proscribe discrimination in the provision of employee welfare benefits among employees,⁹⁴ ERISA does in fact preempt “any and all state laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.⁹⁵ Thus, New Jersey’s attempt to provide employees with family and medical benefits was thwarted by Congress’ desire to maintain national uniformity among employee benefit plans.

While no direct conflict between ERISA and the newly enacted FMLA exists, there is a distinct tension between the underlying objectives of the two Acts⁹⁶ and their effect on the uniformity of laws affecting the administration of employee benefits. The FMLA specifically states that it in no way supersedes any other federal legislation.⁹⁷ Thus, if the state family leave legislation is less generous than the FMLA, and the FMLA therefore supersedes the state law, no conflict arises between the FMLA and ERISA.⁹⁸ Similarly, all employee benefit plans that do not presently qualify under ERISA but are subject to state family leave acts will have to comply with those state laws.⁹⁹ However, the conflict, and the possible preemption issue, arises when an ERISA-qualified benefit plan covers workers in a state that requires more generous family and medical leave benefits than the FMLA.¹⁰⁰ Technically, the employer in such a situation would still have to comply with the FMLA’s minimum standards, but would not be held to any part of the state legislation that “relates to” employee pension or benefit plans.¹⁰¹

Given the climate and history of ERISA interpretation,¹⁰² ERISA

v. Coyne, 482 U.S. 1 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)).

93. *Id.* at 663 (citing *Shaw*, 463 U.S. 85).

94. *Id.*

95. *Id.* (citing § 514(a) of ERISA, 29 U.S.C.A. 1144(a) (1988)).

96. See *supra* notes 67-75 and accompanying text.

97. The FMLA provides that: “Nothing in this Act . . . shall be construed to modify or affect any Federal or State law” 29 U.S.C. § 2651(a) (West Supp. 1994).

98. See 29 C.F.R. § 825.701 (1993).

99. *Id.*

100. See, e.g., *New Jersey Business & Indus. Ass’n v. State*, 592 A.2d 660 (N.J. Super. Ct. Law Div 1991); *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498 (9th Cir. 1993).

101. See, e.g., *New Jersey Business & Indus. Ass’n*, 592 A.2d at 664.

102. In some cases, however, courts have held that the relation was too tenuous for ERISA preemption to apply. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 838 (1988) (upholding state law attachment of ERISA welfare plan benefits); *Metropolitan Life Ins. v. Massachusetts Travelers Ins. Co.*, 471 U.S. 724, 746 (1984) (upholding state laws regulating terms of insurance contracts); *Aetna Life Ins. v. Borges*, 869 F.2d 142, 147 (2d Cir. 1989) (upholding state

preemption of state family leave acts is highly probable.¹⁰³ However, some litigants argue that with the FMLA in place, there is simply no conflict between ERISA and any state or federal family leave law because the FMLA preserves all state family leave legislation.¹⁰⁴ The rationale behind this contention, dubbed the "double saving clause" argument,¹⁰⁵ stems from 29 U.S.C. § 1144(d) which states in part that ERISA is not to be "construed to alter, amend, modify, invalidate, impair or supersede any law of the United States."¹⁰⁶ Advocates of the double saving clause argument contend that when federal laws, like the FMLA, create a regulatory scheme that may include state laws, ERISA preemption of those state laws results in the impairment of federal law.¹⁰⁷ Thus, the double saving clause proponents argue that ERISA cannot preempt state laws enacted in accordance with, or in enhancement of, a comprehensive and

escheat statute); *Rebaldo v. Cuomo*, 749 F.2d 133, 140 (2d Cir. 1984) (upholding state law establishing a cap for inpatient charges); *American Tel. & Tel. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (upholding state court garnishment order); *Planned Consumer Marketing, Inc. v. Coats & Clark, Inc.*, 522 N.E.2d 30, 36-37 (N.Y. 1988) (upholding state laws allowing judgement creditor to reach ERISA trust); *Sasso v. Vachris*, 484 N.E.2d 1359, 1361-62 (N.Y. 1985) (upholding state law assisting employees to recover pension benefits); *Cornell Mfg. Co. v. Mushlin*, 420 N.Y.S. 2d 231, 236-37 (N.Y. App. Div. 1979) (upholding state law allowing judgment creditors to reach into a pension plan).

103. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990) (interpreting ERISA's "relate to" clause broadly); *Mackey*, 486 U.S. at 829 (same); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (same); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987) (same); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) (same); *Shaw*, 463 U.S. at 96-97 (same); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (same); *Aloha Airlines*, 12 F.3d at 1504 (same); *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982) (same); *Standard Oil Co. v. Agsalud*, 633 F.2d 760, 765-66 (9th Cir. 1980) (same); *Pervel Indus., Inc. v. State of Connecticut Comm'n on Human Rights and Opportunities*, 468 F. Supp. 490, 491-92 (D. Conn. 1978) (same); *New Jersey Business & Indus. Ass'n*, 592 A.2d at 664 (same).

Contra Massachusetts v. Morash, 490 U.S. 107, 119 (1989) (interpretive ERISA's "relates to" clause narrowly); *Savings & Profit Sharing Fund v. Gago*, 717 F.2d 1038, 1040 (7th Cir. 1983) (same); *Bucyrus-Erie Co. v. Department of Indus., Labor, & Human Relations*, 599 F.2d 205, 213 (7th Cir. 1979) (same); *Gast v. State*, 585 P.2d 12, 22-23 (Or. Ct. App. 1978) (same).

104. See *Bucyrus-Erie Co.*, 599 F.2d at 213 (holding that Congress did not intend for ERISA to preempt state fair employment laws); *Goodyear Tire & Rubber Co. v. Department of Indus., Labor & Human Relations*, 273 N.W.2d 786, 793 (Wis. Ct. App. 1978) (holding that state fair employment statutes do not "relate to" benefit plans within ERISA's preemptive scope); *Liberty Mutual Ins. Co. v. State Div. of Human Rights*, 402 N.Y.S.2d 218, 219 (N.Y. App. Div. 1978) (concluding that Congress did not intend to preempt state fair employment laws).

105. *Shaw*, 463 U.S. at 101 n.22.

106. 29 U.S.C. § 1144(d) (1988); see *Bucyrus-Erie Co.*, 599 F.2d at 210 ("Preemption of state fair employment laws would at a minimum 'alter,' and probably 'impair,' the Congressional scheme for preventing and penalizing employment discrimination in the administration of welfare benefit plans in contravention of section 514(d).").

107. See *Bucyrus-Erie Co.*, 599 F.2d at 210-11.

integrated federal regulatory scheme.¹⁰⁸

This theory has found little favor over the years, and the Supreme Court implicitly rejected it in 1983.¹⁰⁹ The double saving clause argument failed for three reasons. First, the FMLA cannot and does not transform state legislation into federal law that ERISA's saving clause saves from preemption.¹¹⁰ Simply put, state laws passed in accordance with federal regulations can have no more force than any other state law enacted for other reasons. Second, the FMLA does not require states to enact their own legislation.¹¹¹ In fact, the FMLA provides only minimum standards with which employers must comply.¹¹² Finally, because many federal laws contain nonpreemption provisions, "the double saving clause argument taken to its logical extreme, would save almost all state laws from preemption."¹¹³ Such a result would contravene ERISA as well as the Supremacy Clause. Thus, although the FMLA specifically allows states to enact more generous family and medical leave laws,¹¹⁴ ERISA preemption of these statutes, in the context of qualified employee benefits plans, is inevitable.¹¹⁵

The tension between the FMLA and ERISA is an unavoidable result of the implicit conflict in the respective secondary goals and statutory constructions of the Acts. There is no doubt that ERISA and the FMLA share as their primary purpose the protection of employees from harsh or unfair treatment by employers.¹¹⁶ They both set forth minimum standards regulating appropriate employer behavior, and the common result of the enactment and implementation of the two Acts is to increase employee welfare. However, it is equally clear that ERISA and the FMLA are in opposition over ERISA's secondary, but extremely important, purpose of uniformity.¹¹⁷ Congress enacted ERISA to create a uniform national standard with which all qualifying employee benefit plans must com-

108. *Id.*

109. *Shaw*, 463 U.S. at 101 n.22 ("The Court of Appeals properly rejected the simplistic 'double saving clause' argument . . .").

110. *Cf. id.* ("Title VII does not transform state fair employment laws into federal laws that § 514(d) saves from ERISA preemption.").

111. 29 U.S.C. §§ 2601, 2651(b) (Supp. V 1993).

112. *Id.* § 2601.

113. *Shaw*, 463 U.S. at 101 n.22.

114. 29 U.S.C. § 2651 (Supp. V 1993).

115. *See supra* notes 76, 104 and accompanying text.

116. *See supra* notes 25-28, 56 and accompanying text.

117. *See supra* notes 74-75 and accompanying text.

ply.¹¹⁸ To achieve this goal, ERISA preempts all state legislation that so much as “relates to” any of these employee benefit plans.¹¹⁹ Congress could not have been more clear regarding this point. Moreover, the legislative history reveals that the breadth of ERISA’s preemption clause was no mistake.¹²⁰ If Congress had wanted to allow states to enact separate legislation affecting ERISA-covered benefit plans, the legislators easily could have inserted limiting language.

While there is no doubt that ERISA preempts almost all state legislation regarding employee benefits, the FMLA leaves individual states with the ability to pass more stringent employee family and medical leave laws as they see fit.¹²¹ Therefore, while there is no explicit conflict between the two federal statutes, there is an implicit conflict between the FMLA’s allowance of more generous state leave legislation and ERISA’s desire to achieve national uniformity among employee benefit plans. Concededly, these differing expectations only create a conflict when a state family leave law is more generous than the FMLA, and hence not superseded by it. The conflict is also limited to situations where employers are providing benefits to employees under an ERISA-qualified plan. While this limits the scope of the problem somewhat, as *New Jersey Business & Indus. Ass’n*¹²² indicates, ERISA preemption of state family leave acts more generous than the FMLA contravenes the FMLA’s underlying objectives.

V. PROPOSAL

A final resolution of this contradiction between ERISA and the FMLA can only be accomplished through amendment of one or both of the Acts. However, amending ERISA is not feasible.¹²³ ERISA has been in effect for over twenty years and any amendment to the Act now would have a tremendous ripple effect on the entire body of settled litigation.¹²⁴ More

118. See *supra* notes 29-37 and accompanying text.

119. See *supra* notes 38-55 and accompanying text.

120. See *supra* notes 42-43 and accompanying text.

121. 29 U.S.C. § 2651(b) (Supp. V 1993).

122. 592 A.2d 660 (N.J. Super. Ct. Law Div. 1991).

123. The suggestion that ERISA be amended to exempt state family leave legislation from preemption is ill-conceived and unnecessary. The fact that Congress has implemented a federal family leave act indicates that the legislature deems family leave to be within the federal domain. Amending ERISA to allow state-legislated family leave would not only create redundant federal and state regulation, but it would also produce a climate of uncertainty and chaos for employers, particularly those operating in more than one state. For an opposing view, see Lessard, *supra* note 14.

124. As stated above, the Supreme Court has interpreted ERISA’s “relate to” clause broadly in numerous cases. See *supra* notes 48-55 and accompanying text. Reversing this well-established

importantly, it is clear from the plain meaning of ERISA's preemption language that Congress intended the statute's unique breadth. Congress aimed to achieve complete federal control over the regulation of employee welfare benefit plans and has been successful in that respect.¹²⁵ While no court has yet exempted state family leave legislation from ERISA preemption,¹²⁶ the FLMA poses a potential threat to uniform regulation of employee benefit plans by allowing the enactment of more generous state family leave laws. The FMLA's implicit encouragement of more extensive state leave legislation sets the stage for future challenges to ERISA's ability to preempt these state laws.

For the above reasons, the solution to this problem lies in the amendment of the FMLA. First, Congress could maintain its worthy goal of statutory uniformity by revising the FMLA to make it the national standard for legislated leave policy, rather than just a recommended minimum standard subject to alteration by the states. Congress could implement this transformation through the passage of a preemption provision as part of the FMLA. This solution takes into account the goals of both ERISA and the FMLA. The FMLA would still be in effect and ensure that employees have all rights established by the Act.¹²⁷ Furthermore, because the Act would no longer allow independent state legislation, it would also preserve the goals of ERISA by encouraging nationwide uniformity. By amending the FMLA, Congress could rectify the implicit conflict between the two Acts and create a more harmonious relationship between two of the most important pieces of legislation to the twentieth century working household.

precedent would create confusion among employers and regulators.

125. One commentator has argued that Congress' specific reservation of a few particular employee benefits to state regulation reflects a congressional policy of exempting "employee related safety nets." See Lessard, *supra* note 14, at 845. However, this specific reservation simply indicates that Congress intended for the states to regulate only the areas enumerated in the text of ERISA and no others. Obviously, had Congress intended to exempt family leave from ERISA preemption the legislature could have simply added it to the laundry list of enumerated "employee safety nets." That Congress failed to do so suggests that it deliberately excluded family leave from this list of protected legislation. In other words, *expressio unius est exclusio alterius*: "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

126. See *supra* note 76.

127. On its face, this proposal may appear to lessen the leave benefits that some employees are entitled to receive. However, in effect, the FMLA currently functions as a mandated standard because those state laws providing more extensive benefits than provided under the FMLA likely are subject to ERISA preemption. Thus, Congress can achieve uniformity without eliminating existing employee benefits. In combination with a preemption provision, Congress might also consider increasing the FMLA benefit standard, or offering a range of approved benefit options, to ensure that workers receive adequate protection.

VI. CONCLUSION

The FMLA and ERISA are key pieces of legislation for the American workforce. Both Acts play a necessary role in the modernization of the workplace to meet the growing needs and problems of the twenty-first century. The tension created between the two Acts is litigious in nature and a thorn in the side of employers trying to figure out what rules apply. Rectifying this problem in the manner suggested in this Note would take relatively little effort on the part of Congress but could have tremendous payoffs in the form of lower administrative costs to employers and better protection for employees.

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