
YOU, ME, AND THE CONSEQUENCES OF FAMILY: HOW FEDERAL EMPLOYMENT LAW PREVENTS THE SHATTERING OF THE “GLASS CEILING”¹

I. INTRODUCTION—PREVALENCE OF A GENDER-BASED SOCIETAL DOUBLE STANDARD

A popular 1970's television commercial featured a woman singing the verse “I can bring home the bacon, fry it up in a pan, and never let you forget you're a man . . . cuz I'm a woman!”² This commercial provided a revealing commentary on how our society defined a

1. The Secretary of Labor explains the origin of the term “glass ceiling”:

The term “glass ceiling” first entered America's public conversation less than a decade ago, when the Wall Street Journal's “Corporate Woman” column identified a puzzling new phenomenon. There seemed to be an invisible—but impenetrable—barrier between women and the executive suite, preventing them from reaching the highest levels of the business world regardless of their accomplishments and merits.

Good for Business: Making Full Use of the Nation's Human Capital, Fact-Finding Report of the Federal Glass Ceiling Commission Released by the Labor Department, March 16, 1995, Daily Lab. Rep. (BNA) No. 52, at D-30 (Mar. 17, 1995) [hereinafter Glass Ceiling Report].

2. Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119, 133 n.57 (1994) (citing ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989)).

successful woman.³ This commercial sent a message that society encouraged, even expected, women to act as providers, but not to the exclusion of their traditional roles as wives and mothers.⁴ Some twenty years later, despite the enactment of several pro-family federal employment laws,⁵ a recent survey conducted by the United States Department of Labor reveals that women⁶ are still subject to this societal double standard.⁷

On March 16, 1995 the Department of Labor released the report of the bi-partisan Federal Glass Ceiling Commission (the Commission).⁸

3. See *id.* at 121 (“[W]hile men have both controlled and enjoyed access to the opportunities of the world at large, . . . women has [sic] traditionally been confined to the home.”).

4. See generally ANN HARRIMAN, *WOMEN/MEN/MANAGEMENT* 238-42 (1985) (describing the options women must face when deciding whether to pursue a career). Ms. Harriman explains that once a woman decides to work, she must choose either a career or a job. *Id.* at 239. If the woman pursues a career—an occupation with responsibility—she must then consider whether she can combine her career with marriage and children. *Id.*

5. See, e.g., The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (1994)); The Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (1994)).

6. Although the Commission’s report details the status of minority groups in addition to women, the author will only refer to the Commission’s findings as they relate to women in the workplace. While the focus of this Section is on the nexus between gender-based family considerations and advancement in the workforce, the Commission’s report raises serious concerns about the minorities’ lack of progress in the workplace that also warrants investigation. See *Excerpts of Glass Ceiling Commission Report: A Solid Investment: Making Full Use of the Nation’s Human Capitol*, Daily Lab. Rep. (BNA) No. 226, at E-1,-3 (Nov. 24, 1995) [hereinafter *Glass Ceiling Recommendations*] (noting that Hispanics, Asians, Pacific Islander Americans, as well as women and African Americans, make up 57% of the national workforce).

7. See *Glass Ceiling Report*, *supra* note 1 (discussing the Federal Glass Ceiling Commission’s report on the status of women and minorities in the American workplace). The Commission had strict instructions to study and recommend how it may “eliminat[e] [the] artificial barriers to the advancement of women and minorities.” See *infra* note 31 for the Commission’s recommendations.

8. See *Glass Ceiling Report*, *supra* note 1. The Federal Glass Ceiling Commission was created pursuant to section 203 of the 1991 Civil Rights Act. William L. Kandel, *Affirmative Action and the Glass Ceiling: Contract Compliance and Litigation Avoidance*, 21 *EMPLOYEE REL. L.J.* 109, 111 (1995) (discussing the Commission’s findings and investigation process). The Commission, a bi-partisan 21-member group chaired by the Secretary of Labor, resulted from an amendment offered by Senator Robert Dole which was unanimously approved by the Senate. *Id.*

Congress instructed the Commission⁹ to gather information and report on the progress women and minorities have made in attaining "management and decisionmaking positions" within the workplace.¹⁰ The Commission concluded, *inter alia*, that although women have made significant progress in breaking through the glass ceiling, a substantial barrier still exists at the "highest levels of business."¹¹ While some

9. Glass Ceiling Act of 1991 (GCA), Pub. L. No. 102-166, 105 Stat. 1081 (codified at 42 U.S.C. § 2000e (1994)). Section 202(b) grants Congress the power to establish:

(1) a Glass Ceiling Commission to study—

- (A) the manner in which business fills management and decisionmaking positions;
- (B) the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions; and
- (C) the compensation programs and reward structures currently utilized in the workplace

GCA § 202(b), 42 U.S.C. § 2000e.

Further, section 203 authorizes the Commission:

to conduct a study and prepare recommendations concerning—

- (1) eliminating artificial barriers to the advancement of women and minorities; and
- (2) increasing the opportunities and developmental experiences of women and minorities to foster advancement of women and minorities to management and decisionmaking positions in business.

GCA § 203(a), 42 U.S.C. § 2000e.

10. Pursuant to this Act, the 21 member commission held public hearings across the United States and conducted in-depth research to determine how far women and minorities have progressed in the workplace and what factors continue to impede their advancement. Kandel, *supra* note 8, at 111. Specifically, the Commission held "five public hearings, at which 126 employers and employees testified; [conducted] a survey of 25 chief executive officers of corporations, including minority-owned; [reviewed] 18 specially commissioned research papers; analyze[d] special Census data runs; and [conducted] several 'racially homogeneous' focus groups further divided by sex and age." *Id.*

On November 22, 1995, the Glass Ceiling Commission released its recommendations and suggested twelve ways in which employers and the government could help to dismantle the glass ceiling. *Glass Ceiling Recommendations*, *supra* note 6, at E-4,-5. See also *infra* note 31 (discussing several of the Commission's recommendations).

11. *Glass Ceiling Recommendations*, *supra* note 6, at E-4,-5. Specifically, the report concludes that "95-97% of the senior managers of *Fortune* 1000 industrial and *Fortune* 500 companies are white males." *Id.* Moreover, "[i]n the *Fortune* 2000 industrial and service companies only 5 percent of senior managers are women." *Id.* See also Judith C. Appelbaum, *Uprooting Gender-Based Discrimination*, CONN. L. TRIB., May 8, 1995, at 23. In this Article, the National Women's Law Center reported that "women constitute only 8.6 percent of this country's engineers, 3.9 percent of airplane pilots and navigators, and less than 1 percent of carpenters." *Id.* Yet, "[m]ore than 99 percent of dental hygienists are women, but only 10.5 percent of dentists are women." *Id.* In addition, "[w]omen constitute 23 percent of lawyers, but only 11 percent of law firm partners," and "[w]omen are 48 percent of journalists, but hold only 6 percent of the top jobs in journalism." *Id.* Finally, "women still earn only one-third of doctorate and first

critics argue that the Commission's results are misleading,¹² no one challenges that women remain underrepresented in the upper management levels of large companies and that these statistics show a striking gender inequality in the American workplace.¹³

While society expects women to perform their job duties as well as, if not better than their male counterparts, women still remain the parent primarily responsible for raising children and managing the household.¹⁴ Society does not, however, hold men to this same standard.¹⁵ This state of affairs is consistent with the persistent cultural belief that men are breadwinners, whose job it is to have a career,¹⁶ while women are

professional degrees and remain under-represented in nontraditional fields of study." *Id.*

12. See, e.g., Leslie Kaufman-Rosen & Claudia Kalb, *Holes in the Glass Ceiling Theory*, NEWSWEEK, Mar. 27, 1995, at 24 (noting that *Fortune* 1000 companies only employ 20% of the workforce and in the economy as a whole, women constitute 43% of the managers). In addition, the authors of this article note that "[t]here are about 6.5 million female-owned businesses, employing more people than all of the *Fortune* 500 companies combined." *Id.* See also Cheryl Russell, *Glass Ceilings Can Break*, AM. DEMOGRAPHICS, Nov. 1995, at 8. Ms. Russell argues that women who entered the workforce approximately 30 years ago, as beneficiaries of affirmative action, are just beginning to break into the upper ranks of corporate structures. Consequently, women of the baby-boomer generation are poised to assume top positions in greater numbers. *Id.*

13. See *Glass Ceilings Recommendations*, *supra* note 6, at E-3.

14. Branch, *supra* note 2, at 122 (explaining that women, more often than men, stay home from work to care for a sick child or to wait for a repairman); HARRIMAN, *supra* note 4, at 8-13 (discussing the roles women have played in their families). See also Judith H. Dobrzynski, *Gaps and Barriers, and Women's Career*, N.Y. TIMES, Feb. 28, 1996, at C2. A recent survey of 325 female corporate executives revealed that the biggest obstacle to advancement was "male stereotyping and preconceptions of women." *Id.*

15. Of the 325 women surveyed in Dobrzynski's article, 77% said they had achieved their positions by "consistently exceeding performance expectations." Dobrzynski, *supra* note 14, at C2. In addition, these women adopted a "corporate style" that made men comfortable. *Id.* See Branch, *supra* note 2, at 123 (stating that it is not normal for a father to stay home and care for the children); Note, *Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1995 (1995) [hereinafter *Postmodern Account of Gender*] (stating that women must choose between the "mommy tract" and the fast track, whereas ambitious men do not). See *infra* notes 24-28 and accompanying text for a discussion of the reverse glass ceiling affect which prevents men from fully sharing in childrearing and other home activities.

16. Branch, *supra* note 2, at 122 (noting that a man has a career and his income is essential, whereas a woman has a job and her paycheck helps out); HARRIMAN, *supra* note 4, at 239 (defining a career as "a sequential and occupationally related set of increasingly responsible or technical positions").

homemakers, whose job it is to raise children.¹⁷ Implicit in this equation is the idea that women are welcome to try to ascend to the highest rung of the corporate ladder, but only if they can do so without abandoning their family obligations and without these responsibilities affecting their performance at the office.¹⁸

In addition to an outdated conception of "proper" gender roles, women must also confront a corporate structure and culture that simultaneously pulls them in opposite directions.¹⁹ It appears that at the highest level of the corporate structure, women are often forced to make an outright choice between career and family.²⁰ Because very few women are willing to outwardly choose career over family, their careers tend to follow one of two paths: they either ascend the corporate ladder but are unable to penetrate the top of the corporate hierarchy,²¹ or they simply opt for positions outside large corporations that allow them to more readily balance work and family.²² Consequently, as long as society continues to view women as secondary players in the corporate environment and structural barriers to their progress remain, women will confront a glass ceiling and corporations will not realize the full benefit

17. Branch, *supra* note 2, at 122-23 (noting that cultural norms expect women to be nurturing and caring and men to be aggressive and career-oriented); *Postmodern Account of Gender*, *supra* note 15, at 1994 ("[W]omen continue to do the majority of household chores and child care, . . . while men are defined primarily by career.").

18. Branch, *supra* note 2, at 122.

19. *Id.* at 124. Branch contends that women are criticized if they cannot separate their work from their family responsibilities. *Id.* at 124. This inability to separate their duties is often perceived as a lack of dedication to the job. *Id.* Men, on the other hand, are praised when their work and family duties intertwine. *Id.* See also Leslie Bender, Essay, *Sex Discrimination or Gender Inequality*, 57 *FORDHAM L. REV.* 941, 949 (1989) (arguing that women are allowed to engage in the professional world as long as they do not integrate their professional duties with their caregiving duties).

20. See *supra* note 4.

21. See Branch, *supra* note 2, at 127. Women, in order to provide care for their families, will select jobs that require less training and jobs that allow women to enter and leave the workforce several times. *Id.*

22. See Bender, *supra* note 19, at 943. In analyzing the role of women in large law firms, Bender explains that women, or primary caregivers in particular, are forced to seek alternative careers if they do not want to sacrifice their primary care duties. *Id.* Other alternatives include flextime, job-sharing, and part-time work. *Id.* Also, women often pursue other legal practices that are more flexible, such as in-house corporate counsel, public interest work, or sole practice. *Id.*

of all their employees' potential.²³

Disturbingly, the same forces that make it difficult for women to break through the glass ceiling in the workplace, have created a glass ceiling in the family realm for fathers.²⁴ Under the Family and Medical Leave Act (FMLA) of 1993,²⁵ men are equally entitled to take leave of their jobs to care for family. However, it is far less accepted that men actually do so for the following reasons: First, because men tend to have higher salaries, households will opt for the loss of the woman's income.²⁶ Second, society has traditionally viewed women as the nurturers or primary parent and men as the provider or secondary parent.²⁷ Finally, men are reluctant to take leave for family reasons because they fear it may ruin their careers.²⁸

The Glass Ceiling Commission's report reveals that despite Congress' enactment of the Pregnancy Discrimination Act of 1978 (PDA)²⁹ and the FMLA, the American workplace still treats and

23. *Glass Ceilings Recommendations*, *supra* note 6, at E-3 (reporting that CEO's acknowledge that they are under utilizing their companies' human capital). Corporate America is starting to recognize that women and minorities constitute a growing percentage of the labor and consumer markets and that it will have to recruit managers from a diverse pool of candidates. *Id.* at E-2.

24. Armin A. Brott, *Let's Quit the Daddy Bashing: Men's Importance in Children's Lives Ignored*, PHOENIX GAZETTE, June 17, 1995, at B-9 (stating that society's hesitation to change its attitude concerning men's and women's roles has erected a glass ceiling that prevents men from spending time with their families). See *infra* notes 26-28 and accompanying text (detailing the reasons why fathers encounter a glass ceiling in the home).

25. 29 U.S.C. §§ 2601-54 (1994). Although the FMLA does not distinguish between men and women in defining those employees entitled to FMLA leave, 29 U.S.C. § 2611(2)(A), a recent survey revealed that 95% of employees taking leave were women. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1049-50 (1994).

26. Malin, *supra* note 25, at 1073-74 (discussing the financial reasons why fathers do not take FMLA leave). Although parental leave is available to men, it is usually without pay, whereas women who take leave are initially covered by disability leave. *Id.* at 1073. However, once the disability benefits expire, the woman's leave is also without pay. *Id.* Thus, if both parents take leave, there will be a time period where neither parent is receiving pay. *Id.*

27. See *supra* notes 14-18 and accompanying text (discussing the traditional cultural roles of men and women).

28. See Malin, *supra* note 25, at 1077-79 (discussing employer hostility towards men taking FMLA leave).

29. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (1994).

promotes men and women with significant disparity.³⁰ In its final report and recommendations, the Commission noted that this gender disparity is partially a function of inadequate laws and deep-rooted gender-based stereotypes.³¹

This Section of the Symposium examines the issues of family, gender, and employment in light of the Commission's findings. Part II discusses the PDA. Part III focuses on the FMLA, and how certain provisions of the Act prevent women from attaining leadership positions in the workforce. Part IV reviews the Glass Ceiling Commission's recommendations and suggests ways in which Congress can amend the FMLA to shatter the glass ceiling.

II. THE PREGNANCY DISCRIMINATION ACT (PDA)

Prior to enacting the PDA, the Equal Employment Opportunity Commission (EEOC) interpreted Title VII of the Civil Rights Act of 1964 (Title VII) to prohibit discrimination based on pregnancy.³² Although several district courts and seven federal courts of appeals

30. See *Glass Ceilings Recommendations*, *supra* note 6, at E-2 (recognizing that even after 30 years, minorities and women have not received their "fair share of the growing pie").

31. See *id.* at E-3. The Commission explained that affirmative action, equal opportunity, and the glass ceiling have a complex relationship which has caused this gender disparity. *Id.* The Commission divided its recommendations into two segments: business and government. *Id.* For businesses, the Commission recommended that CEOs establish companywide policies for promoting diversity programs and eliminating the barriers at entry level positions. *Id.* at E-4. Moreover, companies should indicate in their business plans their methods of promoting diversity. *Id.* In addition to preparing minorities and women for senior positions, the Commission further recommended that companies hire and promote qualified individuals from "non-customary sources, backgrounds, and experiences." *Id.* In order to ensure that all qualified individuals can compete for the available positions, the Commission recommended that the companies utilize affirmative action. *Id.* Finally, the Commission recommended that businesses offer formal sensitivity training, adopt "family-friendly policies," and initiate "high performance workplace practices." *Id.*

For the government, the Commission recommended that all agencies and employers review their internal policies for promoting women and minorities into senior positions. *Id.* In addition, the government should improve the anti-discrimination laws, and its method of collecting and dispersing its data. *Id.* at E-4-5. See *infra* notes 92-93 and accompanying text (discussing further the Commission's recommendations).

32. H.R. REP. No. 948, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750.

concurrent with the EEOC,³³ the Supreme Court in *General Electric Co. v. Gilbert*,³⁴ held that pregnancy discrimination was not sex discrimination under Title VII.³⁵ In response to *Gilbert*, Congress enacted the PDA in 1978 to "prohibit sex discrimination on the basis of pregnancy."³⁶ Congress expanded the definition of sex to include "pregnancy, childbirth, or related medical conditions."³⁷ Consequently, discrimination based on pregnancy became the equivalent of sex discrimination under Title VII.³⁸

The PDA prohibits employers from treating pregnant women differently than other workers,³⁹ unless the employer can prove that the pregnancy interferes with the employee's ability to perform her job.⁴⁰ This exception is known as a Bona Fide Occupational Qualification (BFOQ).⁴¹ However, in *Automobile Workers v. Johnson Controls*,

33. *Id.* at 2.

34. 429 U.S. 125, 145-46 (1976). The Court held that a disability benefits plan that excluded pregnancy coverage did not discriminate on the basis of sex within the meaning of Title VII.

35. *Id.*

36. 42 U.S.C. § 2000e(k). Congress added subsection (k) to the "definitions" section of Title VII of the Civil Rights Act of 1964. *Id.* See generally MARCIA M. BOUMIL ET AL., LAW AND GENDER BIAS 142-48 (1994) (discussing the Pregnancy Discrimination Act of 1978).

37. 42 U.S.C. § 2000e(k).

38. See 42 U.S.C. § 2000e-2(a), which provides:

It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

...

Id. (emphasis added). See also H.R. REP. No. 948, *supra* note 32, at 3, reprinted in 1978 U.S.C.C.A.N. at 4751 ("[M]aking [it] clear that distinctions based on pregnancy are *per se* violations of Title VII . . .").

39. Cynthia L. Remmers, *Pregnancy Discrimination and Parental Leave*, 11 INDUS. REL. L.J. 377, 380-81 (1989) (explaining that employers need to treat pregnancy and other disabilities equally, not preferentially).

40. 42 U.S.C. § 2000e-2(e).

41. *Id.* This section defines Bona Fide Occupational Qualification (BFOQ) as:

Notwithstanding any other provision of this subchapter, . . . it shall not be an unlawful employment practice for an employer [to make employment decisions] . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .

Inc.,⁴² the Supreme Court limited the BFOQ defense to those instances where “sex or pregnancy actually interferes with the employee’s ability to perform the job.”⁴³ The Court concluded that Congress enacted the PDA in order to ensure that pregnant or fertile women “may not be forced to choose between having a child and having a job.”⁴⁴

In *California Federal Savings & Loan Ass’n v. Guerra*,⁴⁵ the Supreme Court addressed the issue of whether the PDA preempts state laws concerning pregnancy.⁴⁶ The Court held that the PDA does not preempt states from enacting legislation that requires employers to grant protective measures beyond those enumerated in the PDA for pregnant employees.⁴⁷ Therefore, the PDA permits the preferential treatment of pregnant employees if the treatment promotes equal employment opportunities.⁴⁸

The Court’s decision in *Guerra*, and other similar decisions,⁴⁹

Id.

42. 499 U.S. 187 (1991).

43. *Id.* at 204. The Court interpreted 42 U.S.C. § 2000e-2(e)(1) and held that the employer, a battery manufacturer, could not prevent pregnant or fertile women from being exposed to lead. *Id.* at 206-07. In its opinion, the Court focused on the plaintiff’s ability to perform her job function and did not take into consideration the potential harm to her or her baby. *Id.* “Decisions about the welfare of future children must be left to the parents . . . rather than to the employers who hire those parents.” *Id.* Cf. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 705 (8th Cir. 1987) (asserting that non-pregnancy can be a BFOQ where female plaintiff was a counselor and role model for girls at a youth club).

44. *Johnson Controls*, 499 U.S. at 204.

45. 479 U.S. 272 (1987).

46. *Id.*

47. *Id.* at 280. The Court agreed with the Ninth Circuit Court of Appeal’s conclusion that a state law, which requires an employer to reinstate pregnant workers, was not preempted by Title VII. *Id.* at 284, 292. The Court noted that “Congress intended the PDA to be a ‘floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.’” *Id.* at 285 (quoting *California Federal Savings & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

48. See Remmers, *supra* note 39, at 399-400 (discussing the *Guerra* case).

49. See, e.g., *Barnes v. Hewlett-Packard Co.*, 846 F. Supp. 442, 444-45 (D. Md. 1994) (holding that the PDA does not protect women who take time off to participate in child-rearing activities or for parental leave). See also *Schafer v. Board of Public Educ.*, 903 F.2d 243, 248 (3d Cir. 1990) (holding that a plan that guaranteed mothers childrearing-leave following the birth of a child, but denied fathers the same right, discriminated upon the basis of sex and was therefore impermissible). The *Shafer* court’s recognition of the rights of fathers was an important step in the passage of the FMLA. See H.R. REP. NO. 8, 103d Cong., 1st Sess. 25-26 (1993) (recognizing that men need to take leave for their

foreshadowed Congress' passage of the FMLA by revealing the inadequacies of the PDA and the need for additional protections for women in the workplace.⁵⁰ For example, although the PDA prohibits discrimination against employees who are currently pregnant, employers may set some limitations.⁵¹ Also, the PDA fails to protect employees who are adopting a child.⁵² A further shortcoming of the PDA was that it did not address the issue of leave for non-pregnancy related reasons, such as employee illness or the illness of a close relative.⁵³ In light of these concerns with the PDA, Congress sought to expand the protections afforded to working women.⁵⁴

III. THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

On February 5, 1993, President Clinton signed into law the Family and Medical Leave Act.⁵⁵ The FMLA is the first piece of federal

children). Like the *Schafer* court, the FMLA simultaneously attempts to take into account the needs of the overall family unit and its individual members. See 29 U.S.C. § 2601(a)-(b) (1994). See also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-82 (1983) (holding that an employer's health plan must provide a male employee's spouse the same pregnancy and non-pregnancy related health care benefits as it does for its female employees).

50. See 29 U.S.C. § 2601(a)(5) (finding that the women generally have the responsibility of caring for the family and that this may affect their working lives).

51. See, e.g., *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (holding that an employer does not have to give preferential treatment to pregnant employees because the PDA does not "require employers to offer maternity leave or take other steps to make it easier for pregnant women to work"); *Maganuco v. Leyden Community High Sch. Dist.* 212, 939 F.2d 440, 445 (7th Cir. 1991) (holding that the PDA does not prevent employers from conditioning pregnancy leave on a requirement that the employee return to work "after the end of the medical disability that pregnancy causes").

52. See 42 U.S.C. § 2000e(k). Section 2000e(k) refers only to "pregnancy, childbirth, or related medical conditions."

53. See 42 U.S.C. § 2000e(k). See also *Remmers, supra* note 39, at 402-11 (discussing the impetus for the proposed Parental and Medical Leave Act of 1988).

54. See *infra* notes 60-61 and accompanying text (discussing Congress' motivation for enacting the FMLA).

55. Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-54 (1994)). Representative Patricia Schroeder (D-Colo.) initially introduced the Act in 1985. President Bush vetoed it twice and it remained dormant until President Clinton took office. The House and Senate passed the Bill in early February of 1993 and President Clinton signed it into law immediately. The Act became effective on August 5, 1993. See generally Suzanne M. Crampton & Jitendra M. Mishra, *Family and Medical Leave Legislation: Organizational Policies & Strategies*, 24 PUB. PERSONNEL MGMT., Sept. 22, 1995, at 271; Cynthia Hanson, *Labor Pains: Advocates See Family Leave Act as a "Wake-up Call,"*

legislation that guarantees employees the right to take family and health-related employment leave without the risk of losing their jobs.⁵⁶ While the FMLA affords both men and women the right to take unpaid leave,⁵⁷ it is clear that it aims to close the gender gap that still exists in the American workplace.⁵⁸ The FMLA seeks to accomplish this by preventing employers from discriminating against women based upon real or perceived limitations stemming from their family responsibilities.⁵⁹

Congress enacted the FMLA in response to the increasingly important role played by women in the workforce and the dramatic rise in the number of single parent households.⁶⁰ The purpose of the FMLA is to balance the demands of the workplace with the realistic needs of families in such a way as to simultaneously preserve the integrity of the American family and promote business interests.⁶¹

CHI. TRIB., Feb. 20, 1994, at 1.

56. Crampton & Mishra, *supra* note 55, at 271.

57. 29 U.S.C. § 2611(2)(A) defines an "eligible employee" as *any* employee who has worked for an employer "for at least 12 months" and "for at least 1,250 hours." *Id.* (emphasis added).

58. See 29 U.S.C. § 2601(a)(5)-(6), which reads in pertinent part:
Congress finds that—

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

Id. See also H.R. REP. NO. 8, *supra* note 49, at 16-17 (recognizing that typical family roles have changed and the man may not be the financial supporter).

59. See 29 U.S.C. § 2601(b)(5) (stating that one of the Act's purposes is "to promote the goal of equal employment opportunity for women and men").

60. "The United States has experienced a demographic revolution in the composition of the workforce, with profound consequences for the lives of working men and women and their families." S. REP. NO. 3, 103d Cong., 1st Sess. 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7. See also 29 U.S.C. § 2601(a)(1) (reporting Congress' finding that "the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly").

61. 29 U.S.C. § 2601(b)(1). Congress intended this Act, "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." *Id.*

A. Coverage

The FMLA entitles employees⁶² to take up to twelve weeks of unpaid and job-protected leave if their employers employ more than fifty employees.⁶³ Both men and women may take this leave for the birth or adoption of a child or for the placement of a foster child with the family.⁶⁴ In addition, the FMLA permits employees to take leave in order to care for a child, spouse, or parent suffering from a serious health condition, or for the employee to attend to their own serious ailment.⁶⁵

The FMLA allows employees to take their leave consecutively for the birth or adoption of a child.⁶⁶ An employee may take this leave intermittently, however, provided the employee and the employer agree.⁶⁷ Finally, in addition to unpaid leave⁶⁸ and the right of restora-

62. The FMLA applies to approximately 45 million workers—or over 40% of the American workforce. Joann S. Lublin, *Family-Leave Law Can be Excuse for a Day Off*, WALL ST. J., July 7, 1995, at B1.

63. See 29 U.S.C. § 2611(4)(A) (defining employer); *id.* § 2612 (listing leave requirements).

64. 29 U.S.C. § 2612(a)(1)(A)-(B). Under this section, employees with a permissible purpose may take a maximum of 12 work weeks of unpaid leave per any 12-month period. *Id.*

65. See 29 U.S.C. § 2612(a)(1)(C)-(D). See also, U.S. Dep't of Labor Regulations, 29 C.F.R. § 825.112(a)(4) (1995) (defining a serious health condition as a condition that renders the employee unable to perform the functions of his or her position). See *infra* notes 81-87 and accompanying text for a more in depth discussion of what constitutes a serious health condition.

66. 29 U.S.C. § 2612(b)(1).

67. 29 U.S.C. § 2612(b). Section 2612(b) does permit an employee to take intermittent leave, without the employer's approval, if the employee is tending to a serious health condition. *Id.* See also 29 C.F.R. § 825.303 (requiring employees to provide employers with 30 days notice of their intention to take leave, or as much notice as is practicable).

But cf. Reich v. Midwest Plastic Eng'g Inc., No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 12130, at *3 (W.D. Mich. July 22, 1995). In *Reich*, the court held that an employee suffering from pregnancy complications arising from chickenpox was not eligible for FMLA leave because she failed to inform her employer of her need to take FMLA leave as soon as practicable. *Id.* at *13. The court stated that the employee had an obligation to inform the employer that she had a serious health condition and that she wanted to take FMLA leave. *Id.* at *12-*13.

68. 29 U.S.C. § 2612(c).

tion upon return,⁶⁹ the FMLA requires the employer to continue health and other benefits while the employee is on leave.⁷⁰

Generally, the FMLA entitles eligible employees who take leave to be restored to their former position, or to be assigned to an equivalent position with equivalent "employment benefits, pay, and other terms and conditions of employment."⁷¹ However, the FMLA allows an employer to limit this coverage where its fundamental economic interests are at stake.⁷²

B. *The Key Employee Exception*

Among the otherwise eligible employees under the FMLA there are certain "key employees" whose protections are limited.⁷³ The FMLA and accompanying regulations define a key employee as a "salaried eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite."⁷⁴ Although the FMLA guarantees key employees their unpaid leave and their health benefits, in limited instances, it allows the employer to refrain from reinstating these employees to their previous positions.⁷⁵ An employer can deny restoration when it is "necessary to prevent substantial and grievous economic injury to the operations of

69. *Id.* § 2614(a)(1). See *infra* notes 71-72 and accompanying text (explaining the right of restoration upon return).

70. 29 U.S.C. § 2614(a)(2).

71. *Id.* § 2614(a)(1)(A)-(B). See also 29 C.F.R. § 825.214(a). According to the accompanying regulations, the employer must reinstate an employee returning from FMLA leave even if the employer filled the employee's position. *Id.* However, if an employee can no longer perform the essential function of his or her job because of a serious health condition, the FMLA does not require the employer to restore that employee to another position. *Id.* § 825.214(b).

72. 29 U.S.C. § 2614(b)(1)(A). See also *infra* notes 73-80 and accompanying text (discussing one area where an employers economic interests are deemed at stake—the "key employee" exception).

73. 29 U.S.C. § 2614(b)(2). See also 29 C.F.R. § 825.217(a) (defining key employee).

74. 29 U.S.C. § 2614(b)(2); 29 C.F.R. § 825.217(a).

75. 29 U.S.C. § 2614(b)(1). But see Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 464 n.51 (1995) ("Since 'key employees' are not guaranteed their former positions when ready to return to work, it may be inaccurate even to characterize their absence from work as 'leave.'").

the employer.”⁷⁶

The key employee exception of the FMLA is problematic for several reasons. First, because the exclusion only applies to the top ten percent of salaried employees, “[i]nsignificant differences in pay might cause significant differences in FMLA protections.”⁷⁷ Second, if an employer changes its payroll scheme, it may elevate a worker into the highest paid ten percent of all employees; thus significantly reducing the employee’s rights under the FMLA.⁷⁸ Finally, because the FMLA distinguishes key employees on the basis of their salaries, the type of compensation an employee receives may cause certain employees to lose their FMLA rights.⁷⁹ Thus, for example, if an employer wanted to limit FMLA leave, it could pay the employee on a salary basis rather than with stock options.⁸⁰

C. *Serious Health Condition*

Under the FMLA, employees may request FMLA leave for their own “serious health conditions” or to care for their spouse, son, daughter, or parent who has a serious health condition.⁸¹ In *Seidle v. Provident Mutual Life Insurance Co.*,⁸² the Eastern District of Pennsylvania addressed the definition of a serious health condition under the FMLA

76. 29 U.S.C. § 2614(b)(1)(A). If an employer determines that such an economic injury will occur, it must inform the key employee at that time. *Id.* § 2614(b)(1)(B). However, if “[a]n employer . . . fails to provide such timely notice [it] will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.” 29 C.F.R. § 825.219(a).

77. Rigler, *supra* note 75, at 467 (noting that a key employee who makes \$65,000 may lose FMLA protections whereas a non-key employee who makes \$64,950 will not).

78. *Id.*

79. *Id.* Because key employees are most often salaried employees, employers can manipulate the terms of compensation and thus deprive an employee of FMLA protection. *Id.*

80. *See id.* Under the key employee provision, salaried employees may be at a severe disadvantage to nonsalaried employees. For instance, a highly paid executive receiving most or all of her compensation in the form of commission or stock options would not be subject to the key employee exception while a highly compensated salaried employee could be. *See generally Family Leave Law Could Spark Litigation*, 3 Lab. Rel. Rep. (BNA) No. 143, at D-25 (Aug. 16, 1993).

81. 29 U.S.C. § 2612(a)(1)(C)-(D).

82. 871 F. Supp. 238 (E.D. Pa. 1994).

for the first time.⁸³ In *Seidle*, the plaintiff's employer fired her for taking a four day leave of absence in order to care for her child who had an ear infection and other cold-like symptoms.⁸⁴ The court held that the employer had a right to fire the employee for taking unauthorized leave because the plaintiff's child did not have a serious medical condition as defined by the FMLA and the Department of Labor's regulations.⁸⁵

The court's decision in *Seidle* illustrates how the FMLA may prevent a working woman from balancing her job and family responsibilities. For instance, a mother may have to stay home with her ill child because the child's day care center has a policy "prohibiting children with a 'runny nose' from attending."⁸⁶ However, this type of ailment will not qualify as an "incapacity" sufficient to justify a parent taking FMLA leave. Thus, even if the child's condition is not a serious medical condition, the affect on the mother's ability to work is the same. Because the FMLA does not address this issue, it fails to adequately protect the rights of female workers who are primarily responsible for

83. *Id.* at 242, 243-464. In its opinion, the court reviewed the legislative record and concluded that Congress intended serious health conditions for children to include "conditions or illnesses that affect the health of the child, spouse or parent such that he or she is . . . unable to participate in school or in his or her regular daily activities." *Id.* at 242 (quoting H.R. REP. No. 8, 103d Cong., 1st Sess., pt. 1 at 28 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 31).

84. *Seidle*, 871 F. Supp at 240. The employee's child had a fever for a day and a half, but it subsided after the pediatrician prescribed antibiotics. *Id.* The employee alleged that she had to remain home for the rest of the week because her child still had a runny nose and was not eating. *Id.* at 240-41.

85. *Id.* at 246. There are three reasons why the court concluded that the child's condition was not a serious medical condition: First, the doctors who testified for the employee were not the child's examining physician and they merely confirmed that the examining physician followed medical protocol. Second, a serious medical condition is defined legally and not medically. Third, the physicians expressed that the child's condition was serious based on the potential dangers that could have accompanied the child's illness. However, the court held that "the FMLA and its implementing regulations defining 'serious health condition' are not concerned with the *potential* dangers of an illness but only with the *present* state of that illness." *Id.* at 245-46. See also *Sakellarion v. Judge & Dolph, LTD.*, 893 F. Supp. 800, 807 (N.D. Ill. 1995) (holding that a child's asthma condition was not a serious health condition under the FMLA because the child did not require "continuing treatment by a health care provider after she was discharged from the hospital" and the child was not "incapable of self-care"). Cf. *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1037 (M.D. Tenn. 1995) (concluding that a child's fever and sore throat did constitute a serious health condition because a physician determined that she was "incapacitated" for more than three days).

86. *Seidle*, 871 F. Supp at 244.

rearing and providing for their children.⁸⁷

IV. A PROPOSED AMENDMENT TO THE FMLA THAT WILL SHATTER THE GLASS CEILING

In her introductory remarks to the Glass Ceiling Commission's Final Recommendations, the Commission's Chairperson observed that: "Breaking glass ceiling barriers in corporate America will not result from any single act or event. Rather, it will be the culmination of a process involving people and organizations from all segments of our society."⁸⁸ The Chairperson's comments implicitly suggest that the law is limited in what it can do to dismantle the glass ceiling.⁸⁹ Therefore, despite Congress' legislative efforts, absent significant changes in corporate America's conception of the "proper role" for women and men in the home and workplace, glass ceilings will remain in existence for both genders.⁹⁰ Nonetheless, as the Commission's recommendations illustrate, the law can act as an impetus to redefine the roles of women and men in the home and at the office.⁹¹

The Commission specifically recommended that corporations "[p]repare minorities and women for senior positions" [and] [i]nitiate

87. See Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 55 (1994). "Subtle barriers to women's advancement in the workplace arise from the fact that women are still the primary family caretakers, even when they also work outside the home. . . . This uneven division of labor in the private sphere limits women's opportunities in the public sphere and contributes to the 'glass ceiling' phenomenon." *Id.*

88. *Glass Ceiling Recommendations*, *supra* note 6, at E-2. See *Employment, Glass Ceiling Commission's Recommendations Elicit Mixed Responses*, Daily Rep. Exec. (BNA) No. 240, at D-40 (Dec. 14, 1995) (reporting that the Commission's recommendations have been generally well received by corporate managers and advocacy groups). See also Carol Kleiman, *Glass Ceiling Panel Should Be Resurrected*, SUN-SENTINEL (Fort Lauderdale), Jan. 15, 1996, at 15. After issuing its final recommendations, the Glass Ceiling Commission "went out of business" pursuant to its legislative mandate. Some argue that the Commission should be resurrected until "the problem [created by the glass ceiling] shows some signs of dissipating." *Id.*

89. See *Glass Ceilings Recommendations*, *supra* note 6, at E-4-5. Most of the Commission's 12 recommendations do not refer to inadequacies in antidiscrimination laws, but rather to business practices and general societal attitudes toward women and minorities in the workplace. *Id.* See *supra* note 31 for the Commission's recommendations.

90. See Bender, *supra* note 19, at 949 ("Our business . . . world has been constructed by men to reinforce and reward their gendered male characteristics.").

91. See generally *Glass Ceilings Recommendations*, *supra* note 6.

work-life and family-friendly policies.⁹² Further, the Commission recommended that the federal government “[s]trengthen enforcement of anti-discrimination laws.”⁹³

There are several ways Congress can amend the FMLA to implement these recommendations and achieve the Commission’s goal of eradicating the glass ceiling. First, Congress should expand leave eligibility under the FMLA by guaranteeing the eligibility of all employees. To accomplish this guarantee, Congress should eliminate the key employee exception and broaden the definition of serious health condition. Second, Congress should implement an insurance-based, paid leave system in order to make FMLA leave a realistic opportunity for all employees.

A. *Leave Eligibility*

Presently, leave eligibility under the FMLA is limited. In fact, the FMLA leave provision protects less than half of the workforce.⁹⁴ This disparity exists because currently, the FMLA does not apply to employers with less than fifty employees.⁹⁵ Therefore, prior to eliminating the key employee exception and broadening the definition of serious health condition, Congress should expand the definition of employer.⁹⁶ Congress should extend the FMLA leave provisions to all employers, thus guaranteeing all employees the right to take such leave.

In addition, Congress should eliminate the key employee exception in order to protect the job security of those employees who have already broken through the glass ceiling. The key employee provision appears to contradict the FLMA’s stated purposes⁹⁷ by allowing an employer to deny reinstatement protection to those who are highly compensated.⁹⁸ However, employees may not know whether they presently are, or in the

92. *Id.* at E-2. “The Commission recommends organizations adopt policies that recognize and accommodate the balance between work and family responsibilities that impact the lifelong career paths of all employees.” *Id.*

93. *Id.*

94. Lublin, *supra* note 62, at B1 (stating that 40% of the American workforce is protected by the FMLA).

95. *Id.*

96. 29 U.S.C. § 2611(4)(A).

97. *See supra* note 61 and accompanying text.

98. 29 U.S.C. § 2614(b).

future will be, in the top ten percent of their employer's payroll. Therefore, a woman who wants to start a family may hesitate to pursue the "fast track" up the corporate ladder if she will lose her ability to take FMLA leave. Because women exclusively bear the burden of childbearing and predominantly play the main role in childrearing, this exception disproportionately forces women approaching top management positions to choose between their careers and family responsibilities.

Furthermore, Congress should expand the definition of serious health condition. It should define a serious health condition based on practical considerations and not on listings of particular illnesses.⁹⁹ This modification would allow a parent to take leave to care for an ill child who is unable to attend day care or school. However, in order to prevent widespread abuse, the Act should continue to allow employers to require proof of the condition.¹⁰⁰ This new definition of serious health condition would enable women ascending the corporate ladder to take leave and care for their own or their dependent's legitimate health concerns without the fear of losing their jobs.¹⁰¹

B. *Paid Leave*

Currently, FMLA leave is unpaid.¹⁰² As a result, most eligible employees do not take FMLA leave, or they fail to take leave for the full twelve weeks because of the financial burden involved.¹⁰³ However, even women in high paid positions, who do have the resources to take FMLA leave, may not take the time off because of a fear of backlash from employers who may compare them to their male counterparts.¹⁰⁴

99. The regulations states that a qualifying illness requires in-patient care, or continuing treatment by a health care provider. 29 C.F.R. § 825.114(a)(1)-(2). See Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238, 242 (E.D. Pa. 1994) (listing examples of "serious health conditions"). Practical considerations would additionally include, for example, staying at home to care for a young child with the flu or strep throat.

100. 29 U.S.C. § 2613 (detailing employers right to request certification for a FMLA-leave request, and what will satisfy such a request).

101. See *supra* notes 81-87 and accompanying text for a discussion of how the FMLA's definition of serious health condition prejudices working mothers. See also Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238 (E.D. Pa. 1994).

102. 29 U.S.C. § 2612(d)(1).

103. Rigler, *supra* note 75, at 479 (arguing that the FMLA leave may only benefit those who can afford three months without a paycheck).

104. See Malin, *supra* note 25, at 1077-79 (discussing employers' hostility toward men taking parental leave).

The FMLA would be an effective tool in promoting the rights of women in the workplace if all employees could take limited, paid family leave.¹⁰⁵ Such a provision would also help to eliminate the glass ceiling. Most women still have to choose between their careers and their families.¹⁰⁶ However, if a woman is given the opportunity to take paid leave for the birth of her child and the guarantee that she may return to her job without the fear of reprisal, she will have a greater incentive to "invest in a career."¹⁰⁷ Otherwise, a woman may feel she has little choice but to accept a low-paying job, quit that job to have a child, and then reenter the workforce in another low-paying job.¹⁰⁸ Furthermore, offering paid leave can improve an employee's morale and productivity, which will benefit women employees trying to climb the corporate ladder.¹⁰⁹

In addition, offering paid leave to all employees will encourage more men to take leave to tend to family responsibilities.¹¹⁰ Typically, it is women who take FMLA leave because the presence of the glass ceiling prevents them from making as much money as their spouses, so

105. Lenhoff & Withers, *supra* note 87, at 53-54. Currently, the FMLA "may divide people by class . . . [for those poorly paid employees who have no (or limited use of) paid vacation, sick leave or family leave, the FMLA may simply be irrelevant because '[e]mployees . . . can't afford to take unpaid leave.'" *Id.* (citing *Family Leave: Productivity, L.A. TIMES*, Nov. 6, 1995, at D2. Some large American corporations have implemented partially or completely paid leave policies. For instance, "Northrop Grumman gives employees a pool of 'personal days' that can be used when the worker is sick or when he or she needs to care for an ailing family member." *Id.* Similarly, BankAmerica Corporation offers "[f]ull pay for [a] mother while medically disabled" and Kaiser Permanente grants "10 weeks of fully paid medical leave for [a] mother." *Id.* "If . . . [employers] can help their employees, they are more dedicated and focused in work." *See generally* Deborah Lohse, *Family Leave Act Offers a Wide Range of Benefits*, *WALL ST. J.*, Apr. 28, 1995, at C1 (discussing FMLA benefits).

106. *See supra* notes 19-23 and accompanying text.

107. *See* Branch, *supra* note 2, at 127 (recognizing that presently, many women will select jobs that require less training and jobs that allow them to enter and exit the workforce).

108. *Id.*

109. Rigler, *supra* note 75, at 480 ("[P]roductivity costs might more than offset the savings realized by employers from their employees' limited ability to use sick and family leave."). *See also* Karen Kaplan, *Balancing Work and Family: What Big Employers Offer: More are Realizing that Broadening Family Benefits Can Boost Morale, Productivity*, *L.A. TIMES*, Nov. 6, 1995, at D2. Some large American corporations have implemented partially or completely paid leave policies. For instance, "Northrop Grumman gives employees a pool of 'personal days' that can be used when the worker is sick or when he or she needs to care for an ailing family member." *Id.* Similarly, BankAmerica Corporation offers "[f]ull pay for [a] mother while medically disabled" and Kaiser Permanente grants "10 weeks of fully paid medical leave for [a] mother." *Id.* "If . . . [employers] can help their employees, they are more dedicated and focused in work." *See generally* Deborah Lohse, *Family Leave Act Offers a Wide Range of Benefits*, *WALL ST. J.*, Apr. 28, 1995, at C1 (discussing FMLA benefits).

110. *See supra* notes 24-28 and accompanying text.

their jobs are considered more expendable.¹¹¹ However, if employers offer paid leave to both men and women, then more men may consider taking FMLA leave. As more men take FMLA leave, the stereotypical roles of men and women that are embedded in the glass ceiling will disintegrate.¹¹² Once corporate America changes its view on the traditional roles men and women should play in the workforce, the glass ceiling will finally begin to crack.

The problem with such a policy is determining who should bear the cost. While some large corporations have voluntarily assumed the costs associated with paid leave,¹¹³ most businesses simply cannot afford to. The best option for paying for FMLA leave would be to "extend [the coverage of] Temporary Disability Insurance (TDI) programs."¹¹⁴ This approach has been successfully employed by a number of states which have TDI programs.¹¹⁵ Under a TDI arrangement, employers or the state withhold a small portion of the employee's salary and maintain an insurance fund.¹¹⁶ When an employee takes leave for a permissible health or family related reason, he or she is then paid out of this fund.¹¹⁷ The evidence suggests that the costs incurred by maintaining

111. See Malin, *supra* note 25, at 1073-74 (explaining the financial reasons why men do not take FMLA leave).

112. See *supra* notes 14-17 and accompanying text.

113. See Kaplan, *supra* note 109, at D2 (discussing various programs offered by corporations).

114. Lenhoff & Withers, *supra* note 87, at 53 (discussing paid leave).

115. *Id.* Presently, California, CAL. GOV'T CODE § 12945-2 (West Supp. 1996), Hawaii, HAW. REV. STAT. § 392 (1985 & Supp. 1992), and Rhode Island, R.I. GEN. LAWS §§ 28-39-1 to 28-41-33 (1986 & Supp. 1994), have these insurance-type programs. In California, women are reimbursed "about 55% of their pay while they are medically disabled, typically six weeks." Kaplan, *supra* note 109, at D2.

116. Lenhoff & Withers, *supra* note 87, at 53-54.

117. *Id.* When determining how to fund paid family leave programs, one should consider several other models as well. For instance, Canada allocates leave benefits through a national unemployment insurance system. *Id.* at 54. Commentators suggest that the unemployment insurance scheme in the United States could be "expanded to allow workers to draw from the fund not only when they cannot find work, but also when they cannot return to work because of the need for family or medical leave." *Id.*

Others advocate the approach taken by most European countries where the government provides "[a]ctual accommodations for pregnancy and childbirth." See Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2201 (1994). The European system separates pregnancy-related issues from antidiscrimination laws. *Id.* This structure reflects a

such programs are easily justified by corresponding improvements in worker morale and productivity.¹¹⁸

V. CONCLUSION

While the passage of new laws cannot change societal stereotypes that have evolved over generations, it can provide an impetus for change in the way employers treat their employees. In this regard, Congress should amend the FMLA so that it guarantees all workers the right to take paid leave for essential family matters. Such a policy would help shatter the glass ceiling by allowing women the opportunity to have both a career and a family.

*Jeremy I. Bohrer**

division in the laws that generally affect women and laws that deal with pregnancy. *See id.* at 2207-08 (discussing the special treatment afforded pregnancy leave). *See also* Branch, *supra* note 2, at 152-53 (noting that other countries view childrearing as a societal responsibility and not exclusively as "a parent's private folly"); Carol D. Rasnic, *The United States' 1993 Family and Medical Leave Act: How Does it Compare with Work Leave Laws in European Countries?*, 10 CONN. J. INT'L L. 105 (1994).

118. *See supra* note 109 and accompanying text for a discussion of the benefits employers realize as a result of adopting family-friendly policies.

* J.D. 1996, Washington University.

