



NEW YORK
CITY BAR

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**REPORT ON LEGISLATION BY THE
SEX & LAW COMMITTEE**

**S. 1810
H.R. 3712**

**Sen. Gillibrand
Rep. DeLauro**

The Family and Medical Insurance Leave (FAMILY) Act

THIS BILL IS APPROVED

The Sex and Law Committee of the New York City Bar Association writes in support of the Family and Medical Insurance Leave (FAMILY) Act (S. 1810/H.R. 3712), which would ensure that workers continue to receive some income when they need to take time away from their jobs for family or medical reasons.¹ The Sex and Law Committee addresses issues pertaining to gender and the law in a variety of areas such as violence against women, reproductive rights, gender discrimination, poverty, matrimonial and family law, employment law, and same-sex marriage. Our committee believes that this legislation is critical to the health and economic security of working families in New York and across the country, and is an important step towards bringing the United States in line with our peer nations.

Family and work patterns have shifted dramatically over the past several decades, creating an urgent need for more robust family leave policies. The shifting dynamic is evidenced by the fact that, as of 2012, both parents work in 60% of families.² In addition, there continue to be a significant number of single-parent households, most often headed by women.³ However, current employment policies embrace the outmoded concept of a household being run by one parent who is a breadwinner and one who is the primary caregiver; these policies thus fail to account for the fact that most parents have both work-for-pay and in-home caretaking responsibilities.

¹ The FAMILY Act would be funded by employee and employer payroll contributions, each in the amount of 0.2% of wages (or two cents for every \$10 earned).

² U.S. Bureau of Labor Statistics, *Employment Characteristics of Families Summary* (April 2012), available at <http://www.bls.gov/news.release/famee.nr0.htm> (last visited May 5, 2014).

³ Jonathan Vespa, Jamie M. Lewis, Rose M. Krieder, U.S. Census Bureau, *American Families and Living Arrangements: 2012*, at 23 (Aug. 2013), available at <https://www.census.gov/prod/2013pubs/p20-570.pdf> (last visited May 5, 2014).

There have been important and encouraging steps over the past few decades to adapt employment policies to shifting family dynamics. In 1993, Congress passed the Family and Medical Leave Act (“FMLA”), which guarantees up to 12 weeks of unpaid, job-protected leave for employees of covered entities.⁴ The FMLA was an important step in adapting policies to the current family-work situation, but it does not go far enough.⁵ Because FMLA guarantees only unpaid leave, many eligible workers who need to take family leave are not able to do so. According to the U.S. Department of Labor, almost 78% of employees who needed and were eligible for family leave in 2000 stated that at least one reason they did not take it was because they could not afford to lose pay.⁶ Research shows that only one-fourth of U.S. employers offer fully paid maternity-related leave and that one-fifth offer no maternity-related leave at all, paid or unpaid.⁷ In 2002, California became the first state to offer paid family leave benefits.⁸ Since that time, only three states have followed suit: New Jersey,⁹ Rhode Island,¹⁰ and Washington.¹¹ It is clear that there is not enough momentum among the states to create state-funded family leave benefit programs to cover a significant portion of workers in the United States.

The lack of family leave benefits for persons employed by uncovered entities, means that a significant percentage of the U.S. workforce cannot effectively balance work and family responsibilities; these individuals also have no assurance of continued employment if they do take any family-related leave. Women generally continue to be the primary caregivers for sick, elderly, and disabled family members and therefore are especially burdened by the lack of paid leave benefits. Almost 60% of women work (over 72 million total), mostly in full-time

⁴ FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees within a 75 mile radius of the covered employee’s worksite. Employees are eligible for leave if they have worked for at least 12 months or at least 1,250 hours over the past 12 months. *See* 29 U.S.C.A. §2611(2)(A), (B) (2013).

⁵ It is estimated that, as a result of FMLA’s exclusion of entities with fewer than 50 employees and short-tenure workers, approximately 40% of U.S. workers are not covered by FMLA. *See* Rebecca Ray, Janet C. Gornick, and John Schmitt, *Parental Leave Policies in 21 Countries, Assessing Generosity and Gender Equality*, at 9 (revised June 2009), available at http://www.cepr.net/documents/publications/parental_2008_09.pdf (last visited March 10, 2014). Some researchers posit that only 20% of new mothers are covered by and eligible for FMLA. *See* Sarah Fass, *Paid Leave in the States: A Critical Support for Low-Wage Workers and Their Families*, at 5 (March 2009), available at http://www.nccp.org/publications/pdf/text_864.pdf (last visited March 10, 2014).

⁶ David Cantor et al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*, table 2.17 (Rockville, MD, Westat, 2001).

⁷ *See* Ray, Gornick, and Schmitt, *supra* n. 4, at 9.

⁸ CAL. UNEMP. INS. CODE § 3301(a)(1) (2014) (becomes inoperative in its current form on July 1, 2014). On September 24, 2013, California enacted Senate Bill 770 which becomes operative on July 1, 2014 and expands California’s paid family leave program to include leave to care for a seriously ill grandparent, grandchild, sibling or parent-in-law. 2013 Cal. Legis. Serv. Ch. 350 (S.B. 770) (Westlaw).

⁹ N.J. STAT. ANN. §43:21-27(g)(2) (West, Westlaw through 2013 legislation).

¹⁰ R.I. Gen. Laws § 28-41-35(h).

¹¹ WASH. REV. CODE §§ 49.86.010(8), 49.86.050 (West, Westlaw through 2013 legislation).

positions¹² and one half of these women have children under 18 years old at home.¹³ Because more than 40% of women in the workforce have no paid sick days, they are very likely to face difficulties balancing work and family responsibilities.¹⁴ Poor women are hit even harder: two-thirds of low-income women (defined as below 200% of the poverty line) and 75% of very low-income women (less than 100% of poverty line) do not get paid when they miss work to care for a sick child.¹⁵ Parents are faced with an impossible choice: keep your paycheck, or care for your kids. It is, therefore, unsurprising that when family leave benefits are available to parents they are five times more likely to stay home to care for sick children.¹⁶

Far from being at the forefront of progressive policies to support families' work-life realities, the U.S. lags far behind most other nations when it comes to supporting working families through family leave. It joins Swaziland and Papua New Guinea as the only countries in the world that do not require employers to provide some form of parental leave benefits in *any* employment sector.¹⁷ As of March 2010, only 11% of all U.S. workers had access to family leave benefits.¹⁸ In contrast, as of January 2011, 178 countries offered guaranteed family leave benefits to women in connection with childbirth.¹⁹ Further, a 2010 study showed that 49 countries provided some family leave for fathers around the birth of a child.²⁰ The FAMILY Act would go a long way toward starting to bring the U.S. in line with other nations in recognizing that workers' family responsibilities need not cost them their paychecks. Moreover, a 2010 survey concerning the effects of California's paid family leave law on business showed that for the vast majority of employers interviewed, the law had a "positive effect" or "no noticeable

¹² U.S. Department of Labor, *Women in the Labor Force in 2010*, available at <http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm> (last visited March 17, 2014).

¹³ Institute for Women's Policy Research, *Women and Paid Sick Days: Crucial for Family Well-being* (2007), available at <http://www.iwpr.org/publications/pubs/women-and-paid-sick-days-crucial-for-family-well-being> (last visited March 10, 2014).

¹⁴ *Id.*

¹⁵ The Henry J. Kaiser Family Foundation, *Women, Work, and Family Health: A Balancing Act*, at 2 (2003), available at <http://kaiserfamilyfoundation.files.wordpress.com/2003/04/3336.pdf> (last visited March 10, 2014).

¹⁶ *Id.*

¹⁷ *Failing its Families: Lack of Paid Leave and Work-Family Supports in the US*, Human Rights Watch (Feb. 2011), at 1, available at <http://www.hrw.org/sites/default/files/reports/us0211webwcover.pdf> (last visited March 17, 2014).

¹⁸ *Id.* at 29 (regarding specific paid family leave benefits, "rather than all forms of paid leave that might be applied during time off work to care for family (such as paid sick and vacation days)").

¹⁹ *Id.* at 33.

²⁰ *Id.* (citing ILO, *Maternity at Work: A Review of National Legislation* (Geneva: International Labour Office), at 17 (2010)).

effect” on productivity (88.5%), profitability/performance (91%), turnover (92.8%), and morale (98.6%).²¹

It is time for the United States to provide a meaningful way for employees to fulfill their work and family responsibilities. Providing family leave benefits nationally will promote economic security and family well-being. For these reasons, the Committee urges Congress to pass the FAMILY Act, providing partial wage replacement to employees who need to take family care leave from the workplace.

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²¹ Appelbaum, E. & Milkman, R., *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California*, at 7-8 (Jan. 2011), available at <http://www.cepr.net/documents/publications/paid-family-leave-1-2011.pdf> (last visited March 10, 2014). This is consistent with studies showing that the availability of workplace flexibility options reduces employee turnover and serves as a valuable recruitment and retention tool. Richman, Burrus, Buxbaum, Shannon & Yai, Corporate Voices for Working Families, *Innovative Workplace Flexibility Options for Hourly Workers* at 94-95 (May 2009) (“The expected turnover rate for employees who do not have the flexibility they need at their companies is almost twice the rate of those who do have the flexibility they need.”), available at <http://www.cvworkingfamilies.org/system/files/CVWFflexreport-FINAL.pdf> (last visited May 5, 2014).