THE CALIFORNIA FAMILY TEMPORARY DISABILITY INSURANCE PROGRAM

INTRODUCTION

On September 23, 2002, California Governor Gray Davis signed into law the Family Temporary Disability Insurance program ("FTDI").[1] Beginning July 4, 2004, the FTDI program will provide certain California workers — those non-government workers paying into a state-run disability insurance program — up to six weeks of paid leave to care for a child, an ailing parent, or themselves.[2] The California law is the first comprehensive paid family leave law in the nation, providing upwards of thirteen million California workers with up to six weeks of paid leave in order to take time off "to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child."[3] This program provides monetary benefits to California workers to care for sick family members whereas the federal 1993 Family and Medical Leave Act ("FMLA")[4] and the California Family Rights Act of 1991 ("CFRA")[5] do not. California's adoption of a

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1. 2002 Cal. Legis. Serv. Ch. 901 (S.B. 1661) (West).

2. *See id.* (providing wage replacement benefits to employees who take time off from work in order to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child).

3. *See id.*; *see also* CAL. UNEMP. INS. CODE § 3301 (West 2002).

4. *See* Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601–2654) (granting employees up to twelve weeks of unpaid family leave to care for a newborn child or for a child newly placed for adoption or foster care; or to care for an employee's child, parent, or spouse with a serious health condition; or to care for an employee's own serious health condition).

5. *See* CAL. GOV'T CODE § 12945.2 (West 1991) (making it an unlawful employment practice for an employer to refuse to grant a request made by an employee with more than one year of service with the employer, and who has worked at least 1250 hours during the previous twelve-month period, to take unpaid family care and medical leave for up to twelve weeks). However, the California Family Rights Act ("CFRA") does not consider an employee's pregnancy a serious health condition that would allow her to take CFRA leave. *Id.* CFRA was amended to conform to the FMLA. *Id.* *See also Disability Compensation: Family Members, Hearing on Family and S.B. 1661 Before the Assembly Comm. on Appropriations,* 2001-02 Reg. Sess. (Ca. 2002) [hereinafter *Assembly Disability Compensation Hearings*] (stating that the United States is one of the few developed countries in the world without a national

paid-leave requirement represents a significant step forward, since existing state and federal laws only provide workers with unpaid leave.[6]

California's FTDI program is not without its critics.[7] Despite a vigorous attempt by the business lobby to defeat the bill, the California legislature overwhelmingly passed the FTDI.[8] Although many private sector businesses of all sizes have historically opposed state or federal family leave laws, evidence suggests that paid family leave may make businesses more productive.[9] For instance, a paid leave policy can foster greater attachment to jobs on the part of employees, reducing recruitment and training costs for employers, and in turn potentially increasing employees' wages.[10]

Paid family leave represents a significant milestone in the law for all workers, but it is especially consequential for women, who are frequently the primary caregivers for children and other family members, reconciling the demands of work and family.[11] Significantly, paid family leave enables poorer women, who otherwise might not take unpaid family leave, to care for their families without forfeiting job advancement and pay.[12] California's FTDI program is a

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paid parental leave program). One hundred thirty countries have leave policies. *Id.* Just three of those countries – Ethiopia, Australia, and the United States – provide only unpaid leave. *Id.*

6. *See* 2002 Cal. Legis. Serv. Ch. 901 (providing up to six weeks of paid leave to employees under the state disability insurance program to care for a child, spouse, domestic partner, or parent); *see also* CAL. UNEMP. INS. CODE § 3301(a) (West 2002). *Cf.* 29 U.S.C. §§ 2601-2654 (granting unpaid leave only for an employee's childbirth or serious illness of an employee's dependents).

7. *See Disability Insurance: Family Members, Hearing on S.B. 1661 Before the Senate Comm. on Labor and Industrial Relations*, 2001-02 Reg. Sess. (Ca. 2002) [hereinafter *Senate Disability Insurance Hearings*] (discussing opponents' arguments against the FTDI program, which include objections to the program's application to all employers regardless of size).

8. *See* Kimberly Edds, *Calif. Adopts Family Leave: Law Mandates Time Off*, WASH. POST, Sept. 24, 2002, at A03 (noting private industry's concern about potential additional costs and regulatory burdens imposed by the California FTDI program despite a nearly unanimous vote in the state legislature to pass a paid family leave law).

9. *See* H.R. REP. NO. 8, 103d Cong., 1st Sess. 30 (1993) (finding that the FMLA economically benefits employers because workers will stay at jobs longer without losing wages or benefits).

10. *See* Edds, *supra* note 8 (finding that businesses incur long-term benefits if employees are given paid family leave because it reduces training costs, decreases turnover, and increases employee morale).

11. *See* Belinda Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 289 (2002) (discussing the rise in the number of women in the workforce to over one-half of all workers, and the disproportionate responsibility women shoulder in caring for their families).

12. *See* Michael Selmi, *Family Leave and the Gender Wage Gap,* 78 N.C. L. REV. 707, 712 (2000) (arguing that women's absence from the workplace results in a significant

significant legislative advance because it seeks to accommodate the family needs of all workers by allowing employees to take leave without sacrificing their income.[13]

I. BACKGROUND

The family leave movement has been part of the political dialogue in the United States since women entered the male-dominated workforce on a permanent basis in significant numbers.[14] Not until the 1993 enactment of the FMLA, however, did legislation address concerns that women were shouldering an unequal burden in the home despite their active participation in the workforce.[15] Although the FMLA only met the needs of one-half of all eligible parents who can afford to take unpaid leave, it provided some parents — usually parents with the financial means to have one parent at home — with the job flexibility necessary to care for their families.[16]

Prior to the passage of the FMLA, an employee who had to take time away from work to care for a small child or an ailing parent would have risked having to quit his or her job or face termination.[17] This has been a problem for members of the "baby boom" generation in particular, many of whom must care for young children while simultaneously caring for an aging parent.[18] The proportion of Americans over age sixty-five is increasing, and consequently, the

disadvantage with respect to salary, promotions, and responsibility, and that if men take more leave around the birth of their children, then workplace equality will be achieved).

13. *See, e.g.*, *Senate Disability Insurance Hearings*, *supra* note 7 (discussing the importance of paid family leave for those families whose wage-earners cannot otherwise afford to take time off from work).

14. *See* MARILYN P. WATKINS, ECONOMIC OPPORTUNITY INSTITUTE, BUILDING WINNABLE STRATEGIES FOR PAID FAMILY LEAVE IN THE STATES 3 (2002) (finding that in 1976, only 31% of mothers of infants had jobs outside the home, but by 1998, 73% of mothers with children between the ages of twelve months and eighteen years, and 59% of mothers of infants, were in the workforce).

15. *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, 40-42 (1994) (noting that the FMLA was the first major piece of legislation to address the competing pressures on women from family life and the workplace).

16. *See* 29 U.S.C. § 2611(2)(A) (defining eligible recipients of unpaid family leave as those who have worked in the same place of employment for at least twelve months, and who have worked 1250 hours during the previous twelve months).

17. *See, e.g.,* ARINDRAJIT "ARIN" DUBE & ETHAN KAPLAN, LABOR PROJECT FOR WORKING FAMILIES, PAID FAMILY LEAVE IN CALIFORNIA: AN ANALYSIS OF COSTS AND BENEFITS 12 (2002) (finding that paid leave policies affect how low-income parents make decisions about whether to participate in the labor force), *available at* http://laborproject.berkely.edu/publications/research/dube.pdf.

18. *See* Lenhoff & Withers, *supra* note 15, at 40 (noting that one of the major provisions of the FMLA guarantees leave for care of an employee's parent with a serious health condition).

number of older adults requiring care has been getting larger and will continue to grow.[19] Further, more than twenty-one million households are now providing elder care as well as child care.[20]

FTDI responds to the growing demands of workers' responsibilities to employers and the competing needs of family members, such as a newborn child or aging parent.[21] The law states that "it is in the public benefit to provide family disability insurance benefits to workers to care for their family members."[22] The FTDI program is also a response by the State of California to the growing number of working women and single parents who are one paycheck away from poverty.[23] The California law responds to this potential problem by providing workers who are financially unable to take unpaid leave under the FMLA with six weeks of paid leave.[24]

Employee payroll deductions administered through California's State Disability Insurance system (averaging $70 per employee per year) will fully fund the FTDI program.[25] Businesses will not have to pay into the system under the FTDI program provisions.[26] Only workers paying into a state-run insurance program will be eligible for paid family leave, and state government workers are exempt because they are covered under a separate self-insurance program.[27]

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19. *See* WATKINS, *supra* note 14, at 3 (reporting that the workforce and the population as a whole are aging, and a larger proportion of elderly Americans are being cared for by their children).

20. *See id.* (citing a Department of Labor study finding that more than four million households spend at least forty hours per week caring for an elderly parent and that the numbers will continue to rise).

21. *See, e.g.*, DUBE & KAPLAN, *supra* note 17, at 5 (reasoning that California's family temporary disability insurance program is necessary because many individuals currently turn to these programs when taking unpaid leave causes them financial hardship).

22. 2002 Cal. Legis. Serv. Ch. 901; *see also* CAL. UNEMP. INS. CODE § 3300 (West 2002).

23. *See, e.g.,* DUBE & KAPLAN, *supra* note 17, at 17 (reporting that 76% of parents in the bottom 20% of the income distribution receive no paid sick leave, 58% receive no vacation leave, and 54% lack both vacation and sick leave). One way to improve child health is to provide paid leave to poor families. *Id.*

24. *Compare* 2002 Cal. Legis. Serv. Ch. 901 § 3301 (providing up to six weeks of paid leave to employees), *with* 29 U.S.C. § 2611(2)(A) (mandating that all employees with a minimum of 1250 hours tenure with an employer with over fifty employees be provided twelve weeks of unpaid leave).

25. 2002 Cal. Legis. Serv. Ch. 901; *see also* CAL. UNEMP. INS. CODE § 3300 (West 2002).

26. *See* EMPLOYMENT DEV. DEP'T, STATE DISABILITY INSURANCE, FAMILY TEMPORARY DISABILITY INSURANCE PROGRAM, FAQ 2002 (last visited Feb. 10, 2003) (stating that California's FTDI program is fully funded through employees' contributions), *available at* http://www.edd.ca.gov/diflatx.htm.

27. 2002 Cal. Legis. Serv. Ch. 901; *see also* CAL. UNEMP. INS. CODE § 3303 (West 2002).

The law requires workers to use up to two weeks of vacation time for family emergencies, and limits benefits to a maximum of $728 per week.[28] The law provides for a one-week waiting period before workers can apply to the program.[29] Payments are capped at six weeks over a twelve-month period and at 55% of an employee's wages, up to an annually-adjusted maximum.[30] Compared to the federal and California state unpaid family leave laws, FTDI does not require small businesses with fewer than fifty employees to hold a job open for a worker on leave, therefore giving little job security to employees of smaller private businesses.[31]

FTDI is unique because it is administered through the state's disability insurance program rather than through a special fund.[32] California is one of five states to offer a non-occupational disability insurance program — leave insurance for time off not resulting from a workplace injury.[33] Instead of merely providing a separate fund for workers or requiring employers to contribute to a special fund, the FTDI program will be a component of the state's unemployment compensation disability insurance program, and will be administered in accordance with the policies of the state disability insurance program.[34]

II. ANALYSIS

A. *FTDI Expands Family Leave as We Know It*

FTDI covers many workers who are not covered by the FMLA because the FMLA left more than one-half of the national workforce ineligible for family leave benefits.[35] The FMLA specifically exempts

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id. Cf.* 29 U.S.C. § 2611(4)(A)(i) (requiring family leave policies only for employers with more than fifty employees).

32. 2002 Cal. Legis. Serv. Ch. 901.

33. *See* California Sen. Comm. on Labor and Industrial Relations, May 14, 2002; Senate Bill No. 1661, 2001-2002 Regular Session (stating that Rhode Island, New Jersey, New York and Hawaii are other states providing workers with non-occupational disability insurance). *See also* R.I. GEN. LAWS § 28-41-8 (2001), HAW. REV. STAT. § 392-21(2) (2002), N.Y. LABOR LAW § 591 (2002), N.J. STAT. ANN. § 43:21-5, *amended by* ch. 90, § 12 (1980) (providing partial wage replacement for workers unable to work due to a temporary disability unrelated to their job, including women unable to work because of pregnancy).

34. 2002 Cal. Legis. Serv. Ch. 901 (expanding the population of eligible claimants to those who need to care for a family member).

35. *See* DAVID CANTOR ET AL., U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE 2-14

from its provisions private sector employers with fewer than fifty employees, and excludes from benefit eligibility workers who have worked less than twelve months at their current place of employment, and average fewer than twenty-four hours per week at that job.[36]

Unlike the FMLA, the FTDI covers employees regardless of the size of their employer, thus providing coverage for almost one-half of those workers who are not covered under the FMLA.[37] More important for working class families is the provision stating that eligibility for California's paid family leave is based on the earnings shown in a worker's base period and not on a specific number of days or months worked, thus making it easier for claimants to get the paid family leave that they need.[38]

Businesses with fewer than fifty employees do not have to comply with FMLA requirements, but California's FTDI program covers employees regardless of the size of the employer.[39] There is no added burden on small businesses, because FTDI funding derives solely from employee contributions.[40] Since the number of households caring for an elderly parent has tripled in the past fifteen years, the number of women in the workforce with young children has increased, and the proportion of single-parent households has doubled, paid family leave is not just a luxury, but a necessity for most working families.[41]

Despite FMLA's limitations, it placed family leave at the top of the national policy agenda.[42] Consequently, states, including California,

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(2001) (finding that fewer than one-half of workers are able to take advantage of unpaid family leave provided under the FMLA), *available at* http://www.dol.gov/asp/fmla/toc.htm.

36. *See* 29 U.S.C. §§ 2611(2)(A)(i)-(ii) and 2611(4)(A)(i).

37. *See* John M. Broder, *Paid Family Leave OK'd for California Workers*, CHI. TRIB., Sept. 24, 2002, at 12 (stating that California's new family leave law does not exempt any businesses from its application).

38. *See* 2002 Cal. Legis. Serv. Ch. 901 § 3301(b) (providing payments based on wages earned approximately five to seventeen months before the beginning of the worker's family temporary disability insurance claim); *see also* CAL. INS. CODE § 2655 (West 2003).

39. *See* 29 U.S.C. § 2611(4)(A)(i); *see also* 2002 Cal. Legis. Serv. Ch. 901.

40. *See* 2002 Cal. Legis. Serv. Ch. 901 (outlining the wage contributions that employees are required to make under the FTDI program); *see also* CAL. UNEMP. INS. CODE § 984 (West 2002).

41. *See* Lenhoff & Withers, *supra* note 15, at 51 (concluding that family and medical leave will eventually be considered fundamental to an employee's working environment because households are having to shoulder more caregiving to family members).

42. *See, e.g.,* Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993,* 42 WM. & MARY L. REV. 1507, 1522 (2001) (discussing how the FMLA was heralded as a "turning point after which working parents would no longer have to worry about taking maternity or

are providing a growing number of parents with paid family leave options. In some cases, paid leave provides parents a way to meet both their family obligations and work responsibilities without being penalized on either front.[43]

Paid family leave is particularly important for lower income parents, who work paycheck to paycheck and have difficulty paying for daycare or health-related care. For many employees, financial constraints are likely to result in shorter family leave.[44] These financial constraints affect about 25% of all leave takers.[45] In fact, there is a strong correlation between the length of leave individuals take to care for family and whether they received pay. Studies indicate that family "leaves would be 50% longer for those currently taking unpaid leaves were these individuals to have the same access to paid leave as those who are taking paid leaves today."[46]

Financial constraints continue to be a burden on all families, especially those families headed by a single mother.[47] The proportion of single-parent households in the United States has doubled over the past three decades, and the "proportion of employed single mothers has increased from 53% in 1969 to 66% in 1996."[48] Eighty percent of single parents are women, placing them in a precarious financial situation because they are the sole breadwinners and primary caregivers.[49] Moreover, many single mothers, between 1996 and 2000, were removed from the Temporary Assistance to Needy Families program ("TANF"),[50] and entered low paying jobs with few

paternity leave"). Since its implementation, FMLA has achieved its goals in many areas. *Id.* However, there is still much that needs to be accomplished to give parents greater flexibility in caring for children or aging parents. *Id.*

43. *See, e.g., id.* at 1523-24 (stating that unpaid leave is still problematic for parents who want to take time off from work to spend with a newborn child, because such leave only provides family and job security "for those families who can afford to lose at least one income for a three month period").

44. *See* DUBE & KAPLAN, *supra* note 17, at 27 (asserting that evaluating "financially constrained" families provides better insight into whether or not paid leave affects the length of family leave parents take).

45. *See id.*

46. *Id.* at 28.

47. *See* WATKINS, *supra* note 14, at 4 (asserting that women's wages stagnated or fell to 80% of those of male wage earners between 1973 and 1995).

48. *Id.* at 3.

49. *See id.* (concluding that few working women have much time in their daily schedule to provide additional care to family members who are ill, without reducing their hours at work).

50. *See* Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 408(a)(1)(B), 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C.) (explaining that federal Temporary Assistance to Needy Families ("TANF") benefits will cease after sixty months of receipt).

or no family benefits that might help them balance work and family commitments, and successfully negotiate the transition from public support to work.[51]

B. Opponents of Paid Leave Assert Concerns over FTDI Costs

Opponents of California's FTDI program assert that it will have potentially catastrophic effects on the economy of California.[52] The most virulent opposition comes from the business community, which predicts an increase in worker absences, workers fraudulently filing for paid leave, and increases in the cost of seeking temporary replacements.[53] Some businesses balk at the perceived expense of providing paid leave even though the FTDI program is fully funded by employees' contributions in a manner similar to the state's disability insurance program.[54] Private employers are also concerned about the potential for abuse, because they claim existing family leave laws are already abused by workers, and they fear paid leave law may encourage workers to take advantage of yet another government entitlement.[55]

The FTDI program imposes safeguards to prevent worker fraud.[56] It prosecutes those who falsely certify the medical condition of someone in order to obtain paid leave and those who provide a false written statement in support of a claim for leave.[57] If the employee is

51. *See* WATKINS, *supra* note 14, at 4 (finding that today's working mothers spend just as much time each day with their children as non-working mothers did in the 1960s – but they spend considerably less time sleeping, engaged in leisure activities, and housework).

52. *See, e.g.,* Broder, *supra* note 37, at 12 (reporting that business interests assert that paid leave will drive jobs away, because it allows virtually any worker to take as much as six weeks paid leave to cope with a family emergency).

53. *See* Lisa Girion & Megan Garvey, *Davis OK's Paid Family Leave Bill Benefits: Governor Wins Praise from Advocates and Strong Criticism from Business Groups*, L.A. TIMES, Sept. 24, 2002 at B1 (relating that the business lobby argues that a paid family leave policy will invite employee abuses).

54. 2002 Cal. Legis. Serv. Ch. 901 (stating that paid leave would provide disability compensation for an individual who is unable to work due to the employee's own sickness or injury, the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child, and would be funded by additional employee contributions to the state Disability Fund).

55. *See, e.g.,* Girion & Garvey, *supra* note 53 (citing the small-business community's concern that some employees already abuse the federal law granting unpaid leave for births and family sick care, and that paid leave will encourage more employees to lie or skirt the rules to obtain generous benefits).

56. *See* 2002 Cal. Legis. Serv. Ch. 901 (stating that the family temporary disability insurance benefits program conforms with existing law requiring recipients to certify the medical condition to obtain disability benefits); *see also* CAL. UNEMP. INS. CODE § 2116 (West 2002).

57. *See* 2002 Cal. Legis. Serv. Ch. 901 (discussing the enforcement of criminal sanctions on recipients of family temporary disability insurance benefits who

found to have falsely certified a medical condition in order to obtain the family disability insurance benefits, the Director of Employment Development will penalize the employee.[58] While no program providing benefits will be entirely devoid of fraud, the law addresses these issues.

Some businesses, especially small businesses, take particular exception to the absence of a "length of service requirement."[59] In short, any worker, permanent, temporary or otherwise, will be able to take six weeks off.[60] This could place businesses in the position of having to incur more tangential costs.[61] These costs may include overtime when other workers are asked to pick up the slack caused by absent workers, costs for replacement workers, additional training costs for temporary employees who replace those workers on leave, as well as the "lost productivity and service due to a worker's extended absence."[62] Employers argue that sick leave benefits, personal days, and vacation days are currently the most common methods used for "financing" leaves, and that paid family leave will just encourage more worker absences.[63]

However, some estimates suggest that FTDI will result in long-term financial savings for employers and the state of California.[64] For example, California companies could save $89 million under a paid family leave program due to "increased retention and decreased

knowingly present false statements in support of a claim for benefits).

58. *See id.* (stating that if the Director of Employment Development finds that any individual falsely certifies the medical condition of any person in order to obtain family temporary disability insurance benefits, with the intent to defraud, whether for the maker or for any other person, the director shall assess a penalty against the individual in the amount of 25% of the benefits paid as a result of the false certification); *see also* CAL. UNEMP. INS. CODE § 3305 (West 2002).

59. *See* 2002 Cal. Legis. Serv. Ch. 901 (stating that the family temporary disability insurance program is made available to all of the employees of the employer employed in this state or to all employees at any one distinct, separate establishment maintained by the employer in California); *see also* CAL. UNEMP. INS. CODE § 3254 (West 2002).

60. *See* 2002 Cal. Legis. Serv. Ch. 901 (stating that employees, in part-time or other forms of short-term employment as well as those in full-time employment, will be able to utilize the family temporary disability insurance program).

61. *See* Edds, *supra* note 8 (arguing that California businesses are already financially disabled by high energy costs, overtime calculated on an eight-hour workday, not a forty-hour week, and high worker compensation costs, making it harder for the state to attract and retain businesses).

62. *See* DUBE & KAPLAN, *supra* note 17, at 13-14.

63. *See id.* at 23 (reporting that between 63% and 68% of leave takers get some pay from the use of vacation, personal days, or sick leave).

64. *See id.* at 12 (finding that the State of California could save millions of dollars under a paid family leave program due to a decrease in the number of public assistance recipients, including TANF, renter's assistance, and Medicaid).

turn-over."[65] Additionally, California "stands to save $25 million annually due to decreased reliance on assistance programs, including TANF and Food Stamps."[66] Because FTDI gives workers an incentive not to leave their jobs, paid leave is more likely to provide employees and the California state government with financial savings rather than losses.[67]

CONCLUSION

In the near future, paid family leave will likely be considered a fundamental part of an employee's work benefits. As workplaces accommodate family needs, employees have an increased incentive to become more productive and loyal to their employers. Parents, regardless of income, will be able to stay home and care for a sick child, spouse or parent without fear of losing their job or having to quit. The FTDI provides hope that, perhaps someday, there may be a federal paid family leave law to help every family in need.

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65. *Id.* at 5.

66. *Id.*

67. *See id.* at 12 (reporting that to the degree that low-income parents know that they can use paid family leave, having a paid family leave policy may impact their decision to participate in the labor force at all).