



Who Pays for My Time Off? The Costs and Consequences of Government-Mandated Leave

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Introduction

Balancing the demands of work and family life can be a challenge for any worker. Events such as severe illness or the birth of a child can make working outside the home impossible. People overwhelmingly sympathize with those facing these challenging situations and want society to support such individuals during difficult times.

In recent decades, however, the question has turned not to how civil society can support individuals in times of need, but to how the federal government can dictate how employers must accommodate employees facing these situations. Existing laws require that large employers allow qualified employees to take unpaid leave when facing such circumstances. Some policymakers want to expand these regulations so that they apply to smaller employers and to mandate the availability of additional benefits, such as paid leave.

This paper examines the Family and Medical Leave Act, which mandates that businesses provide unpaid leave to their workers, and considers some of the problems associated with its application. It will also consider the potential consequences of expanding these regulations.

This paper highlights how private entities are voluntarily providing leave benefits and considers ways that policymakers can further encourage businesses and individuals to take actions that will make it easier for individuals in need of leave, without costly government mandates.

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The Background of the Family and Medical Leave Act

President Clinton signed the Family and Medical Leave Act (FMLA) into law on February 5, 1993, hailing its passage as a victory for families in need: “Today, I am pleased to sign into law H.R. 1, the ‘Family and Medical Leave Act of 1993.’ I believe that this legislation is a response to a compelling need—the need of the American family for flexibility in the workplace. American workers will no longer have to choose between the job they need and the family they love.”¹

Under this law, employees who meet eligibility requirements are allowed to take up to twelve weeks of unpaid leave during a twelve-month period for reasons related to personal illness, family illness, or the birth or adoption of a child. Employers are required to maintain provided health benefits while employees exercise their right to leave and to allow employees to return to their original job or a comparable position free of any retaliation or loss of job stature.

For employees to be eligible to take this leave, they have to have worked for an eligible employer for a minimum of twelve months and for at least 1,250 hours in the twelve months prior to taking FMLA leave. FMLA applies to private sector employers of fifty or more employees, as well as public agencies and entities.²

The law specifies the circumstances in which employees become eligible to take leave under FMLA: for the birth of a child of the employee and to care for the newborn; the adoption (or fostering) of a child and to care for the newly placed child; to care for a spouse, parent, son or daughter under age eighteen with a serious health condition; or, for the employee’s own serious health condition. Employees are allowed to choose to use accrued paid leave (vacation, personal, or family leave) for FMLA leave. Employers may also require that employees use these voluntary leave programs for FMLA leave.

If employees feel that their employer has failed to live up to the FMLA requirement, employees can file a complaint with the Department of Labor (DOL) or file a private lawsuit. The DOL was the agency responsible for promulgating the regulations to implement the law.

According to the DOL, 76.1 million workers (or 54 percent of the total 141.7 million workers) were eligible for FMLA leave and 6.1 million workers took FMLA protected leave in 2005.³



Problems with the Existing FMLA Regulations

Those who believe in a limited federal government criticize FMLA as an improper use of federal power. In its essence, FMLA restricts the employment terms that can be offered and accepted by adults. This constitutes a loss of liberty for individuals.

However, putting aside the issue of whether regulations like FMLA are a proper use of government power, there are other problems associated with FMLA's specific terms and enforcement that create challenges for employers and should concern policymakers.

DOL has collected feedback from those affected by FMLA, including employers, administrators, and employees. Employers' complaints have generally focused on a few specific aspects of the law and, more specifically, of the regulations. DOL notes that employers generally "recognize the value of the FMLA and attempt to comply with its requirements." DOL has not received complaints related to "leave for the birth or adoption of a child" or "the use of scheduled intermittent leave as contemplated by the statute, such as when an employee requests leave for medical appointments or medical treatments like chemotherapy." However, employers report "job disruptions" and "adverse effects on the workforce" resulting "when employees take frequent, unscheduled, intermittent leave from work with little or no advance notice to the employer."⁴

In surveys conducted by the Society for Human Resource Management (SHRM), half of the human-resource professionals responded that they had had to approve leave that they believe was unjustified. One-third also responded that they had received complaints from their employees about co-workers' abuse of FMLA.⁵ Two-thirds of respondents said that because of FMLA they had to keep employees who would have been fired because of poor attendance.⁶

While the majority of employers said that FMLA did not have a noticeable effect on their establishment's overall performance, in terms of productivity, profitability, and growth, of those employers that thought it did have an effect, two to three times as many thought the effect on their business's performance had been negative.⁷

Most complaints from employers center on the following issues:

Definition of "Serious Health Condition"

Many employers indicate that there is confusion about what constitutes a "serious health condition" under FMLA. And, indeed, DOL's own definition of "serious health condition" has changed while the law has been in effect.⁸

The first regulations promulgated by DOL specified that unless there are complications, many common conditions (such as the common cold, influenza, earaches, upset stomach, minor ulcers, headaches, and so forth) are not considered

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“serious health conditions” that trigger FMLA protection. However, DOL later revised its position expressing that if such conditions lasted for three days then they meet the threshold of “serious health condition” under FMLA.⁹

Employers can request employees provide documentation from a doctor or a medical professional supporting their claim of having a serious medical condition. According to DOL, employers, healthcare representatives, and employees complain that this can be a burdensome process.¹⁰

Timing of Leave

Employees exercising FMLA leave are allowed to take leave intermittently. According to regulations promulgated during the Clinton administration, employers are required to account for leave in the shortest increment used in their payroll system for leave and must account for time taken by the hour or less. When possible, employees are supposed to work with employers to schedule their leave in order to minimize disruptions in the workplace.¹¹

An estimated twenty percent of FMLA leave was taken intermittently in 1999–2000, according to DOL.¹² Employers complain about the burden and difficulty of keeping track of these short periods of leave.¹³

In addition to creating an administrative burden for employers, co-workers also often take on additional responsibilities when FMLA leave is exercised. Surveys suggest that overwhelmingly the FMLA leave-takers’ workplace responsibilities are shifted to co-workers.

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Leave Notification

While employees are supposed to provide employers with advanced warning of the need for FMLA leave whenever possible, under the law, employees can report unanticipated leave “as soon as practicable.” DOL has interpreted “as soon as practicable” to mean within one to two business days of the incidence of the leave. In other words, employees may take a day off for an FMLA purpose, but not explain this absence to their employer for up to two days after not appearing at work.¹⁴

According to human-resource professionals responding to the SHRM’s survey, less than half of those who used FMLA leave scheduled leave in advance.¹⁵ For employers, the potential problems associated with this provision are clear: it makes it very difficult to plan for unscheduled absence, enforce attendance, and properly account for leave.

Clarifying Existing Regulations—A First Step to Improving FMLA

DOL could ease the burden on employers who administer FMLA by further clarifying employers’ responsibilities related to these provisions. For example, DOL could provide



additional guidance to clarify the situations in which ailments reach the threshold of constituting a “serious health condition,” and ideally this clarification would be returning the law’s application more toward Congress’s original intent.

DOL could also consider tightening notification requirements or specifying in what instances it is acceptable to inform an employer of FMLA leave *after* the leave has occurred (such as during a health emergency requiring hospital treatment) and when an employee must make an employer aware of leave during the incidence of leave (such as when an employee can easily contact the employer by phone).

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Calls for Expanded Government-Mandated Leave

Increasingly, policymakers are calling for expanding government mandates for employer-provided leave. For example, in this Congress, Senator Teddy Kennedy (D-MA) and Representative Rosa DeLauro (D-CT) introduced, “The Healthy Families Act,” which would require that all employers with fifteen or more employees provide full-time workers with seven days of paid leave for their own illness or a family member’s illness and part-time workers (who work at least 20 hours per week or 1000 hours annually) pro-rated paid leave. Senator Christopher Dodd (D-CT) has called for creating at least six weeks of paid leave and expanding FMLA to apply to employers with fewer workers.¹⁶ These proposals would entail significant costs for businesses.

The Costs and Potential Consequences of Mandated Paid Leave

Providing employees with paid leave creates costs for business. During the employees’ absence, businesses must replace those workers or shift their responsibilities to other employees, resulting in lost productivity. While proponents of expansion would likely highlight that most businesses report that FMLA has had a negligible effect to their bottom line, including productivity, there is reason to assume that a paid leave program would have a greater effect on business.

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Workers are more likely to utilize a paid leave benefit than an unpaid leave benefit since the loss of income in the unpaid leave program provides a deterrent to taking leave. So in addition to employers who had not previously provided paid leave facing the additional cost of having to pay absent employees because of this mandate, they would also likely find an increase in the number of absences and greater disruption in the workplace.

The increase in mandated benefits raises the costs associated with hiring an employee. In recent years, benefits have constituted a growing portion of employees’ total compensation. As of 2006, more than 30 percent of the average worker’s total compensation was paid as benefits.¹⁷ That means employees see less of their compensation in their paychecks. A new mandate increasing benefits will likely mean that workers’ take-home pay will be lower than it would have been otherwise been, as a greater share of total compensation becomes dedicated to providing these benefits.

If the cost of hiring a worker increases, businesses will have an incentive to hire fewer workers or to outsource jobs to countries where businesses do not have to provide costly benefits. This could mean a loss of job opportunities in the United States, particularly for employees whose job responsibilities can be fulfilled from alternative locations.



The Impact on Small Businesses

The problems experienced by larger employers implementing FMLA would be magnified for smaller companies if they become subject to the law. While an employer of fifty or more employees may be able to shift work from the FMLA-leave taker to co-workers without meaningfully affecting productivity, an organization with just 15 employees would have a more difficult time picking up the slack left by an absent worker, particularly when such a significant portion of leave taken under FMLA is unscheduled.

Small businesses often are more financially vulnerable and will be less able to assume the additional costs of administering and paying for these benefits. Small businesses have been an engine of job growth in recent years, but that could be slowed by imposing costly new mandates.

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Solving the Problem of the Need for Paid Leave without Government Mandates

Government mandates are not the only way to address the need for individuals to be able to take and sustain themselves during periods when they cannot work.

Most Employers Voluntarily Provide Leave Packages

Many employers already provide leave packages that are in excess of government requirements. According to DOL, in 2006, 82 percent of the 105 million American workers in the private sector had access to some sort of paid leave, whether it is sick leave, vacation, or personal leave.¹⁸ Not surprisingly, full-time workers were much more likely to have access specifically to paid sick leave than part-time workers (nearly 70 percent of full-time workers had paid sick leave, compared with 20 percent of part-time workers).¹⁹ A DOL survey found that roughly two-thirds of those who took FMLA leave received some compensation, primarily through the employers' paid sick leave plan. Seventy percent of those leave-takers who received compensation received their entire paychecks while they were on leave.

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Unfortunately, regulations like FMLA can deter companies from providing or expanding paid leave programs. As the SHRM executive director testified before the Oregon state legislature:

Companies which have voluntarily provided paid leave prior to the enactment of the FMLA have had dramatic increases in absenteeism rates and have had more problems with workers providing little or no notice for unscheduled and unplanned intermittent leave pursuant to ongoing or chronic conditions, some of which are questionable under conflicting legal interpretations. . . . Unfortunately, FMLA misapplications have penalized employers with the most generous leave policies and had a chilling effect on the expansion of paid leave.²⁰

Addressing the problems with FMLA's application and enforcement may encourage more companies to voluntarily provide paid leave.

Greater Workplace Flexibility

A growing number of employees also enjoy more flexible work schedules and work arrangements. For example, telecommuting was rare a decade ago, but today more than four million Americans telecommute most days and an estimated twenty million telecommute at least once a month.²¹ Women are more likely than men to telecommute—2.2 million women worked from home in 2000.²² Telecommuting provides employees with many advantages, including greater flexibility to care for personal and family needs during the day.



Many workers also have flexible worker schedules, according to the Bureau of Labor Statistics. As of May 2004, 27 million full-time wage and salary workers—or 27.5 percent of all full-time wage and salary workers—worked in arrangements that allowed them to vary their work start and end times.²³ These flexible arrangements make it easier for workers to schedule and make time for important personal duties, such as taking care of personal and family healthcare needs, and other parenting duties, such as participating in educational meetings.

The voluntary move toward greater flexibility signals an important shift in businesses' expectations for their workers: a growing number of businesses are evaluating employees based on output and productivity instead of work hours. It demonstrates that many businesses recognize that flexibility can be a win-win for employers and employees.

Encouraging Private Saving to Provide for Family Leave

While many businesses are providing leave voluntarily, a significant portion of the workforce continues to work in jobs that do not provide provisions for leave. Proponents of expanded government mandates point to these individuals as justification for government action.

Ideally, however, the government shouldn't be involved in encouraging companies or individuals to prepare for periods when individuals are unable to work. All individuals know that they face the potential for problems: severe illnesses can strike employees or their family members, and the birth of a child or the introduction of a new member into the family requires time away from work. Responsible individuals should plan for such circumstances, accruing savings while working so that they can sustain themselves if and when they cannot work for pay. The federal government is not supposed to be our national caretaker.

The federal government should, however, not act as an impediment to responsible actions such as private saving. Unfortunately, the government today does just that by continuing to place onerous taxes on income generated by private savings. When an individual uses after-tax dollars to purchase a new television, they do not have to then pay a tax every time they watch a program. But when an individual puts money in a savings account or buys a stock, the federal government does tax the income it generates. The double taxation of savings and investment encourages consumption and discourages saving, leaving individuals less prepared to make ends meet during a time of crisis. Policymakers should eliminate the double taxation of savings as a first step to encouraging greater individual responsibility and to help individuals provide for themselves in times of need.

While the federal government creates impediments to many forms of savings, it has embraced measures to encourage individuals to save for specific foreseeable needs and expenses. For example, the federal government has created tax-advantaged savings accounts for retirement, educational expenses, and healthcare costs. Similar efforts could be made to encourage individuals to save to provide for periods of leave. For example, individuals could

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be allowed to put \$5000 per year into a “Paid Leave” savings account tax-free that could then be accessed when an individual takes unpaid, or partially paid, leave. Regulations could require that those funds can only be accessed without tax penalty in specific situations, such as to address a serious illness or for the birth or adoption of a child. Unused funds could then be accessed without a tax penalty once the individual reaches retirement age.

In addition to providing tax incentives to encourage individuals to contribute to “Paid Leave” savings accounts, the federal government could provide additional incentives for businesses to match employees' contributions. The downside of such a policy is that businesses would have an incentive to divert other forms of non-tax advantaged compensation into contributions to “Paid Leave” savings accounts. Employees would likely have less take-home pay as a result. However, such a policy would be preferable to a government mandate on business to provide paid leave directly.



Conclusion

There are situations when individuals need time off from their jobs. While it is tempting to address this legitimate need through government action, there are significant costs to doing so. In the years that FMLA has been in force, many businesses have struggled to make sense of the regulations and have had to bear increased financial and administrative burdens to comply with this law. DOL could help ease the burden of existing regulations by providing some much needed clarity to some of the laws' provisions.

Today there are calls for an expansion of government mandates, including paid leave and expanding FMLA to apply to smaller businesses. These measures would have significant costs for businesses and could have the unintended consequence of making job opportunities scarcer.

There are other ways for policymakers to help individuals sustain themselves during times of leave. First, the federal government ought to stop penalizing savings. Currently, the government discourages individuals from taking the responsible action of setting aside income that can be drawn upon during a period when they cannot work. In addition to ending destructive anti-savings tax policies, policymakers could explore programs that encourage savings specifically to provide for leave. Policymakers have already created tax-advantaged savings vehicles for retirement, health expenses, and education costs, so they could create a similar initiative to deal with situations that require leave.

The primary goals of any government action should be to encourage individuals to provide for themselves and to avoid creating costly mandates that will be a drag on the economy and reduce job opportunities for Americans.

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VERIZON: A CASE STUDY OF THE UNINTENDED CONSEQUENCES OF THE CURRENT FMLA REGULATIONS²⁴

Verizon Communications prides itself on being an employer that offers its employees generous benefits. In 2006, *Working Mother Magazine* named Verizon Wireless and Verizon Communications one of the 100 best companies for working mothers. Verizon offers employees paid sick leave, short-term disability plans, long-term disability plans, and programs specifically for the addition of a child into the family. However, Verizon has also experienced significant problems related to the implementation of FMLA. It provided a detailed description of those problems to DOL in response to DOL's request for information.

According to Verizon, the number of days of absence per employee has tripled since FMLA was implemented. Approximately 90 percent of all FMLA leave time taken (more than one million days in 2006) by Verizon employees was for the employee's own medical condition. Much of those FMLA days are taken as paid leave. Verizon faces additional expenses including paying overtime and for temporary help to make up for those absences, and the administrative burden associated with tracking this leave. All together, Verizon estimates that FMLA absences cost the company close to \$300 million in 2006.

Verizon's experience highlights the potential for overuse and abuse of FMLA. In 2006, 44 percent of the 370 employees in Verizon's Florida Network Centers division had an intermittent FMLA certification. In Verizon's Domestic Telecommunications sector, 70 percent of FMLA leave was taken in one- or two-day absences, which calls into question if these ailments truly reached what Congress intended by a "serious health condition." Verizon notes that ailments such as stress, anxiety, headaches, and back pain are often cited as reasons for FMLA leave. Patterns of employee absences, such as an employee taking their full FMLA leave upon reaching eligibility, and then having a perfect attendance until the following year when their leave became available once again, suggest abuse. FMLA leaves Verizon with little ability to investigate or challenge instances of abuse, which is why Verizon, a supporter of the FMLA concept, urges DOL to reform FMLA regulations.



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