Giving and Taking Family Leaves: Right or Privilege?

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ABSTRACT: After briefly outlining the contents of the Family and Medical Leave Act (FMLA) and its history, this Article examines four research questions. Two of the questions address the utilization of family leave: 1) how many workers take family leave and 2) which workers take family leave. The others address the implementation of leave: 3) how many employers comply with the FMLA and provide leave and 4) which employers comply with the FMLA and provide leave. To address the first two questions, we use the Commission on Family Leave data on the FMLA to show that the Act bolsters gender inequality in caregiving at the same time as it exacerbates inequalities by marital status, sexuality, race, and class. In doing so, it reinforces a narrow model of families practiced primarily in white, affluent, heterosexual marriages. To further examine the extent to which gender and class shape leave-taking, this Article relies on a qualitative study we conducted using intensive interviews and observations. We show that middle-class women (nurses) are more likely to take the leave provided by the FMLA than working-class women (nurses’ aides) while working-class men (Emergency Medical Technicians) are more likely to take leave than middle-class men (physicians) and argue that this highlights the intersection of gender and class in shaping caregiving and responses to the FMLA. Finally, to answer the last two questions, we use the Families and Work Institute’s National Study of Employers to show that between one-quarter and one-half of employers do not comply with the FMLA. These tend to be small employers whose workforces are not unionized and include fewer women and hourly workers. We conclude by suggesting that the ability to take care of family members is a luxury and that the FMLA ensures caregiving remains a privilege rather than a right.

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I. INTRODUCTION

This year the Yale Symposium "Respecting Expecting: Celebrating the 30th Anniversary of the PDA" celebrated not only the thirtieth anniversary of the passage of the Pregnancy Discrimination Act (PDA) but also the fifteenth anniversary of the Family and Medical Leave Act (FMLA).\(^1\) The 1978 PDA required that maternity leave be covered under the provisions of any existing temporary disability leave policy. Following years of political pressure, the FMLA of 1993 moved well beyond the PDA. The FMLA mandated that employers provide up to twelve weeks of unpaid leave for employees' personal illness (maternity disability and workers' own serious medical conditions) and family caregiving responsibilities (including care of a newborn or newly adopted child or care of seriously ill children, spouses, or parents). The FMLA ensures the right to the continuation of benefits throughout the leave and restoration to the same job or an equivalent position following leave.

A. Background: The Politics of Gender Neutrality and Family Friendliness

Many legal experts, political scientists, and advocates have written the story of the unfolding politics and judicial interpretations of the FMLA. Here we provide a brief summary of that political process as context for our discussion of the triumphs and limits of the Act on the ground.\(^2\) First


\(^2\) For discussions of the political process leading to the passage of the FMLA summarized in this section, see RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 49 (1995); Chai Feldblum & Robin Appleberry, Legislatures, Agencies, Courts, and Advocates: How Laws
introduced in 1985, the Act was twice vetoed by George H.W. Bush and fiercely opposed by business interest groups. Advocates for the bill included members of Congress, led by Senator Christopher Dodd (D-CT) and former Congresswoman Patricia Schroeder (D-CO), to whom Dodd gives credit for conceptualizing the Act, as well as Marge Roukema (R-NJ), who pushed to expand the Act to cover care of the elderly while limiting the Act's scope to employers with at least fifty employees. The Women's Legal Defense Fund (now the National Partnership for Women and Families) along with unions like the United Auto Workers (UAW), 9 to 5, the Coalition of Labor Union Women (CLUW), and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) (represented by Judge Berzon in its strategy sessions) provided critical support for the passage of the Act by testifying before hearings and lobbying Congress. They worked hard: A version of the Act was introduced in every Congress between 1985 and 1993. After a decade of political negotiation, President Clinton proudly claimed it as the first bill he signed into law after his inauguration in 1993.

Though recognizing the compromises made along the way (for example, in the length of leave, the size of companies required to provide leave, and the fact that the leave provided was unpaid), many advocates hailed the passage of the Act. While the PDA was limited to pregnancy and contained no provisions for men to take any job leave, many argued that the FMLA went much further. They emphasized both universalism (especially gender neutrality) and family friendliness as triumphs of the FMLA.

As stated by the early sponsors of the bill and in the final text of the legislation, gender neutrality was key:

> It is the purpose of this Act . . . [to grant leave] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment . . . minimize[s] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral
Almost every word of the FMLA has been litigated by employers and employees. One case reached the Supreme Court in 2003. In *Nevada Department of Human Resources v. Hibbs*, the Court considered whether the FMLA could be validly applied to state governments under Congress’s power to enforce Section Five of the Fourteenth Amendment. Chief Justice Rehnquist wrote for a six-to-three majority that Congress acted within its constitutional authority when it said state governments could be sued for failing to give their employees the gender-neutral benefits required by the Family and Medical Leave Act. The opinion stated: “Stereotypes about women’s domestic responsibilities are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes create a self-fulfilling cycle of discrimination.”

Summarizing the response, Linda Greenhouse, a Supreme Court correspondent for *The New York Times*, wrote:

In a surprising break with its march toward states’ rights, the Supreme Court ruled today that states can be sued for violating their employees’ federally guaranteed right to take time off for family emergencies. . . . The Act’s goal . . . [according to Chief Justice Rehnquist] was to protect the right to be free from gender-based discrimination in the workplace.

But, as Greenhouse recently stated, “[t]he Court can only do so much. It can lead, but the country does not necessarily follow.” In this paper, we argue that not only does the Act impose limits on which employees may take leave, but, as Greenhouse suggests, employers’ compliance with the Act is also limited.

Much has been written about the problems with the intended gender neutrality of the FMLA, as we describe below. Less has been written about the Act’s definition of family or its so-called “family friendliness,” although this was also central to the passage of the Act. The original version of the bill only provided leave to parents to care for children. Eventual supporters of the bill, including the AARP and the U.S. Conference of Catholic Bishops, insisted the definition be broadened because they “liked the more inclusive notion of

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6. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003). William Hibbs worked for Nevada’s Human Services Department and requested catastrophic leave to provide care for his wife, who was recovering from surgery. The Department declined his request and fired him when he did not return to work. He sued Nevada under the FMLA. The district court dismissed his law suit, but the Court of Appeals for the Ninth Circuit reversed, whereupon the Department took the case to the Supreme Court.

7. Id. at 736.


extended family and the concept of a multigenerational circle of care.¹⁰ The AARP in particular insisted that the Act also cover spouses and elderly parents. This is an important extension: A number of advocates have argued that it made opposing the Act more difficult for legislators, even in the face of powerful business opposition.¹¹ A plethora of social science research, some of it used to support passage of the FMLA, has found that not only the birth and care of children, but also the care of spouses and elderly parents often interferes with employees’ ability to keep and develop in their jobs.¹² As we suggest here, however, limiting the Act’s protections to parents, spouses, and children conforms to a heterosexual and middle class notion of family, one found most often among whites. Because it is based on a restricted view of family, the Act sustains race and class inequalities.

Overall, although feminist scholars and activists now celebrate the FMLA and the PDA, we do so with restraint. While a number of scholars have written pieces exploring the actions taken by the courts to uphold the FMLA,¹³ we address practices on the ground and their consequences for equality. Despite the lofty goals of the FMLA, employee use of and employer compliance with the FMLA exacerbate, rather than alleviate, inequality between women and men in the workplace. Further, by ignoring variation in families and jobs among women and among men, the Act is friendly only to particular types of families and jobs; thus, it intensifies class inequalities and maintains inequalities rooted in race, marital status, and sexuality.

Based on empirical analysis, we argue first that inequalities shape individual workers’ ability to use the FMLA and second that employers often do not implement officially declared policy. We conclude by suggesting that family leave of the sort legally mandated by the FMLA remains largely a privilege of the few rather than a right of the many.

B. Research Questions and Data Analysis

To understand the reach and consequences of the Act, we address four empirical questions:

Q. 1: How many workers take family leave?

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¹⁰ ELVING, supra note 2, at 78.
¹¹ Feldblum & Appleberry, supra note 2, at 632.
¹³ ELVING, supra note 2; Feldblum & Appleberry, supra note 2; Grossman, supra note 2; Lenhoff & Bell, supra note 2.
Q. 2: Which workers take family leave?
Q. 3: How many employers comply with the FMLA and provide leave?
Q. 4: Which employers comply with the FMLA and provide leave?

To answer these questions, we rely on three studies we have conducted. First, in prior work summarized below, we used data from the Commission on Family Leave to examine which employees actually take leave. Second, we briefly discuss some of the data from an ongoing study we are conducting to further explore who takes leave. Finally, to address the question of which employers provide leave, we explore national data recently released by the Families and Work Institute.

II. UTILIZATION OF FAMILY LEAVE

A. How Many Workers Take Leave?

Though the FMLA is an important advance over prior policy, it does not provide universal protection for those employees who need leave to provide care for family members. Employees are covered only if they have worked for an eligible employer for at least one year, and for at least 1250 hours in the previous year. Eligible employers are public agencies or private employers with fifty or more employees working within a seventy-five-mile radius. Not only does the Act not protect those who work for small employers, but the Act also does not provide leave for the growing number of temporary workers.14

Approximately 90% of employers, employing about 40% of the workforce, are outside the scope of these provisions. Furthermore, almost one-fifth of workers at covered employers do not meet eligibility requirements, leaving approximately 53% of the workforce ineligible for FMLA leave.15

B. Which Workers Take Leave: Gender, Sexuality, Marital Status, Race, and Class

Perhaps most importantly, our analysis of the employee survey conducted by the FMLA Commission shortly after the passage of the Act16 suggests that although the Act mandated gender-neutral access to leave, actual leave taken post-FMLA remains far from gender-neutral. The Employee Survey conducted

by the Commission randomly sampled members of telephone-owning households within the continental United States aged eighteen years and older who had been employed for pay at any time between January 1, 1994 and the time of the interview (a time span of approximately eighteen months). Family leave-takers were over-sampled to allow for an adequate group for analysis; they make up a little over 20% of the survey respondents, but represent just over 6% of the population. Data on leave taken, the length and reason for leave, and various social and demographic characteristics of the respondent were obtained during the telephone interviews with a total of 2256 respondents. Individuals were characterized as leave-takers if they responded “yes” to: “Since January 1, 1994, [have you/has RELATIONSHIP] taken time off from work to care for a newborn, newly adopted, or new foster child, or for [your/their] own serious health condition, the serious health condition of [your/their] child, spouse, or parent that lasted more than three days or required an overnight hospital stay?”17

An analysis of these data shows that women are more likely than men not only to say they need leave and to take leave, but also to take longer leave. Although women were much more likely than men to take leave following the passage of the Act, a large number of men also took leave. However, their leaves were typically taken when they got sick themselves or, less frequently, to care for some other family member (especially a seriously ill wife or newborn child). Looking at leave sought for any reason, we find that on average leave taken by women is more than twice as long as that taken by men (forty-eight versus twenty days). Looking at leave taken just for newborns and newly adopted children, we find that women take leave on average for almost two months longer than men (seventy-six days versus seventeen days). Additionally, providing newborn care leads to the longest leave for women, but the shortest for men. Even in the era of the FMLA, family-building in the early years of a man’s career seems to mean staying on the job.18

Why this gender disparity? As many have noted, a key problem is that this leave is unpaid. Even though both men and women are now allowed to take leave to care for their families, on average men still earn substantially more

17. See Gerstel & McGonagle, supra note 16, at 516-17; see also Armenia & Gerstel, supra note 16, at 876 (giving a more detailed discussion of the analysis and findings). When an interviewer contacted a household member, that respondent was asked to list all residents; these residents were then screened for eligibility for one of the three categories: leave taker, leave needer, and employed only (neither needer nor taker). Consequently, the person who answered the phone was asked “have you/has RELATIONSHIP taken time off . . . .” (with the interviewer replacing the term “RELATIONSHIP” with the relationship of the target subject—such as “your husband” or “your wife”). To achieve the necessary sample size allocations for each of these three categories, a category-specific subselection rate was applied for each eligible person in the household and the person was either selected for interview or not.

18. This gender gap in leave has also been found by other researchers examining more recent Commission data. See, e.g., DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS (2001).
than women,\textsuperscript{19} making an unpaid leave more expensive for them and their families than it is for women who take leave. The FMLA cannot seriously counter the inequalities rooted in the male-female wage gap that is sustained by pre-existing policies. In addition, employers are permitted to deny leave to "key" workers, defined as the highest-paid ten percent, if they can show that giving leave would cause them considerable hardship. Because men tend to occupy the highest paying jobs, this policy primarily deprives men of leave. Furthermore, the FMLA was introduced in the context of the PDA, existing legislation that provided paid disability leave for some women. As such, men and women do not have similar access to family leave, at least for infant care, because some women (though certainly not all) have paid leave, while most men do not.

The causes of the gender gap in leave-taking are also cultural, rooted in different norms about manhood and womanhood. Masculinity may depend on not giving care, or on breadwinning as a way to care for one's family. In contrast, "doing gender" for women depends on the provision of care to family members.\textsuperscript{20} Especially given the absence of feasible alternatives (for example, good quality and low cost non-familial care for either children or the elderly), women may feel they have little choice but to take unpaid leave to provide support for their families. The FMLA then helps stabilize the unequal labor division—where women do far more parenting and caregiving for other relatives than men—that is still the norm in the United States.\textsuperscript{21}

This gender inequality should come as no surprise. Grossman suggests that although some of its supporters might claim otherwise, the FMLA’s absence of gender neutrality is precisely what Congress intended. She writes, "Congress’s concern with motherhood—despite the veil of neutrality—inhibited meaningful attention to the issue of equality for working mothers."\textsuperscript{22}

But the FMLA does more than maintain gender inequality. We found that the FMLA provisions reproduce other existing inequalities among workers—of marital status, sexuality, race, and class. Marriage affects leave-taking in two ways: It affects who is allowed under the FMLA to take leave, and it affects who can afford to do so.\textsuperscript{23} The provisions of the FMLA include spouses but not unmarried partners; consequently, lesbian and gay employees, like unmarried

\textsuperscript{20} JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 1-2 (2000).
\textsuperscript{22} Grossman, supra note 2, at 63.
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cohabiters more generally, can legally take leave to provide care for their children but not for their partners or their partners’ children.\(^\text{24}\) Even if they live and marry in one of the five states—Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont—where same sex marriage is now allowed, the FMLA applies federal law, which does not recognize same-sex marriages. Moreover, as we will show in greater detail (see Part II.C infra), married people are much more likely than unmarried people to be able to afford leave both because married people have on average a higher household income than unmarried people (including those single or cohabiting in heterosexual and lesbian or gay partnerships) and because they have a partner to rely on when they take unpaid leave that unmarried and unpartnered people do not have. Again, we find that the narrow definition of family in the FMLA exacerbates existing inequalities between married and unmarried people as well as those between heterosexuals and gays or lesbians.\(^\text{25}\)

Race also shapes the ability to take leave. African Americans and Latinas need leave more than whites. Although they are more likely to need health care, they are less likely to have access to health care and health insurance.\(^\text{26}\) African Americans and Latinos—especially women—are more likely to provide practical support to kin than are whites.\(^\text{27}\) More women of color live in extended-family homes and help a wider range of kin, including brothers, sisters, aunts, uncles, and friends (those often referred to as “fictive kin”) than do white women.\(^\text{28}\) None of these family members are covered by the FMLA. At the same time, African Americans and Latinas earn less on average and are less able to afford the unpaid leave provided by the FMLA.\(^\text{29}\)

Although we have discussed race and gender separately here, they operate jointly in their effect on leave-taking. Although we found that men, regardless of race, tend to take shorter leaves than women, it is white men who are significantly less likely than any other group to take any family leave. (There are no significant differences in the likelihood of taking leave among white women, women of color, and men of color.)\(^\text{30}\) The difference by race may be a result of the larger wage gap between white than between African-American

\(^{24}\) Gerstel & McGonagle, supra note 16, at 526.


\(^{28}\) Naomi Gerstel & Natasha Sarkisian, Sociological Perspective on Families and Work: The Import of Gender, Class, and Race, in THE WORK AND FAMILY HANDBOOK, supra note 2, at 237, 255.

\(^{29}\) Gerstel & McGonagle, supra note 16; Naomi Gerstel & Natalia Sarkisian, The Color of Family Ties: Race, Class, Gender, and Extended Family Involvement, in AMERICAN FAMILIES: A MULTICULTURAL READER 447 (Stephanie Coontz et al. eds., 2008).

\(^{30}\) Armenia & Gerstel, supra note 16, at 880-86.
spouses. This difference, then, actually points to greater gender equality in leave-taking among people of color than among whites.

Finally, class position affects the need and ability of workers to take family leave as well as the length of their leave. Because those with lower incomes are less healthy, they have a greater need for leave. Moreover, Americans with less money (regardless of race) are more likely to be called upon to provide care for a wider range of people who are not covered by the FMLA than are the affluent. Indeed, many of the differences that appear to be due to race are, in fact, a function of class.32 Because whites have on average a higher income than people of color, whites are more likely to be able to take leave in order to provide care.

Perhaps most importantly, because the leave is unpaid, the working poor—whose numbers are large and growing—cannot afford to take leave. Of those who reported they needed leave but did not take it, approximately four-fifths explained that it was because they could not afford to do so.34 Approximately nine percent of FMLA leave takers report that they go on public assistance to cover lost income when they do take leave.35 Poor women take less time off after childbirth than do women from higher income households. In addition, poorer employees are significantly more likely to face pressure from their employers to return to work. Consequently, the FMLA does not simply reproduce class inequality; it exacerbates differences in privilege associated with class.

C. Which Workers Take Leave? Intersection of Class and Gender

To further explore the question of who takes leave, we rely on a second study in which we analyze how class and gender limit the reach of the FMLA. We collected data on the factors shaping the hours and schedules of four occupations that vary not only by gender but also by class: nurses and nursing assistants (both groups are mostly women; the first group is middle class and the second is working-class) and physicians and emergency medical technicians (EMTs) (both groups are mostly men; the former is middle-class and the latter is working-class). Although there are, of course, women in each of the “male” occupations and men in each of the “female” ones, we focused on female nurses and nursing assistants and male doctors and EMTs. We chose these four groups because they vary by class and gender, which we expect are

33. Id. at 4-9.
34. CANTOR ET AL., supra note 18, at 2-16.
35. Id. at 4-9.
key to explaining the organization of work and family, because they all operate in the same sector of the economy, and because we could obtain a random sample of all four occupations from state-certification lists. For all four, certification is a required, ongoing process that generates regularly-updated and publicly-available lists that made it possible to generate a truly random sample. We chose healthcare as our research site because it accounts for more than one-seventh of total GDP and is part of the growing service sector rather than the diminishing manufacturing sector. Like an escalating number of workplaces, many healthcare organizations operate twenty-four hours a day/seven days a week with day, evening, and night shifts.

For all four occupations, we conducted intensive interviews and observed the participants at work. We asked workers whether they could and whether they had taken time off to care for sick family members, and we asked employers (especially administrators in charge of schedules and human resource personnel) how these policies operated.

Our initial analyses suggest class and gender intersect to shape the ability of family members to take time off to care for one another. To clarify this intersection, we first compared the two groups dominated by women—nurses and nursing assistants—and then compared the two groups dominated by men—physicians and EMTs.

Women in the middle-class occupation could expect to and did take family leave. They told us that they took leave when they were pregnant, their children fell sick, their spouses were injured, or their elderly parents needed help with a medical problem. At home, most of them had a husband or partner who could support them financially while they took leave from the labor force. At work, they simply brought in a note from their private doctor to obtain official approval from their human resources office, which clearly knew the requirements of and implemented the FMLA when it applied. Then, these nurses called their schedulers and said, “I am not coming in today because I’m taking an FMLA day.” As one manager of the medical floor in a hospital said of the nurses on her floor:

37. Interviews came from two sources. First, we sent a survey to 800 respondents, including 200 in each of the four occupations, with the following response rates: for nursing assistants, 53.9%; for physicians, 57.6%; for EMTs, 64.7%; and for nurses, 78.2%. Second, we did intensive face-to-face interviews with 212 respondents (some of these respondents worked in the eight organizations which we observed and others were from a random sample of those who responded to the survey we sent); most of the interviews were conducted with members of these four occupational groups (as well as a smaller number with hospital and nursing home administrators, schedulers, and human resource personnel). Dan Clawson, Naomi Gerstel & Jill Crocker, Employers Meet Families: Gender, Class, and Paid Work Hour Differences Among U.S. Medical Workers, SOC. INDICATORS RES. (2008), http://www.springerlink.com/content/r764873164n62786/fulltext.html (describing the study and research methods); Naomi Gerstel, Dan Clawson & Dana Huyser, Explaining Job Hours of Physicians, Nurses, EMTs, and Nursing Assistants: Gender, Class, Jobs, and Family, in WORKPLACE TEMPORALITIES 369, 376-82 (Beth A. Rubin ed., 2007).
I mean they [nurses] have to have documentation from their physician or their child’s physician, or whatever, to support the reason for the FMLA, and [the hospital’s] Disability Management Department either approves the FMLA or not. It’s still up to [the hospital], but once it’s approved, there’s nothing I can say.\textsuperscript{38}

Hospital administrators on various floors told us they could ask no further questions if the nurses had received official FMLA “privileges” to take time off for family. Even given occasional suspicions that employees were taking time off without a legitimate reason, the managers did not protest too loudly what they saw as some of the nurses’ frequent absences: They felt they needed their labor too much to raise any questions. If denied leave, the skilled nurses could simply leave and find another job.

The nursing assistants we studied, on the other hand, rarely took family leave, even though a number of them spoke of children and parents in need of the kind of medical attention and leave covered by the FMLA. They were mostly women of color working as single parents for less than $20,000 a year in nursing homes (with a small number in hospitals). Although their employers were sufficiently large to be covered by the FMLA, many of these nursing assistants told us they were afraid to take or sometimes even to ask for leave, even if their kids were quite sick or their aging parents needed the kind of personal care for which they could not afford to pay. As one nursing assistant who worked the night shift told us:

Even if you have doctor’s notes, emergency room letters, you’re terminated. That’s it—no ifs, ands, or buts, no explanations. . . . But they want to pay us chump change. There’s been [sic] weeks I can’t afford to pay one bill because I need food in the house or my daughter needs her medicine, you know? I don’t get welfare; because I work thirty-two hours I should be making enough money to cover my bills. And then if I take a day off they don’t offer you sick time. And if it’s my daughter that’s sick versus me that’s sick, I don’t get my sick time because I wasn’t sick, my kid was sick. So no, they screw us. They have their own little ways to get out of putting out money.\textsuperscript{39}

Other nursing assistants explained this difficult situation by saying, “that’s like we complain about the policy, but, know what I’m saying, you just got to do what you got to do,”\textsuperscript{40} or, “I have to do what I have to do to pay my bills.”\textsuperscript{41}

Poverty made it difficult for them to insist on their right to take care of their families—even when the FMLA mandated that right.

Why this difference between nurses and nursing assistants? The nurses insist to their employers that they have to take care of their families and chose nursing as a profession, in part, because it allows them to do so. The nurses can

\textsuperscript{38} Interview with hospital manager no. 1, in Mass. (Dec. 2005-July 2008).
\textsuperscript{39} Interview with nursing assistant no. 1, in Mass. (Dec. 2005-July 2008).
\textsuperscript{40} Interview with nursing assistant no. 2, in Mass. (Dec. 2005-July 2008).
\textsuperscript{41} Interview with nursing assistant no. 3, in Mass. (Dec. 2005-July 2008).
afford to take unpaid leave because they earn more money (a median of $60,000) than the nursing assistants (a median of $20,000). The nurses also often have husbands’ incomes to rely on. They can afford to hire a doctor to provide the documentation required by law\(^42\) to explain their need for family leave. In contrast, taking such leave is extremely difficult for the nursing assistants who not only earn considerably less, but who also often do not have partners on whom they can rely for financial assistance. But the explanation does not simply rest on differences in personal choice, family characteristics, and human capital. Looking at these two groups of women, we discover the explanation is, in part, systemic in still another way: The labor shortage in nursing grants power to nurses when they negotiate hours and request family leave. Employers told us again and again that they had to offer all sorts of concessions because nurses were in such short supply, making it more difficult for employers to ignore the law. No such labor shortage exists for nursing assistants, so the pressure to obey the FMLA is not present. We will discuss this pattern again in the following section, where we examine compliance with the FMLA.

Turning to the two male occupations we studied—physicians and EMTs—we see a different pattern. In fact, we find something of a reversal by class. At least in regard to the care of children, it was the working class men who were much more likely to take caregiving leaves as compared to the male doctors.

Almost none of the male physicians took time off to care for their children. For example, a typical physician talked about taking leave from work when his own children were sick by saying:

> It’s not like it’s easy to reschedule, and sometimes there’s [sic] [patients] in there that you really wanted to see, who you were worried about. So it is a pressure, it isn’t an easy thing just to get up in the morning and say “I’m not coming in.” . . . You know, kids need mom more than they need dad, and I honestly think that’s true.\(^43\)

In comparison, the EMTs were much more likely to take time off to care for their family members. A typical EMT with a young child reported to us that his “family takes priority,”\(^44\) and another said, “last year I took three sick days to stay home when one of the smaller ones was sick.”\(^45\) If an EMT in our study needed to get time off to take care of his children, it was unusual that this could not be arranged. Both the EMTs and their managers assumed that their co-workers could and would cover for them during their absences. Interestingly, neither they nor their managers tended to talk about leave in terms of the law in general or the FMLA in particular; instead, both groups simply assumed these


working-class men would take unpaid time off to provide care for family members.

Why do we find such difference between these two groups of men? To be sure, there are structural differences in the jobs, but some of these differences (for example, job autonomy) would suggest physicians could more easily take leave to provide care for their children than could EMTs. Like the nurses in comparison to the nursing assistants, these physicians make more money than the EMTs. Moreover, both groups of men work about the same number of hours. So these occupational conditions cannot explain differences in their leave taking. However, there are other occupational conditions that shape the men’s ability to take leave: Physicians in our study reported attachments to particular patients who are often loyal and even demand a particular physician’s care, making it difficult for physicians to substitute the labor of a colleague when they take time off to care for their own children. In contrast, the EMTs told us they often rely on co-workers to substitute for them on the job when they need to take time off to care for sick family members. As we shall see later (see Part III.B infra), the fact that EMTs are unionized probably also helps them take leave without losing their employers’ support.

However, family characteristics, particularly differences in their wives’ role, are especially important for explaining the variation between these two groups of men. A large majority (eighty-six percent) of EMTs’ wives were employed, whereas fewer than half of the physicians’ wives had jobs. EMTs’ wives with paying jobs also tended to work substantially more hours than the employed wives of physicians. Moreover, EMTs’ wives contributed a much larger share of family income; the gap between wives’ and husbands’ income was significantly smaller among the EMT couples than among the physician couples. In addition, many EMTs alternated shifts with their wives—an increasingly frequent childcare strategy for working-class families.\footnote{FRANCINE M. DEUTSCH, HAVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS 173-78 (1999); HARRIET B. PRESSER, WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES 21, 41 (2003).} Finally, unlike physicians’ wives, who seemed to accept the gendered division of family labor (in which the husbands were the primary breadwinners in exchange for the wives’ care of the household and children), the EMTs’ wives often insisted that their husbands be available to provide care for their families. Thus, these different family conditions—the wives’ employment, hours, schedules, income, and insistence on sharing family labor—help explain how much time male EMTs and physicians devoted to caring for their families.

Looking across these four groups, we see a clear interaction between structure and norms, between material resources and values attached to gender. Among women, both groups wanted to take the time to provide care but only the nurses could typically afford to do so. And, though most were married, the
Given the quantitative data, it seems that class and gender intersect to shape the response to the FMLA. Nurses, who are workers with both the leverage and the desire to provide care, benefit from the FMLA. However, nursing assistants, who may not have the leverage to ensure that the law is followed, and those who cannot afford the unpaid leave mandated by the Act, do not benefit as much. Physicians, who are less likely to take advantage of the FMLA provisions, are more similar to the nurses in terms of their use of family leave policies. The gender norms in the EMTs' families more closely resemble those of the nurses, although they are more likely to work part-time and have partners who do not work for pay at all. This may have had an impact on their ability to take advantage of the FMLA. Overall, our analysis suggests that class and gender intersect to shape the response to the FMLA, and this is further supported by national data on part-time work among physicians.

See, e.g., William Cull et al., Pediatricians Working Part-Time: Past, Present, and Future, 109 PEDIATRICS 1015, 1016 (2002). In addition, an American Medical Group Association (AMGA)/Cejka Search survey reported an increase in the percentage of physicians practicing part-time from 13% in 2005 to 19% in 2007. See CEKA SEARCH, PART-TIME PRACTICE TRENDS INTENSIFY PHYSICIAN SHORTAGE ACCORDING TO AMGA AND CEKA SEARCH 2007 PHYSICIAN RETENTION SURVEY (2008), available at http://www.cejkasearch.com/surveys/physician-retention-surveys/2007/default.html. Men increased from 5% to 7%; women increased from 8% to 12%. The age group with the greatest number of physicians practicing part-time is between 35 and 39; the gender split among part-time physicians in that age group is 15% male and 85% female. Id. Moreover, in our data set, a majority (53.8%) of physicians have partners who work fewer than twenty-nine hours a week. Indeed, half of the male physicians have spouses who do not work for pay at all; according to the Cejkasearch, only one in six of the women physicians have such spouses.
qualitative data suggests the same. Now, let us turn to the third question to analyze more broadly the ways in which employers respond to the FMLA.

III. IMPLEMENTATION OF THE FMLA

A. How Many Employers Comply with the FMLA?

For many workers, the availability of leave depends not only on the federal mandate provided by the FMLA, but also on the policies and practices of their employers. In surveys conducted by the U.S. Department of Labor in 1995 and 2000, only slightly more than half of employees at FMLA-covered establishments reported awareness of the FMLA.\(^\text{48}\) In addition, Chardie Baird and John Reynolds find that work status affects levels of awareness of workplace policy; higher paid and supervisory workers are more likely to be aware of leave policies.\(^\text{49}\)

Without independent awareness of the labor laws that apply to them, employees may be left with only the rights of which they are informed by employers. Furthermore, low risks of detection and minimal punishment for non-compliance provide little incentive for employers to follow the law.\(^\text{50}\)

As such, non-compliance with FMLA requirements has been documented among covered establishments, although estimates of non-compliance vary greatly. The Department of Labor surveys found that 83.7% of covered establishments were in compliance in 2000.\(^\text{51}\) However, as Erin Kelly suggests, compliance rates may be inflated due to the fact that this survey was done by the Department of Labor and the interview cued respondents about the length of leave required by law.\(^\text{52}\) In her survey of 389 establishments in 1997, Kelly found that between 42% and 50% of covered establishments were not compliant with the FMLA on maternity and paternity leave (the exact percentage depended on how she treated data on those who did not answer all relevant questions—a set of decisions to which we return below).\(^\text{53}\)

Turning to a third data set allows us to explore recent employer policies and practices for the full range of leave afforded by the FMLA. In the 2008 National Study of Employers by the Families and Work Institute (NSE), surveys were administered to human-resource directors from a representative

\(^{48}\) CANTOR ET AL., supra note 18, at 3-8.
\(^{50}\) Erin L. Kelly, Failure To Update: An Institutional Perspective on Noncompliance with the Family & Medical Leave Act (2008) (unpublished manuscript, on file with author).
\(^{51}\) CANTOR ET AL., supra note 18, at 2-5.
\(^{52}\) Kelly, supra note 50, at 8-9.
\(^{53}\) Id. at 25.
sample of 1100 private sector employers with fifty or more employees.\textsuperscript{54} Employers were selected from Dun & Bradstreet lists using a stratified random sampling procedure in which selection was proportional to the number of people employed by each company to ensure a large enough sample of large organizations. For the analyses presented, the sample was weighted to the distribution of employers of different sizes in the United States.

Respondents were asked about “the maximum length of unpaid or paid job-guaranteed leave that your organization allows for” each of four categories: 1) female employees who give birth to a child, including any period of disability; 2) male employees whose spouses give birth to a child; 3) male or female employees caring for newly adopted children; and 4) employees caring for a Seriously ill or injured family member (a spouse, child, or parent).\textsuperscript{55} These data allow us to assess the extent of employer compliance with the FMLA and the characteristics of companies that correlate with compliance.

Overall, we find that a significant minority of employers are not even in basic compliance with FMLA mandates. We consider an employer “FMLA compliant” if it reports having provided at least twelve weeks of job-protected leave for each of the four reasons allowed by the FMLA. Estimating compliance is complicated, however, by missing data. The Galinsky study relied only on establishments with no missing data to estimate that 81% of establishments are FMLA compliant.\textsuperscript{56} However, of the human resource directors surveyed by Galinsky, 30% did not know or refused to provide information on the maximum leave time for at least one type of FMLA leave.\textsuperscript{57} Those employers with missing data on one type of leave were also more likely to report providing fewer than twelve weeks of another type of leave. The human resource directors who responded to the survey are presumably the main source of information for their employees who need leave. Therefore, we consider it imprudent to simply exclude those cases with missing data. Instead, we present in Table 1 two alternative measures that likely estimate the upper and lower bounds of FMLA compliance.

\textsuperscript{56} GALINSKY ET AL., supra note 54, at 17.
\textsuperscript{57} Id.
Table 1: FMLA Compliance

<table>
<thead>
<tr>
<th>Measurement Method</th>
<th>Number of Employers</th>
<th>FMLA Compliant</th>
<th>FMLA Non-Compliant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compliance measured using only establishments with complete data</td>
<td>836</td>
<td>80.9%</td>
<td>19.1%</td>
</tr>
<tr>
<td>Compliance measured with any valid data, missing data ignored</td>
<td>1016</td>
<td>71.8%</td>
<td>28.2%</td>
</tr>
<tr>
<td>Missing data treated as non-compliance</td>
<td>1100</td>
<td>56.5%</td>
<td>43.5%</td>
</tr>
</tbody>
</table>

For our conservative measure of compliance, we analyze those employers with any valid data on the four different types of leave (N=1016), and code them on compliance based on those valid responses. An employer who reported fewer than twelve weeks of any type of leave is coded non-compliant, and all other employers are coded compliant (in other words, a “don’t know” or “refused” is treated as compliance). Using this criterion, we find that only 72% of employers report compliance with the FMLA.

For the lower bound of compliance, we use the full sample and equate a missing data point with non-compliance. Using this method, we find that only 57% of employers are FMLA-compliant.

Employers also have different levels of compliance across the four types of leave, as presented in Table 2. Employers have the highest rates of compliance for maternity and family sick leave and the lowest rates for paternity leave. Of those employers who answered the question, 88% reported allowing maternity leave of twelve weeks or longer, and 87% reported allowing family sick leave of twelve weeks or longer. Only 79% of establishments reported leave of the length allowed by the FMLA for new fathers, and 83% reported leave of FMLA-permitted length for adoptive parents. Knowledge of employer policy also varies across type of leave. Missing data rates are lowest for maternity leave (11%) and highest for paternity leave (15%) and adoption leave (16%). The higher prevalence and greater knowledge of maternity leave policies is a likely result of their longer existence in the workplace. But this knowledge (or lack of knowledge) may shape whether men pursue leave time and as a result may contribute to the gender gap in leave-taking.

58. When using sampling weights to adjust for the worker population (rather than the employer population), the results suggest that compliant organizations employ a larger proportion of workers, with 77% of workers in compliant organizations by our first measure, and 68% by our second measure.
Table 2: Percent of establishments reporting at least 12 weeks of leave for different reasons (N= 1,100)

<table>
<thead>
<tr>
<th>Length of leave</th>
<th>Maternity leave</th>
<th>Paternity leave</th>
<th>Family sick leave</th>
<th>Adoption leave</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>#</td>
<td>%</td>
<td>Valid %</td>
<td>#</td>
</tr>
<tr>
<td>Fewer than 12 weeks</td>
<td>122</td>
<td>11.1</td>
<td>12.4</td>
<td>196</td>
</tr>
<tr>
<td>12 weeks or more</td>
<td>859</td>
<td>78.1</td>
<td>87.6</td>
<td>736</td>
</tr>
<tr>
<td>Refused/DK</td>
<td>119</td>
<td>10.8</td>
<td>15.3</td>
<td>168</td>
</tr>
</tbody>
</table>

*The Valid percent excludes missing cases (refused/don’t know) from the total number of cases in calculating percentages.
B. Which Employers Comply with the FMLA?

Most of the research conducted post-FMLA examines leave availability from the perspective of the employee, rather than the employer. Of the research that has examined employer-level policies, most took place either before or very soon after the passage of the FMLA and therefore provides few relevant insights into employer compliance post-FMLA. 59

But with considerable time elapsed since the passage of the FMLA and the availability of NSE data on all four types of leave, we have the opportunity to assess the characteristics of employers in compliance with the law. Analyses of these data show that some types of employers are more likely to comply with the law than others.

We estimated logistic regression models to predict FMLA compliance (using the first, more conservative estimate described above) with the following sets of independent variables:

1. Employer characteristics: employer size, recent upsizing or downsizing, years in operation, industry;
2. Management characteristics: women in leadership/senior positions, minorities in leadership/senior positions;
3. Job characteristics: unionization, percentage of hourly workers, percentage of part-time workers; and
4. Workforce characteristics: percentage of female employees, percentage of minority employees.

Logistic regression estimates the simultaneous effect of a set of independent variables on a binary outcome (in this case, whether a company is compliant with the FMLA). The resulting estimates can be converted to odds ratios, interpreted as the increase or decrease in the odds of compliance given the value of a particular variable (controlling for all other variables in the model). 60 We find that there are important dimensions at the company, job, and worker level that promote (or undermine) a worker's access to leave. The results of the significant variables found in the regression analysis are presented in Table 3.

60. DAVID W. HOSMER JR. & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION (2d ed. 2001).
Table 3: Logistic Regression Predicting FMLA Compliance  
(number of employers = 991)\(^61\)

<table>
<thead>
<tr>
<th>Establishment Characteristics</th>
<th>Odds Ratio</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Large Employer (250+ employees)</td>
<td>1.65**</td>
<td>0.29</td>
</tr>
<tr>
<td>More than 50% of workforce is female</td>
<td>1.81***</td>
<td>0.33</td>
</tr>
<tr>
<td>More than 75% of workforce is hourly</td>
<td>0.38***</td>
<td>0.07</td>
</tr>
<tr>
<td>Any unionized employees</td>
<td>1.70*</td>
<td>0.44</td>
</tr>
<tr>
<td>Retail or wholesale sales industry</td>
<td>0.62*</td>
<td>0.13</td>
</tr>
<tr>
<td>Pseudo R(^2)</td>
<td>0.07</td>
<td></td>
</tr>
</tbody>
</table>

\(^* p < 0.05, \ ** p < 0.01, \ *** p < 0.001\)

**Employer Characteristics:** Large employers (those with more than 250 employees) are 1.6 times more likely to be FMLA compliant than smaller employers. Employers in the wholesale and retail sales industry are only 62% as likely as those in other industries to be compliant.

**Management Characteristics:** We find that having women or minorities in leadership or senior management positions has no significant effect on FMLA compliance.

**Job Characteristics:** Employers with any unionized employees are 1.7 times more likely to be compliant as those without unions. Also, employers with more than 75% hourly employees are much less likely (only 38% as likely as those with fewer than 75% hourly employees) to be compliant.

**Workforce Characteristics:** Although having women in senior management does not change employer practice, having a high proportion of female workers does: Those employers with a majority female workforce are about 1.8 times as likely to be compliant as those with a smaller proportion of women. Interestingly, employers with more women employees are also significantly

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\(^61\) Pseudo R\(^2\) is a measure of the proportion of variance explained by the statistical model. The p values refer to standard levels of statistical significance—that the probability of getting a particular result by chance is less than 0.05, 0.01, or 0.001.
more likely to offer paternity leave—something we interpret as either a "contagion" effect (whereby women insist that everyone get or take time off for families) or perhaps a "selection effect" (a result of those particular employees—whether women or men—who choose to work in companies dominated by women) (data not shown).

Overall, without more comprehensive enforcement of the FMLA, the gender and class composition of a workplace clearly shapes whether companies provide family leave.

CONCLUSION

The FMLA goes considerably beyond the PDA, which itself was an important victory. Discussions of policy, however, must examine not only policy mandate but also whom policies actually serve. Although much activism is directed toward obtaining paid family leave, the persistence of inequality in the utilization of leave and compliance with existing law suggests that progress depends on both revising and implementing the law. Several of our findings make that clear.

First, the language of the FMLA was universalistic, with legislators and judges insisting that the statute should destabilize gender by supporting the involvement of men and women in work relating to both families and jobs. Grossman, however, disagrees with this point. She argues that Congress designed the FMLA to support women as mothers rather than to destabilize gender and that the Act operates in this way. Whether or not Grossman is correct, unpaid leave provided by the FMLA cannot create gender neutrality given the current distribution of income and inequality in caregiving responsibilities. Women as wives, mothers, and daughters are far more likely to give care and to take extended family leave than are men as husbands, fathers, and sons. The U.S. labor market and the division of labor in the U.S. family, especially among white married couples, remain barriers to equality in family leave. As Joan Williams has argued extensively, broad-based normative change is required to change that. We must “trouble masculinity and the ideal worker (read male) model.” Such normative change depends on a reframing of values and goals—for example, ramping up the value of both paid and unpaid carework (whether in health, child care, education, or social services) and undoing the cultural lag surrounding masculinity (so that breadwinning is no longer equivalent to successful manliness while caregiving is antithetical to it). It also means transforming the structures of paid work—not only by revising

63. Joan Williams, The PDA’s Limits: Where Do We Go From Here?, Panel Discussion at the Yale Journal of Law and Feminism Symposium: Respecting Expecting (Nov. 8, 2008); see also WILLIAMS, supra note 20, at 64-141.
the FMLA and paying more for caregiving, but also by revising the hours required and admired in paid jobs and revamping the FLSA (for example, by making it illegal for employers to require that workers stay overtime). Changing jobs and the regulations affecting them will go far toward changing the family and reducing gender inequality. Although we have seen some movement in recent years toward greater sharing of carework and kinkeeping, it still remains the work of women far more than men. Much research, including our research discussed here, suggests that this division depends, at least in part, on gender inequality in paid jobs. Because women are more likely to take time off to provide care for their families, they face an earnings penalty on the job. Even if they can return to the same job after taking time off, as the FMLA mandates, research suggests that women are likely to face both wage penalties in the short-term and career mobility penalties over the long-term because they temporarily left the labor force. Women’s and men’s differential responses to the FMLA, then, not only maintain but also exacerbate gender inequality.

Second, the FMLA reproduces inequality among women and among men. As our analysis suggests, race and class do not operate alone: Both intersect with gender to shape utilization of the FMLA. Not only is its mandated leave unpaid, but FMLA leave also promises a limited sort of family friendliness—one that overlooks the brothers, sisters, cousins, and friends that the poor, often people of color, are especially likely to rely on and want to help. Additionally, it overlooks the partners of gays and lesbians. To address such inequalities, revisions of the FMLA should broaden those included in the category of family members. Our analysis of utilization and implementation also suggests that, given the limits of the FMLA, the ability to take family leave is a privilege. Both material and cultural processes at work in organizations and families can hold fast against the kind of limited statutory change contained in the FMLA. Consequently, the U.S. family, at least in its socially and politically valued form of husband, wife, and children caring for one another, is made something of a luxury enjoyed by the relatively affluent—especially married, white women who work with other relatively well-off women in large companies whose employees are mostly women.

Third, our analysis suggests that access to and the ability to utilize family leave are shaped by workplace conditions. Unions are of particular importance. Unions lobbied for legislative change and were central to the passage of the FMLA. Moreover, as we found in a previous study that addressed union response to family leave, “unions provide the means to translate policy into

64. SUZANNE M. BIANCHI, JOHN P. ROBINSON & MELISSA A. MILKIE, CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 45-46 (2006); Gerstel & Sarkisian, supra note 28, at 247-55; Sarkisian & Gerstel, supra note 12, at 444.

65. See Budig & England, supra note 12, at 205-06; Lundberg & Rose, supra note 12, at 699; McLanahan & Percheski, supra note 12, at 257.
As we show in this paper, unions are a major tool for ensuring the Act's implementation, especially for the working class, which might otherwise have little access to the privilege of family leave. To be sure, only a small percentage of workers are unionized, and union support for family issues is mixed. Nonetheless, collective bargaining offers workers grievance arbitration procedures and an ability to assert their rights, and unions provide assistance with outside litigation as well as a means to spread information about the FMLA that is required by law but often missing in practice.

Organizing on the ground—through union activity, FMLA enforcement by the U.S. Department of Labor's Wage and Hour Division of the Employment Standards Administration, EEOC enforcement, and legal advocacy for workers denied the ability to give care—is key for turning the cultural symbols of equality and family friendliness into routine practices. Otherwise, we sadly predict that caregiving will remain a privilege rather than a right.

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