

Family Security Insurance
*A New Foundation for
Economic Security*



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WORKPLACE FLEXIBILITY **2010**
G E O R G E T O W N L A W

BerkeleyLaw
UNIVERSITY OF CALIFORNIA
Berkeley Center on Health,
Economic & Family Security

Family Security Insurance

A New Foundation for Economic Security

Workplace Flexibility 2010

Berkeley Center on Health, Economic & Family Security

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Key contributors from Workplace Flexibility 2010
at Georgetown Law:

Sharon Masling
Senior Counsel
Workplace Flexibility 2010

E. Pierce Blue
Teaching Fellow/Supervising Attorney
Federal Legislation & Administrative Clinic, Georgetown Law

Katie Corrigan
Director
Workplace Flexibility 2010

Key contributors from the Berkeley Center on Health, Economic & Family Security
at UC Berkeley School of Law:

Ann O'Leary
Executive Director
Berkeley Center on Health, Economic & Family Security

Angela Clements
Counsel
Berkeley Center on Health, Economic & Family Security

Gillian Lester
Professor of Law
UC Berkeley School of Law

Stephen D. Sugarman
Roger J. Traynor Professor of Law
UC Berkeley School of Law

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Family Security Insurance:
A New Foundation for Economic Security

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Preface

Critical Shifts

Over the past 40 years, powerful demographic and societal shifts have irrevocably changed the American workforce. Today, women make up nearly half of all U.S. workers. This change has had a dramatic impact on the way families manage their responsibilities at home and at work. Our population has aged significantly — many older Americans are working well past the traditional age of retirement. Transformative civil rights laws empower people with disabilities, allowing them to be productive workers. But the way our workplaces are set up to get work done has failed to keep pace with these changes. The result is a profound “mismatch” between the needs of the modern workforce and the structure of the modern workplace.¹

This mismatch between the needs of workers and out-of-date workplace policies plays out every day in the lives of working Americans across the country as they struggle to meet the demands of both work and family. And as President Obama recently explained, the consequences of this mismatch reach far beyond the needs of certain families or certain industries.

“Workplace flexibility isn’t just a women’s issue. It’s an issue that affects the well-being of our families and the success of our businesses. It affects the strength of our economy — whether we’ll create the workplaces and jobs of the future we need to compete in today’s global economy.”²

This policy platform is the fruit of a collaboration between two organizations: Workplace Flexibility 2010 at Georgetown Law (WF2010) and Berkeley Law School’s Center on Health, Economic & Family Security (Berkeley CHEFS). Six years ago, Workplace Flexibility 2010 was founded on the simple premise that our tremendous societal sea change has been met with an inadequate response from both business and government, and that *workplace flexibility* is critical to the needs of modern workers. Berkeley CHEFS was founded in 2008, in part on the recognition that the mismatch between the needs of the modern workforce and the current organization of workplaces has caused increasing economic insecurity for families. WF2010 and Berkeley CHEFS share the mission of working to develop robust policy solutions to these linked problems of the mismatch between the needs of workers and the structure of workplaces, the need for flexibility, and rising individual and family economic insecurity.

The “great transformation” of the American workforce isn’t affecting only one type of family or one type of industry.³ It’s an American story about a constellation of cultural shifts and demographic changes that challenges us to reconsider the touchstones of our daily lives — how we live; how we support our families; how we meet our responsibilities as parents, children, and workers; how we run our businesses; and how we remain a healthy and globally competitive society.

One of America’s great strengths has been to treat societal change as an opportunity to be seized rather than as a problem that merely needs to be fixed. Confronting the “mismatch” should be no different.

Workplace Flexibility 2010: Building a National Response

Despite a growing consensus that workplace flexibility issues are of national concern,⁴ neither federal policy nor private sector practice has fully adapted to, or adequately accounted for, this new reality. Instead, working families largely have been left to muddle through these issues on their own, resulting in a high degree of demand for various types of flexibility, but little consistency in the supply.

Workplace Flexibility 2010 was established to figure out how to move the ball forward on flexibility using public policy levers.⁵ We view workplace flexibility — including Flexible Work Arrangements, Time Off, and Career Flexibility⁶ — as a necessary response to the modern work-life dilemma. It is a set of tools that acknowledges the diverse needs of the workforce and diverse demands of the workplace.

Our goal was to make workplace flexibility a compelling national issue in Washington, and to come up with common-sense public policy solutions that would help make workplace flexibility the standard in the American workplace. Our unique challenge has been to figure out what role government can play on issues that cut to the heart of how employers do business — how they manage their workforce, how they structure compensation and benefits, and how they achieve their bottom-line goals.

In addressing each aspect of flexibility, we started by getting a handle on the current landscape — the existing relevant law and policy, and the data available on each issue — and then forcing ourselves to look beyond what was in front of us, to imagine new possibilities for restructuring the workplace.

For the first several years of our project, we maintained a posture of “disciplined neutrality” — keeping an open mind on the role of public policy and the types of policy mechanisms that could be used to increase access to flexibility. We were truly looking to get beyond partisan politics and open the door to a reasonable and productive policy conversation on flexibility. Many people from across the political spectrum have engaged on our proposals, offered alternatives, and helped us hone our best thinking on all three aspects of flexibility.⁷ We succeeded in creating space for open and constructive conversation with leaders from across the political spectrum.

That effort has led to real progress. Based on these years of work, Workplace Flexibility 2010 was able to publish a policy platform on Flexible Work Arrangements in 2009.⁸ This report included a “consensus statement” from our National Advisory Commission on Workplace Flexibility (NAC), a diverse group of experts on various aspects of flexibility, which included representatives of employers, labor, and researchers. The platform and consensus statement helped set the stage for the 2010 White House Forum on Workplace Flexibility, which featured numerous companies that have made flexible work arrangements the norm rather than the exception in their workplaces.⁹

That same “consensus-based” process, however, including an intense series of conversations with our National Advisory Commission, did not result in a similar agreement on time off. Everyone acknowledged there was a problem: People need paid time off for their own health and family caregiving and lots of people, across incomes and industries, don’t get it.

But we simply couldn’t come up with an alignment of interests between employers and employees about the role of government and public policy in this equation. Workers’ need for time-off policies is deep, but the concerns of employers are deep as well: How would public policy intersect with how they do business? And how would a new law intersect with current law?

Instead of coming to consensus, we left our Advisory Commission process with a long list of “homework” on time-off policy — tough questions that needed more research, thinking and debate.

The task was a bit daunting. But we also left with a flicker of an idea: There was strong interest from employer and employee representatives in addressing the issue of how to provide income replacement for periods of extended time off from work for health and caregiving reasons.

So, in 2009, the question for Workplace Flexibility 2010 was: How? How do we get more people, across incomes and industries, access to paid time off for health and caregiving reasons? And how can we do it in a way that addresses the needs of working families — as well as the needs of employers?

Berkeley CHEFS: Bridging the Gap Between Academic Ideas and Practical Proposals

While Workplace Flexibility 2010 was tackling the difficult question of how to develop modern day flexibility policies, Berkeley CHEFS was launching its effort to address issues surrounding the increasing economic insecurity of workers and families in the United States.

One of our central goals at Berkeley CHEFS is to ensure that rigorous academic thinking is applied to practical policy solutions. The reason we chose to focus on workers' need for paid time off for health and caregiving was not only because it is a necessary benefit to increase security for today's workers, but also because, collectively, we have spent significant time and energy over the years thinking hard about the problem. More than 20 years ago, Professor Steve Sugarman developed an academic proposal aimed at requiring workers to save in order to be economically prepared for a potential future need to be temporarily away from work.¹⁰ More recently, Professor Gillian Lester made an important contribution to the work addressing this policy problem with her article defending the need for paid leave in our country,¹¹ and Ann O'Leary published an article providing an historical perspective, examining why family leave laws in the United States don't provide adequate protections for low-income workers.¹²

It was the thinking and research behind these articles that formed the initial basis for our research on this project.

Combining Efforts to Construct a Plan

In this last stage of Workplace Flexibility 2010's process, and at the beginning of Berkeley CHEFS' work, we engaged in a wonderful collaboration aimed at finding the best way to address the thorniest questions about time-off policies.

This report presents our answers. We looked to best practices, explored private sector insurance markets, and ultimately landed on a policy solution whose structure, because of its similarity to Social Security, would be familiar to every American. We also ran up against some challenges we believe deserve further research. These include how to ease the "transition costs" for employers as we shift the workplace to account for the "new normal" and ensure that employees feel like they can take paid time off without risking their job, particularly during a time of recession.

Right now, individuals are struggling with these issues. They are working and have families. They are aging, but still need to work to support themselves and may need more time off to address their own ailing health. They have disabilities and health conditions, but could maintain employment if they had temporary disability policies to support them. Women — working or not — continue to carry the bulk of the burden for caregiving (both for children and for their aging relatives who are living longer than ever) and suffer the consequences of any attendant lost family income.

Individual employers are all over the map in their ability to provide this type of time off, depending on whether they believe it fits their business model and bottom line. And the government is only now realizing that workplace flexibility issues have an impact on the nation's "bottom line" — the American economy.

In that context, we believe the scope of our proposal matches the depth of the problem. Our proposal acknowledges the elephant in the room: The world has changed. American families need help. The modern work-family dilemma means people need new kinds of support to take care of themselves and their families. We need sustainable business, economic, and workforce development models that allow us to reap the benefits of every American's participation in the workforce without burning out the most valuable commodity we have: the American people.

So as we move through the economic recession and rebuild our economy, we need to adopt policies that move beyond societal expectations established for a workforce of the last century. We need policies for today's workers, to ensure they keep working. Indeed, workplace flexibility represents, at its core, an opportunity to sustain our economy, maintain competitiveness, and, at the same time, support our families' financial and emotional health. The time has come to seize this opportunity and put workplace flexibility and paid time off at the top of the list for our 21st century economy and American way of life.

Workplace Flexibility 2010
Georgetown Law

Berkeley CHEFS
UC Berkeley School of Law

Executive Summary

¹ Kathleen Christensen & Barbara Schneider, *Evidence of the Worker and Workplace Mismatch*, in *Workplace Flexibility: Realigning 20th-Century Jobs for a 21st-Century Workforce 2* (Kathleen Christensen & Barbara Schneider eds., 2010).

² Traci McMillan, *Obama Says Flexibility Not Just a Women's Issue*, Bloomberg, Oct. 5, 2010. See also Barack Obama, President of the United States, Remarks of the President, White House Forum on Workplace Flexibility (Mar. 30, 2010), available at <http://www.whitehouse.gov/photos-and-video/video/forum-workplace-flexibility-closing-session> (last visited Nov. 16, 2010).

³ Maria Shriver, *A Woman's Nation*, in *The Shriver Report: A Woman's Nation Changes Everything 7* (Heather Boushey & Ann O'Leary eds., 2009).

⁴ See White House Forum on Flexibility, Break out Session: Participant Comments (Mar. 31, 2010), available at <http://www.whitehouse.gov/blog/2010/04/01/a-conversation-workplace-flexibility> (last visited Nov. 16, 2010) (including Ron Glover of IBM, describing the idea of enabling business to be flexible as “really core”; Avis Jones-DeWeever, National Council of Negro Women, emphasizing the difficulties low-wage workers encounter when attempting flexible work; Nancy LeaMond, AARP, conveying older workers' intent to maintain employment at older ages than previous generations; and Sheila Casey, The Hill, explaining how important flexibility is to members of the military or loved ones when the member is at home, especially given the reality of multiple deployments).

⁵ See Chai R. Feldblum, *Policy Challenges and Opportunities for Workplace Flexibility: The State of Play*, in *Work-Life Policies* (Ann C. Crouter and Alan Booth eds., 2009).

⁶ See Workplace Flexibility 2010, Policy Components, available at http://workplaceflexibility2010.org/index.php/policy_components/ (last visited Nov. 16, 2010).

⁷ This feedback process was formalized through our Legal Working Group and National Advisory Commission on Workplace Flexibility, but also included numerous meetings with work-family and business advocates, academic researchers, and business representatives.

⁸ Workplace Flexibility 2010, Public Policy Platform on Flexible Work Arrangements (2010), available at http://workplaceflexibility2010.org/images/uploads/reports/report_1.pdf (last visited Nov. 16, 2010).

⁹ White House Forum on Workplace Flexibility (Mar. 30, 2010), available at <http://www.whitehouse.gov/blog/2010/04/01/a-conversation-workplace-flexibility> (last visited Nov. 16, 2010).

¹⁰ Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 Cal. L. Rev. 465 (1987).

¹¹ Gillian Lester, *A Defense of Paid Family Leave*, 28 Harv. Women's L.J. 1 (2005).

¹² Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 Berkeley J. Emp. & Lab. L. 1 (2007).

In this report, Workplace Flexibility 2010 at Georgetown Law and the Berkeley Center on Health, Economic & Family Security at UC Berkeley School of Law propose a new “Family Security Insurance” (FSI) that would reform our current social insurance system to provide for income replacement when people take time off from work for health and caregiving reasons. This report details the benefits provided under FSI, who would be eligible, how it would be administered, and — importantly — how to pay for it.

The recommendations cover income replacement for the following three significant life events:

- ➔ One's own serious illness or temporary disability that renders a worker temporarily unable to perform his or her job;
- ➔ Arrival of a newborn, newly adopted child or newly placed foster child who needs care and time to bond with parents; and
- ➔ The serious illness of a family member who is in need of care.

Our report is based on an extensive review of research documenting the demographic and societal shifts over the past 40 years, the current variability in access to paid time off, the legal landscape, and the public policy arguments in support of income replacement when workers are away from work for health and caregiving reasons. We make the case that workplace flexibility, and specifically paid time off from work for health and caregiving reasons, is no longer an issue for *some* families or *some* industries, but rather a national priority with major social and economic implications. FSI is designed to support people who are working, and to help keep them working.

FSI would be a national *social insurance program* paid for not by the government, but by spreading the cost among workers and their employers to create a fair, predictable foundation of support. It would *not* be a cash assistance or welfare program that would add to the national deficit.

Key Elements of Family Security Insurance (FSI)

The following summary describes the key elements of the FSI program and how it would work for employers and employees.

Eligibility for income replacement benefits under FSI

FSI would consist of three components: Temporary Disability Insurance (TDI), Parental Care for a New Child Insurance (PCNC), and Caregiving Insurance. Workers would qualify based on the reason needed for time off from work:

TDI: Those eligible must have a “temporary disability,” defined as a “serious health condition” [as that term is used in the Family and Medical Leave Act (FMLA)], which causes an individual to be unable to perform the usual functions of his or her job, including disability resulting from pregnancy or childbirth.

PCNC: An individual would be eligible for PCNC benefits if he or she is the parent of a newborn, newly adopted or newly placed foster child and is providing care to that child.

Caregiving Insurance: A worker would be eligible if he or she is “needed to care for” a “family member” with a “serious health condition.” The terms “needed to care for” and “serious health condition” would track the definitions used in the FMLA. The term “family member” would be defined broadly to include, among others, grandparents, domestic partners, and siblings, as well as spouses, parents, and children.

All participants, regardless of the reason for time off from work, would need to meet a threshold level of attachment to the labor force: They must have worked at least 950 hours in the previous year. This threshold will help meet one of the key objectives of FSI: encouraging continued labor force attachment of individuals who need to interrupt work temporarily to meet health or caregiving demands. A worker’s eligibility would not depend on the size of his or her employer or on having worked for one particular employer. Self-employed individuals also would be covered.

The amount of the benefit

We sought to make the wage replacement rate for each aspect of the program high enough so people could depend on the program to provide substantial financial security when they have a health or caregiving need requiring time off work. We also tailored the benefit – both the wage replacement rate and the length of the time off – to the different needs of, and policy challenges posed by, each of the three components.

TDI: An eligible recipient’s wages would be replaced at 80% of the worker’s average weekly wage, up to a maximum amount of 150% of the national average weekly wage. Benefits would be available for up to 26 weeks per year, although the actual duration of benefits received would depend on a medical provider’s recommendation for the specific illness or injury.

PCNC: An eligible recipient’s wages would be replaced at 90% of the worker’s average weekly wage, up to a maximum amount of 150% of the national average weekly wage. Each parent would be eligible for 12 weeks of PCNC benefits within the first year of a child’s birth, adoption or foster placement. The benefits would accrue to each individual and would not be transferable between parents.

Caregiving Insurance: An eligible recipient’s wages would be replaced at 80% of the worker’s average weekly wage, up to a maximum amount of 150% of the national average weekly wage. There would be a requirement that 26 weeks of caregiving benefits be the maximum amount an individual could receive over the course of his or her working lifetime, and that 12 weeks of caregiving benefits be the maximum an individual could receive in any one year. Within those limits, actual benefit durations would depend on how long a worker had to be away from work to provide care.

Hypothetical FSI Worker Benefits

Worker	Worker’s Average Weekly Wage	Maximum Benefit Allowed [National Average Weekly Wage (\$836) Multiplied by 150 Percent]	Worker’s TDI and Caregiving Insurance Weekly Benefit (80% of Workers Avg. Weekly Wage up to Max of National Avg. Weekly Wage)	Worker’s PCNC Weekly Benefit (90% of Workers Avg. Weekly Wage up to Max of National Avg. Weekly Wage)
Minimum Wage Worker	\$290	\$1254	\$232	\$261
Unionized Worker	\$1000	\$1264	\$800	\$900
Professional Worker	\$1500	\$1254	\$1200	\$1254*

*Note: Because 90% of \$1500 is \$1350, which is higher than the allowed maximum benefit (\$1254), the professional worker would receive the maximum benefit of 150% of the national average weekly wage (\$1254) instead of 90% of his or her salary (\$1350).

Like regular wages, the benefits would be subject to federal income and payroll tax. Benefits would be available for five consecutive business days of time off or more, but not for shorter periods of time off.

In the case of TDI and Caregiving Insurance, a five-business-day waiting period would effectively serve as a “co-pay” into the system. This means recipients might need to use other forms of paid time off, such as sick days or their own savings, before drawing on FSI benefits. This would discourage using the system unnecessarily. There would be no waiting period for PCNC benefits.

Paying for FSI

FSI would be financed by an equal-contribution employer and employee payroll tax, with no cap on the amount of earnings subject to taxation for a given year. The tax would cover the cost of benefits as well as administration of the program. The payroll tax spreads the cost of the program across a large risk pool, protecting against deficit spending and ensuring that the program is budget neutral over the short and long term.

Protecting against overuse, fraud, and abuse

Each aspect of the program – TDI, PCNC, and Caregiving Insurance – includes checks and balances to protect against overuse, fraud, and abuse. We recommend specific eligibility and benefit rules to control cost and prevent fraud and abuse.

To control against overuse, for example, we limit the ability to receive benefits under TDI and Caregiving Insurance to those who take time off from work because, respectively, they have a “serious health condition” or are “needed to care for” an individual with a “serious health condition” as defined by the FMLA. This program will not be available for routine illnesses. In addition, a worker taking TDI has to be *unable to work* due to the serious health condition. In other words, it is not enough to be sick; the illness must render the worker temporarily incapable of working. Recipients of TDI and Caregiving Insurance must also satisfy a *five-day waiting period* before receiving any benefits. Together, these rules help ensure that the program is used only for serious illnesses and injuries.

Another way in which the program controls against overuse is by limiting the Caregiving Insurance benefit to a total maximum benefit duration of 26 weeks across an individual's working life.

In addition, we include a number of mechanisms to control against fraud and abuse. For example, under TDI, medical certification is required to confirm the presence of a serious health condition. For Caregiving Insurance, a benefit recipient must provide documentation that he or she is needed to provide care and what type of care will be provided. Medical providers must certify the need for care. For PCNC, each parent must attest that he or she is providing care to the child.

Rationale for a social insurance model

After exploring several other policy models — such as tax incentives, employer mandates, and personal savings accounts — we became convinced that social insurance was the best policy model for providing income replacement for health and caregiving needs. Historical, fairness, and economic arguments all support a social insurance model.

Historically, our country has decided to insure its citizens against a number of unexpected disruptions and significant life events. Social Security provides protection for retirement, death of a loved one, and permanent disability. Unemployment Insurance protects against the risk of losing a job without cause. Worker's Compensation insures employees against workplace injuries. Further, five states and one territory use Temporary Disability Insurance (TDI) to protect their workers against illness and injury outside the workplace, and two states have added family and medical caregiving protection to that coverage.

National social insurance that provides income replacement during periods of time off for health and caregiving purposes fits well within this system of supports. After all, few events are more disruptive to a person's life than the birth or adoption of a child, or the need to care for oneself or a loved one with a serious health condition.

From a fairness perspective, national social insurance based on workforce attachment is the only option that can guarantee a universal baseline of income replacement. Because access is based on workforce attachment, there are no disparities based upon income, gender, occupation, industry, and/or union membership. A laborer in Massachusetts, for example, has the same basic access to paid time off as an attorney in Arizona. Though some beneficiaries will have access to additional paid time off, such as benefits funded by employers for recruitment and retention purposes, everyone will start from a common baseline.

Finally, national social insurance makes good economic sense. The rise of the two-earner family, coupled with an aging population, has created a permanent demographic shift in the American workforce. More people need to take time off to care for themselves or a loved one, but few are able to afford the time away from work. This is exactly the kind of problem that social insurance was designed to protect against.

In addition, employers — especially small employers — benefit from a social insurance model because it allows them to provide their employees with paid time off at an affordable price. This is true because a national social insurance program has the practical advantage of risk-pooling across firms instead of pricing time-off benefits for each individual employer.

The administration of FSI

FSI would be administered by either a single federal agency or a federal-state partnership. Regardless of which agency administers FSI, a functioning system will require its own set of administrative processes. In the report, we outline how the administration of FSI would work, including the application process, distribution of benefits, and review process.

Other key aspects of the report

We explored additional policy levers that would be necessary to make FSI work better for employers and employees. First, employers should be supported during periods of time that employees are off from work and receiving FSI benefits. Employers need to get their work done, and there are numerous business practices that can help employers manage periods of time off effectively.

We also believe job protection for employees is a necessary prerequisite for any insurance system or wage replacement program. Employees are afraid to take time off from work for fear of being fired or being replaced, particularly in this economy. To ensure people take the time they need — and to ensure we get at the societal “payoffs” of the system — we recommend that the FMLA's job protection requirement be extended to cover smaller employers (those with 15 or more employees rather than the current threshold of 50 or more employees).

Finally, we provide a series of “next steps” that would further our understanding of how to build effective public policy solutions in this arena.

Reasons to adopt FSI despite concerns about the federal deficit and the recession

The key goals of FSI are to keep people working, healthy, and productive. Nothing could be more relevant as America seeks to move through this recession and maintain a balanced budget. In fact, we view the goals of FSI as a necessary part of broader economic and budget conversations.

Many factors — family income security, child development, productivity, labor force attachment, and better health outcomes — combine to make this issue a national priority. This is particularly true during volatile economic times when many families simply can't afford to take unpaid time off even for the most pressing and important health and family events.

Current access to paid time off for health and caregiving comes nowhere near to meeting the demand. The current system runs on the luck of the draw — where some companies offer some forms of paid time off, but others either cannot afford it or presume these issues are not part of their bottom-line strategy. Families hope for the best and muddle through, but sometimes with dire consequences for their job tenure and long-term financial security. Depending on the type of work you do and what industry you're in, there is huge variation in access to paid time off from work.

Even more important than the short-term view is the long-term payoff. Over time, the costs of failing to deal with this issue will add up. In contrast, long-term benefits of addressing this issue include healthier children, parents, and elders; an informal caregiving network that complements the American healthcare system; gender equity and equal opportunity; possible savings on other public benefits programs; sustained labor force attachment by workers who have caregiving obligations; and family economic security.

Of course, spending any amount of money or political capital on this issue will never be “worth it” unless policymakers make this issue a priority. To date, the “big ticket” conversations on the deficit and economic recovery generally haven’t included workplace flexibility – or specifically, paid time off for health and caregiving reasons – as a key variable, even though women’s workforce participation and keeping people working are critical elements to our overall economic competitiveness. That’s exactly why we believe FSI should be front and center in discussions about the deficit and economic growth.

The issue is no longer an individual one. Instead, it has major social and economic implications that merit a national response.

Family Security Insurance (FSI): Policy Recommendations

ELIGIBILITY	
Qualifying Event	<ul style="list-style-type: none"> • Temporary Disability Insurance (TDI): applicant’s serious health condition (includes pregnancy). • Parental Care for a New Child Insurance (PCNC): birth or placement of a new child. • Caregiving Insurance (CI): serious health condition of a family member, broadly defined.
Workforce Attachment Requirements	Minimum of 950 hours worked over a base period, which is defined as the last 4 or 5 quarters preceding an application for benefits. Hours can be served at multiple employers. Self-employed individuals’ eligibility is determined based on earnings.
Covered Employers	All.
BENEFITS	
Duration	<ul style="list-style-type: none"> • TDI: depends on length of an individual’s serious health condition; maximum annual duration of 26 weeks; no total maximum duration. • PCNC: 12 weeks per parent, must be taken within 12 months of child’s birth or placement; no total maximum duration. • CI: depends on length of caregiving need; maximum annual duration of 12 weeks, total maximum duration of 26 weeks.
Wage Replacement Rate & Maximum Benefit Amount	<ul style="list-style-type: none"> • TDI and CI: 80% of worker’s average week wage up to maximum of 150% the national average weekly wage. • PCNC: 90% of worker’s average week wage up to maximum of 150% the national average weekly wage.
Taxation	Benefits are treated as taxable wages for income and payroll tax purposes.
Waiting period	<ul style="list-style-type: none"> • TDI: 5 workdays per year, per serious health condition. • PCNC: None. • CI: 5 workdays per year, per serious health condition of the person being cared for.
Allowable increments of benefits	5 days or more.
FINANCING	
Method of financing	Payroll tax, contributions made on a pre-tax basis.
Proportion of payroll tax contributions	Employees: 50%; Employers: 50%; Self-employed: 100%.
Payroll tax earnings cap	None.
ADMINISTRATION	
Administrative vehicle	Either a single federal agency or a federal-state partnership.
JOB PROTECTION or ANTI-RETALIATION PROVISIONS	
Job protection	No. Recommends an expansion of the FMLA to cover employers with 15+ employees.
Anti-retaliation provision	Yes.

The Challenge

Over the course of our lives and careers, almost all of us will need time off from work to care for our children, our own health needs, or those of a family member. This has always been true, but the problem, magnified by demographic shifts, is now a nearly universal challenge.

Yet our national policy on paid time off from work for health and caregiving reasons has not caught up with today’s reality. As a result, individuals, families, and employers are largely left to muddle through on their own, with only a patchwork of supports that falls far short of the demand. This inaction has consequences not only for individuals and families, but also for business and the overall economy.

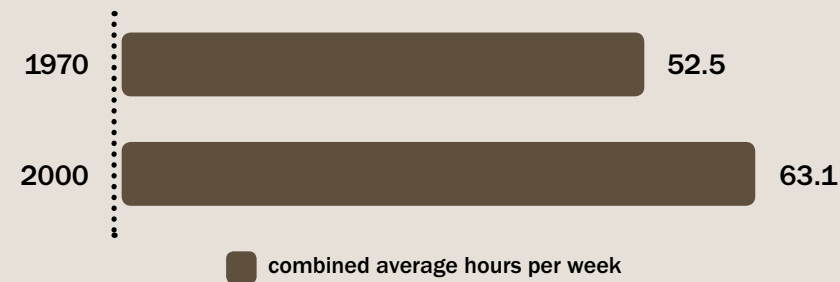
This report offers one solution to the problem of how we support ourselves, our families, our businesses, and our economy through some of life’s most complex and challenging moments. It offers a blueprint for a national social insurance program – which we call “Family Security Insurance” (FSI) – to provide income replacement for workers when they are away from work due to the birth or adoption of a child, their own serious illness, or to care for a family member with a serious illness.¹ This report documents our proposal in detail and shares the depth of rigorous research that supports our conclusions.

Over the last two years, Workplace Flexibility 2010 at Georgetown Law and the Berkeley Center on Health, Economic & Family Security at UC Berkeley School of Law have collaborated to create this proposal. We followed a careful and lengthy process to reach the conclusions laid out in this report. We looked at the reasons people need paid time off from work for health and caregiving and what happens if they don’t get it. We scrutinized how things work right now in the private sector and under current law to understand who has access to paid time off and who doesn’t. We carefully constructed our policy response to meet the needs of individuals across income, gender, age, occupation, and industry, while also addressing employer concerns and remaining conscious of financial costs to individuals, employers, and the government.

Because we looked at these issues through a research lens, we can say with confidence that each of the elements we propose as part of FSI is firmly grounded on a foundation from the fields of law, economics and social science. Our proposal recognizes that the 21st century requires a different set of policies than the 20th century. In the 21st century, we need policies designating a national priority to support people who are working– and to help keep them working. We also need policies that spread the costs of paid time off from work for health and caregiving among employers and employees to create a fair and predictable baseline of support.

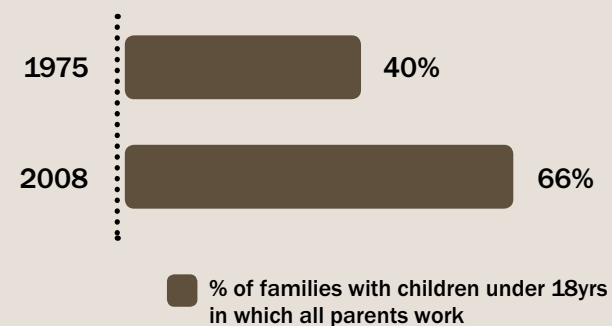
Below, we outline the rationale for our program design– through our key research findings and our goals and objectives.

Couples Spend More Time Working



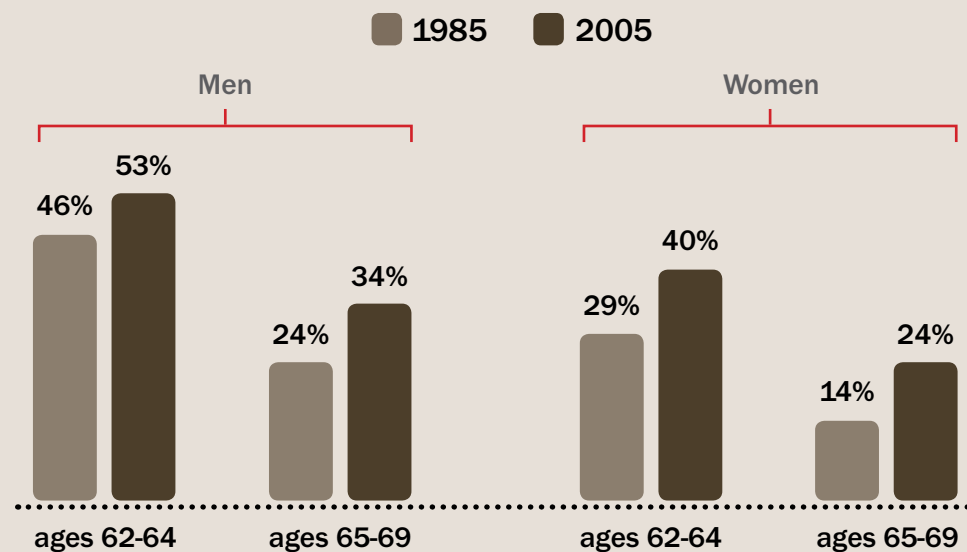
Source: Jacobs and Gerson, *The Time Divide* (Harvard University Press, 2004), p. 44, Table 2.1

More Parents Are in the Labor Force



Source: U.S. Bureau of Labor Statistics, Economic News Release, Table 4: "Families with Own Children, 2007-2008 Annual Averages"; National Center for Education Statistics, U.S. Dept. of Ed., "Indicator 18: Parents' Employment, 1975 to 1993."

More Older Adults Are in the Labor Force



Source: Federal Interagency Forum on Aging-Related Statistics, "Older Americans Update 2006: Key Indicators of Well-Being," Table 11.

The Research Findings

Three key research findings shape the principles behind our recommendations and ultimately guide our thinking on why a social insurance model is the appropriate policy vehicle.

Finding #1: The world of work and family has changed.

Profound demographic and societal shifts over the last 40 years have resulted in an increased and acute need for various types of workplace flexibility, including paid time off for health and caregiving reasons. For example:

- In most families, the family-based caregiving safety net in the form of a "stay-at-home spouse" no longer exists. Women are now nearly half of all U.S. workers and are integral to the national economy as primary or co-breadwinners in over two-thirds of households.²
- We are living longer, working longer, and providing more care to aging relatives.³ In fact, caregiving demands are hitting a critical mass. Fifty-nine percent of the 44.4 million caregivers providing care to older individuals are employed, simultaneously juggling work and caregiving responsibilities.⁴
- Health technology has advanced in ways we could never have imagined 50 years ago. Health conditions that previously would have resulted in death or an inability to work now often can be treated through medication, short-term therapies, and surgery, allowing individuals to get back to work within a matter of weeks.
- People with serious illnesses and temporary disabilities now are able to stay in the workforce and are expected to support themselves through work. In fact, with the passage of the Americans with Disabilities Act, these individuals are empowered to work and contribute to the economy.⁵
- The above changes have led to increased levels of reported work-family conflict.⁶ Americans want more workplace flexibility. Seventy six percent of likely voters say they favor extending the current law to provide paid leave.⁷ Both men and women experience this tug, and the need for flexibility and paid time off goes beyond one type of family or one type of industry.⁸

Finding #2: We haven't caught up to the changes in how we work and live.

Despite the on-the-ground reality facing most Americans, neither the private sector nor public policy has met the demand for paid time off for health and caregiving reasons.

- Working families need paid time off for parental care for a new child, temporary disability, and caregiving reasons, but current access is extremely variable and depends on employer, occupation, income, industry, gender, union membership, and number of hours worked.⁹ What's more, there is huge variation in how employers provide paid time-off benefits, including formal insurance, self-insured benefits, informal policies, and PTO (paid time off) banks.¹⁰
- Disparity continues to exist between women and men regarding who takes time off for caregiving reasons and for bonding with a new child, driven in part by the fact that men continue to earn more than their wives.¹¹

- **The Family and Medical Leave Act (FMLA) provides critical protections, but has two key failings: Its protections reach only about half the workforce, and because the leave is unpaid, many simply cannot afford to take it.¹²**
- No federal programs exist to provide paid time off for health and caregiving reasons, and there are only a few state programs that provide income replacement for these reasons.¹³
- Many, many working Americans lack access to paid time off all together — most frequently those who are low-wage and part-time workers.¹⁴

Finding #3: Income replacement for health and caregiving reasons is good for public health, family economic security, and business productivity.

Beyond the sheer need for more work-family support, there are many reasons why income replacement for personal and family health events is good — even critical — for society. In Chapters 2 through 4 of this report, we detail the reasons: better outcomes for children, greater gender equity, more secure family incomes, and positive business outcomes. Here we provide a few highlights:

Improved Health and Well-Being for Children and Their Caregivers:¹⁵ Income replacement for new parents has tremendous benefits for the health and well-being of children and their caregivers. Parental leave of 12 weeks or more is correlated with many positive health outcomes for children. Further, parental workplace flexibility during the first year of a child’s life, including a significant amount of time off and/or flexibility in scheduling, can have positive developmental and cognitive effects for children.

Parents also benefit from time off to care for newborn, newly adopted, or newly placed foster children. For women, returning early to work, particularly if earlier than preferred, is associated with greater amounts of stress and higher rates of depression. Fathers and non-biological parents (e.g., adoptive or foster parents) also benefit from having time to bond with their children. Although men in the United States rarely take much time off following the birth or adoption of a new child, those who do are more involved in the care of their children later, resulting in stronger long-term, father-child relationships. Time off for foster or adoptive parents is also important because these parents may not have had the same amount of time to prepare psychologically and emotionally for the arrival of the child and are often not present at the birth of the child.

By contrast, returning to work very soon after birth, (i.e., six weeks or less) is associated with a variety of negative outcomes for both parents and children. These include higher rates of infant mortality, lower rates of breastfeeding, lower rates of immunizations and well-baby care, and a higher incidence of maternal physical and mental health concerns.

Greater Income Security: FSI provides greater income security for workers and their families who need time off for a health or caregiving reason. The case for increased income security is especially strong for those events that are unplanned, such as one’s own serious illness or the need to provide care for a suddenly seriously ill family member. It is well documented that working caregivers often suffer significant financial hardship.¹⁶

Better Business Outcomes: Employers stand to gain from the provision of wage replacement for their temporarily disabled workers or for those needing time off to provide care. A worker’s faster and more complete recovery, associated with paid time off, reduces the cost of foregone productivity.¹⁷ Employers may also benefit from reduced health care costs since employees will have time off to recover from an illness or injury instead of developing a chronic problem. Providing workers with wage replacement during time off for caregiving is also advantageous to business. Recent research shows that people who receive wage replacement while taking care-related time off are more likely to return to their job following the event and to be more productive overall.¹⁸

Improved Gender Equity: Women have historically been, and continue to be, primary caregivers in their families, despite the fact that most are now employed outside the home.¹⁹ Women are nearly always the ones who leave the labor force if it is deemed necessary or more cost effective for one parent to do so.²⁰ Data from other countries that have adopted social insurance programs for paid family leave suggest that providing women with the means to take temporary time off keeps them working and also increases their lifetime wages.²¹ Many men would also like to be more involved in caregiving; this is particularly the case among younger generations of workers, who highly value a balance between work and family life.²² Recent experiments in OECD countries, such as Sweden and Finland, have demonstrated that when governments put policies in place to encourage men to take leave, they do it.²³

Our Goals and Objectives

Based on the above research findings, we set out goals and objectives that our ideal program had to meet. Our proposal had to:

- Focus on the *primary sources of workplace/workforce conflict* regarding the need for time off: personal illness, care for an ill family member, and time off to care for a newborn or newly placed adopted or foster child.
- Provide *universal access* to paid time off for medical and caregiving reasons. Universal access means equal access across gender, income, life stage, and industry/occupation.
- Seek to *support people who are working* and keep them working. Labor force attachment drives many aspects of our program design.
- Ensure *efficient delivery* of the benefit so that people would get the income replacement simply and when they needed it, not weeks or months later.
- Be *budget neutral*, spreading the costs among employers and employees rather than increasing the federal deficit.
- Account for *employer interests* in predictability and administrative ease.

We believe FSI meets all these goals.

A Call for Action

In this report, we make the case for why we need a national social insurance system to support workers who must be away from work because of their own illnesses, to care for a new child, or to care for an ill family member. We argue that FSI is in the best interest of families, businesses, and

our national economy, and we provide detailed recommendations regarding how FSI would work in practice. Government inaction is no longer acceptable. The time to act is now.



¹ Note that our proposal focuses on paid leave for temporary periods away from work of more than a week and in some cases up to as much as six months. We believe other policy levers are needed to address very short periods of time off work.

² Heather Boushey, *The New Breadwinners*, The Shriver Report: A Woman's Nation Changes Everything 30-67 (Heather Boushey & Ann O'Leary eds., 2009).

³ U.S. Dep't of Health and Human Servs., *The Future Supply of Long Term Care Workers in Relation to the Aging Baby Boom Generation* (2003), available at <http://aspe.hhs.gov/daltcp/reports/lcwork.pdf> (showing the number of caregivers in the U.S. is expected to rise by 50% by 2050); Family Caregiver Alliance, *Fact Sheet: Selected Long Term Care Statistics* (2005), available at http://www.caregiver.org/caregiver/jsp/print_friendly.jsp?nodeid=440 (showing the vast majority of in-home based care is done by the recipients' family and friends).

⁴ About 35% of workers have regular caregiving responsibilities. See Nat'l Ass'n of Caregivers, *Caregiving in the U.S.* 10 (2009), available at <http://www.caregiving.org/data/CaregivingUSAllAgesExecSum.pdf>.

⁵ See ADA Amendments Act of 2008, 42 U.S.C.A § 12101 et seq. (West 1994 & Supp. 2009) (stating that in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers); See also Emily A. Benfer, *The ADA Amendments Act: An Overview of Recent Changes to the Americans with Disabilities Act* (2009), available at <http://www.law.georgetown.edu/archiveada/documents/BenferADAAA.pdf>.

⁶ Ruth Milkman, *Gender Equality: Transforming Family Divisions of Labor* 339-364 (Janet Gornick & Marcia Meyers eds., 2009); See also *Workplace Flexibility: Realigning 20th-Century Jobs for a 21st-Century Workforce* (Kathleen Christensen & Barbara Schneider eds., 2010).

⁷ Heather Boushey, *Ctr. for american progress, Helping Breadwinners When It Can't Wait* 11 (2009), available at <http://www.americanprogress.org/issues/2009/06/pdf/fmla.pdf>.

⁸ Kathleen Gerson, *The Unfinished Revolution: How a New Generation is Reshaping Family, Work, and Gender in America* 110-11 (2010).

⁹ See *infra* Chapter 2 notes 7-36; 57-64 and accompanying text; Chapter 3 notes 27-34 and accompanying text; Chapter 4 notes 24-28 and accompanying text.

¹⁰ *Id.*

¹¹ See *infra* Chapter 3 note 15 and accompanying text; Chapter 4 note 9 and accompanying text.

¹² See *infra* Chapter 6 notes 22-31 and accompanying text.

¹³ See *infra* Appendix A: Current Social Insurance Programs; Appendix B: Key Characteristics of Social Insurance Programs.

¹⁴ See *infra* Chapter 2 notes 18-24 and accompanying text; Chapter 3 notes 29-32 and accompanying text; Chapter 4 notes 24-28 and accompanying text.

¹⁵ For health and well-being arguments for children and caregivers, see *infra* Chapter 3 notes 1-26 and accompanying text; Chapter 4 notes 1-23 and accompanying text.

¹⁶ See *infra* Chapter 4 notes 17-18 and accompanying text.

¹⁷ See *infra* Chapter 2 notes 4-6 and accompanying text.

¹⁸ See *infra* Chapter 3 notes 15-17 and accompanying text; Chapter 4 notes 4-6 and accompanying text.

¹⁹ Boushey, *supra* note 2, at 30-67; Gillian Lester, *A Defense of Paid Family Leave*, 28 Harv. Women's L. J. 1 (2004); Organization for Economic Co-Operation and Development, *OECD Employment Outlook* 137 (2001); Arlie Hochschild, *The Time Bind: When Work Becomes Home and Home Becomes Work* (1997).

²⁰ U.S. Department of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* (Westat 2001); Kristin Keith and Abigail McWilliams, *The Returns to Mobility and Job Search by Gender*, 52 Indus. & Lab. Rel. Rev. 3 (1999); Robyn Stone, Gail Cafferata, and Judith Sangl, *Caregivers of the Frail Elderly: A National Profile* 27 *The Gerontologist* 616-626 (1987).

²¹ Government Accountability Office, *Women and Low-skilled Workers: Other Countries' Policies and Practices that May Help These Workers Enter and Remain in the Labor Force* (2007); Janet Gornick and Marcia Meyers, *Families that Work: Policies for Reconciling Parenthood and Employment* (2003); Christopher Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 *Q. J. Econ.* 285, 311-312 (1998); Heather Boushey, *Family Friendly Policies: Helping Mothers Make Ends Meet*, 66 *Rev. of Soc. Econ.* 51, 68 (2008) (finding that "access to family friendly policies at best, raises women's earnings, and at worst, does not hurt them").

²² Brad Harrington, Fred Van Deusen, and Jamie Ladge, *The New Dad: Exploring Fatherhood Within a Career Context* (2010), available at http://www.bc.edu/centers/cwf/meta-elements/pdf/BCCWF_Fatherhood_Study_The_New_Dad.pdf; Gerson, *supra* note 8, at 110; Kathleen Gerson, *No Man's Land: Men's Changing Commitments to Family and Work* (1994).

²³ See Chapter 1, *infra* notes 26-27 and accompanying text; Chapter 3, *infra* note 46 and accompanying text.



Part

What is needed?



Universal Recommendations

Some of our recommendations apply to all three types of paid time off: Temporary Disability Insurance, Parental Care for a New Child Insurance, and Caregiving Insurance. Other recommendations differ, depending on the underlying reason for the time off.

All recommendations build on a number of existing laws and programs:

- ➔ The Family and Medical Leave Act (FMLA), which provides unpaid, job-protected time off for one's own serious health condition, to care for a new child, or to care for a seriously ill family member;¹
- ➔ Temporary Disability Insurance (TDI) programs in California, Hawaii, New York, New Jersey, Rhode Island, and Puerto Rico, which provide wage replacement for time off from work due to an individual's temporary illness or injury that renders the person unable to work; and
- ➔ Paid Family Leave (PFL) programs in California and New Jersey, which provide wage replacement benefits for time off from work to bond with and care for a new child, or to care for a family member.

These laws are explained in detail below.²

We start by laying out the recommendations that are universal across all three categories of time off. These include the following:

Eligibility.

- ➔ A worker's eligibility for FSI benefits should be tied to a critical level of labor force attachment. We recommend a minimum of 950 hours worked over a one-year period.
- ➔ A worker's eligibility should not depend on the size of his or her employer or on working, or having worked, for one particular employer.
- ➔ Self-employed individuals should be covered by FSI, but eligibility for the self-employed should be based on earnings, not hours (as it is for traditional employees).

Benefits.

- ➔ FSI benefits should be based on a percentage of the worker's average wages over a one-year period. The wage replacement rate will differ depending on the reason for the time off: 80% for temporary disability and caregiving, and 90% for parental care of a new child.
- ➔ There should be a maximum benefit amount that is the same for all three categories of time off. We recommend a maximum weekly benefit amount that replaces wages up to 150% of the national average weekly wage.
- ➔ FSI benefits should be subject to federal income and payroll tax, but contributions to the program should be made on a pre-tax basis.
- ➔ FSI benefits should only be available for time off that lasts five consecutive business days or longer.
- ➔ No individual should be discharged or discriminated against because he or she has filed a claim for FSI benefits.

Financing.

- ➔ FSI should be financed by an equal-contribution employer and employee payroll tax, with no cap on the amount of wages subject to taxation for a given year. The tax should be sufficient to cover the cost of benefits as well as administration of the program.
- ➔ Contributions to the program should not be experience-rated.

Below we describe our rationale for each of our universal recommendations:

Eligibility.

A worker's eligibility for FSI benefits should be tied to a critical level of labor force attachment. We recommend a minimum of 950 hours worked over a one-year period.

A significant rationale for this proposal is to support the continued labor force attachment of individuals who need to interrupt work temporarily to meet health or caregiving demands. Requiring a specified number of hours worked as a condition of eligibility is the best way to ensure the program achieves this objective. Requiring little or no prior workforce participation would mean the benefit could be used as a form of cash assistance for non-workers. Setting the requirement too high, however, could exclude workers whose labor market participation is less than full time but nevertheless significant.

We propose a reasonable minimum workforce attachment requirement of 950 work hours during a one-year period. The one-year period would generally be calculated by taking the first four of the five most recent quarters preceding an individual's application for benefits. However, if an applicant would be deemed ineligible using the traditional base period, an alternative base period should be used instead — that is, using the last four completed quarters.³

A requirement of 950 hours would allow individuals who work part time to qualify for the program. An employee who works an average of 20 hours per week during the year would qualify for the program even if that person took up to 4¹/₂ weeks off work for vacation, sick days, or other reasons

(including being between jobs). This hours threshold is significantly lower than requirements of the FMLA and recent congressional proposals for paid family and medical leave insurance.⁴ We recommend this lower threshold precisely to address the exclusion of part-time workers we have seen with FMLA coverage.⁵ We are motivated in part by the fact that in the current economic climate, many who work part time do so involuntarily because full-time positions are not available.⁶

While our recommended hours requirement is lower than the FMLA, we recognize it is higher than most Organization for Economic Co-operation and Development (OECD) parental leave programs and some state TDI or PFL programs.⁷ The reason we recommend a higher threshold is because this program is explicitly aimed at supporting and incentivizing strong labor force attachment. With regard to parental care and caregiving leave, research suggests higher levels of workforce attachment prior to leave have a direct correlation to higher levels of attachment by mothers after returning from the leave.⁸ We believe a moderately high threshold is also appropriate for the TDI portion of the program to reduce the likelihood of moral hazard and to reinforce the idea that the program is designed to give benefit entitlements only to those who have a demonstrated commitment to the workforce.⁹

We believe an hours requirement is more appropriate than an earnings test. Hours worked is a more direct measure of workforce attachment than earnings and avoids the skewing of eligibility towards high earners. Many OECD countries condition eligibility for parental leave social insurance programs on a minimum level of hours worked rather than earnings.¹⁰ Furthermore, the historical use of earnings as a proxy for attachment — the criterion used by most state Unemployment Insurance (UI), TDI, and PFL programs — has led to arbitrary exclusions of low-wage and part-time workers, which we seek to avoid.¹¹ The UI programs in Washington and Oregon provide good models for establishing a mechanism to track hours data for salaried and hourly employees.¹²

A worker's eligibility should not depend on the size of his or her employer or on working, or having worked, for one particular employer.

All workers who pay into the system should have access to benefits, regardless of whether such individuals work for a small or large employer. This is consistent with most social insurance programs in the United States, including Social Security, Unemployment Insurance, Workers' Compensation, and state TDI and PFL programs.¹³ The OECD countries we studied also allow individuals at both small and large employers to qualify for parental leave benefits.¹⁴ Extending coverage to all workers, regardless of business size, is also particularly important for low-wage workers, who are more likely to work for small employers and less likely to receive time-off benefits.¹⁵ Low-wage workers are also more likely to report needing leave from work to care for a family member or to recover from their own serious illness or health condition.¹⁶

We also believe there should be no requirement that the hours worked be for the same employer. While job protection must be tied to a particular employer because it requires employers to restore a job, there is no similar need in a national wage replacement insurance system. None of the social insurance programs we studied in the United States requires that the hours worked or earnings must be tied to a particular employer to trigger eligibility for benefits, including UI and state TDI/PFL programs.¹⁷ It is unfair to disqualify workers who have paid into the program at a previous place of employment simply because they have changed jobs. It is equally unfair to disqualify workers who have paid into the program simply because they work part time, but simultaneously, at two or three different jobs.

We recognize that employers, particularly small businesses, might be rightfully concerned about how to cope with an increased number of employees who take time off. To account for these concerns, **this proposal incorporates eligibility and benefits rules that create clear expectations about how the program will be used by employees, and includes safeguards against fraud and abuse.**

Self-employed individuals should be covered by FSI, but eligibility for the self-employed should be based on earnings, not hours (as it is for traditional employees).

We believe that self-employed individuals should be covered by FSI and required to contribute both the employer and employee portions of the payroll tax. Self-employed individuals are also required to maintain coverage under similar social insurance programs such as Social Security and Medicare.¹⁸ Self-employed workers represent 7 percent of the workforce; these individuals are often entrepreneurial risk-takers who are particularly subject to the uncertainties of the market, and therefore arguably even more in need of protection.¹⁹ We considered recommending such coverage on a voluntary basis, but we were concerned that optional coverage for the self-employed could lead to adverse selection and place the fiscal stability of the program at risk. In other words, we were worried that if participation were optional, only individuals with serious health conditions or significant caregiving responsibilities would opt in to the program, thus driving up the costs.

We believe that eligibility for self-employed individuals should be based on earnings, not hours, because, unlike for other workers, there is no feasible mechanism to verify self-employed hours data. Social Security and California's TDI/PFL program both present models for determining an appropriate earnings test for self-employed individuals.²⁰

Benefits.

As explained in subsequent chapters, we recommend that an individual receive 80% wage replacement (up to a cap) for time off for Temporary Disability and Caregiving, and 90% wage replacement (up to the same cap) for Parental Care for a New Child. The following recommendations regarding benefits, however, are universal across all three programs and thus are discussed here.

FSI benefits should be based on a percentage of the worker's average weekly wage over a one-year period.

We believe the program should provide a level of benefits that represents a realistic assessment of workers' past average weekly wages. Thus, we recommend that the benefit amount be based on a worker's average wages across a base period, which should be the last four or five quarters immediately preceding an application.²¹

There should be a *maximum benefit amount* that is the same for all three categories of time off. We recommend a maximum weekly benefit amount that replaces wages up to 150% of the national average weekly wage.

A national social insurance program should include a maximum benefit amount. All individuals should receive a basic wage replacement benefit through FSI and the maximum benefit must be higher than the average weekly wage to ensure families across the income spectrum — in particular, middle-class families — can effectively take advantage of the benefit. Individuals whose incomes fall above the maximum at which wages are replaced and wish to maintain a significantly higher wage replacement during their time off should be encouraged to save private funds for that goal.

We recommend a maximum weekly benefit amount that replaces wages up to 150% of the national average weekly wage. In today's dollars, the maximum weekly wage at which a worker would receive wage replacement corresponding to their income level is approximately \$1,254 per week.²² Setting the maximum benefit at this level ensures that a substantial majority of American households — more than 75 percent — will receive benefits that correspond to their income levels.²³ There is precedent in analogous social insurance programs for setting maximum benefits at a moderately high level. California's TDI and PFL program sets maximum benefits at 150% of the state average weekly wage, and some state workers' compensation programs are set at 150% of their state average weekly wages as well.²⁴ In addition, the federal Longshore and Harbor Workers' Compensation program, which provides wage replacement to longshore and harbor workers who have work-related injuries or disabilities, sets maximum benefits at 200% the national average weekly wage.²⁵

Our primary reason for setting the maximum benefit at a moderately high level is to enable primary household earners, who are disproportionately men, to take parental or caregiving leave. Our review of statistics from paid parental leave programs in countries with low maximum benefit amounts and wage replacement rates showed very low take-up rates among men; high benefit amounts were associated with increased male take-up.²⁶ Additionally, usage data from California and New Jersey's PFL programs show that California's PFL program, which has maximum benefits similar to our proposal, has much higher take-up rates of PFL among men than New Jersey's PFL program, which has a low maximum benefit amount.²⁷ In short, we believe that an effective national social insurance program for addressing temporary disabilities, care for a new child, and caregiving should provide benefits that allow each working family member to affordably take time off work when needed.

To account for changes in wages and cost of living over time, the maximum benefits should be indexed to the national average weekly wage. Several state-level social insurance programs index benefits to their state's average weekly wage.²⁸ For national programs like our proposal, national average weekly wage data is appropriate because workers in every state will be contributing the same percentage of their wages to fund the program.²⁹ Social Security also uses national average weekly wage data as part of its benefit formula.³⁰

FSI benefits should be subject to federal income and payroll tax, but contributions to the program should be made on a pre-tax basis.

We arrived at our recommendation on taxation after researching how similar short-term wage replacement benefits (workers' compensation, state TDI/PFL, and unemployment compensation) are currently treated under federal income and payroll tax rules.³¹ Our research found different tax rules for each type of benefit; in particular, there are complicated rules on taxation of state TDI benefits that depend on how a program is funded.³² We also looked at how other countries treat similar benefits for tax purposes. Many of them treat parental leave and maternity leave benefits as taxable income, particularly if the benefits are offered as wage replacement and not flat-rate public assistance benefits.³³

There are several reasons we chose to treat FSI benefits as taxable wages for income and payroll tax purposes:

First, because FSI is explicitly linked to paid employment and the benefits are based on one's wages, we believe it is appropriate to treat the benefits as taxable wages. Treating the benefits as wages for payroll tax purposes means that a person receiving FSI benefits will still be contributing to Social Security and Medicare while away from work. We believe it is important that an FSI recipient's future

Social Security benefits not be affected by taking the benefit. Nonetheless, the payroll tax used to fund FSI should be deducted from an employee's pre-tax earnings to avoid double taxation when that employee receives benefits. Further, we recommend that benefits be treated as earned income for purposes of qualifying for the EITC. Because income is required to be eligible for the EITC, it is important that the benefit be treated as earned income in order to assist low-income workers who might otherwise fall out of EITC eligibility.

Second, we wanted to ensure equity between FSI benefits and similar benefits that are currently available through other social insurance programs. We were particularly concerned with achieving equity between workers' compensation benefits and our proposed temporary disability benefits. Workers' compensation benefits are not subject to taxation; income is usually replaced at 66%. Temporary disability benefits under FSI are offered at 80% wage replacement. By taxing the temporary disability benefits proposed under our program we would achieve rough equivalence in effective wage replacement rates with workers' compensation.³⁴

Finally, we sought to simplify tax rules so that someone receiving benefits under our program could expect nearly the same tax treatment as if they were receiving regular wages.

FSI benefits should only be available for time off that lasts five consecutive business days or longer.

FSI is a wage replacement system for individuals who need to take extended periods of time off — *i.e.*, more than one week — from work. It is designed to supplement, but not supplant, other sources of wage replacement available for shorter periods of time off, such as paid sick days, paid vacation days, and PTO banks. As such, we recommend that FSI benefits be available only for periods of time off that last one business week (five days) or longer. Such a requirement makes the benefits easier to administer, provides scheduling predictability to employers, and provides flexibility to employees who need wage replacement for varying needs and for varying periods of time.

Some individuals, however, will need episodic periods of time off for the same underlying reason. For example, a woman with breast cancer may need to undergo a number of surgeries — a few months apart from each other — if she undergoes a mastectomy and reconstruction. As such, we believe that benefits for the same underlying reason should be available for non-continuous periods of time off — so long as the periods of time off each last at least one week.

That said, we recognize there are individuals who may need to take episodic periods of time off, for the same underlying reason, in increments shorter than one week. For example, the woman with breast cancer may need to attend weekly chemotherapy or radiation appointments. Other individuals who have taken an extended period of time off may want to “phase back in” to work by working a part-time or reduced-hours schedule. Using the same example, a woman who took four weeks off from work for a mastectomy may want to phase back into work by working three or four days per week for a few weeks prior to returning to work full time. Or a new mother may want to work a reduced-hours schedule for a few months prior to returning to a full-time schedule.

As noted above, we believe that individuals who need wage replacement for these shorter periods of time should be able to receive wage replacement from other sources, such as paid sick days or PTO banks. Unfortunately, however, as discussed below, some individuals — especially low-wage workers — do not have access to any paid time off. Many others have access to some paid time off, but not a sufficient amount to address their needs. As a result, and as explained further in Chapter 7, we believe additional research needs to be done regarding whether and how a national social insurance program such as FSI can feasibly provide benefits for episodic periods of time off, or reduced-hours

schedules, in durations of less than one week.

No individual should be discharged or discriminated against because he or she has filed a claim for FSI benefits.

A number of state workers' compensation laws provide that an individual should not be discharged or discriminated against for filing a claim for workers' compensation benefits.³⁵ New York TDI, which is operated out of the state workers' compensation agency, follows the New York non-discrimination provision.³⁶ We believe the same should apply to FSI claimants — namely, an individual should not be discharged or discriminated against because he or she has filed a claim for FSI benefits.

Financing.

FSI should be financed by an equal contribution employer and employee payroll tax, with no cap on the amount of earnings subject to taxation for a given year. The tax should be sufficient to cover the cost of benefits as well as administration of the program.

Both employers and employees benefit from FSI. As such, employers and employees should share the costs through a joint payroll tax.

Employers — especially small employers — benefit because FSI allows them to provide their employees with paid time off at an affordable price. This is true because a national social insurance program has the practical advantage of risk pooling across firms instead of pricing time-off benefits for each individual employer. In addition, low-wage and middle-income workers will find it easier to maintain their attachment to the workplace, helping with retention and reducing turnover costs for employers.

Employees also benefit from the establishment of a social insurance program for caregiving, temporary disability, and parental care for a new child. Obviously, not all employees will use each of the available benefits. But almost everyone will use at least some FSI benefit over the course of his or her lifetime. Also, all employees will gain peace of mind from knowing these life-altering events are covered and that they will have economic security for themselves and their families.

Both employers and employees benefit because of the positive societal effects described in subsequent chapters — including increased labor force participation, the potential for lower health care costs, and better physical and emotional health outcomes for children, leading to future economic growth and productivity.

The new payroll tax would have no limit on the amount of earnings subject to taxation (like Medicare). This model helps ensure the solvency of the new program and maintains progressivity in its financing. As we noted above, we do recommend a maximum benefit amount. However, the maximum benefit amount we impose is intentionally high, so most workers, including most middle-income workers, receive benefits commensurate with their income levels.³⁸

We also recommend the payroll tax cover the cost of benefits as well as administration of the program, so the program does not need to rely on general revenue financing. Several other social insurance programs we studied finance the administrative costs through a payroll tax.³⁹

As discussed in Chapter 7, we specifically chose not to cost out the FSI program at this time because we wanted to focus solely on the substantive policy issues and spark debate. That said, we did study the costs of similar programs, particularly the five state TDI programs and the two PFL programs (California and New Jersey).⁴⁰ Each of these programs is financed either through employee-only payroll taxes or joint employee-employer payroll taxes. The tax rates and the amount of earnings subject to taxation vary, but are generally quite low. For example, as of 2010, non-self-employed workers covered by California's TDI/PFL program pay a 1.1 percent tax on the first \$93,916 of their earnings to finance the program.⁴¹ This means that the maximum worker contribution per year is currently \$1,026.⁴² In New Jersey, both employers and employees contribute to the state's TDI program, but only employees contribute to the state's PFL program. As of 2010, the basic TDI tax rate for New Jersey employers is .5% on the first \$29,700 of employee wages; employees pay .5 percent to finance the TDI program and .12 percent to finance the PFL program.⁴³ Thus, assuming an employer is paying the basic tax rate of .5 percent, an employer's maximum yearly contribution per worker for the TDI plan is \$148.50. An employee's maximum yearly contribution for both the TDI and PFL programs is \$184.14 (\$148.50 for TDI and \$35.64 for PFL).

Contributions to the program should not be experience-rated because employers have no control over the triggering events.

In general, social insurance programs that experience-rate employer contributions have features giving employers some control over the cost of their premiums through their own behavior, and penalize those who have higher usage rates.

For instance, workers' compensation is experience-rated on the assumption that employers can take measures to provide safer workplaces, which will reduce their premiums through fewer work-related injuries and illnesses. Unemployment Insurance is experience-rated to discourage frequent layoffs and fairly allocate the costs imposed on society at large by unemployment.⁴⁴

But employers do not have any control over whether their employees will need time off or will utilize benefits for temporary disability, parental care, or caregiving. Hence, employers should not be penalized for their employees' use of benefits. Furthermore, if employers were experience-rated based on how often employees utilized time-off programs, they might actively discourage leave-taking, or discriminate against those employees perceived to be at "high risk" of leave-taking, such as women of childbearing age or employees with disabilities or young children.



The universal rules described above apply regardless of the reason for claiming FSI benefits. In Chapters 2 through 4 we describe the eligibility and benefit rules that vary depending on the reason for time off: temporary disability, parental care for a child, or caregiving.

Here we provide one final point of clarification. As we explain in Chapter 6, we believe access to job protection while receiving FSI benefits is critical. (Indeed, in that chapter, we recommend the FMLA's job protection requirement be extended to cover smaller employers.) FSI benefits, however, do not in and of themselves provide a worker with an independent right to take a leave of absence from his or her current job. That right must be granted by the employer, either voluntarily or as a result of their obligations under the FMLA and any other relevant federal or state laws governing time off from work.⁴⁵

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¹ The FMLA also provides job-protected leave to an employee because of any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is on active duty. See 29 U.S.C. 2612(a)(1)(E) (2009).

² See also Appendices A and B.

³ The base period is typically the first four of the five most recent completed quarters preceding application for benefits. For workers with irregular schedules, the insertion of a one-quarter "lag period" might produce a situation in which a worker with low work hours in the first of five quarters is excluded, while another worker with identical total hours over the five quarters but whose fifth quarter was low will be eligible. State incentives in the American Recovery and Reinvestment Act, and concern about arbitrary exclusion of workers with irregular workforce attachment, has led a majority of the states in recent years to adopt more lenient criteria for UI eligibility through the use of an "alternative base period" (ABP). See "Federal Stimulus Funding Produces Unprecedented Wave of State Unemployment Insurance Reforms," National Employment Law Project, Dec. 2, 2009, available at <http://www.nelp.org/page/-/UI/UMARoundup1209.pdf>. Under our proposal, which incorporates an alternative base period, an employee filing in the January-March 2011 quarter would qualify if the employee meets the hours requirement for the standard base period (October 2009 to September 2010) or the alternative base period (January 2010 to December 2010).

⁴ FMLA requires 1,250 hours worked in the previous 12 months at the same employer. 29 U.S.C. § 2611 (2009). The Family Leave and Insurance Act of 2009, introduced by Representative Pete Stark, would require 625 hours of service with one employer during the previous six months. Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. § 101 (2009). A similar bill introduced in 2007 by Senators Dodd and Stevens would have required that an employee be eligible under FMLA and have earned wages with a covered employer for 12 of the last 18 months prior to filing an application for benefits. Family Leave and Insurance Act of 2007, S.1681, 110th Cong. § 101 (2007).

⁵ Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, Monthly Lab. Rev. (2001), available at <http://www.bls.gov/opub/mlr/2001/09/art2full.pdf>.

⁶ U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, *Involuntary Part-Time Work On The Rise* (2008). See also U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Situation Summary: The Employment Situation, Oct. 2010 Table A-8* (Nov. 5, 2010), <http://www.bls.gov/news.release/empsit.nr0.htm>.

⁷ Hawaii is the only state that has a TDI law requiring hours in addition to earnings as a condition of eligibility (requiring 20 hours a week for at least 14 weeks). Haw. Rev. Stat. §§ 392-6, -25. Because of minimum earnings eligibility requirements for New Jersey and Rhode Island's TDI programs, minimum wage workers in both states must work at least 20 hours per week to qualify for the benefits, which is a slightly higher requirement than our recommendation. See N.J. Stat. Ann. § 43:21-41(d)(2); N.J. Dep't of Lab. & Workforce Dev., *Wage Requirements—State Plan*, http://lwd.dol.state.nj.us/labor/tdi/content/sp_wage_requirements.html; R.I. Gen. Laws § 28-41-11(b)(1). See also Appendix B: Key Characteristics of Social Insurance Programs (Eligibility: Workforce Attachment Requirements).

⁸ Wen-Jui Han, Christopher J. Ruhm, Jane Waldfogel, & Elizabeth Washbrook, *The Timing of Mothers' Employment After Childbirth*, Monthly Lab. Rev. (2008), available at <http://www.bls.gov/opub/mlr/2008/06/art2full.pdf>; Jacob Alex Klerman & Arleen Leibowitz, *Job Continuity Among New Mothers*, 36 *Demography* 154, 150-51 (1999).

⁹ In public and private insurance programs, the problem of moral hazard occurs when the behavior of an insured party changes because the insured party no longer bears the full costs of the loss or hazard. This results in higher insurance costs overall since the insurance, and not the individual, is paying for the cost of the behavior. For example, in a TDI program with full wage replacement there might be fewer incentives for individuals to avoid injury or accident that would render them unable to work since the program, and not the individual, would bear the costs of lost wages. Of course, individuals generally want to avoid injury or illness for reasons other than lost wages, but to the extent that the financial loss is no longer a big concern, some benefit recipients might not take as many steps to mitigate the effects of an illness that renders them unable to work. See Jonathan Gruber, *Public Finance and Public Policy* 321-324 (2004) (examining the moral hazard costs of social insurance programs).

¹⁰ For example, the new Australian parental leave social insurance program requires continuous employment for the last 10 of 13 months prior to the birth or adoption of a child, with at least 330 hours of work during that period, but does not include an earnings floor. Department of Families, Housing, Community Services and Indigenous Affairs, *Australia's Paid Parental Leave Scheme* (2009), available at http://www.fahcsia.gov.au/sa/families/progserv/paid_parental/parental_leave/Documents/paid_parental_leave/page1.htm. Canada requires 600 hours of qualifying employment within the year preceding parental leave, but sets no minimum earnings requirement. Employment Insurance Act, S.C. 1996, c.23, § 6 (Can.). New Zealand requires six months of employment at the same employer for a minimum of 10 hours per week before qualifying for parental leave benefits, but lacks a minimum benefits requirement. Parental Leave and Employment Protection Act 1987, 1987 S.N.Z. No. 129, § 7.

¹¹ For instance, under UI, a minimum-wage worker qualifies for benefits in all states, so long as he or she works full time and full year. Similarly, a half-time (20-hour-per-week) worker qualifies for benefits in all states so long as he or she works for the full year at \$8.00 an hour (which exceeds the minimum wage). But a half-time worker who earns the minimum wage may fall short of UI or TDI/PFL earnings requirements in some states if that worker is out of work for just a few weeks in a year – whether through sickness, being between jobs, or another reason. See Amy Chasanov, *Low-wage, part-time workers find unemployment insurance elusive*, Economic Policy Institute (Sept. 1, 2004), available at http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_09012004. This had led to calls for adoption eligibility requirements based upon hours worked. See Laurie J. Bassi & Daniel P. McMurrer, *Coverage and Reciprocity: Trends and Effects, in Unemployment Insurance in the United States: Analysis of Policy Issues* 51, at 81 (Christopher J. O'Leary & Stephen A. Wandner eds., 1997) (arguing that hours should replace earnings for unemployment insurance eligibility); Michael J. Gaetz & Jerry L. Mashaw, *True Security: Rethinking American Social Insurance* 204-205 (1999) (explaining that unemployment insurance earnings requirements disqualify low-

wage workers and recommending a system where workers could qualify based upon earnings or a history of full-time work); Advisory Council on Unemployment Compensation, *Unemployment Insurance in the United States: Benefits, Financing, & Coverage* 16-19 (1995) (recommending that individuals who work at least 800 hours per year or the earnings equivalent be eligible for UI benefits).

¹² In order to meet the initial eligibility requirements for unemployment benefits in Washington, an individual must have worked 680 hours in a base year. See Wash. Rev. Code § 50.04.030 (2010). Each employer must submit a quarterly tax and wage report that details the remuneration paid for employment to workers in its employ, the full names and social security numbers of all such workers, and the total hours worked by each worker, subject to penalty. Wash. Admin. Code § 192-310-010 (2010); *Id.* § 192-310-030; *Id.* § 192-310-040. In Oregon, a UI applicant may qualify by working at least 500 hours in a base year or by earning above a certain threshold. Or. Rev. Stat. § 657150 (2009). Every employing unit must maintain a payroll record of individuals performing services for it. Or. Admin. R. 471-031-0005 (2010). The payroll record must show the total payroll of the employing unit by calendar quarter and with respect to each individual's wages and the number of hours worked. Or. Admin. R. 471-031-0085 (2010).

¹³ See Appendix B (Eligibility: Covered Employers and Employees).

¹⁴ For example, in Australia, parental leave is available to all full-time and part-time employees (aside from casual employees who must meet certain statutory requirements to qualify for leave). Fair Work Act, 2009, s.67 (Austl.). In Canada, all employees paying into Employment Insurance qualify for parental leave benefits once they've accumulated 600 work hours in the qualifying benefit period. Service Canada, *Employment Insurance and maternity, parental, and sickness benefits* (2010), available at <http://www.servicecanada.gc.ca/eng/ei/types/special.shtml>. In New Zealand, all employees are eligible for parental leave benefits. Parental Leave and Employment Protection Act 1987, 1987 S.N.Z. No. 129, §§ 96-97. In the United Kingdom, all employees who have been employed by a single employer for the duration of a qualifying period are entitled to parental leave benefits. Margaret O'Brien & Peter Moss, UK Department for Business, Innovation and Skills, *International Review of Leave Policies and Related Research* 337-49 (2009). In Sweden, all employees are entitled to parental leave benefits. Sweden.se, *The collective rights of employees* (2010). Germany also entitles all employees to parental leave benefits. C. Katharina Spiess & Katharina Wrohlich, *The Parental Leave Benefit Reform in Germany: Costs and Labour Market Outcomes of Moving towards the Scandinavian Model*, 2372 *Inst. Stud. Lab.* 7.

¹⁵ Mark C. Berger, Dan A. Black, & Frank A. Scott, *Distribution of Low-Wage Workers by Firm Size in the United States* 8 (Carolyn Loof and Associates 1999), available at <http://www.sba.gov/advo/research/rs196tot.pdf> (finding that 54% of minimum wage workers were employed by firms with fewer than 100 employees); David Card & Alan Krueger, *Myth and Measurement: The New Economics of Minimum Wage* 314-18 (1995) (finding that nearly 60% of all minimum wage workers were employed in firms with 25 employees or fewer). Gregory Acs & Austin Nichols, *Low-Income Workers and Their Employers: Characteristics and Challenges* 3, 7 (The Urban Institute 2007) (finding that firms with fewer than 25 workers employ 53 percent of low-wage workers [those earning less than \$7.73 an hour] and 48 percent of low-wage workers who live in families below 200 percent of the federal poverty line). See also Dep't of Labor & Bureau of Labor Statistics, *National Compensation Survey: Occupational Earnings in the United States*, tbl.27 (2008), available at <http://www.bls.gov/ncs/ncswage2008.pdf> (showing that workers in businesses with fewer than 50 employees have the lowest average wages across business size). Small and medium-size employers also offer fewer benefits (including time-off benefits) than large businesses. Dep't of Labor & Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States* 4, 24 (2006), available at <http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf>.

¹⁶ Naomi Gerstel & Katherine McGonagle, *Job Leaves and the Limits of the Family and Medical Leave Act: The Effects of Gender, Race, and Family*, 26 *Work and Occupations* 510, 518-519 (1999).

¹⁷ See Appendix B (Eligibility: Workforce Attachment).

¹⁸ The Self-Employment Contributions Act of 1954 requires self-employed workers to pay a percentage of earnings on a yearly basis. 26 U.S.C. § 1401 (2006). These payments are distributed to the social security and disability insurance trust funds (42 U.S.C. 401(a)(4)), and the hospital insurance trust fund (42 U.S.C. 1395i(a)(2)). Self-employed coverage is currently excluded or optional under all state PFL and TDI programs. See Appendix B (Eligibility: Covered Employers and Employees).

¹⁹ See Bureau of Labor Statistics, *Household Data Annual Averages*, <http://www.bls.gov/cps/cpsaat15.pdf>.

²⁰ For Social Security, self-employed individuals earn credits at a rate of one credit for each \$1,120 in net earnings, but no more than four credits per year. An employee must accrue a certain number of credits in order to retire. See Soc. Sec. Admin., Pub. No. 05-10072, *How You Earn Credits* (2010), available at <http://www.ssa.gov/pubs/10072.html>. To qualify for TDI or PFL benefits in California, a self-employed individual must submit a copy of their IRS schedule for the previous fiscal year showing a net profit of at least \$4,600 or an average net profit of at least \$1,150 per quarter since becoming self employed or for the preceding four quarters, whichever period is less. Cal. Unempl. Ins. Code §§ 702.5, 704(f), 708.5 (West 2009).

²¹ See *supra* note 3 and accompanying text (discussion of recommendation on how to calculate a base period).

²² Based upon calculations using average annual wage data from the Bureau of Labor Statistics, *National Occupational Employment and Wage Estimates* (2009), available at http://www.bls.gov/oes/2009/may/oes_nat.htm#00-0000.

²³ *Id.* As of 2009, the annual mean wage was \$43,460, translating to an AWW of \$836 and 150% AWW of \$1,254. *Id.* Seventy-five percent of workers make \$52,920 or less annually, or about \$1018/wk. *Id.*, available at ftp://ftp.bls.gov/pub/special_requests/oes/oesm09nat.zip. Therefore, more than 75% of workers will receive wage replacement that corresponds to their income level.

²⁴ Cal. Lab. Code §§ 2655, 4453 (West 2009); See also Appendix B (Wage Replacement Rate & Maximum Benefit Amount). Nevada and Vermont both set maximum workers' compensation benefits at 150% the average state weekly wage. See Nev. Rev. Stat. § 616A.005-617.150 (2009); Vt. Stat. Ann. tit. 21 §§ 601-711 (2010).

²⁵ 33 U.S.C. § 906(b)(1) (2010).

²⁶ For example, Austria, Belgium, France, and Italy have relatively low wage replacement rates and maximum benefits (such as Italy's 30 percent) and correspondingly low take-up rates among men (from 1 to 17 percent). Comparatively, countries and provinces with high wage-replacement rates and maximum benefit amounts, such as Iceland, Norway, Quebec, and Sweden (which replace at between 55 and 75 percent in Quebec to 80 to 100 percent in Norway) have correspondingly high take-up rates among men.] (from 48-90 percent). (However, because fathers access parental leave in several different forms – either as short-duration gender-specific paternity leave or as gender-neutral, transferrable, parental leave – low observed take-up rates may be influenced by the transferability of leave and may not fully reflect male take-up of parental leave.) Katherine Marshall, *Fathers' Use of Paid Parental Leave*, 75-001-X Perspectives – Statistics Canada 7 (2008).

²⁷ As of 2009, California had a 24 percent take-up rate among men for baby bonding and offered maximum benefits up to \$959 per week, approximately 150 percent of the state's average weekly wage. California Employment Dev. Dep't, "State Disability Insurance (SDI) Statistical Information," http://www.edd.ca.gov/Disability/pdf/PFL_Program_Statistics.pdf (last visited Nov. 4, 2010). New Jersey's take-up rates among men for baby bonding from July 2009 to April 2010 were just over 9 percent; the maximum benefits in New Jersey were \$546, only 66 percent of the state's average weekly wage). N.J. Dep't of Lab. & Workforce Dev., E-mail and attachment from Christopher Longo, April 2010, (on file with Berkeley CHEFS) (providing New Jersey Family Leave Insurance usage data by gender from July 2009 to April 2010).

²⁸ Of the states that have a social insurance model for paid family leave and/or temporary disability, all of them index maximum benefits to their state's average weekly wage. Cal. Lab. Code § 4453 (West 2009) (California); N.J. Stat. Ann. § 43:21-40 (West 2010) (New Jersey); R.I. Gen. Laws Ann. § 28-41-5 (West 2010) (Rhode Island); See also Appendix B (Benefits: Wage Replacement Rate & Maximum Benefit Amount). Many states also index to a state average weekly wage for unemployment insurance (UI) and workers' compensation. See U.S. Dep't of Labor, Employment Training & Admin., Comparison of State Unemployment Laws: Monetary Entitlement 3-8, 3-122009) 3-8, 3-12 available at <http://www.workforcesecurity.doleta.gov/unemploy/uilawcompar/2009/monetary.pdf> (last visited Dec. 10, 2009); National Employment Law Project, "Precedent for Indexing Labor Standards to Average Wages" (June 4, 2009) available at nelp.3cdn.net/e18f9a4abcc9148e19_psm6bh8js.pdf (finding that 45 states used the state average weekly wage to calculate minimum and/or maximum workers' compensation benefits.).

²⁹ Two national programs, Social Security and the Longshore and Harbor Workers' Compensation Act, index to national average weekly wages as part or all of the maximum benefit calculation. 42 U.S.C. §§ 415(a), 409(k) (2010) (Social Security); 33 U.S.C. §§ 902(19), 906(b)(1) (2010) (Longshore and Harbor Workers' Compensation Act). Social Security also uses the Consumer Price Index to determine each year's COLA adjustment in retiree benefits, a practice that has been criticized as not reflecting rising living standards. 42 U.S.C. § 415(i) (2010); See also Nat'l Emp't Law Project, Precedent for Indexing Labor Standards to Average Wages 3 (2009), available at nelp.3cdn.net/e18f9a4abcc9148e19_psm6bh8js.pdf.

³⁰ Social Security uses the national average wage index for a number of purposes, including the basis for determining the "primary insurance amount" for a beneficiary. See SSA, "National Average Wage Index," <http://www.ssa.gov/OACT/COLA/AWI.html>. See also Appendix B (Benefits: Wage Replacement Rate and Maximum Benefit Amount).

³¹ See Appendix B (Benefits: Taxation).

³² *Id.*

³³ Canadian Employment Insurance benefits, including caregiving, parental, and maternity leave, constitute taxable income. Service Canada, *Employment Insurance Regular Benefits* (2009), available at <http://www.servicecanada.gc.ca/eng/ei/types/regular.shtml>. In New Zealand, benefits are taxed according to the individual's income. Income Tax Act 2007, 2007 S.N.Z. No. 97, § CF1. In the United Kingdom, both Statutory Maternity Pay and Statutory Paternity Pay constitute taxable income. HM Revenue & Customs, EIM76101 - Social security benefits: list of taxable social security benefits, Parts 9 & 10 ITEPA (2003), available at <http://www.hmrc.gov.uk/manuals/eimanual/eim76101.htm>. In Sweden, the parental cash benefit is not taxed up to the flat-rate base allowance (residence-based benefits for which every resident of Sweden qualifies). However, individuals may receive additional, separate benefits that correspond to their income levels, and these additional benefits are subject to taxes like other ordinary income. Ministry of Health and Social Affairs, *Social Insurance in Sweden* (2009), available at <http://www.regeringen.se/content/1/c6/13/75/63/d1783aed.pdf>.

³⁴ We recognize that low earners who may not owe any income tax would receive a more valuable benefit under our temporary disability program than under a state workers' compensation program.

³⁵ See, e.g., Cal. Lab. Code § 132a (West 2009) (California); N.J. Stat. Ann. § 34:15-39.1 (West 2010) (New Jersey); N.Y. Workers' Comp. Law § 120 (West 2010) (New York).

³⁶ See N.Y. Workers' Comp. Bd., Form DB-271S (8-09), Statement of Rights-Disability Benefits Law (2009), available at www.wcb.state.ny.us. See also N.Y. Work. Comp. Law § 120 (McKinney 2010).

³⁷ See also Appendix F: Other Policy Models for Achieving Wage Replacement for Temporary Disability, Parental Care, and Caregiving (describing the economic advantages of the social insurance model, and the disadvantages of models that do not pool risk broadly across firms).

³⁸ See *supra* notes 22-23 and accompanying text (noting that under our proposal more than 75 percent of American workers would receive benefits that match their contributions to the program).

³⁹ See e.g. Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3301 (2010); Employment Training and Admin., U.S. Dep't of Lab., <http://workforcesecurity.doleta.gov/unemploy/uitaxtopic.asp> (federal FUTA tax goes to reimbursing states for the costs of administration); 42 U.S.C. § 401(g)(1)(A)(2006) (requiring FICA payroll tax to cover administrative costs).

⁴⁰ See generally Appendix B (Financing).

⁴¹ Cal. Unempl. Ins. Code § 985 (West 2009); Self-employed workers pay a 2.2% tax on the same maximum earnings cap. California Employment Dev. Dep't, "FAQs for Elective Coverage," http://www.edd.ca.gov/disability/FAQs_for_Elective_Coverage.htm; See also U.S. Dep't of Lab., Comparison of State Unemployment Laws: Temporary Disability Insurance 8-3 (2009), available at www.workforcesecurity.doleta.gov/unemploy/uilawcompar/2009/disability.pdf. (last visited Dec. 11, 2009) (discussing California SDI financing). See also Appendix B (Financing).

⁴² California EDD, *Disability Insurance and Paid Family Leave Statistics* (2010) http://www.edd.ca.gov/About_EDD/Quick_Statistics.htm#DIStatistics.

⁴³ On November 18, 2010, the New Jersey Department of Labor and Workforce Development announced the tax rate for the Family Leave Insurance program will be cut in half for FY2011, from .12 percent to only .06 percent. Thus, the maximum employee contribution for New Jersey's Family Leave Insurance program will only be \$17.76 per worker. See Bureau of National Affairs, *New Jersey Labor Department to Cut 2011 Family Leave Insurance Tax Rate*, Nov. 18, 2010. An employer's rate in New Jersey may decrease to .1 percent or increase to 1.1 percent on the basis of the employer's reserve ratio, length of employment, and the status of the fund as a whole. See N.J. Stat. Ann. § 43:21-7(e); See also New Jersey Department of Labor and Workforce Development, *Employer Handbook: New Jersey's Unemployment & Disability Insurance Programs*, at 32-33, available at http://lwd.dol.state.nj.us/labor/forms_pdfs/ui/b426.pdf (last visited Dec. 2, 2009) (describing experience rating in NJ TDI system); U.S. Dep't of Labor, Comparison of State Unemployment Laws: Temporary Disability Insurance (2009), at 8-3, available at <http://www.workforcesecurity.doleta.gov/unemploy/uilawcompar/2009/disability.pdf> (last visited Oct. 25, 2010) (summarizing New Jersey TDI financing); See also Appendix B (Financing).

⁴⁴ 26 U.S.C. § 3303(a) (2010). The Federal Unemployment Tax Act (FUTA) encourages the practice of experience rating by offering additional credits against the federal UI tax to employers with low state experience ratings. As with the other credit provisions of the FUTA, if a state fails to experience-rate its system, its companies lose the potential offsets.

⁴⁵ Under the FMLA, employers with 50 or more employees are required to provide job-protected leave for eligible employees for up to 12 weeks per year. In this report, we recommend an expansion of the FMLA to cover all employers with 15 or more employees, recognizing there are many questions that would first need to be addressed regarding how to make the FMLA work for small employers. We also recommend that further research be conducted to examine the access to benefits issue that may be created due to the discrepancy in job protection offered under the FMLA, even if it is expanded at some point to lower the employer threshold and the benefits available under FSI.



Temporary Disability Insurance

The first component of FSI provides wage replacement for time off taken because of a non work-related temporary disability.

In the United States, we have some social insurance programs that provide wage replacement when a worker is out of work due to a permanent disability or a work-related disability or injury. However, no form of national public insurance exists to support workers who need temporary time off from work to recover from non-work-related illnesses or injuries of moderate duration, or to give birth and recover from childbirth.

State-level workers' compensation programs cover workers who become temporarily or permanently disabled through a work-related illness or injury.¹ The Social Security Disability Insurance program covers people who become permanently disabled.² Additionally, there is current legislative interest focused around national guaranteed paid sick days to cover mild, short-term illnesses or injuries, such as brief ailments that require a week or less away from work.³

In this chapter we discuss the policy arguments in favor of providing wage replacement during time off from work because of a temporary disability, and current access to wage replacement during periods of temporary disability – both those related to illness or injury not suffered on the job, as well as those related to pregnancy, childbirth, and recovery from childbirth. We then describe our policy recommendations to address this need.

A. Temporary Disability Related to Illness or Injury

1. Policy Arguments

Most individuals will face a temporary disability, illness, or injury in their lifetime – whether it is a condition requiring intensive recovery, like a heart attack or an injury from a car accident, or a chronic illness that may need recurring treatment, like multiple sclerosis or rheumatoid arthritis. These illnesses or injuries are usually out of the control of individuals, most of whom want and need to work, and who want to return to their job following time away from work.

Such individuals need time off to receive medical treatment and recover. Unless they are fortunate enough to have significant savings, they will need some form of wage replacement during their time off—to pay for their groceries, their health care, their rent or mortgage, their utilities, and other regular expenses.

Without paid time off, individuals who are ill or injured may return to work before being fully recovered, thus making them susceptible to a relapse or recurrence, and potentially placing additional burdens on our health care system. When a job requires physical stamina or ability, individuals who return to work too early may put themselves or others in jeopardy.

Employers stand to gain from the provision of wage replacement for their temporarily disabled workers. Faster and more complete recovery associated with paid time off reduces the cost of foregone productivity.⁴ Employers may also benefit from reduced health care costs since employees will have time off to recover from an illness or injury instead of developing a long-term chronic problem. Many employers have recognized the cost-effectiveness of providing paid, temporary disability benefits to their professional employees.⁵ While most employers do not currently provide such benefits to their low-wage workers, research shows providing them with workplace flexibility, including paid time off, is equally cost effective, both in terms of increased productivity and decreased turnover.⁶

2. Current Access to Wage Replacement

There is neither a national system nor a nationally encouraged state system for wage replacement during periods of non-work-related, temporary disability. This does not necessarily mean, however, that workers in this country have no access to wage replacement when they are ill or injured. Indeed, employers have developed various types of paid time-off policies as part of employee compensation packages. And five states and one territory have Temporary Disability Insurance (TDI) programs, funded by employer and/or employee payroll taxes.⁷

To fully understand the current landscape regarding access to wage replacement during time away from work because of temporary disability, we must look at the full range of private and public benefits currently offered in the United States.⁸

a. Voluntary Employer Practices

Employer-provided wage replacement for periods of illness or injury is usually provided through a combination of paid sick days and, for longer periods of disability, short-term disability insurance plans. Paid sick days generally provide 100 percent wage replacement, whereas short-term disability plans generally replace between one-half and two-thirds of a worker's pre-disability gross weekly wages.⁹ In general, paid sick days provide wage replacement for short periods of time off (less than one week), whereas short-term disability benefits provide wage replacement for illnesses or injuries that last longer than one week. Workers who have access only to paid sick days, however, will often use those days for longer-term illnesses, to the extent they can. Short-term disability payments and paid sick days are both subject to taxation to the extent the employer pays for them.¹⁰

Paid sick days are available to an employee to use immediately upon accrual. After one year on the job, full-time, private-sector workers who receive paid sick days receive, on average, seven paid sick days per year.¹¹ Part-time workers who receive paid sick leave, as well as workers in firms with fewer than 100 employees, receive, on average, six paid sick days per year.¹²

Under most short-term disability plans, there is a waiting period of at least one week during which the disabled employee receives no wage replacement benefits under the plan (although they may use their accrued paid sick days, if they have any, to replace wages during this time).¹³ This waiting period functions similarly to a "co-pay" and helps control plan costs and simplify administration.¹⁴

The typical short term disability plan pays benefits for up to 26 weeks after the waiting period has been satisfied.¹⁵ In practice, however, many illnesses and injuries that workers experience do not

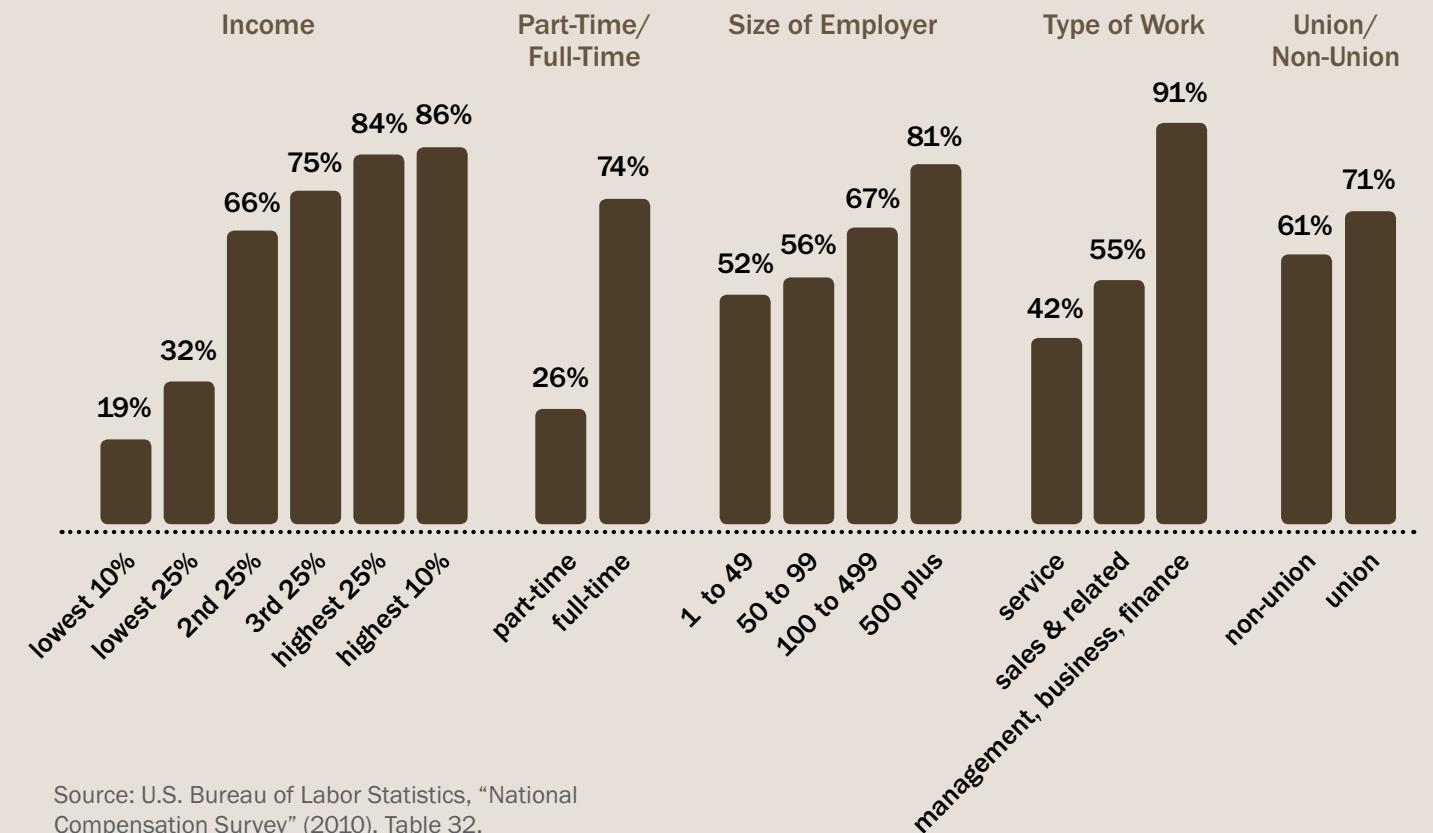
require them to be out of work for a full 26 weeks.¹⁶ For example, a worker recovering from surgery might only be out of work for four weeks, and therefore would only receive four weeks of short term disability benefits. Companies often use case-management tools and procedures, such as the Official Disability Guidelines and the Medical Disability Advisor, to determine the number of weeks a particular disability will render an employee unable to work.¹⁷

According to the Bureau of Labor Statistics' (BLS) 2010 National Compensation Survey, 39 percent of private-sector workers had access to employer-provided short term disability insurance policies.¹⁸ Of those workers who had access to such plans, 97 percent of the workers participated in them.¹⁹ The data from 2010 indicate that 80 percent of employees participated in plans funded entirely by their employers, while 20 percent of employers required employees to contribute to their short-term disability plans.²⁰

The following factors affect whether an individual has access to paid short-term disability benefits or paid sick days:

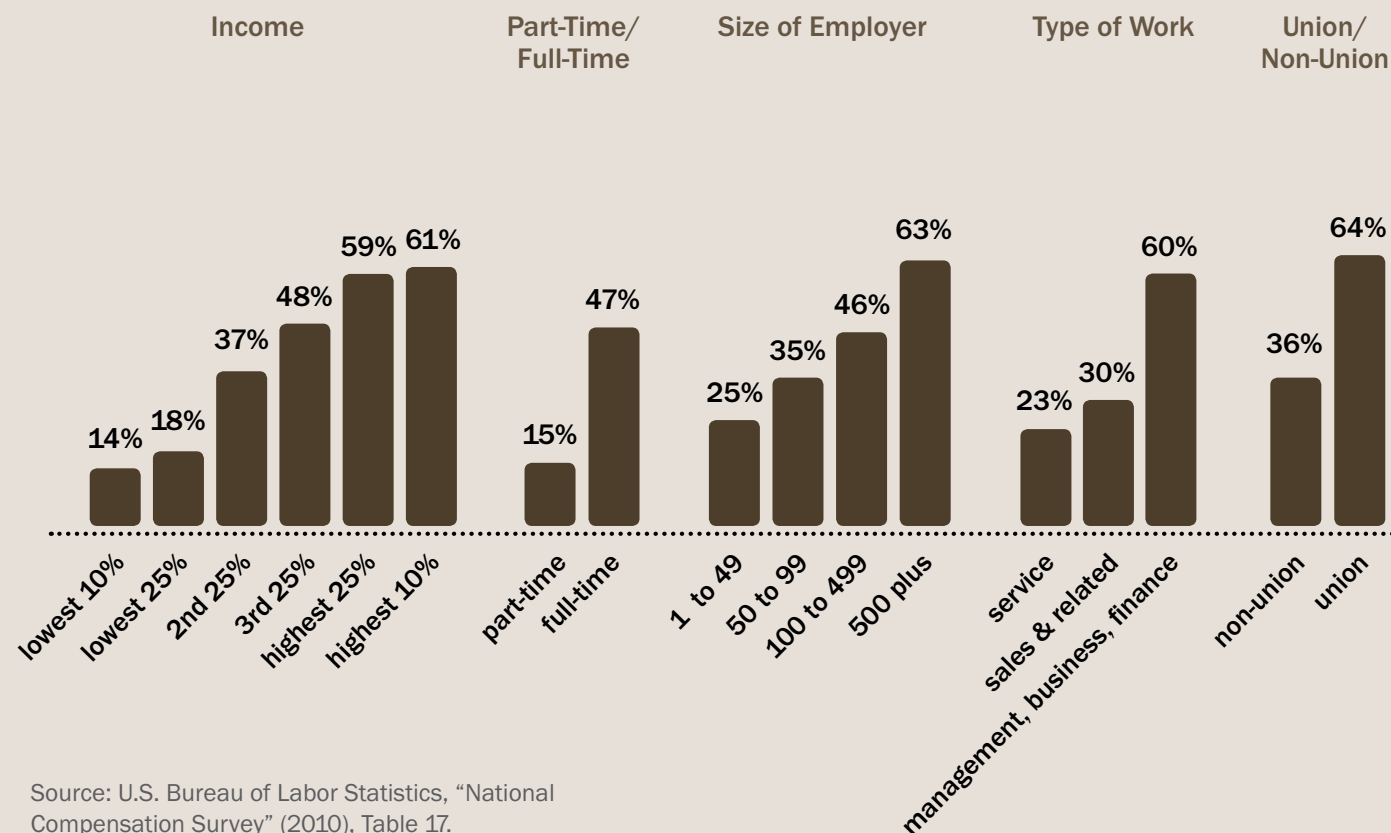
The employee's income is the greatest predictor. The greater a worker's wages, the more likely the worker will have access to these benefits. For example, in 2010, only 18 percent of low-wage private sector workers had access to short-term disability benefits, compared to 59 percent of high-wage workers.²¹ Similarly, only 32 percent of low-wage workers in the private sector had access to some form of paid sick-days benefit, while 84 percent of high-wage private sector workers had access to such benefits.²²

Access to Paid Sick Leave (Private Sector)



Source: U.S. Bureau of Labor Statistics, "National Compensation Survey" (2010), Table 32.

Access to Short Term Disability (Private Sector)



Source: U.S. Bureau of Labor Statistics, "National Compensation Survey" (2010), Table 17.

Whether the worker works full time or part time is also significant. For full-time private sector workers, 47 percent had access to short-term disability insurance, compared to just 15 percent of part-time private sector workers.²³ Seventy-four percent of full-time private sector workers had access to some form of paid sick-days benefit, as compared to just 26 percent of part-time private sector workers.²⁴

Size of employer also has an impact. For employees working in establishments with fewer than 100 employees, just 27 percent had access to short-term disability benefits. Forty-six percent of employees working in establishments with 100-499 employees, and 63 percent of employees working for employees with more than 500 employees, had access to short-term disability benefits.²⁵ As for paid sick days, 53 percent of employees working in establishments with fewer than 100 employees had access to some paid sick days. Sixty-seven percent of employees working in establishments with 100-499 employees had access to this benefit, as did 81 percent of employees working for employers with more than 500 employees.²⁶

Both type of work and union membership make a difference. Sixty percent of management, business, and financial workers had access to short-term disability benefits, compared with just 30 percent of workers in sales and related occupations, and only 23 percent of service workers.²⁷ Sixty-four percent of union workers had access to short-term disability benefits, compared with 36 percent of non-union workers.²⁸ As for paid sick days, 91 percent of management, business, and financial workers had access to some paid sick days, compared to just 55 percent in sales and related occupations, and only 42 percent of service workers. Seventy-one percent of union workers, compared with 61 percent of nonunion workers, had access to paid sick days.²⁹

It should be noted that, according to BLS, 16 percent of short-term disability plans provided by employers are legally required under state laws discussed below.³⁰ While the BLS data provide breakdowns of access to short-term disability plans by geographic area,³¹ it does not provide a comparable breakdown by state. Thus, it is unclear whether the already-limited access that low-income workers have to such plans is due to the fact that an employer has voluntarily provided such access or merely because the employer is required to provide such access by state law. The same is true for part-time workers, employees working for small employers, employees working in non-unionized shops, and employees working in industries that provide short-term disability benefits to a low percentage of workers.

Finally, the fact that a worker does not have access to paid sick days or short-term disability insurance does not necessarily mean the worker will go without any wage replacement during periods of time off because of illness or injury.

For example, after one year on the job, private-sector workers receiving paid vacation receive, on average, nine vacation days. In other words, more private sector workers have access to paid vacation time (77 percent) than have access to paid sick days (62 percent) or short term disability plans (39 percent).³² And many workers now receive a generic bank of Paid Time Off (PTO) instead of sick days and vacation days.³³ Employers that provide PTO generally provide between 15 and 25 PTO days per year.³⁴ If an employee has unused vacation or PTO time that can be taken during an illness or injury, the employee will presumably use those paid days off during periods of temporary disability.

The data on access to vacation leave and PTO is not, however, particularly helpful in determining how much access actually exists for any specific employee's illness or injury. First, we have no way of knowing whether those days are still available at the time an unexpected illness or injury occurs, or whether those days were already used for other purposes. Indeed, the amount of time set aside by employers for PTO or vacation is usually designed for what an average employee might need for sick leave, vacation, and personal days — and not what an employee who has suffered a more serious illness or injury might require.³⁵ In addition, the requirements for using vacation leave may preclude its use for an unexpected illness or injury, because employees generally are required to provide advance notice of their need for that type of time off.³⁶

In sum:

- ➔ Many more workers have access to paid sick days than they do to short-term disability benefits. The number of paid sick days a worker receives, however, will often be insufficient when a worker suffers an illness or injury that lasts more than one or two weeks.
- ➔ There are substantial disparities in access to both paid sick days and short-term disability benefits. Access is strongly skewed toward higher-income, professional, full-time, and/or unionized workers. Lower-income workers, part-time workers, and workers in the service and retail industries have particularly low access to these benefits, especially to short-term disability benefits.
- ➔ Some employees also have access to paid vacation leave and PTO days, which may sometimes be used for temporary illness or injury. Again, however, access skews toward higher-income, professional, and full-time workers. In addition, access to paid vacation leave and PTO days does not guarantee this paid time off will be available when a worker needs it because of temporary illness or injury.

b. State and Local Laws

A handful of state and local laws require the provision of wage replacement when a worker takes time off from work because of a non-work-related illness or injury. Currently, only two cities — Washington, D.C., and San Francisco — require that employers provide a certain number of paid sick days to their employees.³⁷ The number of days required depends on the size of the employer and whether the employee works full time or part time.

Five states and one territory — California, Hawaii, Rhode Island, New York, New Jersey, and Puerto Rico — have statewide TDI programs. These programs provide temporary disability insurance benefits to private and public sector employees who are unable to work because of their own non-work-related illnesses or injuries that last longer than five to seven days.³⁸ As discussed in Chapter 1, some state TDI programs are funded exclusively by employee payroll tax contributions, while others are jointly financed between employers and employees.³⁹ Programs that are based on a social insurance model, such as California and New Jersey's TDI programs, generally allow employers to opt out of the state-run program if an employer offers an approved, voluntary plan.⁴⁰

“I was the victim of domestic violence. I had been severely beaten and was unable to work for over six months. Without [California's Short Term Disability (SDI) Program], I don't know how I would have taken care of my 11-year-old son or kept a roof over our heads. [SDI] allowed us to barely survive until I was able to return to work. [SDI] allowed me to provide for both of my sons without facing eviction or hunger.”

Testimonial from California employee, Labor Project for Working Families

Employees qualify for benefits if they work for a covered employer and meet a set of eligibility requirements, including satisfying a waiting period (generally 5-7 days).⁴¹ While standards vary from state to state, most workers are covered, including both full- and part-time employees.⁴²

Benefit recipients are entitled to a weekly benefit based on their past wages, usually up to a specified cap.⁴³ The benefit duration usually allows up to 26 weeks of benefits per year, but Rhode Island and California are more generous, offering up to 30 weeks or 52 weeks per year, respectively.⁴⁴ As with private, short-term disability benefits, however, TDI benefits are only provided for the actual number of weeks that a worker is unable to work because of a disability. For example, the average claim under California's State Disability Insurance program lasted only 15.23 weeks in FY 2009, even though the total allowable annual duration is 52 weeks.⁴⁵

The following chart provides the weekly wage replacement rate, the current maximum benefit amount, and benefit duration for each state program.⁴⁶

B. Temporary Disability Related to Pregnancy, Childbirth, and Recovery from Childbirth

	Weekly Wage Replacement Rate	Maximum Benefit Amount (per week)	Maximum Benefit Duration
California	55%	\$987	52 weeks
Hawaii	58%	\$510	30 weeks
New Jersey	66%	\$561	26 weeks
New York	50%	\$170	26 weeks
Puerto Rico	65%	\$113	26 weeks
Rhode Island	4.26% of total high base period quarter wages (translating into a weekly wage replacement rate of ~51%)	\$700	30 weeks

1. Policy Arguments

Women who are unable to work due to pregnancy-related complications, giving birth, and/or recovering from childbirth are often treated as having a pregnancy-related disability.⁴⁷ Time off for these pregnancy-related reasons serves several critical purposes, including better outcomes for both mothers and infants.

Approximately 13 percent of women will have a complication from pregnancy requiring them to be hospitalized before delivery, likely requiring at least some time off from work.⁴⁸ These complications may range from gestational diabetes to pre-eclampsia⁴⁹ to pre-term labor. Pregnant women with medical complications often have to go on partial or full bed rest prior to childbirth; 20 percent of pregnant women spend a minimum of one week on bed rest during the course of their pregnancy.⁵⁰

Even women with uncomplicated pregnancies experience health benefits when taking time off prior to labor and delivery.⁵¹ This time off is known as “antenatal leave,” and it is taken by nearly 30 percent of employed women in the United States.⁵² In the postnatal period, the minimum period of physical recovery from a normal pregnancy and delivery is six weeks (eight weeks for Cesarean deliveries).⁵³ Of course, the required length of pregnancy disability leave will vary depending on specific maternal health needs.⁵⁴

Finally, providing wage replacement for pregnancy-related disabilities may lessen reliance on public assistance benefits, such as Temporary Assistance for Needy Families (TANF).⁵⁵ The Department of Labor found that 9 percent of women on unpaid FMLA leave used public assistance to supplement family income while out on maternity leave, including 20 percent of women from low-income families.⁵⁶

2. Current Access to Wage Replacement

a. Voluntary Employer Practices

If women receive wage replacement for pregnancy-related reasons, they receive it through a dedicated “paid maternity leave” plan and/or from other sources of employer-provided paid time off, such as vacation and sick days. Of those employers who provide dedicated, paid maternity leave plans, most offer them as part of their short-term disability plans, although some offer self-insured, paid, maternity leave benefits.⁵⁷ As noted above, certain classes of workers – including part-time and low-wage workers and those who work for small employers – have limited access to short term disability plans, paid vacation days, and paid sick days.

Based on the Medical Disability Advisor recommendation,⁵⁸ the majority of private, short-term disability plans provide six weeks of wage replacement for a normal delivery.⁵⁹ If there are complications from the pregnancy or childbirth, or if the woman has a Cesarean section, a doctor will certify a longer period of recovery, and wage replacement will be provided for that period.⁶⁰

Employers who do not provide wage replacement through a short-term disability plan will sometimes provide specific maternity-leave benefits paid through their general assets. For example, according to a study conducted by the Society for Human Resource Management (SHRM) of its members, 14 percent of respondents stated that they offered paid maternity leave other than what was covered by their short-term disability plans.⁶¹ Other employers, who do not specifically provide paid maternity-leave benefits, allow their workers to use their paid sick days and other sources of paid time off (vacation leave, holidays, PTO days, etc.) for pregnancy and recovery from childbirth.⁶²

According to data from the 2004 U.S. Census Bureau’s Survey of Income and Program Participation (SIPP), which surveyed employed women who delivered their first child between 2001 and 2003, nearly 50 percent used some form of paid leave for pregnancy-related reasons or recovery from childbirth.⁶³ Many of these women combined several types of paid leave to fund their time off. Nearly 39 percent of the women surveyed used maternity leave, 9.1 percent used vacation leave, 8.7 percent used sick leave, 8.5 percent used disability leave, and 2.8 percent used other paid leave.⁶⁴

b. State Laws

All state TDI programs are required to provide wage replacement for pregnancy-related disabilities as a result of the federal Pregnancy Discrimination Act.⁶⁵ As a result, women who reside in California, New York, New Jersey, Rhode Island, Hawaii, and Puerto Rico and who take time off due to pregnancy-related complications, childbirth, and/or recovery from childbirth, may receive TDI benefits for the amount of time they are unable to work due to their pregnancy disability. Eligibility requirements, weekly wage replacement rates, the maximum benefit amount, and benefit duration are the same as those for non-pregnancy-related disabilities.

C. Recommendations

Given the significant disparities in access to wage replacement during periods of temporary disability (including pregnancy-related disability), as well as the pressing need for income during such periods, we recommend that FSI provide a minimum level of wage replacement for individuals who take time off from work because of a serious health condition that lasts longer than one week, or because of a pregnancy-related disability.

“I am currently having complications with my pregnancy. I have been put off work two months early on bed rest. If the SDI programs weren’t there for me now, and for my maternity leave afterward, my family would not be able to make ends meet. My husband also works. However, his income alone is not enough to pay all the bills. The two-income family has become necessary these days.”

Testimonial from California employee, Labor Project for Working Families

Our specific recommendations are as follows:

Eligibility.

- ➔ “Temporary disability” should be defined as a “serious health condition” (as that term is used in the FMLA) that causes an individual to be unable to perform the usual functions of his or her job, including disability resulting from pregnancy or childbirth.
- ➔ Benefits should not be available to those who are receiving workers’ compensation benefits for their condition.

Benefits.

- ➔ An eligible recipient’s wages should be replaced at 80 percent of the worker’s average weekly wage, up to a maximum of 150 percent of the national average weekly wage.
- ➔ Benefits should be available for up to 26 weeks per year. The actual duration of benefits should depend on the specific illness or injury.
- ➔ There should be a five-day waiting period, per qualifying serious health condition, before benefits can be collected. If an individual needs to take time off for the same qualifying condition at a later point in the same year, a waiting period should not apply.
- ➔ The time off from work may be taken only while the recipient is suffering from a serious health condition.

Below we describe our rationale for each recommendation:

Eligibility.

“Temporary disability” should be defined as a “serious health condition” (as that term is used in the FMLA) that causes an individual to be unable to perform the usual functions of his or her job, including disability resulting from pregnancy or childbirth.

In deriving a definition of “temporary disability” we looked to the FMLA and several state TDI programs.⁶⁶ We settled on using the FMLA definition because we believe a different definition of “temporary disability” would create confusion between the FMLA and a national program of wage replacement for the same type of time off from work. Specifically, we wanted to avoid confusion regarding whether a person who is entitled to FMLA job protection is also entitled to FSI TDI benefits, and vice-versa.

We recognize that some members of the business community argue the FMLA’s definition of “serious health condition” is overly broad and difficult to administer.⁶⁷ However, as discussed above, under our proposal, wage replacement is only available to recipients who take at least five days off work. We believe this requirement will help minimize disputes over whether a particular illness or injury satisfies the FMLA’s definition of “serious health condition” and thus warrants FSI wage replacement benefits.

Benefits should not be available to those who are receiving workers’ compensation benefits for their condition.

Our proposal is intended to fill the gap in wage replacement benefits for workers who experience illnesses or injuries not already handled through the workers’ compensation system. Because workers’ compensation laws in all 50 states provide wage replacement for individuals who suffer work-related disabilities (both temporary and permanent), benefits under our TDI proposal would not be available to those currently receiving workers’ compensation benefits. This recommendation reflects similar policies in the New York, New Jersey, California, Rhode Island, Hawaii, and Puerto Rico state TDI programs.⁶⁸

Benefits.

An eligible recipient’s wages should be replaced at 80 percent of the worker’s average weekly wage, up to a maximum of 150 percent of the national average weekly wage.

Our recommended wage replacement rate of 80 percent of the worker’s average weekly wage for temporary disability benefits is based on three principles. First, we believe that wage replacement levels for a temporary disability program must be sufficiently high to provide financial support to promote individual health and well-being. The program must provide enough income to allow workers to recover from their illness or injury while they are unable to work and not to return to work prematurely.

In determining a proposed benefit amount under this TDI component, we looked first at the five states and one territory that currently have temporary disability insurance laws. As noted above, the weekly wage replacement rate in these programs ranges from lows of 50 percent in New York and 55 percent in California to highs of 65 percent in Puerto Rico and 66 percent in New Jersey.⁶⁹ The maximum benefits amounts also vary, from lows of \$113/week in Puerto Rico and \$170/week in New York, to highs of \$700/week in Rhode Island and \$987/week in California.⁷⁰ We also looked at private-sector, short-term disability insurance plans, which generally provide a more generous 60-70 percent wage replacement rate without any maximum cap.⁷¹

Second, the wage replacement levels should not be so high that recipients take more time off than is necessary to recover, or are discouraged from taking the steps necessary to recover and return to work as quickly as possible. To the extent that moral hazard exists, or is perceived to exist in a TDI

program, having less than full wage replacement can counter that problem, or perceptions of that problem.

Finally, benefits programs for both work- and non-work-related injuries and illnesses should be generally equivalent from the perspective of the employee. All 50 states' workers' compensation programs provide wage replacement for individuals who cannot work because of a work-related illness or injury. The wage replacement rate in most states is approximately 66 percent of average weekly earnings, up to a cap usually set at 100 percent of the state average weekly wage, with maximum benefits even higher in some states.⁷² As discussed above, workers' compensation benefits are not taxable. Because we propose taxation of all of the benefits proposed, the effective wage replacement rates between our proposed TDI benefits (80 percent, subject to taxation) and state workers' compensation benefits (66 percent, not subject to taxation) are largely equivalent.

Benefits should be available for up to 26 weeks per year. The actual duration of benefits should depend on the specific illness or injury.

This recommendation is based on a review of existing state TDI programs and private-sector, short-term disability programs. As set forth in the chart above, benefit durations in most of the state TDI programs run up to 26 weeks, although Rhode Island provides up to 30 weeks and California up to 52 weeks. Private sector plans generally provide benefits for up to 26 weeks.⁷³

Women who are unable to work because they are recovering from childbirth, as well as women who are unable to work because they are experiencing medical complications during their pregnancy, (i.e., "pregnancy-related disabilities") should receive temporary disability benefits for the time they are unable to work. Benefits should be commensurate with the time needed for physical recovery. For example, birth mothers who have medical complications during childbirth will need more time off than those who have a normal delivery. As discussed in Chapter 3 below, under our proposal, women using TDI for pregnancy disability will be able to transition seamlessly from TDI to Parental Care for a New Child Insurance. Both California and New Jersey also allow women to transition directly from temporary disability to paid baby-bonding leave benefits after they are no longer disabled because of pregnancy.⁷⁴

There should be a five-day waiting period, per qualifying serious health condition, before benefits can be collected. If an individual needs to take time off for the same qualifying condition at a later point in the same year, a waiting period should not apply.

A five-day waiting period per qualifying condition is appropriate before an individual receives temporary disability benefits. The waiting period underscores the fact that the program is intended to provide wage replacement only when an individual has an illness or injury that makes the individual unable to work for an extended period of time. A waiting period operates as a co-pay for accessing the benefit and helps avoid problems of moral hazard and overutilization.

Instead of requiring a waiting period for each claim for benefits, however, our proposal only requires one waiting period per year for the same qualifying serious health condition. Thus, if a claimant has a serious illness, returns to work, and then must leave work again, he or she would not need to satisfy a new waiting period for wage-replacement benefits, provided he or she had already received benefits earlier that year for the same serious health condition. As discussed in Chapter 1, however, that individual would only be eligible for benefits for the second (or third or fourth) time if she again was off from work for at least five days. The only difference is that the individual would be eligible for benefits on the first day of absence, rather than having to first exhaust a five-day waiting period.

A waiting period is also appropriate because, as a practical matter, the temporary disability component of this program should supplement, not supplant, shorter-term, voluntary employer policies such as paid sick days or "paid time off" banks. Thus, those workers who have access to such employer benefits will ordinarily receive wage replacement during their one-week waiting period.⁷⁵

The time off from work may be taken only while the recipient is suffering from a serious health condition.

Benefits should only be available for time off taken from work while the recipient is experiencing a serious health condition. As discussed in Chapter 5 below, a health care provider must certify that a claimant has an illness or injury that renders the individual unable to work.



¹ Ishita Sengupta, Virginia Reno, & John F. Burton, Jr., *Workers' Compensation: Benefits, Coverage, and Costs 1*, National Academy of Social Insurance (2007), available at http://www.nasi.org/sites/default/files/research/NASI_Workers_Comp_2005_Full_Report.pdf. See also Appendix B: Key Characteristics of Social Insurance Programs (Eligibility: Qualifying Events).

² U.S. Social Security Administration, "Disability Planner: What We Mean By Disability," <http://www.socialsecurity.gov/dibplan/dqualify4.htm>. See also Appendix B (Eligibility: Qualifying Events).

³ Healthy Families Act, S. 1152, 111th Cong. § 5 (2009); Healthy Families Act, H.R. 2460, 111th Cong. § 5 (2009).

⁴ Vicky Lovell, No Time to Be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave 1 (Institute for Women's Policy Research 2004), <http://www.iwpr.org/pdf/B242.pdf>.

⁵ See U.S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 2752, National Compensation Survey: Employee Benefits in the United States, March 2010, 237 (Table 17) available at <http://www.bls.gov/ncs/ebs/benefits/2010/ebbl0046.pdf> [hereinafter BLS, Employee Benefits 2010] (showing that 51 percent of management, professional and related employees in the private sector have access to short-term disability insurance policies).

⁶ Corporate Voices for Working Families, Innovative Workplace Flexibility Options for Hourly Workers (2009), available at <http://www.cvworkingfamilies.org/system/files/CVWFflexreport-FINAL.pdf>.

⁷ See generally Appendix A: Current Social Insurance Programs; Appendix B.

⁸ Of course, if the United States had a universal legal requirement for paid time off during periods of temporary disability, and such a legal requirement was effectively enforced, it would be much easier to determine who had access to wage replacement for these reasons – because it would simply be all workers covered by such a requirement. In the absence of such a requirement, however, we are dependent on the data that have been collected on private-employer practice, some of which is spotty or unclear.

⁹ Employee Benefit Research Inst., *Fundamentals of Employee Benefit Programs*, 346-47 (6th ed. 2009), available at http://www.ebri.org/pdf/publications/books/fundamentals/2009/33_Disability-Ins_OTHER-BENS_Funds-2009_EBRI.pdf [hereinafter *Fundamentals of Employee Benefit Programs*].

¹⁰ I.R.S. Publication 15-A, *Employers Supplemental Tax Guide 15-19 (2010)*, available at <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

¹¹ See BLS, *Employee Benefits 2010*, *supra* note 5, at 309 (Table 35). After five years on the job, private sector workers receive an average of eight days per year. *Id.*

¹² *Id.*

¹³ *Fundamentals of Employee Benefit Programs*, *supra* note 9, at 346.

¹⁴ *Id.*

¹⁵ Note, however, that the maximum period of benefits under a specific short-term disability plan may range from as little as

13 weeks to as many as 52. Burton T. Beam, Jr. & John J. McFadden, *Employee Benefits* 178 (6th ed. 2001); *Fundamentals of Employee Benefit Programs*, *supra* note 9, at 346.

¹⁶ For example, the average claim under California's State Disability Insurance program, which offers 52 weeks of coverage, lasted only 15.23 weeks in FY 2009. See California Employment Dev. Dep't, "State Disability Insurance Statistical Information," available at http://www.edd.ca.gov/Disability/pdf/DI_Program_Statistics.pdf. Although California's SDI program is a *public* insurance scheme, the usage rate is still useful for understanding private insurance take-up since California, like the other states with TDI, uses case-management tools and procedures, such as the Medical Disability Advisor Guidelines, that are similar to private-sector insurance companies. See Jonathan Borak, M.D., *Book Reviews: The Medical Disability Advisor and Official Disability Guidelines* 49 J. Occupational & Env'tl. Med. 346, 347 (2007) (noting that private companies often need to rely on Disability Guidelines such as the Official Disability Guidelines and the Medical Disability Advisor for claim management).

¹⁷ See Jonathan Borak, MD, *Book Reviews: The Medical Disability Advisor: Workplace Guidelines for Disability Duration*, 5th Edition, 49 J. Occupational & Env'tl. Med. 346, 347 (2007).

¹⁸ BLS *Employee Benefits* 2010, *supra* note 5, at 237 (Table 17).

¹⁹ *Id.*

²⁰ *Id.* at 261 (Table 23).

²¹ *Id.* at 237 (Table 17). Here, we define "low-wage" workers as those in the lowest earnings quartile and "high-wage" workers as those in the highest earnings quartile. More specifically, the percentage of private sector workers who had access to short-term disability benefits broke out along the following lines: 14% of workers in the 10th percentile (earnings at or below \$8.10/hour), 18% in the first quartile (earnings at or below \$10.63 per hour), 37% in the second quartile (earnings between \$10.63-\$15.70 per hour), 48% in the third quartile (\$15.70-\$24.53 per hour), 59% in the highest quartile (at or above \$24.53 per hour), and 61% in the 90th percentile (at or above \$37.02 per hour). *Id.* at 527.

²² *Id.* at 297 (Table 32).

²³ *Id.* at 237 (Table 17).

²⁴ *Id.* at 297 (Table 32).

²⁵ *Id.* at 238 (Table 17) (showing that in firms with 1-49 employees, 25% had access to short-term disability benefits, as compared to 35% of workers in firms with 50-99 employees).

²⁶ *Id.* at 298 (Table 32).

²⁷ *Id.* at 237 (Table 17).

²⁸ *Id.*

²⁹ *Id.* at 297 (Table 32).

³⁰ *Id.* at 257 (Table 22). NCS benefits data includes employee access to state-mandated benefits provided through the employer, as long as there is an employer cost. Only plans that are 100% *employee* paid are excluded.

³¹ 73% of workers in the Middle Atlantic region had access to short-term disability, much higher than any other region. Among other regions, access to short-term disability is as follows: East North Central, 42%; New England, 40%; East South Central, 36%; South Atlantic, 35%; West North Central, 31%; West South Central, 29%; Pacific, 27%; Mountain, 28%. *Id.* at 238 (Table 17).

³² *Id.* at 313 (Table 36); 297 (Table 32); 237 (Table 17). Part-time workers received an average of seven vacation days, and workers in firms with fewer than 100 employees receive an average of eight total days. *Id.* at 313 (Table 36).

³³ A PTO system is an alternative to a traditional time-off benefit package that separates sick, personal and vacation time. Instead, PTO systems lump these categories of leave together, giving employees one bank of leave, which they can use for sick days, vacations or other forms of personal leave. Employers who use PTO systems generally allot more PTO days to longer-tenured employees than to new recruits. According to a 2008 survey, employees who had been with an employer for one year or less received 15 PTO days on average, whereas those who had tenure of at least 20 years received an average of 25 PTO days. *Paid Time Off Benefits*, Culpepper Compensation & Benefits Surveys (2008), <http://www.culpepper.com/eBulletin/2008/JunePTO.asp> [hereinafter *Paid Time Off Benefits*]. See also *WorldatWork: The Total Rewards Ass'n, Paid Time Off: Programs and Practices* (2010), available at <http://www.worldatwork.org/waw/adimLink?id=38913&nonav=yes> [hereinafter *WorldatWork*]...Although the survey, conducted by a global human resources association, offers a snapshot into PTO policy use and structure by American employers, because of a small sample size and a limited pool of respondents skewed towards larger firms, its results should be interpreted cautiously.

³⁴ See *Paid Time Off Benefits*, *supra* note 33.

³⁵ According to the survey of *WorldatWork* members, 18 days was the median number of paid time off days allocated annually under a PTO system for employees that have been with the employer for one to two years. See *WorldatWork*, *supra* note 33.

³⁶ Lovell, *supra* note 4, at 5-6:

³⁷ Accrued Sick and Safe Leave Act of 2008, 55 D.C. Reg. 3452 (Apr. 4, 2008) (codified at D.C. Code §§ 32-131.02 to 17 (2010)); Sick Leave Ordinance, S.F., Cal., Mun. Admin. Code §§ 12W.1 to 16 (2006). Milwaukee has enacted a similar statute, but it is currently the subject of a legal challenge and has not yet gone into effect. Milwaukee, Wis., Code § 112 (2008). See Nick Bohr, *Milwaukee's Sick Pay Ordinance Goes Before State Supreme Court*, WISN News, Oct. 5, 2010, <http://www.wisn.com/r/25242977/detail.html>.

³⁸ See Cal. Unemp. Ins. Code §§ 2601-3306 (West 2005); Haw. Rev.Stat. § 392-1 to -101 (2005); N.J. Stat. Ann. § 43:21-25 to -71 (2005); N.Y. Workers' Comp. Law §§ 200-42 (2005); P.R. Laws Ann. tit. 11, §§ 201-12 (2005); R.I. Gen. Laws §§ 28-39-1 to 41-33 (2005). See also U.S. Dept. of Labor, Emp't and Training Admin., *Unemployment Law Comparison* 6 tbl. 8-5 (2010), available at <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2010/disability.pdf>. See generally Appendix A and Appendix B (providing detailed information on all five states' and Puerto Rico's temporary disability laws).

³⁹ See Appendix B (Financing).

⁴⁰ See Appendix B (Eligibility: Covered Employers and Employees).

⁴¹ See Appendix B (Benefits: Waiting Period).

⁴² See Appendix B (Eligibility: Covered Employers and Employees).

⁴³ See Appendix B (Benefits: Wage Replacement Rate and Maximum Benefit Amount).

⁴⁴ See Appendix B (Benefits: Duration).

⁴⁵ See "State Disability Insurance Statistical Information," California Employment Development Dep't, available at http://www.edd.ca.gov/Disability/pdf/DI_Program_Statistics.pdf. Although California's SDI program is a *public* insurance scheme, the usage rate is still useful for understanding private insurance take-up since California, like the other states with TDI, uses case-management tools and procedures – such as the Medical Disability Advisor Guidelines – that are similar to private sector insurance companies. See Jonathan Borak, MD, *Book Reviews: The Medical Disability Advisor and Official Disability Guidelines*, 49, 3, J. Occup. Environ. Med. 346, 347 (2007) (private companies often need to rely on Disability Guidelines such as the Official Disability Guidelines and the Medical Disability Advisor for claim management).

⁴⁶ See also Appendix B (Benefits: Wage Replacement Rate and Maximum Benefit Amount)

(providing detailed information on state TDI programs' benefit structures).

⁴⁷ See Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat 2076 (1978)(amending the Civil Rights Act of 1964 and prohibiting discrimination in the provision of medical and insurance benefits on the basis of pregnancy).

⁴⁸ Letitia Williams et al., U.S. Department of Health and Human Services, *Pregnancy Risk Assessment Monitoring System: PRAMS 2002 Surveillance Report* (2002).

⁴⁹ Preeclampsia is a disorder developed during pregnancy that affects both the mother and the fetus and is marked by elevated blood pressure, swelling, and protein in the urine. Worldwide, approximately five to eight percent of pregnancies are affected by preeclampsia. Mild preeclampsia can be treated with bed rest and frequent visits to the obstetrical care provider. More severe cases require delivery. Preeclampsia Foundation, *Preeclampsia Fact Sheet* (2007), available at <http://www.preeclampsia.org/pressroom/Preeclampsia%20Fact%20sheet%20v2.pdf>.

⁵⁰ Linda L. Dunn, Marilyn C. Handley & Melondie R. Carter, *Antepartal Bed Rest: Conflicts, Costs, Controversies and Ethical Considerations*, 3 Online J. Health Ethics 1 (2006).

⁵¹ Sylvia Guendelman et al., *Maternity Leave in the Ninth Month of Pregnancy and Birth Outcomes Among Working Women*, 19 Women's Health Issues 1, 30 (2009) (finding that antenatal leave is associated with significantly lower rates of Cesarean deliveries, which are often associated with poor health outcomes.); See also Sylvia Guendelman, et. al, *Work and Breastfeeding: Effects of Maternity Leave and Occupational Characteristics*, 123 Pediatrics e38, e39 (2009) (noting that antenatal leave may also increase milk supply and result in fewer lactation problems, and reduce fatigue and physical discomfort prior to labor and delivery).

⁵² Rates of antenatal leave taking in the United States among employed women are around 28 percent; rates in California, where TDI is in place, are similar. Sylvia Guendelman et al., *Maternity Leave in the Ninth Month of Pregnancy and Birth Outcomes Among Working Women*, 19 Women's Health Issues 1, 30-37 (2009); Sylvia Guendelman et al., *Utilization of Pay in Antenatal Leave among Working Women in Southern California*, 10 J. Maternal & Child Health 1, 63-73 (2006).

⁵³ F. Gary Cunningham et al, *Williams Obstetrics* (23rd ed., McGraw-Hill Professional 2009).

⁵⁴ Judith Galtry & Paul Callister, "Assessing the Optimal Length of Parental Leave for Child and Parental Well-Being: How Can Research Inform Policy?" 26 J. Fam. Issues 219, 237 (2005).

⁵⁵ M. Perry-Jenkins, *Work in the Working Class: Challenges Facing Families in Work, Family, Health, and Well-being* 453 (Suzanne M. Bianchi, Lynne M. Casper & Rosalind Berkowitz King eds. 2005). TANF, which succeeded the Aid to Families with Dependent Children (AFDC) program, provides temporary financial assistance to low-income families while aiming to encourage recipients to become employed so assistance is no longer necessary. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193 (1996); U.S. Dep't of Health & Human Serv's, "About TANF Program," <http://www.acf.hhs.gov/programs/ofa/tanf/about.html#history> (last visited Nov. 15, 2010).

⁵⁶ Dep't of Labor and U.S. Comm'n on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Practices* at 283 (1996), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key_workplace.

⁵⁷ Ellen Galinsky, James Bond & Kelly Sakai, *Families & Work Inst., 2008 National Study of Employers* 19 (Table 7), available at <http://familiesandwork.org/site/research/reports/2008nse.pdf> (hereinafter 2008 National Study of Employers) ("Of employers providing at least some pay to women during maternity leave, [80%] fund this pay through a general temporary disability insurance (TDI) plan. . .").

⁵⁸ See, e.g., Reed Group, *Medical Disability Advisor*, MDGuidelines.com, *Pregnancy, Normal*, <http://www.mdguidelines.com/pregnancy-normal> (last visited October 29, 2010).

⁵⁹ Vicky Lovell et al., *Institute for Women's Policy Research*, A131, *Maternity Leave in the United States* 1 (2007).

⁶⁰ This assumes the certified period of recovery falls within the range provided by the Medical Disability Advisor or other disability guidelines. See, e.g., *Medical Disability Advisor*, MDGuidelines.com, "Pregnancy, Normal," available at <http://www.mdguidelines.com/pregnancy-normal> (last visited Nov. 15, 2010).

⁶¹ Soc'y for Human Res. Mgmt., *2009 Employee Benefits: Examining Employee Benefits in a Fiscally Challenging Economy* 26 (Table d-1), available at http://www.shrm.org/Research/SurveyFindings/Articles/Documents/09-0295_Employee_Benefits_Survey_Report_spread_FNL.pdf [hereinafter SHRM Employee Benefits Report].



Parental Care for a New Child Insurance

The second component of FSI provides wage replacement for “parental care for a new child” (PCNC). We define time off for PCNC as time off from work that parents – both women and men – take after a child’s birth, adoption, or foster placement to care for and bond with their child.

In this chapter we discuss the policy arguments in favor of providing wage replacement for parental care, and current access to wage replacement during periods of time off for parental care. We then describe our policy recommendations to address this need.

A. Policy Arguments

Both parents and their children benefit when parents have time off to care for and bond with their newborn, newly adopted, or newly placed foster child.

A child’s overall physical, cognitive, and behavioral outcomes are better when his or her parents have sufficient time off work after birth, adoption, or foster placement.¹ Parental bonding, which takes place immediately following birth, adoption, or foster placement, is critical for a child’s physical and emotional well-being.² It is during this time that primary attachment relationships form and children develop a sense of safety, stability, and trust.³ Children adopted after infancy particularly have attachment needs that require a period of adjustment.⁴

Public health research shows that parental leave of 12 weeks or more is correlated with many positive health outcomes for children.⁵ Further, parental workplace flexibility during the first year of a child’s life, including a significant amount of time off and/or flexibility in scheduling, can have positive developmental effects for children.⁶

By contrast, returning to work very soon after birth, (i.e., six weeks or less) can be associated with a variety of negative outcomes for both parents and children compared to families in which working parents take more time off (i.e. 12 weeks or more) before returning to work. These negative outcomes include higher rates of infant mortality, lower rates of breastfeeding, lower rates of immunizations and well-baby care, a higher incidence of maternal physical and mental health

⁶² As noted above, we do not know how much access pregnant workers actually have to wage replacement for pregnancy and recovery from childbirth when they combine these forms of paid time off because workers will presumably have used some of those paid days for their original purposes (i.e. a personal day, sick day or vacation). Moreover, even if one assumes that a pregnant worker has been able to save up all such time over the course of a previous year, the average amount of time provided may not be sufficient for pregnancy and recovery from childbirth.

⁶³ Tallese Johnson, U.S. Census Bureau, P70-113, Maternity Leave and Employment Patterns of First-Time Mothers: 1961-20039 (Table 6) (2008).

⁶⁴ *Id.* at 9 (Table 6). Because this data is based on self-reporting, it is possible that some women who reported receiving paid maternity leave actually received short-term disability benefits, but believed they were receiving paid maternity leave since that is what the employer called it.

⁶⁵ See Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat 2076 (1978) (amending the Civil Rights Act of 1964 and prohibiting discrimination in the provision of medical and insurance benefits on the basis of pregnancy).

⁶⁶ For example, California defines “disability” as the inability to perform work due to:

- (1) Illness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical condition.
- (2) . . . a written order from a state or local health officer to an individual infected with, or suspected of being infected with, a communicable disease.
- (3) Acute alcoholism being medically treated or . . . resident status in an alcoholic recovery home.
- (4) Acute drug-induced illness being medically treated or, to the extent specified in Section 2626.2, resident status in a drug-free residential facility.

Cal. Unemp. Ins. Code § 2626. See also Appendix B (Eligibility: Qualifying Events).

⁶⁷ See Dep’t of Labor, The Family and Medical Leave Act: A Report on the Request for Information (2007 Update), <http://www.dol.gov/whd/fmla2007report.htm> (“Many of the comments...reported that the current regulatory definition [of ‘serious health condition’] is ‘vague and confusing.’”)

⁶⁸ N.Y. Workers’ Comp. Law § 206(c) (2010); . § 43:21-30(b) (West 2010); Cal. Unemp. Ins. Code § 2629 (West 2009); R.I. Gen. Laws § 28-41-6 (2010); Haw. Rev. Stat. § 392-28 (2010); P.R. Laws Ann. tit. 11, § 203(i)(2) (2009).

⁶⁹ See also

Appendix B (Benefits: Wage Replacement Rate and Maximum Benefit Amount).

⁷⁰ See *supra* note 46 and accompanying text; See also Appendix B (Benefits: Wage Replacement Rate and Maximum Benefit Amount).

⁷¹ See Kelsey Logan, et. al., *Short Term Disability Benefit Amount as a Percentage of Salary*, Soc’y of Human Res. Mgmt., Feb. 1, 2009, available at <http://www.shrm.org/Research/Articles/Articles/Pages/MetricoftheMonthShortTermDisabilityBenefitAmount.aspx>; Burton T. Beam, Jr. & John J. McFadden, *Employee Benefits* 172 (6th ed. 2001).

⁷² House Ways and Means Committee, *Workers’ Compensation Overview*, available at <http://waysandmeans.house.gov/media/pdf/110/wcss8.pdf> (last accessed September 24, 2010); National Academy of Social Insurance, *Workers’ Compensation: Benefits, Coverage, and Costs*, 2008 (2010).

⁷³ See *supra* note 15 and accompanying text.

⁷⁴ California Employment Dev. Dep’t, Paid Family Leave Frequently Asked Questions, http://www.edd.ca.gov/disability/FAQs_for_Paid_Family_Leave.htm (last visited Nov. 8, 2010) (explaining that PFL benefits may be applied for as soon as a claimant has recovered from a pregnancy-related disability and is no longer in receipt of temporary disability benefits. Further, “[t]here is no additional seven-day waiting period for a [PFL] claim for benefits to bond with a newborn when the Paid Family Leave claim follows the Disability Insurance pregnancy-related claim.”); N.J. Admin. Code § 12:21-1.2 (“In the case of an individual taking family leave immediately after the individual has a period of disability for the individual’s own disability, there shall be no waiting period between the period of the individual’s own disability and the period of family leave.”) In New Jersey, all mothers who receive benefits for pregnancy-related disability automatically receive a transitional claim form they can file to continue to receive family-leave benefits after their period of disability. N.J. Dep’t of Labor and Workforce Dev., “How to File A Claim,” http://lwd.dol.state.nj.us/labor/fli/content/file_a_claim.html (last visited Nov. 15, 2010).

⁷⁵ We believe that employees also need paid Short Term Time Off (STO) and that employers should generally provide such benefits as an ordinary course of business. However, we recognize that many employers do not provide such benefits now, particularly to part-time workers and low-income workers. For example, only 32 percent of the lowest-wage workers compared to 84 percent of the highest wage workers receive paid sick days. BLS “Employee Benefits Survey, 2010” at 297 (Table 32). Hence, we recognize that this one-week waiting period will be a hardship for such employees until STO benefits, such as a minimum number of mandatory, paid sick days, become universally available.

concerns,⁷ and increases in externalizing behavior problems in young children (such as ADHD, behavioral problems, or aggression).⁸

Significantly, while public-health research supports a reasonable period of time off to bond with a new child (i.e., 12 weeks or more), research also suggests that parents — specifically, mothers — who return to work within the first year of a child’s life do not negatively affect children’s physical or emotional development.⁹ In fact, limited research suggests that mothers who spend some time at work during their child’s early life might create a slightly higher-quality home environment than those who do not work at all, an effect attributed to the various economic and social benefits of working.¹⁰

Parents also benefit from time off to care for newborn or newly placed adopted or foster children. Unfortunately, most research focuses on the benefits to biological mothers, not fathers or non-biological parents. We discuss here what we currently know about the health and economic benefits to parents who have time off work to care for children, but we believe more research needs to be done in this area.

For women, returning early to work, particularly if earlier than preferred, is associated with greater amounts of stress and higher rates of depression.¹¹ By contrast, taking 12 weeks of leave is associated with a significant decline in depressive symptoms among mothers.¹² Women who return to work after fewer than six weeks of leave are also four times more likely than women who take more than 12 weeks of leave to fail to establish consistent breastfeeding patterns, and are more likely to breastfeed for shorter periods of time.¹³ Some of the positive health benefits of breastfeeding for childbearing mothers include fewer incidences of postpartum depression, decreased postpartum bleeding, earlier return to pre-pregnancy weight, and protection against breast and ovarian cancer.¹⁴

With regard to economic security, it is well documented that significant family care obligations, which tend to fall more heavily on women, often lead to reduced labor force attachment among women, which in turn leads to lower lifetime income potential.¹⁵ Evidence suggests paid parental leave is an important way to help women meet these family-care obligations, while also helping women remain attached to the workforce. Specifically, women who receive paid time off to care for and bond with their new children are more likely to return to work after taking leave, have a higher lifetime income, and have stronger labor force participation compared with women with no access to parental leave.¹⁶ This strengthening of workforce attachment associated with paid parental leave is not as strong for unpaid parental leave.¹⁷

“I am not unemployed, and I am not a stay-at-home dad. I’ve got a ‘real’ job; I just haven’t gone to the office since last December. In total, I’ve spent 18 of the past 36 months on paternity leave here in Sweden, my adopted country, ‘off’ work to care for my two kids. And, yes, I still get paid.”

Nathan Hegedus, “Snack Bags and a Regular Paycheck: The Happy Life of a Swedish Dad,” *Slate Magazine*, August 31, 2010

Fathers and non-biological parents (e.g., adoptive or foster parents) also benefit from having time to bond with their children. Although men in the United States rarely take much time off following the birth or adoption of a new child, evidence shows that those who take time off work of at least two weeks or more are more involved in the care of their children later, resulting in stronger, long-term father-child relationships.¹⁸ Time off for foster or adoptive parents is also important because these parents may not have had the same amount of time to prepare psychologically and emotionally for the arrival of the child, and are often not present at the birth of the child.¹⁹

Finally, paid time off from work to care for newborn or newly placed children can also help families manage the significant logistical and financial challenges to finding suitable childcare arrangements, especially for infants. First, there are often very long waiting lists for infant childcare.²⁰ Paid time off for parents while they are out of work waiting for a suitable childcare arrangement may help relieve significant stress. In addition, infant childcare is generally the most expensive type of childcare and is often unaffordable for low- and middle-class families.²¹ If parents receive paid time off during the first several months of a child’s life, they may offset some of the high costs of infant childcare, and parents will be able to return to work under less financial strain.

In sum, while more research should be done on the positive health and economic effects associated with paid time off for parental care of a new child, the current body of literature suggests that paid time off for a moderate duration — that is, between 12 and 26 weeks — is beneficial for children and their families.

As with Temporary Disability Insurance and Caregiving Insurance, there are several reasons why Parental Care for a New Child Insurance would also be beneficial for businesses. First, those employers who offer paid parental care benefits experience increased morale and decreased stress among their employees.²² Employee satisfaction, in turn, is associated with increased revenue growth and greater customer satisfaction.²³ Second, paid parental-care benefits are associated with increased employee retention, particularly among female workers.²⁴ This reduced turnover helps businesses avoid the significant costs of replacing a lost worker.²⁵ In addition to being more likely to return to the workforce in general, evidence shows women receiving paid parental leave are also more likely to return to the employer they worked at before taking time off, optimizes the human capital investment a particular employer has made.²⁶

Finally, taking a longer-term view, caring for children in their critical, early years represents a frontline investment in human capital, playing a key role in the development of the cognitive and social capacities that are crucial for later productive contributions in the workforce.

B. Current Access to Wage Replacement

1. Voluntary Employer Practices

As noted in the previous chapter, women who receive maternity leave through employer-provided, short-term disability plans receive wage replacement based on their *inability* to work during that time period. Women *also* use that paid time off, however, to care for and bond with their newborn children.

Women also use other forms of employer-provided, paid maternity leave, paid vacation, and paid sick days to bond with their newborns — either in conjunction with short-term disability plans (if they have access to such a plan) or as their sole source(s) of wage replacement.²⁷

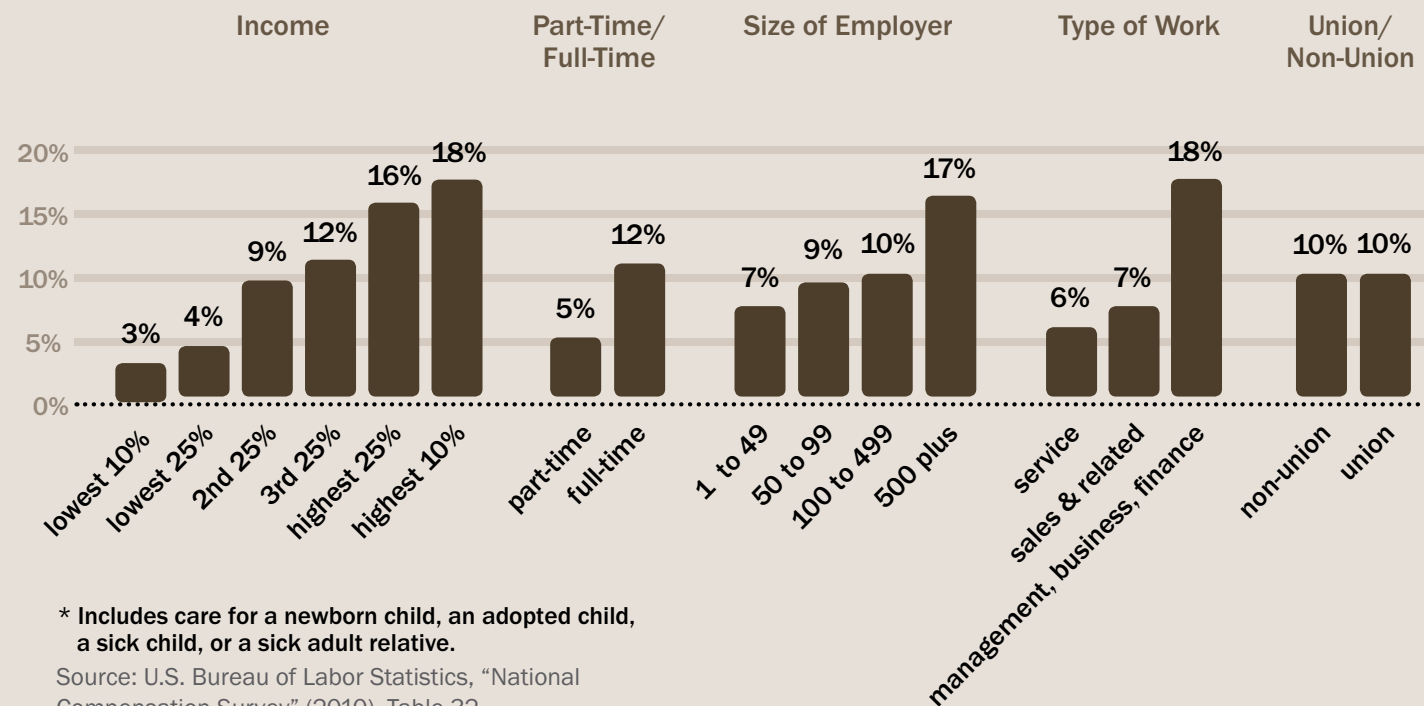
However, for biological fathers and non-biological parents (e.g., adoptive parents, foster parents, and/or same-sex partners), generally neither employer-provided, paid sick days nor short-term disability benefits can be used as sources of wage replacement for time off to care for and bond with their new children. This is because fathers and non-birth mothers are not temporarily disabled by the arrival of a new child.

Some employers provide wage replacement for parental care through paid paternity leave, paid parental leave, paid family leave, and/or paid adoption leave policies. Definitions of these policies vary from employer to employer.

The data is very limited on workers' access to these various types of wage replacement. In general, however, access to parental care is much less than that provided to birth mothers for pregnancy disability, leaving fathers and non-biological parents with less time to care for and bond with their new children.

There is only one nationally representative survey on employee access to parental care: the Bureau of Labor Statistics' National Compensation Survey. The survey defines "paid family leave" as including paid leave to care for a newborn or newly adopted child.²⁸ That survey found that in 2010, only 10 percent of private sector employees had access to paid family leave.

Access to Paid Family Leave* (Private Sector)



Not surprisingly, even among the small number of employees who had access to paid family leave, access varied depending on income, type of job, full-time versus part-time status, and industry.²⁹ While only 3 percent of workers in the lowest 10th percentile of wages had access to paid family leave, and only 4 percent of workers in the lowest 25th percentile of wages had such access, 18 percent in the highest 10th percentile of wages had access to paid family leave.³⁰ Eighteen percent

of workers with management and professional positions had access to paid family leave, but only 6 percent of workers in the service industry and 7 percent in sales and related industries did.³¹ Twelve percent of full-time workers had access, but only 5 percent of part-time workers did. Interestingly, union membership did not appear to have an impact: 10 percent of both union and non-union members had access to paid family leave.³²

There is also limited data from surveys of employers. While such surveys give us information regarding the percentage of employers who are providing parental-care benefits, they offer little information regarding employee access to these benefits, because employers may provide the benefits to some employees, but not others. Even with these limitations, the data still provide insight into employer practices regarding voluntary paid parental leave benefits.

For example, the Families and Work Institute's 2008 National Survey of Employers found that 52 percent of surveyed employers provided at least some wage replacement for maternity leave, and 16 percent provided at least some wage replacement for paternity leave.³³ The survey did not, however, ask whether paid maternity and paternity leave was provided to all employees, or only to those in certain positions (e.g., management or professional) or those who worked full time.

Further, in a 2009 survey of members of the Society for Human Resource Management, 25 percent of the roughly 500 human resource professionals who responded to the survey indicated that their workplace provided paid family leave, 15 percent indicated that their workplace provided paid paternity leave, 15 percent indicated that their workplace provided paid adoption leave, and 14 percent indicated that their workplace provided paid maternity leave (other than what is covered by short-term disability).³⁴ Again, however, the study did not provide any information regarding which workers received these benefits.

Finally, employees who do not have access to any of the forms of wage replacement described above, but who do have access to vacation days or to some other source of paid time off (such as PTO), can presumably use those paid days off to care for and bond with their new child. However, as noted above, employer-provided vacation days average nine days per year, while employers that provide PTO generally provide 15-25 days per year. Neither of these types of paid time off provide a significant amount of wage replacement for parental care for a new child, particularly because employees must use their PTO days when they are sick or when a family member (including their new child) is sick, as well as for holidays, vacations, and other time-off needs.

2. State Laws

Two of the states with TDI programs — California and New Jersey — have expanded their TDI programs to include a Paid Family Leave (PFL) component.³⁵ The coverage and qualification standards are identical to those used in the states' TDI systems, except that applicants do not have to prove that they have a disability. Rather, applicants must show that they qualify either for parental leave (recent birth or adoption of a new child) or that they are needed to care for a covered family member.³⁶ For purposes of this section, we focus on the provisions regarding parental care for a new child.

Like TDI, benefits under these two PFL programs are correlated to the employee's income and delivered through a state plan or a state-approved private plan. Benefit duration is capped at six weeks in both programs.³⁷

In New Jersey, employers using a private plan must ensure the plan provides benefits equal to the state plan.³⁸ In California, employers who wish to use a private plan must demonstrate that the

private coverage exceeds the state plan in at least one respect.³⁹

The state PFL programs in California and New Jersey are funded exclusively through employee contributions; employers have the option of paying the employees' premiums or "topping up" state PFL benefits through their own benefit plans.⁴⁰ Whereas California's PFL financing scheme mirrors its TDI program (100% employee financed), New Jersey's PFL program departs from the financing scheme for its TDI program, which requires at least 50 percent contributions from employers.⁴¹

In addition, two states — Hawaii and Wisconsin — have laws that require that if an employer provides paid sick days to its employees, the employer must provide its employees the option of using a certain percentage of their paid sick days for time off for the birth or adoption of a child.⁴²

C. Recommendations

Given the lack of access by most workers to wage replacement during periods of time off for parental care, the pressing need for income during such periods, and the current inequity in male and female take-up, we recommend that FSI provide a robust level of wage replacement to individuals who take time off from work to care for and bond with a newborn or newly placed adopted or foster child. A national insurance program would provide wage replacement for all individuals who take time off for parental care and would provide a strong signal that both women and men need, and are expected to take, time off after the birth, adoption, or foster placement of a child.

Our specific recommendations are as follows:

Eligibility.

- ➔ **An individual should be entitled to PCNC benefits if he or she is the parent of a newborn, newly adopted or newly placed foster child (or is acting *in loco parentis* to a newborn or newly placed child) and is providing care to that child. Each parent must attest that he or she is providing care for the child during any time period in which PCNC benefits are received by that parent.**

Benefits.

- ➔ **For time off taken from work for PCNC purposes, an eligible recipient's wages should be replaced at 90 percent of the worker's average weekly wage, up to a maximum of 150 percent the national average weekly wage.**
- ➔ **Each parent should be eligible for 12 weeks of PCNC benefits. The benefits are an individual entitlement to each parent and not transferable between parents. In households with two parents, the benefits can be taken simultaneously or consecutively.**
- ➔ **There should be no waiting period for PCNC benefits.**
- ➔ **The 12 weeks of PCNC benefits need to be taken for periods of at least five days or more within the first year of a child's birth or adoption, but they need not be taken consecutively.**

Below we describe our rationales for each recommendation.

Eligibility.

An individual should be entitled to PCNC benefits if he or she is the parent of a newborn, newly adopted or newly placed foster child (or is acting *in loco parentis* to a newborn or newly placed child) and is providing care to that child. Each parent must attest that he or she is providing care for the child during any time period in which PCNC benefits are received by that parent.

All parents, including those acting *in loco parentis*, should have access to PCNC benefits as long as they are providing care to their child.⁴³ Requiring an attestation that parents are providing care to their child while receiving wage replacement benefits is standard in state PFL programs and in the programs in OECD countries that we researched.⁴⁴ This requirement ensures that the program is being used for its intended purpose.

Benefits.

For time off taken from work for PCNC purposes, an eligible recipient's wages should be replaced at 90 percent of the worker's average weekly wage, up to a maximum of 150 percent the national average weekly wage.

The PCNC benefit must be sufficiently robust so that a single parent or both parents in a two-parent family have a strong incentive to take the benefit and to use the time to bond with a newborn or new adoptive or foster child.⁴⁵ The percentage at which an individual's wage is replaced must be sufficiently high so that both a *primary and a secondary breadwinner* can take time off without leaving the family financially constrained. In addition, a high-wage replacement rate appropriately signals that society views the time off as worthy of support because of the long-term benefits that children, families, and society experience.

A national program of robust wage replacement would encourage more men to take extended time away from work to care for and bond with a new child. Evidence from paid parental schemes in other countries shows that greater take-up by fathers of parental leave is directly associated with robust benefit levels and extended leave duration.⁴⁶ Increased take-up by fathers of parental care for a new child would create new cultural expectations and norms around caregiving. It would also provide significant benefits to the children receiving care from their fathers.

“What would happen if we passed policies that gave strong incentives for men to take parental leave? Don't laugh, the Swedes have tried it. And now you see hunky blond Swedish men pushing strollers down the streets while Mom is at work. It's an intriguing idea and it could decrease gender discrimination.”

Dwyer Gunn, “Freakonomics: Betsey Stevenson Answers Your Questions,” *New York Times*, October 13, 2010, 2:30 PM, at <http://freakonomics.blogs.nytimes.com/2010/10/13/betsey-stevenson-answers-your-questions/>

A wage replacement level of 90 percent of the worker's average weekly wage subject to the universal maximum benefit across all programs – 150 percent of the national average weekly wage – would be sufficiently high so that both primary and secondary breadwinners in *middle-income families* could take time off during this period, without leaving the family financially constrained. This high wage replacement rate and high maximum weekly benefit is also essential for single parents who do not have a partner to contribute to the household's income.

Each parent should be eligible for 12 weeks of PCNC benefits. The benefits are an individual entitlement to each parent and not transferable between parents. In households with two parents, the benefits can be taken simultaneously or consecutively.

The duration of benefits should be long enough to support parental and child health and economic security, but not so long that the program discourages workforce attachment after taking time off from work. Research suggests that paid parental leaves of moderate duration (around six months, or 26 weeks) are correlated with the best outcomes in both areas.⁴⁷ Our proposal would provide benefits for a combined leave period of 24 weeks of leave for children with two parents, if parents decide to take time off consecutively. Because every family's situation is different, however, we also believe parents should be able to take PCNC benefits *simultaneously*, as long as they are both providing care to the child.

As a result, under our proposal, mothers who have an uncomplicated childbirth would be entitled to 18 weeks of benefits in total: six weeks of TDI benefits (at 80% wage replacement with a one-week waiting period) to recover from pregnancy, and an additional 12 weeks of PCNC benefits (at 90% wage replacement with no waiting period) to care for and bond with the new child. This aligns with the recommendations discussed above, both with respect to maternal and child health and female labor force attachment. Of course, this assumes that the birth mother is able to take 18 weeks of leave from work. If a woman is able to take only 12 weeks of leave or fewer, she might choose to file a claim for PCNC benefits alone rather than for TDI benefits, because the PCNC wage replacement level is higher and there is no waiting period.

We believe the benefits should be non-transferable between parents in two-parent families, just as the FMLA is an individual entitlement. Evidence suggests that children do best when both parents take a leave of absence from work after birth or adoption.⁴⁸ Also, making the time off non-transferable promotes gender equity. Parental leave programs in other countries that allow transferable entitlements between parents have very little take-up by fathers in heterosexual households, resulting in a caregiving burden that disproportionately falls on women.⁴⁹

There should be no waiting period for PCNC benefits.

Having no waiting period for PCNC benefits helps provide families with immediate income support. The lack of a waiting period also encourages leave-taking by avoiding a wage gap after the birth or adoption of a child. Also, PCNC recipients should not be penalized if they do not apply for benefits in advance of childbirth or the date of adoption, because individuals cannot predict the exact time a child might be born or placed with a family.

In addition, if a recipient has not applied in advance for benefits, the program should provide retroactive benefits from the date of childbirth or adoption as long as a claimant attests that he or she has not worked since the birth or adoption of the child.

The 12 weeks of PCNC benefits need to be taken for periods of at least five days at a time or more within the first year of a child's birth, but they need not be taken consecutively.

The public health literature shows the most critical time for parents to have some time off to be with new children is within the first year of a child's life.⁵⁰ While most parents will likely take most of the time off in consecutive segments, we believe the program should allow flexibility within the first year of a child's life for some segmented periods of leave. We believe this segmentation will allow two-parent households to better manage shared-caregiving responsibilities and will help parents transition back into the workforce earlier by allowing them to return to work, but with the option to receive benefits for additional segments of time off when they may need it (such as when a child care arrangement does not work out). New Jersey's PFL program has a similar rule for time off taken to care for a new child.⁵¹



¹ Anna Sarkadi et al., *Fathers' Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 *Acta Paediatrica* 153 (2008); Christopher Ruhm, *Parental Employment and Child Cognitive Development*, 39 *J. Hum. Resources* 155 (2004); Jeanne Brooks-Gunn, Wen-Jui Han & Jane Waldfogel, *Maternal Employment and Child Cognitive Outcomes in the First Three Years of Life: The NICHD Study of Early Child Care*, 73 *Child Dev.* 1052 (2002); Christopher Ruhm, *Parental Leave and Child Health*, 19 *J. Health Econ.* 931 (2000); Pauline Hopper & Edward Zigler, *The Medical and Social Science Basis for a National Infant Care Leave Policy*, 58 *Am. J. Orthopsychiatry* 324 (1988).

² Committee on Integrating the Science of Early Childhood Development et al., *From Neurons to Neighborhoods: The Science of Early Childhood Development* (2000); Marianne De Wolff & Marinus van IJzendoorn, *Sensitivity and Attachment: A Meta-Analysis on Parental Antecedents of Infant Attachment*, 68 *Child Dev.* 571, 586 (1997); Mary Main & Judith Solomon, *Discovery of a New, Insecure-Disorganized/Disoriented Attachment Pattern, in Affective Development in Infancy* 95-124 (T. B. Brazelton & M. Yogman, eds., 1986); Inge Bretherton, *Attachment Theory: Retrospect and Prospect*, 50 *Monographs of the Soc'y for Res. in Child Dev.* 3 (1985); Mary Main, Nancy Kaplan & Jude Cassidy, *Security in Infancy, Childhood and Adulthood: A Move to the Level of Representation, in Monographs of the Soc. for Res. in Child Dev.* 66 (1985); Attachment and Bonding: A New Synthesis (C. Sue Carter et al. eds. 2006); Bárbara Figueiredo et al., *Mother-to-Infant and Father-to-Infant Initial Emotional Involvement*, 177 *Early Childhood Dev. & Care* 521 (2007).

³ *Id.*

⁴ David Brodzinsky, Daniel Smith & Anne Brodzinsky, *Children's Adjustment to Adoption: Developmental and Clinical Issues* (1998); *The Psychology of Adoption* (David Brodzinsky and Marshall Schechter eds., 1990).

⁵ Patricia McGovern et al., *Time Off Work and the Postpartum Health of Employed Women*, 35 *Med. Care* 507 (1997).

⁶ Jeanne Brooks-Gunn, Wen-Jui Han & Jane Waldfogel, *First-Year Maternal Employment and Child Development in the First Seven Years*, 75 *Monographs of Soc'y for Res. in Child Dev.* 1, 35-49 (2010).

⁷ Patricia McGovern et al., *supra* note 5 (1997); Patricia McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, 4 *Annals Fam. Med.* 159 (2006).

⁸ Sylvia Guendelman et al., *Juggling Work and Breastfeeding: Effects of Maternity Leave and Occupational Characteristics*, 123 *Pediatrics* 38 (2009); Julia O. Johnson and Barbara Downs, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2000*, *Current Population Reports* P70-103 (2005); Lawrence Berger, Jennifer Hill & Jane Waldfogel, *Maternity Leave, Early Maternal Employment and Child Health and Development in the U.S.*, 115 *Econ. J.* 29 (2005).; Sakiko Tanaka, *Parental Leave and Child Health Across OECD Countries*, 115 *Econ. J.* 7 (2005); Charles L. Baum II, *Does Early Maternal Employment Harm Child Development? An Analysis of the Potential Benefits of Leave Taking*, 21 *J. Lab. Econ.* 381 (2003); Jeanne Brooks-Gunn, Wen-Jui Han & Jane Waldfogel, *supra* note 6 (2002); Christopher Ruhm, *Parental Leave and Child Health*, 19 *J. Health Econ.* 931 (2000); Cynthia M. Visness & Kathy I. Kennedy, *Maternal Employment and Breast-Feeding: Findings from the 1988 National Maternal and Infant Health Survey*, 87 *Am. J. Pub. Health* 945 (1997).

⁹ Brooks-Gunn, et al., *supra* note 8, at 1 (finding that early maternal employment has no net negative effects on children's outcomes: instead, quality of parenting and child care have a more significant impact).

¹⁰ Aletha C. Huston & Stacey R. Aronson, *Mothers' Time With Infant and Time in Employment as Predictors of Mother-Child Relationships and Children's Early Development*, 76 *Child Dev.* 467 (2005) (finding positive effects from maternal employment

even when controlling for differences in educational backgrounds).

¹¹ Patricia McGovern et al., *Mothers' Health and Work-Related Factors at 11 Weeks Postpartum*, 5 *Annals of Fam. Med.* 519 (2007); Pinka Chatterji & Sara Markowitz, *Does the Length of Maternity Leave Affect Mental Health?* 72 *S. Econ. J.* 16 (2005); Dwenda K. Djerdingen & Kathryn M. Chaloner, *The Relationship of Women's Postpartum Mental Health to Employment, Childbirth, and Social Support*, 38 *J. Fam. Prac.* 465 (1994).

¹² Pinka Chatterji & Sara Markowitz, *Does the Length of Maternity Leave Affect Maternal Health?* 72 *Southern Econ J.* 16-41 (2005) (finding that increasing maternal leave from six or fewer weeks to eight weeks or 12 weeks is associated with an appreciable decline in depressive symptoms of approximately 11 percent and 15 percent, respectively).

¹³ Sylvia Guendelman et al., *supra* note 8 (2009); Alan Ryan, Wenjun Zhou & Mary Beth Arensberg, *The Effect of Employment Status on Breastfeeding in the United States*, 16 *Women's Health Issues* 243 (2006); Lawrence Berger, Jennifer Hill & Jane Waldfogel, *supra* note 8. The World Health Organization and the American Academy of Pediatrics recommend that women breastfeed their infants exclusively for the first six months of life. American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 115 *Pediatrics* 496 (2005); World Health Organization, *Infant and Young Child Nutrition: Global Strategy on Infant and Young Child Feeding* WHA55 A55/15 (2002). The Centers for Disease Control has also called for a national plan of action to remove obstacles to breastfeeding, including those found in the workplace. Centers for Disease Control and Prevention, *Breastfeeding: Policies* (2010), available at <http://www.cdc.gov/breastfeeding/policy/>.

¹⁴ Cindy-Lee Dennis & Karen McQueen, *The Relationship Between Infant-Feeding Outcomes and Postpartum Depression: A Qualitative Systematic Review*, 123 *Pediatrics* 736 (2009); Stanley Ip et al., *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries*, 153 *Evidence Report/Tech. Assessment* 1 (2007); American Academy of Pediatrics, *supra* note 13; Collaborative Group on Hormonal Factors in Breast Cancer, *Breast Cancer and Breastfeeding: Collaborative Reanalysis of Individual Data from 47 Epidemiological Studies in 30 Countries*, 360 *Lancet* 187, 190 (2002); World Health Organization, *supra* note 13;

M. O. Bernier, et al., *Breastfeeding and Risk of Breast Cancer: A Meta-analysis of Published Studies*, 6 *Hum. Reprod. Update* 374, 385 (2000); Kathryn G. Dewey, et al., *Maternal Weight-Loss Patterns During Prolonged Lactation*, 162 *Am. J. Clin. Nutrition* 162 (1993).

¹⁵ Gillian Lester, *A Defense of Paid Family Leave*, 28 *Harv. Women's L.J.* 1, 21-22 (2005).

¹⁶ Christopher Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 *Q. J. Econ.* 285 (1998); Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference?* 16 *J. Lab. Econ.* 505 (1998); Christopher Ruhm & Jackqueline Teague, *Parental Leave Policies in Europe and North America*, in *Gender and Family Issues in the Workplace* (Francine D. Blau & Ronald Ehrenberg eds., 1997); C. R. Winegarden & Paula M. Bracy, *Demographic Consequences of Maternal Leave Programs in Industrial Countries: Evidence from Fixed-Effects Models*, 61 *S. Econ. J.* 1010 (1995); Wen-Jui Han et al., *Public Policies and Women's Employment after Childbearing*. IZA Discussion Paper No. 3937 at 26. (2009).

¹⁷ Jutta M. Joesch, *Paid Leave and the Timing of Women's Employment Before and After Birth*, 59 *J. Marriage & Fam.* 1008 (1997) (finding that women with access to paid parental leave were more likely than women without such access to take leave during the birth month, but they were also more likely to work later into their pregnancies and return to work sooner after the baby was two months old compared to women taking unpaid leave).

¹⁸ Lenna Nepomnyaschy & Jane Waldfogel, *Paternity Leave and Fathers' Involvement with Their Young Children: Evidence from the ECLS-B*, 10 *Community, Work & Fam.* 425, 447 (2007); Sakiko Tanaka & Jane Waldfogel, *Effects of Parental Leave and Working Hours on Fathers' Involvement with Their Babies: Evidence from the UK Millennium Cohort Study*, 10 *Community, Work & Fam.* 407 (2007); Sheila Kamerman, *Parental Leave Policies: The Impact on Child Well-Being*, in *International Review of Leave Policies and Related Research* (Peter Moss & Margaret O'Brien eds., 2006); Daniel de Vise, *Study: Working Mothers Not Necessarily Harmful to Child Development*, *Wash. Post*, July 31, 2010.

¹⁹ Geert-Jan Stams, Femmie Juffer & Marinus van IJzendoorn, *Maternal Sensitivity, Infant Attachment, and Temperament in Early Childhood Predict Adjustment in Middle Childhood: The Case of Adopted Children and Their Biologically Unrelated Parents*, 38 *Developmental Psychol.* 806 (2002); David Brodzinsky, Daniel Smith & Anne Brodzinsky, *Children's Adjustment to Adoption: Developmental and Clinical Issues* (1998).

²⁰ Children's Defense Fund, *State Developments in Child Care, Early Education, and School-Age Care* 2, 9 (2003) (finding that infant care is often the most difficult to find and that parents often face long waiting lists).

²¹ According to the National Association of Child Care and Referral Agencies (NACCRA), child care costs increased twice as fast as the median income of families with children from 2000 to 2010. National Association of Child Care Resources & Referral Agencies, *Parents and the High Cost of Child Care* 1, (2010) available at <http://www.naccrra.org/publications/naccrra-publications/parents-and-the-high-cost-of-child-care.php>. The average annual cost of center-based care exceeded 10% of the median income of two-parent families in 36 states (the average annual cost for full-time infant care in 2010 ranged from \$4,550 in Mississippi to \$18,750 in Massachusetts). *Id.*

²² Helen Wilkinson & Stephen Radley, *Time out: The Costs and Benefits of Paid Parental Leave* 18 (1997); Commonwealth of Australia, *Australia's Paid Parental Leave Scheme: Supporting Working Australian Families* 714-716 (2009), available at <http://home.deewr.gov.au/Budget/documents/PPLBooklet.pdf> [hereinafter "Australian Parental Leave Commission Report"]; S.L. Grover & K.J. Crooker, *Who Appreciates Family-Responsive Human Resource Policies: The Impact of Family-Friendly Policies on the Organizational Attachment of Parents and Non-parents*, 48 *Personnel Psychology* 271, 273-275, 279-282 (1995).

²³ Dana E. Friedman, *Employer Supports for Parents with Young Children*, 11 *The Future of Children* 63, 74 (2001) (referencing a

study by Sears corporation that found a 5 percentage point improvement in employee satisfaction was associated with greater customer satisfaction and a 1.6% increase in revenue growth in the following quarter; one of five management strategies that influenced satisfaction was implementing flexible workplace policies).

²⁴ This is true both for voluntary employer policies and for policies required by law in other countries. See Australian Parental Leave Commission Report, *supra* note 22, at 714-716; Ruhm, *supra* note 16, at 311-315.

²⁵ Executive Office of the President, Council of Economic Advisers, *Work-Life Balance and the Economics of Workplace Flexibility* 17 (2010) (noting that the direct and indirect costs to business of employee turnover are considerable); Arindrajit Dube & Ethan Kaplan, *Paid Family Leave in California: An Analysis of Costs and Benefits* 40-43, (2002) available at <http://www.iies.su.se/~ekaplan/paidfamilyleave.pdf> (finding that California's paid family leave law would potentially result in savings to businesses because of reduced employee turnover).

²⁶ Jennifer Glass and Lisa Riley, "Family Responsive Policies and Employee Retention Following Childbirth," *Social Forces*, Vol. 76, No. 4 (1998); Jane Waldfogel, Yoshio Higuchi, and Masahiro Abe, "Family Leave Policies and Women's Retention after Childbirth: Evidence from the United States, Britain, and Japan," *Journal of Population Economics*, Vol. 12, No. 4 (1999).

²⁷ See Chapter 2 *supra* notes 57-64 and accompanying text (discussing the type of access that women have to these various forms of employer-provided wage replacement for maternity-related purposes).

²⁸ Bureau of Labor Statistics, *National Compensation Survey: Glossary of Employee Benefit Terms* 17 (July 2009), available at http://www.bls.gov/ncs/ebs/detailedprovisions/2008/glossary_2008_2009.pdf. Paid family leave is defined as leave "granted to an employee to care for a family member and includes paid maternity and paternity leave. The leave may be available to care for a newborn child, an adopted child, a sick child, or a sick adult relative. Paid family leave is given in addition to any sick leave, vacation, personal leave, or short-term disability leave that is available to the employee." *Id.*

²⁹ U.S. Dept. of Labor, Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry* 2010 (Table 32), available at <http://www.bls.gov/ncs/ebs/benefits/2010/ownership/private/table21a.htm> [hereinafter BLS National Compensation Survey].

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Ellen Galinsky, James Bond & Kelly Sakai, *Families & Work Inst.*, 2008 National Study of Employers 19 (Table 7), available at <http://familiesandwork.org/site/research/reports/2008nse.pdf>.

³⁴ Soc'y for Human Res. Mgmt., 2009 Employee Benefits: Examining Employee Benefits in a Fiscally Challenging Economy 26 (Table d-1), available at http://www.shrm.org/Research/SurveyFindings/Articles/Documents/09-0295_Employee_Benefits_Survey_Report_spread_FNL.pdf.

³⁵ See Cal. Unemp. Ins. Code §§ 3300-3306 (West 2009); N.J. Stat. Ann. § 43:21-39.1 to .3 (West 2010). The Washington state legislature has also passed a law to establish a paid Family Leave (PFL) program. See Wash. Rev. Code § 49.86.005 to .903 (2010). The state does not have an existing TDI program. The PFL legislation did not designate a funding source or a lead administrative agency. As of the writing of this document, Washington has yet to resolve those issues and the program remains dormant. See Joint Task Force on Family Leave Ins., *Final Report* 1 (2008), available at <http://www.leg.wa.gov/jointcommittees/FLI/Pages/default.aspx>; Workforce Management, *Washington State Delays Maternity Leave* (May 22, 2009), <http://www.workforce.com/section/00/article/26/44/74.php> (describing a law that pushed back the start date for WA Family Leave Insurance).

³⁶ Cal. Unemp. Ins. Code § 3303 (West 2009); Cal. Code Regs. tit. 22, §§ 3302-2, 3303-1 (2010); N.J. Stat. Ann. §§ 43:21-39.2, -39.3 (West 2010); N.J. Admin Code § 12:21-3.2; (2010).

³⁷ *Id.*

³⁸ N.J. Stat. Ann. § 43:21-32 (b)-(c) (West 2010).

³⁹ Cal. Unemp. Ins. Code § 3254(a) (West 2009).

⁴⁰ See Appendix B: Key Characteristics of Social Insurance Programs (Financing).

⁴¹ Cal. Emp't Dev. Dep't, *State Disability Insurance Tax*, http://www.edd.ca.gov/payroll_taxes/State_Disability_Insurance_Tax.htm; N.J. Stat. Ann. §§ 43:21-7(d), 43.31-7 (West 2010); New Jersey Dep't of Labor & Workforce Dev., *Your Guide to Family Leave Insurance in New Jersey*, http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/WPR-119.pdf. In New Jersey's TDI program, employers are required to contribute to the fund. However, the PFL program only relies on employee contributions. Employers are free, if they choose, to pick up all or part of an employee's required PFL premium, but they are in no way required or incentivized to do so.

⁴² Haw. Rev. Stat § 398-4 (2010) (allowing the use of up to 10 paid sick days per year for family leave reasons); Wis. Stat. § 103.10(5)(b) (2010) (allowing employees to use any type of paid time off for family leave reasons).

⁴³ Our proposal tracks the same relevant definitions under the FMLA. See 29 U.S.C. § 2612 (2009) (allowing unpaid leave to take care of a "son or daughter"); 29 C.F.R. § 825.122 (2009) (defining "son or daughter" to include biological, foster, or adopted parents, as well as those individuals acting "in loco parentis."); U.S. Dep't of Labor, Wage & Hour Division, Administrator's Interpretation No. 2010-3, available at http://www.dol.gov/WHDO/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm (defining "in loco parentis").

⁴⁴ See e.g., California EDD, "Sample Claim Form," http://www.edd.ca.gov/pdf_pub_ctr/de2501f-sample.pdf. New Jersey Dep't of Labor & Workforce Dev., "Application for Family Leave Insurance Benefits," http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/fl1.pdf.

⁴⁵ Men may experience more work-family conflicts and barriers to parental involvement than women, including less access to

paid leave, primary wage-earner status within families, and gendered workplace hostility towards taking paternal leave. See Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. Ill. U. L. Rev. 25 (1998) (suggesting that parental involvement is important to men, women, and their children).

⁴⁶ Margaret O'Brien, *Fathers, Parental Leave Policies, and Infant Quality of Life: International Perspectives and Policy Impact*, 624 *Annals Amer. Acad. Pol. & Soc. Sci.* 190, 209 (2009) (finding evidence from several countries' paid parental leave schemes suggesting that fathers' use of paid parental leave is "greatest when high income replacement (50 percent or more of earnings) is combined with extended duration (more than 14 days).")

⁴⁷ See *supra* notes 1-26 and accompanying text.

⁴⁸ Judith Galtry & Paul Callister, *Assessing the Optimal Length of Parental Leave for Child and Parental Well-Being: How Can Research Inform Policy?* 26 *J. Fam. Issues* 219 (2005); Malin, *supra* note 45, at 28-30.

⁴⁹ Janet C. Gornick & Marcia K. Meyers, *Families that Work: Policies for Reconciling Parenthood and Employment* 133-139 (2003) (comparing the design of gender equity provisions in family-leave policies and the impacts on take-up of leave by men and women).

⁵⁰ See *supra* notes 1-10 and accompanying text.

⁵¹ N.J. Stat. Ann. § 43:21-39.3; New Jersey Dep't of Labor & Workforce Dev., "Bonding with a Newborn or Newly Adopted Child," available at <http://lwd.dol.state.nj.us/labor/fli/content/bonding.html> (stating that New Jersey Family Leave Insurance is allowed to be taken in one-week increments, but not less, and only with employer approval).



Caregiving Insurance

The third component of FSI provides wage replacement for time off from work to care for a family member with a serious health condition.

In this chapter we discuss the policy arguments in favor of providing wage replacement for caregiving, and current access to wage replacement during periods of time off for caregiving. We then describe our policy recommendations to address this need.

A. Policy Arguments

Caregiving covers a wide variety of situations in which an individual provides care to a family member, broadly defined, with an illness or disability. Most people who temporarily leave the workforce to provide care to someone do so in order to care for their children, their elderly parents, or their spouse or partner. But there are times when workers need to provide care to someone else – for example, a sibling, a grandparent or grandchild, or another person who is like a family member.¹ The type of care provided may vary greatly – from physical care to psychological support to logistical help. While caregiving primarily involves helping family members recover from a moderate-duration illness or injury, caregivers also provide occasional care for those with long-term diseases or disabilities; support elders when they must be moved to a more intensive care setting; or stay with a person who is dying. Nearly everyone will substantially benefit from being able to take paid time off during their working lives to address these situations.

Working caregivers are a rapidly growing segment of the population. An aging population, the deinstitutionalization of elder care, and the rise of dual-earner families are all trends that have contributed to this growth.² In any given 12-month period, about one-third of households have someone (most often woman) who is providing care to someone else, typically an older relative.³ Of these caregivers, nearly 60 percent are employed, the majority of them full time.⁴ Nearly half of working individuals have provided elder care in the past five years, many of whom are part of the "sandwich generation," providing elder care while simultaneously taking care of minor children at home.⁵

Two-thirds of caregivers who are employed report significant effects on their job — either going in late, leaving early, or taking time off.⁶ One in five report taking leaves of absence from work, and almost one in 10 gives up working all together.⁷

On average, caregivers devote more than 20 hours per week to providing care, and 13 percent of caregivers spend more than 40 hours per week providing care.⁸ While both men and women are providing care for seriously ill family members, one study found that women were twice as likely to take unpaid leave to provide elder care and twice as likely to report that they considered quitting their jobs as a result of elder care responsibilities.⁹ The fact that women disproportionately provide care — and, as suggested by this study, are more likely to take leave and potentially quit their jobs when caregiving conflicts with work — gives us concern that caregiving responsibilities have negative effects on women’s labor market attachment and outcomes.

Balancing work with the need to care for others takes a toll on the well-being of workers.¹⁰ Those who provide caregiving to others have higher rates of absenteeism, worse health outcomes, and higher rates of stress than other workers.¹¹ Research shows that having workplace flexibility, including paid time off to provide caregiving, would help alleviate these outcomes.¹²

The care provided by family members also has significant positive health benefits for care recipients. Sick children who stay home generally need their parents to administer medicines, take them to the doctor, and monitor their health in case their conditions worsen.¹³ And hospitalized children are able to go home more quickly and suffer fewer complications when a parent is present during the hospital stay than when a parent is absent.¹⁴ The American Academy of Pediatrics credits “family-centered care” — care that includes the presence and participation of family members — for various improvements in health outcomes and more efficient allocation of medical resources.¹⁵ In addition, although moderate illnesses or injuries generally cause family stress, there is less familial stress when family members can stay home to care for individuals who are in need.¹⁶

Working caregivers often suffer financial hardship as well. In one study, women who cared for their parents cut back their work hours by an average of 41 percent, resulting in significant wage loss.¹⁷ Caregivers who reduce their work hours also may experience reduced Social Security benefits due to lower earnings, more limited access and contributions to employer-sponsored pensions and 401(k) plans due to working part time, and reduced personal savings due to less time in the workforce.¹⁸

Providing workers with wage replacement during time off for caregiving is advantageous to businesses as well. Recent research shows that people who receive wage replacement while taking care-related time off are more likely to return to their job following the event and to be more productive overall.¹⁹

Businesses benefit from reduced turnover (saving on the high costs of recruiting and training new workers) and lower rates of absenteeism (and thus superior ability to engage in medium-term scheduling and planning). In addition, workers who are unable to take leave when they need it may be preoccupied with their family member’s care needs and thus less productive than they would otherwise be.²⁰

Finally, caring for people at home is significantly less expensive than other, formal forms of care, such as skilled nursing facilities.²¹ Elderly, disabled and medically frail individuals are less likely to spend time in a nursing home, hospital or assisted living facility if they have family members to

care for them.²² Although temporary time off cannot replace the role of full-time caregiving, it often is sufficient for less serious needs, can lower health care costs, and can reduce reliance on public assistance.²³

B. Current Access to Wage Replacement

In the United States, there are only two sources of direct wage replacement when a worker needs to take time off for caregiving: wage replacement provided voluntarily by an employer or, for residents of California and New Jersey, wage replacement provided through the state Paid Family Leave (PFL) programs. There is currently almost no private insurance market for individuals to protect themselves against the risk that they may need to take a leave of absence, and forgo wages, to provide care for a family member. In some instances, however, family members may be able to get paid for the family care they provide through the ill family member’s long-term care insurance or through a Medicaid-funded, in-home support services program, but as we detail below these policies are a poor substitute for direct wage replacement insurance for workers needing to take leave to provide care.

1 Volunteer Employer Practices

First, an employer might provide wage replacement for caregiving, either by offering a specific type of paid time off for caregiving or by allowing employees to use other types of time off for caregiving.

Employer policies that give wage replacement to employees specifically for time off for caregiving are rare. As noted in Chapter 3, the nationally representative BLS Compensation Study found that only 10 percent of employees in the private sector have access to formal paid family leave — a term that BLS defines as including leave to care for and bond with a newborn or adopted child, care for a sick child, and care for a sick relative.²⁴ While we have no confirmation, we assume that this data point would drop if it excluded leave to care for and bond with a new child and instead was limited to the population that has access to paid leave to care for a sick child or other family member.

Of course, as with time off for parental care for a new child, this statistic does not reflect the full scope of employee access. Rather than instituting formal paid family leave policies, many employers allow employees to use paid time off (PTO) and/or vacation days to cover these types of situations.²⁵ Some employers also voluntarily allow employees to use accumulated sick leave to take care of a sick family member, although many do not. As discussed below, some states have recently enacted laws requiring employers to allow their employees to use a certain percentage of their paid sick days to care for an ill family member.²⁶

“The medical infrastructure for elder care in America is good, very good. But the cultural infrastructure is all but nonexistent. How can it be that so many people like me are so completely unprepared for what is, after all, one of life’s near certainties?”

Jonathan Rauch, “Letting Go of My Father,” The Atlantic, April 2010

Again, however, there are significant disparities in access to such paid time off depending on the employee's income, job position, industry, and full-or part-time status. Moreover, even workers who have access to generous vacation time, sick leave, and/or PTO policies may find they do not have sufficient paid time off to provide the caregiving their family members need.

The BLS study was the only study we could find regarding *employee* access to formal paid time off policies for caregiving purposes. Self-reported data from employers, however, corroborate the fact that access to these formal policies is low. The Society for Human Resource Management's study of its members found that only 25 percent of the employers surveyed provide paid family leave.²⁷ According to a study on working couples caring for children and aging parents, only 15 percent of companies with more than 500 employees provided "elder care leave."²⁸ And again, just because an employer provides caregiving benefits to *some* employees does not mean that *all* individuals who work for that employer have access to such benefits.

2. State Laws

The two states with paid family leave insurance programs—New Jersey and California—provide wage replacement to employees who take time off for caregiving purposes. These programs define caregiving quite broadly—providing wage replacement to individuals who take time off from work to provide physical and emotional support to their family members with serious health conditions, including time to care for a dying relative and time to provide logistical support, such as helping someone move to a nursing home.²⁹ The wage replacement benefits provided for caregiving are equivalent to those for parental leave to bond with a new child.³⁰

“My mother had Stage IV breast cancer and Paid Family Leave (PFL) allowed me to take time off work to travel to Texas and take care of her during her final months. There is absolutely no way I could have managed to keep my apartment (and life) here in California while taking unpaid leave from work. The application process was relatively easy, the benefits arrived quickly, and the people I talked to when I needed help were courteous and helpful. The huge relief all this provided while dealing with the extremely stressful situation of caring for and saying goodbye to my mother cannot be fully explained in words. I am very grateful that I live in one of the few states that offer this benefit.”

Melissa Stern, paidfamilyleave.org

In addition, eight states have “kin care” laws that require that *if* an employer provides paid sick days to its employees, the employer must provide its employees the option of using a certain percentage of their paid sick days to care for ill family members.³¹

3. Private Insurance Policies

Unlike time off for a temporary disability—which individuals can insure against through short-term disability insurance (most often offered through an employer)—there is no real private market for caregiving insurance. Indeed, we were only able to find private insurance policies for caregiving in New Jersey, a state that already possesses a public, paid, family leave insurance program. New Jersey law allows companies to opt-out of the public TDI and PFL programs and either self-insure or purchase private insurance (subject to the standards set for private plans by the state.) A handful of private insurers that already provide TDI insurance to companies have applied to provide PFL as well.³² The presence of these policies proves that a private market *may* develop once a state or national program is put in place. However, the impact of these existing private insurance policies should not be overstated as they remain a very small part of the overall market (both private and public) for caregiving insurance and are not available to the vast majority of the country.

While individuals cannot purchase insurance to protect against lost wages during leaves of absence to provide family care, it may be that the person for whom they are caring can pay them for their services.

Under some long-term care insurance plans, reimbursement to pay a *family member* who is providing care is allowed.³³ In addition, all but six states allow Medicaid reimbursement for in-home health support that is provided by a family member.³⁴ Finally, a new social insurance program for long-term care, the Community Living Assistance Services and Support (CLASS) program, was recently enacted as part of the federal health care reform law.³⁵ Starting in January 2011 this program will be funded by payroll tax contributions from all workers, except those who choose to opt out of the program.³⁶ While it is too early to know if funds received through the CLASS program will be able to be used to support a family member who is providing caregiving services, it is another future potential source of payment to family caregivers.

There are two limitations with long-term care insurance as a form of paid time off for family caregivers. First, the funds received through the policies are not “wage replacement” *per se* because pay is based on a set amount allowed under the insurance policy, not on the family caregiver's wages at their place of employment. Second, these policies are directed at individuals with long-term disabilities or seriously ill elders and, as a result, the care needed is often extensive and may not easily accommodate short-term exit from and reentry into the labor market.

C. Recommendations

Given the minimal availability of wage replacement during periods of time off for caregiving, the pressing need for income during such periods, and the current inequity in male and female caregiving, we recommend that FSI provide meaningful wage replacement to all individuals who take time off from work to provide caregiving to their family members. The program would also provide meaningful wage replacement for all individuals who take time off for caregiving and would provide a strong signal that *both* women and men need, and have the necessary support to take, time off to care for a family member.

Our specific recommendations are as follows:

Eligibility.

- An employee is eligible for caregiving benefits if he or she is “needed to care for” a “family member” with a “serious health condition.”

- ➔ The terms “needed to care for” and “serious health condition” should track the definitions in the FMLA.
- ➔ The term “family member” should be defined broadly and should track the definition used by the federal government to allow its employees to use their own sick leave to care for a family member.
- ➔ An eligible recipient must attest that he or she is acting as a caregiver for a family member during any time period in which benefits are received.

Benefits.

- ➔ An eligible recipient’s wages should be replaced at 80 percent of the worker’s average weekly wage, up to a maximum of 150 percent of the national average weekly wage.
- ➔ There should be a requirement that 26 weeks of caregiving benefits be the maximum amount an individual can receive over the course of his/her working lifetime, and that 12 weeks of caregiving benefits be the maximum an individual can receive in any one year. Within those limits, actual benefit durations should depend on how long a worker must be out of work to provide care.
- ➔ There should be a five-day waiting period for each of the care recipient’s qualifying serious health conditions before benefits can be claimed.

Below we describe our rationale for each section:

Eligibility.

An employee is eligible for caregiving benefits if he or she is “needed to care for” a “family member” with a “serious health condition.” The terms “needed to care for” and “serious health condition” should track the definitions in the FMLA.

The terms “needed to care for” and “serious health condition” have been part of federal law for a number of years under the FMLA.³⁷ We believe the definitions of those terms are substantively in line with the purposes of our proposal and will provide consistency for the administrative agency when determining eligibility for FSI Caregiving benefits.³⁸

The FMLA regulations provide that a person is “needed to care” for a covered family member with a serious health condition if he or she is needed to provide physical and/or psychological care, such as assisting with the basic health care needs of a family member, providing emotional support to a dying family member, or helping an elderly relative transition to an assisted living facility.³⁹ As discussed in Chapter 5, the administrative agency implementing FSI should require certification from a health care provider documenting the need for care.

The term “family member” should be defined broadly and should track the definition used by the federal government to allow its employees to use their own sick leave to care for a family member.

We believe that eligibility to take leave for caregiving purposes must be broad enough to recognize the full range of caregiving relationships in our society — e.g., grandparents who are the primary caregivers for their grandchildren; siblings; or non-relatives who are like a family member. Data on

caregiving in the United States shows that non-immediate family members make significant sacrifices to care for extended family and friends — whether it be a grandparent, an uncle, or a close friend who is like a family member. One study found that more than 14 percent of caregivers are caring for a non-relative.⁴⁰ Another study found that more than 40 percent of caregivers for Alzheimer’s patients are not covered under the FMLA’s narrow definition of family, and yet another found that nearly 20 percent of primary caregivers for chronically disabled individuals are neither the spouse nor the child of the person receiving care.⁴¹ Non-immediate family care is likely to become more prevalent as workers become increasingly mobile and, as a result, cease to live near immediate family members.

Furthermore, because our proposal is a social insurance program financed by contributions from all workers, there is merit to allowing workers to provide care to those individuals who most need it, whether or not the care recipient is part of the individual’s immediate family. Allowing a worker to use benefits earned through his or her contributions to care for any person who falls within the proposed definition of family member will make the program useful to a broader cross-section of workers. We also believe that, as a matter of social policy, government should encourage caregiving, and allowing benefits to be used to provide care for all those who qualify as family members under this definition increases the number of potential caregivers in the population. Some people who need temporary care from others for a serious health condition may not have an immediate family member available to provide it for them. Allowing care from another individual is more economical for the government than paying for professional nursing care.

Because of these concerns, we concluded that the FMLA’s definition of “family member” — children, a spouse, and parents — is too narrow and does not recognize the current constellations of families and caregiving relationships. As a result, we recommend that the term “family member” track the federal regulations allowing federal employees to use their sick leave to care for a seriously ill family member. That regulatory definition of a “family member” is broader than the FMLA, and includes an individual with any of the following relationships to the employee:

- (1) Spouse, and parents of a spouse, *i.e.*, fathers and mothers in-law;
- (2) Sons and daughters, and spouses of a son or daughter, *i.e.*, daughters or sons in-law;
- (3) Parents, and spouses of a parent, *i.e.*, stepparents;
- (4) Brothers and sisters, and spouses of a brother or sister, *i.e.*, brothers or sisters in-law;
- (5) Grandparents and grandchildren, and spouses thereof;
- (6) Domestic partner and a domestic partner’s parents; and
- (7) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.⁴²

An eligible recipient must attest that he or she is acting as a caregiver for a family member during any time period in which benefits are received.

Like the eligibility rules for parental care, we recommend adopting language modeled after state paid family leave programs. Those programs require eligible recipients to attest that they are acting as a caregiver while benefits are received to ensure that the program is being used for its intended purpose.⁴³

Benefits.

An eligible recipient’s wages should be replaced at 80 percent of the worker’s average weekly wage, up to a maximum of 150 percent of the national average weekly wage.

We chose to set wage replacement levels for caregiving at the same level as temporary disability. Caring for one's *own* disability and caring for *another's* disability both rest on the same "qualifying event": a serious health condition. As with temporary disability, wage-replacement levels for individuals who take time off from work to care for others must be high enough to provide meaningful income support during such individuals' time away from work. Otherwise, the societal rationale of supporting those who provide important caregiving services for those in need will not be achieved. At the same time, wage replacement levels for supportive caregiving cannot be so high as to encourage over-use of the program. Setting wage replacement levels at the same level for caregiving and disability also avoids the inequitable situation where a care recipient could receive higher wage replacement than the person for whom he or she is caring, assuming that person happens to be accessing the temporary disability portion of the program.

There should be a requirement that 26 weeks of caregiving benefits be the maximum amount an individual can receive over the course of his/her working lifetime, and that 12 weeks of caregiving benefits be the maximum an individual can receive in any one year. Within those limits, actual benefit durations should depend on how long a worker must be out of work to provide care.

As explained above, we believe caregiving benefits should be available when an employee takes time off to care for a family member, broadly defined, in order to recognize and support the wide range of familial caregiving relationships that exist today.

That said, there are four reasons why we believe it is appropriate to set a maximum number of weeks an individual could receive benefits for caregiving over the course of his or her working life.

First, we are concerned about overuse. A program that allows unlimited wage replacement benefits to care for family members, broadly defined, could result in overuse and unsustainable costs. One way to limit use is to more narrowly define the class of persons to whom one can provide care. But we believe setting a maximum number of weeks an employee can take off for caregiving during his/her working lifetime is a more equitable solution. Specifically, we believe it would be unfair to exclude a worker who has been contributing to the program and is otherwise eligible simply because the worker's relationship to the person in need of care does not meet a narrow definition of "family."

We are also concerned that unlimited benefits for caregiving might lead to fraud and abuse. As will be discussed in Chapter 5, administering caregiving benefit claims is inherently complex, especially when claims are allowed for a broader array of caregiving relationships. Limiting an individual's total benefit allotment will discourage abuse of the system and encourage individuals only to use the program when the caregiving need is serious.

Third, we are motivated by concerns that imposing no limit on Caregiving benefits will perpetuate disparities in caregiving obligations between men and women. If caregiving benefits are limited, there will be stronger incentives for males to take caregiving leaves; once a female caregiver has exhausted her benefits, the only way for a family to receive additional insured leave may be for a male family member to take the leave.

Finally, we believe that 26 weeks of caregiving benefits for temporary time off from work is just one part of a larger public policy response to a growing caregiving crisis. Longer-term caregiving is addressed by long-term care insurance and government programs such as the recently enacted CLASS Act and Medicare and Medicaid reimbursement for home health care providers.⁴⁴

As a result, we recommend there be a requirement that 26 weeks of caregiving benefits be the maximum amount an individual can receive over the course of his/her working lifetime, and that 12 weeks of caregiving benefits be the maximum an individual can receive in any one year. Within those limits, actual benefit durations should depend on how long a worker must be out of work to provide care.

The 26-week total benefit maximum would allow an individual to receive up to half a year's worth of wage replacement over the course of the individual's working life when taking time off from work to provide care to various family members.

The 12-week annual benefit maximum would ensure that caregivers have access to enough benefits to provide wage replacement for a variety of caregiving needs. The 12-week annual benefit duration tracks the FMLA, which provides up to 12 weeks per year of unpaid leave for, among other things, caregiving purposes.⁴⁵ It recognizes that some illnesses and disabilities last longer than others, and that some caregivers have caregiving responsibilities for more than one person. In addition, it compels caregivers to exercise prudence in order to save some benefits for the future – for example, when they might need to take time off from work to provide care in their later years.

Under our proposal, an individual, over the course of her career, could claim benefits for one month to care for her mother recovering from surgery, three weeks to help a sibling recovering from an injury, two weeks to assist her father as he moves into a nursing home, six weeks to care for a dying spouse, and still have 11 weeks' worth of benefits if unforeseen caregiving needs arise in the future. However, the individual could receive only up to 12 weeks of caregiving benefits per year. [Note that the Caregiving benefit is available *in addition to* the maximum of 26 weeks per year of Temporary Disability benefits, and 12 weeks per year of PCNC benefits.]

We recognize that the 12-week annual caregiving limit is shorter than the 26-week annual TDI limit. However, while the duration of wage replacement benefits must be long enough to allow individuals to take the time off that they need to provide care, it need not be as long as benefits provided for one's own temporary illness or injury. First, some individuals who are recovering from a disability will not need someone to take time off work to care for them (especially in increments of a week or more), either because they can recover on their own or because they have a professional caregiver (e.g., in-home health aide, hospital staff, etc.). Second, when an individual is unable to work because of illness or injury, there is no one else who can recover for the individual. By contrast, when an individual's family member is seriously ill or injured, there will often be more than one person who can provide care to that family member, especially when the term "family member" is broadly defined.

There is no way to predict the number of weeks an individual will need to take time off from work in his or her lifetime to provide caregiving. Some individuals will have large, extended families, where a number of relatives might need care, but also where a number of relatives might be available to share the caregiving burden. Other individuals will have small families, where fewer relatives might require care, but where the caregiving burden might fall on only one or two family members. While 26 weeks of wage replacement for caregiving purposes may not be sufficient for all, we believe half a year of wage replacement constitutes a reasonable amount of benefits that can be used to address a variety of caregiving needs. Further, because we have recommended a broad definition of "family member," we anticipate a broader pool of caregivers will be eligible under the program and able to provide care if another person has exhausted their total allowable benefits.

As explained in Chapter 7, however, while we recommend a 26-week total benefit duration and 12-week annual benefit duration, we also recommend that there be further research on whether there are other ways to mitigate concerns about overuse, program sustainability, and fraud and abuse.

There should be a five-day waiting period per qualifying serious health condition of the care recipient before benefits can be collected.

We believe there should be a five-day waiting period before an individual can seek wage replacement for caring for others. As with the waiting period for temporary disability benefits, a waiting period for caregiving benefits helps avoid problems of moral hazard and overuse. It underscores the fact that the program is intended to provide wage replacement only when time off is taken to care for an individual with a serious illness or injury. In addition, we believe this program should supplement shorter-term policies such as paid sick days that can be used to care for sick family members and PTO days.

As with TDI, our proposal only requires a Caregiving benefit recipient to serve one five-day waiting period per qualifying serious health condition. If an individual has to take additional time off to care for the same individual with the same condition, the individual can claim benefits without another five-day waiting period.



¹ See *infra* notes 40-42 and accompanying text (describing data on the diverse array of caregiving arrangements in the U.S.).

² Ann O'Leary, *What's the Workplace Impact?*, in *The Shriver Report: A Woman's Nation Take on Alzheimer's 184-85* (Angela Timashenka Geiger, Olivia Morgan, Kate Meyer & Karen Skelton, eds., 2010).

³ National Alliance for Caregiving & AARP, *Caregiving in the U.S.* 4 (2009), available at http://www.caregiving.org/data/Caregiving_in_the_US_2009_full_report.pdf [hereinafter "Caregiving in the U.S."].

⁴ *Id.* at 53.

⁵ Kerstin Aumann, Ellen Galinsky, Kelly Sakai, Melissa Brown, & James T. Bond, *Families & Work Institute: The Elder Care Study: Everyday Realities & Wishes for Change* (2010) available at http://familiesandwork.org/site/research/reports/elder_care.pdf.

⁶ Caregiving in the U.S., *supra* note 3, at 53-55.

⁷ *Id.*; See also Ann O'Leary, *What's the Workplace Impact*, *supra* note 2, at 186 (finding that "more than 60 percent of working caregivers of people with Alzheimer's reported the need to come in late, leave early, or take time off as a result of their caregiving responsibilities.").

⁸ Caregiving in the U.S., *supra* note 3, at 53-55.

⁹ MetLife Mature Market Institute, National Alliance for Caregiving, and the Center for Productive Aging at Towson, *The MetLife Study of Sons at Work Balancing Employment and Eldercare* 8-9 (2003), available at www.geckosystems.com/downloads/sonsatwork.pdf

¹⁰ Leonard I. Pearlin, Joseph T. Mullan, Shirley J. Semple, and Marilyn M. Skaff, *Caregiving and the Stress Process: An Overview of Concepts and their Measures*, 30 *The Gerontologist* 583-594; Margaret B. Neal, Nancy J. Chapman, Befit Ingersoll-Dayton, and Arthur C. Emlen, *Balancing Work and Caregiving for Children, Adults, and Elders* (1993).

¹¹ MetLife Mature Market Institute, National Alliance for Caregiving, and the University of Pittsburgh Institute on Aging, *The MetLife Study of Working Caregivers and Employer Healthcare Costs* 4-5 (2010), available at http://www.caregiving.org/data/Caregiver_Costs_Study_Web_FINAL_2-12-10.pdf [hereinafter "The MetLife Study of Working Caregivers & Employer Healthcare Costs"]; Richard Schulz and Scott Beach, *Caregiving as a Risk Factor for Mortality: The Caregiver Health Effects Study*, 282 *J. Am. Med. Ass'n* 2215 (1999); Margaret B. Neal and Leslie B. Hammer, *Working Couples Caring for Children and Aging Parents: Effects on Work and Well-Being* (2006).

¹² The MetLife Study of Working Caregivers & Employer Healthcare Costs, *supra* note 11, at 23-26 (2010); Joseph Grzywacz,

Patrick Case, & Fiona A. Jones, *The Effects of Workplace Flexibility on Health Behaviors: A Cross-Sectional and Longitudinal Analysis*, 49 *J. Occupational Med.* 1302-1309 (2007).

¹³ S. Jody Heymann, Alison Earle, and Brian Egleston, *Parental Availability for the Care of Sick Children*, 98 *Pediatrics* 226, 229 (1996); S. Jody Heymann, Sara Toomey, and Frank Furstenberg, *Working Parents: What Factors are Involved in Their Ability to Take Time Off From Work When Their Children Are Sick?*, 153 *Archives Pediatrics & Adolescent Med.* 870 (1999).

¹⁴ M. R. H. Taylor and P. O'Connor, *Resident Parents and Shorter Hospital Stay*, 64 *Archives of Disease in Childhood* 274 (1989) (finding that hospitalized children whose parents reside at the hospital during the child's stay recover 31 percent faster than children whose parents are not resident); Sarah J. Palmer, *Care of Sick Children by Parents: A Meaningful Role*, 18 *J. Advanced Nursing* 185, 188 (1993) (concluding that a mother's presence during a child's hospitalization has a number of health benefits for the child).

¹⁵ Comm. on Hospital Care, American Academy of Pediatrics, *Family-Centered Care and the Pediatrician's Role*, 112 *Pediatrics* 691 (2003).

¹⁶ Caregiving in the U.S., *supra* note 3, at 53-55.

¹⁷ Richard W. Johnson & Anthony T. Lo Sasso, *The Impact of Elder Care on Women's Labor Supply*, 43 *Inquiry* 195, 207 (2006); See also Katharine M. Donato, *The Consequences of Caregiving: Effects on Women's Employment and Earnings*, 24 *Population Res and Pol'y Rev.* 467 (2005) (finding that caregiving to aging family members has a negative effect on women's labor force participation and earnings).

¹⁸ Johnson & Sasso, *supra* note 17, at 207. See also MetLife Mature Market Institute, *The MetLife Juggling Act Study: Balancing Caregiving with Work and the Costs Involved* (1999), available at <http://www.caregiving.org/data/jugglingstudy.pdf>.

¹⁹ Ruth Milkman, *Class Disparities, Market Fundamentalism and Work-Family Policy: Lessons from California*, in *Gender Equality: Transforming Family Divisions of Labor*, 339, 350-51 (Janet C. Gornick & Marcia K. Meyers eds., 2009); MetLife Mature Market Institute, National Alliance for Caregiving, and the University of Pittsburgh Institute on Aging, *The MetLife Study of Working Caregivers and Employer Healthcare Costs* (2010), http://www.caregiving.org/data/Caregiver_Costs_Study_Web_FINAL_2-12-10.pdf; MetLife Mature Market Institute & National Alliance for Caregiving, *The MetLife Caregiving Cost Study: Productivity Losses to U.S. Business* (2006), <http://www.caregiving.org/data/Caregiver%20Cost%20Study.pdf>.

²⁰ See Milkman, *supra* note 19, at 350-51. See also Janet C. Gornick & Marcia K. Meyers, *Families That Work: Policies for Reconciling Parenthood and Employment* 296 (Russell Sage Foundation, 2003) (discussing research that indicates employers find unpredictability in the incidence and duration of leaves to be particularly onerous, rather than long leaves *per se*).

²¹ Peter S. Arno, Carol Levine, & Margaret M. Memmott, *The Economic Value of Informal Caregiving*, 18 *Health Affairs* 182 (1999).

²² Courtney Harold Van Houtven & Edward C. Norton, *Informal Care and Health Use of Older Adults*, 23 *J. of Health Econ.* 1159 (2004).

²³ Brenda C. Spillman & Lilliana E. Pezzin, *Potential and Active Family Caregivers: Changing Networks and the "Sandwich Generation"*, 78 *Milbank Q.* 347 (2000).

²⁴ BLS National Compensation Survey (Table 32).

²⁵ See WorldatWork, *PAID Time Off: Programs and Practices* 9 (2010), available at <http://www.worldatwork.org/waw/adimLink?id=38913&nonav=yes> (showing that 40 percent of organizations surveyed use a PTO bank-type system in which paid vacation and personal leave is combined into one category of available time off that can be managed by the employee subject to certain employer guidelines).

²⁶ See *infra* note 31 and accompanying text.

²⁷ Soc'y for Human Res. Mgmt., *2009 Employee Benefits: Examining Employee Benefits in a Fiscally Challenging Economy* 26 (Table d-1), available at http://www.shrm.org/Research/SurveyFindings/Articles/Documents/09-0295_Employee_Benefits_Survey_Report_spread_FNL.pdf.

²⁸ MetLife Mature Mkt. Inst. *The MetLife Study of Working Caregivers and Employer Health Care Costs* 7 (2010) (citing M.B. Neal & L.B. Hammer, *Working Couples Caring for Children and Aging Parents: Effects on Work and Well-Being* (2007)).

²⁹ For example, the California PFL law requires a claimant to establish that the serious health condition of an eligible family member "warrants the participation of the employee." Cal. Unempl. Ins. Code § 2708(b) (West 2009). The California PFL regulations provide that "physical assistance and/or psychological comfort" are acceptable types of care warranting the participation of the employee. 22 C.C.R. § 2708(b)-1(a) (2009). Arranging third-party care is also included, with the regulations explicitly allowing PFL benefits to help with a "transfer to a nursing home." 22 C.C.R. § 2708(b)-1(b) (2009).

³⁰ See Appendix B: Key Characteristics of Social Insurance Programs (Wage Replacement Rate & Maximum Benefit Amount).

³¹ See Cal. Lab. Code § 233 (2010); Conn. Gen. Stat. § 31-511i; Haw. Rev. Stat. § 398-4 (2010); Md. Code Ann., Lab. & Empl. § 3-802 (2010); Maine Rev. Stat Ann. tit. 26, § 636 (2010); Minn. Stat. § 181.9413 (2010); Wash. Rev. Code Ann. § 49.12.270 (2010); Wis. Stat. § 103.10(5)(b) (2010).

³² Telephone Interview with New Jersey Department of Labor and Workforce Development (Nov. 2, 2010) (notes on file with WF2010).

³³ U.S. Dep't of Health & Human Serv's., *National Clearinghouse for Long-Term Care Information*, http://www.longtermcare.gov/LTC/Main_Site/Paying_LTC/Private_Programs/LTC_Insurance/index.aspx (last visited Nov. 11, 2010) (noting that some long-term care insurance policies provide some payment for family members or friends to help provide care, but likely do so on a limited basis, or only in relation to the costs that the family member incurs.)

³⁴ Brent D. Fulton, Ph.D., *Is America Ready for the Economic Impact of Alzheimer's*, in *The Shriver Report: A Woman's Nation Take on Alzheimer's 172-73* (Angela Timashenka Geiger, Olivia Morgan, Kate Meyer & Karen Skelton, eds., 2010).

³⁵ The Community Living Assistance Services and Support Act (H.R. 3001, hereinafter “CLASS Act”), was enacted on March 23, 2010. Patient Protection and Affordable Care Act (PPACA) of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010). The CLASS Act established a voluntary national insurance program to provide individuals with either age-related or non-age-related disabilities with cash to purchase services, technologies, and other types of non-medical-care assistance to promote integrated, community-based living and care. Henry J. Kaiser Family Foundation, *The Community Living Assistance Services and Supports (CLASS) Act*, Focus on Health Reform (2009). Unlike Social Security or Medicare, the CLASS program is not a compulsory, tax-based program: It will be funded entirely by voluntary contributions from participants through monthly payroll deductions from those enrolled. *Id.*

³⁶ *Id.*

³⁷ See 29 U.S.C. § 2612(a)(1)(C) (making FMLA leave available to employees “in order to care for” [a covered family member]); 29 U.S.C. § 2613(b) (requiring certification that the employee requesting FMLA leave is “needed to care for” a covered family member); 29 C.F.R. § 825.124 (defining the term “needed to care for”); see also 29 USC § 2611; 29 CFR § 825.113 (defining “serious health condition”).

³⁸ To the extent that further guidance is needed, California and New Jersey have developed extensive regulations to determine eligibility for caregiving under their paid family leave social insurance programs. See N.J. Admin. Code § 13:14-1.2 (West 2009) (definition of “care” under the New Jersey Family Leave Act); Cal. Code Regs. tit. 22, § 2708(b)-1(a) (2010) (providing that “physical assistance and/or psychological comfort” are acceptable types of care warranting the participation of the employee). Arranging third-party care is also included in California, with the regulations explicitly allowing PFL benefits to help with a “transfer to a nursing home.” Cal. Code Regs. tit. 22, § 2708(b)-1(b) (2010). Under California’s PFL program, up to three family members can provide this care within a 24-hour period (8 hours per caretaker) to covered family members. Cal. Code Regs. tit. 22, § 33031(b)-1 (2010). An estimate of the amount of time necessary to provide care is required in the claimant’s application. Cal. Code Regs. tit. 22, § 2706-2(f)(2)(F) (2010).

³⁹ 29 C.F.R. 825.124 (2010).

⁴⁰ National Alliance for Caregiving, *Caregiving in the U.S. 18* (2009), available at http://www.caregiving.org/data/Caregiving_in_the_US_2009_full_report.pdf. Under our proposal, the availability of benefits to care for non-relatives depends on whether the applicant’s relationship to that person is considered “the equivalent of a family relationship.” See *infra* note 42 and accompanying text.

⁴¹ Jennifer L. Wolff, Sydney M. Dy, Kevin D. Frick & Judith D. Kasper, “End-of-Life Care: Findings of a National Survey of Informal Caregivers,” 167 *Arch. Intern. Med.* 40, 43 (2007) (finding that 20 percent of all primary unpaid caregivers of chronically disabled community dwelling adults were not the spouse or child of the person receiving care). Ann O’Leary, *What’s the Workplace Impact*, *supra* note 2, at 189 (finding that 40 percent of Alzheimer’s caregivers who are providing care to relatives are not covered under the FMLA).

⁴² 5 C.F.R. § 630.201(b) (2010).

⁴³ See e.g., California EDD, “Sample Claim Form,” http://www.edd.ca.gov/pdf_pub_ctr/de2501f-sample.pdf. New Jersey Dep’t of Labor & Workforce Dev., “Application for Family Leave Insurance Benefits,” http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/fl1.pdf.

⁴⁴ See *generally supra* Section B.2 (describing current access to long-term care).

⁴⁵ We note that the FMLA provides up to 26 weeks of unpaid leave to care for a servicemember. See 29 U.S.C. § 2612(a)(1)(E). As explained in Chapter 7, we recommend that there be further research regarding whether caregivers for servicemembers should be entitled to a more generous total benefit duration.

Part

III

How Would It Work?



Administration

Previously, we discussed our recommendations on eligibility, benefits, and financing for a national social insurance system for time off for temporary disability, parental care for a new child, and caregiving. This section discusses how the program can be administered.

A. Background

While we are proposing the first *national* social insurance system for temporary disability, parental care for a new child, and caregiving benefits, a number of lessons can be learned from experiences in the states. Rhode Island established our first social insurance system for temporary disability more than 68 years ago, in 1942. California, our largest state, has been operating its temporary disability insurance program since 1946 and its parental care and caregiving insurance programs since 2003. These programs, and similar laws in New Jersey, New York, Hawaii, and Puerto Rico, have operated, for the most part, without undue cost or complaint.¹ Their continued existence alone suggests strongly that our proposed FSI program is both workable and affordable from an administrative standpoint.

Our goal was to build from the states' experiences and put forward recommendations regarding how a TDI, PCNC, and Caregiving Insurance system should work and where it can best fit in our national social insurance structures.

To that end, we conducted an in-depth examination of the existing social insurance structures in the United States — Social Security, Rail Road Retirement and Sickness Insurance, Unemployment Insurance (UI), state Temporary Disability Insurance (TDI), and state Paid Family Leave (PFL) systems — to see what is and is not working in the distribution of social benefits and whether there is an ideal administrative vehicle for the FSI program.²

We also explored the leading national social insurance proposals — a proposal to amend the Social Security Act to provide Social Security benefits for FMLA-covered reasons;³ a proposal to provide wage replacement to individuals who take FMLA leave with the benefit financed by a payroll tax and administered by employers;⁴ and a proposal for a family-leave insurance program financed by a payroll tax and administered by a federal-state partnership⁵ — to learn about different administrative approaches.

Providing wage replacement for temporary disability, caregiving, and parental care, however, is in

many ways fundamentally different from the missions of each of the major national social insurance systems. For instance, Social Security operates a disability insurance program, but that system is designed to cover disabilities that prevent most gainful employment and are expected to last for a year or longer, not temporary conditions that keep a person from performing his or her current job. As one would expect, the eligibility standards and application screening processes associated with Social Security Disability Insurance (SSDI) are more intensive and lengthy than those needed for a temporary disability system. Likewise, the retirement and survivor's insurance programs are capable of providing benefits based solely on relation. Yet, benefits are predicated on a concrete event, the death of a parent or spouse, as opposed to the more subjective standard of "needed to care" for that person.

Similarly, while Unemployment Insurance provides wage replacement for short-term, involuntary absences from the labor force, it is not equipped to handle claims that are medical in nature. Indeed, as the Commissioner of the SSA said in the Social Security Amendment Act hearings of 1949, "[E]xperience has shown that the two programs of temporary disability and unemployment insurance are so different as to require almost separate administration, with separate policies, separate procedures, and separate administrative staffs."⁶

As a result, we had to start from the premise that **regardless of which agency administers the FSI program, a temporary disability, caregiving, and parental care system would require its own set of administrative processes.** In the sections that follow, we describe our initial thoughts about how those processes might work and how we would address some of the unique challenges associated with this kind of system. We then turn to our recommendations on the most appropriate administrative delivery vehicle for these benefits.

B. Basic Process and Claim Evaluation

1. Key Elements of the System

While the purposes of our program diverge from those found in our major national social insurance programs, the basic processes would look very similar to what is currently done in state UI, TDI, and PFL systems:

Application: For each FSI component, an applicant will be required to submit a formal application to the agency in charge of distributing benefits (see section C for our discussion on the agencies best suited to handle these benefits). For TDI, that application will need to be accompanied by medical certification of an illness or injury that renders the individual unable to work.⁷ For Parental Care, the applicant will need to provide some proof of the relationship with the new child and attest that they are providing care to the child.⁸ For Caregiving, there will need to be proof of relationship and a medical certification showing that the care recipient has a serious health condition and requires care.⁹

Review by the Agency: Once an application is submitted, there will need to be some form of review and verification by the agency in charge of the program. This will include a review of wage and hour records provided to the agency by employers to determine an applicant's eligibility and benefit level.¹⁰ In addition, agency staff will need to review and approve medical certifications. We discuss some of the unique challenges associated with this kind of review below.

Appeals: If an applicant is dissatisfied with either the eligibility or benefit determination made by the agency, the applicant should be able to appeal that decision — both within the agency and to an independent administrative tribunal.¹¹

Distribution: There will need to be some system in place to distribute program benefits. Most of the programs we studied offer applicants the choice of receiving benefits by check or by direct deposit. For example, the Rhode Island TDI program, Wisconsin’s UI program, New Jersey’s UI program, and all of the Social Security programs offer direct deposit as a payment option.¹² Some states even use electronic debit cards that are distributed through partnering banks.¹³ We believe a range of alternatives will be needed to meet both the financial needs of applicants and the administrative capabilities of each system.¹⁴

As one would expect, of the four steps summarized above, claim evaluation presents the greatest challenge. Ensuring smooth distribution of applications and benefits is mostly a question of sufficient resources and staff. Claim evaluation, on the other hand, consists of both hiring the right personnel and establishing the right processes. In the sections below, we outline some of our findings regarding the challenges presented by each segment of our program.

2. Specific Claim Evaluation Challenges

a. Temporary Disability

The largest challenge in the administration of temporary disability benefits is the evaluation of medical certifications. As noted above, our program will rely on certifications from medical professionals to determine whether a person is suffering from a qualifying illness or injury. These certifications will, of course, need to be verified by agency staff.

There are essentially two methods for handling verification. First, an agency can hire claim administrators with medical training or medical backgrounds to review certifications. Second, the agency can adopt a set of medical guidelines, like the Medical Disability Advisor (MDA), to assist administrators in making initial determinations — an approach currently employed by TDI programs in Rhode Island and California.¹⁵

The most efficient method is to craft medical guidelines and train administrative staff in how to implement them. Medical guidelines, such as the MDA, enable staff without medical training to effectively review applications by providing accessible descriptions of common ailments, their typical duration, and the factors that can speed or slow recovery from them. As a result, highly trained medical experts, such as Registered Nurses, would be needed only for the review of suspicious cases and testimony in support of agency determinations.¹⁶ This approach is much less expensive than employing experts to review all applications or requiring extensive training for all administrators, and it will be much faster than having experts complete an extensive review of all applications.

b. Parental Care for a New Child

Of the three types of time off we discuss in this proposal, PCNC presents the fewest challenges in terms of claims evaluation.

The proof and analysis required to prove a parental care claim is generally straightforward. A birth certificate, adoption or foster placement records, parentage judgment, or other official record that demonstrates the claimant’s relationship to the child will generally serve as adequate proof for a

claim.¹⁷ In order to approve the claim, the benefits administrator will simply need to verify that the proof presented is authentic. The training required to review the authenticity of these documents is not as intensive as the training needed to review medical claims.¹⁸ As a result, there will be less need to worry about processing speed and appeals procedures.

Claims involving parental relationships where no official recognition exists (e.g., an individual acting *in loco parentis*) are naturally more complex. In these situations, a claims administrator will not be able to rely on state-sanctioned records to prove a relationship exists. A signed attestation by the claimant confirming the relationship is, probably, the best substitute available.¹⁹

c. Caregiving

Caregiving claims are intrinsically difficult to evaluate. Applications depend on the relationship between the care recipient and claimant, the medical status of the care recipient, and the recipient’s need for care from the claimant. Proof of relationship is generally simple to provide, although proving relationships outside of the core family will be more complicated. In addition, establishing that the recipient requires care and assistance from the claimant will sometimes be difficult to prove.

These complications naturally lead to concerns about potential fraud. However, an agency should be able to safely rely on practices similar to those used in the New Jersey and California family leave insurance systems. In those programs, the primary evidence in support of a caregiving claim consists of a statement from a physician or other healthcare provider stating that the care recipient has a serious health condition and requires care.²⁰ Because our proposal adopts a broader definition of family, the agency charged with reviewing claims might also request a signed statement from the care recipient (when possible) that verifies the nature of the care being provided as an extra check against fraud. It should be noted that neither California nor New Jersey requires this, however.

As in the parental care context, if a government-issued document verifying the relationship between the care provider and care recipient is not available, we would recommend the agency accept a signed attestation from the care provider confirming the relationship.

Finally, since this is a new program, we would also recommend occasional spot audits to ensure that the program is working as intended and that only legitimate claims are approved.

C. Federal or Federal-State Approach

As noted above, the unique requirements of a temporary disability, caregiving, and parental care system ensure that, regardless of the administrative vehicle, our program will largely stand apart from the processes currently in place. However, we also recognize that there are efficiencies to be gained from aligning it with an existing system.

From our perspective, there are two plausible forms this alignment could take:

- ➔ **A national-state program directed by a federal agency, but administered by state agencies; OR**
- ➔ **A national program directed and administered by a federal agency.**

Regardless of administrative vehicle, an FSI program will be a part of the broader social safety net in the United States. As such, it is likely that any legislation establishing an FSI program would be

an amendment to the Social Security Act — which established, among other things, Old Age and Survivors' Insurance (OASI), Social Security Disability Insurance (SSDI), and Unemployment Insurance (UI). The question here is whether it makes more sense to align the *administrative* aspects of the FSI program more closely with UI (which is administered by the Department of Labor and state agencies) or OASI and SSDI (administered by the Social Security Administration).

In the sections below, we discuss how the FSI program would be administered under each approach, and where the challenges lie.

1. A Federal-State Partnership

One option would be for the FSI program to be administered by a federal-state partnership.

A similar administrative structure is proposed under the “Family Leave Insurance Act of 2009,” which was introduced by Rep. Pete Stark (D-Calif.). The Stark bill would create a national family leave insurance program that is funded by the federal government, but run through state agencies.²¹ The program would be funded through an increase in the employee FICA payroll tax by 0.1 or 0.2 percent (depending on whether the person works for a large or small employer).²² The money collected would then be used to provide wage replacement, on a sliding scale, for employees who take time off for FMLA-qualifying reasons.²³

The primary vehicle for administering the benefit in Stark's bill is a federal-state partnership. Under these partnerships, the Department of Labor would provide the state with funding for a family leave and temporary disability insurance program in exchange for having a state agency administer the program.²⁴ In order to qualify, states would be required to administer the program through an existing system, such as Unemployment Insurance or Workers' Compensation.²⁵

We recommend a similar approach, where the federal agency would be responsible for collecting funds for wage replacement and program administration through a federal payroll tax, and would set national standards for benefit levels, duration, and eligibility. State agencies would be responsible for the processing of claims and distribution of benefits. Funding for program administration and benefits would come entirely from the proceeds of the payroll tax collected by the federal government.

Under this approach, the lead federal agency would, most likely, be the Department of Labor, and the lead state agency would, most likely, be the state workforce agency currently responsible for administering Unemployment Insurance. The state Unemployment Insurance agencies would be responsible for processing applications, handling appeals, and distributing payments. The Department of Labor would allot funds for program administration and benefits, set national standards, and ensure that state agencies are administering the program effectively. Unlike the initiative undertaken during the Clinton Administration, in which states were permitted to use UI funds to provide wage replacement during times of parental leave for newborns or newly adopted children,²⁶ this approach would simply build off of the *administrative* structures of the state UI agencies — their payment, processing, and appeals systems — and would not use funds slated for UI administration or benefits.²⁷

This approach would mirror what is currently done in the two states with functioning Paid Family Leave Insurance (PFL) programs, California and New Jersey. Both states chose to build their PFL administrative systems off of their existing Temporary Disability Insurance (TDI) programs.²⁸ Those TDI programs, in turn, were built on top of the state UI infrastructures. The programs — UI, TDI, and

PFL²⁹ — have distinct policies, procedures, and funding sources, yet all three work out of the same department and share some of the same administrative resources.³⁰

Indeed, the connection between these systems reflects a long-standing tie between UI and TDI programs at the national level. Since 1946, the federal laws governing the certification of state unemployment compensation programs — namely the Federal Unemployment Tax Act (FUTA) and Title III of the Social Security Act — have specifically permitted the use of funds derived from state UI taxes on employees for TDI benefits.³¹

The states will, of course, need to affirmatively grant the relevant state agencies the authority to administer the program and work cooperatively with the federal government. The role of the federal government, then, is to incentivize the granting of authority. States that refuse to partner with the federal government will forfeit funds set aside for program operation and benefits, even though state residents have contributed to the program. If that turns out to be an insufficient motivator, however, other incentives, such as a tax credits similar to those used to promote UI, could be added.³²

The Trade Adjustment Assistance (TAA) program provides a good illustration of the agreement/incentive approach. The TAA provides partial wage replacement and other employment services to individuals who are unemployed or underemployed due to a free trade agreement or other structural change in the United States economy. The program is fully funded by the federal government and is administered through state UI offices. To encourage participation, businesses in states that fail to enter into agreements with the federal government to administer the TAA program lose part of their federal unemployment tax credit.³³

Even though we recognize that TDI, PCNC, and Caregiving will require largely separate programs, there are still a number of efficiencies one would expect to flow from building on top of the UI infrastructure. These include use of wage records, payment systems, and appeals networks. As noted above though, certain aspects of our program will require distinct or expanded infrastructure.

As the current unemployment crisis has underscored, our UI infrastructure, particularly the computer systems used for claim processing and data storage, is woefully outdated.³⁴ Without a sufficient influx of resources, the wage records, payment, and appeal systems of the state UI programs will be unable to absorb these added responsibilities.

Another issue is that our program, unlike most UI systems, uses hours worked instead of wages earned as a measure of eligibility. Only two states, Washington and Oregon, currently require employers to track and submit hours worked by employees.³⁵ The Washington experience shows that tracking hours is viable from an administrative standpoint, but the addition of hours worked to the information tracked by state agencies will constitute a new practice for 48 state systems.

A third issue is that our program will be governed by national standards on eligibility and benefits.³⁶ The UI system, on the other hand, gives state agencies greater flexibility in establishing eligibility and benefits requirements. In this way, our proposal more closely matches the Supplemental Nutrition Assistance Program (SNAP). SNAP, more commonly known as the Food Stamp program, is a national benefit administered by the Department of Agriculture but operated by state and local organizations.³⁷ The federal law establishes uniform eligibility, benefit, and distribution standards.³⁸ The state or local agency in charge of administration simply verifies eligibility and distributes benefits.³⁹

2. A New Federal Program

Another option would be that a federal agency, most likely the Social Security Administration or the Department of Labor, administer FSI.

A similar recommendation, based in part on earlier work by Workplace Flexibility 2010⁴⁰ and other proposals, has been put forward by Heather Boushey, an economist at the Center for American Progress. Under the Boushey proposal, entitled “Social Security Cares,” the program would operate either as a traditional social insurance program, funded through an increase in the Social Security payroll tax and/or an increase in the wage cap, or alternatively, it would be financed through a unique “time-lending” system that would allow Social Security recipients to trade future benefits for family- and medical-leave benefits.⁴¹

As discussed in our universal recommendations in chapter 1, however, our proposal would be limited to using a payroll tax to fund the benefit, which would be administered by the federal agency. Employees would submit their applications for benefits to the agency, agency employees would handle the processing and approval of these applications, and benefits would be distributed by the agency.

Unlike the federal-state partnership, FSI operated by a federal agency could be enacted through federal legislation alone. There would be no need for individual state legislation or federal incentives to create state programs.

As with the federal-state partnership proposal, we expect there would be a number of efficiencies associated with operating FSI at the federal level. However, there are also a number of aspects of our program that will require distinct or additional infrastructure.

For instance, if we were to operate FSI alongside Social Security programs such as OASI, we would be able to tap into existing employment records, wage data, payment systems, and appeals networks. Not all of these mechanisms, however, are well suited for an FSI program.

To start with, the Social Security Administration’s (SSA) employment and wage data only covers employment history and wages earned. It does not contain any information about hours worked. In addition, the SSA only collects this data once a year. Furthermore, each program in the Social Security system uses a complicated benefit formula that differs substantially from our rather straightforward method of replacing a certain percentage of wages up to a national cap.⁴² Finally, the Social Security payment system currently can only process checks on a *monthly basis*.⁴³ Benefits under our proposed program would need to be processed and delivered quickly, so individuals would have wage replacement during the periods they were not working — not weeks or months afterward.⁴⁴

Similarly, if we were to place FSI within the Department of Labor there would be gains in terms of area expertise and national reach. The DOL already operates four national workers’ compensation programs⁴⁵ and employs a cadre of experts on short-term benefit programs and employment law.⁴⁶ However, despite its expertise on the subject, the Department has little experience in actually *operating* a program like FSI. The existing workers’ compensation systems would provide a base to build from, but those systems are fairly meager when compared to the social insurance programs operated by the SSA and the state unemployment agencies.⁴⁷ Most of the system would need to be newly built.

That being said, we believe that FSI could work in either setting. The question is whether the advantages associated with a federal approach outweigh the advantages inherent in the partnership model.

D. Conclusion

There are clearly challenges associated with administering a temporary disability, parental care for a new child, and caregiving benefit, regardless of the administrative structure that is ultimately chosen.

The broader point, however, as first made in a 1949 report of the Federal Security Agency, is that our national experience shows “basic family protection for all workers through compulsory contributory social insurance is in harmony with the American way of life and . . . a firm and successful administrative foundation exists upon which to build [this] new benefit program.”⁴⁸ The only question is which foundation we want to build upon.



¹ This is not to say that there has been no controversy. In recent years, states have (sometimes successfully) attempted to raid the Temporary Disability Insurance trust funds to help pay for other state expenses. See, e.g., California Budget Project, *Governor Releases May Revision With, As Promised, “Absolutely Terrible Cuts,” No Tax Increases* (May 19, 2010), http://www.cbp.org/documents/100514_May_Revise.pdf (explaining the Governor’s budget proposal to use \$500 million from California’s State Disability Insurance trust fund to pay for job training); Labor Management News for New Jersey Employers, February 2006 (stating that since 1993, \$473 million have been diverted from NJ’s TDI to pay for the state’s general operating expenses). Similarly, states have experienced shortfalls in trust fund levels. In the early ‘90s for instance, California had to increase their SDI premiums in order to avoid the collapse of the fund. See Mark Schwanhauser, *State SDI Rate Rises*, San Jose Mercury News, Apr. 1, 2000 (explaining past rate hikes in the SDI program). Much further in the past, RI’s TDI trust fund came dangerously close to collapse only a few years after its creation. The fund has remained stable since that point though. See Comment, *Insurance Against Temporary Disability: A Blueprint for State Action*, 60 Yale L.J. 647, 663 n. 79 (1951) [hereinafter Yale Comment] (describing the early Rhode Island problem).

Likewise, there are occasional complaints about the speed of claim processing, backlogs, and error rates. These, however, tend to be similar to complaints lodged against UI. See Robert Salladay, *Chief of State Disability Program Quits Under Fire*, San Francisco Chron., Feb. 5, 2003 (describing the results of a newspaper sponsored audit of SDI applications and checks and the subsequent dismissal of the head of the SDI program); Michelle Quinn, *California Family Leave Program Lagging Behind Stream of Claim Applications*, San Jose Mercury News, July 29, 2004 (describing an early backlog in the processing of PFL claims); Tom Abate, *Spike in Jobless Claims Highlights Systems Flaws*, San Francisco Chron., Mar. 2, 2010, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/03/02/MN4U1C5TJ9.DTL> (describing claim processing problems in the state UI program).

² See Appendix A: Current Social Insurance Programs.

³ Heather Boushey, Center for American Progress, *Helping Breadwinners When it Can’t Wait: A Progressive Program for Family Leave Insurance* (2009), available at <http://www.americanprogress.org/issues/2009/06/fmla.html>.

⁴ S. 1681, 110th Cong. (1st Sess. 2007).

⁵ H.R. 1723, 111th Cong. (1st Sess. 2009); H.R. 5873, 110th Cong. (2d Sess. 2008); H.R. 3192, 109th Cong. (1st Sess. 2006).

⁶ *Hearings on the Social Security Amendments Act of 1949 Before the House Committee on Ways and Means*, 1081, 1093 (1949) (statement of Dr. Arthur J. Altmeyer, Commissioner for the Social Security Administration); Social Security Amendments Act of 1949, H.R. 2893, 81st Cong. (2nd Sess. 1949) (which included national TDI).

⁷ See R.I. Dep’t of Labor & Training, TDI Application Form, available at <http://www.dlt.ri.gov/tdi/pdf/tdiapp09.pdf>; N.Y. State Ins. Fund, TDI Form DB-450, available at http://www.fordham.edu/images/admin_offices/HR/Notice%20and%20Proof%20of%20Claim%20for%20Disability%20Benefits.pdf; Cal. Emp’t Dev. Dep’t, Claim for Disability Insurance Benefits, available at http://www.edd.ca.gov/pdf_pub_ctr/de2501.pdf; N.J. Dep’t of Labor and Workforce Dev., Claim for Disability Benefits DS-1, available at <http://www.state.nj.us/labor/tdi/WDS1.pdf>; Haw. Dep’t of Labor & Indus., Form TDI-45, available at <http://www.alohainsurance.com/files/tdi-claim.pdf>.

⁸ See Cal. Emp’t Dev. Dep’t, Paid Family Leave Sample Form, available at http://www.edd.ca.gov/pdf_pub_ctr/de2501f-sample.pdf; N.J. Div. of Temp. Disability Ins., Form FL-1, available at http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/complete_f11_R11_09.pdf.

⁹ See Cal. Emp’t Dev. Dep’t, Paid Family Leave Sample Form; N.J. Div. of Temp. Disability Ins., Form FL-1.

¹⁰ New Jersey, New York, and Hawaii require employers to complete and sign a statement regarding their employee’s wages and

hours when their employees file for TDI benefits. The employee must obtain this statement from the employer and file it along with the initial application. Rhode Island and California do not require employers to fill out any portion of the initial application. Instead, the relevant state agencies rely on applicants' descriptions of their hours and wages and verify with the employer as necessary. See Appendix A: Current Social Insurance Programs (TDI).

¹¹ Applicants in almost every system are provided multiple levels of appeals. The first determination is made at the agency level. In some programs, such as in California's TDI and PFL program, or in SSDI, the next step is also an internal review. In most programs, however, the second step is an administrative hearing in front of an Administrative Law Judge (ALJ) or a designated hearing tribunal. If the hearing is before a tribunal, it tends to be either the board charged with overseeing the entire system, such as the Workers' Compensation Board in New York, or a specialized appellate review board, such as the Board of Review in Rhode Island or the Unemployment Insurance Appeals Board in California. See Appendix A: Current Social Insurance Programs.

¹² See *Temporary Disability Insurance: Frequently Asked Questions*, R.I. Dep't of Labor & Training, <http://www.dlt.ri.gov/tdi/tdifaqs.htm>; *Frequently Asked Questions About Direct Deposit of Unemployment Insurance Payments*, Wis. Dep't of Workforce Dev., http://dwd.wisconsin.gov/uiben/faq_direct_deposit.htm; *Direct Deposit of UI Benefits*, N.J. Dep't of Labor & Workforce Dev., <http://lwd.dol.state.nj.us/labor/ui/claim/dirdeposit.html>; *Social Security Direct Deposit*, Soc. Sec. Admin., <http://www.ssa.gov/deposit/>.

¹³ See *Temporary Disability Insurance Electronic Payment Card Welcome*, R.I. Dep't of Labor & Training, <http://www.dlt.ri.gov/tdi/tdiEPCWelcome.htm>; *What's New About EDD*, Cal. Emp't Dev. Dep't, http://www.edd.ca.gov/About_EDD/Whats_New.htm (describing new electronic debit card system for benefits administered through the Employment Development Department, including TDI/PFL).

¹⁴ Consumer protection concerns regarding the use of electronic payment systems for benefit programs are well documented. See, e.g., Gov't Accountability Office, GAO-08-645, *Electronic Payments 18-26* (2008) (detailing agency concerns about the use of EBT in their programs). If an agency were to implement an electronic payment program, we would recommend the imposition of strong consumer protections.

¹⁵ The *Medical Disability Advisor* (MDA) provides evidence-based disability duration guidelines to clients in all 50 states and more than 38 other countries. It is published by the Reed Group and recently released its 6th edition of the manual in April of 2009. The tables and narratives in the book are reviewed by a Medical Advisory Board of 37 doctors. See The Reed Group, *Medical Disability Advisor Brochure*, available at http://www.reedgroup.com/Guidelines/pdf/MDA_Brochure.pdf.

¹⁶ As noted above, California and Rhode Island follow this model in their TDI Programs. The Rhode Island Department of Labor and Training uses an online version of the Medical Disability Advisor (MDA) to assist them with their Temporary Disability Insurance program. Upon receipt of a TDI claim, case managers, who often have no formal medical training, review the disability duration to determine if it is within the MDA guidelines. If so, claims are certified and approved for payment. Claims outside the maximum disability duration, however, are automatically flagged and referred to the Claims Management Unit (CMU), which is staffed by registered nurses. See R.I. Dep't of Labor & Training, 2007 Progress Report 8, available at http://www.dlt.state.ri.us/tdi/pdf/2007TDI_ProgressReport.pdf. Similarly, the California Economic Development Department uses the MDA as an informal guide to assist case managers in evaluating claims for their TDI program (known as State Disability Insurance). Upon receipt of a claim, EDD case managers, taking into account the age and profession of the claimant, review the diagnosis and estimated date of recovery and determine whether those are consistent with what is "normally expected" (a standard informed by the MDA) for a disability of that kind. If the diagnosis and estimated date of recovery are "significantly greater" than what is normally expected, the EDD will engage in further investigation. See Cal. Emp't Dev. Dep't, *The Medical Provider's Guide to Disability Insurance*, available at http://www.edd.ca.gov/pdf_pub_ctr/de2548.pdf.

¹⁷ See Cal. Code Regs. tit. 22, §§3302-2, 3303-1 (2010); N.J. Stat. Ann. § 43:21-39.2 (2010); N.J. Admin Code § 12:21-3.2 (2010).

¹⁸ Soc. Sec. Admin., *Survivor Benefits 7* (2009), available at <http://www.ssa.gov/pubs/10084.pdf>.

¹⁹ The Deputy Administrator of the Wage and Hour Division recently issued guidance on how these situations should be treated in the FMLA context. According to the WHD, "Where an employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as *in loco parentis* where there is no legal or biological relationship." See Dep't of Labor Wage & Hour Div., *Administrator's Interpretation No. 2010-3*, available at http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm (citing 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008)).

²⁰ See Appendix A: Current Social Insurance Programs. (PFL). It should be noted that this is slightly different than what is done under the FMLA. An employer may ask an employee requesting FMLA leave to provide medical certification regarding the serious health condition of the person being cared for, but the employer is not required to obtain a certification. See 29 U.S.C. § 2613(a)-(b).

²¹ H.R. 1723, 111th Cong. (2009). See Appendix D: Legislative Proposals on Time Off (Family Leave Insurance Act of 2009) for previous introductions of the legislation.

²² *Id.* at § 306.

²³ *Id.* at § 103(c).

²⁴ *Id.* at § 102(b)(1)(b).

²⁵ *Id.* at § 102(b)(1)(a) (stating that "State agrees to establish, or expand a State program *in effect at the date of the enactment of this Act*") (emphasis added).

²⁶ The Department of Labor, under the Clinton Administration, issued regulations permitting states to use Unemployment Insurance (UI) funds to pay for wage replacement for employees who had left their jobs because of the birth or adoption of a child. Those regulations were subsequently reversed by the Bush Administration. See *Birth and Adoption Unemployment Compensation*, 65 Fed. Reg. 37,210 (June 13, 2000).

²⁷ In fact, under current law, grants for UI administration and funds collected via the UI payroll tax are *only* available for UI use. See 26 U.S.C. § 3304(a)(4)(A); 42 U.S.C. § 503(a)(5). We do not recommend changing those provisions. However, there have been a number of instances where the Congress has specifically required state employment agencies to share wage data with other state and federal agencies. We would recommend similar action to encourage data sharing. See, e.g., 42 U.S.C. § 503(d) (Stating that the state agency charged with administering UI must disclose, on a reimbursable basis, UI wage data upon request of the Secretary of Agriculture and/or officers and employees of State Nutritional Assistance Programs).

²⁸ See Cal. Unemp. Ins. Code §§ 135-2708 (2005); N.J. Stat. Ann. §§ 43:21-25, 43:21-71 (2005). It is important to note that these states chose to build their TDI programs on top of Unemployment Insurance even though others argued that Workers' Compensation was better suited for a medically based program like TDI. See Yale Comment, *supra* note 1 (laying out the general approaches to providing TDI); M. William Zucker, *The New York Disability Benefits Law: The Model Approach*, 4 Cornell Ind. & Lab. Rel. Rev. 420 (1951) (arguing that the N.Y. Workers' Compensation approach is best suited for TDI); P.L. 79-719 § 416(a); 60 Stat. 978, 991 (1946) (law allowing the use of collected UI funds for the payment of TDI benefits); Soc. Sec. Admin., *Temporary Disability Insurance Program Description and Legislative History, 2009 Annual Statistical Supplement (2009)*, available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2009/tempdisability.html>.

²⁹ See Appendix A: Current Social Insurance Programs (TDI and PFL).

³⁰ In New Jersey, the TDI, UI, and FLI programs are run through the Department of Labor and Workforce Development. California operates their SDI, PFL, and UI systems through the Employment Development Department. All three programs also use the same wage information to determine benefit amounts and use the same appeals process. See Department of Labor, *Comparison of State UI Laws: Temporary Disability Insurance 8-9* (2010), available at <http://www.ows.doleta.gov/unemploy/comparison2010.asp>. It should be noted, however, that there are limits to the integration of UI and other social insurance systems. As mentioned in note 27, current law prohibits the use of UI administration grant funds for any purpose other than administering UI programs. States can still pool UI and non-UI funds for the purpose of buying or operating systems that benefit both, however. OMB Circular A-87 governs the use of federal grant money in state programs. The basic rule for allocating a cost to a program is that costs associated with systems and/or employees that benefit more than one program (such as a general tax program that collects UI, TDI, and PFL payroll taxes or a processing center that collects wage information for a database shared by UI, TDI, and PFL) must be shared by all systems in proportion to the benefit they receive. In this way, efficiencies are certainly gained, but costs are not shifted entirely to UI. See Office of Mgmt. & Budget, OMB Circular A-87 (2004).

³¹ See 26 U.S.C. § 3304(a)(4)(A) ("all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation . . . except that: (A) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration"); 42 U.S.C. § 503(a)(5) ("The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act includes provision for— [. . .] (5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b) of the Federal Unemployment Tax Act: Provided, That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration").

³² See Appendix A: Current Social Insurance Programs (UI), describing tax incentives to participate in the Unemployment Insurance system. As it is unconstitutional for the federal government to coerce or force state agencies or officers to act on behalf of the federal government, these types of arrangements are typically carried out through voluntary administrative agreements between federal and state governments. The natural disadvantage of this approach is that the federal government loses the ability to directly control the state agencies. Instead, it must rely on indirect methods of persuasion. See *Printz v. U.S.*, 528 U.S. 898 (1997) (holding that the Brady Act's "compelled enlistment" of state executive officers violated the 10th Amendment). See also *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (holding that the Federal Unemployment Tax and its accompanying incentives did not constitute coercion of the states by the federal government).

³³ See 26 U.S.C. § 3302(C)(3). There are, in fact, a number of programs run through UI that use this approach. The Disaster Unemployment Assistance program, for instance, is funded entirely by the federal government (both benefits and administration) but run by the state UI agencies via agreements made between the state and the Department of Labor. Unlike TAA, however, funds for the benefit and administration are the only incentives offered for participation. See 42 U.S.C. § 5177.

³⁴ See generally *NELP 2009 Unemployment Insurance Reform Conference*, National Employment Law Project, http://www.nelp.org/index.php/site/issues/category/Unemployment_Insurance_Progress_Prospects_and_Priorities (the conference featured presentations by Jim Garner of the Kansas State Department of Labor on responding to the "Great Recession" and Joseph Vitale of the National Association of State Workforce Agencies on building a 21st century service delivery system).

³⁵ U.S. Dep't of Labor, *Comparison of State Unemployment Laws, Chapter 3: Monetary Entitlement 3-6, 3-7* (2009), <http://www.ows.doleta.gov/unemploy/uiawcompar/2009/monetary.pdf>. Washington State has successfully tracked hours as part of its UI program since the mid-1970s.

³⁶ The issue of federal preemption of current state laws is closely related to this point. As we note in our chapter on future

research, we think preemption is an issue that needs further exploration and do not take a position on it.

³⁷ See *About SNAP*, U.S. Dep't of Agriculture, <http://www.fns.usda.gov/snap/rules/Legislation/about.htm> (last visited Nov. 5, 2010).

³⁸ See 7 U.S.C. § 2011 *et seq.*

³⁹ See *About SNAP*, *supra* note 37.

⁴⁰ See WF2010, Proposals for Providing and Funding Wage Replacement During Periods of Extended Time Off ("The Four Models") 7-9 (suggesting the Social Security system as potential provider of national paid Extended Time Off); Boushey, *supra* note 3 (suggesting that a paid family leave program in Social Security could be financed by lifting the earnings cap beyond its current level, increasing the Social Security payroll tax slightly, or allowing workers to trade future benefits for family leave).

⁴¹ Boushey, *supra* note 3, at 2.

⁴² See *Social Security Benefits Amounts*, Social Security Administration, <http://www.ssa.gov/OACT/COLA/Benefits.html> (last visited Nov. 5, 2010).

⁴³ 42 U.S.C. § 405(i) (2009); 20 C.F.R. §§ 404.1805, 404.1807 (2008).

⁴⁴ Employees would presumably have lead-time prior to the birth and adoption of a child, as well as lead time for caregiving needs for planned events, such as surgery. But they would be unlikely to have similar lead-time in the case of their own temporary disability or for many caregiving needs.

⁴⁵ See *Office of Workers' Compensation Programs*, U.S. Dep't of Labor, <http://www.dol.gov/owcp/>. DOL operates Workers' Compensation programs for Federal Employees, Longshore and Harbor Workers, Coal Miner Workers, and Department of Energy Employees. The Federal Employee program alone covers more than 3 million workers. These programs, and the Department generally, are supported by a national network of district and field offices.

⁴⁶ In addition to the Workers' Compensation programs, the Department of Labor contains the Employment and Training Administration, which oversees the operation of the state Unemployment Compensation programs and Workforce Investment Grants, the Wage and Hour Division, which is responsible for enforcing the FLSA and the FMLA, and the Bureau of Labor Statistics, which is the primary source for data on employment issues in the United States. See generally *DOL Organizational Chart*, U.S. Dep't of Labor, <http://www.dol.gov/dol/aboutdol/orgchart.htm> (last visited Nov. 5, 2010).

⁴⁷ As noted in note 46, the Federal Employee program covers more than 3 million employees. The California Unemployment Insurance program, on the other hand, handled almost 3 million claims in 2008. See *Monthly Program and Financial Data*, Emp't & Training Admin., U.S. Dep't of Labor, <http://www.ows.doleta.gov/unemploy/claimssum.asp> (to obtain data for 2008-09, select "State," choose California from the menu, enter 1/2008 as the start date and 1/2009 as the end date, and then click "Submit.")

⁴⁸ Federal Security Agency, Temporary Disability Insurance Coordinated with Unemployment Insurance 1 (1949).



Making it Work for Employers and Employees

Wage replacement, alone, will not guarantee that a national social insurance system will work — for employers or employees. In this section, we discuss those additional supports and guarantees that employees and employers will need to make FSI fully functional.

A. For Employers: Getting the Work Done

Many employers understand and support employees' need for paid time off to care for a family member or recover from an illness or injury. At the same time, employers are faced with the reality that a job needs to get done. As we developed our proposal, we were quite aware of this tension and spent time trying to understand and recognize the employer perspective on these issues. Paid time off in and of itself may not carry significant costs. Indeed, as discussed above, there is evidence that time off — particularly in combination with flexible work arrangements — can enhance productivity and have positive bottom-line results.¹ But from the perspective of many employers, the need for employees to take time off creates some short-term challenges, particularly around continuity of operations and ease of administration. These challenges, however, are not new, and many employers have developed effective policies, tools, and management strategies to assist them with executing time off effectively at their worksites.

An exhaustive analysis of these issues is beyond the scope of this report. But we provide here a brief introduction to key employer interests identified in our research and some promising management tools and strategies. We also identify a sampling of public policy ideas that build on the programs and policies that the private sector has already developed. While we are under no illusion that the potential responses identified below will meet every employer concern or ameliorate all potential administrative burdens associated with FSI, we strongly recommend that employer interests and supports to address employer concerns be considered in any broader policy discussions on FSI.

1. The Current Landscape

Our research shows that employers consistently identify two major challenges in providing periods of time off to employees: continuity of operations and administration of time-off policies.

Continuity of operations — that is, how to get the work done — appears to be the primary challenge faced by employers. Employers place a high premium on predictability and stability. Time off that

is taken with little or no notice is often experienced as a disruption to business operations. On the other hand, companies report that time off taken with adequate notice is generally easier to plan around and can have positive benefits for their business.²

Absences can also lead to reductions in capacity and productivity.³ Some employers find when an employee is out they end up spending scarce resources on expensive temporary labor, and valuable time developing a plan for managing and reallocating the missed work.⁴ Customer service and other performance indicators may also suffer.⁵ Additionally, employers report that absences can lead to reductions in workforce morale if employees have to increase their hours to cover for lost work or feel that the absent worker is receiving special treatment.⁶

The second major challenge expressed by employers is the potential administrative burden imposed by a paid time-off program.⁷ Employers are naturally concerned about new laws and programs that impose administrative burdens such as additional paperwork, reports, or compliance monitoring. These indirect costs can be especially difficult for small employers to bear.⁸

Of course, the reality of today's workforce is that employers must be prepared for all contingencies: planned absences (e.g., for the birth of a new child or to care for a spouse after surgery) as well as unplanned ones (e.g., a heart attack, a child injured in a car accident); absences of known duration as well as those that continue longer than originally predicted.

Many employers, large and small, have developed strategies and tools to more effectively and efficiently manage periods of employee time off in order to ensure smooth continuation of operations. Below we describe a few of these management strategies in greater detail:

- ➔ “Cross training” refers to the practice of training employees for multiple jobs within an organization.⁹ If there is an unplanned absence or unexpected surge in work in a certain area, a company with cross-trained employees can simply move existing workers around to cover the problem. This technique is especially useful in industrial settings, both large and small, where the unexpected loss of a single employee could severely delay the production of a good or service.
- ➔ A “team approach” emphasizes reliance on a group of employees, as opposed to individuals given discrete tasks, for the production of a product or service.¹⁰ Unlike a traditional top-down management system, a company or division of a larger organization built around teams gives the employees tasked with performing a service control over the process by which the work is completed. This often results in both gains in productivity and flexibility since teams tend to apportion work in a manner that allows all workers to gain some knowledge of the tasks needed to produce the ultimate service or product. As in cross training, that shared knowledge can allow the team, and therefore the company, to more easily adapt to extended absences. In addition, the team approach can be easily integrated into companies of all sizes. Larger organizations can break operations down into multiple teams while smaller companies may find that the entire business can operate as one team. The same principles, and gains, apply in either setting.
- ➔ “Mass Career Customization” (MCC) is an approach pioneered by Deloitte Consulting.¹¹ The MCC approach operates on the assumption that a workplace should offer every employee the opportunity to customize his or her career to include periods of change along four dimensions of work: pace, workload, location and schedule, and role. By shaping the workplace around flexibility, companies that adopt the MCC model work from the assumption that extended

absences are likely and, as a result, are better able to respond to those situations when they occur.

- ➔ “Return to work” programs assist employees re-entering their job after a prolonged absence from work.¹² They usually take a broad view, considering legal obligations, the individual job design, and the design of the overall insurance package to help get an employee back on the job.

Of course, none of these policies offers perfect solutions to the challenges associated with time off. The potential impact of each is limited and new ideas and thinking will certainly be needed if employers are going to deal effectively with the realities of the modern workplace. However, they serve as evidence that employers are searching for ways to handle these problems.

Ultimately, we believe any technique that enhances flexibility for business operations and accepts the reality that extended time off is a part of modern working life will reduce the burdens experienced by companies. And, as we discuss below, we think government can play a role in promoting, disseminating, and furthering the development and adaptation of these kinds of policies to ease the transition to FSI. However, we understand that government assistance will never be the only — or even the best — answer to the challenges that FSI may create. Instead, it will require a combination of public policy supports and creative management strategies.

2. Policy Recommendations

Public policy can make implementation of FSI easier on employers. We have tried to tailor our proposal with that goal in mind.

a. Supporting Continuity of Operations

FSI is designed to provide some predictability regarding the length of leave and timing of return. Minimum and maximum durations of leave, along with the requirement that health care professionals provide estimated dates of return for temporary disability and caregiving claimants, ensure that there will be some measure of certainty for employers. In addition, FSI is specifically designed to discourage overutilization and has a number of checks and balances in place to minimize the potential for fraud and abuse.

That being said, challenges associated with continuity of operations will remain for most employers. We believe the government can play a role in easing those challenges by serving as a source of training and technical assistance in promising management strategies — such as the ones described above — both to further the spread of these ideas and cultivate new approaches.

For instance, using strategies similar to those laid out in Workplace Flexibility 2010's *Public Policy Platform on Flexible Work Arrangements*, the government could build on existing business models and disseminate information on how best to plan for and manage when one or more employees are out for an extended period of time. This could be done through various media including websites, printed materials, webinars, conferences, and on-site trainings. The government could also provide direct technical assistance support, available via 1-800 numbers, e-mail, and social media sites. It could also be done through a grant program to incentivize non-governmental entities to develop model policies, provide training and technical assistance in those areas to further the spread of these ideas, eliminate piecemeal approaches when possible, and cultivate new approaches.

In fact, a program focusing on the options mentioned above would easily fit into current efforts to start a national dialogue on workplace flexibility and build from programs already in place.¹³

A number of countries with existing paid time-off programs already provide similar types of training and assistance. Unlike the technical assistance programs currently in place for the paid family leave insurance laws in California and New Jersey, these international programs are designed specifically to help employers cope with the impacts of paid time off as opposed to helping them comply with the legal requirements imposed by the law. The Government of New Zealand, for example, maintains a comprehensive guide on work-life balance policies for employers.¹⁴ The guide includes a brief introduction to the concept of workplace flexibility, suggestions for making the individual components of flexibility (including maternity and paternity leave) work, and lessons learned from employers who have implemented flexibility programs.¹⁵ The guide also places a heavy emphasis on knowing what to expect when an employee is out for extended periods and the need to plan in advance for these kinds of absences. Similarly, both the Government of the United Kingdom’s “Business Link” website and Singapore’s private Employer Alliance provide practical guidance to employers regarding tools for managing employee absences.¹⁶

Technical Assistance Websites

Technical assistance websites are an important, cost-effective way to get valuable information to employers about the implementation of paid family-leave policies. Several countries have helpful websites for employers to understand and better effectuate such policies.

- ➔ New Zealand’s Department of Labor has a website detailing ways to “make flexibility work” for employers, including how to manage parental leave. <http://www.dol.govt.nz/worklife/resources/making-it-work.asp#3>
- ➔ Singapore’s Employer Alliance has a website explaining the different types of leave benefits an organization can offer and testimonials on how they can work. <http://www.employeralliance.sg/toolkit/index.html>
- ➔ The United Kingdom’s Business Link has a website with sections on managing maternity, paternity, adoption, and parental leave. <http://www.businesslink.gov.uk/bdotg/action/layer?topicId=1073858787&r.s=tl&tc=000SYDG00101>
- ➔ Australia Fair Work Ombudsman’s websites detail how employers can comply with Australia’s parental, personal, carer’s, and compassionate leave laws. <http://www.fairwork.gov.au/leave/personal-carers-and-compassionate-leave/pages/default.aspx>
- ➔ <http://www.fairwork.gov.au/leave/parental-leave/pages/default.aspx>
Service Canada has a website on how to manage compassionate care leave. http://www.servicecanada.gc.ca/eng/ei/types/compassionate_care.shtml

b. Easing Administrative Burdens

FSI strives to impose minimal administrative burdens on employers. Claim evaluation, monitoring, and payment would all be handled by the agency charged with administration of FSI. The only direct administrative requirements placed on employers would be limited to those related to withholding the FSI payroll tax, tracking hours worked by employees, and responding to requests for information. While these administrative duties are not insubstantial, we feel they represent the lightest burden we could impose under a comprehensive program like FSI.

Employer experience with the California paid family-leave insurance program reinforces the fact that employer administrative burdens associated with family leave insurance schemes can be relatively light. While there may be room for debate regarding the overall impact of the law on businesses,¹⁷ one thing that is clear is the administrative requirements associated with PFL have been minimal. The EDD produces applications, reviews claims and certification forms, processes benefits, and even provides employees with the appropriate tax forms.¹⁸ Employers are only required to post a notice in their workplaces and provide a brochure created by the EDD to new employees and those taking qualified leave.¹⁹ New Jersey’s program has not operated long enough to make similar claims about administrative ease, but, with a few exceptions relating to the role employers are expected to play in verifying wages and employment, we believe it will also prove to be less onerous than anticipated.²⁰

As noted above, we have tried to follow California’s lead and minimize the administrative burdens imposed upon employers by FSI wherever possible. To assist employers with any administrative burdens that may remain, we would recommend a vigorous employer outreach and education program. Lessons could be drawn from the efforts undertaken by New Jersey and California. Both states have developed fairly comprehensive employer guides to the programs, and California even offers regular webinars and in-person trainings.²¹ These programs help employers to understand their administrative obligations and can serve as tools for spreading best practices.



FSI implementation will have impacts on business operations, and it is important they be analyzed and taken seriously. The transition may not always be easy. We believe the above discussion serves as a starting point — both regarding the challenges businesses may face and the role public policy can play in helping to address those challenges. But it is only a starting point. As policy discussions around FSI continue, we believe these issues merit further attention and exploration.

B. For Employees: Job Protection

The primary purpose of this Policy Platform is to provide a blueprint for a national wage replacement program for time off from work for medical or caregiving reasons. Job protection — the right to one’s former job (or an equivalent job) upon return from a period of time off — is, in a theoretical sense, separate and apart from the issue of wage replacement. In reality, however, it is difficult to speak about either issue separately.

Without wage replacement, individuals entitled to job-protected time off may be unable or reluctant to take the time off because they cannot afford to do so. Indeed, two leading studies on the FMLA show that of individuals who needed to take leave but did not, the number one reason was that they could not afford the loss of wages.²² Conversely, the absence of job protection may prevent individuals with access to wage replacement from taking time off from work. Workers understandably will be disinclined to leave their job for an extended period if there is a chance that the position will

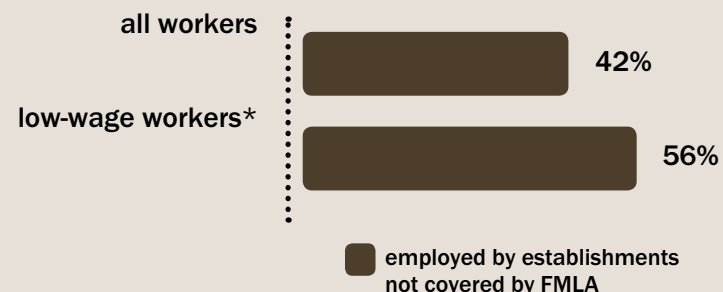
not be there when they are ready to return.

Of course, this is only true for some workers. If a worker has a temporary disability, he or she will have to take the time off regardless of job protection. And for many workers, it will make good business sense for the employer to keep the job open until the worker can return — in order to keep a good employee, avoid turnover costs, and assist in overall recruitment and retention. However, some employers may decline to provide job protection based on their belief that it does not make good business sense for them to do so. And there are other workers who, in better economic times, might have taken time off, but who now are scared to do so out of fear of being viewed as “lazy,” or “not committed to the job.”²³ For these latter categories of workers, job protection is essential.

1 The Current Landscape

The principal federal source of job protection for people who take time off from work for medical or caregiving reasons is the Family and Medical Leave Act (FMLA).²⁴ The FMLA provides up to 12 weeks of job-protected time off per year for one’s own health condition, to care for a new child, or to care for a seriously ill family member.²⁵ However, the statute only applies to persons who work for employers with 50 or more employees, and only those who have worked 1,250 hours in the past year.²⁶ About 40 percent of workers are employed by institutions that do not meet the FMLA employer threshold, and, among the approximately 60 percent who do work for covered employers, another 20 percent are excluded from FMLA coverage by the hours requirement.²⁷ Some state family and medical leave laws are broader in coverage and scope, providing job-protected time off to employees who work for smaller employers or who work part time.²⁸ Nevertheless, this still leaves *approximately half of private sector workers without job protection if they need to take time off for medical or family caregiving reasons.*²⁹

FMLA Coverage: Who’s Left Out?



*family incomes below 200% of federal poverty level

Source: Ross Philips, “Working for All Families?” *In The Economics of Work and Family* (2002), pp. 164; 170

Low-wage workers are particularly vulnerable.³⁰ Fifty-six percent of workers with a family income of up to twice the poverty line (as compared to 42 percent of higher wage workers) work for employers with fewer than 50 employees (i.e., for employers not covered by the FMLA).³¹

Preliminary data from the California Paid Family Leave (PFL) program suggests a connection between wage replacement and job protection. As discussed above, California PFL was the first family-leave program established in the nation. PFL became law in September of 2002, and the California Employment Development Department (EDD) started dispensing benefits to eligible recipients in July of 2004.

From its inception, PFL has experienced lower than expected take-up rates. A 2002 study by economists at the University of Chicago and the University of California at Berkeley estimated that the total number of leaves taken under the program would range between 300,000 and 600,000 per year.³² A 2000 study by the state EDD, which assumed the program would only be available to employees covered by the FMLA or the state equivalent to the FMLA, the California Family Rights Act (CFRA),³³ — a universe much smaller than that actually covered by PFL — estimated at least 211,000 people would use the program annually.³⁴ Actual program usage, however, has ranged from a low of 139,593 in 2004-05 to a high of 187,889 in 2008-2009.³⁵

There are several major studies underway that seek to understand why the take-up rates are low, but one strong working hypothesis is that a lack of job protection prevents many workers from using the program.³⁶

A 2007 study by the California Senate Research Office, for instance, found that more than half of early PFL claims came from employees working for large employers (with 1,000 or more employees). That percentage was surprising since employees working for employers with 1,000-plus employees only constituted 14 percent of the overall California workforce.³⁷ The study also found a similar, but less pronounced, pattern in employees working for firms with 250 to 499 and 500 to 999 employees.³⁸ Since most employees working for larger employers are protected by the FMLA and the CFRA, whereas employees working for smaller employers are not,³⁹ one explanation for this disparity is the fact that individuals working for small employers do not have job protection.

The 2007 study also found that only two-thirds of mothers receiving state short term disability benefits (SDI) for pregnancy opted to continue on to the state PFL program.⁴⁰ One reasonable explanation for this disparity is that the employees could no longer afford to live on the reduced wages offered by SDI and PFL. Another explanation, however, is the loss of job protection forced these employees to return to the workforce. Most women receiving SDI payments for pregnancy are entitled to job protection under the California Pregnancy Disability Leave Law (PDLL).⁴¹ However, PDLL protections do not apply to persons taking PFL leave to bond with their newborn children.⁴² Unless a worker is covered under the FMLA or CFRA, PFL bonding leave is taken at the risk of losing employment.

2. Policy Recommendations

While the dynamic between the lack of job protection and the utilization rate for California family leave is still being studied, we believe there is a strong likelihood that employees who need time off may not elect to take it — even if it is paid — if it is not connected to some form of job protection.⁴³ Empirics aside, our intuition boils down to common sense: Why take the benefit of a limited-time insurance subsidy at the risk of losing your job (i.e., primary income)? As a result, we believe in order to achieve the goals of FSI, all persons eligible for this program *should* be given some form of job protection.

On the other hand, as discussed above, we are mindful of the very real challenges that employers — especially small employers — face when an employee is out of work for a week or more. The question is how we can reconcile these competing interests and provide meaningful protection.

We believe the simplest and most effective means for creating job protection for people who take time off under FSI is to amend the FMLA so it covers more individuals.

As a result, we recommend that the FMLA's job protection requirement be extended to cover all employers with at least 15 employees. It should be noted, however, that in recommending expansion of the FMLA, we are not recommending that the FMLA conform to FSI standards. For instance, even if the FMLA employer coverage threshold was expanded, an employee would still have to work for a single-covered employer for 12 months and have 1,250 hours of service before becoming eligible for FMLA job protected leave.

This expansion of the FMLA employer threshold would mean 85 percent of private sector employees would work in covered establishments.⁴⁴ This would track the majority of employment discrimination laws, which prohibit discrimination by all employers with 15 or more employees.⁴⁵ This would also track a number of state family- and medical-leave laws that cover employers with fewer than 50 employees.⁴⁶ Compliance with these state laws demonstrates that lowering the employer threshold is not unprecedented, and that smaller employers can comply with job protection requirements similar to the FMLA's.

That said, the FMLA, in its entirety, currently covers medium and large employers, and smaller employers might have unique difficulties complying with the law as currently drafted. Thus, if the employer threshold is expanded, **we recommend further discussion and exploration regarding whether the FMLA's substantive requirements should be modified to address the concerns of small businesses.**

Such analysis, however, is beyond the scope of this report. For purposes of this report, we wanted to make the strong recommendation that the FMLA employer threshold be lowered in order to provide job protection for more individuals who take time off and receive wage replacement under the FSI program.



¹ In an interview of employers who had recently implemented paid time-off systems, 56 percent claimed they had reduced unscheduled absences and 89 percent stated their switch to paid time off had met or exceeded their expectations. CCH, 2005 CCH Unscheduled Absence Survey (2005), available at <http://hr.cch.com/clickthroughlog/ctl-default.asp?URL=http://onlinestore.cch.com/default.asp?ProductID=3700&campaignID=FPPress-2005Absenteeism&RecordClick=1>

² See Workplace Flexibility 2010, FMLA Comment Review Memoranda: Different Types of Leave 3 (2007), available at <http://workplaceflexibility2010.org/images/uploads/DifferentTypesofLeave%20FMLA.pdf>.

³ See SHRM, Paid Time Off: Giving Employees More Control Over Leave (2006), available at http://www.shrm.org/hrdisciplines/benefits/Articles/Pages/CMS_018373.aspx ("Unscheduled absenteeism can be a particularly acute problem for smaller employers and larger firms whose workers operate within small departments or project teams."); *The Family and Medical Leave Act: Present Impact and Possible Next Steps Before the Subcomm. on Children and Families of the S. Comm. on Health, Educ., Labor & Pensions*, 106th Cong., 1st Sess., (1999) (statement of Kimberley K. Hostetler, Director, Human Resources Services, Connecticut Hospital Association); See also Wolters Kluwer, CCH Survey Finds Most Employees Call in "Sick" For Reasons Other Than Illness (2007), available at http://www.wolterskluwer.com/WK/Press/Latest+News/2007/Oct/pr_11oct07_2.htm

⁴ See *Survey Says: Intermittent Leave Creates Challenges for FMLA Management*, Business Wire, Sept. 24, 2007, at 2, available at <http://www.allbusiness.com/labor-employment/compensation-benefitsemployee/5258259-1.html> (noting that highly skilled workers in specialized workforces appear to be especially time-consuming to replace); *Chamber Testimony on Paid Family Leave: Hearing on A-873 and S-786 Before the Assembly Comm. on Appropriations*, 2008 Leg., (N.J. 2008) (statement of Kathleen A. Davis, Executive Vice President and Chief Operating Officer, Chamber of Commerce Southern New Jersey), available at <http://www.chambersnj.com/news/Article.aspx?id=1873> (stating that the Chamber of Commerce for Southern New Jersey typically paid temporary employees wages that were 30 percent higher per hour than regular employees); *What is the Bush Administration's Record in Regulatory Reform? Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Govt. Reform Comm.*, 108th Cong., 2nd Sess. (2004) (statement of Nancy McKeague, Senior Vice President, Michigan Health and Hospital Association)

⁵ See Steven F. Cyboran & Thomas M. Morrison, Jr., SHRM, Paid Time Off: Giving Employees More Control Over Leave (2006), available at http://www.shrm.org/hrdisciplines/benefits/Articles/Pages/CMS_018373.aspx.

⁶ *New Jersey Chamber of Commerce Testimony Regarding Paid Family Leave: Hearing on S.2249 Before the Senate Comm. on Appropriations & Budget*, 2007 Leg., (N.J. 2007) (statement of Joan Verplanck, President, New Jersey Chamber of Commerce), available at <http://www.njchamber.com/News/may%2007%20pfl%20testimony.asp> ("For instance, if a business employs five people and one goes out for 12 weeks, there is no way to easily replace that person. The other four team members will have to pick up the extra work, forcing them to work longer hours. . . . In fact, those left to maintain productivity will experience additional stress on themselves and their families, working longer hours to maintain profitability.")

⁷ See *Hearing on H.R. 2339, the "Family Income to Respond to Significant Transitions Act," and H.R. 2460, the "Healthy Families Act" before the Subcomm. on Workforce Protractions of the H. Ed. and Labor Comm.*, 111th Cong., 1st Sess., (2009) (testimony of the Hon. Victoria Lipnic), available at <http://edlabor.house.gov/documents/111/pdf/testimony/20090611VictoriaLipnicTestimony.pdf> (citing administrative burdens associated with the FMLA); See Alicia Ault Barnett, *Fixing Dysfunctional Family Leave—Family and Medical Leave Act*, Business and Health, Mar. 1997, at 1, available at http://findarticles.com/p/articles/mi_m0903/is_n3_v15/ai_19240774/ (stating that a 1997 SHRM survey found that one in four employers claimed tracking FMLA leave was administratively "burdensome").

⁸ See Mark Crain, Small Business Administration, Office of Advocacy, The Impact of Regulatory Costs on Small Firms V (2005), available at <http://www.sba.gov/advo/research/rs264tot.pdf> (maintaining that regulatory costs are generally 45 percent higher for small employers).

⁹ See SHRM, Cross-Training – Value in Today's Environment (2001), available at http://www.shrm.org/Research/Articles/Articles/Pages/CMS_000449.aspx.

¹⁰ See generally Gretchen M. Spreitzer, Susan G. Cohen & Gerald E. Ledford Jr., *Developing Effective Self-Managing Work Teams in Service Organizations*, 24 Group and Organizational Mgmt. 340 (1999) (discussing the different dimensions of SMWT effectiveness in service organizations); R. Wageman, *Critical Success Factors for Creating Superb Self-Managing Teams*, 26 Organizational Dynamics 49-62 (1997).

¹¹ Cathleen Benko & Anne Weisberg, *Mass Career Customization: Aligning the Workplace with Today's Nontraditional Workforce* (Harvard Business School Press 2007).

¹² See Gordon Steele and Elizabeth Secor, *Design and Administer an Effective Short-Term Disability Plan*, HR Issues & Answers, April 10, 2006, <http://hr.cch.com/hrlib/issues-answers/Design-and-administer-an-effective-short-term-disability-plan.asp?date=April-17-2006>

For example, Aetna reported an increase in women returning to work after pregnancy leave when maternity leave periods were extended and included other types of workplace flexibility. Pamela Babcock, *Workplace Flexibility Benefits Employees*, Employers, Soc. Hum. Res. Mgmt., January 30, 2008, <http://www.menloinnovations.com/pressreleases/SHRM.pdf> (explaining 91 percent of women returned after integration of workplace flexibility strategies, whereas only 71 percent had returned previously when the leave duration was shorter).

¹³ See White House Council on Women and Girls, *Continue the Conversation on Workplace Flexibility* (2010), <http://www.whitehouse.gov/work-flex-kit>. See also "Flex-Options," a project sponsored by the Women's Bureau at the U.S. Department of Labor. Since 2003, Flex-Options has been helping employers create more flexible workplace cultures; addressing the challenges of recruitment, retention, and work-life strategies; and helping build a range of work-life strategies. Women Entrepreneurs, Inc., Flex-Options, <http://www.we-inc.org/flex.cfm> (last visited November 16, 2010).

¹⁴ See New Zealand Dep't of Labour, *Work-Life Balance Guide* (2010), <http://www.dol.govt.nz/worklife/resources/making-it-work.asp#3>.

¹⁵ *Id.*

¹⁶ See UK Business Link, *Working Hours and Time Off* (2010), <http://www.businesslink.gov.uk/bdotg/action/layer?r.s=tl&r.l1=1073858787&r.lc=en&topicId=1084822788>; see Employer Alliance, *Work-Life Toolkit* (2009), <http://www.employeralliance.sg/toolkit/index.html>.

¹⁷ Employers opposed the passage of PFL in the first place and some undoubtedly continue to regard it as bad policy. See, e.g., Carlsbad Chamber of Commerce, *New Paid Family Leave Could Mean Trouble for Business* (2002), <http://www.carlsbad.org/products/product.aspx?pid=366> (as President and CEO of the Carlsbad Chamber Jan Sobel said, "While the Chamber understands the need for individuals to care for family members, this new legislation will undoubtedly impact business' bottom line... This is just another example of how employers are being forced to bear the brunt of the cost of new programs, thereby impacting the state's economic well being"). However, some employer groups have also noted the law has been less troublesome than predicted. See, e.g., SHRM, *January 2010: California's Paid Family Leave Act Is Less Onerous Than Predicted* (2010), <http://www.shrm.org/Publications/LegalReport/Pages/January2010CaliforniaPFLAct.aspx>.

¹⁸ See Cal. Emp. Dev. Dep't, *Fact Sheet: Paid Family Leave* (2009), http://www.edd.ca.gov/pdf_pub_ctr/de8714cf.pdf. See also Employment Development Department, *Paid Family Leave Website*, http://www.edd.ca.gov/Disability/Paid_Family_Leave.htm (last visited Nov. 16, 2010).

¹⁹ See California Employment Development Department, *Paid Family Leave Website, Employer Requirements*, http://www.edd.ca.gov/Disability/Employer_Requirements.htm (last visited Nov. 16, 2010).

²⁰ See New Jersey Department of Labor and Workforce Development, *Submitting Wage Information*, http://lwd.dol.state.nj.us/labor/fli/empins/fli_submitting_wage_information.html (last visited Nov. 16, 2010) (describing the wage verification requirements imposed on employers).

²¹See California Employment Development Department, Outreach Activities, http://www.edd.ca.gov/disability/Outreach_Activities.htm (last visited Nov. 16, 2010); Cal. Emp. Dev. Dep't, Employer Guide to PFL (2010), http://www.edd.ca.gov/pdf_pub_ctr/de44.pdf; N.J. Dep't of Labor & Workforce Dev., Employer Handbook (2010), http://lwd.dol.state.nj.us/labor/forms_pdfs/employer/B-426_2010_EmplyrHndbk.pdf.

²² Sandra L. Hofferth & Sally C. Curtin, *Parental leave statutes and maternal return to work after childbirth in the United States*, 33 *Work & Occupations* 73, 78 (2006).

²³ See, e.g., Eva Tahmincioglu, *More workers facing a sick leave conundrum: Downturn is leading fewer Americans to take time off for medical reasons*, MSNBC (Sept. 27, 2010, 3:38 PM) <http://www.msnbc.msn.com/id/39346051/ns/business-careers/> (“[Choosing between taking time off for illness or injury and returning to work has] only gotten worse during this economic downturn as companies cut back on staffing, leaving fewer people with more work, workplace experts contend. That makes it even harder to take time off to deal with a medical condition, whether it’s their own or that of a family member.”).

²⁴ 29 U.S.C. § 2601 *et seq.* The Americans with Disabilities Act (ADA) also provides job protection to some employees with disabilities who can demonstrate that time off is a reasonable accommodation necessary to perform the job, and where the time off would not impose an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A). See, e.g., *Dark v. Curry Cnty.*, 451 F.3d 1078, 1090 (9th Cir. 2006) (“[u]npaid medical leave may be a reasonable accommodation under the ADA.... Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer.”) (quoting *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1245-47 (9th Cir. 1999)); *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir. 1998) (finding employee’s request for extended time off was reasonable because she would have been able to return to the job and the employer admitted it would have been more profitable for the employer to have allowed her time off rather than train a new employee).

²⁵ The FMLA also provides up to 12 weeks of job-protected leave to an employee because of any qualifying exigency arising out of the fact that the employee’s spouse, child, or parent is on active duty (or has been notified of an impending call or order to active duty), as well as up to 26 weeks of job-protected leave to care for a servicemember with a serious illness or injury. See 29 U.S.C. § 2612(a)(1)(E); 29 U.S.C. § 2612(a)(3)-(4).

²⁶ 29 U.S.C. §§ 2611(2)(A), (4)(A)(i).

²⁷ Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, *Monthly Labor Review*, Sept. 2001, at 19-20, available at <http://www.bls.gov/opub/mlr/2001/09/art2full.pdf>.

²⁸ See Workplace Flexibility 2010, Overview of Job Protected Leave, available at <http://workplaceflexibility2010.org/images/uploads/EXTOJobProtection.pdf> (summarizing state laws).

²⁹ Waldfogel, *supra* note 28, at 20 (only 46.9 percent of private sector employees are eligible for FMLA leave).

³⁰ See generally Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 *Berkeley J. Emp. & Lab. L.* 1 (2007).

³¹ Katherine Ross Phillips, *Working for All Families? Family Leave Policies in the United States*, in *The Economics of Work and Family* 165 (Jean Kimmel & Emily P. Hoffman eds., 2002). See also Jane Waldfogel, “The Impact of the Family and Medical Leave Act,” 18 *J. Pol’y Analysis & Mgmt.* 281, 300 n.29 (1999) (“Those who do not have paid leave, however, are more likely to be from lower-income families and are thus least able to manage without pay. For example, 12 percent of women leave-takers turn to public assistance to replace the income they lose while on unpaid leave.”).

³² Arindrajit Dube & Ethan Kaplan, *Paid Family Leave in California: An Analysis of Costs and Benefits* 35, tbl.4 (2002), available at <http://www.paidfamilyleave.org/pdf/dube.pdf>.

³³ The CFRA is the state equivalent of the federal FMLA and, for the most part, applies to the same group of workers. The CFRA provides 12 weeks of unpaid job-protected leave to all employees who work for a covered employer (defined as a company doing business in California that has 50 or more employees) and have been employed for 12 months and put in at least 1,250 hours of service. The FMLA, by comparison, applies to all employees who work for a covered employer (defined as a company with 50 or more employees within a 75 mile radius) and have been employed for 12 months and put in at least 1,250 hours of service. Compare Ca. Gov’t Code §§12945.1-12945.2 with 29 U.S.C. § 2601 *et seq.*

³⁴ Arindrajit Dube & Ethan Kaplan, *Paid Family Leave in California: An Analysis of Costs and Benefits* 35, tbl.4 (2002), available at <http://www.paidfamilyleave.org/pdf/dube.pdf>. (citing the EDD study statistics).

³⁵ Cal. Emp. Dev. Dep’t, PFL Program Statistics (2010), available at http://www.edd.ca.gov/Disability/pdf/PFL_Program_Statistics.pdf.

³⁶ See Sarah Fass, *Nat’l Ctr. for Children in Poverty, Paid Leave in the States* 7 (2009), available at http://www.nccp.org/publications/pdf/text_864.pdf. The California Senate Office of Research agrees that the lack of job protection might be one reason for low take-up. Cal. Senate Office of Research, *Balancing Work and Family* 5 (2007), available at <http://www.paidfamilyleave.org/pdf/paidfamily07.pdf> [hereinafter California Senate]. However, the Office theorizes that other potential reasons – including the fact that partial wage-replacement is insufficient for many employees and/or that employees are not aware of CA PFL – might also explain the low take-up. *Id.*

³⁷ California Senate, *supra* note 36, at 9.

³⁸ *Id.*

³⁹ Approximately 40% percent of California workers are not protected by the CFRA and FMLA because of the statutes’ employer-size and hours-worked requirements. Dube, *supra* note 34, at 9 (citing a 1996 Commission on Family and Medical Leave finding that approximately 62 percent of California employees are covered by the FMLA).

⁴⁰ California Senate, *supra* note 36, at 5.

⁴¹ The PDLL offers up to 16 weeks of job-protected leave for illness and temporary disability related to pregnancy to women

working for employers with five or more employees. See Cal. Gov’t Code § 12945(a)-(c) (making it an unlawful employment practice for an employer to refuse a reasonable period of leave, not to exceed four months, to a female employee disabled by pregnancy, childbirth, or a related condition unless such refusal is based on a bona fide occupational qualification); Cal. Gov’t Code § 12926(d) (defining “employer” for the purposes of the California Fair Employment and Housing Act, of which the PDLL is a part, as any person regularly employing 5 or more persons).

⁴² See Cal. Gov’t Code § 12945(a). The PDLL, like SDI, only covers leave needed for disabilities related to pregnancy, childbirth, or a related condition. PFL for bonding applies to time off taken explicitly to bond with a new child.

⁴³ See Hofferth, *supra* note 22, at 78 (“The most important aspect of the FMLA is that it requires covered employers to at least provide job-protected leave. Employees may feel more comfortable about requesting leave knowing that their job is secure.”).

⁴⁴ See U.S. Small Business Administration, Office of Advocacy, *Employer Firms, Establishments, Employment, and Annual Payroll Small Firm Size Classes, 2007* (2007), http://www.sba.gov/advo/research/us_07ss.pdf.

⁴⁵ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff *et seq.*

⁴⁶ See Workplace Flexibility 2010, Overview of Job Protected Leave, <http://workplaceflexibility2010.org/images/uploads/EXTOJobProtection.pdf>.

Part

III

Where Do We Go From Here?



Recommendations for Further Research

The recommendations in this report are based on an exhaustive study of decades' worth of research on the problems surrounding paid time off for temporary disabilities, parental care and other caregiving needs. After conducting this review, we have identified a number of gaps in the research that, if filled, might result in additional recommendations or modifications to our existing recommendations. Below we outline some of these research gaps.

A. Increments of Time Off

We recommend that benefits be available for a minimum of one business week (five days) per episode of time off. As a result, individuals who have a serious health condition (or who care for an individual with a serious health condition) that requires short periods of time off would not be able to receive wage replacement benefits under this proposal. Nor would an individual who chooses to phase back into work on a reduced-hours schedule after being out for several weeks.

We believe the need for wage replacement in these situations is quite significant, and we struggled with how to incorporate them into FSI. Ultimately, we believe more research would help address concerns regarding: a) whether our one-week increments might cause moral hazard by either encouraging leave takers to take an entire week off when they only need one or two days of leave, or providing a disincentive to transition back into work on a reduced hours or part-time schedule; b) how wage replacement for shorter periods of time off fits with a program whose primary purpose is wage replacement for longer periods of time off from work, c) how employers currently manage short periods of intermittent leave, both under the FMLA and as a general practice, recognizing that intermittent leave as allowed under the FMLA has caused concerns and management challenges for some employers,¹ and d) whether it is administratively feasible to distribute benefits for short periods of time off through a national social insurance program.

We note that most developed OECD countries account for short-term time-off needs for disability and caregiving through mandates requiring employers to provide sick and vacation days.² By contrast, maternity, paternity, and parental leave benefits are generally offered through a government-administered social insurance program.³ Although some countries provide benefits for very short increments of time off or for reduced schedules, many others only provide benefits for recipients who are fully out of the workforce and taking time off in one long increment, e.g., three months or six months.⁴

We also note that New Jersey and California — the only two states with social insurance programs for paid family leave — each have different rules with regard to wage replacement for short increments of leave. California Paid Family Leave provides benefits for claimants who take any form of PFL in hourly, daily, or weekly increments.⁵ New Jersey Family Leave Insurance, on the other hand, only provides intermittent *caregiving* benefits in one-day increments.⁶ Intermittent *parental care* benefits are *not* available under the New Jersey program *unless* an employer agrees to the intermittent leave schedule.⁷ Even then, in order to receive intermittent parental care benefits, the claimant must take time off in minimum increments of one week.⁸

There is very little research or data collection about how California and New Jersey’s rules on intermittent leave are working in practice. We believe further research is needed regarding:

- ➔ the extent to which, and reasons why, individuals are currently seeking benefits under these intermittent caregiving provisions;
- ➔ how the benefits are being administered, and whether administration of these short-term benefits is creating any difficulties for the administering agency; and
- ➔ whether these provisions have created any undue burdens on employers.

We believe that similar research should be conducted in OECD countries that provide short-term benefits for disability and/or caregiving. This research would allow policymakers to better evaluate arguments regarding the best way to provide benefits for shorter periods of time off, including arguments regarding administrative ease and burdens on employers.

B. Total and Annual Caregiving Benefit Durations

To ensure that the program is sustainable and to protect against overuse and potential fraud and abuse, we recommend there be a requirement that 26 weeks of caregiving benefits be the maximum amount an individual can receive over the course of his/her working lifetime, and that 12 weeks of caregiving benefits be the maximum an individual can receive in any one year.

We recognize that the California and New Jersey paid family leave laws do not have a total benefit duration for any of the benefits offered under the programs. However, these laws only provide up to 6 weeks of benefits per year, and the six weeks include benefits taken for both caregiving and parental care purposes. Under FSI, in addition to 26 weeks of caregiving benefits, individuals are entitled to 12 weeks PCNC benefits per child. Moreover, the wage replacement rates — 55 percent of a worker’s average weekly wage, up to a maximum of \$959 per week in California, and 66 percent of a worker’s average weekly wage, up to a maximum of \$543 per week in New Jersey — are significantly lower than those proposed for FSI Caregiving benefits (80 percent of a worker’s average weekly wage, up to a maximum of 150 percent of the national average weekly wage, which translates to \$1,254 per week). Finally, California and New Jersey paid family leave laws have restrictive definitions of family that naturally limit the number of individuals who qualify for benefits. FSI contains a much broader definition of family.

We believe additional research is needed regarding how the caregiving components of California and New Jersey’s paid family leave programs are working in practice. Issues that should be addressed include:

- ➔ The purposes for which care is being provided;

- ➔ The relationship between care providers and care recipients, including how many applicants are rejected for benefits because they do not meet the definition of “family”;
- ➔ The average number of caregiving claims per individual;
- ➔ The mechanisms in place for detecting fraud and abuse; and
- ➔ The amount of fraud and abuse that has been detected.

In addition, we believe more research is needed regarding whether the FSI 26-week maximum total benefit duration is the appropriate duration, and whether there are alternate ways to mitigate concerns about overuse, program sustainability, and fraud and abuse.

Finally, we believe there should be additional research regarding whether the maximum benefit duration for caregivers of servicemembers should be extended, so as to more closely track the FMLA, which provides up to 26 weeks of unpaid leave for servicemember care.

C. Interaction between Job Protection and Program Utilization

We recommend the FMLA be extended to cover all employers with 15 or more employees. While this would provide job protection to a number of employees not currently protected by the FMLA, it still leaves a number of individuals without protection, including those who have not met the FMLA’s year in service and hours requirement, those who need to care for a family member not covered by the FMLA, and those who work for very small businesses.

We are concerned this may result in a situation where workers will be required to make contributions to a social insurance program for time-off benefits that they are unable to effectively access because they fear losing their jobs.

We note, however, that workers without job protection in California and New Jersey are still required to make contributions to those paid family leave programs. We believe further research is needed regarding the dynamic between the lack of job protection and the utilization rate for California and New Jersey paid family leave in order to determine whether there should be additional extensions of the FMLA, opt-out provisions for workers who lack job protection, or other modifications to our proposal.⁹

D. Data Collection

As evidenced by the above sections, we believe there needs to be more research done on the implementation of California and New Jersey’s paid family leave insurance laws. In particular, there needs to be more quantitative research regarding program usage, and more qualitative research regarding the impact of the laws’ provisions on employees, employers, and the administering agencies.

In addition, we believe there needs to be new research on FMLA implementation. The last national study was conducted in 2000, and there are many concerns regarding the study’s scope and the lack of subsequent studies.¹⁰ The Secretary of Labor has announced that DOL is planning to conduct a new nationwide study in 2011, which we believe will help ensure the design of a national social insurance system rests on the most current and accurate data regarding how the FMLA is working in practice.¹¹

E. Cost/Benefit Analyses

It is difficult to quantify the costs and benefits of a federal social insurance program for temporary disability, parental care, and caregiving. What might be a benefit for employees might be a cost for employers, and vice versa. On top of that, there are costs and benefits to society as a whole. While some cost-benefit analyses were conducted prior to the enactment of California's paid family leave law, we are not aware of any post-enactment studies of California or New Jersey's PFL programs.¹² We also are not aware of cost-benefit analyses of the existing five-state TDI programs. We believe there needs to be sophisticated cost/benefit analyses of these programs, and similar programs in the OECD countries, at both the firm level and the macroeconomic level. There have been many important contributions to the field, particularly related to maternity and parental leave,¹³ but research is not as comprehensive as similar work in the health care and retirement security contexts.

We believe there needs to be further analysis of the California and New Jersey PFL programs, and the state TDI programs, in an effort to address a number of critical issues around cost. We believe the answers to questions such as the following will help guide a more sophisticated analysis of the costs and benefits of FSI, as well as any other similar social insurance program:

- ➔ Has implementation of the California and New Jersey PFL laws placed significant burdens on employers, and if so, in what ways?
- ➔ How much have employers saved as a result of not having to bear the full cost of maternity leave, paternity leave, and short-term disability benefits?
- ➔ Is FMLA utilization for time off to care for one's own serious health condition any greater in TDI states than in non-TDI states?
- ➔ How can one quantify the benefits to employees, and society as a whole?
- ➔ What are the costs of *not* providing wage replacement for temporary disability, parental care for a new child, and caregiving for a family member?

In addition, we believe there needs to be more research into the relationship between TDI and SSDI. A very basic look at rates of SSDI usage in states with public TDI programs compared to those without shows that TDI states tend to have fewer SSDI claimants per capita than non-TDI states.¹⁴ This deviation could, of course, be explained by any number of factors other than TDI—including unemployment rates, average income, climate, the “health culture” of the state, etc. However, given the costs to society associated with SSDI claims — the estimated lifetime savings of just 1 percent of SSI/SSDI recipients returning to work is \$3 billion¹⁵ — we think the link is worth exploring in greater detail.

F. Preemption

The FSI program builds on existing social insurance programs at the state level — namely, the five state (and one territory) TDI programs, and the two state paid family leave programs. This naturally raises questions about how FSI would interact with these state programs, as well as any state social insurance program enacted in the next few years.

One option would be to frame FSI as a “floor” and have the federal government certify whether state programs provide similar, or better, wage replacement benefits than FSI. If so, then states could apply for a waiver from FSI, and state residents would no longer have to contribute to the FSI system. Of course, determining whether a state program is as good as or better than FSI would be quite challenging. In addition, employers might argue against having to deal with a system that varies from state to state, making their leave programs more difficult to administer.

Another option would be that FSI preempt—or supplant—the state programs, since FSI would address the same needs and, as currently proposed, would provide greater wage replacement benefits. However, this would undercut current state systems that are up and running and would limit states' ability to improve on the federal system.

Given this complexity, we do not make any recommendations in this document regarding preemption. Instead, we recommend that additional research be conducted on these issues.

G. Better Understanding of the Costs of Different Design Elements

We specifically chose not to cost out the FSI program at this time, since we wanted to focus solely on the substantive policy issues and spark debate. That said, it would be helpful to know the costs of different program design elements, and how changing them would raise or lower the costs of the program. For example, how does the cost of the program change if the wage-replacement rate is set at 60 percent or 70 percent of a worker's average weekly wage, or if the benefits are not taxed? What if PCNC benefits are only available for 6 weeks, or if TDI benefits are only available for 20 weeks? What actuarial data are available to estimate how many individuals will claim caregiving benefits? Such information will be tremendously helpful in ultimately designing a budget-neutral, self-funding, sustainable program.



In sum, as the debate continues regarding how best to provide paid time off for temporary disability, parental care, and caregiving, we hope there will be additional research to inform the debate. The above discussion lays out some of the primary issues we believe merit further exploration.



¹ See Dep't of Labor, *The Family and Medical Leave Act: A Report on the Request for Information (2007 Update)*, <http://www.dol.gov/whd/fmla2007report.htm> (documenting employer concerns regarding the administration and use of unforeseen, intermittent leave).

² Jody Heymann, Hye Jin Rho, John Schmitt, & Alison Earle, *Contagion Nation: A Comparison of Paid Sick Day Policies in 22 Countries*, Ctr. for Econ. & Policy Research (May 2009), <http://www.cepr.net/index.php/publications/reports/contagion-nation/paid-sick-days-2009-05.pdf>.

³ See generally Dep't for Bus. Innovation & Skills, *International Review of Leave Policies and Related Research (Sept. 2009)*, <http://www.berr.gov.uk/files/file52778.pdf>.

⁴ *Id.* at 83–86.

⁵ Cal. Unemp. Ins. Code §§ 3302.1–3303 (West 2009); see also *Part-Time Worker/Intermittent/Reduced Work Schedule*, St. of Cal., Emp't Dev. Dep't, http://www.edd.ca.gov/disability/PFL_Part-time_Worker.htm (last visited Nov. 3, 2010).

⁶ N.J. Stat. Ann. § 43:21-39.2(a) (2010) (employers must also be provided 15 days prior notice if intermittent leave is taken to care for a family member with a serious health condition).

⁷ *Id.*

⁸ *Id.*

⁹ Two forthcoming studies are expected to address whether the lack of job protection prevents some workers from accessing paid family leave benefits in California. See Ruth Milkman and Eileen Appelbaum, *Paid Family Leave in California: New Research Findings* (forthcoming 2011) and Catherine Albiston, *Social Obstacles to Exercising Mandated Leave Rights* (forthcoming 2011).

¹⁰ See, e.g., Letter from National Partnership for Women and Families, to Richard M. Brennan, Senior Regulatory Officer, Wage

& Hour Div., Dep't of Labor (Feb. 16, 2007), <http://www.regulations.gov/search/Regs/contentStreamer?objectId=0900006480239325&disposition=attachment&contentType=pdf> (“[T]he lack of available data on many of the issues raised in the RFI is an unfortunate reminder of DOL’s failure to conduct objective studies on the FMLA and its implementation in recent years); Letter from Randel K. Johnson, Vice President, Labor, Immigration, & Emp. Benefits, Chamber of Commerce, to Victoria A. Lipnic, Assistant Sec’y for Emp’t Standards, Dep’t of Labor, (Feb. 16, 2007), <http://www.regulations.gov/search/Regs/contentStreamer?objectId=090000648025921a&disposition=attachment&contentType=pdf> (stating that existing studies provide “little insight” into the difficulties in FMLA implementation or other issues faced by employers and employees).

¹¹ See Hilda Solis, Secretary, Dep’t of Labor, Introductory Remarks at the Middle Class Task Force Work-Life Balance Event (July 20, 2010), http://www.dol.gov/_sec/media/speeches/20100720_MCTF.htm.

¹² Compare Arindrajit “Arin” Dube & Ethan Kaplan, *Paid Family Leave in California: An Analysis of Costs and Benefits*, Labor Project for Working Families (June 19, 2002), http://www.working-families.org/learnmore/pdf/paidleave_costbenefit.pdf, with Bruce D. Phillips, *Paid Family Leave in California: A Bad Idea at a Bad Time*, Nat’l Fed’n of Indep. Bus. Research Found., http://www.nfib.com/Portals/0/Paid_Family_Leave_Report.pdf (last visited Nov. 3, 2010) Both studies were written prior to the passage of the California Paid Family Leave law; key provisions to the proposed law were ultimately modified after these reports were written, including the elimination of employer contribution to the program.

¹³ See, e.g., Deanna S. Gomby & Dow-Jane Pei, *Newborn Family Leave: Effects on Children, Parents, and Business*, Packard Found. http://www.packard.org/assets/files/children%20families%20communities/NFLA_fullreport_final.pdf (last visited Nov. 3, 2010); Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, *Am. Econ. Rev.*, Vol. 84, No. 3 (1994), pp. 622–41, available at <http://www.jstor.org/pss/2118071>; Christine Jolls, *Accommodation Mandates*, 53 *Stan. L. Rev.* 223 (2000); Jacob Alex Klerman & Arleen Leibowitz, *Labor Supply Effects of State Maternity Leave Legislation*, in *Gender and Family Issues in the Workplace* 65–91 (1997); Christopher Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113(1) *Q. J. of Econ.* 285 (1998), available at libres.uncg.edu/ir/uncg/f/C_Ruhm_Economic_1998.pdf; Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference*, 16 *J. Lab. Econ.* 505 (1998).

¹⁴ A quick comparison of SSDI usage rates per state with estimated state population reveals that TDI States (California, Hawaii, New Jersey, New York, and Rhode Island) average approximately 2,400 SSDI beneficiaries per 100,000 in population, while non-TDI States (the rest of the U.S.) average 3,200 SSDI beneficiaries per 100,000 in population.

¹⁵ Such costs may arise because these individuals are not working, as well as the costs of providing SSI/SSDI benefits. Joann Sim, *Improving Return-to-Work Strategies in the United States Disability Programs, with Analysis of Program Practices in Germany and Sweden*, 62(3) *Soc. Security Bull.* 41 (1999), available at <http://www.ssa.gov/policy/docs/ssb/v62n3/v62n3p41.pdf>.



Conclusion

When Workplace Flexibility 2010 and the Berkeley Center on Health, Economic & Family Security began our collaboration in 2009, we set out to answer some critical questions:

- ➔ How do we create national policy solutions that explicitly account for the facts on the ground? Given the realities of what families look like today — dual-earner families, single heads of households, and an aging population — people of all ages and across incomes will need financial security when they take time off from their jobs to care for themselves, their aging parents and their kids. What can the government do to support these families' needs?
- ➔ How do we create policy solutions that reflect the modern reality where having a health condition or disability is no longer a barrier to working? And how do we confront the fact that society generally expects people to work regardless of health status? Right now our federal policy forces a choice between being considered permanently disabled or not at all. How do we shift the system so it reflects the continuum of ability created by modern medicine and equal opportunity?
- ➔ As we develop these policies, how do we account for the needs of employers in a competitive global economy, taking into account that employers need to get their work done, regardless of what is happening in their employees' lives? And how do we build a system that works well and does not add to the national debt?

A year and a half later, after a great deal of research, writing, discussion, and debate, we arrived at Family Security Insurance (FSI). As we articulate clearly in this report, FSI would fill a critical gap in our national social insurance system.

We recognize that this proposal requires some tough choices about priorities and demands a commitment from many stakeholders inside and outside government to make it a reality. But we are convinced that a comprehensive national social insurance program is the best way to meet the growing health and caregiving needs of American workers.

Seventy-seven percent of Americans believe that businesses should be required to provide paid family and medical leave to every worker who needs it.¹ An even stronger majority — 85 percent — believes that businesses are at risk of losing good workers if they fail to adapt to modern family needs.² These statistics are not in spite of the current economy — they are because of it. American workers are struggling, the private sector hasn't adequately responded, and there has been a lack of comprehensive national policy on these issues since the FMLA was passed in 1993.

“Staying home to care for a sick child or taking an elderly parent to a doctor’s appointment shouldn’t mean risking one’s job Things like paid family leave and sick days and affordable child care should be the norm, not the exception.”

Michelle Obama, Remarks by the First Lady during visit to the Department of Labor, January 14, 2010

This report provides a blueprint for a program that would fundamentally reform our social policy to address workers' critical needs — and at the same time, spread the cost fairly, protect the deficit, and keep people working.

We view this report as the beginning of what we hope is a much longer conversation that engages a wide range of stakeholders from both the private and public sectors. Critical decisions are being made about the deficit in the current economic climate, making it especially important to factor this type of social insurance policy into overall discussions about how we make our economy globally competitive, while increasing financial security for American families. This report paves a path to progress on both counts.



¹Heather Boushey, It's Time for Policies to Match Family Needs: New Polling Data Shows Widespread Support for an Agenda to Address Work-Family Conflict (Center for American Progress 2010), http://www.americanprogress.org/issues/2010/03/pdf/work_survey.pdf.
² *Id.*

Appendices

Appendix A

Current Social Insurance Programs in the United States

The United States has a robust social insurance network at the state and federal level. This appendix provides a brief overview of the major state and federal social insurance programs with a special emphasis on eligibility standards, benefits, and administration.

I. Unemployment Insurance

Unemployment Insurance (UI) is a federal-state program created by the original Social Security Act of 1935. The system's primary mission is to provide wage replacement to workers who become unemployed through no fault of their own.¹

Each state operates its own UI program. While the establishment of a state UI program is technically voluntary, the tax and incentive structure established by the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA) effectively mandates the creation of one.² Currently, all 50 states and the District of Columbia operate within the federal system.³

A. Eligibility

Individuals qualify for UI benefits if they work for a covered employer and meet state eligibility requirements at the time of unemployment. Covered employers include those that paid out at least \$1,500 in wages in the current or previous calendar year or employed one or more persons at least one day a week for 20 weeks in the current or previous calendar year.⁴ Agriculture and domestic services industries have special coverage thresholds,⁵ though each state may set its own rules.⁶ About half of the states use a definition of "employer" that is even broader than the federal minimum.⁷

Working for a covered employer that pays UI tax does not guarantee that an individual is covered under the state UI program. An applicant can perform services for a covered employer but still be deemed ineligible for UI coverage if she is found to be a non-covered "independent contractor"⁸ or if she fails to meet additional monetary and non-monetary requirements.

Applicants must have earned wages beyond a threshold amount in a specified period to demonstrate sufficient workforce attachment. Federal guidelines ensure the threshold wage in each state is similar, though states use different formulae to implement these guidelines.⁹

In addition to meeting the monetary requirement, an applicant must 1) have been involuntarily separated from the job without fault, 2) be available and willing to accept suitable work, and 3) be currently looking for work.¹⁰ Some states have "good cause" exceptions that relax the involuntary separation requirement in certain situations. These can include sexual harassment and "compelling family reasons" such as domestic violence, a relocating spouse, or the illness or disability of an immediate family member.¹¹ New federal funding incentives created under the American Recovery and Reinvestment Act of 2009 have prompted many states to enact good cause exceptions: 31 states now have domestic violence exceptions (up from 20), 22 states have spousal relocation exceptions (up from 10), and 20 states have worker illness and disability exceptions (up from nine).¹²

B. Benefits

Under the UI system, states set the benefit levels. Each state has a system for determining a recipient's "weekly benefit amount" (WBA), though these calculations are subject to a state statutory minimums and maximums. As of July 2009, the lowest and highest WBA maximums were enforced by Mississippi (\$235) and Massachusetts (\$628).¹³ The maximum duration of benefits in most states is 26 weeks.¹⁴

Thirty-seven states have a non-payable waiting period before benefits can be collected.¹⁵ While nearly all states stop paying regular UI benefits after 26 weeks, the federal-state Extended Benefits (EB) program provides for emergency extensions of benefits in states that have high unemployment.¹⁶ Typically EB costs are shared by federal and state governments, however, the ARRA extended the length of benefits and provided 100 percent federal funding for the program.¹⁷ Under the most recent extension, federally-funded EB benefits are available through November 30, 2010.¹⁸

C. Administration

1. Funding and State Agencies

The state UI programs are funded by a combination of state and federal employer payroll taxes. The proceeds from the federal tax are allocated to each state to cover their administrative costs.¹⁹ State payroll taxes, paid almost exclusively by employers, are used to fund program benefits.²⁰ Unlike the uniform federal tax, the rates and terms of the state taxes vary significantly.²¹ All states use an "experience rating," which creates a variable employer tax based on employment stability factors.²² For example, an employer that has historically laid off few employees will have a more favorable rate than an employer with frequent layoffs.

While federal law sets numerous guidelines, the states have some latitude in how they administer the programs.²³ Each state maintains its own unique UI organization, usually within an executive agency devoted to labor and employment issues. Due to the large inflow and outflow of money, these organizations are often among the state's largest agencies.

2. Benefit Application and Determination

UI applicants apply for unemployment in the state where they were employed, even if it is not their state of residence.²⁴ The application collects basic contact, citizenship, and employment information.²⁵ States may also ask for wage information, though this can be more reliably obtained from the employer or from another state agency. The state agency reviews applications, contacts the applicant's last employer to request or verify wage and employment information, and makes an initial eligibility determination.²⁶

Each state has appeals procedures as required under the Social Security Act.²⁷ Almost all states have two levels of administrative appeals.²⁸ The first level is usually the appellant's only hearing of right and is often conducted in person.²⁹ In the second level of administrative appeals, review is generally limited to the record and additional hearings are seldom held. Further appeals may be made to the courts, though the level of initial jurisdiction varies.³⁰ Both employee and employer may appeal a benefits decision. The courts require that UI benefits continue during an appeal by the employer.³¹

All states require that UI recipients answer weekly or bi-weekly questionnaires to certify ongoing eligibility and need for benefits.³² The recipient may also be required to provide information on the progress of her search for new work.³³

3. Benefit Payment and Termination

The Department of Labor tracks several measures of speed and efficiency of the state UI programs. The DOL sets a goal that each state should pay 87 percent of first-time benefit recipients within 21 days.³⁴

Recipients' benefits are terminated automatically if they exhaust the statutory duration limits for UI benefits. If a UI recipient regains full-time employment, some states simply ask that the recipient cease to fill out the weekly certifications.³⁵ In all states, the recipient's weekly certification responses may trigger termination. In many states, regaining partial employment does not disqualify someone from receiving some benefits, assuming he or she continues to seek full-time or additional part-time work.³⁶

II. Temporary Disability Insurance

Temporary Disability Insurance (TDI) is a state program or mandate providing for wage replacement when an employee is unable to work due to a non-work-related temporary illness or injury. Currently, five states and Puerto Rico provide TDI coverage.³⁷ This section discusses the TDI systems currently in place in California, Hawaii, New Jersey, New York, and Rhode Island.

All five state programs have been in place for decades. The oldest program, Rhode Island's, was enacted in 1942, and the youngest program, Hawaii's, began in 1969. The lack of uniform federal guidelines on benefits and administration has led to a wide range of approaches to providing TDI coverage among the different states. Rhode Island relies solely on a state-run social insurance system.³⁸ New Jersey and California operate a hybrid system in which a public TDI plan operates alongside approved voluntary plans purchased by employers that either meet or exceed the state's TDI requirements.³⁹ Hawaii and New York use modified versions of a private mandate. These states require that employers self-insure or purchase temporary disability insurance from private companies or, in New York, from the state itself.⁴⁰

A. Eligibility

Employees qualify for benefits if they work for a covered employer and meet defined employee coverage requirements. While standards vary from state to state, most employers are covered.⁴¹

Applicants must demonstrate that they meet certain earnings and employment thresholds in addition to being unable to work. These thresholds vary greatly. New York requires only that applicants have worked four consecutive weeks (or 25 days for regular but non-daily employees).⁴² California and Rhode Island use only earnings thresholds, though the threshold is calculated differently in each state.⁴³ New Jersey and Hawaii use both earnings and employment thresholds. As of 2010, New Jersey requires applicants to have earned at least \$145 a week for 20 weeks (translating into 20 hours a week for a minimum-wage worker) or \$7,300 total in the base year.⁴⁴ Hawaii requires applicants to have worked for 20 hours a week for 14 weeks *and* earned at least \$400 in the previous year.⁴⁵

B. Benefits

Eligible applicants are entitled to a weekly benefit based on their past income, usually up to a specified cap. The benefit duration in Hawaii, New Jersey, and New York is 26 weeks;⁴⁶ Rhode Island and California are more generous, offering 30 and 52 weeks respectively.⁴⁷ As of 2010, the weekly wage replacement rate, maximum benefit amount, and duration of these benefits range as follows:

- ➔ California: 55 percent wage replacement from \$50/week minimum up to \$987/week (150 percent of the state average weekly wage), for up to 52 weeks.⁴⁸
- ➔ Hawaii: 58 percent wage replacement up to \$510/week (80.7 percent of the state average weekly wage), for up to 26 weeks.⁴⁹
- ➔ New Jersey: 2/3 wage replacement up to \$561/week (53 percent of the state average weekly wage), for up to 26 weeks or until 1/3 total base period wages has been paid.⁵⁰
- ➔ New York: 50 percent wage replacement up to a \$170/week statutory maximum, for up to 26 weeks.⁵¹
- ➔ Rhode Island: 4.62 percent of total highest base period quarter wages, from \$69/week minimum up to \$700/week (85 percent of the state average weekly wage), for up to 30 weeks or until 36 percent of total base period wages has been paid.⁵²

All five states require a seven-day waiting period before an applicant can claim benefits.⁵³ New Jersey and Rhode Island plans will pay wage replacement for the waiting period retroactively if the disability lasts long enough (21 days in New Jersey and 28 days in Rhode Island);⁵⁴ Hawaii, New York, and California plans do not reimburse applicants for lost wages during the waiting week.⁵⁵

C. Administration

1. Funding and State Agencies

Most state TDI systems are financed by employee and employer contributions. New Jersey and Hawaii require employers and employees to contribute a percentage of program costs.⁵⁶ New York's low employee contribution cap (60 cents per week) forces employers to share program costs as well.⁵⁷ California and Rhode Island fund their TDI programs solely through employee payroll taxes.⁵⁸

Rhode Island, California, and New Jersey have built their TDI system on their Unemployment Insurance (UI) systems. In each state, the two programs share many of the same benefit appeal resources.⁵⁹

New York's program is overseen by its Workers' Compensation Board, but the Board does not administer any plans. A self-sufficient quasi-public entity, the New York State Insurance Fund (NYSIF), is the state's largest competitive carrier.⁶⁰ NYSIF was created to provide employers with workers' compensation protection at the lowest possible cost. After New York passed its TDI law, the Fund began offering temporary disability insurance as well.⁶¹

Hawaii's TDI plans are purely private; an employer can provide coverage through a collective bargaining agreement, an insurance provider, or its own insurance plan.⁶² All plans must meet a baseline of coverage and be approved by either the Commissioner of Insurance or the Director of the Department of Labor and Industry.⁶³

2. Benefit Application and Determination

All state plans and the private plans in Hawaii and New York use a state application form. The form includes personal information completed by the applicant and a medical certification completed by a licensed medical provider.⁶⁴ New York, New Jersey, and Hawaii (the states where employers may have private coverage) also require an employer statement.⁶⁵ Some states reduce or refuse benefits for claims filed too long after the date of disability.⁶⁶

The estimated date of return to work on the medical certification forms the basis of the disability claim.⁶⁷ The TDI agencies in Rhode Island and California may challenge claims where the benefit duration exceeds the state's published medical guidelines on disability durations.⁶⁸ In all states, the state agency and (in states using private plans) the employer or insurance carrier may require independent medical evaluations of the claim as often as weekly.⁶⁹

Each state provides for an appeals process for denied claims. Rhode Island provides for an appeal to an Appeal Tribunal appointed by the Board of Review and a second appeal by right to the Board of Review itself.⁷⁰ California provides for a re-review of any appealed claim, followed by appeal to an ALJ in the Office of Appeals and then to the California Unemployment Insurance Appeals Board.⁷¹ Although New York does not have a state TDI plan, the state Worker's Compensation Board provides for appeals before an ALJ, followed by a discretionary appeal to a panel of three Board members.⁷² New Jersey maintains parallel appeals processes for its state and private plans. Appeals under the state plan are heard by an Appeals Examiner;⁷³ claimants may thereafter request review by the Board of Review.⁷⁴ Appeals of denials under private plans are heard by a Private Plan Officer, with no further administrative appeal.⁷⁵ Hawaii provides for agency review of private plan denials. The state may of its own accord review any claim denial and request reconsideration where it believes the denial is erroneous.⁷⁶ The employee may also request the state agency to conduct a review when her claim is denied as well as when her claim is accepted but the benefits are unsatisfactory.⁷⁷ In all states, denials may be appealed to the state courts when administrative remedies have been exhausted.⁷⁸

3. Benefit Payment and Termination

The time from filing a claim to receiving the first benefit check varies across the states; California and New Jersey send out most initial checks within two to three weeks,⁷⁹ while Rhode Island claimants receive their first payment within three to four weeks.⁸⁰ New York requires the insurer to pay the claimant within the first 18 days of disability or within four days of the claim filing date, whichever is later.⁸¹

Under all state plans, benefits automatically terminate once the claimant's disability certification expires, unless the claimant files new paperwork to show ongoing medical need.⁸² Claimants must inform the state insurer if they return to work before estimated.⁸³ The states maintain various mechanisms designed to deter and detect fraud and duplication of benefits.⁸⁴

III. Paid Family Leave

Paid family leave (PFL) provides wage replacement for workers who take time off work to care for a loved one (including parental care for a new child and caregiving for ill or injured family members). Only two states offer PFL programs: California's Paid Family Leave (PFL) program enacted in 2002,⁸⁵

and New Jersey’s Family Leave Insurance (FLI) program enacted in 2008.⁸⁶ (Washington State passed a PFL law in 2007, but it has never been funded and will remain nonoperational until at least 2012.)⁸⁷ Both states’ programs function alongside the states’ TDI system, sharing many of the statutory requirements.⁸⁸ To date, the majority of claims filed in both programs have been for parental care for a new child.⁸⁹ For example, from July 2009 to June 2010, parental care constituted 88 percent of claims filed California and 78 percent in New Jersey.⁹⁰

A. Eligibility

The eligibility requirements for FLI/PFL are basically identical to those used in the state TDI programs — except that instead of requiring the claimant to be suffering a temporary disability, the FLI/PFL programs require that the claimant be caring for a new child or ill family member.⁹¹ In addition, in California, an individual may be ineligible for PFL benefits if another family member is “ready, willing, able and available” to perform the caregiving functions during the same period and time of day.⁹²

B. Benefits

Under PFL, recipients can collect approximately 55 percent of their highest base-period earnings up to 150 percent of the state average weekly wage for six weeks in a 12-month period.⁹³ In 2010, the weekly benefit cap is \$987.⁹⁴ Eligible individuals under FLI can obtain two-thirds wage replacement up to 53 percent of the state average weekly wage for six weeks in a 12-month period.⁹⁵ In 2010, the weekly benefit cap was \$561.⁹⁶ A seven-day waiting period applies in both programs.⁹⁷ As with their state’s TDI programs, neither PFL nor FLI provide job protection.

New Jersey requires that newborn bonding leave be taken in consecutive weeks, unless the employer agrees to intermittent leave;⁹⁸ the state permits intermittent leave for family caregiving where medically necessary.⁹⁹ California permits recipients of both family caregiving and newborn bonding benefits to take intermittent leave.¹⁰⁰

California permits recipients to take intermittent leave in hourly, daily, or weekly intervals.¹⁰¹ New Jersey, on the other hand, only allows intermittent leave to be taken in 24-hour blocks for caregiving and seven-day periods for bonding.¹⁰²

C. Administration

1. Funding and Agencies

Both PFL and FLI are administered through their states’ disability systems (State Disability Insurance (SDI) in California and Temporary Disability Insurance (TDI) in New Jersey) and are funded through employee payroll taxes.¹⁰³

2. Benefit Application and Determination

Applications for FLI/PFL benefits are obtained from the state agency; where an individual is already receiving TDI benefits for pregnancy, a FLI/PFL application will automatically be mailed to her after the child is born.¹⁰⁴ Both states’ applications require personal information about the caregiver and care recipient, a medical certification (completed by a doctor) or bonding certification (completed by the applicant), and a HIPAA authorization.¹⁰⁵ New Jersey includes a section completed by the employer.¹⁰⁶

New Jersey requires that applicants provide employers with 30 days “prior notice” for bonding leave and “reasonable” notice for other caregiving leave.¹⁰⁷ In both states, employers may force employees to exhaust up to two weeks of sick leave benefits before applying for FLI; New Jersey counts these two weeks against the benefit limit, while California does not.¹⁰⁸ As with TDI, the medical certification for family caregiving leave must be completed by a Licensed Medical Provider and must include a diagnosis and an estimated date of recovery for the ill or injured relative. The states may require the relative to submit to one or more independent evaluations.¹⁰⁹

Both states’ appeals processes for denied claims are identical to those used in their TDI programs.¹¹⁰

3. Benefit Payment and Termination

FLI/PFL claims in both states are paid in the same way as TDI claims,¹¹¹ except that in both states FLI/PFL benefits are taxable.¹¹² As with the states’ TDI programs, benefits for family caregiving terminate when the claim certification expires, benefits are exhausted, or the care recipient returns to work or otherwise becomes ineligible for benefits. California, unlike New Jersey, will provide benefits to persons who return to work on a reduced schedule. For newborn care, benefits terminate 12 months after the child’s birth, even if the six weeks have not been exhausted.¹¹³

IV. Social Security: Old Age, Survivors, and Disability Insurance

Federal old-age insurance benefits date to the Social Security Act of 1935. Four years later, lawmakers added benefits for spouses and children of retirees and deceased workers.¹¹⁴ Old Age Insurance provides benefits to retiring workers and their relatives; Survivors Insurance provides benefits to the relatives of deceased workers, similar to a life insurance plan.

Social Security Disability Insurance (SSDI), which provides benefits to impaired workers before they reach retirement, was added to the Social Security program in 1954. The SSA also administers a parallel program known as Supplemental Security Income (SSI) that pays benefits to disabled workers who have not worked enough to qualify for SSDI. Unlike the relatively straightforward criteria for old age insurance, SSDI employs a lengthy and complex process to decide the merits of disability claims. In 2007, just over two million people applied for disability benefits.¹¹⁵

A. Eligibility

1. Old Age Insurance

People qualify for old-age insurance when they reach age 62 and have worked a sufficient amount of time during their careers.¹¹⁶ Many wait until they reach “full retirement age” — which will increase from 65 to 67 over the next two decades — to apply in order to maximize benefits.¹¹⁷ Relatives of retirees (including spouses,¹¹⁸ dependent children under 18,¹¹⁹ and certain divorced spouses,¹²⁰ stepchildren, and grandchildren)¹²¹ are eligible for benefits at one-half the value of the retiree’s benefits.

Forty quarters of coverage (QCs) or “credits” are required for “full insurance.”¹²² The SSA will generally count a minimum amount of money earned in each year as worthy of a QC.¹²³ For example, in 2009, \$1,090 earns 1 QC.¹²⁴ No one can earn more than four quarterly credits in a given year.¹²⁵ SSA tracks this information for every worker who pays the Social Security payroll tax.

2. Survivors Insurance

Social Security provides survivors insurance only to the family members of deceased workers who have worked a sufficient amount during their lives. The minimum requirement depends on the age of death, though no one needs to work longer than 10 years.¹²⁶ Several different types of relatives qualify to receive survivors insurance. Any widow or widower at full retirement age can garner full benefits while those older than 60 but below full retirement can only obtain reduced checks right away.¹²⁷ A disabled widow or widower may qualify for full benefits as early as age 50.¹²⁸ Similarly, spouses who currently care for a deceased's child (under age 16 or disabled), the unmarried dependent children of the deceased under 18, and children who became disabled before they turned 22 are also eligible for benefits immediately.¹²⁹ SSA will even pay out benefits to certain stepchildren, grandchildren, or adopted children.¹³⁰

3. Disability Insurance

To qualify for SSDI benefits a worker must be blind or have a disability that will result in death or prevent them from performing most work for at least a year.¹³¹ The claimant must "prove" that she meets these criteria to the DDS,¹³² but the agency has a duty to obtain, on its own, any relevant medical reports and information from the preceding 12 months.¹³³ The worker must also have earned a certain number of work credits under the Old Age Insurance system.¹³⁴

B. Benefits

1. Old Age Insurance

If the SSA confirms at some point that a person meets eligibility criteria, it will calculate her monthly benefit using a complicated formula set forward in the Social Security Act.¹³⁵ The average retired beneficiary received \$1,153 a month in 2009.¹³⁶

Old Age benefits continue until a beneficiary dies or an individual's yearly income exceeds the set earning ceilings. The law applies an earnings test to the time between when a person begins receiving old-age benefits and the time she reaches full retirement age,¹³⁷ but no such limits exist after that date. For the years leading up to the time an individual reaches full retirement age, the law removes one dollar of benefits for every two dollars earned above \$14,160 (the 2010 cap).¹³⁸

2. Survivors Insurance

Survivors receive a proportion of the benefits the deceased would have received. Widows above retirement age receive full benefits, widows over the age of 60 but below retirement age receive 71-99 percent, widows of any age with children younger than 16 receive 75 percent, and children receive 75 percent.¹³⁹ Dependent parents may also receive benefits.¹⁴⁰ A family cannot collect more than 150-180 percent of the deceased's benefit amount.¹⁴¹ Widows or widowers also qualify for a lump sum death payment of \$255.¹⁴²

3. Disability Insurance

SSDI beneficiaries receive an amount of money equal to what they would receive in old age benefits

if they had turned age 62 on the day they became disabled.¹⁴³ They therefore receive slightly less than those who wait until full retirement age to collect.¹⁴⁴ A five-month waiting period applies before benefits may be collected.¹⁴⁵

C. Administration – Old Age and Survivors Insurance

1. Funding and Agencies

OASI benefits are administered by the Social Security Administration. Today Social Security is the single largest program in the federal budget.¹⁴⁶ In 2007 the Social Security Administration (SSA) handled roughly \$624 billion in transfer payments for over 50 million people while spending a mere 1% on administrative costs.¹⁴⁷ About half of that sum goes toward managing Old Age, Survivors, and Disability Insurance (OASDI).¹⁴⁸ Funding for SSA programs including OASI comes entirely from payroll taxes levied on both employers and employees under the Federal Insurance Contributions Act (FICA).¹⁴⁹

2. Benefit Application and Determination

Eligible citizens can apply for old-age benefits online, by phone, or in person once they have reached 61 years and 9 months in age.¹⁵⁰ Eligible citizens must apply at least four months before they wish to begin receiving payments.¹⁵¹ At the initial stage, claimants must provide their Social Security number along with personal, citizenship, and tax information.¹⁵² Claimants also provide bank information for direct deposit. Once a representative confirms eligibility, SSA will notify the claimant in writing.

A survivor can claim benefits by providing the deceased's proof of death; Social Security numbers of the applicant, the deceased, and any dependent children; birth certificates of the applicant and any dependent children; marriage certificate (for a widow or widower); divorce papers if applicable; W-2 or tax return for the deceased; and direct deposit information.¹⁵³

A dissatisfied applicant has 60 days to request reconsideration in writing.¹⁵⁴ If the original decision is upheld, applicants may request a hearing before an ALJ.¹⁵⁵ Applicants can appeal an unfavorable ALJ ruling to Social Security's Appeals Council, which may dismiss a claim outright, issue a decision, or remand the claim for further proceedings in front of the ALJ.¹⁵⁶ Upon receiving a dismissal or denial, a claimant has 60 days to file suit in federal district court.¹⁵⁷

3. Benefit Payment and Termination

Each month's benefits are deposited on the following month. Though the law does not allow individuals to collect retirement benefits for the month of their death, survivors can receive a payment for this month.¹⁵⁸ As benefits are subject to earnings ceilings, beneficiaries must report their earnings so that benefits may be adjusted accordingly.¹⁵⁹

D. Administration – Disability Insurance

1. Funding and Agencies

Under the Social Security Act, responsibility for making disability determinations falls to the states' Disability Determination Services (DDS) agencies.¹⁶⁰ The use of state agencies dates back to the

beginnings of SSDI.¹⁶¹ The SSA pays the state agencies' costs, which totaled over \$1.8 billion in FY 2008.¹⁶² Funding for SSDI, as with OASI, comes entirely from payroll taxes levied under the Federal Insurance Contributions Act (FICA).¹⁶³

2. Benefit Application and Payment

SSDI applicants must first complete an application asking for basic information such as name, gender, and social security number.¹⁶⁴ If the applicant meets the non-medical eligibility requirements she can file a Disability Report, which requires information about the applicant's ailment, medical records, and work and education history.¹⁶⁵ The SSA field office then forwards the case to the state DDS for evaluation. The DDS considers an applicant's work status, severity of the medical condition, and ability to work.¹⁶⁶ The DDS may require an independent medical examination.¹⁶⁷ Owing to complex national standards, increased applications, and ongoing funding and personnel issues, there is a substantial backlog; it took an average of 88 days to process a claim in 2007.¹⁶⁸ In 2008 the SSA implemented the Quick Disability Determination (QDD) process to speed the process for those who easily qualify for benefits.¹⁶⁹

As with OASI, a dissatisfied SSDI applicant may request reconsideration, then appeal in turn to an ALJ, the Social Security Appeals Council, and federal district court. Roughly 62 percent of submissions are denied by the state DDS at the initial stage.¹⁷⁰ However, three-quarters of appellants will eventually receive benefits,¹⁷¹ most after appeals to the federal ALJ.¹⁷²

3. Benefit Payment and Termination

The lengthy appeals process means that many applicants wait more than two years for a final decision.¹⁷³ Even with a favorable initial determination, a claimant may wait three to five months after applying to receive their first payment. Beneficiaries receive monthly payments until they die, reach retirement age,¹⁷⁴ or no longer have a disability.¹⁷⁵ Recipients must notify SSA if their condition improves, if they successfully complete vocational therapy or training, if they return to work, or if their earnings increase.¹⁷⁶ Beneficiaries must report any earnings to SSA before April 15th of the following year.¹⁷⁷ The SSA regularly reviews cases to evaluate whether a participant still meets disability criteria.¹⁷⁸

The law incentivizes labor-market reentry. The SSA's Ticket to Work program permits beneficiaries to engage in trial work periods while maintaining, for a time, supplemental benefits.¹⁷⁹ The program also provides vouchers for public or private employment or vocational rehabilitation services.¹⁸⁰ However, take-up for the Ticket to Work program has been limited.¹⁸¹

V. Workers' Compensation

Workers' Compensation (WC) provides wage replacement and medical benefits to workers who have suffered workplace injuries.¹⁸² All 50 states, the District of Columbia, and the federal government have WC laws in place.¹⁸³ These laws codify a fundamental exchange between employers and employees: employees agree to forgo negligence claims in return for employer-provided insurance for workplace injuries.¹⁸⁴

Workers' compensation is financed almost exclusively by employers through self-insurance, private carriers, or payments into state funds. In 2008, workers' compensation covered 130,643,000

workers.¹⁸⁵ The total wages of the covered workers amounted to \$5.9 trillion.¹⁸⁶ Workers' compensation plans paid out \$29.1 billion in medical benefits and \$28.6 billion in cash benefits in 2008.¹⁸⁷ Employers paid an additional \$21.3 billion in administrative costs (if self-insured) or premiums (if purchasers of insurance), bringing the total cost to employers to \$78.9 billion in 2008.¹⁸⁸ Benefits and costs have declined in recent years since peaking in the early 1990s.¹⁸⁹

A. Eligibility

Forty-nine states mandate that almost all private employers have workers' compensation coverage (under a state or a private insurance scheme as required by the state's laws).¹⁹⁰ Many states exempt small employers or certain other categories of employers from coverage.¹⁹¹ Federal employees and their dependents are covered under the federal workers' compensation law.¹⁹²

Texas is the only state where workers' compensation coverage is voluntary; however, the employer must provide notice to the state if electing no coverage.¹⁹³ As of 2008, 33 percent of Texas private employers representing 25 percent of the state's workforce did not have workers' compensation coverage.¹⁹⁴ Non-subscribing employers reported higher satisfaction overall and higher satisfaction as to the adequacy/equity of occupational benefits paid to workers than subscribing employers.¹⁹⁵ In Texas, employers electing not to subscribe to coverage are not protected from tort suits.¹⁹⁶

Unlike the other programs discussed here, workers' compensation has no monetary or nonmonetary eligibility requirements beyond sustaining an injury in the course of one's employment; there are no earnings or hours thresholds for benefit eligibility, so coverage starts on an employee's first day of work.¹⁹⁷

B. Benefits

Generally, workers' compensation pays for immediate medical care and provides cash benefits after a three to seven day waiting period.¹⁹⁸ In 2008, medical-only cases accounted for 77 percent of all cases, but only 8 percent of benefits paid out.¹⁹⁹ Wage replacement benefits for lost work are only paid in 23 percent of cases, but account for 92 percent of all benefits paid out.²⁰⁰

Wage replacement benefits vary based on the duration and severity of the injury. Temporary disability benefit cases are the most common type, representing 63 percent of cash-benefit cases and 16 percent of benefit payments.²⁰¹ *Temporary partial disability* benefits cover situations where the worker returns to work before her full medical recovery with reduced responsibilities and pay.²⁰² *Temporary total disability* benefits are paid where the worker is unable to work while recovering.²⁰³

Permanent disability benefit cases are less common but more costly. *Permanent partial disability* benefits, which represent 36 percent of cases but 67 percent of benefit payments, are paid for permanent impairments that do not completely limit the worker's ability to work.²⁰⁴ *Permanent total disability* benefits, which represent only 1 percent of all cases but 17 percent of benefit payments, cover very significant impairments judged to be permanent.²⁰⁵

Benefit amounts and durations may vary widely depending on the state and the type of disability. For temporary total disability, most states allow the worker to recover two-thirds of her weekly wage subject to a maximum benefit correlated with the state's average weekly wage.²⁰⁶ Forty-four jurisdictions use a schedule — a list of body parts that are covered — to determine the duration and amount of permanent partial disability benefits for certain injuries.²⁰⁷ For unscheduled injuries, states may use several different approaches to evaluate the disability and assign compensation.²⁰⁸

Some states, such as California, provide for upward or downward modification of benefits where an injured worker is not offered, or refuses to accept, modified or alternative work.²⁰⁹ Cash benefits for permanent injuries often have a limited duration.²¹⁰

C. Administration

1. Funding and Agencies

States require employers to obtain insurance or prove their financial ability to carry the risk (self-insure). Private insurers are the largest source of workers' compensation benefits — in 2007, private carriers paid 52.3 percent of benefits.²¹¹ North Dakota, Ohio, Washington, and Wyoming rely on a state-run monopoly.²¹² Twenty-two states, including California and New York, maintain state-run funds that compete with private carriers.²¹³ The rest, including Iowa, Massachusetts, and Texas, rely entirely on private insurance carriers.

2. Benefit Application and Determination

States commonly place a limit on how long after an injury a worker may apply for benefits.²¹⁴ Applications usually include an employer's certification of workplace accidents and a medical certification of the injuries and disability.

Private insurers are often mandated to process a claim within a set amount of time, with penalties for delay.²¹⁵ In California, the claims administrator must authorize medical treatment up to \$10,000 within one working day after the injured worker files a claim form with their employer, even while the claim is being investigated.²¹⁶ New York, on the other hand, grants insurers a longer time period to determine whether to accept or deny a claim and to pay benefits.²¹⁷ Also, New York insurers may delay payments for a lack of medical evidence, which they are not required to obtain on their own.²¹⁸ In contrast, other states require insurers to obtain the medical information and do not accept "lack of medical evidence" as a reason to delay payment of benefits.²¹⁹

Each state maintains an appeals process, including states that have no public plan. In North Dakota, the first level is a request for reconsideration by the state agency.²²⁰ In Massachusetts and Texas, which have no state plans, the first level is an informal meeting with the worker and insurer aimed at reaching a voluntary agreement.²²¹ All states provide at some point for a formal hearing before an administrative law judge (ALJ) or similar official, followed in most states by appeal to a governing board.²²² After administrative remedies are exhausted, parties in all states may file suit in state court.

3. Benefit Payment and Termination

As with other wage replacement programs, workers' compensation benefits come in a regular disbursement, often with a significant lag time between application and payment.²²³ Benefits may be terminated when the state's maximum benefit duration is reached or when the worker is no longer medically eligible. A worker is no longer medically eligible when she recovers or reaches a state of maximum medical improvement, a point at which her condition is not expected to further improve.²²⁴

¹ SSA, 42 U.S.C. § 501 et seq.

² The FUTA currently imposes a 6.2% payroll tax on all employers. Companies in states with UI programs that meet minimum federal requirements can credit state UI payroll taxes against the federal rate (a process that creates an effective federal tax of 0.8%). Companies in states without approved UI plans are forced to pay the full amount. States without approved UI programs are also ineligible for federal grants that cover administrative costs associated with operating a UI program. FUTA, 26 U.S.C. §§ 3301, 3306(b); SSA, 42 USC § 501-504; see also Office of Workforce Security, U.S. Dep't of Labor, Comparison of State Unemployment Laws 2-1 (2009), available at <http://www.ows.doleta.gov/unemploy/uilawcompar/2009/comparison2009.asp> [hereinafter Comparison of State Unemployment Laws]; Kathleen Romig & Julie Whittaker, U.S. Cong. Research Service, The Unemployment Trust Fund (UTF): State Insolvency and Federal Loans to States 1 (2009), available at <http://wikileaks.org/leak/crs/RS22954.pdf>; 26 U.S.C. § 3302; 42 U.S.C. §§ 501-02.

³ This section aims, wherever possible, to describe generally applicable features of the UI system. However, in order to avoid citing to all 50 state laws, the programs in Arkansas, California, New Jersey, and Wisconsin are used to illustrate a handful of points.

⁴ 26 U.S.C. § 3306(a)(1). Because FUTA has unique tax exemptions for certain organizations (including nonprofits, state governments, and Indian tribes), subsequent amendments to FUTA have created affirmative requirements for states to cover these groups. Comparison of State Unemployment Laws, *supra* note 2, at 1-2.

⁵ 26 U.S.C. §§ 3306(A)(2)-(3).

⁶ California, for instance, eschews the higher coverage threshold for the agricultural industry, effectively including small farms and other agricultural units in the standard employer definition. Comparison of State Unemployment Laws, *supra* note 2, at 1-2 to 1-3.

⁷ For example, California only requires an entity to pay over \$100 in a quarter to be an "employer" for UI purposes. Cal. Unemp. Ins. Code § 675.

⁸ The ABC test defines employee as any worker *other than those who*: (A) are free from control or direction in the performance of the work; (B) conduct work outside the usual course of the company's business and off the premises of the business; and (C) are customarily engaged in an independent trade, occupation, profession, or business. *Id.* at 1-5. See also Nat'l Employment Law Project, Use the Broad "ABC" Test to Define Employer-Employee Relationships, available at http://nelp.bluestatedigital.com/page/-/UI/cwce_book/Employer-EmployeeRelationships.pdf

⁹ For example, in California an applicant must have earned \$1,300 in at least one of the past four quarters or earned at least \$900 in her highest quarter and at least \$1,125 total in the past four quarters. Cal. Unemp. Ins. Code § 1281(a). The New Jersey formula instead uses "average base weeks." New Jersey applicants must have earned at least \$143 (the current average base week amount) in 20 weeks during the past year or earned 1,000 times the minimum wage total in the past year. N.J. Stat. Ann. § 43:21-4(e)(4); N.J. Dep't of Labor and Workforce Dev., What is Needed to Qualify? Did I Earn Enough?, <http://lwd.dol.state.nj.us/labor/ui/calc/needqualify.html>. See also Office of Workforce Security, U.S. Dep't of Labor, Significant Provisions of State Unemployment Insurance Laws (2009), available at <http://www.ows.doleta.gov/unemploy/content/sigpros/2000-2009/July2009.pdf> [hereinafter Significant Provisions].

¹⁰ See e.g., Ark. Code Ann. § 11-10-507; Cal. Unemp. Ins. Code § 1253; N.J. Stat. Ann. § 43:21-4; Wis. Stat. § 108.04(2).

¹¹ See Comparison of State Unemployment Laws, *supra* note 2, at 5-2; Nat'l Employment Law Project, Federal Stimulus Funding Produces Unprecedented Wave of State Unemployment Insurance Reforms 2,7 (2009), available at <http://www.nelp.org/page/-/UI/UIIMA.Roundup.June.09.pdf?nocdn=1>

¹² Nat'l Employment Law Project, *supra* note 11, at 7.

¹³ The "highest maximum" does not include dependency benefits, which Massachusetts and several other high paying states have. Massachusetts also has the highest maximum when dependency benefits are considered. See Significant Provisions, *supra* note 9.

¹⁴ Ark. Code Ann. § 11-10-504; Cal. Unemp. Ins. Code § 1281(b); N.J. Stat. Ann. § 43:21-3(d)(2); Wis. Stat. § 108.06(1). See also Significant Provisions, *supra* note 9.

¹⁵ Ark. Code Ann. § 11-10-507(4); Cal. Unemp. Ins. Code § 1253(d).

¹⁶ Comparison of State Unemployment Laws, *supra* note 2, at 4-1.

¹⁷ Nat'l Employment Law Project, *supra* note 11, at 1; see American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 §§ 2001, 2002, 2005, 123 Stat. 115;

¹⁸ Unemployment Compensation Extension Act of 2010, Pub. L. No. 111-205, 124 Stat. 2236.

¹⁹ 42 U.S.C. §§ 501-02. See also Office of Workforce Security, U.S. Dep't of Labor, Unemployment Compensation Federal-State Partnership 16 (2009), available at <http://www.ows.doleta.gov/unemploy/pdf/partnership.pdf>; Julie M. Whittaker & Christine Scott, U.S. Cong. Research Office, Unemployment Compensation (UC) and the Unemployment Trust Fund (UTF): Funding UC Benefits 6 (2008), available at <http://file.wikileaks.org/file/crs/RS22077.pdf>

²⁰ Three states, Alaska, New Jersey, and Pennsylvania, also require a minimal employee tax. Office of Workforce Security, *supra* note 19, at 12.

²¹ See generally Significant Provisions, *supra* note 9.

²² Comparison of State Unemployment Laws, *supra* note 2, at 2-6; Significant Provisions, *supra* note 9. The use of state experience ratings is allowed under FUTA. 26 U.S.C. § 3303(a).

²³ See 42 U.S.C. § 503 (explaining the state UI requirements).

²⁴ Comparison of State Unemployment Laws, *supra* note 2, at 1-7.

²⁵ See Cal. Employment Dev. Dep't, Information You Need to File an Unemployment Claim, available at http://www.edd.ca.gov/pdf_pub_ctr/de2326.pdf; Cal. Employment Dev. Dep't, Before You Start: Information You Need to Apply for UI, http://www.edd.ca.gov/Unemployment/Before_you_Start.htm; N.J. Dep't of Labor and Workforce Dev., What Do You Need To File Your Unemployment Claim Over the Internet?, <https://njsuccess.dol.state.nj.us/njsuccess/html/fileAClaimHome.htm>; Wis. Dep't of Workforce Dev., What Information Do I Need to Apply?, http://www.dwd.state.wi.us/uiben/information_needed.htm; Ark. Dep't of Workforce Services, Application for Unemployment Insurance Benefits, available at http://www.dws.arkansas.gov/UI/PDF/PDF501_BLANK.pdf

²⁶ Ark. Code Ann. § 11-10-521(b), -522; Cal. Unemp. Ins. Code §§ 1327-29; N.J. Stat. Ann. § 43:21-6; Wis. Stat. § 108-03.

²⁷ 42 U.S.C. § 503(a)(3); Comparison of State Unemployment Laws, *supra* note 2, at 7-1.

²⁸ Comparison of State Unemployment Laws, *supra* note 2, at 7-1.

²⁹ See, e.g., Ark. Dep't of Workforce Services, Appealing a UI Determination, Hearing Dates/Times/Locations and Notices, <http://www.state.ar.us/esd/Programs/Appeals/AppealGuide.htm>

³⁰ Comparison of State Unemployment Laws, *supra* note 2, at 7-4.

³¹ Cal. Dep't of Human Res. Dev. v. Java, 402 U.S. 121 (1971).

³² See, e.g., Cal. Employment Dev. Dep't, A Guide to Benefits and Employment Services 13, available at http://www.edd.ca.gov/pdf_pub_ctr/de1275a.pdf

³³ *Id.* at 13, 24.

³⁴ Unemployment Insurance Program Letter No. 23-10 (letter from Jane Oates, Assistant Sec. of Labor, to State Workforce Agencies) 5 (Apr. 30, 2010), available at <http://wdr.doleta.gov/directives/attach/UIPL/UIPL23-10acc.pdf>. Compliance varies: fourteen states achieved the goal for every month in 2009, while six states and the District of Columbia missed the goal every month. Office of Workforce Security, Dep't of Labor, Benefits Timeliness and Quality (BTQ) Reports of State Workforce Agencies, available at <http://workforcesecurity.doleta.gov/unemploy/btq.asp>.

³⁵ Cal. Employment Dev. Dep't, FAQ, How Do I End My Claim?, http://www.edd.ca.gov/Unemployment/FAQ_-_Collecting_Benefits.htm#Howdolendmyclaim; Ark. DWS, Your Unemployment Insurance Information Handbook 12 (2009), available at [http://www.state.ar.us/esd/ARClaimHelp/500%20BOOKLET%20\(2009\).pdf](http://www.state.ar.us/esd/ARClaimHelp/500%20BOOKLET%20(2009).pdf).

³⁶ See, e.g., N.J. Dep't of Labor and Workforce Dev., Requirements For Payment Report Part Time Earnings, <http://lwd.dol.state.nj.us/labor/ui/claim/ptwages.html>

³⁷ See Cal. Unemp. Ins. Code §§ 2601 - 3306 (2005); Haw. Rev. Stat. § 392 (2005); N.J. Stat. Ann. § 43:21-25 to 43:21-65 (2005); N.Y. Workers' Comp. Law §§ 200 - 242 (2005); P.R. Laws Ann. tit. 11, §§ 201 - 212 (2005); R.I. Gen. Laws §§ 28-39-1 to 28-41-33 (2005).

³⁸ R.I. Gen. Laws §§ 28-39-1, 28-41-33 (2005).

³⁹ Cal. Unemp. Ins. Code §§ 2601 - 3306 (2005); N.J. Stat. Ann. § 43:21-25, 43:21-71 (2005). New Jersey only requires that private plans meet state requirements while California requires that they must exceed the public benefits in at least one category.

⁴⁰ While NY state law requires employers to buy TDI insurance, NY allows its State Insurance Fund, a quasi-public entity created to offer worker's compensation insurance, to offer TDI coverage as well. Hawaii, on the other hand, imposes a truly private mandate: the state issues guidelines on basic TDI coverage requirements, but offers no public or quasi-public TDI plan. Employers can select from a list of approved private insurers or choose to self-insure. N.Y. Workers' Comp. Law §§ 200 - 242 (2005); Haw. Rev. Stat. § 392 (2005)

⁴¹ California, New Jersey, and Rhode Island use the same definitions as for their UI programs, with some exceptions. Cal. Unemp. Ins. Code § 2606; N.J. Stat. Ann. § 43:21-27(a); R.I. Gen. Laws §§ 28-39-2(12), 28-42-3(15). Hawaii and New York include all individuals or organizations employing one or more person, though New York excludes part-time domestic services. Haw. Rev. Stat. § 392-3; N.Y. Workers' Comp. Law § 202.

⁴² N.Y. Workers' Comp. Law § 203.

⁴³ California requires that applicants have earned at least \$300 in the base period preceding disability (typically 5-17 months based on the month the claim begins). Cal. Unemp. Ins. Code § 2652. Rhode Island requires applicants to have either (A) \$8,880 in earnings during the base period (the first four of the last five completed calendar quarters or the last four completed quarters) OR (B) \$1,480 earnings in one base period quarter, and total base period earnings of at least 1.5 times the highest quarter earnings or \$2,960, whichever is higher. See R.I. Gen. Laws § 28-41-11 (setting earnings requirements as a function of the state hourly minimum wage, which is currently \$7.40)

⁴⁴ N.J. Stat. Ann. § 43:21-41; N.J. Dep't of Labor and Workforce Dev., Wage Requirements—State Plan, http://lwd.dol.state.nj.us/labor/tdi/content/sp_wage_requirements.html (noting current eligibility requirement dollar amounts); see also N.J. Stat. Ann. § 43:21-32 (noting that private plans must have eligibility requirements at least as liberal as state plans).

⁴⁵ The 14 weeks need not be consecutive nor with a single employer. Haw. Rev. Stat. § 392-6, -25.

⁴⁶ Haw. Rev. Stat. § 392-23; N.J. Stat. Ann. § 43:21-38; N.Y. Workers' Comp. Law § 205;

⁴⁷ Cal. Unemp. Ins. Code § 2653; R.I. Gen. Laws § 28-41-7.

⁴⁸ Cal. Unemp. Ins. Code §§ 2653, 2655; Cal. Employment Dev. Dep't., Disability Insurance Benefits, http://www.edd.ca.gov/disability/DI_Benefit_Amounts.htm (noting 2010 weekly benefit range)

⁴⁹ Haw. Rev. Stat. §§ 392-22 to 392-23; Haw. Dep't of Labor and Ind. Relations, Frequently Asked Questions, <http://hawaii.gov/labor/dcd/dcd-links/frequently-asked-questions> (noting 2009 weekly benefit range)

⁵⁰ N.J. Stat. Ann. §§ 43:21-38 to 43:21-40; N.J. Dep't of Labor and Workforce Dev., Benefit Calculations—State Plan Employer, http://lwd.dol.state.nj.us/labor/tdi/employer/state/sp_emp_benefit_calculations.html (noting 2010 weekly benefit maximum)

⁵¹ N.Y. Workers' Comp. Law § 204.

⁵² R.I. Gen. Laws §§ 28-41-5, 28-41-7; R.I. Dep't of Labor and Training, Temporary Disability Insurance Frequently Asked Questions, <http://www.dlt.ri.gov/tdi/tdifaqs.htm> (noting 2010 weekly benefit range)

⁵³ Cal. Unemp. Ins. Code § 2627(b); Haw. Rev. Stat. § 392-24; N.J. Stat. Ann. § 43:21-38; N.Y. Workers' Comp. Law § 204(1); R.I. Gen. Laws § 28-41-12.

⁵⁴ N.J. Stat. Ann. § 43:21-39; R.I. Gen. Laws § 28-41-12.

⁵⁵ Cal. Unemp. Ins. Code § 2627(b); Haw. Rev. Stat. § 392-24; N.Y. Workers' Comp. Law § 204(1).

⁵⁶ In Hawaii, employers must contribute at least 50% of program costs; employees provide up to 50% of program costs, but their contributions are capped at 0.5% of average weekly earnings. Haw. Rev. Stat. § 392-43. New Jersey is one of the few states to directly tax employers for the TDI program. Employers pay between 0.1% and 0.75% of the first \$29,700 of annual earnings for their employees. N.J. Stat. Ann. § 43:21-7(e). New Jersey employees pay 0.5% on their first \$29,700 in annual earnings. *Id.* § 43:21-7(d)(1)(G)(i). See also N.J. Dep't of Labor & Workforce Dev., State Disability Benefits—Cost to the Worker: State Plan, http://lwd.dol.state.nj.us/labor/tdi/worker/state/sp_cost.html; Sedgwick CMS, SDI Chart 2010, available at <http://www.vpaweb.com/about/pdf/SDI.pdf>.

⁵⁷ See *id.* (noting that all contributions beyond employee limits come from employers); N.Y. Workers' Comp. Law § 209

⁵⁸ Cal. Unemp. Ins. Code § 2901; R.I. Gen. Laws § 28-40-1.

⁵⁹ R.I. Dep't of Labor & Training, Temporary Disability Insurance Frequently Asked Questions, <http://www.dlt.ri.gov/tdi/tdifaqs.htm>; see Cal. Unemployment Ins. Appeals Bd., Welcome to the California Unemployment Insurance Appeals Board, <http://www.cuiab.ca.gov/index.shtm> (noting that the board "conducts hearings of cases concerning claims for unemployment and disability benefits"); NJ Stat. Ann. § 43:21-32.

⁶⁰ N.Y. State Ins. Fund, About NYSIF, <http://ww3.nysif.com/AboutNYSIF.aspx>.

⁶¹ *Id.*

⁶² Haw. Rev. Stat. § 392-41(a). The state maintains a special state fund for unemployed workers and employed workers whose employers have gone bankrupt or has failed to comply with the private-insurance requirement. *Id.* § 292-61 to -69.

⁶³ See Haw. Rev. Stat. § 392-41(d).

⁶⁴ R.I. Dep't of Labor & Training, How Can I file a Temporary Disability Insurance Claim, <http://www.dlt.ri.gov/tdi/TDIfile.htm>; N.Y. State Ins. Fund, Filing Claims, <http://ww3.nysif.com/DisabilityBenefits/ClaimantServices/FilingClaims.aspx>; Cal. Employment Dev. Dep't, Claim for Disability Insurance Benefits, http://www.edd.ca.gov/pdf_pub_ctr/de2501.pdf; N.J. Dep't of Labor and Workforce Dev., Claim for Disability Benefits DS-1, <http://www.state.nj.us/labor/tdi/WDS1.pdf>; Haw. Dep't of Labor and Ind. Relations, Form TDI-45, <http://www.alohainsurance.com/files/tdi-claim.pdf>.

⁶⁵ N.Y. State Ins. Fund, *supra* note 64; N.J. Dep't of Labor and Workforce Dev., *supra* note 64; Haw. Dep't of Labor and Ind. Relations, *supra* note 64.

⁶⁶ See N.Y. Workers' Comp. Law § 203 (requiring a claim to be filed within 30 days); Cal. Unemp. Ins. Code § 2706.1 (requiring a claim to be filed by the 41st compensable day); Cal. Employment Dev. Dep't, *supra* note 64 (noting that the filing window totals 49 days); Haw. Admin. R. § 12-11-35 (requiring good cause to be shown for providing full benefits when claim is filed more than 90 days after disability, and providing that claims filed more than 26 weeks after date of disability shall be automatically rejected).

⁶⁷ Haw. Admin. R. § 12-11-45; N.J. Admin. Code § 12:18-3.2; R.I. Dep't of Labor & Training, TDI for Qualified Healthcare Providers, <http://www.dlt.state.ri.us/tdi/pdf/tdiQHPbrochure.pdf>; N.Y. State Ins. Fund, Form DB-450: Notice and Claim and Proof of Claim for Disability Benefits, <http://ww3.nysif.com/EyebrowPages/Forms.aspx#dbclaim>; Cal. Employment Dev. Dep't, *supra* note 64;

⁶⁸ Cal. Employment Dev. Dep't, The Medical Provider's Guide to Disability Insurance, http://www.edd.ca.gov/pdf_pub_ctr/de2548.pdf; See R.I. Dep't of Labor & Training, Frequently Asked Questions for Qualified Healthcare Professionals, <http://www.dlt.state.ri.us/tdi/Faq4qhp.htm>.

⁶⁹ N.J. Stat. Ann. § 43:21-49(a)(2); N.Y. Workers' Comp. Law § 217; Haw. Admin. R. § 12-11-35; Cal. Unemp. Ins. Code § 2708(g); R.I. Gen. Laws § 28-39-12.

⁷⁰ R.I. Gen. Laws § 28-40-07.

⁷¹ Cal. Unemp. Ins. Code § 2707.5

⁷² N.Y. State Workers' Comp. Bd., Hearings and Appeals, http://www.wcb.state.ny.us/content/main/onthejob/hearings_OTJ.jsp

⁷³ N.J. Stat. Ann. § 43:21-50(b).

⁷⁴ N.J. Admin. Code 12:20-4.1

⁷⁵ N.J. Stat. Ann. § 43:21-50; N.J. Admin. Code § 1:12A-9.1

⁷⁶ Haw. Admin. R. § 12-11-41

⁷⁷ *Id.*

⁷⁸ Haw. Rev. Stat. § 392-75; R.I. Bd. of Review, Unemployment Insurance and Temporary Disability Insurance, <http://www.dlt.state.ri.us/bor/>; N.Y. State Workers' Comp. Bd., *supra* note 74; Cal. Employment Dev. Dep't, Appeals, <http://www.edd.ca.gov/Disability/Appeals.htm>; N.J. Dep't of Labor and Workforce Dev., Right to Further Appeal, http://lwd.dol.state.nj.us/labor/at/content/bor_further_appeal.html.

⁷⁹ Cal. Employment Dev. Dep't, Frequently Asked Questions for Disability Insurance, http://www.edd.ca.gov/Disability/FAQs_for_Disability_Insurance.htm; N.J. Dep't of Labor and Workforce Dev., Payment, http://lwd.dol.state.nj.us/labor/tdi/worker/state/sp_payments.html.

⁸⁰ R.I. Dep't of Labor & Training, *supra* note 60.

⁸¹ N.Y. Workers' Comp. Law § 208

⁸² *Id.* § 205; R.I. Dep't of Labor & Training, TDI Partial Return to Work Program <http://www.dlt.ri.gov/tdi/pdf/tdiPartialRTW.pdf>; Cal. Employment Dev. Dep't, *supra* note 79; N.J. Dep't of Labor and Workforce Dev., *supra* note 79.

⁸³ N.Y. Workers' Comp. Law § 205; R.I. Dep't of Labor & Training, *supra* note 82; Cal. Employment Dev. Dep't, *supra* note 79; N.J. Dep't of Labor and Workforce Dev., Frequently Asked Questions, NJ TDI, <http://lwd.dol.state.nj.us/labor/tdi/content/faq.html>.

⁸⁴ See N.J. Stat. Ann. § 43:21-55; R.I. Dep't of Labor & Training, TDI What Employers Need To Know, <http://www.dlt.state.ri.us/tdi/pdf/tdiforEmployers.pdf>; N.Y. State Ins. Fund, Detecting Fraud, <http://ww3.nysif.com/Home/SafetyRiskManagement/RiskManagement/LimitingLiability/DetectingFraud.aspx>; Cal. Employment Dev. Dep't, Report Fraud, http://www.edd.ca.gov/Disability/Report_Fraud.htm.

⁸⁵ Cal. Unemp. Ins. Code §§ 3300-06.

⁸⁶ See N.J. Stat. Ann. § 43:21-39.4(b)(2) (describing the program as Family Leave Insurance).

⁸⁷ Rachel La Corte, *Some WA programs laws in name only*, Seattle Times, May 30, 2010, available at http://seattletimes.nwsource.com/html/localnews/2011991761_apwawalawsinlimbo1stldwritethru.html.

⁸⁸ See Cal. Unemp. Ins. Code § 3301; N.J. Stat. Ann. §§ 43:21-39.1 to 39.4.

⁸⁹ See Cal. Employment Dev. Dep't, PFL Program Statistics, http://www.edd.ca.gov/Disability/pdf/PFL_Program_Statistics.pdf; N.J. Dep't of Labor and Workforce Dev., Family Leave Insurance—Program Statistics, http://lwd.dol.state.nj.us/labor/fli/content/monthly_report_fli.html. Notably, only 76% of caregiving claims filed in New Jersey are approved, while 89% of newborn bonding claims are approved. See N.J. Dep't of Labor and Workforce Dev., *supra* this note.

⁹⁰ See Cal. Employment Dev. Dep't, PFL Program Statistics, http://www.edd.ca.gov/Disability/pdf/PFL_Program_Statistics.pdf; N.J. Dep't of Labor and Workforce Dev., Family Leave Insurance—Program Statistics, http://lwd.dol.state.nj.us/labor/fli/content/monthly_report_fli.html.

⁹¹ See Cal. Unemp. Ins. Code § 2627; N.J. Stat. Ann. §§ 43:21-37.

⁹² Cal. Unemp. Ins. Code § 3303.1.

⁹³ Cal. Unemp. Ins. Code §§ 2655, 3301.

⁹⁴ Cal. Employment Dev. Dep't, Disability Insurance (DI) and Paid Family Leave (PFL) Weekly Benefit Amounts in Dollar Increments (2010), http://www.edd.ca.gov/pdf_pub_ctr/de2589.pdf.

⁹⁵ N.J. Stat. Ann. § 43:21-40.

⁹⁶ N.J. Dep't of Labor and Workforce Dev., Family Leave Insurance Fact Sheet, http://lwd.dol.state.nj.us/labor/fli/content/fli_fact_sheet.html.

⁹⁷ *Id.*; N.J. Stat. Ann. § 43:21-39. Where PFL/FLI immediately follows an eligible period of temporary disability for the recipient's own condition (such as for pregnancy), there is no waiting period. N.J. Stat. Ann. § 43:21-39; Cal. Employment Dev. Dep't, *supra* note 79.

⁹⁸ N.J. Stat. Ann. § 43:21-39.3(a).

⁹⁹ *Id.* § 43:21-39.2(a).

¹⁰⁰ Cal. Unemp. Ins. Code § 3302.1. The seven-day waiting period may therefore be served on non-consecutive days. *Id.* § 3303(b); Cal. Code Regs. tit. 22, § 3303 (b)-1.

¹⁰¹ Cal. Employment Dev. Dep't, Part-Time Worker/Intermittent/Reduced Work Schedule, available at http://www.edd.ca.gov/Disability/PFL_Part-time_Worker.htm.

¹⁰² N.J. Stat. Ann. § 43:21-39.3(a), § 43:21-39.2.

¹⁰³ See N.J. Stat. Ann. § 43:21-39.4(b)(2); Cal. Employment Dev. Dep't, *supra* note 96.

¹⁰⁴ Cal. Employment Dev. Dep't, *supra* note 96; N.J. Dep't of Labor and Workforce Dev., FLI Poster, available at http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/fli_poster.pdf.

¹⁰⁵ Cal. Employment Dev. Dep't, Paid Family Leave Sample Form, http://www.edd.ca.gov/pdf_pub_ctr/de2501f-sample.pdf; N.J. Dep't of Labor and Workforce Dev., Form FL-1, http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/complete_fli_R11_09.pdf.

¹⁰⁶ N.J. Dep't of Labor and Workforce Dev., *supra* note 104.

¹⁰⁷ N.J. Stat. Ann. § 43:21-39.2(a); For intermittent caregiving leave, 15 days notice must be provided.

¹⁰⁸ *Id.* § 12:21-3.5(c); N.J. Stat. Ann. § 43:21-39.1; Cal. Unemp. Ins. Code § 3303.1.

¹⁰⁹ Cal. Unemp. Ins. Code § 3306; N.J. Stat. Ann. § 43:21-39.2(c).

¹¹⁰ See Cal. Employment Dev. Dep't, *supra* note 78; N.J. Stat. Ann. § 43:21-39.1(e) (stating that rights to appeal under FLI shall be the same as TDI and that the same regulations shall apply).

¹¹¹ E.g., N.J. Stat. Ann. § 43:21-42(a) (stating that all disability benefits paid out under the TDI/FLI law shall be subject to the same laws and regulations as unemployment compensation).

¹¹² Cal. Employment Dev. Dep't, *supra* note 96; N.J. Dep't of Labor and Workforce Dev., FLI FAQ's http://lwd.dol.state.nj.us/labor/fli/content/fli_faq.html.

¹¹³ N.J. Stat. Ann. § 43:21-39.3(c); Cal. Unemp. Ins. Code § 3302.1.

¹¹⁴ Social Security Administration, Social Security a Brief History 6 (2007).

¹¹⁵ Soc. Sec. Admin., Annual Statistical Report on the Social Security Disability Insurance Program 18-19 (2009).

¹¹⁶ See 42 U.S.C. § 402(a) (2009); 20 C.F.R. § 404.110 (2008).

¹¹⁷ See 42 U.S.C. § 426(l) (2009); 20 C.F.R. § 404.409 (2008).

¹¹⁸ 42 U.S.C. § 402(b)-(c) (2008); 20 C.F.R. § 404.330 (2009).

¹¹⁹ 42 U.S.C. § 402(d) (2009); 20 C.F.R. § 404.350.

¹²⁰ 42 U.S.C. §§ 402(b), 416(d) (2009); 20 C.F.R. § 404.336 (2008).

¹²¹ 42 U.S.C. §§ 402(d), 416(e) (2009); 20 C.F.R. § 404.357-8. (2008).

¹²² 42 U.S.C. § 413(a) (2009); 20 C.F.R. § 404.110 (2008).

¹²³ 42 U.S.C. § 413(a) (2009); 20 C.F.R. § 404.110 (2008).

¹²⁴ Soc. Sec. Admin., Quarter of Coverage, <http://www.ssa.gov/OACT/COLA/QC.html#qcseries>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 42 U.S.C. §§ 402(e), 416(c) (2009), 20 C.F.R. § 404.335 (2008).

¹²⁸ 42 U.S.C. §§ 402(e), 416(c) (2009), 20 C.F.R. § 404.335 (2008).

¹²⁹ 42 U.S.C. §§ 402(d), 416(c) (2009); 20 C.F.R. § 404.350 (2008).

¹³⁰ 42 U.S.C. §§ 402(d), 416(e) (2009); 20 C.F.R. § 404.357-8 (2008).

¹³¹ 42 U.S.C. §§ 416(i)(1), 423(d) (2009); 20 C.F.R. § 404.1505 (2008).

¹³² 20 C.F.R. § 404.1512(a) (2008) (requiring applicants to "prove" their case using objective evidence) pursuant to 42 U.S.C. § 423(d)(5)(A) (2009) (granting SSA authority to define objective evidence).

¹³³ 42 U.S.C. § 423(d)(5)(B) (2009), 20 C.F.R. § 404.1512(d).

¹³⁴ This number increases with age, and workers over the age of 24 must earn some of their credits within a certain time period before they became disabled. 42 U.S.C. § 423(c)(1).

¹³⁵ See 42 U.S.C. §§ 413-15 (2009).

¹³⁶ Soc. Sec. Admin., What's the Average Monthly Benefit?, http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/13.

¹³⁷ See 42 U.S.C. § 403(f) (2009), 20 C.F.R. § 404.430 (2008).

¹³⁸ Soc. Sec. Admin., How Work Affects Your Benefits, <http://www.ssa.gov/pubs/10069.html#howmuch>. In the taxable year where a beneficiary reaches full retirement age, the person only loses 1 dollar for every three dollars of benefits earned above the monthly exempted level (\$37,680 in 2010). *Id.*

¹³⁹ Soc. Sec. Admin., Survivors Benefits 8-9 (2009), available at <http://www.ssa.gov/pubs/10084.pdf>.

¹⁴⁰ *Id.* at 6.

¹⁴¹ *Id.* at 9.

¹⁴² 42 U.S.C. § 402(i), 20 C.F.R. § 404.390 (2008).

¹⁴³ 42 U.S.C. § 423(a)(2) (2009), 20 C.F.R. § 404.317 (2008).

¹⁴⁴ See 42 U.S.C. § 426(l) (2009); 20 C.F.R. § 404.409 (2008); Soc. Sec. Admin., *supra* note 114.

¹⁴⁵ 42 U.S.C. § 423(c)(2); C.F.R. § 404.315.

¹⁴⁶ Congressional Budget Office, Historical Budget Tables 9 (2009).

¹⁴⁷ Kathleen Romig, Cong. Research Service, Social Security Administration: Administrative Budget issues 1 (2008).

¹⁴⁸ *Id.*

¹⁴⁹ I.R.C. §§ 1401, 3101, 3111. See also Soc. Sec. Admin., Contribution and Benefit Base (2010), <http://www.ssa.gov/OACT/COLA/cbb.html>.

¹⁵⁰ Soc. Sec. Admin., How to Apply for Benefits, <http://www.ssa.gov/retire2/applying8.htm>.

¹⁵¹ *Id.*

¹⁵² Soc. Sec. Admin., Information You'll Need When You Apply for Retirement Benefits or Medicare, <http://www.ssa.gov/online/ssa-1.html>.

¹⁵³ Soc. Sec. Admin., Survivor Benefits 7 (2009), available at <http://www.ssa.gov/pubs/10084.pdf>.

¹⁵⁴ The Social Security Act only provides for an evidentiary hearing, but it gives wide latitude to the SSA to develop regulations and procedures to certify all OASDI claims. See 42 U.S.C. § 405(b)(1) (2009). The SSA sets forward the requirements for reconsideration at 20 C.F.R. § 404.909(a)(1) (2008).

¹⁵⁵ 20 C.F.R. § 404.933 (2008).

¹⁵⁶ *Id.* § 404.967 (2008).

¹⁵⁷ *Id.* § 404.981 (2008).

¹⁵⁸ 42 U.S.C. § 402.

¹⁵⁹ See *id.* § 403.

¹⁶⁰ See 42 U.S.C. § 421(a)(1) (2009).

¹⁶¹ See generally Part III Background Material, Legislative History, The Development of the Disability Program Under Old-Age Survivors Insurance, 1935-74, available at <http://www.ssa.gov/history/pdf/dibreport.pdf>.

¹⁶² Soc. Sec. Admin., FY2009 Budget Justification 100 (2009).

¹⁶³ 26 U.S.C. ch. 21.

¹⁶⁴ Soc. Sec. Admin., Information You'll Need When You Apply for Disability Benefits, <http://www.ssa.gov/online/ssa-16.html>.

¹⁶⁵ See Disability Report—Adult—Form SSA-3368-BK, available at www.ssa.gov/online/ssa-3368.pdf.

¹⁶⁶ 42 U.S.C. §§ 405(a), 20 C.F.R. § 404.1520(a) (2008).

¹⁶⁷ See 42 U.S.C. § 421(j) (2009), 20 C.F.R. § 404.1509(a) (2008).

¹⁶⁸ Soc. Sec. Admin., FY2007 Performance And Accountability Report, 68 (2007). This is down from 106 days in 2001. *Id.*

¹⁶⁹ Office of the Inspector Gen., Soc. Sec. Admin., National Rollout of Quick Disability Determinations 1 (2009).

¹⁷⁰ Soc. Sec. Admin., *supra* note 114, at 138.

¹⁷¹ Nat'l Acad. Comm. on Improving the Disability Decision Process, Improving the Social Security Disability Decision Process: Interim Report 1 (2006).

¹⁷² Often reluctant to overturn the decisions of their coworkers, DDS staffers confirm denials about 90% of the time. Soc. Sec.

Admin., *supra* note 114, at 140. At least part of the high success rate at the ALJ level is due to the fact that most applicants seek legal representation after receiving a denial at the reconsideration stage. Lynda Yamamoto, A Primer on Social Security Disability Insurance Law, 256-FEB N.J. Law 47 (2009).

¹⁷³ GAO, Disability Delivery Challenges 8 (2007).

¹⁷⁴ At that point retirement benefits convert from disability insurance to retirement insurance.

¹⁷⁵ 20 C.F.R. § 404.1590 (2008), see 42 U.S.C. § 425(a) (2009).

¹⁷⁶ 42 U.S.C. § 403(h) (2009), 20 C.F.R. § 404.1588 (2008).

¹⁷⁷ Federal law requires this but allows the SSA to create procedures to implement the requirement. 42 U.S.C. § 403(h) (2009). The SSA sets forward these regulations at 20 C.F.R. § 404.452 (2008).

¹⁷⁸ 20 C.F.R. § 404.1590(a), (c)-(d) (2008). The interval depends on the beneficiary's likelihood of improvement: those with normal improvement prospects are reviewed every 6-18 months, while those with only a small possibility of progress are reviewed every 3-5 years and those not ever expected to improve are reviewed every 5-7 years. *Id.* § 404.1590(c)-(d) (2008).

¹⁷⁹ Soc. Sec. Admin., Working While Disabled—How We Can Help, <http://www.socialsecurity.gov/pubs/10095.html#part3>.

¹⁸⁰ 20 C.F.R. § 411.125; Ticket to Work, What is the Ticket to Work Program, http://www.yourtickettowork.com/program_info.

¹⁸¹ See Soc. Sec. Admin., *supra* note 167, at 83.

¹⁸² See, e.g., Cal. Lab. Code § 3600.

¹⁸³ See Nat'l Acad. of Soc. Ins., Workers' Compensation: Benefits, Coverage, and Costs 2008 7 (2010), available at http://www.nasi.org/usr_doc/Workers_Comp_Report_2008.pdf. Citations in this section refer primarily to the WC programs in California, Iowa, Massachusetts, New York, North Dakota, and Texas.

¹⁸⁴ *Id.*; Douglass E. Hyatt, *Risk Shifting in Workers' Compensation*, in *Pay at Risk: Compensation and Unemployment Risk in the United States and Canada* 161, 161 (John A. Turner ed., 2001).

¹⁸⁵ Nat'l Acad. of Soc. Ins., *supra* note 183, at 2.

¹⁸⁶ *Id.* at 8.

¹⁸⁷ *Id.* at 2.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 5. Between 2007 and 2008, benefits paid out rose \$2.4 billion even as administrative costs and premiums dropped by \$8.1 billion. *Id.* at 2. As a percentage of covered wages, however, 2008 benefits were the lowest since 1980. *Id.* at 5.

¹⁹⁰ See *id.* at 8.

¹⁹¹ Arkansas, Georgia, Michigan, New Mexico, North Carolina, Virginia, and Wisconsin exempt employers with fewer than 3 workers. See *id.* Florida and South Carolina exempt employers with fewer than 4 workers. *Id.* Alabama, Mississippi, Missouri, and Tennessee exempt employers with fewer than 5 workers. *Id.* Eleven states (in addition to Texas) exempt farm employees. *Id.* States may impose numerous other exemptions; for instance, New York exempts from mandatory coverage all business partners, self-employed persons, sole and dual shareholder/officers, state and municipal workers in hazardous occupations, and executive officers of religious, charitable, educational, and veterans' organizations. N.Y. Workers' Comp. Law §§ 2, 3, 10 (McKinney 2008).

¹⁹² 5 U.S.C. ch. 81.

¹⁹³ Tex. Lab. Code Ann. §§ 406.002-406.004 (Vernon 2009).

¹⁹⁴ Workers' Comp. Research and Evaluation Group, Tex. Dep't of Ins., Employer Participation in the Texas Workers' Compensation System: 2008 Estimates 6-7 (2008), available at <http://www.tdi.state.tx.us/wc/regulation/roc/wcregnews.html> (click on hyperlink *Employer Participation in the Texas Workers' Compensation System: 2008 Estimates*).

¹⁹⁵ *Id.* at 16. About 52% percent of non-subscribers (covering 82% of the non-subscriber workforce) provide occupational benefits. *Id.* at 23. Of those, 70% cover medical costs and 68% say they pay wage replacement benefits. *Id.* at 27-28.

¹⁹⁶ Tex. Lab. Code Ann. § 406.033.

¹⁹⁷ See, e.g., Tex. Lab. Code Ann. §§ 406.031, .091 (including all employees except those with specific exemptions); Cal. Lab. Code § 3600 (stating that employer is liable for any injury subject certain conditions); N.D. Cent. Code § 65-01-02(10) (defining "compensable injury" as any injury arising out of employment)

¹⁹⁸ See *id.* Depending on the duration of the disability, most states may provide the waiting period cash benefits retroactively. See, e.g., Ala. Code § 25-5-59 (providing for a three day waiting period, with benefits to be paid retroactively to first day of incapacity if disability continues longer than 21 days).

¹⁹⁹ See Nat'l Acad. of Soc. Ins., *supra* note 182, at 9.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 9, 12.

²⁰⁵ *Id.* at 9.

²⁰⁶ *Id.* The 2008 maximum benefit amounts for temporary total disability ranged from \$1,366 in Iowa to \$398.93 in Mississippi. *Id.*

²⁰⁷ *Id.* at 12; see, e.g., Mass. Gen. Laws ch. 152, § 36.

²⁰⁸ Nat'l Acad. of Soc. Ins., *supra* note 182, at 12.

²⁰⁹ E.g., Cal. Lab. Code § 4658.6; Cal. Div. of Workers' Comp., Answers to Frequently Asked Questions About Workers'

Compensation for Employees, <http://www.dir.ca.gov/dwc/WCFaqIW.html>.

²¹⁰ See Nat'l Acad. of Soc. Ins., *supra* note 182, at 9

²¹¹ *Id.* at 16.

²¹² *Id.* Wyoming and North Dakota do not permit self-insurance and require employers to obtain coverage from the state funds. *Id.*; see N.D. Cent. Code § 65-04-04; Wyo. Stat. § 27-14-202. Washington permits self-insurance individually or by group. Doug McCoy, Workers' Compensation Insurance: The Survival Guide for Business 8.49 (2009). Ohio permits individual self-insurance. *Id.* at 8.37.

²¹³ Nat'l Acad. of Soc. Ins., *supra* note 182, at 13; see Cal. Lab. Code § 3700; N.Y. Workers' Comp. Law § 50. This number includes West Virginia, which is transitioning to a complete privatization of their state fund. See *West Virginia Touts Switch to Private Workers' Compensation System*, Ins. Journal, July 7, 2009, available at <http://www.insurancejournal.com/news/southeast/2009/07/07/102008.htm>; Nat'l Acad. of Soc. Ins., *supra* note 182, at 16.

²¹⁴ See, e.g., N.D. Cent. Code § 65-05-01 (noting that claim must be filed within one year of injury or two years of death); N.Y. Workers' Comp. Law § 28 (McKinney 2008) (stating that claim must be filed within two years of when the worker learned of the relation of the injury to his employment); Mass. Gen. Laws Ann. ch. 152, § 41 (requiring that claims be filed within four years of the accident).

²¹⁵ E.g., Mass. Gen. Laws Ann. ch. 152, § 7; Cal. Lab. Code § 4650.

²¹⁶ Cal. Lab. Code § 4650(d).

²¹⁷ N.Y. Workers' Comp. Law § 20 (giving 30 days to evaluate a claim); N.Y. State Ins. Dep't, Joint Report to the Governor from the Superintendent of Insurance and Chair, Workers' Compensation Board, Summarizing and Benchmarking Workers' Compensation Data and Examining Progress on Prior Recommendations for Improvements in Data Collection 11 (2009), available at <http://www.wcb.state.ny.us/content/main/TheBoard/2009DataCollectionReport.pdf>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ N.D. Workforce and Safety Ins., Disputing a Claim Decision, <http://www.workforcesafety.com/workers/disputingclaim.asp>.

²²¹ Mass. Exec. Office of Labor and Workforce Dev., What is a Conciliation, [http://www.mass.gov/?pageID=elwdterminal&L=4&LO=Home&L1=Government&L2=Departments+and+Divisions+\(EOLWD\)&L3=Division+of+Dispute+Resolution&sid=Elwd&b=terminalcontent&f=dispute_concil_what_is_a_conciliation&csid=Elwd](http://www.mass.gov/?pageID=elwdterminal&L=4&LO=Home&L1=Government&L2=Departments+and+Divisions+(EOLWD)&L3=Division+of+Dispute+Resolution&sid=Elwd&b=terminalcontent&f=dispute_concil_what_is_a_conciliation&csid=Elwd); Tex. Dep't of Ins., Dispute Resolution for Injured Workers, <http://www.tdi.state.tx.us/wc/employee/dispute.html>.

²²² Mass. Exec. Office of Labor and Workforce Dev., Industrial Accident Board, [http://www.mass.gov/?pageID=elwdterminal&L=4&LO=Home&L1=Government&L2=Departments+and+Divisions+\(EOLWD\)&L3=Division+of+Dispute+Resolution&sid=Elwd&b=terminalcontent&f=dispute_iab_index&csid=Elwd](http://www.mass.gov/?pageID=elwdterminal&L=4&LO=Home&L1=Government&L2=Departments+and+Divisions+(EOLWD)&L3=Division+of+Dispute+Resolution&sid=Elwd&b=terminalcontent&f=dispute_iab_index&csid=Elwd); Tex. Dep't of Ins., *supra* note 220; Cal. Div. of Workers' Comp., Workers' Compensation Appeals Board—How to File an Application for Adjudication of a Claim, <http://www.dir.ca.gov/dwc/iwguides/IWGuide04.pdf>; N.Y. State Workers' Comp. Bd., Hearings and Appeals, http://www.wcb.state.ny.us/content/main/onthejob/hearings_OTJ.jsp; Iowa Workforce Dev., Fiscal Year 2008 Annual Report 17 (2008), available at <http://www.iowaworkforce.org/report/AnnualReport2008Web.pdf>.

²²³ Massachusetts, one of the fastest states in payout time, saw 53.4% of 2008 claimants paid within 21 days. In 2009, only 19.7% of New York claimants were paid within the same window. N.Y. State Ins. Dep't, *supra* note 216, at 11.

²²⁴ E.g., Tex. Lab. Code § 408.102; see Tex. Dep't of Ins., Injured Employee's Benefits, <http://www.tdi.state.tx.us/wc/employee/benefits.html#iibs>.

Appendix B

Key Characteristics of Social Insurance Programs

Eligibility: Qualifying Events	
Unemployment Insurance (UI)	Individuals must have lost their job through no fault of their own and be unemployed as a result. ¹
Social Security Disability Insurance (SSDI)	Individuals must be blind or meet Social Security's definition of disability. ²
Social Security Survivors Insurance	Individuals become eligible for partial benefits upon reaching age 62 and having earned the requisite number of work credits (generally 40). ³ Individuals are not eligible for full benefits until they reach "full retirement age" – a number that varies from 65 to 67 based upon birth year. ⁴
Social Security Survivors Insurance	Certain surviving family members become eligible upon the death of a worker who has earned Social Security credits. ⁵
California Paid Family Leave	An individual must be bonding with a new child during the first year after the birth or adoption of the child or caring for a seriously ill child, parent, spouse, or domestic partner. ⁶
New Jersey Family Leave Insurance	An individual must be bonding with a new child during the first year after the birth or adoption of the child or caring for a child, spouse, domestic partner, civil union partner, or parent who has a serious health condition. ⁷
California State Disability Insurance	A non-work-related disability, including pregnancy, which causes an individual to be unable to work. ⁸
New Jersey State Disability Benefits	A non-work-related disability, including pregnancy, which causes an individual to be unable to work. ⁹
New York State Disability Insurance	A non work-related disability, including pregnancy, which causes an individual to be unable to work. ¹⁰
Rhode Island Temporary Disability Insurance	A non-work-related disability, including pregnancy, which causes an individual to be unable to work. ¹¹
Hawaii Temporary Disability Insurance	A non-work-related disability, including pregnancy, which causes an individual to be unable to work. ¹²
Puerto Rico Temporary Disability Insurance	A non-work-related disability, including pregnancy, which causes an individual to be unable to work. ¹³
Workers' Compensation¹⁴	Worker-related injury or illness suffered on the job or arising in the course of employment. ¹⁵

Eligibility: Workforce Attachment Requirements	
Unemployment Insurance	Individuals must earn a certain amount of wages and/or work a certain period of time during the "base period," (BP) defined as the first four of the last five completed calendar quarters in most states. ¹⁶ Workers must generally have earnings in more than one quarter within the BP. ¹⁷ The minimum amount of wages an eligible individual must earn during the base period ranges from \$130 in Hawaii to \$4,455 in North Carolina. ¹⁸
Social Security Disability Insurance	Individuals must earn a specified number of work credits. ¹⁹ In 2009, \$1,090 in income equals one credit; \$4,360 equals the maximum four credits an individual can earn per year. ²⁰ The maximum number of required credits is 40. Younger workers may qualify with fewer credits: <ol style="list-style-type: none"> 1) Before age 24, six credits are required. 2) Between ages 24 and 31, individuals must have credit for working half the time between age 21 and the year they became disabled. 3) For workers aged 31 or older, the number of credits required increases with age. Of the credits required, 20 must have been earned in the previous 10 years (ending in the year in which the individual became disabled).²¹
Social Security Retirement Benefits	Individuals born after 1929 need 40 work credits, calculated in the same manner as SSDI, to qualify for Social Security retirement benefits (equivalent to 10 full years of work). ²²
Social Security Survivors Benefits	Eligibility depends on the decedent's work credits. ²³ The maximum number of credits required is 40. ²⁴ Younger workers may qualify with fewer credits. ²⁵ If a decedent earned at least six credits in the three years before his or her death, surviving children and any spouse taking care of the children can receive benefits. ²⁶
California Paid Family Leave	Individuals must have \$300 in wages during the 12-month period approximately five to 17 months prior to the date of application for paid family leave (the base period) and must be currently employed or actively seeking work. ²⁷
New Jersey Family Leave Insurance	Individuals must be currently employed (or have been unemployed for less than two weeks) ²⁸ and must have earned at least \$145 in at least 20 calendar weeks or have earned at least 1,000 times the minimum wage (currently \$7,300) during the 52 weeks immediately prior to the week in which the family leave claim begins. ²⁹
California State Disability Insurance	Same as California Paid Family Leave
New Jersey State Disability Benefits	Same as New Jersey Family Leave Insurance
New York State Disability Insurance	Individuals must be employed for four or more consecutive weeks. ³⁰ Individuals continue to be eligible for four weeks after the termination of covered employment. ³¹

Eligibility: Workforce Attachment Requirements (CONTINUED)	
Rhode Island Temporary Disability Insurance	An individual may be eligible if he or she has earned at least 1,200 times the minimum wage during the base period (currently \$8,880). ³² Alternatively, individuals must have been paid at least 200 times the minimum hourly wage (currently \$1,480) in any quarter during the first four of the five most recent completed calendar quarters (the base period) and must have total base period earnings that are at least 1.5 times the amount paid in the quarter of highest earnings, provided that the minimum amount of total base period wages is at least 400 times the minimum hourly wage (currently \$2,960). ³³
Hawaii Temporary Disability Insurance	An employee must have been employed for at least 20 hours per week for at least 14 weeks and have earned at least \$400 in the 52 weeks prior to the disability. ³⁴ The 14 weeks need not be consecutive nor with only one employer. The employee must be currently employed or have incurred the injury or illness not more than two weeks from the last day of covered employment. ³⁵
Puerto Rico Temporary Disability Insurance	Individuals must have received wages of at least \$150 in a covered employment during the first four of the last five consecutive calendar quarters which immediately precede the date of filing the application for benefits (the “base year”). ³⁶
Workers’ Compensation	Coverage generally starts on the employee’s first day of employment in all states. ³⁷

Eligibility: Workforce Attachment Requirements (CONTINUED)	
Unemployment Insurance	All, with limited exceptions. ³⁸ Self-employed individuals are excluded.
Social Security Disability Insurance	All, with limited exceptions. ³⁹
Social Security Retirement Insurance	Same as SSDI.
Social Security Survivors Insurance	Same as SSDI.
California Paid Family Leave	All, with limited exceptions. ⁴⁰ Self-employed individuals may elect coverage. ⁴¹
New Jersey Family Leave Insurance	All, with limited exceptions. ⁴² Self-employed individuals are excluded.
California State Disability Insurance	Same as California Paid Family Leave.
New Jersey State Disability Benefits	Same as New Jersey Family Leave Insurance.
New York State Disability Insurance	All, with limited exceptions. ⁴³ Self-employed individuals are excluded.
Rhode Island Temporary Disability Insurance	All, with limited exceptions. ⁴⁴ Self-employed individuals are excluded.
Hawaii Temporary Disability Insurance	All, with limited exceptions. ⁴⁵ Self-employed individuals are excluded.
Puerto Rico Temporary Disability Insurance	All, with limited exceptions. ⁴⁶ Self-employed individuals are excluded.
Workers’ Compensation	Every state except Texas requires almost all private employers to provide workers’ compensation coverage. ⁴⁷ In Texas, coverage is voluntary, but employers not providing coverage are not shielded from tort liability as employers in other states are. ⁴⁸ Some states also exempt very small businesses – for example, employers employing fewer than five people are not required to cover their employees in 13 states. ⁴⁹

Benefits: Duration	
Unemployment Insurance	Most states offer benefits for a maximum of 26 weeks. ⁵⁰
Social Security Disability Insurance	SSDI recipients will continue to receive benefits for as long as they continue to be disabled and unable to participate in substantial gainful activities. ⁵¹
Social Security Retirement Insurance	Retirement benefits last as long as the recipient is alive. ⁵²
Social Security Survivors Insurance	Benefits last until one of many terminating events occurs, including death of the recipient, remarriage, or, in the case of a child receiving benefits, reaching the age of majority. ⁵³
California Paid Family Leave	Up to 6 weeks per year in which an individual is eligible for benefits. ⁵⁴
New Jersey Family Leave Insurance	Up to 6 weeks per year in which an individual is eligible for benefits. ⁵⁵
California State Disability Insurance	Up to 52 weeks per year in which an individual is eligible for benefits, or as long as an individual's temporary disability lasts, whichever is shorter. ⁵⁶
New Jersey State Disability Benefits	Up to 26 weeks per year in which an individual is eligible for benefits, or as long as an individual's temporary disability lasts, whichever is shorter. ⁵⁷
New York State Disability Insurance	Up to 26 weeks per year in which an individual is eligible for benefits, or as long as an individual's temporary disability lasts, whichever is shorter. ⁵⁸
Rhode Island Temporary Disability Insurance	Up to 30 weeks per year in which an individual is eligible for benefits, or as long as an individual's temporary disability lasts, whichever is shorter. ⁵⁹
Hawaii Temporary Disability Insurance	Up to 26 weeks per year in which an individual is eligible for benefits, or as long as an individual's temporary disability lasts, whichever is shorter. ⁶⁰
Puerto Rico Temporary Disability Insurance	Up to 26 weeks per year in which an individual is eligible for benefits, or as long as an individual's temporary disability lasts, whichever is shorter. ⁶¹
Workers' Compensation	For temporary total disability benefits, more than half of states allow benefits to be paid as long as the disability lasts. ⁶² The remaining states have a total maximum duration ranging from 104 weeks to 700 weeks. ⁶³ Permanent total disability benefits generally last until a set retirement age or for life, although some states impose a total maximum benefit cap (e.g. \$318,000 in Indiana). ⁶⁴ Permanent partial disability benefits are subject to a total maximum duration in the majority of states, ranging from approximately 200 weeks to 520 weeks. ⁶⁵

Benefits: Waiting Time	
Unemployment Insurance	Most states require a one-week waiting period before benefits are paid. ⁶⁶
Social Security Disability Insurance	Individuals must have been disabled for five consecutive months before becoming eligible for benefits. ⁶⁷
Social Security Retirement Benefits	N/A
Social Security Survivors Benefits	N/A
California Paid Family Leave	Individuals must serve a waiting period of seven days before benefits are paid; the waiting period may be served non-consecutively. ⁶⁸ If the period of family leave immediately follows an eligible period of temporary disability for the individual's own illness, such as pregnancy disability, there is no waiting period for the Paid Family Leave claim. ⁶⁹
New Jersey Family Leave Insurance	Individuals must serve a waiting period of seven days before benefits are paid; if the period of family leave lasts three weeks or more, retroactive benefits may be paid for the waiting period. ⁷⁰ If the period of family leave immediately follows an eligible period of temporary disability for the individual's own illness, such as pregnancy disability, there is no waiting period for the Family Leave Insurance claim. ⁷¹
California State Disability Insurance	Individuals must serve a waiting period of seven consecutive days before benefits are paid. ⁷²
New Jersey State Disability Benefits	Individuals must serve a waiting period of seven consecutive days before benefits are paid; if the period of family leave lasts three weeks or more, retroactive benefits may be paid for the waiting period. ⁷³
New York State Disability Insurance	Individuals must serve a waiting period of seven consecutive days before benefits are paid. ⁷⁴
Rhode Island Temporary Disability Insurance	Individuals must serve a waiting period of seven consecutive days before benefits are paid. ⁷⁵
Hawaii Temporary Disability Insurance	Individuals must serve a waiting period of seven consecutive days before benefits are paid. ⁷⁶
Puerto Rico Temporary Disability Insurance	Individuals must serve a waiting period of seven consecutive days before benefits are paid. ⁷⁷
Workers' Compensation	Workers' compensation pays for medical care immediately and pays cash benefits for lost work time after a waiting period, which ranges by state from three to seven days. ⁷⁸

Benefits: Wage Replacement Rate & Maximum Benefit Amount	
Unemployment Insurance	On average, states replace approximately 50 percent of an eligible individual's lost wages, up to a maximum benefit amount, which is usually a percentage of the state average weekly wage. ⁷⁹ Benefit amounts are calculated as a percentage of an individual's earnings in a specified base period, generally covering the most recent 12- to 18-month period. ⁸⁰
Social Security Disability Insurance	Two "bend points" (calculated based on the national average wage index) are used to create three earnings brackets. ⁸¹ Earnings up to the first bend point are replaced at 90 percent, earnings between the first and second bend points are replaced at 32 percent, and earnings beyond the second bend point are replaced at 15 percent (up to the federal maximum, which is updated annually). ⁸² In 2009, the bend points result in the following calculation: <ul style="list-style-type: none"> • 90 percent of the first \$744 of average-indexed monthly earnings (AIME), plus • 32 percent of the next \$3,739 of AIME, plus • 15 percent of AIME over \$4,483.⁸³
Social Security Retirement Benefits	Same as SSDI. Benefit amount is reduced if benefits are received before full retirement age. ⁸⁴
Social Security Survivors Benefits	Benefit payments are equal to a proportion of the primary insurance amount (PIA) of the deceased. ⁸⁵ The proportion of the PIA depends on the individual's relationship to the deceased. ⁸⁶ Widows or widowers may also be entitled to a lump sum payment of \$255 upon the death of a deceased spouse. ⁸⁷
California Paid Family Leave	The wage replacement rate is 55 percent of an individual's weekly wages during a specified base period. ⁸⁸ The maximum benefit amount, which is updated annually, is indexed to the state average weekly wage and cannot exceed the maximum benefit amount for workers' compensation temporary disability benefits, which is set at 150 percent the state average weekly wage). ⁸⁹ In 2010, the maximum weekly benefit amount was \$987. ⁹⁰
New Jersey Family Leave Insurance	The wage replacement rate is 66 percent of an individual's weekly wages during a specified base period. ⁹¹ The maximum benefit amount, which is updated annually, is 53 percent of the state's average weekly wage. ⁹² In 2010, the maximum weekly benefit amount was \$561. ⁹³
California State Disability Insurance	Same as California Paid Family Leave.
New Jersey State Disability Benefits	Same as New Jersey Family Leave Insurance.
New York State Disability Insurance	The wage replacement rate is 50 percent of an individual's average weekly wage during the last eight weeks of employment; the maximum benefit is statutorily set at \$170 per week. ⁹⁴

Benefits: Wage Replacement Rate & Maximum Benefit Amount (CONTINUED)	
Rhode Island Temporary Disability Insurance	The wage replacement rate is 4.62 percent of the wages paid to an individual in the calendar quarter of highest earnings within the base period (translating into a weekly wage replacement rate of ~51 percent); the maximum benefit is 85 percent of the state average weekly wage. ⁹⁵ As of July 1, 2010, the maximum benefit was \$700. ⁹⁶
Hawaii Temporary Disability Insurance	Except for individuals with very low earnings, the wage replacement rate is 58 percent of an individual's average weekly wage in the week before filing a claim for disability; the maximum benefit cannot exceed 121 percent the state average weekly wage. ⁹⁷ As of 2009, the maximum weekly benefit amount was \$510. ⁹⁸
Puerto Rico Temporary Disability Insurance	The benefit amount is approximately 65 percent of the average weekly wage (computed using the quarter of highest earnings during the base year). ⁹⁹ For nonagricultural workers, the weekly benefit amount ranges from \$12 - \$113. ¹⁰⁰ For workers who earn at least 50 percent of their income as agricultural workers, the weekly benefit amount is calculated using a schedule based on total wages during the base year. ¹⁰¹ The weekly benefit amount for agricultural workers ranges from \$12 to \$55. ¹⁰²
Workers' Compensation	Most states pay weekly benefits for temporary total disability that replace two-thirds (66 percent) of a worker's pre-injury wages, although wage replacement rates vary from a national low of 60 percent in New Hampshire to a high of 80 percent in Alaska, Iowa, Maine and Michigan. ¹⁰³ Maximum benefits, which are usually indexed to a state's average weekly wage, vary between states. ¹⁰⁴ As of 2010, maximum weekly benefits ranged from a low of \$351 in Mississippi to a high of \$1,173 in Illinois and Iowa. ¹⁰⁵

Benefits: Taxation	
Unemployment Insurance	Unemployment benefits are subject to income tax. ¹⁰⁶ Federal law requires states to offer workers the opportunity to voluntarily have Federal income tax withheld from unemployment benefits at the rate of 10 percent. ¹⁰⁷ Federal law also permits states to withhold state and local income tax from unemployment benefits. ¹⁰⁸
Social Security Disability Insurance	Some recipients are required to pay federal income taxes on their Social Security benefits if they have another source of substantial income in addition to Social Security benefits, such as wages, self-employment, interest, dividends and other taxable income. ¹¹⁰ No Social Security recipient pays federal income tax on more than 85 percent of his or her Social Security benefits. ¹¹¹
Social Security Retirement Benefits	Same as SSDI.
Social Security Survivors Benefits	Same as SSDI.
California Paid Family Leave	Benefits in excess of contributions to the program are subject to federal income taxes, but not state income taxes. ¹¹²
New Jersey Family Leave Insurance	Benefits in excess of contributions to the program are subject to federal income taxes, but not state income taxes. ¹¹³
California State Disability Insurance	With limited exceptions, benefits are not considered federal taxable income because the program is employee-funded. ¹¹⁴ Benefits are exempt from state income tax. ¹¹⁵
New Jersey State Disability Benefits	Benefits that represent the employer contribution to the program are federal taxable income; the remaining portion is free of federal income tax. ¹¹⁶ Benefits are exempt from state income tax. ¹¹⁷
New York State Disability Insurance	Benefits that represent the employer contribution to the program are federal taxable income; the remaining portion is free of federal income tax. ¹¹⁸ Benefits are likely exempt from state income tax. ¹¹⁹
Rhode Island Temporary Disability Insurance	With limited exceptions, benefits are not considered federal taxable income because the program is employee funded. ¹²⁰ Benefits are exempt from state income tax. ¹²¹
Hawaii Temporary Disability Insurance	Benefits that represent the employer contribution to the program are federal taxable income; the remaining portion is free of federal income tax. ¹²² The statute does not specify whether benefits are exempt from state income tax. ¹²³
Puerto Rico Temporary Disability Insurance	Benefits that represent the employer contribution to the program are federal taxable income; the remaining portion is free of federal income tax. ¹²⁴ Benefits are likely exempt from state income tax. ¹²⁵
Workers' Compensation	Workers' compensation benefits are not subject to federal or state income taxes. ¹²⁶

Financing	
Unemployment Insurance (UI)	Generally 100 percent employer financing. UI is funded by federal and state taxes. The federal tax rate, set by the Federal Unemployment Tax Act (FUTA), is 6.2 percent of taxable wages and pays for administration of the program. ¹²⁷ Federal law only imposes FUTA tax on the first \$7,000 of earnings, but most states have increased their taxable wage bases above the minimum. ¹²⁸ Employers who pay state unemployment tax on a timely basis receive an offset credit of up to 5.4 percent regardless of the rate of tax they pay the state. ¹²⁹ Therefore, the net FUTA tax rate is generally 0.8 percent (6.2% - 5.4%), for a maximum FUTA tax of \$56.00 per employee, per year (.008 X \$7,000. = \$56.00). ¹³⁰
Social Security Disability Insurance (SSDI)	Shared employer and employee financing; equal contributions of 6.2% from each. ¹³² Self-employed individuals pay both the employer and employee contribution (12.4%). ¹³³ The earnings cap for the OASDI payroll tax is based on a formula set by law; the taxable wage base only adjusts if a cost of living increase becomes effective. ¹³⁴ In 2010, the taxable earnings cap was \$106,800. ¹³⁵
Social Security Retirement Insurance	Same as SSDI.
Social Security Survivors Insurance	Same as SSDI.
California Paid Family Leave	100% employee financing. The 2010 tax rate is 11% percent of taxable wages per employee, per year; with a taxable wage base capped at \$93,916. ¹³⁶ The taxable wage base adjusts with changes in the state average weekly wage. ¹³⁷ Self-employed individuals who elect coverage pay both the employer and employee contribution up to the same taxable wage base cap as non-self employed individuals. ¹³⁸
New Jersey Family Leave Insurance	100% employee financing. The 2010 tax rate is .12% of taxable wages per employee; the taxable earnings cap is equal to the earnings cap for state unemployment insurance benefits: in 2010, the cap was \$29,700. ¹³⁹
California State Disability Insurance	Same as California PFL.
New Jersey State Disability Benefits	Shared employer and employee financing. ¹⁴⁰ As of 2010, the employee tax rate was .5% with a taxable earnings cap of \$29,700. ¹⁴¹ Employers covered by the state fund pay a basic rate of .5% on the same taxable wage base as employees, but employers are subject to experience rating. ¹⁴² An employer's rate may decrease to .1% or increase to 11% on the basis of the employer's reserve ratio, length of employment, and the status of the fund as a whole. ¹⁴³

Financing (CONTINUED)	
New York State Disability Insurance	Primarily employer financed. Employers can require employee contributions up to a cap of .5% on the first \$120 of weekly wages (not more than 60 cents per week). ¹⁴⁴
Rhode Island Temporary Disability Insurance	100% employee financing. The 2010 tax rate is 1.2% of taxable wage per employee, per year with an taxable earnings cap of \$57,000. ¹⁴⁵
Hawaii Temporary Disability Insurance	Primarily employer financed, employee contributions are limited to half the cost of providing benefits but not more than 0.5% of weekly earnings up to the annually adjusted maximum weekly taxable wage base (\$877 in 2009). ¹⁴⁶
Puerto Rico Temporary Disability Insurance	Shared employer and employee financing; equal contributions of .5% from each; earnings cap was \$9,000 in 2010. ¹⁴⁷
Workers' Compensation	100% employer financing. Contributions are experience-rated. ¹⁴⁸

Administration	
Unemployment Insurance	Federal-State Partnership. Federal government provides funding and sets national standard on some processes; state employment agencies physically handle claims and dispense benefits. ¹⁴⁹
Social Security Disability Insurance	Federal-State Partnership. The Social Security Administration accepts applications, handles appeals, and determines benefits; state disability determination services, which are funded by the federal government, make initial eligibility decisions. ¹⁵⁰
Social Security Retirement Insurance	Federal Administration. Operated by the Social Security Administration. ¹⁵¹
Social Security Survivors Insurance	Federal Administration. Operated by the Social Security Administration. ¹⁵²
California Paid Family Leave	State Administration. Operated by the California Employment Development Department as a part of the state disability insurance program. The EDD also administers unemployment insurance for California. ¹⁵³
New Jersey Family Leave Insurance	State Administration. Operated by the New Jersey Department of Labor and Workforce Development as a part of the state temporary disability insurance program. The department also administers unemployment insurance for New Jersey. ¹⁵⁴
California State Disability Insurance	Same as PFL. ¹⁵⁵
New Jersey State Disability Benefits	Same as FLI. ¹⁵⁶
New York State Disability Insurance	State Administration. State law mandates that employers purchase temporary disability insurance or self-insure. The New York State Worker's Compensation Board oversees the operation of these plans. ¹⁵⁷
Rhode Island Temporary Disability Insurance	State Administration. Operated by the Rhode Island Department of Labor and Training. The DLT also oversees Rhode Island's workers' compensation law and administers unemployment insurance. ¹⁵⁸
Hawaii Temporary Disability Insurance	State Administration. State law mandates that employers purchase temporary disability insurance or self-insure. The Hawaii Department of Labor and Industrial Relations, which also oversees the operation of the state workers' compensation law and unemployment insurance, monitors the operation of these plans. ¹⁵⁹
Puerto Rico Temporary Disability Insurance	State Administration. Operated by the Commonwealth Department of Labor and Human Resources. The department also administers unemployment insurance for Puerto Rico. ¹⁶⁰
Workers' Compensation	State Administration. Most state laws mandate that employers carry workers' compensation insurance. A Workers' Compensation Commission/ Board within a state Department of Labor and Industries or Employment Security will generally oversee the operation of the law. ¹⁶¹

1 Emp. & Training Admin., U.S. Dep't of Labor, Comparison of State Unemployment Laws: Nonmonetary Eligibility (ch. 5) (2010), available at <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2010/nonmonetary.pdf>.

2 42 U.S.C. § 416; 20 C.F.R. § 404.1505.

3 42 U.S.C. § 402.

4 42 U.S.C. § 416(l); 20 C.F.R. § 404.409.

5 42 U.S.C. § 402(b)-(h).

6 Cal. Unemp. Ins. Code § 3303.

7 N.J. Stat. Ann. §§ 43:21-39.2 to 39.3; N.J. Admin. Code § 12:15-11A.

8 Cal. Unemp. Ins. Code § 2626.

9 N.J. Stat. Ann. § 43:21-29 (a).

10 N.Y. Workers' Comp. Law §§ 201, 204.

11 R.I. Gen. Laws § 28-41-8.

12 Haw. Rev. Stat. § 392-3.

13 P.R. Laws Ann. tit. 11, § 202(g).

14 Note: Workers' Compensation laws vary in all 50 states and territories of the United States. This Appendix provides a general overview of the key characteristics of workers' compensation programs across all jurisdictions.

15 Nat'l Acad. of Soc. Ins., Workers' Compensation: Benefits, Coverage, and Costs, 2008 (2010), available at http://www.nasi.org/sites/default/files/research/Workers_Comp_Report_2008.pdf.

16 Emp. & Training Admin., U.S. Dep't of Labor, Comparison of State Unemployment Laws: Monetary Entitlement (ch. 3) (2010), available at <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2010/monetary.pdf>

17 *Id.*

18 *Id.*

19 42 U.S.C. § 423.

20 Soc. Sec. Admin., Electronic Fact Sheet – Update 2010, SSA Publication No. 05-10003 (2010), available at <http://www.ssa.gov/pubs/10003.html>.

21 42 U.S.C. § 423.

22 42 U.S.C. § 414(a); 20 C.F.R. § 404.110.

23 42 U.S.C. § 402(b)-(h); 42 U.S.C. § 414; Soc. Sec. Admin., Electronic Booklet: Survivors Benefits, SSA Publication No. 05-10084 (2009), available at <http://www.ssa.gov/pubs/10084.html#2>.

24 42 U.S.C. § 402(b)-(h); 42 U.S.C. § 414; Soc. Sec. Admin., Electronic Booklet: Survivors Benefits, SSA Publication No. 05-10084 (2009), available at <http://www.ssa.gov/pubs/10084.html#2>.

25 42 U.S.C. § 402(b)-(h); 42 U.S.C. § 414; Soc. Sec. Admin., Electronic Booklet: Survivors Benefits, SSA Publication No. 05-10084 (2009), available at <http://www.ssa.gov/pubs/10084.html#2>.

26 42 U.S.C. § 402(b)-(h); 42 U.S.C. § 414; Soc. Sec. Admin., Electronic Booklet: Survivors Benefits, SSA Publication No. 05-10084 (2009), available at <http://www.ssa.gov/pubs/10084.html#2>.

27 Cal. Unemp. Ins. Code §§ 2610, 2652.

28 N.J. Stat. Ann. § 43:21-27(b)(1).

29 N.J. Stat. Ann. § 43:21-41(d)(2) (setting the wage requirement at 20 base weeks or 1,000 times the state minimum wage rounded to the next highest \$100 increment). New Jersey's minimum wage is \$7.25. N.J. Stat. Ann. § 34:11-56a4 (setting the state minimum wage at \$7.15 or the federal minimum wage, whichever is more); 29 U.S.C. § 206 (setting a federal minimum wage of \$7.25). See also *Wage Requirements – State Plan*, N.J. Dep't of Labor & Workforce Dev., http://lwd.dol.state.nj.us/labor/tdi/content/sp_wage_requirements.html (noting current eligibility requirement dollar amounts).

30 N.Y. Workers' Comp. Law § 203.

31 *Id.*

32 R.I. Gen. Laws § 28-41-11 (setting earnings requirements as a function of the state hourly minimum wage); *id.* § 28-12-3 (setting the minimum wage at \$7.40).

33 R.I. Gen. Laws § 28-41-11.

34 Haw. Rev. Stat. §§ 392-6, -25.

35 *Id.*

36 P.R. Laws Ann. tit. 11, § 203(b)(1).

37 Nat'l Acad. of Soc. Ins., *supra* note 15.

38 Generally, employers must pay both state and federal unemployment taxes if: (1) they pay wages to employees totaling \$1,500, or more, in any quarter of a calendar year; or, (2) they had at least one employee during any day of a week during 20 weeks in a calendar year, regardless of whether or not the weeks were consecutive. 26 U.S.C. § 3306.

39 The following categories of workers are excluded from Social Security:

- Civilian federal employees hired before January 1, 1984
- Railroad workers
- Certain employees of state and local governments who are covered under their employers' retirement systems
- Domestic workers and farm workers whose earnings do not meet certain minimum requirements
- Persons with very low net earnings from self-employment, generally under \$400 annually.

42 U.S.C. § 410.

40 Most California employers who employ at least one individual and pay at least \$100 in wages during any calendar quarter must provide benefits. Cal. Unemp. Ins. Code §§ 676, 2606. Domestic employers who pay wages in cash of seven hundred fifty dollars (\$750) or more to individuals employed in such service during any calendar quarter in the calendar year or the preceding calendar year must also provide paid family leave. Cal. Unemp. Ins. Code § 2606.5.

41 Cal. Unemp. Ins. Code §§ 701-13.

42 Any employer covered by New Jersey's Unemployment Compensation law must provide coverage, including any state governmental entity or instrumentality. N.J. Stat. Ann. § 43:21-27 (a).

43 An employer of one or more persons on each of 30 days in any calendar year becomes a "covered" employer four weeks after the 30th day of such employment. Employers of domestic workers must provide coverage after employing such worker for 40 hours per week for four consecutive weeks. N.Y. Workers' Comp. Law § 202.

44 Employers of one or more employees who earn more than \$1,000 per calendar quarter must provide coverage. Governmental entities are not required to offer coverage to their employees. They may, however, elect to offer coverage. R.I. Gen. Laws § 28-39-3.

45 Excluded employees include federal government employees, certain domestic workers, insurance agents and real estate salespersons paid solely on a commission basis, individuals under 18 years of age in the delivery or distribution of newspapers, certain family employees, student nurses, interns and workers in other categories specifically excluded by the law. Haw. Rev. Stat. § 392-5.

46 Any employer who employed one or more individuals on any day in the current or preceding calendar year is covered by the Puerto Rico TDI laws. P.R. Laws Ann. tit. 11, § 202(h)-(j). Excluded employees include:

- Certain domestic workers
- Certain student workers and interns
- Maritime workers
- Federal employees and government workers
- Employees of certain nonprofit organizations
- Real estate agents

Id. § 202(j).

47 Nat'l Acad. of Soc. Ins., *supra* note 15, at 7-8.

48 *Id.* at 8.

49 *Id.*

50 Emp. & Training Admin., U.S. Dep't of Labor, Significant Provisions of State Unemployment Insurance Laws Effective July 2009 (2009), available at <http://www.ows.doleta.gov/unemploy/content/sigpros/2000-2009/July2009.pdf> [hereinafter Significant Provisions 2009].

51 42 U.S.C. § 423; 20 C.F.R. § 404.316.

52 42 U.S.C. § 402(a).

53 42 U.S.C. §§ 402(b)-(h).

54 Cal. Unemp. Ins. Code § 3301.

55 N.J. Stat. Ann. § 43:21-39.

56 Cal. Unemp. Ins. Code §§ 2608, 2653.

57 N.J. Stat. Ann. § 43:21-38.

58 N.Y. Workers' Comp. Law § 205.

59 R.I. Gen. Laws § 28-41-7.

60 Haw. Rev. Stat. § 392-23.

61 P.R. Laws Ann. tit. 11, § 203(c)(1).

62 Nat'l Acad. of Soc. Ins., *supra* note 15, at tbl. I.

63 *Id.*

64 *Id.*

65 *Id.*

66 Significant Provisions, *supra* note 50.

67 42 U.S.C. § 423(c)(2); C.F.R. § 404.315.

68 Cal. Unemp. Ins. Code § 3303(b); Cal. Code Regs. tit. 22, § 3303 (b)-1.

69 *FAQs for Paid Family Leave*, Cal. Emp. Dev. Dep't, http://www.edd.ca.gov/disability/FAQs_for_Paid_Family_Leave.htm.

70 N.J. Stat. Ann. 43:21-39; *Family Leave Insurance Frequently Asked Questions*, N.J. Dep't of Labor & Workforce Dev., http://lwd.dol.state.nj.us/labor/fli/content/fli_faq.html.

71 N.J. Stat. Ann. 43:21-39; *Family Leave Insurance Frequently Asked Questions*, *supra* note 70.

72 Cal. Unemp. Ins. Code § 2627(b).

73 N.J. Stat. Ann. § 43:21-38.

74 *Id.*

75 *Id.*

76 Haw. Rev. Stat. § 392-24.

77 P.R. Laws Ann. tit. 11, § 203(c)(1).

78 Nat'l Acad. of Soc. Ins., *supra* note 15.

⁷⁹ Monetary Entitlement, *supra* note 16.

⁸⁰ *Id.*

⁸¹ 42 U.S.C. § 415; 20 C.F.R. §§ 404.210-12, 304, 317.

⁸² 42 U.S.C. § 415; 20 C.F.R. §§ 404.210-12, 304, 317.

⁸³ *Automatic Increases: Benefit Formula “Bend Points”*, Soc. Sec. Admin., <http://www.ssa.gov/OACT/COLA/bendpoints.html>.

⁸⁴ 42 U.S.C. § 402(q); 20 C.F.R. § 404.410.

⁸⁵ 42 U.S.C. §§ 402(b)-(h), 415(a).

⁸⁶ Specific calculations for Social Security Survivors benefits are as follows:

1. The benefit payment for a surviving husband or wife who is caring for the decedent’s child is equal to **one-half** the PIA of the deceased.
2. The benefit payment for a surviving child is equal to **one-half** the PIA of the deceased.
3. The benefit payment for a surviving widow or widower is generally **equal to** the PIA of the deceased.
4. The benefit amount for a dependent mother or father is equal to **three-fourths** of the primary insurance amount of the deceased.

Id.

⁸⁷ 42 U.S.C. § 402(i).

⁸⁸ Cal. Unemp. Ins. Code §§ 2655, 3301.

⁸⁹ Cal. Unemp. Ins. Code §§ 2655, 3301 (establishing weekly benefit amounts for State Disability Insurance and Paid Family Leave); Cal. Labor Code § 4453(a)(10) (establishing the formula for determining the maximum benefit amount for workers compensation payments).

⁹⁰ Cal. Emp. Dev. Dep’t, Disability Insurance (DI) and Paid Family Leave (PFL) Weekly Benefit Amounts in Dollar Increments (2010), available at http://www.edd.ca.gov/pdf_pub_ctr/de2589.pdf.

⁹¹ N.J. Stat. Ann. § 43:21-40.

⁹² N.J. Stat. Ann. § 43:21-40.

⁹³ *Family Leave Insurance Fact Sheet*, *supra* note 70 (posting the maximum benefit amount for N.J. Family Leave Insurance); *Temporary Disability Insurance: Calculating Benefits, State Plan*, N.J. Dep’t of Labor & Workforce Dev., http://lwd.dol.state.nj.us/labor/tdi/worker/state/sp_calculating_bene_amounts.html (posting the maximum benefit amount for N.J. Temporary Disability Insurance).

⁹⁴ N.Y. Workers’ Comp. Law § 204.

⁹⁵ R.I. Gen. Laws § 28-41-5.

⁹⁶ *Temporary Disability Insurance: Frequently Asked Questions*, R.I. Dep’t of Labor & Training, <http://www.dlt.ri.gov/tdi/tdifaqs.htm>.

⁹⁷ The statute provides for 58% wage replacement, but caps the amount of wages considered in determining wage replacement at 121% of the state average weekly wage. Haw. Rev. Stat. Ann. § 392-22; Haw. Rev. Stat. § 386-31.

⁹⁸ *Frequently Asked Questions, Disability Compensation Division: Temporary Disability Insurance*, Hawaii Dep’t of Labor & Indus. Relations, <http://hawaii.gov/labor/dcd/dcd-links/frequently-asked-questions#2>.

⁹⁹ P.R. Laws Ann. tit. 11, § 203(d).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ House Ways & Means Committee, Workers’ Compensation Overview, available at <http://waysandmeans.house.gov/media/pdf/110/wcss8.pdf> (last accessed September 24, 2010); Nat’l Acad. of Soc. Ins., *supra* note 15.

¹⁰⁴ House Ways and Means Committee, *supra* note 103, at 2.

¹⁰⁵ *Id.* at tbl. 15.

¹⁰⁶ 26 U.S.C. § 85.

¹⁰⁷ 23 U.S.C. § 3304(a)(18); Monetary Entitlement, *supra* note 16, at 3-27.

¹⁰⁸ *Id.*

¹⁰⁹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 1007, 123 Stat. 115 (2009).

¹¹⁰ IRS Publication 915, Social Security and Equivalent Railroad Retirement Benefits (2009), available at <http://www.irs.gov/pub/irs-pdf/p915.pdf> (last visited October 20, 2010).

¹¹¹ *Id.*

¹¹² Office of the Chief Counsel, Internal Revenue Service, Memorandum No. 200630017 (July 28, 2006) (explaining that benefits in excess of contributions to the state paid family leave program are taxable income); *FAQs for Paid Family Leave*, *supra* note 69 (explaining that CA PFL benefits are not subject to state income tax).

¹¹³ Office of the Chief Counsel, *supra* note 112 (explaining that benefits in excess of contributions to the state paid family leave program are taxable income); *Family Leave Insurance—Frequently Asked Questions*, N.J. Dep’t of Labor & Workforce Dev., http://lwd.dol.state.nj.us/labor/fli/content/fli_faq.html#37 (question 37: “How are Family Leave Insurance benefit payments treated for tax purposes?”) (explaining that NJ family leave insurance benefits are not subject to state income tax).

¹¹⁴ Compare 26 U.S.C. § 104(a)(3) and 26 C.F.R. § 1104-1(d), with 26 U.S.C. 105(e)(2) and 26 C.F.R. § 1105-5(a) (establishing that temporary disability benefits offered under a State plan are only taxable in proportion to the employer contribution; if the program is entirely funded through employee contributions, benefits are not subject to federal income tax). However, if

the benefits are received in place of unemployment benefits, they may be subject to federal income tax even if the program is employee-funded. See Internal Revenue Service, Publication 17, at ch. 12, *Unemployment Benefits: Types of Unemployment Compensation*, http://www.irs.gov/publications/p17/ch12.html#en_US_publink1000172033 (last visited October 21, 2010).

¹¹⁵ *Special Circumstances-Disability-SDI*, Cal. Tax Service Ctr., http://www.taxes.ca.gov/income_tax/specialind.shtml (last visited October 21, 2010) (explaining that SDI benefits may be subject to federal income tax if received in place of unemployment compensation but are not taxable by the state of California).

¹¹⁶ See IRC § 104(a)(3), Treas. Reg. § 1.85-1(b)(1)(ii). See also *Frequently Asked Questions - New Jersey Temporary Disability Insurance*, N.J. Dep’t of Labor & Workforce Dev., <http://lwd.dol.state.nj.us/labor/tdi/content/faq.html> (last visited September 17, 2010).

¹¹⁷ N.J. Stat. Ann. § 43:21-37.

¹¹⁸ See *supra* note 116.

¹¹⁹ The New York State Temporary Disability Insurance law is silent regarding whether TDI benefits are subject to state income tax. See generally N.Y. Workers’ Comp. Law § 200 *et seq.* The statutory provisions establishing the New York TDI program are part of the New York Workers’ Compensation Law, which mandates workers’ compensation benefits. See generally N.Y. Workers’ Comp. Law §§ 1-401. Workers’ compensation benefits for occupational injuries are exempt from state income tax; presumably the same rules apply for benefits received for non-occupational disabilities under the state’s TDI program. See N.Y. Workers’ Comp. Law § 15 (McKinney).

¹²⁰ See *supra* note 116; See also R.I. Dep’t of Labor & Training, *supra* note 96.

¹²¹ R.I. Dep’t of Labor & Training, *supra* note 96.

¹²² See *supra* note 116.

¹²³ See generally Haw. Rev. Stat. § 386 *et seq.*

¹²⁴ See *supra* note 116.

¹²⁵ The Puerto Rico Temporary Disability Insurance law is silent regarding whether TDI benefits are subject to state income tax. See generally P.R. Laws Ann. tit. 11, § 1 *et seq.* The statutory provisions establishing the Puerto Rico TDI program are part of the Puerto Rico Workmen’s Compensation Law, which mandates workers’ compensation benefits. See generally P.R. Laws Ann. tit. 11, § 1-251. Workers’ compensation benefits for occupational injuries are exempt from state income tax; presumably the same rules apply for benefits received for non-occupational disabilities under the state’s TDI program.

¹²⁶ 26 U.S.C. § 104(a)(1); Nat’l Acad. of Soc. Ins., *supra* note 15; House Ways and Means Committee, *supra* note 103, at 2.

¹²⁷ Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3301; *Unemployment Insurance Tax Topic*, Employment Training and Admin., U.S. Dep’t of Labor, <http://workforcesecurity.doleta.gov/unemploy/uitaxtopic.asp>.

¹²⁸ FUTA, 26 U.S.C. § 3306(b)(2000); Emp. Training & Admin., U.S. Dep’t of Labor, Comparison of State Unemployment Laws: Financing (2009) (ch. 2), at 2-1, available at <http://www.workforcesecurity.doleta.gov/unemploy/uilawcompar/2009/financing.pdf> (last visited October 21, 2010).

¹²⁹ *Unemployment Insurance Tax Topic*, *supra* note 127.

¹³⁰ *Id.*

¹³¹ For 2009 tax rates and earnings caps in all 50 states see Significant provisions, *supra* note 50.

¹³² I.R.C. §§ 1401, 3101, 3111. See also *Contribution and Benefit Base*, Soc. Sec. Admin., <http://www.ssa.gov/OACT/COLA/cbb.html>.

¹³³ I.R.C. §§ 1401, 3101, 3111. See also *Contribution and Benefit Base*, Soc. Sec. Admin., <http://www.ssa.gov/OACT/COLA/cbb.html>.

¹³⁴ I.R.C. §§ 1401, 3101, 3111. See also *Contribution and Benefit Base*, Soc. Sec. Admin., <http://www.ssa.gov/OACT/COLA/cbb.html>.

¹³⁵ I.R.C. §§ 1401, 3101, 3111. See also *Contribution and Benefit Base*, Soc. Sec. Admin., <http://www.ssa.gov/OACT/COLA/cbb.html>.

¹³⁶ *State Disability Insurance Tax*, Cal. Emp. Dev. Dep’t, http://www.edd.ca.gov/payroll_taxes/State_Disability_Insurance_Tax.htm.

¹³⁷ Cal. Unempl. Ins. Code § 985.

¹³⁸ *FAQs for Elective Coverage*, Cal. Emp. Dev. Dep’t, http://www.edd.ca.gov/disability/FAQs_for_Elective_Coverage.htm. See also U.S. Dep’t of Labor, Comparison of State Unemployment Laws: Temporary Disability Insurance (2009), at 8-3, available at <http://www.workforcesecurity.doleta.gov/unemploy/uilawcompar/2009/disability.pdf> (last visited Dec. 11, 2009) (discussing California SDI financing) [hereinafter State TDI Comparison 2009].

¹³⁹ N.J. Stat. § 43:21-7(d); N.J. Dep’t of Labor & Workforce Dev., Your Guide to Family Leave Insurance in New Jersey (2010). http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/WPR-119.pdf.

¹⁴⁰ N.J. Stat. Ann. § 43.31-7.

¹⁴¹ *State Disability Benefits—Cost to the Worker: State Plan*, N.J. Dep’t of Labor & Workforce Dev., http://lwd.dol.state.nj.us/labor/tdi/worker/state/sp_cost.html.

¹⁴² *Id.*; N.J. Stat. Ann. § 43:21-7(e). See also N.J. Dep’t of Labor & Workforce Dev., Employer Handbook: New Jersey’s Unemployment & Disability Insurance Programs 32-33 (2008), available at http://lwd.dol.state.nj.us/labor/forms_pdfs/ui/b426.pdf (last visited Nov. 1, 2010) (describing experience rating in N.J. TDI system); State TDI Comparison 2009, *supra* note 138 at 8-3 (summarizing N.J. TDI financing).

¹⁴³ N.J. Stat. Ann. § 43:21-7(e). See also N.J. Dep’t of Labor & Workforce Dev., Employer Handbook: New Jersey’s Unemployment &

Appendix C

Historical Background on Maternity Leave Insurance and Temporary Disability Insurance in the United States

A. The Early Years

In this appendix, we outline some of the critical historical and legislative developments surrounding maternity leave insurance and temporary disability insurance in the United States.¹

The idea that the government should offer wage replacement for time taken off work to care for a new child or a person's own illness through social insurance is not entirely new.

As early as the 1916, labor and progressive party advocates pressed for maternity leave insurance programs for female workers.² In 1919, New York State even came close to passing a comprehensive health insurance proposal that included maternity leave insurance and temporary disability benefits.³ Staunch opposition from the medical and insurance communities prevented these proposals from advancing.⁴

These issues reappeared during the deliberations of the US Committee on Economic Security in the 1930's. President Roosevelt created the Committee in 1934 and tasked it with developing recommendations on old-age pensions, unemployment insurance, and a "unified social insurance system affording protection against all major personal hazards which lead to poverty and dependency."⁵ Though their reports on old-age assistance and unemployment garnered the most attention—and ultimately led to the creation of our Social Security system—the Committee studied, and issued proposals, on a range of economic issues, including health security. The health report contained four key recommendations:

- 1) Aid to local medical facilities and services.
- 2) **Temporary disability insurance** in the form of cash benefits.
- 3) Further study for a system of permanent disability insurance.
- 4) A cooperative federal-state system for medical insurance in which a State would receive a specified federal subsidy if it met certain basic federal safeguards.⁶

The Committee saw temporary disability insurance (TDI) as a natural corollary to medical insurance. When a person fell ill, medical insurance would provide assistance with hospital costs while TDI covered lost wages.⁷ Temporary disability, in turn, would supply a person with cash-benefits and thereby help them avoid the double blow of increased medical costs and decreased income.

American Medical Association (AMA) opposition to any form of national medical insurance effectively prevented the Committee's health security report from receiving consideration in Congress.⁸ In fact, the Committee and the President did all they could to ensure that the health report went largely unnoticed. The Administration and leading Committee members were concerned that AMA opposition could ultimately undermine passage of the more limited Social Security Act, which covered the Committee's recommendations on old age pensions, unemployment insurance, and federal assistance grants for the elderly and families with dependent children, then moving through Congress.⁹

Maternity leave insurance benefits were notably absent from the Committee's health insurance

Disability Insurance Programs 32-33 (2008), available at http://lwd.dol.state.nj.us/labor/forms_pdfs/ui/b426.pdf (last visited Nov. 1, 2010) (describing experience rating in N.J. TDI system); State TDI Comparison 2009, *supra* note 138 at 8-3 (summarizing N.J. TDI financing).

¹⁴⁴ N.Y. Workers' Comp. Law §§ 209, 210, 211; See also State TDI Comparison 2009, *supra* note 138 at 8-3 (summarizing New York TDI financing).

¹⁴⁵ R.I. Gen. Laws §§ 28-40-1 to 28-40-18; 2009 *UI and TDI Quick Reference*, R.I. Dep't of Labor & Training, <http://www.dlt.state.ri.us/tdi/Faq4emp.htm>.

¹⁴⁶ Haw. Rev. Stat. §§ 392-41, 392-32; Hawaii Dep't of Labor & Indus. Relations, Disability Compensation Division, 2009 Maximum Weekly Wage Base and Maximum Weekly Benefit Amount (2008), <http://hawaii.gov/labor/dcd/PDF/general/2009%20Wage%20Base.pdf>. See also State TDI Comparison 2009, *supra* note 138, at 8-3 (summarizing Hawaii TDI financing).

¹⁴⁷ See State TDI Comparison 2009, *supra* note 138, at 8-3 (summarizing Puerto Rico TDI financing).

¹⁴⁸ See Nat'l Acad. of Soc. Ins., *supra* note 15, at 6-7.

¹⁴⁹ 26 U.S.C. §§ 3301, 3306(b); 42 U.S.C. § 501-504. See also Office of Workforce Security, U.S. Dep't of Labor, Unemployment Compensation Federal-State Partnership 16 (2009), available at <http://www.ows.doleta.gov/unemploy/pdf/partnership.pdf>.

¹⁵⁰ 42 U.S.C. § 421(a)(1).

¹⁵¹ 42 U.S.C. § 901(b).

¹⁵² *Id.*

¹⁵³ Cal. Unemp. Ins. Code §§ 301(a)-(f), § 3300(f).

¹⁵⁴ N.J. Stat. § 43:21-45(a)

¹⁵⁵ Cal. Unemp. Ins. Code § 301(a)-(f).

¹⁵⁶ N.J. Stat. §§ 43:21-26, 43:21-45(a).

¹⁵⁷ N.Y. Workers' Comp. Law §§ 141, 211, 241.

¹⁵⁸ R.I. Gen. Laws §§ 28-29-36, 28-39-10, 28-42-31.

¹⁵⁹ Haw. Rev. Stat. §§ 371-12, 383-91, 386-71, 392-41, 392-91.

¹⁶⁰ P.R. Laws Ann. tit.11, § 206; P.R. Laws Ann. tit. 29 § 713.

¹⁶¹ See Soc. Sec. Admin., Social Security Programs in the United States 42 (1997), available at <http://www.ssa.gov/policy/docs/progdsc/sspus/> (describing the administration of worker' compensation laws generally).

report. The Committee did recommend grants to states for maternal and child health benefits and aid for dependent children as part of an enhanced public assistance program, but it did not specifically propose a maternity leave insurance program for working mothers.¹⁰

The failure to address maternity leave insurance for working women was likely the result of the Committee's focus on alleviating unemployment among male breadwinners.¹¹ At the time, maternity leave insurance benefits were seen by many as an incentive for men to send their wives into the workforce.¹² Given the already tight labor market of the 1930's and the general stigma against working mothers, it is not surprising that the Committee decided not to include maternity leave insurance.¹³ This mode of thinking slowly dissipated as middle-class women began to re-enter the workforce in the 1960's and 1970's, but, in the 1930's and 40's, it remained a major barrier to the consideration of the issues facing women in the workplace.

The failure to incorporate TDI into the original Social Security Act did not dissuade the Roosevelt, and later, the Truman Administration, from pursuing its inclusion in subsequent expansions of Social Security. In the run-up to the 1939 Social Security Amendments, for instance, both the Social Security Board and Roosevelt's Interdepartmental Committee on the Coordination of Health and Welfare Activities recommended the establishment of a national TDI program.¹⁴

The Interdepartmental Committee (IC) report, which the Social Security Board largely echoed, was essentially a continuation of the Committee on Economic Security's original health security study. The IC's recommendations on TDI were, like the Committee on Economic Security's, made in the context of a National Health Program that included incentives for the creation of public medical insurance systems.¹⁵ As in 1935, this association with health care ensured that TDI received little serious consideration during the deliberations about modifying Social Security.¹⁶

In 1946, the Truman Administration won a small victory for national TDI when it successfully advocated for a modification to the Federal Unemployment Tax Act (FUTA) that allowed UI funds gathered through taxes on employees to be used for the operation of state TDI systems.¹⁷ Two of the nine states eligible for this provision¹⁸—California and New Jersey—¹⁹responded by creating state TDI programs.²⁰ New York also created a TDI program shortly after the FUTA Amendments, but the state chose to model its system on the state Workers' Compensation Law.²¹ As a result, the new allowance provided no benefit to New York.

An aggressive campaign to transform Social Security into a true "cradle to grave" social insurance program followed the passage of the FUTA Amendments. Anticipating a debate on retirement and survivor's benefit levels, Truman's Social Security Administration issued a remarkable report on the need to move beyond the current system and adopt a "Single National Program" of social insurance.²² The proposed national program included enhanced coverage and benefits for Old-Age and Survivor's Insurance, centralized UI, national health insurance, maternity leave insurance, and permanent and temporary disability insurance benefits.²³ With the full backing of the Administration, the proposal was submitted to Congress in the form of H.R. 2893.²⁴

The House and Ways and Means Committee spent over a month taking testimony from witnesses—including a five-day appearance by Dr. Arthur J. Altmeyer, the director of the SSA.²⁵ The Committee's questions covered a range of TDI and maternity leave insurance related topics and issues, but primarily focused on fraud prevention and concerns about the ability of employees to "work the system."²⁶ Outside of the Committee, concerns were also voiced about the costs of the new programs and the possibility that they would crowd out state programs and charitable efforts.²⁷

Recognizing a lack of support, Rep. Doughton pulled H.R. 2893 in the summer of 1949 and replaced it with H.R. 6000—a new package of Amendments that retained the benefit and coverage expansions of H.R. 2893, but dropped the "weekly benefit programs," which included TDI and maternity leave insurance.²⁸ H.R. 6000 ultimately formed the basis for the Social Security Amendments of 1950.²⁹

B. From the 1950's to the Present

After the defeat of H.R. 2893, there was little movement in the TDI and maternity leave insurance fields at the national level. The SSA stopped calling for an expanded social safety net and the push to pass TDI at the local level stalled. In 1956, permanent and total disability insurance was added to the Social Security program, sapping much of the urgency surrounding the establishment of a national program for temporary disability.³⁰

The conversation slowly began to shift as more women began to return the workforce in the 1960's and 1970's. Maternity leave insurance benefits, and their exclusion from most private and public TDI plans, became a major rallying point for women concerned with workplace discrimination and societal stigmas against working women. Like many of the issues associated with the campaign for women's rights, the 1963 release of the final report of President Kennedy's Commission on the Status of Women played an important role in bringing awareness to this issue.³¹ Among a number of findings and policy recommendations, the Commission noted the importance of maternity benefits and urged the federal government to take the lead in providing cash benefits to mothers out on maternity leave.³²

A second milestone came in 1964 when "discrimination on the basis of sex" was added to title VII of the Civil Rights Act.³³ That provision was subsequently used by the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the Civil Rights Act, as the basis for guidelines on pregnancy discrimination that, among other things, specifically prohibited the exclusion of pregnancy related illnesses and disabilities from public and private TDI plans.³⁴ The Supreme Court ultimately overturned the guidelines as inconsistent with the Civil Rights Act, but Congress moved quickly to authorize EEOC and private civil law suits in this field by passing the Pregnancy Discrimination Act of 1978 (PDA).³⁵

The PDA explicitly prohibited discrimination on the basis of pregnancy by amending the definition of "on the basis of sex" to include "pregnancy, childbirth, or related medical conditions."³⁶ For public and private TDI plans, this legislative change made it illegal for pregnancy to be excluded from the list of illnesses that prevented work. Overnight, maternity leave insurance became a required component of public and private TDI plans.³⁷

The movement for greater protections continued in 1985 with the introduction of the first versions of the FMLA.³⁸ These initial drafts provided unpaid, job protected leave for temporary disabilities and maternity/paternity leave.³⁹ By 1987, the bills had expanded to include coverage for family caregiving leave and, as the bill neared passage, funding for a study on the costs of creating a federal paid leave program.⁴⁰

The FMLA first passed Congress in 1991 but was not signed into law until President Clinton took office in 1993.⁴¹ As enacted, the FMLA provides employees working in mid-size and large organizations with 12 weeks of job-protected but unpaid time off, with continuing employer-based health coverage, to bond with a new child, care for a family member, or treat personal illness.⁴² The funding to commission a study on a federal paid leave program was ultimately removed.

Despite these major gains in job protection for workers at medium and large businesses, there remained a persisting lack of momentum in advancing a national system of wage replacement for family and medical leave.

The late 1990's saw the Clinton Administration's Birth and Adoption Unemployment Compensation initiative (BAA-UC).⁴³ The program allowed states to use their Unemployment Insurance funds to provide wage replacement for leave taken to care for a newly born or adopted child by adding birth and adoption to the list of exceptions for the "able and available to work" requirement.⁴⁴ The Bush Administration ultimately repealed BAA-UC in 2003 on the grounds that it would overwhelm the Unemployment Compensation Trust Funds.⁴⁵

In 2002 and 2008, California and New Jersey, respectively, became the first states to create Paid Family Leave Insurance systems. Both states added these benefits by expanding their existing Temporary Disability Insurance programs.⁴⁶ Washington State became the first state to pass a stand-alone paid paternity and maternity leave insurance program in 2007, but, as of the writing of this document, the program remains unfunded.⁴⁷



This appendix has reviewed the history of maternity leave insurance and temporary disability insurance programs in the United States. It highlights the lengthy discussion that we, as a society, have had over the establishment of these kinds of programs and underscores the need to move away from a public and private patchwork of time off benefits and create a truly comprehensive system of parental care, caregiving, and temporary disability insurance.



¹ Wage replacement for family caregiving is a relatively recent concept so it is not covered here. However, it is important to note that caregiving is within the intellectual tradition of social insurance programs for short-term wage replacement like unemployment compensation, maternity leave insurance, and temporary disability insurance.

² See Beatrix Hoffman, *Wages of Sickness: The Politics of Health Insurance in Progressive America*, chps. 2 and 7 (2001) (covering the American Association for Labor Legislation's campaigns for health and accident insurance in the early 1900's and the role of women in pushing for Maternity Benefits in the 1919 New York State Health Insurance proposal); Sharon Lerner, *Why Unpaid Maternity Leave is Not Enough*, *Washington Post*, June 13, 2010 available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/11/AR2010061103251.html>. (Describing the issues that arose in the labor and women's rights movement when the Wilson Administration debated signing an International Labor Organization agreement that said women should receive maternity benefits).

³ Hoffman *supra* n.2 at 32; Social Sec. Admin., *Chronology of Social Insurance* available at <http://www.ssa.gov/history/1900.html>. (The New York Senate passed the Health Insurance bill in 1919 but the New York Assembly defeated the legislation).

⁴ Hoffman *supra* n.2 at 26-38; Lerner *supra* n. 2 ("The century-long battle for maternity leave in America is a story of missed opportunities and historical accidents, further slowed by activists' miscalculations and some well-funded opposition").

⁵ Edwin E. Witte, *The Development of the Social Security Act: A Memorandum on the History of the Committee on Economic Security and Drafting and Legislative History of the Social Security Act*, pg. 18 (1962).

⁶ *Id.* at Appendix III.

⁷ *Id.* at 208, Appendix III.

⁸ *Id.* at 187-88, Appendix III.

⁹ *Id.* at 188-89; P.L. 74-271, 49 Stat. 620, 42 U.S.C. §301 *et seq.*

¹⁰ P.L. 74-271 §§ 501-505. The Committee's TDI program—which would have covered absences from work due to illness or disability—did not explicitly exclude pregnancy. However, past proposals—and future Administration reports—treated Maternity leave insurance as separate and distinct from TDI.

¹¹ See Arthur J. Altmeyer, *The Formative Years of Social Security*, pg. 13 (1968) ("the President and his committee both felt that unemployment insurance should have top priority" among the other subjects studied).

¹² See Alice Kessler-Harris, *In Pursuit of Equity*, pg. 210 (2001) ("To the American mind, though, even [maternity benefits] suggested incentives for men to send their wives out to work"); Hoffman *supra* n. 2 at chp. 7. pg. 140, 142 (quoting Florence Kelley, a noted advocate for industrial reform and progressive legislation, as saying that maternity benefits only served to "lighten the burdens of husbands who send their wives out as wage-earners" and most men whose wives worked for wages were either alcoholics, insane, afflicted with venereal disease, "negroes," or "unskilled aliens.")

¹³ See Kessler-Harris *supra* n. 13 at 209 (discussing the efforts to pass maternity leave insurance in Roosevelt and Truman years and stating that "Providing even unpaid leaves to women who gave birth violated the notion that men could and should support their families without the help of wives. Offering insurance protection against lost earnings during pregnancy seemed even more threatening.")

¹⁴ See Interdepartmental Committee to Coordinate Health and Welfare Activities, *Report of the Technical Committee on Medical Care*, <http://www.ssa.gov/history/reports/Interdepartmental.html> (hereinafter "Interdepartmental Committee Report"); Social Sec. Brd., *Comments and Recommendations on Proposed Changes in the Social Security Act*, <http://www.ssa.gov/history/reports/38ssbadvise.html>. The 1938 Social Security Board Report modeled their TDI proposal after the existing UI system. Under the proposal, states would receive an off-set to a federal tax if they complied with broad federal standards. It should also be noted that the Board's report was in response to recommendations made by the Advisory Council on Social Security established by the Senate Finance Committee. The Council was formed to give the Committee, which was dominated by Southern conservatives, independent advice on reforming the new program. Their report, which did not include TDI, is available at <http://www.ssa.gov/history/reports/38advise.html>.

¹⁵ See Interdepartmental Committee Report *supra* n. 15; Peter A. Corning, *Social Sec. Admin., The Evolution of Medicare from Idea to Law*, Chp.2 (1969) available at <http://www.ssa.gov/history/corningchap2.html>.

¹⁶ We should note that by the late 1940's, the connection between insurance for lost wages due to accidents and illnesses and insurance for health care expenses resulting from those accidents and illnesses had been severed. The Truman Administration's proposal on health insurance, for instance, was submitted separately from their proposal for national TDI. As a result, one should not view TDI's absence from modern debate about health reform as a sign of lost interest. They have simply evolved into two distinct subjects.

¹⁷ P.L. 79-719 § 416(a); 60 Stat. 978, 991 (1946). Social Sec. Admin., *Temporary Disability Insurance Program Description and Legislative History*, 2009 Annual Statistical Supplement available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2009/tempdisability.html> (hereinafter 2009 Annual Statistical Supplement).

¹⁸ At the time of the amendment, only 9 states required employee contributions to their state UI funds. 2009 Annual Statistical Supplement *supra* n. 18.

¹⁹ It should be noted that RI had already established such a program in 1942 but it took advantage of the new law and diverted UI taxes into the TDI fund. See 2009 Annual Statistical Supplement *supra* n. 18..

²⁰ See Cal. Unemp. Ins. Code §§ 135 - 2708 (2005); N.J. Stat. Ann. § 43:21-25, 43:21-71 (2005); N.Y. Workers Comp. Law §§ 200- 242 (2005); R.I. Gen. Laws §§ 28-39-1, 28-41-33 (2005).

²¹ See N.Y. Workers Comp. Law §§ 200- 242 (2005).

²² Social Sec. Admin., *A Comprehensive Social Security Program* available at <http://www.ssa.gov/history/reports/48advise2a.html>. As with the '38 Report, this paper appears to have been issued as a prepared rebuttal to the recommendations of a second Advisory Council on Social Security formed by the Senate Finance Committee (available at <http://www.ssa.gov/history/reports/48advise2.html>). The insistence on a truly national TDI program in the Social Security Report was slightly surprising given the SSA's earlier support for a UI-type system and the gains made after the amendments to the FUTA. However, the stance did fit with the "nationalized" theme of the report.

²³ Social Sec. Admin., *A Comprehensive Social Security Program* available at <http://www.ssa.gov/history/reports/48advise2a.html>.

²⁴ H.R. 2893, 81st Cong. (Rep. Doughton) at §§ 201(a)-(l), 203, 204.

²⁵ *Social Security Act Amendments of 1949: Hearing on H.R. 2893 Before the H. Comm. On Ways and Means*, 81st Cong. 1081-1343 (1949)(hereinafter *Ways and Means Hearings*).

²⁶ *Ways and Means Hearings supra* n. 26 at 1262 – 73. Rep. Wilbur Mills (D-Ark), for instance, devoted his time to pointing out inequities between TDI and UI rates and walking through "extreme" scenarios such as the case of a woman who earned \$260 by working for 5 weeks in 1948 but could, under the terms of the program, conceivably remain eligible for 40 weeks of payments through the year 1951.

²⁷ At least two Congressmen, Rep. Daniel Reed (R-NY)—transmitting a letter on behalf of former President Herbert Hoover—and Rep. Thomas Jenkins (R-OH) inserted statements into the Congressional Record on these points. Others, including Rep. James Patterson (R-CT), worried that the new "weekly benefits" were an overreach and urged the Committee to focus only on expanding

the existing programs for the elderly and survivors. See 95 Cong. Rec. A2438 (April 26, 1949)(statement of Rep. Daniel Reed); 95 Cong. Rec. A2119 (April 8, 1949)(Statement of Rep. Thomas Jenkins); 95 Cong. Rec. A2103 (April 8, 1949)(statement of Rep. James Patterson).

²⁸ H.R. 6000, 81st Cong. (Rep. Doughton).

²⁹ P.L. 81-734 (1950).

³⁰ P.L. 84-880 (1956). The original SSDI program only applied to persons aged 50 and older. Subsequent amendments in 1960 (P.L. 86-778) and 1972 (P.L. 92-603) removed the eligibility threshold and added the Supplemental Security Income Program.

³¹ President's Commission on the Status of Women, Presidential Report on American Women (1963).

³² *Id.*

³³ 42 U.S.C. §2000e(k) (2010), P.L. 88-352, 78 Stat. 241.

³⁴ See 29 C.F.R. 1604.10 (b) (1975); S. Rept. 95-331, pg. 2. (1977).

³⁵ See *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *General Electric v. Gilbert*, 429 U.S. 125 (1976)(which both held that the refusal to cover pregnancy under public and private TDI and medical plans did not constitute discrimination on the basis of sex).

³⁶ P.L. 95-555 (1978)(amending the Civil Rights Act of 1964 and prohibiting discrimination in the provision of medical and insurance benefits on the basis of pregnancy).

³⁷ This also meant that the 6 existing TDI programs—Hawaii and Puerto Rico had passed TDI laws in 1969—automatically gained maternity leave insurance components. Though, it should be noted that RI, CA, NY, and NJ already covered pregnancy to a certain extent. See Haw. Rev.Stat. §§ 392-1, 392-101 (2005); P.R. Laws Ann. tit. 11 §§ 201 - 212 (2005); 2009 Annual Statistical Supplement *supra* n.18; Kessler-Harris *supra* n. 13 at 211.

³⁸ See H.R. 2020, 99th Cong. (Rep. Schroeder); H.R. 4300, 99th Cong. (Rep. Clay); S. 2278, 99th Cong. (Sen. Dodd). See also WorkplaceFlexibility2010, ChartOutliningtheDevelopmentoftheStatutoryTextRegardingtheLengthofFamilyandMedicalLeaveandthe Definition of Covered Employer: 1985-1993 available at http://workplaceflexibility2010.org/index.php/laws_impacting_flexibility/fmla/ (hereinafter FMLA Chart).

³⁹ See H.R. 2020, 99th Cong. (Rep. Schroeder); H.R. 4300, 99th Cong. (Rep. Clay); S. 2278, 99th Cong. (Sen. Dodd). FMLA Chart *supra* n. 39.

⁴⁰ Provisions included the establishment of a commission or advisory panel to study international and state level programs providing workers with full or partial salary replacement during family or medical leave. After compiling and reviewing existing practices, the commission would submit legislative recommendations to Congress on a federal level paid leave program. See H.R. 284, 100th Cong. (Rep. Roukema); S. 249, 100th Cong. (Sen. Dodd); H.R. 925, 100th Cong. (Rep. Clay); S. 2488, 100th Cong. (Sen. Dodd); H.R. 770. See also *The Family and Medical Leave Act of 1993: Joint Hearings Before the H. Sub. Comm. On Labor Mgmt Rel. and H. Sub. Comm. On Labor Stand., 100th Cong. 79-80 (1987)* (statement of Rep. Richard K. Arme, Texas) (“I take it then that you will not accept the bill without the provision for the study mandated by and paid for by the taxpayers to examine the question of paid leave.”); FMLA Chart *supra* n. 39.

⁴¹ See Donna R. Lenhoff, *Family and Medical Leave in the United States: Historical and Political Reflections*, <http://www.hhh.umn.edu/centers/wpp/afterbirth/pdf/lenhoff.pdf>.

⁴² P.L. 103-3, 29 USC 2601 *et seq.* (2009).

⁴³ See Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13, 2000).

⁴⁴ *Id.*

⁴⁵ Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (Oct. 9, 2003) (to remove 20 C.F.R. § 604).

⁴⁶ See Cal. Unemp. Ins. Code §§ 3300-3306; N.J. Stat. Ann. § 43-21-25.

⁴⁷ See Wash. Rev. Code § 49.86; Joint Task Force on Family Leave Insurance, Final Report 1, January 2008 available at <http://www.leg.wa.gov/jointcommittees/FLI/Pages/default.aspx>; Workforce Management, *Washington State Delays Maternity Leave*. May 22, 2009 available at <http://www.workforce.com/section/00/article/26/44/74.php> (Describing a recently enacted law that pushed back the start date for WA Family Leave Insurance).

Appendix D

Legislative Proposals on Paid Time Off

The need for some form of temporary wage-replacement for employees unable to work due to their own disability or their need to care or bond with a family member has been the subject of much debate on Capitol Hill and in state legislatures. In this appendix, we offer brief summaries of the major federal proposals on time off for health and family reasons and recent activity at the state level.

A. The FIRST Act – H.R. 2339

The grant approach—embodied by Rep. Woolsey’s Family Income to Respond to Significant Transitions Act ¹ (otherwise known as the FIRST Act)—seeks to encourage the establishment of TDI and PFL programs at the state level by providing federal grants for their design and implementation.²

Under the FIRST Act, grants would last a maximum of three years and would be available to fund administration, implementation, development, and educational outreach.³ States with and without TDI and PFL would be eligible for funding, but the states without those programs would be given priority.⁴ The bill only permits one or two three-year grants per state.⁵ This one-off approach differs significantly from existing federal-state partnerships such as UI, for which the federal government subsidizes states’ administrative costs on an ongoing basis. Moreover, unlike the UI system, the grant approach in the FIRST Act does not provide payroll tax breaks or similar incentives to employers in participating states.

Rep. Woolsey’s (D-CA) and other members of Congress have introduced this legislation in various forms over the past six years, but it has gained little traction.⁶ The sole hearing on the bill came in front of Rep. Woolsey’s own Education and Labor Workforce Protections Subcommittee in June of 2009.⁷

B. Social Security Cares

In March of 2009, the Center for American Progress released a report by economist Heather Boushey titled “Helping Breadwinners When It Can’t Wait: A Progressive Program for Family Leave Insurance.”⁸ In that report, Boushey advocates for the inclusion of a Family Leave Insurance program within the Social Security system.⁹

She argues that Social Security’s nationwide scope presents an opportunity to enact consistent, effective, and broadly popular legislation on the issue. Moreover, she argues that using the eligibility requirements developed as part of the Social Security program would ensure that the new program covers nearly all American workers.¹⁰

The Social Security Cares program would operate as either a traditional social insurance program, funded through an increase in the Social Security payroll tax and/or an increase in the wage cap, or, alternatively, it would be financed through a unique “time-lending” system that would allow Social Security recipients to trade future benefits for family and medical leave benefits.¹¹

To date, the Social Security Cares program has not been introduced as an actual piece of legislation.

C. The Family Leave Insurance Act of 2009 – H.R. 1723

A hybrid approach, Rep. Pete Stark's (D-CA) Family Leave Insurance Act,¹² would establish a national family leave insurance program operated through federal-state partnerships and/or the Social Security Administration.

Under the federal-state partnerships, the Secretary of Labor would be given the authority to enter into administrative agreements with individual states.¹³ Those agreements would allow the Secretary to provide funding for the operation of a PFL/TDI system if the state promised to administer the benefits.¹⁴ Interestingly, this approach would *not* allow the state to create a new agency for the purpose of administering family leave insurance. States could only qualify for funds if the new PFL/TDI benefit was run through an existing program such as UI or WC.¹⁵

If a state were not willing to administer the benefit through an existing agency, the bill would authorize the Commissioner of Social Security, at the request of the state's Governor, to establish a family and medical insurance program within the state.¹⁶ Program funding would come entirely from the federal government, and benefits, presumably, would be distributed through existing Social Security offices and resources in the state.¹⁷

All options would be funded by the federal government through a 0.1 or 0.2 percent increase (depending on whether the person works for a large or small employer) in the Social Security payroll tax. The tax would be called the "Family and Medical Leave Premium."¹⁸

In order to be eligible for benefits under the Stark proposal, an employee must have worked for his or her employer for at least the previous six months, and must have worked 625 hours for that employer in those six months (thus excluding many part-time workers from eligibility).¹⁹ Small employers, defined as those employing fewer than 20 persons,²⁰ would be exempt from mandatory participation.²¹

Rep. Stark has introduced this bill in various forms over the past 5 years.²² It is currently awaiting action in the Workforce Protections Subcommittee of the House Committee on Education and Labor.

D. The Family Leave Insurance Act of 2007 – S. 1681

The bipartisan Family Leave Insurance Act, introduced in the 110th Congress by Senators Christopher Dodd (D-CT) and Ted Stevens (R-AK), took the rather unique approach of using *employers* as the benefit delivery vehicle for a national insurance program.

The bill, like the Stark proposal, would pay for a family leave insurance program by levying a "Family and Medical Leave Premium" on eligible employers and employees.²³ The proceeds from these premiums would then be placed in a special "Family and Medical Leave Insurance Fund" controlled by a Board of Trustees.²⁴ Employers would make the initial payments to their employees and then seek reimbursement from the insurance fund.²⁵ In this way, the government plays absolutely no role in the distribution of benefits. The employers bear the entire administrative load, including handling applications and making initial eligibility determinations.²⁶

Sec. 103(f)(4) describes limitations on payments, specifically that no amount may be paid greater than that which is remaining in the Insurance Fund. In the same section, there is also a provision for a "notice of insufficient funds," which relieves employers of the requirement to pay benefits as long as the notice is in effect.

As with the proposals mentioned above, the Dodd-Stevens bill did not receive much legislative attention. The bill was introduced in June of 2007 and referred to the Senate Finance Committee. No major action was taken on the bill during the 110th Congress and Sen. Dodd has yet to reintroduce it in the 111th Congress.

E. The Obama Administration's State Paid Leave Fund

The President's FY2011 budget proposal for the Department of Labor included a 50 million dollar "State Paid Leave Fund."²⁷ The fund is designed to offer grants to states to assist them with the initial start up costs associated with paid leave programs.

The Senate Appropriations Committee included a scaled down version of the fund—10 million instead of 50 million dollars—in its Labor, Health, and Human Services appropriations for FY2011.²⁸ The House Appropriations subcommittee on Labor, Health, and Human Services, however, did not include similar language in its version of the FY2011 appropriations bill.²⁹ As of this writing, the fate of the fund is uncertain.

F. State Activity

State legislative activity on paid family leave tends to fall into two broad categories.³⁰ First, a handful of states are considering legislation that would either establish a comprehensive wage-replacement program for temporary disability, caregiving, and parental care for a new child or would add caregiving and parental care benefits to existing TDI programs. Legislative proposals currently active in New York, Hawaii, Illinois, and Massachusetts fit this description.

Second, a slightly larger group of state legislatures are debating programs that would only provide wage-replacement for time off to care for a new child or a family member with a serious health condition. Arizona, Missouri, New Hampshire, Oregon, Pennsylvania, Texas, and Vermont fall into this category.³¹

The specifics of the proposed programs in both categories vary widely. Benefits range from \$250 a week in Arizona,³² Hawaii³³ and New Hampshire³⁴ to \$750 a week in one proposed bill in Massachusetts.³⁵ Several of the bills would also impose caps based on the state average weekly wage.³⁶ Benefit durations range from four weeks in Hawaii³⁷ and Missouri,³⁸ to 12 weeks in Massachusetts³⁹ and Pennsylvania.⁴⁰

The proposed methods for funding these programs are similarly varied. Arizona would require employers to pay a small premium into a statewide insurance fund.⁴¹ Vermont's proposal,⁴² as well as the one pending in the Massachusetts House,⁴³ would establish a payroll tax. Missouri would require employers to pay the wage replacement.⁴⁴ A bill in New Hampshire⁴⁵ would even make the plan contingent on the receipt of federal funds.

These proposals have met with mixed responses. The New York bill has been approved by the Legislative Assembly several times but has failed to garner equal support in the State Senate. In New Hampshire, an official legislative study was commissioned in 2010 and the House Committee on Commerce and Consumer Affairs recommended the bill for consideration in the 2011 session. In most states, no official action has been taken.⁴⁶



¹ H.R. 2339, 111th Cong. (introduced by Rep. Lynn Woolsey on May 7, 2009).

² *Id.* § 3.

³ *Id.* §3(a)(2)

⁴ *Id.* §3(a)(3)

⁵ States with an existing program can obtain one three-year grant, while states without a pre-existing paid family leave system can obtain one three-year grant to set up a program and another to run it. *Id.* §3(a)(2).

⁶ See H.R. 2363, 108th Cong. (Introduced by Rep. Rosa DeLauro on June 5, 2003), H.R. 5625, 109th Cong. (Introduced by Rep. Carolyn Maloney on June 15, 2006), H.R. 1369, 110th Cong. (Introduced by Rep. Carolyn Maloney on March 7, 2007).

⁷ *Hearing on H.R. 2339, the Family Income to Respond to Significant Transitions Act and H.R. 2460, the Healthy Families Act before the H. Sub. Comm. on Workforce Protections*, 110th Cong. (June 11, 2009) available at <http://edlabor.house.gov/hearings/2009/06/hr-2339-the-family-income-to-r.shtml>.

⁸ Heather Boushey, Center for American Progress, *Helping Breadwinners When it Can't Wait: A Progressive Program for Family Leave Insurance* (2009), available at <http://www.americanprogress.org/issues/2009/06/pdf/fmla.pdf>.

⁹ *Id.* at 1

¹⁰ *Id.* at 13.

¹¹ *Id.* at 2.

¹² H.R. 1723, 111th Cong. (Introduced by Rep. Pete Stark on March 25, 2009).

¹³ *Id.* §102(b)(1)(a).

¹⁴ *Id.* §102(b)(1)(b).

¹⁵ *Id.* §102(b)(1)(a) (stating that “State agrees to establish, or expand a State program *in effect at the date of the enactment of this Act*”)(emphasis added).

¹⁶ *Id.* §102(b)(2)(a).

¹⁷ *Id.* §102(b)(2)(b).

¹⁸ *Id.* §306.

¹⁹ *Id.* § 101(1)(A).

²⁰ *Id.* § 101(2)(C).

²¹ *Id.* § 101(2)(A)(II) (noting that small employers are voluntary participants).

²² See H.R. 3192, 109th Cong (Introduced by Rep. Pete Stark on May 1, 2006), H.R. 5873, 110th Cong. (Introduced by Rep. Pete Stark on April 22, 2008).

²³ S. 1681 §306, 110th Cong. (Introduced by Sen. Chris Dodd on June 21, 2007).

²⁴ *Id.* §§ 301-02

²⁵ *Id.* § 102.

²⁶ *Id.* § 103(d)

²⁷ President’s Proposed Budget for the Department of Labor, FY 2011, pg. 797 available at <http://www.whitehouse.gov/omb/budget/Overview/>.

²⁸ See S. 3686; S. Rep. 111-243. The report describes the purpose of the fund in the following terms: “Grants will support State start-up activities relating to the implementation of paid leave programs, such as program infrastructure in States that have passed but not implemented paid leave programs. The Committee is interested in the capacity of this new initiative to encourage passage of paid leave programs in additional States. Accordingly, these funds will have a 2-year period of availability to allow sufficient time for States to consider and pass legislation authorizing paid leave programs.”

²⁹ See Committee on Appropriations, FY2011 Labor, Health, and Human Services, Education, and Related Agencies Appropriations Bill Summary Table available at http://appropriations.house.gov/index.php?option=com_content&view=article&id=692:fy11-lh-appropriations-&catid=33:labor-hhs-education&Itemid=134&Itemid=4.

³⁰ See *Generally National Partnership for Women and Families, 2010 State Action on Paid Family and Medical Leave* available at http://www.nationalpartnership.org/site/DocServer/Paid_Leave_Tracking.pdf?docID=1921.

³¹ Washington might also be included in this category. As noted earlier, Washington has passed a paid family leave program that would provide maternity and paternity benefits to new parents. However, as of this writing, the State has yet to fund the program or empower an administrative agency to distribute benefits. See Appendix A: Current Social Insurance Programs (PFL).

³² See Arizona HB 2319, introduced by Rep. Daniel Patterson in Jan. 2010.

³³ See Hawaii HB 2258, introduced by Rep. Karl Rhoads in Jan. 2010.

³⁴ See New Hampshire HB 661, introduced by Rep. Mary Gile in Feb. 2009.

³⁵ See Massachusetts S.71, introduced by Sen. Karen Spilka in Jan. 2009.

³⁶ See New York A8742 introduced by Assemblyman Sheldon Silver in June 2009; Massachusetts S. 474 introduced by Sen. Pat Jehlen in January 2009.

³⁷ Hawaii *supra* note 33.

³⁸ See Missouri HB 1940, introduced by Rep. Beth Low in Feb. 2010.

³⁹ Massachusetts *supra* note 35; See also Massachusetts S.474, introduced by Sen. Pat Jehlen in Jan. 2009.

⁴⁰ See Pennsylvania HB 1558, introduced by Rep. Jaret Gibbons in May 2009.

⁴¹ Arizona *supra* note 32.

⁴² See Vermont H.672, § 472d(a), as introduced by Rep. Rachel Weston in Jan. 2010.

⁴³ See Massachusetts H.124, §77, as introduced by Rep. Antonio Cabral in Jan. 2009.

⁴⁴ Missouri *supra* note 38.

⁴⁵ New Hampshire *supra* note 34.

⁴⁶ See Center for Working Families, *New York State Paid Family Leave*, pg. 4 available at <http://www.workingfamiliesparty.org/wordpress/uploads/2009/04/cwf-new-york-state-paid-family-leave.pdf> (noting that the New York Assembly passed a Paid Family Leave Bill in 2008); *Time to Care New York, Paid Leave for New York Families: We Need Time to Care* available at <http://www.timetocareny.org/About.htm> (noting that a Paid Family Leave Bill passed the New York Assembly in 2005); *New Hampshire General Court, Docket of HB 661* available at http://www.gencourt.state.nh.us/bill_status/Bill_docket.aspx?lstr=744&sy=2010&sortoption=&txtsessionyear=2010&txtbillnumber=HB661

Appendix E

Comparison of FSI Proposal to Similar Paid Time Off Proposals

	Family Security Insurance	Family Leave Insurance Act of 2009, H.R. 1723 (111th Congress), introduced by Rep. Stark ¹	Family Leave and Insurance Act of 2007, S. 1681, (110th Congress), introduced by Senators Dodd and Stevens ²	Social Security Cares ³
ELIGIBILITY				
Qualifying Event	<ul style="list-style-type: none"> ➔ Temporary Disability Insurance (TDI): applicant's serious health condition (includes pregnancy). ➔ Parental Care for a New Child (PCNC): birth or placement of a new child. ➔ Caregiving Insurance (CI): serious health condition of a family member, broadly defined. 	<ul style="list-style-type: none"> ➔ TDI: same as FSI. ➔ PCNC: same as FSI. ➔ Caregiving: FMLA-covered family members and domestic partners. 	<ul style="list-style-type: none"> ➔ TDI: same as FSI. ➔ PCNC: same as FSI. ➔ Caregiving: limited to FMLA-covered family members. 	<ul style="list-style-type: none"> ➔ TDI: same as FSI. ➔ PCNC: same as FSI. ➔ Caregiving: limited to FMLA-covered family members; recommends an amendment to FMLA to cover more family members, such as domestic partners.
Workforce Attachment Requirements	Minimum of 950 hours worked over a base period, which is defined as the last 4 or 5 quarters preceding an application for benefits. Hours can be served at multiple employers. Self-employed individuals' eligibility is determined based on earnings.	625 hours of service with one employer during the previous 6 months.	Employee must be eligible under FMLA (1,250 hours of work at a particular employer and a year-in-service at that employer). Employee must have also earned wages with a covered employer for 12 of the last 18 months prior to filing an application for benefits.	Based on Social Security credit model. All employees, including those who are self-employed, earn one credit for each \$1,090 in earnings, up to a maximum of four credits per year. <ul style="list-style-type: none"> ➔ Before age 24, workers will need 1 years of work (six credits) in the three years prior to the leave date; ➔ Between ages 24 through 30, workers will need credits for half of the time

	Family Security Insurance	Family Leave Insurance Act of 2009, H.R. 1723 (111th Congress), introduced by Rep. Stark ¹	Family Leave and Insurance Act of 2007, S. 1681, (110th Congress), introduced by Senators Dodd and Stevens ²	Social Security Cares ³
ELIGIBILITY				
Workforce Attachment Requirements				between age 21 and the leave date (i.e. 2 years of work required if leave is taken at 25 and 4 years of work required if taken at age 30); <ul style="list-style-type: none"> ➔ At age 31 or older, workers need at least 20 credits (i.e. 5 years of work) in the 10 years immediately before the leave date. Hours can be served at multiple employers.
Covered Employers	All.	Employers with 20+ employees. Employers may opt-out if they adopt a voluntary plan approved by the agency administering the program. Self-employed individuals and employers with between 2 and 19 employees may elect to participate.	All employers covered under the FMLA (50+ employees). Employers may opt-out if they adopt a voluntary plan approved by the agency administering the program. Self-employed individuals and employers with between 2 and 49 employees may elect to participate.	All.

	Family Security Insurance	Family Leave Insurance Act of 2009, H.R. 1723 (111th Congress), introduced by Rep. Stark ¹	Family Leave and Insurance Act of 2007, S. 1681, (110th Congress), introduced by Senators Dodd and Stevens ²	Social Security Cares ³
BENEFITS				
Duration	<ul style="list-style-type: none"> ➔ TDI: depends on length of an individual's serious health condition; maximum annual duration of 26 weeks; no total maximum duration. ➔ PCNC: 12 weeks per parent, must be taken within 12 months of child's birth or placement; no total maximum duration. ➔ CI: depends on length of caregiving need; maximum annual duration of 12 weeks, total maximum duration of 26 weeks. 	Same as FMLA: 12 weeks per year for all qualifying events.	8 weeks per year for all qualifying events.	Same as FMLA: 12 weeks per year for all qualifying events.
Wage Replacement Rate & Maximum Benefit Amount	<ul style="list-style-type: none"> ➔ TDI and CI: 80% of weekly wages up to maximum of 150% the national average weekly wage. ➔ PCNC: 90% of weekly wages up to maximum of 150% the national average weekly wage. 	Less than \$20,000*: 100% \$20,000-\$30,000: 75% \$30,000-\$60,000: 55% \$60,000-\$97,000: 40% Above \$97,000: 40% of \$97,000. *Income categories indexed to the national average weekly wage index.	Same as H.R. 1723.	Follows current benefit schedule in Social Security Disability Insurance. Two "bend points" (calculated based on the national average wage index) are used to create three earnings brackets. Earnings up to the first bend point are replaced at 90 percent, earnings between the first and second bend points are replaced at 32 percent, and earnings beyond the second bend point are replaced at 15 percent up to the annually-updated federal maximum.

	Family Security Insurance	Family Leave Insurance Act of 2009, H.R. 1723 (111th Congress), introduced by Rep. Stark ¹	Family Leave and Insurance Act of 2007, S. 1681, (110th Congress), introduced by Senators Dodd and Stevens ²	Social Security Cares ³
BENEFITS				
Taxation	Benefits are treated as taxable wages for income and payroll tax purposes.	Does not specify.	Does not specify.	Does not specify; presumably benefits would be subject to tax in the same manner as other Social Security benefits: if a recipient has another substantial source of income, benefits may be partially taxed.
Waiting period	<ul style="list-style-type: none"> ➔ TDI: 5 workdays per year, per serious health condition. ➔ PCNC: None. ➔ CI: 5 workdays per year, per serious health condition of the person being cared for. 	5 workdays per year.	5 workdays per year.	Does not specify.
Allowable increments of benefits	5 days or more.	Minimum increment of one day.	Minimum increment of one day.	Does not specify.

	Family Security Insurance	Family Leave Insurance Act of 2009, H.R. 1723 (111th Congress), introduced by Rep. Stark ¹	Family Leave and Insurance Act of 2007, S. 1681, (110th Congress), introduced by Senators Dodd and Stevens ²	Social Security Cares ³
FINANCING				
Method of financing	Payroll tax, contributions made on a pre-tax basis.	Payroll tax.	Payroll tax.	3 financing options: 1) Increase in the Social Security payroll tax, which imposes equal contributions from employers and employees; 2) Lifting the earnings cap on which payroll taxes are assessed beyond its current level; 3) Allowing workers to trade future Social Security benefits for paid family and medical leave benefits. Based on Social Security. Equal contributions from employees and employers. Self-employed individuals cover employer and employee contribution.
Payroll tax earnings cap	None.	<ul style="list-style-type: none"> ➔ Large employers (20+ employees): Equal contributions from employer and employee at a tax rate of .2% each. ➔ Opt-in small employers (less than 20): Equal contributions from employer and employee at a tax rate of .1% each. ➔ Self-employed: Self-employed individuals who elect to participate are required to contribute at a tax rate of .4%. 	<ul style="list-style-type: none"> ➔ Large employers (20+ employees): Equal contributions from employer and employee at a tax rate of .2% each. ➔ Opt-in small employers (less than 20): Equal contributions from employer and employee at a tax rate of .1% each. ➔ Self-employed: Self-employed individuals who elect to participate are required to contribute at a tax rate of .2% 	Same as Social Security earnings cap (currently \$106,800).

	Family Security Insurance	Family Leave Insurance Act of 2009, H.R. 1723 (111th Congress), introduced by Rep. Stark ¹	Family Leave and Insurance Act of 2007, S. 1681, (110th Congress), introduced by Senators Dodd and Stevens ²	Social Security Cares ³
ADMINISTRATION				
Administration vehicle	Either a single federal agency or a federal-state partnership.	Either a federal-state partnership or, at the request of a state governor, administration by Social Security offices.	Employers distribute and administer benefits and receive reimbursement from Family Leave Insurance Fund.	Social Security.
JOB PROTECTION or ANTI-RETALIATION PROVISIONS				
Job protection	No. Recommends an expansion of the FMLA to cover employers with 15+ employees.	No.	No.	No. Recommends an expansion of the FMLA to cover more employers, but does not recommend a specific threshold.
Anti-retaliation provision	Yes.	Yes.	Yes.	Does not specify.

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¹ Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. (2009).

² Family Leave and Insurance Act of 2007, S.1681, 110th Cong. (2007).

³ Heather Boushey, Helping Breadwinners When It Can't Wait, A Progressive Program for Family Leave Insurance (Center for American Progress 2009), <http://www.americanprogress.org/issues/2009/06/pdf/fmla.pdf>.

⁴ Some recipients are required to pay federal income taxes on their Social Security benefits if they have another source of substantial income in addition to Social Security benefits, such as wages, self-employment, interest, dividends and other taxable income. No Social Security recipient pays federal income tax on more than 85 percent of his or her Social Security benefits. IRS Publication 915, Social Security and Equivalent Railroad Retirement Benefits (2009), <http://www.irs.gov/pub/irs-pdf/p915.pdf>.

Appendix F

Other Policy Models for Achieving Wage Replacement for Temporary Disability, Parental Care, and Caregiving

We explored a number of possible policy models to increase access to paid time off for health and caregiving needs. In this section, we discuss the wage replacement models we explored in detail and the advantages and disadvantages of each.

1. Employer-Based Models

One way to increase the number of employers that offer paid time off to employees is through favorable tax incentives. For example, some members of Congress and federal policy experts have proposed establishing a new tax credit for employers who provide paid family and medical leave to their employees.¹² The goal of employer tax incentives is to tip the financial bottom line in favor of a particular behavior. An employer tax credit for offering paid time off might increase the number of businesses providing such benefits by making it affordable to do so. Offering such benefits might then increase employee retention and productivity, which would provide another financial boost to businesses.³

There is ample precedent for using federal tax policy to incentivize employers to adopt policies that help families manage caregiving obligations. For instance, employers receive a federal tax credit of up to \$150,000 when they provide child care facilities and resources to their employees.⁴ Employers also benefit from reduced payroll taxes when they offer Health Care or Dependent Care Flexible Savings Accounts (HSAs and DCFSAs), which allow reimbursement for health care, childcare, and some elder care expenses with pre-tax dollars.⁵

Tax incentives to employers that provide paid family and medical leave would be a relatively efficient way for government to facilitate paid time off because employers would be responsible for administering the program. The federal government could condition incentives on whether an employer meets broad, minimum standards (such as requiring that an employer provide extended time off for an FMLA-qualifying reason). Beyond basic standards, employers could be allowed to innovate with various ways to provide additional paid time off. This room for innovation might help an employer adapt a paid time off policy to meet the specific needs of its business, such as offering higher wage replacement or expanding the reasons employees can take extended time off work (for example, a sabbatical or time off for additional job training). Ideally, this innovation would spur “best practices” models that could be replicated in other workplaces.

The primary disadvantage with relying solely on employer tax incentives to increase workers’ access to wage replacement is that coverage is likely to be far from universal. Evidence suggests that many employer tax credits tend to reward employers who are already inclined towards the behavior the tax credit is designed to incentivize rather than encouraging new behavior.⁶ Further, large employers are far more likely than small employers to offer work-family benefits like child care facilities and DCAPs.⁷ While it is difficult to predict how many employers would decide to offer new paid time off programs as a result of a new tax credit, similar tax incentives have not shifted employer behavior to the point of achieving anywhere near universal coverage.⁸ In order to incentivize the vast majority of employers to take advantage of a paid time off tax credit, the credit itself would need to be fairly large, which would have a negative impact on federal revenue streams. Also, the current economic recession has meant that other employer tax credits targeted directly at economic recovery, such as those provided

under the HIRE Act and the first-time home buyer’s tax credit, have received higher priority.⁹

Another option that locates responsibility for paid extended time off on employers is to directly mandate that employers provide paid time off for health and caregiving reasons. For instance, the FMLA could be expanded to require that leave taken under the FMLA be paid by employers (but this would still mean that only about half of workers would receive benefits, unless FMLA were expanded to all businesses). There are a number of examples of direct employer mandates, including the Fair Labor Standards Act’s minimum wage requirements, civil rights laws prohibiting employment discrimination, the FMLA’s job protection mandate, and an employer participation requirement under the new Patient Protection and Affordable Care Act (PPACA).¹⁰ Also, legislation currently pending in Congress—the Healthy Families Act—would require employers to provide a certain number of annual paid sick days to workers.¹¹ Similarly, eight states have laws, known as “kin care” laws requiring employers who provide sick days to allow employees to use those days to care for family members.¹²

Assuming a mandate applied across the board to small and large employers, it could be an effective way of securing private provision of paid time off for health and caregiving reasons. Yet, the political reality of direct mandates has often meant that these laws are not evenly applied to small and large employers.¹³

Some scholars have also expressed concern that employer mandates for paid time off could lead to job discrimination against individuals who might be perceived as being more likely to use the benefits. For example, while take-up rates of unpaid FMLA tend to be relatively equal between men and women, there still might be a perception that women are more likely to use paid time off, particularly maternity and parental leave benefits.¹⁴ This perception could lead to disparities in labor market outcomes for women, including pay and hiring discrimination.¹⁵

The risks of cost-shifting to likely users of paid time off inherent in a mandate nominally financed by employers argues in favor of a scheme that severs the direct link between leave-taking by individual employees and the tax imposed on employers to finance the leaves. A social insurance scheme financed by a tax spread across employers and/or workers—and not “experience-rated” so that employers who have more leave-takers would not pay higher taxes—would help ameliorate this problem.¹⁶

Finally, a direct mandate tying responsibility for the expense and administration of benefits to particular employers may not meet the reality of today’s highly mobile workforce.¹⁷ With a direct mandate, employers might reasonably demand a policy requiring significant pre- and post-leave work history with that employer as a condition of eligibility. While we believe workers need to have a significant level of workforce attachment to qualify for wage replacement benefits and we support policies that encourage loyalty to the workforce after taking leave, onerous single-employer attachment requirements could prove too restrictive, and are not reflective of workforce realities.¹⁸ We believe a social insurance approach, as described in our proposal, provides better protection to persons who must hold multiple jobs (such as low-wage workers with one or more part-time positions) or those who regularly change employers.

A similar, but less aggressive approach to a broad employer mandate for paid time off is using the government’s regulatory powers to incentivize businesses to provide paid time off for health and caregiving reasons.

For example, the Society for Human Resource Management has proposed giving businesses a “safe

harbor” compliance exemption from federal, state, and local leave laws if they provide paid time off benefits.¹⁹ However, exemptions from leave laws—like the FMLA’s job protection mandate—in exchange for wage replacement benefits are problematic because workers are less likely to take paid time off if they do not have a job to return to after their leave is over.²⁰

Another approach involves using the federal government’s regulation of federal contracts and grants to incentivize employers to offer paid family and medical leave benefits. For example, some policy experts have proposed using the government’s significant purchasing power to take into consideration employer work-family policies when awarding federal contracts or grants, including whether contractors or grantees provide paid family leave to their workers.²¹ However, even though the federal contracting workforce is large (it represents nearly 25% of the American workforce),²² government purchasing power alone will not secure universal access to wage replacement benefits for all workers.

2. Employee-based models

Rather than focusing on employer provision of paid time off, government could encourage workers to finance their own time off by incentivizing and supporting dedicated personal savings.

For example, the government could allow tax-preferred savings accounts similar to Health Care or Dependent Care Flexible Savings Accounts (HSAs and DCFsAs).²³ The money set aside would be pre-tax, so workers could reduce their adjusted gross income and pay for paid family and medical leave with untaxed dollars.²⁴

Another approach is for the government to subsidize private savings. Several countries have adopted a savings account model to assist families when they have children, although it is important to note that these models are a supplement—not an alternative—to other work-family policies, such as social insurance programs for maternity and parental leave.²⁵

An individual account model could be an administratively inexpensive way for government to facilitate wage replacement for time off for health and caregiving reasons because a private entity would likely administer the accounts. Individual accounts also have the advantage of being portable and flexible. Workers could access funds even if they have changed jobs, and workers would have the flexibility to decide what proportion of their earnings to set aside based on their own individual situation. Some workers might be able to save enough to fully account for lost wages instead of relying on a social insurance program that caps benefits above a certain income level and does not replace wages at 100 percent.

While the individual account model has many attractive features, it is not feasible to rely solely on this model to ensure coverage for most workers, particularly workers facing the most economic insecurity. Evidence from similar individual savings account models—such as DCFsAs and HSAs—shows that a large number of employers do not offer such accounts²⁶ and of those who do, take-up rates among employees tend to be low.²⁷ Assuming no change in the voluntary nature of the individual savings account model, we believe it is unlikely to generate adequate savings to support current needs, especially the needs of low-wage workers, but also early-career workers of all income levels.

Individual accounts are also often subject to annual contribution caps, which limits the tax-preferred advantage of this type of savings vehicle. For example, the capped savings rate for DCFsAs, which can be used to offset the cost of childcare, is \$5,000 per year.²⁸ This amount does not come close to

covering the actual costs of high-quality childcare for most families.²⁹ It is unlikely that the tax code could financially bear a high enough savings cap needed to help most families achieve sufficient wage replacement for time off for health and caregiving reasons.

Even if an individual account model was adopted, it would likely need to be designed to allow workers to roll over their savings from year to year, as with 401(k) accounts, rather than the annual “use it or lose it” approach that has been adopted for health savings accounts. Note that Health Reimbursement Accounts (HRAs), which are set up and funded by employers, roll-over unused funds from one year to the next.³⁰

Yet, even with roll-overs, higher contribution caps and individual foresight, we anticipate disadvantages with the individual account model. Many workers with new children are relatively new entrants to the workforce and will not have had enough time in the labor market or surplus earnings to save for parental care or other unexpected events or situations. Others won’t be able to afford to.

Another employee-centered policy model is to require that workers carry insurance that would provide wage replacement during time off for temporary disability, parental care, or caregiving. This model is similar to the individual mandate in the Patient Protection and Affordable Care Act (PPACA) and the many state laws that require vehicle owners to carry liability insurance. As with the PPACA, an individual mandate could be coupled with government subsidies and tax credits to ensure that mandated coverage is affordable for low and moderate income families. The PPACA’s individual mandate is also supported by an employer participation requirement; a similar requirement could reduce the risk that employers who currently provide paid time off would stop doing so.

By mandating universal participation in an insurance pool, the government forces a broader spreading of risks than a private insurance market.³¹ Spreading risks broadly could reduce the cost of insurance and facilitate inclusion of workers who would be excluded from private insurance and for whom saving privately for individual coverage would be prohibitively difficult, particularly women and low to middle-income workers.³²

Without some degree of government subsidy, an individual mandate to insure for health and caregiving needs will be unaffordable for most workers. Even families with the resources to set aside funds for a rainy day may have competing out of pocket expenses. Moreover, there are separate public policy reasons to encourage individuals to save for competing life events, such as college and retirement, rather than make mandatory payments for paid time off insurance. Finally, unlike health or auto insurance, there is virtually no functioning private market for “family and medical leave insurance” because caregiving needs do not easily fit into the actuarial parameters necessary to sustain a private insurance market.³³ Given that caregiving obligations are a universal concern, and healthy childrearing is a social good, a social insurance program that allows for some shared costs is a preferable alternative to precluding access to extended time off for those who need it most, such as chronically disabled individuals or childbearing women.

3. State-Based Models

An alternative to focusing on a national policy solution is working towards incremental progress in the states. The federal government could still play a role by providing grants to states who wish to start their own TDI and PFL programs, such as those that currently exist in California and New Jersey.

The grants approach has been proposed in Rep. Lynn Woolsey’s Family Income to Respond to

Significant Transitions Act³⁴ and the Administration's FY 2011 Budget for the Department of Labor.³⁵ Both proposals seek to encourage the establishment of TDI and PFL programs at the state level by providing federal grants for the design and implementation of such programs.³⁶

While grants to states to implement TDI and PFL programs certainly have the potential to increase access to these benefits, we believe the need is of such magnitude that we cannot wait for all 50 states to act. In addition, we believe it would be unfair and confusing to have a disparity in benefits simply based on where one lives. A state-by-state approach could also result in a race to the bottom effect where states provide minimal benefits to keep the employer contribution low.³⁷ As discussed in our proposal, we believe a federal-state partnership would be a viable way to administer a paid time off program for health and caregiving reasons. Federal standards would be put in place to ensure that benefits are equal across jurisdictions, but states would be allowed flexibility in administering the program.



We believe that some of the models discussed above, such as pre-tax savings accounts and employer tax credits, could supplement a national social insurance scheme by encouraging employer innovation and by incentivizing personal savings by workers to finance their own health and caregiving needs.

Until a national scheme is adopted, these incentive plans might be a valuable first step. However, incentives alone are unlikely to achieve the full coverage we favor. For this reason, we favor a national social insurance program, which has the practical advantage of risk-pooling, and recognizes the collective nature of social risks and responsibilities.³⁸ As outlined in our proposal, we believe there are compelling economic, public health, and equity reasons to treat the support of workers with temporary disabilities or caregiving obligations as a collective obligation whose costs are shared.

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¹ During the debate prior to the passage of the Family and Medical Leave Act in the early 1990s, there were a number of Republican alternatives offered which would have provided tax credits to employers for costs paid or incurred as a result of family leave. S. 841, 102nd Cong. (1992) (this proposal would have offered a tax credit to employers of up to 50% of costs paid or incurred for family leave). In 1992, President George H.W. Bush encouraged Congress to consider a tax incentive as an alternative to the FMLA when he vetoed the FMLA. 138 Cong. Rec. S 14841 (1992) and in 1993, the first amendment offered to the FMLA was an amendment by Senator Craig offering a tax credit of up to 20% for costs paid or incurred due to family leave. 139 Cong. Rec. S 994 (1993). In more recent years, Dean Baker of the Center for Economic and Policy Research developed a proposal that would give employers a tax credit of up to \$2,500 per worker for providing paid time off, including extended time off for paid family and medical leave. This tax credit would replace approximately 125 hours of wages for a median wage earner (just over three full time weeks—40 hours per week—for employees making \$20/hour). Dean Baker, Pay for Play? Tax Credits for Paid Time Off (Center for Economic and Policy Research 2009), available at <http://www.cepr.net/index.php/publications/reports/pay-for-play-tax-credits-for-paid-time-off/>.

² Similar proposals have been considered by several state legislatures, but none of the proposals have become law. For example, two recent proposals in the Pennsylvania and New Mexico legislatures would have provided tax credits to small and medium size employers who voluntarily offer 12 weeks of paid time off in addition to or concurrent with FMLA leave. H.B. 83, 191st Gen. Assemb., 2008-09 Sess. (Pa. 2008), S. 559; S. 570, 49th Legislature, First Session, 2009, (Nm. 2009); See also Anne Wells, *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers*, 77 S. Cal. L. Rev. 1067, 1074, fn 39 (2004) (citing several state legislative proposals extending tax incentives to employers that offer extended time off).

³ WhiteHouseCouncilonEconomicAdvisers, *Work-LifeBalanceandtheEconomicsofWorkplaceFlexibility* (2010), <http://www.whitehouse.gov/files/documents/100331-cea-economics-workplace-flexibility.pdf> (citing several studies showing the economic benefits of work-family policies).

⁴ 25 U.S.C. § 45F (2010).

⁵ Health Care FSAs (HSAs) and Dependent Care Assistant Plans (DCAPs) are optional savings programs facilitated by employers that allow employees to set aside a limited amount of pre-tax dollars to pay for a statutorily enumerated list of health- and child-care-related expenses, allowing the employee to reduce their tax liability while saving untaxed funds for future care needs. HSAs, which are authorized by the Internal Revenue Code at § 213, rely on employers to set a cap for the amount an employee may contribute in any given year, though contributions are generally self-limited by employees, as unused funds are forfeited at the end of the fiscal year. DCAPs, which are codified in § 129 of the Internal Revenue Code, have a federal cap of \$2,500 for single employees and \$5,000 for married employees. These savings accounts are not only attractive to employees, but also to employers, who stand to save significantly on payroll taxes: every dollar an employee saves in an HSA or DCAP is not only exempt from income tax, but also from payroll taxes.

⁶ See e.g. John H. Bishop and Mark Montgomery, *Does the Targeted Jobs Tax Credit Create Jobs at Subsidized Firms?*, 32 Industrial Relations 289, 290 (1993) (noting that “[T]he great majority of claims for the [Targeted Jobs Tax Credit were] for workers who would have been hired even in the absence of the subsidy. These are simple transfer payments to employers.”). See also Donna Euben & Barbara Reisman, *Employer tax credits for Child Care: Asset or Liability?* (Child Care Action Campaign 1989) (finding that employer tax credits had a minimal effect on the supply of child care).

⁷ For example, child care assistance benefits and Dependent Care Flexible Savings Accounts are concentrated among very large employers (1,000+ employees). According to the 2008 National Study of Employers, twenty-one percent of employers with more than 1,000 employees offered childcare at or near the worksite, compared to seven percent of small to medium-size businesses. *Id.* Also, while three-quarters of employers with 1000+ employees offered DCFASAs as of 2008, just over a third of small employers did so. *Id.* at Table 9.

⁸ According to the Families and Work Institute's 2008 National Survey of Employers, only five percent of employers offer direct financial assistance for child care, and only nine percent provide child care at or near the worksite. Ellen Galinsky, James Bond, and Kelly Sakai, 2008 National Study of Employers 15 (Table 9) (Families and Work Institute, 2008), available at <http://familiesandwork.org/site/research/reports/2008nse.pdf> (hereinafter “2008 National Study of Employers”).

⁹ HIRE Act, P.L. No. 111-147 (2010) (providing an employer payroll tax deduction for new hires and a \$1,000 credit for retaining newly hired employees for at least 52 consecutive weeks); Housing and Economic Recovery Act of 2008, Pub.L. No. 110-289 (2008) (establishing a tax credit for first-time home buyers); Worker, Homeownership and Business Assistance Act of 2009, P.L. No. 111-092 (2009) (extending the 2008 tax credit).

¹⁰ Family and Medical Leave Act, P.L. No. 103-3 (1993); Patient Protection and Affordable Care Act, P.L. No. 111-148 (2010); Health Care and Education Reconciliation Act, Pub.L. No. 111-152 (2010); Fair Labor Standards Act, Pub.L. No. 75-718 (1938).

¹¹ Healthy Families Act, H.R. 2460, 111th Cong. (2009); S. 1152, Healthy Families Act, 111th Cong. § 5 (2009).

¹² California, Connecticut, Hawaii, Maine, Maryland, Minnesota, Washington, Wisconsin. [Cal. Lab. Code § 233 (2010); Conn. Gen. Stat. § 31-511l (2010); Haw. Rev. Stat § 398-4 (2009); ME Rev. Stat Ann. Tit. 26, § 636 (2009); Md. Code Ann., Lab. & Empl. § 3-802 (2010); Minn. Stat. § 181.9413 (2010); Wash. Rev. Code Ann. § 49.12.270 (2010); Wis. Stat. § 103.10 (2010).]

¹³ For instance, concerns that small businesses could not afford the compliance costs associated with the FMLA motivated Congress to exempt them from the law. H.R. Rep. 101-28(l), 101st Congress; S. Rep. No. 101-77, pt. 10, at 61 (1989) (minority views) (“For small businesses the total costs of mandated leave would be incalculable. . . . [M]any of these small businesses struggle to survive and remain competitive. Without some incentive or relief, they would be forced to bear the brunt of the costs

of mandated leave....”).

¹⁴ U.S. Dep’t of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*, (Westat 2000) (finding that males took 42% of FMLA leave and females took 58%).

¹⁵ See Gillian Lester, *A Defense of Paid Family Leave*, 28 Harv. J. Law & Gender 1, 55-61 (2004). Christine Jolls, *Accommodation Mandates*, 53 Stan. L. Rev. 223, 231 (2000) (exploring the economic effects of mandates that affect the employee population generally versus those that benefit an identifiable segment of the employee population, such as women taking maternity leave); Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 Am. Econ. Rev. 177 (1989) (providing general analysis of the economic effects of direct mandates); Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 American Econ. Rev. 622 (1994) (finding “substantial” cost-shifting to female wages resulting from mandated maternity benefits).

¹⁶ Note that even if wage replacement is financed using a social insurance pool, the problem of cost-shifting to intended beneficiaries may not be completely eliminated given the likelihood of other costs associated with accommodating leaves, e.g., redistributing the work of the employee who takes leave to other employees, or training a temporary replacement. If these costs outweighed the wage savings while the leave-taker was collecting insurance benefits, then some cost-shifting to leave-takers may still occur. But they may prove insignificant. Lester, *supra* note 15, at 61. Other commentators have noted the potential benefits of a social insurance paid leave model over a direct mandate. See, e.g., Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 Yale J.L. & Feminism 1, 27 (2002) (concluding that “[a] tax-and-transfer form of social insurance would have less detrimental effects on the intended beneficiaries’ wages than would private employer-based insurance, and could achieve redistribution to those workers experiencing family risks.”); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 Colum. L. Rev. 2154, 2214 (1994) (proposing a risk pooling social insurance system to provide paid pregnancy leave for women and noting that such a system is more likely to reduce employer incentives to discriminate against women).

¹⁷ Arthur and Rousseau, “The Boundaryless Career: A New Employment Principle for a New Organizational Era.” Oxford University Press. 2001; Daniel C. Feldman and Thomas W. H. Ng, “Careers: Mobility, Embeddedness, and Success,” *Journal of Management* 2007; 33; 350.;

Zeit, Gerald; Blau, Gary; Fertig, Jason, “Boundaryless careers and institutional resources,” *International Journal of Human Resource Management*, Volume 20, Number 2, February 2009, pp. 372-398(27).

¹⁸ Evidence has shown that the FMLA’s requirement that an employee complete 1,250 hours of work and a year of service with a single employer excludes nearly one-fifth of the workforce from coverage. See Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, *Monthly Labor Review* 19-20 (2001), available at <http://www.bls.gov/opub/mlr/2001/09/art2full.pdf>. Even workers with a long workforce attachment history over their lifetime can be excluded by the FMLA if they happen to fall short of these requirements, such as by recently changing jobs or switching from full-time to part-time work.

¹⁹ Society for Human Resource Management, “Workplace Flexibility: Public Policy Issue Statement,” (May 2009) at p. 3, available at <http://www.shrm.org/about/Documents/050609%20FINAL%20WF%20Public%20Policy%20Statement.pdf> (SHRM’s proposal would exempt employers from leave laws if they offered a bank of paid time off benefits; the proposal does not explicitly say whether an employer would be required to allow the PTO benefits to be used for paid family and medical leave purposes).

²⁰ Evidence from California’s paid family leave program shows that workers at small businesses, who often do not have access to job protected leave, are less likely to utilize the program even though they pay premiums to fund it. While there could be many factors for the low take-up rates for California PFL among workers at small businesses, the lack of job protection could be one key factor. See Rona Levine Sherriff, California Senate Office of Research, *Balancing Work and Family* (2007) (finding that who worked for large employers accounted for nearly half of all California paid family leave claims, but represented only 14 percent of the California workforce).

²¹ Ann O’Leary, *Making Government Work for Families: The Federal Government’s Role as Employer and Contractor in Improving Family-Friendly Policies* (Center for American Progress 2009); Marc Goulden, Karie Fransch, Mary Ann Mason, *Patching America’s Leaky Pipeline in the Sciences* (Center for American Progress 2009).

²² Ann O’Leary, *Making Government Work for Families: The Federal Government’s Role as Employer and Contractor in Improving Family-Friendly Policies* (Center for American Progress 2009).

²³ See *supra* note 5 describing HSAs and DCFSAs).

²⁴ At least two states—New York and Nebraska—have proposed this model in recent years. A. 2824, New York State Assem., 2008 Legis. Sess., available at <http://assembly.state.ny.us/leg/?bn=A02824>; LB 413, Nebraska Leg., 99th Legis. Sess., available at <http://uniweb.legislature.ne.gov/FloorDocs/99/PDF/Intro/LB413.pdf>.

²⁵ For example, in the United Kingdom, the government makes an initial contribution to a children’s savings fund, called the Child Trust Fund, when parents set up an account. United Kingdom, Directgov, *Children’s Savings Schemes and Accounts*, http://www.direct.gov.uk/en/moneytaxandbenefits/managingmoney/planningyourpersonalfinances/dg_10014128 (last visited June 17, 2010). These types of accounts could be broadened to allow withdrawals for caregiving needs. See Anne L. Alstott, *Caretaker Resource Accounts for Parents in The Citizen’s Stake: Exploring the Future of Universal Asset Policies* 135 (2006) (supporting such a proposal).

²⁶ See *supra* notes 7-9 and accompanying text.

²⁷ According to the National Compensation Survey, within the 30 percent of families that had access to HSAs or DCAPs in 2006, only two to six percent of eligible employees used them, presumably because they cannot afford to set aside large amounts from their take-home pay. Eli Stoltzfus, Bureau of Labor Statistics, *Pretax Benefits: Access to Section 125 Cafeteria Benefits and Health Savings Accounts in the United States, Private Industry* (2007), available at <http://www.bls.gov/opub/cwc/cm20070321ar01p1.htm>;

Paula A. Calimafde & Deborah A. Cohn, *Small Business and the Cafeteria Plan*, in *New York University Review of Employee Benefits and Executive Compensation* (2002). See also Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, 2008, *Employment Benefit Research Institute Issue Brief No. 336*, 12 (figure 5) (2009), available at http://www.ebri.org/publications/ib/index.cfm?fa=ibDisp&content_id=4402 (analyzing data from the Current Population Survey and finding that among all workers, participation rates in retirement plans increase with income, ranging from a 5.3% percent participation rate for workers with annual earnings of less than \$10,000 to a 72% participation rate for workers with annual earnings of \$50,000 or more); J. Kawachi, et al., *Making maximum use of tax-deferred retirement accounts* (Washington, DC: The Urban Institute (2006) (analyzing several studies finding that contribution rates to 401(k) accounts depend on income and that higher earners are more likely than low and moderate earners to contribute the statutory maximum to a 401(k) account); See also Erica H. Zielewski and Shelley Waters Boots, *Exploring Policy Models for Extended Time Off* 41 (2008) (unpublished paper) (noting that low-take up rates of retirement plans limits their applicability to achieving universal coverage under an EXTO plan).

²⁸ See Internal Revenue Service, Publication 503, <http://www.irs.gov/pub/irs-pdf/p503.pdf>.

²⁹ According to the National Association of Child Care and Referral Agencies (NACCRA), child care costs increased twice as fast as the median income of families with children from 2000 to 2010. National Association of Child Care Resources & Referral Agencies, *Parents and the High Cost of Child Care* 1, (2010) available at, <http://www.naccra.org/publications/naccra-publications/parents-and-the-high-cost-of-child-care.php>. The average annual cost of center-based care exceeded 10% of the median income of two-parent families in 36 states (the average annual cost for full-time infant care in 2010 ranged from \$4,550 in Mississippi to \$18,750 in Massachusetts). *Id.*

³⁰ Internal Revenue Service, Publication 969, http://www.irs.gov/publications/p969/ar02.html#en_US_publink1000204194.

³¹ Lester, *supra* note 15, at 18.

³² See generally *supra* Chapter 2 - 4, (discussing disparities in access to individual insurance policies for disability and noting that virtually no private market exists for parental care insurance or caregiving insurance).

³³ Lester, *supra* note 15, at 15. (“With parental leave, the kind of need in question is not so much indemnification against unexpected, unwanted events as it is a need to ensure that adequate funds are available for workers to manage predictable, and often chosen, family demands that interrupt work.”); There is a limited individual market for short-term disability insurance, but policies tend to be available only for highly paid professional employees. See Alan Lavine, *Disability Insurance Sales Rise* Registered Rep. (2009), available at, http://registeredrep.com/newsletters/insuranceletter/disability_insurance_sales_rise0616/. Short-term disability policies are also gender-rated, making them more expensive for women because of the costs of pregnancy disability. *Id.* There is also a limited market for long-term care insurance to provide care for elders and disabled family members but less than 10% of individuals have access to this insurance. Brent D. Fulton, Ph.D., *Is America Ready for the Economic Impact of Alzheimer’s*, in *The Shriver Report: A Woman’s Nation Take on Alzheimer’s* 172-73 (Angela Timashenko Geiger, Olivia Morgan, Kate Meyer & Karen Skelton, eds., 2010).

³⁴ H.R. 2339, 111th Cong. (Introduced by Rep. Lynn Woolsey on May 7, 2009).

³⁵ President’s Proposed Budget for the Department of Labor, FY 2011, pg. 797 available at <http://www.whitehouse.gov/omb/budget/Overview/>.

³⁶ Family Income to Respond to Significant Transitions Act H.R. 2339, 111th Cong., § 3 (2009) (introduced by Rep. Lynn Woolsey). Under the Woolsey proposal, grants would last a maximum of three years and would be available to fund administration, implementation, development, and educational outreach. *Id.* at §3(a)(2). States with and without TDI and PFL programs would be eligible for federal funding, but states without such programs would be given priority. *Id.* at §3(a)(3). The Obama Budget proposal consists of a simple \$50 million dollar “State Paid Leave Fund.” The fund would offer grants to assist states with starting paid leave programs. Unlike the Woolsey bill, the proposal has no explicit language regarding priority of distribution or maximum length of the grants. President’s Proposed Budget for the Department of Labor, FY 2011 797 (2010), available at <http://www.whitehouse.gov/omb/budget/Overview/>.

³⁷ This race to the bottom effect has been observed with some aspects of worker’s compensation, which is solely administered by the states, and unemployment insurance, where significant features of the program are left up to the states. Even with minimal federal standards for unemployment insurance there has been a race to the bottom effect with some aspects of the program. For instance, some states have a practice of cutting UI taxes or keeping the wage base low to create more “competitive” business climates. To avoid this race to the bottom, progressives have urged Congress to raise the Federal Unemployment Insurance Tax and the wage base it is assessed on (currently states must have a maximum tax of not less than 5.45% on the first \$7,000 in wages). See Progressive Policy Institute, *Modernizing Unemployment Insurance for the New Economy and the New Social Policy* (2002), http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=107&subsecID=175&contentID=250213.

With regard to workers compensation, there is concern that a state-by-state approach has led to a race to the bottom particularly with regard to benefit amount. For example, in 2003 Iowa and New Hampshire provided maximum weekly benefits of slightly more than \$1000, while Mississippi and Arizona capped maximum benefits at less than \$400. This gap can’t be explained by drastically different average weekly wages or cost of living. For example, as of 2009, the average weekly wage in Iowa was \$17.77/hr while Mississippi’s \$16.14/hr. Department of Labor, Bureau of Labor Statistics, *National Compensation Survey* (2009). In sixteen states, average workers’ compensation weekly benefits leave injured workers below the state’s poverty line. See National Academy of Social Insurance, *Workers’ Compensation, Benefits, Coverage, and Costs* (2007).

³⁸ Lester, *supra* note 15, at 17 (noting that tax incentives are essentially a form of self-insurance).

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From Workplace Flexibility 2010 at Georgetown Law

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From the Berkeley Center on Health, Economic & Family Security

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Over the course of this collaboration, both WF2010 and Berkeley CHEFS experienced our fair share of time-off needs. In addition to drafting a 150+ page report, we shared in the joy and worked

through the challenges of two babies, two honeymoons, five surgeries, one engagement, two Senate confirmation hearings, five real estate transactions, and two sabbaticals. Not all of these events would be covered by our proposed FSI, of course, but you get the idea . . .