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PDA, FMLA, and Beyond: A Brief Look at Past, Present, and Future Sex Discrimination Laws and Their Effects on the Teaching Profession

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PDA, FMLA, AND BEYOND:
A BRIEF LOOK AT PAST, PRESENT, AND FUTURE
SEX DISCRIMINATION LAWS AND
THEIR EFFECTS ON THE TEACHING PROFESSION

Congressional passage of the Family Medical Leave Act of 1993 (FMLA) marked a shift from equal treatment under Title VII¹ to a more accommodation-based standard. Unlike earlier sex discrimination legislation, Congress designed the FMLA to protect working women who choose to have children. The FMLA provides this protection by, among other things, guaranteeing working mothers a maximum of twelve weeks leave each year for the care of their families. Theoretically, passage of the FMLA was a major victory for those female educators who were forced by Title VII to choose between family and profession. Practical application of the FMLA, however, reveals that it has not done enough to protect these female educators. Additional legislation is needed to allow educators to balance family and professional demands. Specifically, the FMLA must be amended to provide paid family-related leave for educators.

Section one of this article gives a brief history of sex discrimination in education and addresses the issues that led to the passage of the Pregnancy Discrimination Act of 1978 (PDA). Section one also addresses some of the inadequacies found in the PDA that led to continued issues of sex discrimination amongst educators. These inadequacies contributed to the shift from an equal treatment standard under the PDA to the accommodation-based standard found in the FMLA. Section two discusses this shift in standards.

Section three explores proposed changes to the FMLA and the role individual states may play in its expansion. This section also addresses the attempts by California and other states to implement a paid family leave act. Finally, section

1. Title VII refers to the Equal Rights Act of 1964, *see* 42 U.S.C. § 2000e; 2000e-17 (Supp. 2000).

three concludes that changes in family leave statutes are essential because FMLA protection will be of little use to educators unless some form of paid leave is implemented. Educators can ill afford twelve weeks of unpaid leave on their meager salaries.

Despite the conclusions drawn in section three, the unfortunate reality is that current factors, such as the present state of the economy, the pro-business makeup of Congress, and increasing war costs, make the possibility of paid family leave legislation very remote. For now, paid family leave activists' only hope is that state sponsored paid leave programs like California's Family Relief Act prove effective and feasible.

I. THE HISTORICAL SETTING: FACTORS LEADING TO IMPLEMENTATION OF THE PDA

A. *Pre-Pregnancy Discrimination Act*

School teachers in the United States have been and continue to be predominately female.² Despite female domination of the profession, society did not address sex discrimination in education until well into the Twentieth Century. Much of this discrimination arose from society's belief that school teachers had a responsibility to function as more than educators; teachers served as role models for their students and were expected to be a constant example in regard to proper "deportment, dress, conversation, and all personal habits."³ Although changes in customs during the early Twentieth Century led to less stringent moral standards for school teachers, courts continued to uphold rulings that dismissed school teachers for various acts, such as social drinking, smoking, dancing, and even marriage.⁴ Childbearing was considered unacceptable until late into the Twentieth Century.⁵

2. As of 1996, 78 percent of elementary and middle school teachers and 50.1 percent of high school teachers were female. Org. for Econ. Cooperation & Dev., *Education at a Glance: OECD Indicators* 99 table P31.2 (1996).

3. William E. Elsbree, *The American Teacher: Evolution of a Profession in a Democracy* 296, 297 (1939).

4. Floyd G. Delon, *Legal Issues in the Dismissal of Teachers for Personal Conduct* 2-3 (1982).

5. *Id.* at 3.

The 1950's sparked dramatic changes in the American workforce. Between 1950 and 1990, female presence in the workforce increased by nearly 200 percent.⁶ As a result of the drastic increase in female workers, society gave more attention to claims of sex discrimination in the workplace.

This attention on sex discrimination led to some reforms in the field of education, yet these reforms focused only on preventing pregnancy discrimination.⁷ School boards throughout the United States created, adopted, and enforced rules that included mandatory maternity leave. This forced school teachers to take maternity leave without pay.⁸

For example, in 1952 the Cleveland, Ohio, Board of Education required every pregnant school teacher to take a non-paid maternity leave, commencing five months before the expected birth of the child and continuing until the beginning of the first school semester after the child had reached the age of three months.⁹ Although this leave was mandatory, the school board still required pregnant school teachers to apply for the leave no later than two weeks before its commencement.¹⁰ The school board considered failure to comply with any of these requirements as grounds for immediate dismissal.¹¹ Moreover, the school board did not reinstate the teacher when she returned from the mandatory leave; she was merely given priority for reassignment to a position for which she was qualified.¹² The Cleveland school board rule was not unique, for school board rules requiring school teachers to take unpaid maternity leave were common during this time period.¹³

The first case challenging mandatory pregnancy leave requirements to reach the United States Supreme Court was

6. Albert S. Miles, Charles J. Russo, Augus W. Steinhelber, *The Family and Medical Leave Act of 1993: An Overview and Implications for Schools*, 88 Ed. L. Rep. 923, 923 (1994).

7. *Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

8. *Id.* at 634.

9. *Id.* at 635.

10. *Id.*

11. *Id.*

12. *Id.* In addition to these requirements the Cleveland board rule required that the school teacher must receive a doctor's certificate attesting to the health of the teacher before she was allowed to return from the mandatory leave. Even if the school teacher received a doctor's certificate, the school board still had the option of requesting an additional physical.

13. See *Somers v. Aldine Indep. Sch. Dist.*, 464 F. Supp. 900, 904 (S.D. Tex. 1979).

Board of Education v. LaFleur in 1973.¹⁴ *LaFleur* was a compilation of two similar cases challenging the constitutionality of mandatory pregnancy leave requirements adopted and enforced by school boards.¹⁵

The Supreme Court found that any pregnancy leave policy that established a mandatory cutoff date for pregnant teachers was unconstitutional. The Court stated that making an irrefutable presumption that all women who are four or five months pregnant are physically incompetent was a violation of the Due Process Clause of the Fifth and Fourteenth Amendments.¹⁶ "The ability of any particular woman to continue at work past any fixed time in her pregnancy is very much an individual matter. . . . [T]hus, the presumption embodied in these rules. . . is neither necessarily nor universally true and is violative of the Due Process Clause."¹⁷ The Due Process Clause entitles pregnant school teachers to a more individualized determination of their physical competence¹⁸ than was provided by mandatory leave rules.

The Court's ruling in *LaFleur* was of particular importance because it provided pregnant school teachers with some control over the amount of time away from the classroom.¹⁹ It is likely that many of the pregnant teachers were unable to live without income for the required eight month leave under the 1952 Cleveland rule. The Court's decision in *LaFleur* effectively

14. 414 U.S. 632.

15. School Boards involved were the Cleveland Board of Education and Chesterfield County School District. *Id.* at 632.

16. *Id.* at 644. In addition to the incompetent argument presented by the school boards, the court felt that there were ulterior motives for the cut off dates. Footnote 9 suggests that leave regulations might have been originally

inspired by other, less weighty considerations. For example, Dr. Mark C. Schinnerer, who served as Superintendent of Schools in Cleveland at the time the leave rule was adopted, testified in the District Court that the [leave] rule had been adopted in part to save pregnant teachers from embarrassment at the hands of giggling school children; the cutoff date at the end of the fourth month was chosen because this was when the teacher 'began to show.' Similarly, several members of the Chesterfield County School Board thought a mandatory leave rule was justified in order to insulate school children from the sight of conspicuously pregnant women.

Id. at 641.

17. *Id.* at 646.

18. *Id.* at 645.

19. *Id.* at 649. Note that *LaFleur* upheld the idea that, in the interest of classroom continuity and order, school districts still had discretion in determining when a school teacher returned from leave.

opened the door for female school teachers to pursue both career and family without so great a fear of financial instability.

B. Introduction of the Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964²⁰ prohibited various forms of sex discrimination. Legislators assumed that Title VII included pregnancy discrimination in the workforce,²¹ but the Supreme Court disagreed.

In the controversial 1976 decision in *General Electric v. Gilbert*,²² the Supreme Court found that the exclusion of pregnancy from comprehensive disability insurance plans did not justify a sex discrimination claim under Title VII. Justice Rehnquist, writing for the majority, reasoned that since pregnancy is not a condition that affects all women, exclusion of pregnancy from an insurance plan did not qualify as gender discrimination.²³ This decision effectively established that plaintiffs had no claim of pregnancy discrimination under Title VII, leaving them with only a constitutional claim. Such a constitutional claim required plaintiffs to show facially discriminatory treatment or evidence of a discriminatory purpose.²⁴

The *Gilbert* dissent, written by Justice Stevens, attacked the reasoning of the majority. "By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."²⁵ Simply stated, Justice Stevens argued that because pregnancy is a condition unique to women, exclusion of pregnancy from disability coverage has to be classified as sex-based and should be protected under Title VII.

Stevens' dissent proved to be the popular view in Congress. As a direct result of, and in retaliation against *Gilbert*,²⁶

20. Pub. L. No. 88-352, 78 Stat. 253; 42 U.S.C. § 2000e; 2000e-17 (Sup. 2000).

21. See Cong. Rec. 29641 (1977).

22. 429 U.S. 125 (1976).

23. *Id.* at 134, 35.

24. See explanation of *Gilbert* as contained in article by Susan A. Kidwell, *Pregnancy Discrimination in Educational Institutions: A Proposal to Amend the Family Medical Leave Act*, 79 Tex. L. Rev. 1287, 1293 (2001).

25. *Gilbert*, 429 U.S. at 161, 162.

26. See 123 Cong. Rec. 29641 (1977), which contains comments made by members of congress during the debates over the PDA, in particular the comment of Senator Blayh, who stated that "this legislation was made necessary by the unfortunate

Congress enacted the Pregnancy Discrimination Act of 1978. This act amended the Title VII definition of sex discrimination to include any discrimination based on childbirth, pregnancy, or related health conditions.²⁷

Although the PDA stresses equal treatment for pregnant women in the workplace, some feel that the Act could be interpreted to go further in providing for special treatment in some circumstances in order to promote "equal opportunity."²⁸ The Supreme Court has yet to solidify such an interpretation. The Court does emphasize, however, that although the PDA states that employers are not required to make special accommodations for pregnant workers, nothing in the Act or in the Congressional record suggests that Congress intended to prohibit such special accommodation.²⁹

Regardless of the interpretation, it is evident that the Act itself is at least designed to prohibit discriminatory treatment toward pregnant workers. Under the PDA, employers are not required to provide special benefit programs for pregnant women; the bill simply requires that benefits be the same for similarly situated pregnant and non-pregnant workers.

Another benefit the PDA has given to pregnant workers is the right to challenge overtly as well as facially neutral rules that adversely impact their lives. The PDA included pregnancy discrimination under the umbrella of Title VII protection. Therefore, plaintiffs can now use disparate treatment claims to challenge overt discrimination, and they can use disparate impact claims to challenge facially neutral policies that have a negative impact on pregnant workers.

Courts use the three-step process established in 1973 in *McDonnell Douglas Corporation v. Green*³⁰ when determining a disparate treatment claim. First, plaintiffs must establish a prima facie case of discrimination by showing that 1) the plaintiff belongs to a protected group, 2) the plaintiff was performing his or her job satisfactorily, 3) he or she was terminated, and 4) the employer attempted to replace the individual with someone of similar skill and performance.³¹ If

decision rendered by the Supreme Court in the case of *Gilbert*. . . *Id.*

27. 42 U.S.C. § 2000e(k) (2002).

28. See Kidwell, *supra* n. 24, at 1293.

29. *Cal. Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 287 (1987).

30. 411 U.S. 792 (1973).

31. *Id.* at 802.

these factors are met, the burden then shifts to the employer to explain how and why the employment discrimination was not discriminatory.³² The Court is often willing to accept the alternative reasoning offered by the employer as to why the employee was terminated. For example, in *Troupe v. May Dept Stores*,³³ the court rejected the plaintiff's claim that she was fired because she was pregnant and instead accepted the employer's alternative explanation that she was fired because she was late for work.³⁴ Finally, the Court gives the plaintiff the opportunity to rebut the employer's alternative explanation; the plaintiff must do so by a preponderance of evidence standard.³⁵

Disparate impact claims, on the other hand, are easier to establish because they do not require proof of discriminatory intent. Under the standard created in *Griggs v. Duke Power Company*,³⁶ the plaintiff must simply show that a facially neutral policy has had a disparate impact on a protected class.³⁷ As a defense, the employer is entitled to the claim that the policy is a legitimate business concern. The plaintiff must then show that there is a less discriminatory way to address the employer's business concerns.³⁸

Pregnant school teachers who have challenged policies under disparate impact and disparate treatment theories have had mixed success.³⁹ Although not always victorious, these challenges have undoubtedly brought to the attention of school districts the need to consider what effects their policies may have on pregnant school teachers.

II. FROM EQUAL TREATMENT UNDER PDA TO SPECIAL ACCOMMODATION WITHIN THE FMLA

During the late 1970's and early 1980's, courts began to set guidelines as to what types of leave should be addressed under

32. See *id.* at 803. Often times the court is willing to listen and accept the employers' alternative explanation for the action taken. See *id.* at 803.

33. *Troupe v. May Dept. Stores*, 20 F.3d 734 (7th Cir. 1994).

34. *Id.* at 737.

35. *Id.*

36. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

37. *Id.* at 431.

38. *Id.* at 431-32.

39. *Scher v. Woodland Sch. Community Consol. Dist.*, 867 F.2d 974 (7th Cir. 1976) (case in favor of the teachers).

the PDA. These courts found that a distinction had to be drawn between these three types of leave: (1) leave designed to accommodate for "pregnancy leave," (2) time lost as a direct result of the mother's inability to work due to pregnancy and delivery, and (3) "parental leave," which arises after the initial leave due to the pregnancy and delivery.⁴⁰ These courts decided that any leave taken to care for an infant after the initial labor and delivery was not covered under the PDA. As a result of these decisions, it was evident that further legislation would be necessary if working parents were to be given leave in order to care for their families.

After eight years of legislative molding, the Family Medical Leave Act⁴¹ ("FMLA") was signed into law on February 5, 1993. In passing the FMLA, Congress stated that their intent was "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."⁴²

The FMLA guarantees eligible employees twelve weeks of unpaid leave during each one-year period. This leave allows employees to recover from a serious illness, to care for a new baby, or to attend to a sick relative.⁴³ The Act defines an eligible employee as one who has been employed by the employer for at least twelve months,⁴⁴ has amassed at least 1250 hours of service during the twelve month period immediately preceding the commencement of the leave,⁴⁵ and is employed by an employer that has at least fifty employees within a seventy-five mile radius.⁴⁶ The twelve months that the employee has been employed by the employer need not be consecutive.⁴⁷

The FMLA provides eligible employees the flexibility to adjust unpaid leave in certain special circumstances. These circumstances can be broken down into two separate

40. *Guerra*, 479 U.S. at 289 (stating that the care for a newborn child is not covered under the PDA, only the actual time missed due to the birth).

41. *Family Medical Leave Act of 1993*, Pub. L. No. 103-3, 107 Stat. 6 (29 U.S.C. §§ 2601-2654 (West 2002)).

42. *See* 29 U.S.C. § 2601 (1994).

43. 29 C.F.R. § 825.110(a)(1) (2003).

44. *Id.*

45. 29 C.F.R. § 825.110(a)(2).

46. 29 C.F.R. § 825.110(a)(3).

47. 29 C.F.R. § 825.110(b).

categories: intermittent leave, or leave on a reduced schedule;⁴⁸ and leave taken near the end of the semester.⁴⁹

If the educator requests intermittent leave, or leave on a reduced schedule, for a foreseeable medical treatment and would be absent for more than 20 percent of the total working days during the leave period,⁵⁰ the special provisions give the school two options. The school can either require that the employee take leave for periods of particular duration not to exceed the length of planned treatment⁵¹ or transfer the employee temporarily to another position with equal pay and benefits.⁵²

If leave is to be taken near the end of the school term, three different rules apply. First, if the educator begins leave more than five weeks prior to the end of the term, the school can require that the educator continue to take leave until the end of the term if the school teacher anticipates being absent at least three weeks⁵³ and return to work would take place during the three weeks before the end of the term.⁵⁴ Second, if the leave is less than five weeks before the end of the term, a school can require the educator to take leave until the end of the term if expected leave would be longer than two weeks and return would take place during the final two weeks of the term.⁵⁵ Third, if leave is less than three weeks prior to the end of the term and greater than five working days, the school may require the educator to stay on leave until the end of the term.⁵⁶

The FMLA, including its special regulations for educators, was a giant step forward in the fight to reduce sex discrimination in the classroom. Prior to the FMLA, educators often had no choice but to extend parental leave for the duration of the school term, even if they desired to return to work sooner. Although these extensions were mandatory, the school districts did not have to guarantee the continuation of

48. 29 U.S.C. § 2618(c).

49. 29 U.S.C. § 2618(d).

50. 29 U.S.C. § 2618(c)1.

51. 29 U.S.C. § 2618(c)(1)(a).

52. 29 U.S.C. § 2618(c)(1)(b)(i, ii).

53. 29 U.S.C. § 2618(d)(1).

54. 29 U.S.C. § 2618(d)(1)(A, B).

55. 29 U.S.C. § 2618(d)(2)(A, B).

56. 29 U.S.C. § 2618(d)(3).

the educator's insurance or benefits. The FMLA forced school districts to not only grant parental leave for educators but also guarantee educators the right to continued insurance benefits during their absence and a right to return during the school term, as long as the leave met the requirements of the FMLA's special requirements for educators.

Approximately 55 percent of American workers are covered under the FMLA's eligibility requirements.⁵⁷ Of the 55 percent of employees covered under the umbrella of the FMLA, it is estimated that only 2 percent of these employees take advantage of the Act each year. Among leave takers, 60 percent used leave for reasons of their own health, 23 percent used leave to care for an ill family member, 13.3 percent used leave to care for a newborn, adopted, or fostered child, and 3.8 percent used leave for maternity disability.⁵⁸

Although passage of the FMLA has been viewed as a great accomplishment in the fight for balance between employment and family, many claim that the Act is in need of additional change. Both opponents and proponents of the FMLA have introduced into Congress numerous bills aimed at modifying the Act. This next section will briefly address these bills and the issues they challenge.

III. PROPOSED CHANGES

A. *Family Medical Leave Act*

1. *Paid Leave*

The idea of paid versus unpaid leave under the FMLA has been debated since the first draft of the Act was considered.⁵⁹ During the debates, proponents of paid leave pointed out that few people could afford to take up to twelve weeks of unpaid leave.⁶⁰ Clearly this argument has merit, especially when taken in the context of school teachers who are almost always paid well below the median income. Opponents of paid leave argue that forcing employees to fund a paid leave program

57. The Commn. on the Family and Med. Leave Act (1996).

58. *Id.*

59. Ronald D. Elving, *Conflict and Compromise: How Congress Makes the Law* 29, 30 (Simon & Schuster 1995).

60. *Id.* at 30.

would be, in effect, an unwarranted intrusion by government on private industry, and would likely burden employers, especially small employers, with unnecessary costs.⁶¹ In the end, proponents of paid leave, facing a Congress focused on budget deficits and a private sector on economic competitiveness, dropped their campaign to get paid leave included within the FMLA. "While their intention had been to write a model bill rather than a modest one, the drafting group reluctantly chose not to press for paid leave."⁶²

Expanding the FMLA to include paid leave would help protect working women educators. Paid leave would provide greater benefits to female educators, allowing them to balance professional and family needs. The problem, though, remains in finding a way to realistically fund such a program. In 1999, Senator Dodd introduced a bill⁶³ that would have set aside \$400 million for an insurance demonstration project that would have funded state and local projects. While the initial scope of coverage would be limited to paid leave for childbirth and adoption, states would have the choice of expanding coverage to additional families who used their FMLA leave for reasons other than childbirth or adoption. Although this type of an incentive-based federal program is seen by many as a viable alternative to mandated funding by employers, such legislation has yet to be approved.

One reason why legislation has yet to be approved is the makeup of the legislative body. Republicans, who are fiscally conservative and more often than not pro-business, have been in control of Congress during most of the time that the FMLA has been in place. Another contributing factor to the reluctance of Congress to implement paid leave is the stagnate economy and looming fear of impending war. Lawmakers likely fear that it would be counterproductive at this time, in this economy to force business owners to fund a paid-leave program when so many businesses are struggling to stay afloat.

A possible solution would be to implement an employee/employer funded family leave program. If paid family leave is so important to employees, it is likely that the

61. *Id.*

62. *Id.*

63. *Family Income to Respond to Significant Transitions Insurance Act (FIRST)*, 1999 S.B. 1355, 106th Cong. § 7 (1999).

majority of employees would be interested in contributing to the fund. Employee contributions would be matched by the employer, thus creating a combined employee/employer effort. Such a proposal would likely be attractive to both Democrats and Republicans because the paid leave program created would be funded by the local employees and employers, thus avoiding government subsidies. This proposal is similar to what California is now attempting, although California businesses are not required to contribute.

2. Expansion of Coverage under the FMLA

Currently, the FMLA applies only to employers with fifty or more employees.⁶⁴ Legislation has been introduced that would reduce this number, thereby extending FMLA coverage to more than 55 percent of the workforce. Each year, though, this proposed addition to the FMLA has been voted down. Proponents fear that companies employing less than fifty individuals cannot afford to replace workers for up to twelve weeks. Although the FMLA currently provides only unpaid leave, employers are required to continue paying insurance and benefits to employees on leave.⁶⁵ The majority of Congress currently believes that increasing coverage is too high of a burden upon small to mid-sized businesses.

The number of employees needed to qualify for FMLA coverage could be substantially lowered without placing too high of a burden on small to mid-sized businesses. All employers with fifteen or more employees are held responsible for antidiscrimination laws under federal law. A safe proposal would be to drop the number of employees needed for FMLA to apply from fifty in a seventy-five mile radius to thirty. This would be substantially less than fifty, but at the same time twice as many as are necessary to invoke federal antidiscrimination protection.

B. State Law

Although changes to the FMLA by Congress seem unlikely, state laws governing FMLA coverage are drastically changing. Of those states, California has emerged as a leader in the

64. See 29 U.S.C. § 2618.

65. See 29 U.S.C. § 2618.

expansion of FMLA coverage and rights. This section will explore modifications California has made to the FMLA and what impact California's actions might have on other states.

On September 23, 2002, California Governor Gray Davis signed into law Senate Bill 1661.⁶⁶ Senate Bill 1661, or the California Family Rights Act, is a modification to the California state version of the FMLA. This modification allows employees to receive a portion of their salary while on leave, providing that the reason for leave is one approved under the FMLA.⁶⁷ This makes California the first state to provide paid family leave to employees.

Funds for the paid leave will be drawn from the state disability insurance program, which is funded through employees' mandatory payroll deductions. The California Family Rights Act creates, in essence, a new paid family leave program within the state disability insurance program. Payroll deductions for the paid leave do not begin until January 2004. Employees' mandatory payroll deductions for the 2004-2005 calendar year will be increased by .08 percent to cover the initial costs of the paid leave.⁶⁸ After the 2004-2005 calendar year, required worker contributions will be at a rate determined by the director to reimburse the disability fund for the compensation paid and estimated to be paid during the year.⁶⁹

Under the California Family Rights Act, employees will be eligible for leave in July of 2004. The new law allows for a maximum of six weeks of wage benefits to workers. During those six weeks, employees are eligible to receive 55 percent of their wages. In addition to mirroring the FMLA's eligibility requirements, the California Family Rights Act covers all state and local government employers, no matter what their size.⁷⁰

As expected, the California School Employees Association was a major supporter of the California Family Rights Act. As a result of this new law, all California public school teachers and private school teachers working for an employer with fifty

66. 2001 Cal. S.B. 1661, Stats 2002 ch. 901 §6 (codified at Cal. Unempl. Ins. Code § 3300 (2003)).

67. *Id.* at Legal Counsel's Digest.

68. *Id.* at § 1(B).

69. *Id.* at § 1(a).

70. The FMLA only applies to government employers with fifty or more employees within seventy-five miles of employer's worksite.

or more employees are now eligible for six weeks paid family care leave at a rate of 55 percent of normal wages. It is likely that this law will give some teachers the option for the first time of using family care leave without fear of financial ruin. This, in and of itself, is one more step toward elimination of sex discrimination and adaptation to the needs of working mothers within educational institutions.

Questions remain as to how successful the California Family Rights Act will be. Critics claim that the new law will encourage employees to take more time off and stay out longer, leading to less productivity and higher costs.⁷¹ Others fear that usage will drain the state disability insurance fund, thus leading to large tax increases.⁷² Proponents of the new law feel that stiff penalties for abusing the fund will serve as a strong deterrent for anyone wanting to wrongfully use the system. Because the law does not take effect until 2004, both sides must wait and see.

Could California's decision to implement paid family leave become a trend among individual states? As of November, 2002, at least sixteen states have considered or are considering legislation to provide some form of paid leave for new parents out of unemployment funds.⁷³ At first glance, it seems as if the California Family Rights Act has set the precedent and other states are following suit.

The problem, though, is that the California Family Rights Act will not take effect anytime soon. In an election year, California Governor Gray Davis signed into law the paid family leave. It is hard to judge the success of a program that is still almost two years from implementation. As a result, it is more than likely that other states will adopt a "wait and see" approach and will not move forward with state paid family leave plans until states have the opportunity to judge the success of California's program. As a result, implementation of state programs is still, at best, probably four years away.

Additionally, there is the chance that California may decide within the next two years to discontinue plans for the

71. *Empl. Discrimination L. Update 2* (Nov. 2002).

72. *Id.*

73. See Minnesota Empl. L. Letter (Aug. 2000). Other states are Minnesota, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, and Washington.

California Family Rights Act altogether. To say the least, the future of California paid family leave is questionable.

IV. CONCLUSION

There is little doubt that the American workforce is changing. The number of women employed outside of the home has increased dramatically over the past fifty years. Today, over fifty-seven million women either work outside the home or are seeking such employment.⁷⁴ The increase of female workers in traditionally male dominated jobs has forced courts and legislators to address sex discrimination in the workforce. Schoolteachers, a predominately female profession,⁷⁵ have benefited from these changes. Society now is addressing many of the problems that have gone unnoticed for centuries within the educational setting.

The Pregnancy Discrimination Act of 1978 forced school districts, for the first time, to accommodate pregnancy-related leave in a manner that promoted equal opportunity for women. The Family Medical Leave Act of 1993 built on the PDA by extending the accommodation to family as well as pregnancy-related matters thus giving educators a better chance to balance both family life and their professional responsibilities.

Although it is evident that more must be done, the current Congress has reached its limit as to what it is willing to do. Attempts by groups to implement paid family leave have been fruitless. The American economy is struggling and many fear that any extra resources we have may be needed for war.

Despite the current dismal outlook, there are other potential solutions. Congress should consider a shared employee/employer funded paid family leave program that would provide at least partial compensation for family leave taken. This idea could prove profitable to educators by giving them the opportunity to utilize available family leave without facing severe financial difficulty.

Congress should also consider lowering the number of employees needed to take advantage of FMLA coverage so that more employees are able to take advantage of FMLA benefits.

74. Miles, Russo, & Steinhelber, *supra* n. 6 (giving statistics).

75. As of 1996, 78 percent of elementary and middle school teachers and 50.1 percent of high school teachers were female. Org. for Econ. Cooperation & Dev., *supra* n. 2.

Currently only 55 percent of employees are eligible for coverage.

As the American workforce continues to change, new problems will undoubtedly surface. Fortunately, past and current trends suggest that sex discrimination laws will continue to move in the right direction. Although not yet implemented and completely untested, the California Family Rights Act gives employees hope that paid-family leave plans will become a reality. For now, though, we'll all just have to wait and see.

Sean Stewart