

TENNESSEE’S FAMILY LEAVE PROVISIONS ARE AN INSUFFICIENT SUPPLEMENT TO THE FMLA

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This article evaluates the inadequacies of family leave provisions in Tennessee by comparing the shortcomings of current applicable federal and state legislation with more progressive policies in states like Washington and Maryland. Despite broad public support for paid family leave due to its numerous, supported benefits—including promoting gender equality, enhancing child welfare, and improving workplace productivity—Tennessee’s policies remain insufficient. This analysis presents current shortcomings that predominantly affect women and low-income families, who are disproportionately disadvantaged under the present system. Drawing on comparative legislation and socio-economic impacts, this article advocates for a comprehensive policy for Tennessee families. This article proposes a universally inclusive, paid twelve-week family leave policy, funded by a combination of employee and employer contributions. Such a policy promotes the goals of rectifying gender disparities, supporting economic stability for families, and fostering equitable workplace environments. This paper emphasizes the benefits that a robust family leave program can have on Tennessee’s contemporary society.

INTRODUCTION

Current family leave policies applicable in Tennessee have failed to keep up with changing political, social, and familial trends. In the United States, where women historically were viewed as the physically weaker employees, initial policies on maternity leave often focused on protecting women from extreme working conditions after giving birth.¹ As early as the outset of twentieth century, the International Labour Organization advocated for maternity leave policies, such as twelve weeks of maternity leave, job protection, and some income support as an effort to protect women in the workforce.² Early designs of family leave policies emphasized traditional gender roles, the view that women should stay at home, and the view that men should be the breadwinners.³ By the mid-1900s, as women entered the workforce at higher rates, demand for maternity leave increased.⁴ Today, both men and women support family leave, but the United States has fallen behind other similarly situated countries, having only passed family leave provisions at the federal level as late

1. Claudia Olivetti & Barbara Petrongolo, *The Economic Consequences of Family Policies: Lessons from a Century of Legislation in High-Income Countries*, 31 J. ECON. PERSPS. 205, 207 (2017).

2. *Id.*

3. *See id.*

4. *Id.* at 207–08.

as 1993.⁵ Because family leave at the federal level has not progressed in the last thirty year, states are responsible for implementing family leave policies that make up for the inadequacies of the federal legislation.

Most Americans support family leave policies due to a variety of factors and perceived benefits.⁶ An increase in the number of working parents has put pressure on workers as they try to balance their work responsibilities in tandem with their caregiving responsibilities.⁷ Research suggests, however, that middle- and higher-income workers are much more likely than low-income workers to have access to paid family leave.⁸ Though Americans' opinions differ on issues like who should receive paid family leave and how paid leave should be funded, most Americans support paid family leave for both mothers and fathers and most Americans support employers footing the bill.⁹

This article will address the persistent need for paid family leave in the United States grounded in the benefits that paid family leave provides. In doing so, this article considers the historical challenges that women have faced in the workplace. This article suggests how family leave provisions can address past discrimination against women. Further, family leave provisions have benefits extending beyond women. For instance, family leave provides various benefits to children and families, employers, and communities. However, some of those benefits may be realized when family leave policies are tailored to promote equal use by men and women to discourage employers from relying on traditional gender roles.¹⁰

This article argues that current family leave provisions that govern Tennesseans result in a patchwork of coverage at best, leaving many groups of individuals out of coverage. Tennessee can address the needs of its constituents by providing broader coverage under paid family leave policies for all workers. Specifically, Tennessee should

5. *Id.* at 208 (“Parental leave rights were introduced in the United States with the passage of the Family and Medical Leave Act of 1993, allowing eligible employees up to 12 weeks of unpaid leave for pregnancy and newborn care.”).

6. See Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RES. CTR. (Mar. 23, 2017), <https://www.pewresearch.org/social-trends/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>.

7. *See id.*

8. *See id.*

9. *See id.*

10. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2003 (1996) (“Some feminists advocate *equal treatment*, or the application of the same legal rules to men and women, in order to eliminate legal biases that discourage women’s market work and reinforce traditional gender roles.”).

implement a policy similar to Washington and Maryland, which both provide 12-weeks of paid family leave to *all* employees funded by premiums split between employees and employers. With a comprehensive paid family leave plan in place, Tennessee can effectively address the historical discrimination against women, provide social and health benefits to employees, avoid falling behind other jurisdictions who already offer paid leave benefits, and increase women's workforce participation.

Part I summarizes the various benefits derived from paid family leave. These benefits include counteracting historic and lasting gender discrimination in the workforce, promoting family bonds and quality of life, enhancing the economic growth of businesses, and advancing the careers of women in the workforce. Part II discusses the present need for paid family leave based on the current, typical labor divisions. Part III outlines the current provisions for leave the govern Tennesseans at the state and federal level and argues that these provisions are largely insufficient to address the needs to Tennesseans. Part IV proposes a paid family leave plan for Tennessee based on other states' leave plan that can more effectively meet the needs of Tennesseans. Lastly, Part V addresses some critiques of paid family leave provisions and suggests how the proposed plan mitigates those concerns.

I. POSITIVE EFFECTS OF PAID FAMILY LEAVE

To understand both why Americans need paid family leave and why current family leave provisions in Tennessee are insufficient, it is critical to understand the benefits that paid family leave provides. Paid family leave benefits both men and women because paid family leave has been shown to increase gender equality within the home.¹¹ One study found that when more generous paid maternity leave policies were implemented in low- and middle-income countries, there was an increase in gender equality in economic decision-making in the household and improvements in gender norms related to work.¹² Where attitudes about gender norms are more equal, men spend more time doing domestic work, thereby reducing the gender gap in housework.¹³

11. See generally Yan Chai et al., *Does Enhancing Paid Maternity Leave Policy Help Promote Gender Equality? Evidence from 31 Low- and Middle-Income Countries*, 39 GENDER ISSUES 335, 335 (2022) (explaining that increases in paid maternity leave strengthen women's decision-making power in the home).

12. *Id.*

13. *Id.* at 336.

Additionally, paid family leave provides numerous benefits to all family members, including mothers, fathers, and children. Proponents of paid family leave cite improvement of health and well-being of mothers, children, and families.¹⁴ Benefits like the healthy development of children, improvement in maternal health, and enhancement in families' economic security are well-established.¹⁵ Research based on state programs suggests that paid leave benefits young children by “provid[ing] time to establish a strong bond with parents during the first months of life, increase[ing] rates and duration of breastfeeding, support[ing] fathers' involvement in care, improv[ing] rates of on-time vaccination, reduc[ing] infant hospital admissions, and reduc[ing] probabilities of having ADHD, hearing problems or recurrent ear infections.”¹⁶ Further, paid family leave reduces the risk factors for stress and depression among caretakers, which improves a caretaker's ability to take on the that role.¹⁷ Advocates claim family leave has a beneficial impact beyond a mother's welfare and career because it benefits child development and reduces abortions.¹⁸

Another benefit of paid family leave is that it provides economic advantages to employers. Research suggests that employers have adapted well to paid leave programs.¹⁹ For instance, California, enacting its own paid leave programs in 2004, found that most employers “reported a positive effect on employee productivity, profitability and performance, or no effect.”²⁰ Paid family leave also benefits employers by improving employee retention and productivity and boosting participation in the workforce.²¹

Lastly, paid family leave can positively impact a woman's career. For instance, “[w]omen who take a paid leave are 93 percent more likely to be in the workforce nine to 12 months after a child's birth than women who take no leave.”²² States that mandated paid family leave reported that the programs increased the work force

14. See Kathleen Romig & Kathleen Bryant, *A National Paid Leave Program Would Help Workers, Families*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 27, 2021), <https://www.cbpp.org/sites/default/files/4-27-21bud.pdf>.

15. *Id.*

16. *Paid Leave Works: Evidence from State Programs*, NAT'L P'SHIP FOR WOMEN & FAMILIES (Feb. 2022), <https://nationalpartnership.org/wp-content/uploads/2023/02/paid-leave-works-evidence-from-state-programs.pdf>.

17. *Id.*

18. Olivetti & Petrongolo, *supra* note 1, at 208.

19. *Paid Leave Works: Evidence from State Programs*, *supra* note 16, at 3–4.

20. *Id.* at 3.

21. Romig & Bryant, *supra* note 14.

22. *Paid Leave Works: Evidence from State Programs*, *supra* note 16.

participation of caregivers.²³ Paid family leave minimizes workforce participation disparities between men and women by enabling women to remain to the job market. Consequently, paid family leave improves the economy. When caretakers return to the workforce, they are less likely to fall into poverty as they increase their household incomes, meaning that they are significantly less likely to need SNAP or other public support programs.²⁴ “According to one study, both women and men who return to work after paid leave are significantly less likely to receive public assistance in the year after the birth of their child than parents who take no leave at all.”²⁵ As such, a taxpayer who never takes paid leave may still derive the benefits from paid leave because access to paid leave saves taxpayer dollars in the long run.²⁶

II. THE WORKING MOTHER’S CHOICE BETWEEN HAVING A CAREER OR RAISING THE CHILDREN

Because working mothers are often confronted with the difficult choice between sacrificing their careers to take on the responsibility of the domestic labor and sacrificing the ability to raise their children to remain in the workforce, paid family leave is necessary to alleviate this burden on working mothers. When making the decision to leave the workforce temporarily, women consider a variety of factors that both “pull” the mother towards the domestic role at home and “push” the mother out of the workforce.²⁷ “Pull” factors, which can pressure women to take on the caregiving role, include the desire to care for one’s child, concerns of cost and quality of placing a child in non-parental care, and evidence that women are stuck with disproportionate burden of household tasks.²⁸ “Push” factors, which can pressure a women out of the workforce, include inadequate maternity-leave, inflexible work hours, and extreme cost of childcare.²⁹ Notably, the United States Census Bureau estimates that when mothers have more than one child under the age of five, the cost of day care could be equal to what she earns “unless

23. *Id.* at 5.

24. *Id.*

25. *Paid Family Leave is Good Business for Tennessee*, BETTER BALANCE (Feb. 2023), <https://www.thinktennessee.org/wp-content/uploads/2023/02/paid-family-leave-brief.pdf>.

26. *Id.*

27. See Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed out Mom*, 105 GEO. L.J. 1323, 1324–25 (2017).

28. *Id.* at 1325.

29. *Id.* at 1326.

she has fairly high earnings.”³⁰ Accordingly, narratives about women “opting out,” or choosing to leave the workforce and return home, are an oversimplification of the fact that women assess a multitude of factors that drive their decision.³¹ Ultimately, paid family leave can lighten this burden, which promotes a woman’s autonomy in choosing whether they want to remain in the workforce, take on the domestic role, or both.

A. *Gender Discrimination in Administration and Use of Leave Policies*

When employers decide whether they should implement family leave policies, stereotypes about gender can impact the decisions of who should qualify and whether leave should be paid. Throughout its history, the United States has limited a woman’s employment opportunities through a variety of state laws that “frequently subjected women to distinctive restrictions, terms, conditions, and benefits for [] jobs they could take.”³² Laws restricting women were based on beliefs that women should be homemakers and that the government had an interest in protecting women from work that may interfere with her ability to be a mother.³³ On the other hand, workplace stereotypes about men have resulted in failure of employers to extend similar leave benefits to men as they provide for women.³⁴ Such stereotypes may also lead to hesitation in implementing new, more robust leave because of gender stereotypes that, for example, promote the idea that leave is only needed for women and that unpaid leave is sufficient because the male breadwinner will continue to work and provide for the stay-at-home mother. “[S]tereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.”³⁵ The gender stereotypes prevail, in part, because of the disparate coverage of family leave policies between women and men,

30. *Id.* at 1327.

31. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 1, 12–14 (2010) (“[O]ne major drawback of the opt-out story line is that it is not true. In fact, it is riddled with inaccuracies.”).

32. *Nevada Dep’t Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003); *see Bradwell v. State*, 16 Wall. 130 (Ill. 1873) (upholding a law prohibiting women from practicing law); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1984) (upholding a law prohibiting women from tending bar).

33. *Hibbs*, 538 U.S. at 729.

34. *See id.* at 731 (“[D]ifferential leave policies [are] not attributable to any differential physical needs of men and women, but rather to pervasive sex-role stereotype that caring for family members is women’s work.”).

35. *Id.* at 736.

which is rooted in employers' reliance on such discriminatory leave policies.³⁶

Today, women and men experience workplace discrimination based on "invalid gender stereotypes," which also negatively impacts the election of gender-neutral leave benefits.³⁷ Even when provisions are gender-neutral, women tend to take leave at higher rates than their male counterparts.³⁸ Inequality in the workplace persists partly, "because men have not yet changed their employment-related behavior, and employers enact penalties on women . . . because of the presumption that women will leave the workforce when they have children."³⁹ It is unsurprising that men are unwilling to take family leave when studies suggest "that employers are less likely to hire mothers compared with childless women."⁴⁰ On top of that, studies suggest that wage penalties exist for mothers, even if they have not taken time away from work to care for a child.⁴¹ Other studies have found that "unmarried women without children earn 96 percent of what their male counterparts earn, while married women with a child at home earn only 76 percent of their male counterparts' earnings."⁴² The underlying implication is that employers make job-related decisions based on gender stereotypes regarding child care responsibilities. As a result, men may fear similar treatment if they take parental leave.

B. *Unequal Responsibility for Domestic Labor*

Notwithstanding the rise in women's participation in the workforce, women continue to engage in a disproportionate share of household unpaid labor like childcare,⁴³ which could be mitigated by implementing paid family leave that encourages a more equal division

36. *Id.* at 130 (discussing "a 1990 Bureau of Labor Statistics [] survey [that] stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies"). Further, public sector family leave policies differ little from what is offered in the private sector. *Id.* at n. 3.

37. *Id.* at 730.

38. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C.L. REV. 707, 711 (2000).

39. *Id.* at 708.

40. McCormack, *supra* note 27, at 1327.

41. *Id.*

42. Sarah Jane Glynn, *Report: An Unequal Division of Labor*, CTR. AM. PROGRESS (May 18, 2018) <https://www.americanprogress.org/article/unequal-division-labor/>.

43. Alstott, *supra* note 10, at 2002; see WILLIAMS, *supra* note 31, at 17 ("One troubling story is that of Patsy Wiggins, a . . . mother of three and former hard-driving attorney, who quit her job in frustration 'over her husband's . . . unwillingness to share domestic responsibilities.'").

of labor.⁴⁴ Even given that mothers spend less time engaging in paid labor, mothers are more likely to “engage in household labor and chores on days when they also work for pay.”⁴⁵ Studies suggest that mothers spend significantly more time on household labor and chores when compared with fathers.⁴⁶ This typically includes household labor like cooking, cleaning, and taking care of day-to-day chores, as well as any childcare responsibilities.⁴⁷ Further, studies have found that fathers report having more time for leisure than mothers, and less of a father’s leisure time is spent on providing child care.⁴⁸

Changes in gender dynamics have led to a new form of unequal division of labor. According to scholars, the newest version of sex-based divisions of labor consists of “the part-time, low-earning, low-status Mom and the more than full-time, higher-earning, higher-status Dad.”⁴⁹ Unequal division of family responsibilities can have a detrimental impact on the careers of both men and women.⁵⁰ For instance, women are more likely to sacrifice their job to take on child care responsibilities while men are more likely to take on more shifts to climb the promotional ladder now that they are providing economically for their family.⁵¹

C. Career Implications

The cost of leaving the workforce due to lack of paid family leave provisions can have detrimental effects on a woman’s career. Whether she can afford to take unpaid maternity leave or she decides to leave the workforce without protection by any mandated leave, she may be sacrificing a sense of identity and pride by leaving a career in which she has invested valuable time and money.⁵² Upon reentry into the workforce, a mother who takes time off to care for her children also faces a significant reduction in earning potential, retirement investments, disability investments, and Medicare benefits.⁵³ Indeed,

44. See Chai, *supra* note 11.

45. Glynn, *supra* note 42.

46. *Id.*

47. See *id.* (“Mothers of young children, in addition to doing significantly more household labor, take on the majority of child care responsibilities within their families.”).

48. *Id.*

49. Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 120 (1998) (quoting legal scholar Susan Deller Ross).

50. See *id.* at 120.

51. *Id.*

52. McCormack, *supra* note 27, at 1327.

53. *Id.* at 1327–28.

some proponents of paid family leave suggest that women who have children sacrifice 15% of their earnings to provide family care, which results in an average of \$295,000 in lost wages and retirement income over their lifetime.⁵⁴ Moreover, the long-term cost of unpaid parental leave impacts less-educated mothers even more, as research suggests that “[l]ifetime care-related earnings losses represent 26 percent of potential earnings for mothers who did not complete high school, compared with 12 percent for college graduates.”⁵⁵ Experts suggest that women should remain in the workforce and view childcare costs as an investment to the overall financial asset of remaining in the workforce and increasing their lifelong earning capacity.⁵⁶ Policies like paid, job protected family leave would make it easier for women to remain in the workforce and pursue their careers.⁵⁷

D. *Changing Gender Dynamics and the Increased Need for Gender-Neutral Paid Leave*

As family dynamics continue to change, family leave provisions should adapt to uphold society’s new goals and concerns regarding work and division of labor. The number of moms who work either full or part time has increased from 51% to 72% in the past fifty years.⁵⁸ The increase in women’s workforce participation can be attributed to economic need, access to education, and more employment opportunities for women.⁵⁹ Unsurprisingly, nearly half of all two-parent households now include two full-time working parents.⁶⁰ Further, couples with children are getting married at lower rates than they used to, suggesting that unmarried couples are more likely to consist of two working individuals.⁶¹

54. Richard W. Johnson et al., *Unpaid Family Care Continues to Suppress Women’s Earnings*, URBAN INST. (June 9, 2023), <https://www.urban.org/urban-wire/unpaid-family-care-continues-suppress-womens-earnings>.

55. *Id.*

56. McCormack, *supra* note 27, at 1329.

57. *Id.* at 1329–30.

58. Gretchen Livingston et al., *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RES. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/short-reads/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>.

59. Glynn *supra* note 42.

60. *Id.* (reporting that “in 1975, more than half, or 52.6 percent, of [] married-couple families had a father who worked and a mother who stayed at home, while in 2016, less than one-third of married couples had this configuration”); Livingston et al., *supra* note 58.

61. Glynn, *supra* note 42 (reporting that “[i]n 1975, 84 percent of couples with minor children were married, compared with 67.6 percent in 2016”).

Women are not the only ones whose traditional gender roles have been challenged. The idea of fatherhood has grown to include working a full-time job and taking on more childcare responsibilities.⁶² Perhaps this change in dynamic explains why the overwhelming majority of Americans support family leave policies.⁶³ As such, it is even more critical that states adopt a paid family leave program that ensures both parents can sustain their career, enables parents bond with their child and each other, and promotes economic security for families.

III. CURRENT FAMILY LEAVE PROVISIONS APPLICABLE TO TENNESSEANS ARE INSUFFICIENT.

In 1993, Bill Clinton signed into law the Family and Medical Leave Act (“FMLA”), which requires some employers to provide up to twelve weeks of unpaid, job-protected family parental leave after the birth, adoption, or foster of a child.⁶⁴ The FMLA was intended to promote family stability and workplace productivity.⁶⁵ The FMLA is the primary federal parental leave provision in the United States.⁶⁶ Critics of the FMLA argue that, when it was enacted, the FMLA largely replicated leave that was already offered at the state level.⁶⁷ Several states have passed more generous family leave provisions that supplement the FMLA by providing paid leave or leave for longer than twelve weeks.⁶⁸ Recently, Tennessee has enacted legislation that provides paid leave to certain state employees, but only for up to six weeks.⁶⁹ The United States could take notes from other countries with

62. *Id.*

63. See Horowitz et al., *supra* note 6.

64. Kelly McDonald Garrison et al. eds., *The Family and Medical Leave Act & Parental Leave Policies*, 21 GEO. J. GENDER & L. 333, 334, 338 (2020).

65. See *id.* at 338.

66. *Id.* at 336.

67. Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 397 (1999). “In addition to the availability of employer-provided leave, at the time the FMLA was enacted, thirty-four states, as well as Puerto Rico and Washington, D.C., had some type of leave legislation in place.” *Id.* at 407.

68. See *Paid Family and Medical Leave as of June 2022*, NAT’L CONF. OF STATE LEGISLATORS (updated September 9, 2022), <https://www.ncsl.org/labor-and-employment/state-family-and-medical-leave-laws>.

69. Vivian Jones, *Legislature Approves 6 Weeks Paid Parental Leave for State Employees, None for Legislative Staff*, TENNESSEAN (Apr. 11, 2023, updated at 1:53 PM), <https://www.tennessean.com/story/news/politics/2023/04/11/legislature-approves-6-weeks-paid-parental-leave-for-state-employees-none-for-legislative-staff/70103109007/>.

family leave policies, where policies are typically even more robust.⁷⁰ Or, the United States could derive a policy similar to its own private companies, who understand that current family leave policies are insufficient and decide to fill in the gaps with generous paid family leave.⁷¹

Paid family leave has many benefits, but the current coverage fails to support all families who need it. Current unpaid family leave provisions are generally available to only those who can afford to leave work without pay, and those who can already afford to take unpaid leave are unlikely to need the protections of leave provisions as desperately as those who cannot afford to lose that income.⁷² Further, current paid provisions, like those offered by private companies, are often only available to individuals holding higher paying or more prestigious jobs in the first place and remain unavailable to low-income employees, which disproportionately affects minority individuals.⁷³ In order to accomplish the goals of family leave provisions, such provisions must offer paid leave and must apply to a wider range of employees.

A. *Pitfalls of the Family Medical Leave Act*

In the United States, federal government intervention on paid family leave has not evolved since 1993 with the passage of the Family and Medical Leave Act.⁷⁴ The FMLA requires some employers to provide up to twelve weeks of unpaid, job-protected family parental leave after the birth, adoption, or foster of a child.⁷⁵ When it was enacted, Congress enumerated the five main goals of the FMLA:

- (1) balancing the demands of family life and the work place,
- (2) allowing both male and female employees to

70. Jeanne Sahadi, *It's Good to Be a Working Parent in Europe*, CNN (Feb. 19, 2016), <https://money.cnn.com/2016/02/17/pf/working-parents-paid-leave/index.html>.

71. See e.g., *Paul Hastings Expands Paid Parental Leave Policy for All in U.S.*, PAUL HASTINGS (June 18, 2019), <https://www.paulhastings.com/news/news-paul-hastings-expands-paid-parental-leave-policy-for-all-in-us>; Rebecca J. Rosen, *Netflix's Parental-Leave Policy: 'Just About Ideal'*, ATLANTIC (Aug. 15, 2015), <https://www.theatlantic.com/business/archive/2015/08/netflix-parental-leave/400541/>; Kristen Lotze, *10 Tech Companies with Generous Potential Leave Benefits*, TECH REPUBLIC (Feb. 15, 2019), <https://www.techrepublic.com/article/10-tech-companies-with-generous-parental-leave-benefits/>.

72. See generally Garrison et al. eds., *supra* note 64, at 352–56 (discussing the shortcomings of the FMLA).

73. *Id.* at 354–55.

74. See *id.* at 336.

75. *Id.* at 338.

take reasonable leave for medical reasons, the birth or adoption of a child, or to care for a family member, (3) promoting the legitimate interests of employers, (4) minimizing employment discrimination based on sex, and (5) promoting the goal of equal employment opportunity for men and women.⁷⁶

Generally, unpaid leave may have benefits like reducing infant mortality and premature births, but those benefits are typically derived by college-educated, married mothers.⁷⁷ The FMLA, while a step in the right direction, falls short of meeting these goals due to its limited employee coverage and inaccessibility to low-wage workers.

First, the FMLA does not apply to all employees, leaving many employees uncovered or covered by state or employer provisions. In the public sector, the FMLA only requires public agencies, such as state, local and federal employers, and schools, regardless of the number of employees, to provide unpaid, job protected leave up to twelve weeks.⁷⁸ In the private sector, the FMLA only requires employers engaged in commerce with at least fifty employees in at least twenty work weeks from the current or preceding calendar year to provide unpaid family leave.⁷⁹ Critics argue that facially neutral requirements like these disadvantage poor women because poor women are more likely to work in informal economies which are not covered by these FMLA provisions.⁸⁰

Second, critics argue that the FMLA's unpaid leave favors higher-income employees and is inaccessible or not practical for low-wage earners and single-income parents.⁸¹ Unpaid leave is inaccessible to those who lack sufficient savings to cover the absence of income involved with unpaid leave.⁸² The result is that many individuals who qualify for unpaid leave typically return to work after less than two weeks of unpaid leave.⁸³ For mothers who have recently undergone

76. *Id.*

77. Romig & Bryant, *supra* note 14.

78. Garrison et al. eds., *supra* note 64, at 339.

79. *Id.*

80. *Id.* at 355.

81. See generally, Maria O'Brien Hylton, "Parental" Leave and Poor Women: *Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 476 (explaining that "the debate about parental leave has ignored the possibility that the cost of this mandated benefit is likely to be borne by poor, low-skill working women who will find that their job opportunities narrow as employers try to shift some of the costs of the benefit to the employees"); Garrison et al. eds., *supra* note 64, at 354–56 (discussing the disparate impact unpaid leave has on persons of color and persons of lower socioeconomic status).

82. Garrison et al. eds., *supra* note 64, at 354.

83. *Id.*

such a serious medical event as childbirth, returning to work shortly after can affect her autonomy as well as her mental and physical health.⁸⁴

Third, because it is unpaid, critics argue that it fails to meet its goal of minimizing gender equality.⁸⁵ In the United States, traditional gender stereotypes remain pervasive, especially in the workplace.⁸⁶ The result is that women are more likely to take leave because they continue to take on the bulk of household duties and men are less likely to take leave because of pressure to earn income.⁸⁷ Critics argue that the FMLA “does not address fundamental challenges to the achievement of equal employment opportunities for men and women, including unequal pay and the expectation that women will assume responsibility for domestic work.”⁸⁸ Despite the FMLA’s goal of minimizing inequality, the result is that unpaid leave has created “serious economic consequences” for women such as decreasing earning potential and losing jobs and job opportunities.⁸⁹ On the other hand, some argue that the FMLA has made strides towards gender equality because it has encouraged the legislature and courts to consider the impact of gender stereotypes when drafting and interpreting leave provisions.⁹⁰

The United States’ federal system for family leave, which currently offers zero weeks of paid family leave, pales in comparison to the systems in other countries. Estonia offers the most generous family leave by providing 82 weeks or more of paid leave to mothers with 435 paid days, or about 62 weeks, that can be split between a couple.⁹¹ Britain offers up to 52 weeks of maternity leave total and 39 of those weeks are paid.⁹² The paid time off is typically at 90% of the leave-taker’s salary for the first six weeks, but the remainder is usually set at a lower rate.⁹³ Britain allows new parents to share up to 50 weeks of leave, including split 37 of the 39 paid weeks between them.⁹⁴ However, this has resulted in fewer fathers or partners taking

84. *Id.*

85. *See id.* at 352–54.

86. *Id.* at 353.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 353–54.

91. Miriam Berger et al., *How Does the U.S. Compare to Other Countries on Paid Parental Leave? Americans Get 0 weeks. Estonians Get More Than 80.*, WASH. POST, (Nov. 11, 2021, 11:08 AM) <https://www.washingtonpost.com/world/2021/11/11/global-paid-parental-leave-us/>.

92. *Id.*

93. *Id.*

94. *Id.*

leave, as data suggests only between two and eight percent of leave is taken by fathers or partners.⁹⁵

Other countries are even more proactive when it comes to their family leave provisions, like Sweden, who addressed the unequal utilization between men and women of its 68-week family leave policy by enacting a “use it or lose it” policy to encourage more men to take leave.⁹⁶ The policy not only encourages men to use the paid leave, it encourages women to return to work.⁹⁷ Parents have reported that the policy has transformed attitudes about childcare and gender.⁹⁸ However, in general because “[o]nly 40% of Swedish women work full time . . . compared to 75% of men, and men are paid higher wages[.]” the impact on gender inequality that the use it or lose it policy can have is limited.⁹⁹ Though no action has been taken on the federal level since the FMLA, it is clear that many states are aware of the United States’ deficient family leave policies as they have enacted or enhanced their own.¹⁰⁰ Notably, some states, like New York and Massachusetts, have implemented policies that address the pitfalls of the FMLA by providing *paid* family and medical leave, but Tennessee has yet to provide coverage at the same level of those states.¹⁰¹

B. *Pitfalls of Tennessee Legislation on Family Leave*

Recently, Tennessee enacted family leave policies that attempt to address some of the FMLA’s shortcomings. Tennessee enacted the Tennessee Works Tax Act of 2023 which provides for a tax benefit to private businesses that provide paid family leave to employees.¹⁰²

95. *Id.*

96. *See id.*; *How a Parental Leave Policy Changed the Way Sweden Sees Fatherhood*, APOLITICAL (June 6, 2017), <https://apolitical.co/solution-articles/en/parental-leave-policy-changed-way-sweden-sees-fatherhood>.

97. *How a Parental Leave Policy Changed the Way Sweden Sees Fatherhood*, *supra* note 96 (finding that “mothers . . . now take 75% of parental pay compared to 99.5% in the 1970s”).

98. *Id.*

99. *Id.*

100. *In the Spirit of Mothers’ Day, What States Have Enacted Paid Family Leave Policies for the Birth, Adoption, or Foster Placement of a Child?*, CSG SOUTH, (May 2023), https://csgsouth.org/wp-content/uploads/CSG_QOM_MAY31_compressed.pdf.

101. *See* Vicki Shabo, *Explainer: Paid and Unpaid Leave Policies in the United States*, NEW AM. (Sept. 3, 2023), <https://www.newamerica.org/better-life-lab/briefs/explainer-paid-and-unpaid-leave-policies-in-the-united-states/>.

102. Tennessee Works Tax Act of 2023, Pub. L. No. 377, § 18 (2023) (codified as amended in scattered sections of Tenn. Code Ann., Title 67); *Tennessee General Assembly Passes Tennessee Works Tax Act*, RADIO WBMC (Apr. 28, 2023, 9:51 AM), <https://www.radiowbmc.com/2023/04/28/tennessee-general-assembly-passes-tennessee-works-tax-act/>.

Additionally, Tennessee passed a 6-week paid parental leave bill for executive and judicial branch employees (hereinafter “Tennessee Public Employee Leave Bill”).¹⁰³ Advocates of paid family leave in Tennessee state that the policy “brings Tennessee in line with peer states across the region that have enacted similar programs in recent years . . . [and] help[s] make the state more competitive in recruiting and retaining employees.”¹⁰⁴ Though these policies are a step in the right direction, Tennessee has not done enough to adequately provide all employees with paid family leave, which would address historical inequalities for women in the workplace, promote family development, and address growing economic concerns.

1. The Tennessee Public Employee Leave Bill Provides Insufficient Paid Leave Coverage.

First, the Tennessee Public Employee Leave Bill does not provide a sufficient duration for leave because it only provides six weeks of paid leave. The original bill proposed provided paid leave for twelve work weeks for certain state employees, which is the typical amount that other states provide.¹⁰⁵ Further, public employees that qualify for this leave must also qualify under the FMLA.¹⁰⁶ As such, consistent with the FMLA, employees may take the remaining time up to twelve weeks total as unpaid leave.¹⁰⁷ Although providing some paid leave to some state employees is a step in the right direction, Tennessee Public Employee Leave Bill does not sufficiently cover Tennesseans because it fails to address employees who do not qualify for any leave under the FMLA.

Second, the Tennessee Public Employee Leave Bill fails to compete with leave offered in other states. Members of the legislature indicated that the proposal to increase paid leave from zero to twelve

103. Pub. Ch. No. 216 (2023) (codified as amended in scattered sections of Tenn. Code Ann., Title 8, Ch. 50, Pt. 8); Jones, *supra* note 69.

104. *Statement: Three Years After Initial Proposal, A Better Balance Celebrates Passage of Paid Parental Leave for Tennessee State Employees as Important First Step*, A BETTER BALANCE (Apr. 11, 2023), <https://www.abetterbalance.org/statement-three-years-after-initial-proposal-a-better-balance-celebrates-passage-of-paid-parental-leave-for-tennessee-state-employees-as-important-first-step/>.

105. Jones, *supra* note 69 (“After approving 12 weeks of paid leave . . . consistent with [Governor] Lee’s proposal, Senators voted 26 to 5 along party lines . . . to cut the amount by half to concur with an amended version of the bill passed by the House.”); see Comparative Chart, *infra* note 120.

106. See Pub. Ch. No. 216 § 1(c) (2023) (codified as amended in scattered sections of Tenn. Code Ann., Title 8, Ch. 50, Pt. 8).

107. Jones, *supra* note 69.

weeks “was too much”¹⁰⁸ Yet, states that have enacted their own paid leave provisions generally surpass what is currently offered in Tennessee. For instance, New York offers twelve weeks of fully paid leave for certain state employees.¹⁰⁹ Even still, critics of New York’s paid family leave argue that it neglects low-income employees,¹¹⁰ an argument which can similarly be made about Tennessee’s new paid family leave legislation.

Third, the bill only applies to higher wage earners, who are more likely to reap benefits already through application of the FMLA’s unpaid leave. In calculating the fiscal impact of the Tennessee Public Employee Leave Bill, the “estimated average salary for state employees” is \$88,322 per year based on FY21-22.¹¹¹ Yet, according to the United States Census Bureau from 2018–2022, in Tennessee the median *household* income was \$64,035.¹¹² The United States Census Bureau states that household income “includes income of the householder and all other individuals 15 years old and over in the household,” meaning that the number that contributes to that median is often the sum of multiple incomes.¹¹³ This suggests that the Tennessee Public Employee Leave Bill does not address the issue of applicability to low-income workers created by the FMLA as it merely provides paid leave for middle- to high-income state employees.

2. The Tennessee Works Tax Act does not Sufficiently Address the Needs of Tennesseans.

The Tennessee Works Tax Act of 2023 creates a paid family and medical leave tax credit to businesses that give employees paid family leave.¹¹⁴ The tax credit is only temporary and is effective for tax years

108. *Id.*

109. New York’s Paid Family Leave Program, OFFICE OF THE NEW YORK STATE COMPTROLLER (Apr. 2023) <https://www.osc.state.ny.us/reports/new-yorks-paid-family-leave-program>.

110. See Anna Petrocelli, *A Critique of New York Paid Family Leave*, 49 FORDHAM URB. L.J. 1251, 1253 (2022).

111. Fiscal Memorandum, Tennessee General Assembly Fiscal Review Committee, SB 276 – HB 324 (Mar. 29, 2023), <https://www.capitol.tn.gov/Bills/113/Fiscal/FM1221.pdf>.

112. *QuickFacts Tennessee*, U.S. CENSUS BUREAU (last accessed Apr. 4, 2024), <https://www.census.gov/quickfacts/fact/table/TN/INC110221>.

113. *Id.*

114. See Tennessee Works Tax Act of 2023, Pub. L. No. 377, § 18 (2023) (codified as amended in scattered sections of Tenn. Code Ann., Title 67); *Tennessee General Assembly Passes Tennessee Works Tax Act*, *supra* note 102.

ending after December 31, 2023 but before December 31, 2025.¹¹⁵ The tax credit is “allowed against a taxpayer’s combined franchise and excise tax liability.”¹¹⁶ Further, the tax credit is based on the federal paid family and medical leave credit pursuant to Internal Revenue Code § 45S.¹¹⁷ According to the Department of Revenue, “[t]he credit may be used to offset up to 50% of the combined franchise and excise tax liability shown on the return before the credit is taken, and any unused credit may be carried forward up to 25 years.”¹¹⁸ The purpose of allowing the credit to be carried forward is so that employers can maximize the credit amount.¹¹⁹

Though tax credits may be helpful in encouraging a desired outcome, here, these tax credits fail to encourage employers to provide paid family. First, tax credits are not mandatory for employers, they are merely a voluntary benefit. As such, the benefit is only derived by those who elect to use it. Therefore, businesses may easily not provide paid family leave and opt to not get the benefit. Second, because the Tennessee Works Tax Act’s benefit is only temporary, it is unlikely to encourage an employer to implement a paid family leave program. This type of benefit is likely only helpful to those who already have provisions in place. Thus, this benefit is unlikely to expand coverage beyond current offering, as it is inadequate to encourage employers to provide paid family leave. Finally, this benefit likely does not provide incentives to small businesses, where financial restraints limit the ability to provide paid family leave, because the cost of providing paid family leave to employees may outweigh any potential tax benefit that might be derived.

IV. TENNESSEE SHOULD IMPLEMENT A PAID FAMILY LEAVE PLAN COMPARABLE TO WASHINGTON AND MARYLAND TO ADDRESS THE NEEDS OF CONSTITUENTS.

Thirteen U.S. states and the District of Columbia provide some type of paid family leave.¹²⁰ However, only two states, Washington

115. Franchise and Excise Tax Notice #23-10, *Tennessee Works Tax Act Creates Paid Family and Medical Leave Credit*, TN DEP’T REV. (May 2023), <https://www.tn.gov/content/dam/tn/revenue/documents/notices/fae/23-10fe.pdf>.

116. *Id.*

117. *Id.*

118. *Id.*

119. Fiscal Memorandum, Tennessee General Assembly Fiscal Review Committee, SB 276 – HB 324 (May 4, 2023), <https://www.capitol.tn.gov/Bills/113/Fiscal/FM1374.pdf>.

120. *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, A BETTER BALANCE (updated Oct. 24, 2023),

and Maryland, provide coverage of paid leave to *all* employees.¹²¹ Compare these states to Tennessee, where unpaid leave under the FMLA is not accessible to nearly 63% of workers and paid family leave is not accessible to around 80% of workers.¹²² Proponents argue that “Tennesseans need a common sense, national paid leave program.”¹²³ Such a paid leave program should include *all* workers and provide sufficient income that workers can afford leave regardless of income level.¹²⁴ In order to adequately address the goals of paid family leave, it is necessary that coverage extends to all employees, as such, Tennessee should follow Washington and Maryland when implementing a paid family leave plan.

A. *Implementation of Paid Family Leave Plan in Washington and Maryland*

In Washington and Maryland, paid family leave can be used to bond with a child in the first year after the child is born or to bond with a child within a year after the child has been adopted or fostered.¹²⁵ In both states, all employees may qualify for benefits as long as they have worked for a minimum number of hours during the qualifying period prior to be eligible for paid family leave.¹²⁶ Further, both states provide job protection when the employee returns from family leave.¹²⁷ In Maryland, most jobs are protected with some narrow exceptions, while in Washington only employees who meet specific eligibility criteria similar to that of the FMLA are afforded job protection.¹²⁸ Like Maryland, Tennessee should provide broad job protection, because when employees who take leave are able to return to their job, it improves employee morale, encourages women to remain in the workforce, and boosts the economy.

In Washington, workers are eligible to receive 90% of the employee’s average weekly wage up to the amount equal to 50% of the statewide average weekly wage.¹²⁹ If an employee reaches that

<https://www.abetterbalance.org/wp-content/uploads/2021/12/CombinedPFMLChart-October-2023.pdf> (hereinafter “Comparative Chart”).

121. *Id.*

122. *Paid Leave Means a Stronger Tennessee*, NAT’L P’SHIP (Feb. 2023), <https://nationalpartnership.org/wp-content/uploads/2023/04/paid-leave-means-a-stronger-tennessee.pdf>.

123. *Id.*

124. *Id.*

125. Comparative Chart, *supra* note 120.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

maximum, then the employee starts to receive 50% of an employee's average weekly wage above an amount equal to 50% of the statewide average weekly wage.¹³⁰ Similarly, in Maryland an employee will receive 90% of their average weekly wage up the amount equal to 65% of the statewide weekly average wage.¹³¹ If an employee reaches that maximum, then they will receive 50% of their average weekly wage above the amount equal to 65% of the statewide average weekly wage.¹³² However, the maximum weekly benefit for leave in Washington was \$1,427 per week, or 90% of the statewide average weekly wage. In Maryland, where the paid family leave program is just beginning, the maximum will be \$1,000 per week initially, adjusted based on inflation.¹³³ Further, in both Washington and Maryland, employees can receive paid family leave for up to twelve weeks within a 52-week period.¹³⁴

Washington and Maryland fund their respective family leave programs differently. In Washington, the employees cover the full cost of family leave through a premium that is about 0.4% of wages earned and that is only withheld from wages below the Social Security contribution base.¹³⁵ On the other hand, in Maryland employers and employees share the cost of family leave.¹³⁶ Maryland employers can withhold up to 50% of the contribution from the workers' wages, then employers cover the remaining cost.¹³⁷ Importantly, employers with fewer than fifteen employees are not required to pay the employer portion, alleviating any financial stress small businesses might feel from funding mandatory paid family leave provisions.¹³⁸ The program in Maryland will not begin collecting payroll taxes until October 1, 2024, but the initial total contribution in Maryland will be 0.9% of wages below the Social Security Contribution Base.¹³⁹ Then, on January 1, 2026 benefits will begin for those who apply in Maryland, giving the state a sufficient pool of funding to being rolling out benefits.

B. *The Proposed Plan for Paid Family Leave in Tennessee*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

Tennessee should implement a job-protected, 12-week paid family leave provision for the birth, adoption, or foster of a child, where all employees are eligible for leave, regardless of gender, income level, and field of work. Tennessee may provide employee eligibility provisions requiring that an employee has worked a certain number of hours to qualify for the paid benefit. Like Washington, a Tennessee employee should meet this eligibility requirement even if their hours were worked for multiple employers within the qualifying period. Moreover, Tennessee employees should be eligible to receive 90% of the employee's average weekly wage up to the amount equal to 50% of the statewide average weekly wage. Of course, Tennessee's policy should analyze the expected funds collected from the premiums and set the provisions for the weekly wage accordingly. Additionally, Tennessee can cap the maximum weekly wage that an employee may receive, but the cap should be no less than \$1,000 per week, or the equivalent amount accounting for inflation from the time of this proposal. Because Maryland's funding plan provides greater flexibility, Tennessee should adopt a comparable plan where both employers and employees fund the plan, but employers with less than fifteen employees are not required to pay the employer portion. When choosing the premium, Tennessee should use a rate between 0.4% and 0.9% of wages below the Social Security contribution base in accordance with the any projections of necessary funds. Finally, if Tennessee implements a paid family leave provision, then employees and employers could begin by paying into the plan for a year or two before employees are eligible to apply for the benefits, to ensure adequate funding.

C. How the Proposed Plan will Address the Needs of Tennesseans

A comprehensive paid family leave plan, like the one proposed, can help address the current needs of Tennessee constituents, provide social and health benefits to employees, provide economic benefits to employers, compete with leave policies in other jurisdictions, and increase women's workforce participation. Further, such a paid family leave policy can help address past discrimination against women in the workforce and, when such provision is gender neutral, help combat gendered divisions of labor.

First, given the history of women facing discrimination in the workforce, the most important benefit of paid family leave for Tennesseans is that paid leave can help combat workplace discrimination. Though discrimination against women employees and mothers is not unique to Tennessee, from 2012–2015, Tennessee ranked tenth highest in terms of rate of pregnancy-discrimination

charges filed within the US Equal Employment Opportunity Commission.¹⁴⁰ This data suggests that Tennessee’s pregnant workers need workplace protections to stay healthy and employed, such as a paid family leave plan that provides job security. Further, providing paid family leave as opposed to unpaid leave is likely to reduce the stereotypes surrounding pregnant employees. Paid leave encourages women to return to work, thereby mitigating the stereotype that once a woman becomes pregnant, she will stay home with her child and not return to work. Further, paid leave encourages both men and women to take leave because it ensures the family’s economic security so that one parent does not have to continue working to support the other parent’s unpaid leave.

Additionally, paid family leave can mitigate the discrepancies between income level, earning potential, and workforce participation between men and women. In Tennessee half of families depend on a female breadwinner, but over 40% of female-headed households live in poverty, which is above the national average for female-headed households in poverty (34.4%).¹⁴¹ There is also a wage gap between fathers and mothers in Tennessee—mothers make seventy-two cents for every dollar that fathers make.¹⁴² Studies suggest that nearly 15% of women in Tennessee live in poverty, which is a higher rate than the rate in forty other states.¹⁴³ Due to their economic circumstances, many women in Tennessee are unlikely to take unpaid leave offered under the FMLA even when they qualify, because they “are less likely to have basic economic security” making it impossible for them to sacrifice their stream of income.¹⁴⁴ Yet, as noted previously, low-income workers typically do not qualify for the FMLA or any other parental leave, which disproportionately impacts working women in Tennessee who are “twice as likely as men to have a low-wage job.”¹⁴⁵

These discrimination issues can be alleviated by implementing paid family leave provisions that apply to all employees. Because many families in Tennessee rely on the mother’s income, it is vital that Tennessee implement paid family leave with job protection so that mothers who qualify for leave can take the time off from work to

140. *State of Our State: Women in the Workforce*, BETTER BALANCE (last accessed Apr. 5, 2024), <https://www.abetterbalance.org/state-of-tn-women/>.

141. *Id.* (providing that “[l]arge portions of women in Tennessee . . . are family breadwinners . . . [which] are single mothers or married mothers who earn at least 40% of the couple’s joint income”).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (finding that “women make up over two-thirds of the low-wage workforce”).

recover and bond with their child and then return to their job. Additionally, the lack of sufficient family leave provisions in Tennessee may negatively impact the discrepancy in earnings of mothers and fathers in Tennessee because mothers leave the workforce at higher rates than fathers, a problem which could be alleviated by the proposed paid family leave plan. Because women are more likely to have low-wage jobs than men and individuals who work low-wage jobs are less likely to qualify for paid family leave, women in the workforce will derive a greater benefit from the proposed paid family leave as it would apply to all employees, regardless of income level.¹⁴⁶

Second, paid family leave can positively impact employees by improving families' health and economic security.¹⁴⁷ When paid parental leave is provided for eight to twelve weeks, mothers can properly recover from the physical effects of childbirth and bond with their child.¹⁴⁸ Further, research suggests that adequate family leave can also improve a mother's mental health.¹⁴⁹ As such, the proposal for Tennessee to provide 12-weeks of paid family leave is an adequate amount of time for employees to derive health and economic benefits of leave.

Third, paid family leave benefits employers by increasing employee retention and reducing turnover.¹⁵⁰ By providing paid family leave, research suggests that employers can save anywhere from one-half to two-times the employee's annual salary by avoiding the cost of replacing an employee.¹⁵¹ According to the Center for Economic and Policy Research, the overwhelming majority of employers reported positive or neutral effect of paid family leave policies.¹⁵² The majority of employers reported that areas such as productivity, profitability, and employee morale remained stable or increased.¹⁵³ The proposed plan for paid leave in Tennessee enables employers to derive these benefits while also not imposing significant

146. See Maya Rossin-Slater, *Easing the Burden: Why Paid Family Leave Policies are Gaining Steam*, STAN. INST. FOR ECO. POLY RES. (Feb. 18, 2023), <https://siepr.stanford.edu/publications/policy-brief/easing-burden-why-paid-family-leave-policies-are-gaining-steam> ("The relative impacts [of paid family leave] are largest for the least advantaged mothers (those who are unmarried, minorities, and with low education levels), who previously had the lowest leave-taking rates.").

147. See *Paid Family Leave is Good Business for Tennessee*, *supra* note 25.

148. *Id.* (stating that the "physical effects of childbirth can persist well after six weeks").

149. *Id.*

150. *State of Our State: Women in the Workforce*, *supra* note 140.

151. *Paid Family Leave is Good Business for Tennessee*, *supra* note 25.

152. *Id.*

153. *State of Our State: Women in the Workforce*, *supra* note 140.

burdens on the employers in terms of funding because employees and employers would share the burden of funding the leave. Additionally, there would be minimal harm to employers with less than fifteen employees because they would not be required to fund the leave through an employer premium.

Fourth, the private market and other jurisdictions have more generous paid family leave plans than Tennessee. The overall trend is that most people are supportive of paid family leave.¹⁵⁴ Some representatives like Bill Beck, D-Nashville, believe that Tennessee has fallen behind the private market, believing that “[m]ost corporations are offering 12 paid weeks to attract new, good employees.”¹⁵⁵ As discussed, states like Washington and Maryland provide twelve weeks of paid family leave to all employees, while states like New York and Massachusetts similarly provide up to twelve weeks of paid family leave to most employees, with some exceptions.¹⁵⁶ Further, availability of paid family leave continues to climb, suggesting that the desire and necessity of paid family leave is not going away, and as such, Tennessee ought to implement paid family leave policies to keep up with private and state job markets.¹⁵⁷

Lastly, research suggests that providing paid family leave drastically increases women’s workforce participation.¹⁵⁸ In Tennessee, if women participated in the workforce “at the same rate as women in other countries with paid leave, there would be an estimated 104,000 additional workers in the state and \$3.3 billion more wages earned statewide.”¹⁵⁹ Other research reveals several discrepancies between men and women in the workforce that suggest that women in Tennessee are struggling more than women in other states. For instance, there is a 13-percentage point gap in labor force participation between men who were at 67.7% and women who were at 54.5% in 2018.¹⁶⁰ This gap is reportedly larger than the gaps in

154. See *Paid Family Leave is Good Business for Tennessee*, *supra* note 25 (finding that “[a]t least 20 major employers—including FedEx, Dollar General, First Horizon, BlueCross BlueShield of Tennessee, and Pilot Flying J—provide paid family leave for their employees to care for a new child”); Horowitz et al., *supra* note 6.

155. Jones, *supra* note 69.

156. Comparative Chart, *supra* note 120.

157. See Kathryn Mayer, *Parental, Family Leave Programs See Boost in 2023 SHRM Employee Benefits Survey*, SHRM (June 12, 2023), <https://web.archive.org/web/20231202193312/https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/shrm-2023-employee-benefits-survey-paid-parental-family-leave.aspx>.

158. See *Paid Leave Means a Stronger Tennessee*, *supra* note 122.

159. *Id.*

160. *State of Our State: Women in the Workforce*, *supra* note 140.

forty-two other states.¹⁶¹ Women who take job-protected paid leave are more likely to return to the workforce, which also can have a positive impact on her earning potential.

V. OBJECTIONS AGAINST FAMILY LEAVE PROVISIONS

A. *Potential Costs*

Some critics argue that businesses will bear additional costs of paid family leave, including the cost of funding the leave and the cost of replacing workers who are on leave.¹⁶² This is certainly a concern in Tennessee, as Representative Jason Zachary, R-Knoxville, opposed the Tennessee Public Employee Leave Bill arguing that small business owners, who cannot afford to provide paid family leave, will not be able to keep up.¹⁶³ As such, the proposed plan for Tennessee should follow Maryland's plan, which provides an exception to the payroll premium for employers with less than fifteen employees. Importantly, employees at small businesses will still be eligible for paid family leave, which allows small businesses to compete in the job market as all businesses would provide paid family leave.

Although this article's proposed plan for Tennessee suggests that employees and employers should split the cost, except when the employer has less than fifteen employees, employers may still face indirect costs from hiring replacement employees or coordinating their employees' schedules.¹⁶⁴ However, proponents suggest that employers who provide paid family leave may save money in the long run by retaining workers who would have otherwise quit, therefore reducing their turnover rates.¹⁶⁵ Though research on the effects that paid family leave has on employers is sparse, "[s]urveys of selected firms in California and New Jersey find that the vast majority of employers report either positive or neutral effects of [paid family leave] on employee productivity, morale, and costs."¹⁶⁶ It is unlikely that employers, especially small business employers, will face significant financial burdens from the proposed paid family leave plan for Tennessee.

161. *Id.*

162. See Hylton, *supra* 81, at 482.

163. Jones, *supra* note 69.

164. Rossin-Slater, *supra* note 146.

165. *Id.*

166. *Id.*

B. *Possibility of Discrimination Against Women*

Another argument against mandated paid family leave is that businesses will discriminate against women during the hiring process due to the extra costs of providing for the paid leave.¹⁶⁷ Critics argue that businesses will be more inclined to offer job opportunities to men because men decline to take family leave more often than women.¹⁶⁸ Consequently, some scholars caution against family leave policies entirely funded by employers because of concerns that employers will be less likely to hire women.¹⁶⁹

Hylton suggests that the argument against mandated leave stems from employers essentially doing a cost-benefit analysis of the perceived benefits and drawbacks of leave.¹⁷⁰ Hylton wrote in 1991 in anticipation of the FMLA's enactment,¹⁷¹ but since then states have mandated paid leave and collected data on its benefits to employers.¹⁷² The data regarding the effects of paid family leave on businesses demonstrates that employers generally report either positive or neutral effects.¹⁷³ This data suggests that paid family leave is at least unnoticeable and at best beneficial to employers. As such, employers should not be compelled to discriminate in the hiring process due to concerns about the effects of providing paid family leave. Of course, gender discrimination is not simply alleviated by these statistics. Instead, these promising statistics indicate that as mandated family leave becomes more widespread, the stigma surrounding employees who take paid leave may diminish. Thus, stereotypes that influence gender discrimination will become less pervasive. Furthermore, under the proposed plan for Tennessee, employees and employers should split the cost of funding paid family leave, which may reduce the employer's economic concerns that have influenced discriminatory hiring processes.

An additional solution to prevent discrimination against women is to encourage men and women to take leave more equally. Providing paid leave is a good first step as it allows both parents to take leave without having to sacrifice their income. Further, as the availability

167. See Hylton, *supra* note 81, at 481–82.

168. *Id.* at 477.

169. See e.g., Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 401 (1984–85).

170. Hylton, *supra* note 81, at 486.

171. See generally *id.*

172. See e.g., *Paid Leave Works: Evidence from State Programs*, NAT'L P'SHIP FOR WOMEN AND FAMILIES (Feb. 2022) <https://nationalpartnership.org/wp-content/uploads/2023/02/paid-leave-works-evidence-from-state-programs.pdf>.

173. See *supra* Section V.A.

of paid family leave becomes widespread, it is likely that more individuals, regardless of gender, will use it; thereby reducing the stigma around taking paid family leave. Tennessee could also adopt a policy akin to the “use it or lose it” policy in Sweden, which successfully encouraged more fathers to take leave.¹⁷⁴

C. *Racial Discrimination in the Application of Family Leave*

Another concern regarding mandated family leave is that it will result in racial discrimination in its application to employees. For instance, some scholars suggest that gender discrimination in the hiring process “affect[s] only the low-wage segment of the female labor market, rather than women employees generally.”¹⁷⁵ Additional research shows that women of color are more likely to work low-wage jobs that do not offer any family leave (let alone *paid* leave) and that women of color suffer greater penalties from using family leave benefits when they are offered.¹⁷⁶

To address this concern, it is imperative to understand how paid family leave provisions can apply both to low-wage employees and higher earning employees. Regarding the potential for racial discrimination in the eligibility of paid family leave policies, the proposed plan for Tennessee aims to cover all employees, regardless of income-level. This guarantees coverage for all employees, including low-income minority workers who were previously excluded from state and federal family leave in Tennessee. Additionally, Tennessee’s proposed plan must offer *paid* leave to allow employees, who otherwise could not afford to take unpaid leave, to take the necessary time off. Further, Tennessee should adopt generous eligibility requirements which can be met even if the employee’s hours were worked for multiple employers within the qualifying period. Such requirements will ensure that more employees are eligible without having to jump through procedural hoops. A comprehensive paid family leave program for all Tennesseans will drastically reduce the

174. See *How a Parental Leave Policy Changed the Way Sweden Sees Fatherhood*, *supra* note 96.

175. Hylton, *supra* note 81, at 484.

176. Asha DuMonthier et al., *The Status of Black Women in the United States*, INST. FOR WOMEN’S POL’Y RSCH. (2017) <https://iwpr.org/wp-content/uploads/2020/08/The-Status-of-Black-Women-6.26.17.pdf>; see also Kimberly Seals Allers, *Rethinking Work-Life Balance for Women of Color (and How White Women Got It in the First Place)*, SLATE (Mar. 5, 2018), <https://slate.com/human-interest/2018/03/for-women-of-color-work-life-balance-is-a-different-kind-of-problem.html>.

disparate impact that current family leave provisions have on minority employees.

D. *Even When Leave is Offered, Employees do not Utilize it*

Some critics argue that when leave is offered, employees do not utilize it. This can be adequately explained by the fact that most leave offered is unpaid and most individuals cannot afford to take unpaid leave and lose that line of income.¹⁷⁷ In fact, one study found that over 60% of individuals who qualified for leave but did not take it made less than \$35,000 annually.¹⁷⁸ Others may fear retaliation in the workplace from taking the leave.¹⁷⁹ There are additional barriers that may limit someone from taking family leave like “lack of policy awareness, too stringent eligibility requirements, too low pay, or absence of job protection.”¹⁸⁰ Under the proposed plan for Tennessee, providing paid leave will mitigate some of these issues by ensuring financial security and job protection for those who qualify for leave. Tennessee should also consider adopting other provisions to encourage both parents to take leave, like the “use it or lose it” policy adopted in Sweden for instance.

CONCLUSION

Tennesseans should have access to twelve weeks of paid family leave to allow for families to bond, encourage women to return to work if they chose, counteract historic discrimination in the workplace, and support economic prosperity for businesses and employees. At present, the Family Medical Leave Act fails to provide adequate family leave to address these concerns, given that guarantees zero weeks of paid family leave. States have and will continue to adopt their own policies to address the deficiencies of the FMLA, but Tennessee has failed to adequately provide additional leave for its constituents. Currently in Tennessee, only some governmental employees qualify for merely six weeks of paid family leave. To ensure that Tennessee meets the needs of all constituents, Tennessee should enact a 12-week paid family leave policy that is funded by both employees and employers, with exceptions for small businesses, and

177. See *supra* Section III.A.–B. discussing the pitfalls of unpaid leave.

178. Catherine Albiston & Lindsey Trimble O'Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 32 (2016).

179. See *supra* Section II.A. discussing how disparate rates of men and women taking leave may be due to fear of retaliation.

180. Rossin-Slater, *supra* note 146.

provides a pay that is adequate for Tennesseans to live on during the time they take leave.

