

The Importance of Job Protection for Paid Leave

“Paid family and medical leave is something people pay for, so they shouldn’t be afraid to use it.”

Summary

Workers taking time to care for themselves or a loved one need comprehensive paid, protected family and medical leave. Common sense and research tells us that one of the biggest concerns people have about taking leave is whether they might lose their job, even if they are contributing to a paid leave social insurance fund.¹

While the FAMILY Act would provide vital leave benefits to workers, it only guarantees job protection to those covered by the Family and Medical Leave Act of 1993 (FMLA). Therefore, the FAMILY Act fails to protect the jobs of the roughly 40 percent of workers not covered by FMLA, including private sector workers whose employers employ less than 50 employees or who have not worked for their current employer for at least 12 months and 1250 hours.²

This gap in job protection is critical to helping workers—particularly those being paid low wages, who are disproportionately women, people of color, and people with disabilities—retain their jobs at a critical moment in their lives when economic stability is especially important. Including job protection in the FAMILY Act would be a big step for our country in more accurately acknowledging the value of time off for healing or providing care.

What is job protection?

As currently drafted, the FAMILY Act includes anti-retaliation provisions that prohibit discrimination against workers applying for or receiving benefits. It does not, however, prohibit discrimination for being absent from work or give workers an affirmative right to return to work following leave. More than 40 percent of employees eligible for paid leave benefits will still have to worry about losing their job or other negative repercussions when using their benefits by taking time off. Only those workers eligible for FMLA would be covered by that law’s protections.

Key Takeaways

- **Without job protection, workers will forgo needed leave**
- **Denying workers job protection worsens income, race, and gender disparities**
- **The FAMILY Act should include job protection and robust anti-retaliation provisions.**

After taking leave to give birth a woman in San Francisco said, "They couldn't save me my job there, so I had to quit and reapply. But there were no jobs available by the time I reapplied."³

Without job protection, workers will forgo needed leave

Workers should be able to use paid leave to meet their basic needs. A 2012 U.S. Department of Labor survey found that among employees needing leave for a qualified family and medical reason but not taking it, the fear of losing their job

was the second most commonly cited reason (17 percent), behind unaffordability. Evidence, including from states like California and Rhode Island with paid leave programs, shows that a lack of job protection and unawareness of job protection will deter workers from using their benefits.⁴

Employment practitioners and advocates also understand workers fear for their jobs when they take leave.

"You can get 12 weeks of leave but what good does that do if you don't have a job?"

Nancy Rankin, Community

"What will happen to my job if I take leave?"

"At A Better Balance, we staff a free, confidential legal hotline at 1-833-NEED-ABB where we answer questions every day from workers across New York state about paid family leave. One of the questions we hear over and over again is, 'What will happen to my job if I take leave?' For many workers, knowing that their job is safe is the most important protection that the law provides. Getting workers paid benefits while they are bonding with a new child or caring for a sick loved one is a necessary piece of any paid leave program. But ensuring that workers have a job to go back to after their leave is up is just as crucial. Many workers will forgo needed leave for fear of losing their job, income, and health insurance if they take it."

Madeleine Gyory, Law Fellow, A Better Balance: The Work & Family Legal Center

Denying workers job protection worsens income, race, and gender disparities

By including job protection, the FAMILY Act can better address the income, race, and gender disparities it is meant to alleviate. Workers who are paid low wages are most likely to fall in the gap of those not covered by the FMLA's job protections.⁵ A Congressional Research Service report found that only about 39 percent of employees making less than \$35,000 may have been eligible for FMLA, while nearly 78 percent of employees paid more than \$75,000 could have taken the leave.⁶ In addition, women, African-American, Asian-American and Pacific Islander, and Native American

workers “are almost twice as likely to have an unmet need for leave than white workers.”⁷

Job protection also enhances the probability men will take leave, which can reduce gender inequality at home and in the labor market. In Rhode Island’s first year of paid family leave (PFL), men were more likely to know leave was job protected and more likely than men in California and New Jersey to use leave.⁸

Job protection may also improve women’s likelihood of returning to their same employers after taking leave for the birth of a child.⁹ This is particularly true for women with lower incomes and less education, who are much more likely to leave paid employment altogether after childbirth than women who have higher incomes and higher educational attainment.¹⁰

Lessons from the states

States recognize the necessity of job protection for comprehensive paid family and medical leave. Rhode Island and New York’s existing paid leave laws protect workers’ jobs while they are on family leave. Massachusetts’s new law includes full job protection for all leave-taking with robust anti-retaliation provisions. Connecticut and Oregon provide job protection to all workers who have been employed with their employer for approximately three months. New Jersey recently passed legislation that added new anti-retaliation protections to its paid family leave and temporary disability insurance law, while also amending the New Jersey Family Leave Act, the state’s unpaid leave law, to expand access to the right to reinstatement after taking family leave to an estimated 200,000 workers.

We know from the states that including job protection is feasible and critical. Workers should not be paying into a benefit they can’t take advantage of without risking their current and future economic security.

Including job protection in the FAMILY Act

In general, paid leave is good for workers and employers. Most employers realize that virtually all workers will need leave to care for themselves and a loved one at some point. Being able to take that leave with economic security and knowing they have a job to return to improves morale and reduces turnover. Businesses also benefit by retaining valuable and skilled employees.

In practice, employers have succeeded in managing paid leave programs. Smaller businesses in Rhode Island did not see an issue with job-protected leave because they reassigned the responsibilities of workers on leave to other employees.

Many employers in California have found its paid family leave program generates savings. The program helps reduce turnover and allows employers to coordinate their own benefits and leave with the state program.¹¹ Employers can cope with workers’ temporary absences by reassigning work to others, hiring temporary replacements, or paying overtime to other workers. In practice, it’s simply not that common for lots of employees to take leave at any individual worksite, and it’s rare that multiple employees take leave at the same time.

Strengthening retaliation protections in the FAMILY Act

In addition to job protection for all leave-taking, the FAMILY Act should include robust anti-retaliation protections. The FAMILY Act should prevent retaliation against workers not just for seeking or taking benefits, but also for taking leave from work. It should also include a rebuttable presumption that negative changes in an employee's job, benefits, or pay while on leave or within six months of taking leave are retaliatory.¹² This will further protect workers from those few employers who act in bad faith and do not deserve the benefit of the doubt for retaliating against workers for taking leave.

Endnotes

¹ Barbara E. Silver, Helen Mederer, and Emilija Djurdjevic, *Launching the Rhode Island Temporary Caregiver Insurance Program (TCI): Employee Experiences One Year Later*, 2016, https://www.dol.gov/wb/media/RI_paid_leave_report.pdf.

² U.S. Department of Labor, *Need Time? The Employee's Guide to the Family and Medical Leave Act*, <https://www.dol.gov/whd/fmla/employeeeguide.pdf>.

³ Quote from focus group participant in California study: Pamela Winston, Ariel Pihl, Lincoln Groves, Colin Campbell, Elizabeth Coombs, and Sharon Wolf, *Exploring the Relationship Between Paid Family Leave and the Well-being of Low-Income Families: Lessons from California*, 2017, U.S. Department of Health and Human Services, <https://aspe.hhs.gov/system/files/pdf/255486/PFL.pdf>.

⁴ Ariel Pihl and Gaetano Basso, *Paid Family Leave, Job Protection and Low Take-up Among Low-wage Workers*, UC Davis Center for Poverty Research, <https://poverty.ucdavis.edu/policy-brief/paid-family-leave-job-protection-and-low-take-among-low-wage-workers>; Eileen Appelbaum and Ruth Milkman, *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California*, Center for Research on Economic Policy, 2011; The Council of Economic Advisers, *The Economics of Paid and Unpaid Leave*, 2014, https://obamawhitehouse.archives.gov/sites/default/files/docs/leave_report_final.pdf; Silver et al., *Launching the Rhode Island*. While Rhode Island's program has job protection, not all workers are aware of it.

⁵ Eduardo Hernandez and Pronita Gupta, *Threats, Opportunities on FMLA's 25th Anniversary*, CLASP,

2018, <https://www.clasp.org/blog/threats-opportunities-fmlas-25th-anniversary>.

⁶ Gerald Mayer, *The Family and Medical Leave Act (FMLA): Policy Issues*, Congressional Research Services, 2013,

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⁷ U.S. Department of Labor, *The Cost of Doing Nothing: The Price We All Pay Without Paid Leave Policies to Support America's 21st Century Working Families*, 2015,

<https://www.dol.gov/wb/resources/cost-of-doing-nothing.pdf> (citing Jacob Alex Klerman, Kelly Daley, and Alyssa Pozniak, *Family and medical leave in 2012: Technical report*, Abt Associates, 2014, <https://www.dol.gov/asp/evaluation/fmla/fmla-2012-technical-report.pdf>).

⁸ Silver et al., *Launching the Rhode Island*; National Partnership for Women and Families Issue Brief, *First Impressions: Comparing State Paid Family Leave Programs in Their First Years; Rhode Island's First Year of Paid Leave in Perspective*, 2015, <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/first-impressions-comparing-state-paid-family-leave-programs-in-their-first-years.pdf>.

⁹ Appelbaum and Milkman, *Leaves That Pay*; Winston et al. 2017.

¹⁰ Lynda Laughlin, *Maternity Leave and Employment Patterns: 2006–2008*, Current Population Report, P70-128, U.S. Census Bureau, Washington, DC, 2011,

<https://www.census.gov/prod/2011pubs/p70-128.pdf> (noting 61 percent of first-time mothers without a high school diploma left work around childbirth, compared with 16 percent with a BA or more).

¹¹ Appelbaum and Milkman, *Leaves That Pay*.

¹² See, e.g., Massachusetts's paid family medical leave law, 2018, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter121>.