

# Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement

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*“If you or any American has to choose between being a good parent and being successful in your careers, you have paid a terrible price, and so has your country.”*

President Bill Clinton<sup>1</sup>

## INTRODUCTION

With these words, President Clinton announced his plans to help Americans balance their responsibilities to their jobs and families. In a commencement speech at Grambling State University, Clinton introduced his proposals for increasing the affordability of leaves taken to care for a family member.<sup>2</sup> This speech set off a flurry of activity among state legislatures,

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1. *Grambling Speech: President Clinton and Vice-President Gore: Working to Strengthen Families* (May 23, 1999), available at <http://www.workingforthefuture.org/grambling.html>.

2. *Id.*

policy analysts and business coalitions, who are all trying to answer the question, "Who should be responsible for insuring family risks?"

Managing a family is demanding, especially when combined with participation in the external work force. Adult workers have always had family responsibilities that at times have conflicted with workplace demands. In recent years, however, several factors have combined to increase the opportunity for this conflict. These factors include an increase in the number of families with both parents in the workforce, an increase in the number of one-parent families, and an aging population that has led to an increased number of families caring for elderly relatives. But perhaps the leading factor contributing to an increased tension between work and family, however, has been the increased number of women in the work force.<sup>3</sup>

Workers are subject to numerous risks that may cause them to leave the work force and forego labor income. For the most part, these risks are insured through the American social insurance system. For example, the risk that old age or permanent disability will require one to leave the work force is insured by the Social Security system. The risk that work-related injury will cause absence from the work force is insured through state workers' compensation systems. The risk of involuntary job loss is insured by the unemployment insurance system. Workers face another category of risk, however, that frequently causes absence from the work force but that has gone largely unaddressed. The risk that a family breadwinner will have to temporarily leave the work force in order to achieve an appropriate balance between work and family is incurred by millions of families each year, yet, there is no social insurance safety net providing income replacement to those workers.

This Article addresses the question of who should bear that risk. Starting with President Clinton's words above, it begins with the normative premise that both workers and our country pay a terrible price when workers have to choose between their families and the labor income they depend on to support them. Recent events signal that our nation may be ready to say that for some family risks, we simply will not force our citizens to make that awful choice.

For example, accommodating the need to balance work and family has been on the agenda of Congress and state legislatures since the 1980s. The first family leave law was passed by Washington state in 1989, with several other states soon following suit. In 1993, Congress passed the federal Family and Medical Leave Act (FMLA),<sup>4</sup> after the issue spent nearly ten years on the Congressional agenda. Family leave laws that have been passed to date, however, provide largely for unpaid, job-protected leave, and narrowly define the family risks that come within the laws' scope. Due to this limitation, states

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3. U.S. DEP'T OF LABOR, *FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21<sup>ST</sup> CENTURY* 28 (1999) [hereinafter *FUTUREWORK*].

4. Pub. L. No. 103-3, 107 Stat. 6 (codified at 5 U.S.C. § 6831 et seq. and 29 U.S.C. §§ 2601-54).

and Congress have frequently considered expanding the family leave statutes. Proposals have been advanced to expand the risks covered by job-protected leave, the employees eligible for protection, and the family members on whose behalf leave may be taken.

In 1996, the bipartisan Commission on Family Leave called for consideration of a uniform system of wage replacement for family leave. To further this purpose, the Department of Labor (DOL) issued regulations in June 2000 allowing states to create experimental programs utilizing state Unemployment Insurance (UI) systems, and many states are now considering legislation that would capitalize on the new rule. The DOL's decision to fund family risks through the UI system has been hotly contested, resulting in a lawsuit and a national campaign by business alliances to overturn the regulations.<sup>5</sup> Policy analysts and legislatures are exploring numerous other possibilities for insuring family risks.

Inspired by this national controversy, this Article attempts a full examination of the topic of family risk insurance, and develops recommendations for a comprehensive national family policy. Beginning with an analysis of the demographic changes that have facilitated the need to consider insuring this risk, the Article then analyzes the various family risks that workers face, and which of those risks might be appropriate for social insurance. It next highlights the existing systems that provide some form of insurance to workers who are required to temporarily leave the work force for family reasons and examines recent proposals for providing family risk insurance, drawn from both legislative agendas and the academic literature. Finally, the Article proposes a hybrid approach to solving this dilemma—both updating current systems and creating new ones to insure those risks that cannot appropriately be handled by systems already in place.

## I. BACKGROUND

This first Section of the Article lays the framework for a system to insure family risks. Beginning with a description of the demographic changes precipitating the need to address this situation, this Section calls for creation of a national family policy to address demographic changes and to provide a safety net for American workers. After examining the meaning of “family” in American social insurance and the family risks that may cause workers to leave the work force, the final portion of this Section attempts to match family risks with the various systems that might be used to insure them.

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5. See National Partnership for Women & Families, *Providing Family Leave Benefits Through Unemployment Insurance, Questions & Answers*, <http://www.nationalpartnership.org/Content.cfm?L1=202&TypeID=1&NewsItemID=285> (last visited Mar. 22, 2002) [hereinafter *Questions & Answers*]; see *infra* note 161.

### A. Demographic Changes

A better understanding of the current need to address family risks can be gleaned by examining the history of our labor force and the evolution of American family structure and function. Elizabeth Thompson recounts this early history as follows:

Many perceptions of labor and family stem from traditional ideas dating back to the seventeenth century when the family was a self-sustaining economic unit with the male as the laborer and the female as the homemaker and nurturer of the children. This family structure remained in place until the nineteenth century when America began its change from an agrarian to an industrialized nation. Change brought adjustments in our social structures. Families moved to urban areas, men got jobs in factories, and women stayed at home to care for children . . . . Throughout these years and through the mid-twentieth century, males dominated the labor force. It was not until the early twentieth century and into the Depression era that women began to leave the home in large numbers to earn money to help the family survive. *Because of years of male domination in the workplace, lawmakers and employers considered only male needs when constructing rules affecting the workplace.* Not surprisingly, these rules often discriminated against women who tried to enter such workplaces and perpetuated perceptions that only males belonged in the labor force.<sup>6</sup>

Indeed, the bulk of the American social insurance system was crafted during the New Deal era, when this norm of a male-dominated workplace was prevalent. The composition of the American work force, however, has changed dramatically since the 1930s. Over the past few decades, women have left the domestic sphere in increasing numbers in order to seek market employment. In the period between 1940 and 1998, the percentage of American women in the work force increased from 28% to 60%.<sup>7</sup> The number of working married women with children increased by 84% between 1969 and 1996,<sup>8</sup> and by 1998, two-thirds of all married mothers were in the work force.<sup>9</sup> As a result of this increased work force participation, the typical American family “no longer consists of a father employed outside the home and a mother who, because she

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6. Elizabeth F. Thompson, Comment, *Unemployment Compensation: Women and Children – The Denials*, 46 U. MIAMI L. REV. 751, 755 (1992) (emphasis added).

7. FUTUREWORK, *supra* note 3, at 28 (citation omitted).

8. *Id.* at 30.

9. *Id.* at 30 (citing Howard V. Hayghe, *Developments in Women's Labor Force Participation*, MONTHLY LABOR REVIEW, Sept. 1997, at 42). Several factors have been credited with this increase in women's labor force participation, including rising labor market opportunities for women, the need for a second income to keep pace with the cost of living, changing attitudes regarding women's roles in the family, and reduced workplace discrimination against women. See *id.* at 28 (citing COUNCIL FOR ECONOMIC ADVISORS (CEA), *FAMILIES AND THE LABOR MARKET, 1969-1999: ANALYZING THE "TIME CRUNCH"* 6 (1999)).

is not so employed, is available to care for children and other relatives in need.”<sup>10</sup> As Professor Malin notes, the nature of employment has also changed for working mothers: “Whereas at one time, married women often were characterized as secondary wage earners whose attachment to the labor force was open to question, such is no longer the case.”<sup>11</sup> As such, the frequency of work-family conflicts has likely increased commensurately with the rate of female work force participation during this period.

Another factor contributing to increased work-family conflicts is the significant rise in the number of single-parent families, especially those headed by women.<sup>12</sup> The proportion of single-parent families has more than doubled over the last thirty years, from 11% of family households with children in 1970, to 27% of such households in 1998.<sup>13</sup> In a comparable period, the percent of working single mothers with children under eighteen increased from 53% to 66%.<sup>14</sup> Single parents are especially vulnerable to the risk of leaving the labor force when family problems occur, because they do not have a spouse with whom to divide family responsibilities. In addition, single parents generally have less family income than married couples and are therefore less able to purchase services (such as child-care services) that might alleviate the need to temporarily leave the work force.

Today, many workers are in the position of simultaneously caring for their children and their aging parents.<sup>15</sup> Individuals age sixty-five and older currently make up twelve percent of the American population, and that number continues to grow rapidly.<sup>16</sup> Nearly twenty percent of American households reported caring for a person age fifty or older in the year 1996.<sup>17</sup> The Families and Work Institute expects this number to increase, and estimates that approximately forty-two percent of workers will provide some form of elder care in the year 2002.<sup>18</sup> Nearly two out of three individuals providing care for elders are working.<sup>19</sup> Six percent of caretakers report that they had to leave the labor force entirely, and more than fifty percent report making changes at work,

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10. Martin H. Malin, *Part I: Unemployment Compensation and Eligibility: Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REF. 131, 133 (Fall 1995 / Winter 1996).

11. *Id.* at 133 (citation omitted).

12. FUTUREWORK, *supra* note 3, at 30.

13. *Id.* at 30 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, GROWTH IN SINGLE FATHERS OUTPACES GROWTH IN SINGLE MOTHERS (1998), available at <http://www.census.gov/Press-Release/www/family.html>)

14. *Id.* at 31.

15. Malin, *supra* note 10, at 134.

16. *Id.* at 133.

17. FUTUREWORK, *supra* note 3, at 31.

18. *Id.* at 32 (citing ELLEN GALINSKY & JAMES T. BOND, FAMILIES AND WORK INSTITUTE, THE 1998 BUSINESS WORKLIFE STUDY 48 (1998)).

19. Fifty-two percent work full time and 12% work part-time. FUTUREWORK, *supra* note 3, at 31.

such as leaving early, going in late, changing to a part-time work schedule, or taking time off during the day.<sup>20</sup>

The above mentioned changes in our nation's demography have increased the tension between work and family, and have increased the likelihood that a family breadwinner will need to temporarily cease labor force participation in order to tend to family needs. The following Section describes the implications of these changes for social policy.

### *B. Need for a Comprehensive Family Policy and Updated Social Insurance Systems*

Establishing that families face risks that may cause a worker to leave the workforce does not answer the question of who should bear the burden of those risks. Currently, the family unit is generally required to self-insure and bear the full costs when a breadwinner must leave the work force to tend to family needs. Some employees who work for large and generous employers receive income replacement during such absences, which makes those employers another candidate for bearing this risk. Finally, the government might also bear this risk, as it does with old age or permanent disability, by providing social insurance.

The question, "Who should bear the risk?" has been asked with more frequency in the last several years, and begs another question: "What is the appropriate role for government in this area?" In a recent article on family and work policy, Lisa Bornstein suggests that as we think about the appropriate role for government, "we must move beyond the New Deal theme of help for the common working man, and strike a new theme of help for the working family."<sup>21</sup> Demographic changes have made it necessary to update social insurance systems, and, as Bornstein suggests, this update should reflect the current reality of the labor force and the family.

Bornstein and others have noted that the United States government has done little to help working families and lacks any comprehensive national family policy.<sup>22</sup> Professor Selmi observes that the U.S. was among the last industrialized nations to pass parental leave legislation, and that even when it did, it adopted the least generous policy of any industrialized country.<sup>23</sup> Of the

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20. *Id.*

21. Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77 (2000).

22. *Id.* at 77.

23. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 709 (2000). Selmi highlights the United States' weak commitment to facilitating work and family issues by examining its expenditures on other workplace benefits:

As a society, we spend more than \$60 billion annually on workers' compensation, with another \$20 billion devoted to unemployment benefits. In addition to these workplace benefits, we also subsidize health insurance and pensions, as well as non-workplace items such as home mortgages—all of which cost billions of dollars annually. Nevertheless, when

130 countries that have family leave policies, only three—the United States, Australia and Ethiopia—provide unpaid leave.<sup>24</sup>

Bornstein believes that the lack of governmental action in the area of work and family issues can be attributed to constraint “by values of privacy, autonomy, self-sufficiency, and minimal government interference;”<sup>25</sup> or, phrased differently, by a belief that the family unit alone should bear the risk. Bornstein notes that demographic changes are forcing the government to confront the reality of the work-family dilemmas faced by many Americans. Where the government has confronted these issues, she characterizes its interventions as “limited to piecemeal responses to headline grabbing outrages.”<sup>26</sup> Deborah Rhode harshly criticizes these piecemeal responses, and asserts that the government “needs to assume greater responsibility for helping individuals to accommodate work and family responsibilities.”<sup>27</sup>

As detailed above, recent academic literature calls for the creation of a national family policy and an increased governmental role in bearing family risk. A flurry of legislative activity, discussed in Part II of this Article, demonstrates that state and federal legislatures are actively investigating how this might take shape. This Article suggests a number of changes that would form a national family policy, update social insurance systems to help the working family, and allocate risks among employees, employers, and the government.

### C. Defining “Family”

“As the structure of the labor market shifts from the traditional model of the all-male workforce, society must deal with changing family structures.”<sup>28</sup> This Section addresses family structure and how to define “family” for the purposes of social insurance.

In talking about the need for family leave, the definition most often applied is that contained in the Family and Medical Leave Act (FMLA), which limits “family” to a spouse, son, daughter, or parent.<sup>29</sup> Section 2611 of the Act further defines these terms, explaining that spouse means a “husband or wife,”

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it comes to facilitating family leave as a way of providing some balance between work and family, we spend practically nothing on the federal level, primarily because we are concerned about the effects the costs might have on employers and wages.

*Id.* at 710.

24. National Partnership for Women & Families, *Leave Policies: Percentage Paid*, at <http://www.nationalpartnership.org/Content.cfm?11=202&TypeID=1&NewsItemID=304> (last visited Mar. 22, 2002).

25. Bornstein, *supra* note 21, at 77.

26. *Id.* at 77.

27. Deborah L. Rhode, *Symposium: Changing Images of the State: Feminism and the State*, 107 HARV. L. REV. 1181, 1197 (1994).

28. Thompson, *supra* note 6, at 751.

29. 26 U.S.C. § 2612(a)(1)(A)-(C).



son or daughter means a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis,” who is either “under 18 years of age,” or “18 years of age or older and incapable of self-care because of a mental or physical disability,” and that parent means “the biological parent of an employee or an individual who stood in loco parentis” to the employee.<sup>30</sup>

The FMLA’s definition of family is not completely satisfactory, however, because it ignores some family members for whom workers have care-taking responsibility. For example, the Act excludes from protection leaves to care for grandparents, parents-in-law, domestic partners, adult children, or siblings. Noting this deficiency, several states apply a more expansive definition of “family member” for leave purposes.<sup>31</sup>

If the purpose of social insurance is to protect workers from loss of income due to inability to participate in the labor market, then the definition of family should be broad enough to encompass the reality that workers face. Excluding domestic partners or in-laws from coverage might be interpreted as reflecting a societal value that individuals should not be supported in their efforts to care for these loved ones.<sup>32</sup> The irony is that FMLA supporters in Congress often declared that “as a matter of basic policy, American workers should not be forced to choose between caring for their loved ones and their jobs.”<sup>33</sup> Yet, by defining family in the narrow fashion that it does, the Act perpetuates the need

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30. 26 U.S.C. § 2611. The Department of Labor’s (DOL) interpretive regulations clarify these terms to some degree, adding that the definition of spouse includes “common law marriage in States where it is recognized,” and that the definition of parent specifically excludes parents “in law.” See 29 C.F.R. § 825.113(a)-(b).

31. The District of Columbia, for example, includes all individuals related by blood, legal custody, or marriage, and people with whom employees live and have a committed relationship. Hawaiian leave law includes in-laws, grandparents, and grandparents-in-law. Oregon and Vermont both include the spouse’s parent in the definition of family. See National Partnership for Women & Families, *State Family Leave Laws that are More Expansive than the Federal Family and Medical Leave Act*, at <http://www.nationalpartnership.org/Content.cfm?Li=202&TypeID=1&NewsItemID=259> (last visited Mar. 22, 2002). Along similar lines, at least one state has defined family broadly in the context of unemployment insurance. Washington state law permits a good cause exception for employees who leave employment because of domestic responsibilities. Washington’s definition of immediate family does not encompass unmarried cohabitating adults, but does include the “individual’s spouse, children (including unborn children), stepchildren, foster children, or parents of either spouse, whether living with the individual or not, and other relatives who temporarily or permanently reside in the individual’s household.” See Kirsten Hagedorn Frey, Comment, *Employment Law —The Erosion of the Voluntary Quit Disqualification from Unemployment Compensation Benefits: Reep v. Commissioner of the Department of Employment & Training*, 19 IOWA J. CORP. L. 183 & n.108 (1993) (citing WASH. ADMIN. CODE § 192-16-013(3)(b) (1992)).

32. Bornstein criticizes the FMLA as having cultural assumptions at the root of its policy. See Bornstein, *supra* note 21, at 81. She asserts that the exclusions “reflect a moral code, pronouncing which individuals and families are entitled to the coverage and security of a national policy, and which are not.” *Id.* By excluding certain individuals and family arrangements from its protections, she asserts, the FMLA “preserve[s] a vision of the family that is presumptively nuclear, heterosexual, middle-class and male-headed . . . .” *Id.* at 104.

33. Malin, *supra* note 10, at 132.

to make this choice when a family member falling outside the Act's coverage requires care.<sup>34</sup>

This Article includes a prefatory note that in designing a national family policy, we should consider moving beyond the FMLA's narrow definition of family. There are endless possibilities for how this might be accomplished for the purposes of social insurance. One possibility is to adopt a broader statutory definition of family—specifying more qualifying relationships in the statutory language—in order to be more reflective of reality. To avoid any cultural imposition, another option would be simply to allow the employee to designate in advance who is part of his or her “family” for purposes of the law, or to include any individual for whom the employee is the primary care-taker.<sup>35</sup> This Article does not attempt to pick the “right” definition. It merely asserts that the FMLA definition does not capture the current reality, and that an insurance system intended to protect income from family risks would need to reach beyond these narrow confines.

#### *D. Defining “Family Risks”*

The risks that workers face as members of family units are a key consideration in designing a system of family risk insurance. The Article's starting point for defining “family risks” is to address those changes in work requirements or family circumstances that require a family breadwinner to miss work or temporarily leave the work force in order to achieve an appropriate balance between work and family. As it did with the definition of family, the Article will begin this task by examining coverage under the FMLA.

The first category of risks this might be insured, those covered by the FMLA's job-protected leave mandate, includes the following risks that may cause a family breadwinner to miss work: (1) the birth of a son or daughter and time off to care for such son or daughter within the 12-month period following birth; (2) the placement of a son or daughter for adoption or foster care during the 12-month period beginning on the date of placement; (3) the care of a spouse, son, daughter or parent with a serious health condition; and (4) the employee's own serious health condition (including pregnancy) that renders the employee unable to perform the functions of his or her position.<sup>36</sup> Workers,

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34. Bornstein concurs with this position, stating that the values imbedded in the FMLA “function to perpetuate many of the problems that the Act intended to rectify.” See Bornstein, *supra* note 21, at 82.

35. Of course, the more individuals who are included in the definition, the more costly any system may become. To limit the possibilities, employees might be limited as to the number of individuals they can designate as “family members” for insurance purposes.

36. 26 U.S.C. § 2612(a)(1)(A)-(D); 29 C.F.R. § 825.114(a)(2)(ii) While the employee's own serious health condition technically falls under the rubric of “medical” as opposed to “family leave,” this Article includes it within the definition of family risks for several reasons. First, as the FMLA put the categories together, they are being treated as a unit by many states considering family risk insurance. Second, this FMLA category includes pregnancy, which has obvious relation to family risks. Third,

however, face numerous family risks outside the FMLA's scope that require absence from the work force.

These risks might be divided into several conceptual categories. Thus, the second category of risks that might be insured would include those changes in work requirements that force employees to miss work in order to tend to family needs. This might occur when an employer changes the terms of employment such that they create a conflict with the employee's domestic obligations, or when the terms of a collective bargaining agreement have similar effect.<sup>37</sup> This category would also include the requirement that an employee work unscheduled overtime or that the employee change his or her normal start time in a way that conflicts with existing child- or elder-care arrangements. Other risks in this category might include being assigned work duties that the employee is unable to perform due to a serious health condition (including pregnancy), or that would put the employee's family in danger (e.g., requiring a breast-feeding mother to work with chemicals that may harm her infant). Employees faced with this situation will typically ask for an accommodation from the employer, which may consist of either withdrawal of the employer's request, or a temporary reprieve so that the employee can make alternate arrangements. Professor Malin notes that "Although many employers have become more 'family friendly' in their human resource policies, they do not view accommodation of family responsibilities as an employee's entitlement and retain the option to say 'no' when they deem it necessary."<sup>38</sup> Where the employer refuses the accommodation, the employee may be discharged for refusing orders, or may quit rather than comply, either of which may result in a period of unemployment.

Workers also face many family risks caused by their family unit or forces external to either the family or the employer. For purposes of analysis, these risks can be divided into several categories, roughly tied to the expected duration of the absence and the employee's availability for work.

Thus, a third overall category of family risks would include absences that may be very short, such as a partial workday or only one to two workdays. Absences included in this category might be characterized as "emergency care" and "appointments." An example of "emergency care" would be an unexpected school closing that leaves parents of school-age children suddenly

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keeping the categories together is useful because it makes paid benefits something that men want and will use as much as women. Insuring the medical side helps keep this a benefit for both sexes, which will also discourage hiring and wage discrimination. See *infra* notes 101-104 and accompanying text.

37. See Deborah Maranville, *Symposium: New Approaches to Poverty Law, Teaching, and Practice: Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291, 313 (1995). Deborah Maranville believes that the two changes in this category having the greatest impact on workers are the conversion of a part-time job to full-time or the transfer of an employee from her usual shift to one that is in conflict with family obligations such as child or elder care. See *id.* at 315.

38. Malin, *supra* note 10, at 132.

without child-care arrangements. Ill children pose similar problems, because schools and daycares often will not care for them, and a parent may not be entitled to leave under FMLA because the child's illness does not qualify as a serious health condition. Similarly, an employee may need to miss work to recuperate from his or her own non-FMLA-eligible illness. "Appointments" would include absences to transport an ill family member to the doctor, as well as medical and dental visits for an employee or family member that need to be scheduled during work hours. Other examples would include activities for the educational advancement of a child, such as interviewing for a new school, attending parent-teacher conferences, or attending school or community activities.

Other family risks may entail absences of several days' or weeks' duration. This fourth category would include absences for "continued care" and for "changes in family structure." An example of "continued care" would occur if a worker suddenly loses the availability of child-care because a caretaker falls ill, moves to a new area, or otherwise discontinues services. Likewise, workers who suddenly become responsible for elder care, or whose existing arrangements fall through, may need time off from work to locate nursing- or group-home or other professional services related to elder's care. Until suitable care is found, the worker may need to leave work to provide care him- or herself. Examples of "changes in family structure" would include such trials as a death in the family, a divorce, or a missing person. For example, workers who lose a loved one may require time away from work for bereavement or to arrange and attend a funeral. The death of an immediate family member may often entail time away from work to settle the deceased's estate. Workers may have to appear in probate court, meet with financial institutions and insurance providers, make arrangements to sell the deceased's real estate, and, in rare cases, arrange for custody of orphaned children. This category also includes employee absences to attend matters related to the transition from marriage to separation or divorce, such as relocating to a new residence, meeting with attorneys, or appearing in court for divorce or child custody proceedings. Workers may also need time off in order to search for a missing family member, such as a runaway or kidnapped child or an elder who wanders off and cannot be found.

Still other family risks may require complete separation from the current employer, yet allow the worker to remain available for work and begin a new job search almost immediately. "Relocation" risks fall into this fifth category. Workers who are victims of domestic violence, for example, may be required to relocate in order to ensure their own safety and that of their children. Other examples include workers whose spouses are forced by an employer to relocate, and who leave their current jobs in order to accompany the spouse and find new employment.

The classification of risks into the five categories listed above is somewhat amorphous, and some absences do not fit neatly into a single category. The following Section re-categorizes these risks, further discusses who should bear them, and examines whether an existing form of family risk insurance might cover them. As part of this discussion, the following Section outlines the basic elements of what will hereinafter be referred to as the “Family Risk Insurance Proposal” (“FRIP” or “the Proposal”), which is a series of recommendations for a national family policy, the specific elements of which will be developed and supported throughout the remainder of this Article.

### *E. Insuring Family Risks*

The first category of family risks discussed in the previous Section included those risks currently protected by the FMLA. The FMLA was designed to guarantee workers time off from work in times of serious family need or transition. As the authors of the FMLA chose to protect only those absences related to major changes in family functioning, these risks appear to be the type that are appropriate for social insurance. For reasons forthcoming in Section II.B.1, the dominant approach to insuring these risks, expansion of the UI system, is the wrong approach. Section II.B.2 explains that this category could be most appropriately covered via a national expansion of the Temporary Disability Insurance (TDI) systems currently existing in several states. Thus, the first element of the Proposal entails wage replacement for FMLA-qualifying risks through a national TDI program.

The second category of family risks addressed by FRIP might be called “employer-induced work changes.” In cases where these changes result in a complete separation from employment, the Proposal would provide income replacement under the Unemployment Insurance (UI) system. Section II.B.1 contends that separations due to this risk should be considered good cause attributable to the employer. Because the workers in this category remain able and available to work, but just not for that particular employer under the new conditions of employment, insuring this risk under UI would be generally consistent with other UI provisions, and the system would require little adjustment to accommodate this risk. In cases where an employer grants an accommodation in the form of time off to resolve the family situation, FRIP would provide insurance under category three or four below, as appropriate.

The third category of risks addressed by the Proposal can be called “short-term absences to tend to family business,” and would include any absences for “emergency care” and “appointments” that last three or fewer work days. While FRIP would mandate up to twenty-four hours of job-protected leave each year for such purposes in Section II.A.1, it would continue to leave costs of these risks wherever they currently lie. For some workers, this would mean that the

risks must be self-insured. Other workers could easily avoid loss of wages by utilizing their employers' paid leave programs, such as sick leave or vacation, described in Section II.A.2. The Proposal excludes these risks from wage replacement based on a determination that they are inappropriate for social insurance because they cause small, if any, shocks to family income, and because they are more susceptible to moral hazard than many other family risks. Each worker should expect that a certain number of days or weeks each year will be consumed by these normal family occurrences, and can reasonably plan by reserving vacation or sick days or saving money from each paycheck. The only exception to this hands-off approach would be the use of welfare reinvestment funds to provide income replacement to low-income families faced with such risks in cases where the employer does not provide income replacement and the absence exceeds one-half workday in duration. This approach is advocated in Section II.B.3, because low-wage workers are least likely to have employer-provided benefits to cover such absences, to be able to afford alternative arrangements, or to be able to self-insure.

The fourth category of family risks addressed by FRIP can be called "extended absences to tend to family business." While this category includes the subcategories "continued care" and "changes in family structure," it would also include any verifiable absences due to compelling family circumstances. In every case, the risk would not be considered insurable unless the particular situation caused the worker to miss more than three consecutive workdays. Absences more than three days are more insurable because they are not expected to occur on an annual basis, or in some cases, even within a worker's lifetime. These risks have the potential to produce shocks to family income and to exacerbate the stress that such events cause. These absences do not fall neatly under the umbrella of any existing social insurance program, and would require the development of a new social insurance program as described in Part III. These risks have been selected for differential treatment because they do not fall under the umbrella of the FMLA, nor do they appropriately fall under UI because the worker does not remain able and available for work. Since these risks have not yet merited even an unpaid leave mandate, it would be difficult to convince legislators that they merit treatment equal to that accorded FMLA absences. Thus FRIP would insure them with a new system funded by employee contributions and would provide less generous wage replacement than for FMLA absences.

The fifth and final category of family risks addressed by FRIP can be called "relocation-related absences." The two examples of family risks included in this category, domestic violence and spousal relocation, are increasingly being covered by UI systems. FRIP assigns them to that system because they can easily be encompassed within UI's "good cause" quit

exception and because these workers remain able and available for work, as discussed in Section II.B.1.<sup>39</sup>

For each of the categories in which the use of TDI or UI systems is adopted, FRIP would also include a safety net for low-income workers who do not meet the minimum earnings eligibility for these programs. Section II.B.3 advocates the use of welfare reinvestment surpluses to fund income replacement to these workers if they would otherwise be eligible under the terms of UI or TDI.

To summarize, the assignment of family risks discussed in Section I.D can be mapped to the five categories of risks addressed by FRIP as follows:

FAMILY RISK FROM SECTION I.D	RISK CLASSIFICATION IN SECTION I.E	SYSTEM USED TO INSURE UNDER FRIP
1) FMLA Qualifying	1) FMLA Qualifying	<ul style="list-style-type: none"> <li>• Temporary Disability Insurance (TDI)</li> <li>• TANF safety net for low wage workers</li> </ul>
2) Changes in Work Requirements <ul style="list-style-type: none"> <li>• Work hours/Start time</li> <li>• Overtime</li> <li>• Increased risk/danger</li> </ul>	2) "Employer-Induced Work Changes" <ul style="list-style-type: none"> <li>• If employee is given time off to resolve the situation→</li>   <li>• If employee quits/is fired because they cannot resolve the situation→</li> </ul>	<ul style="list-style-type: none"> <li>• Depends on duration of absence (see "Short-term Absences to Tend to Family Business" and "Extended Absences to Tend to Family Business" below)</li>   <li>• "Good Cause" quit exception granted under UI</li> <li>• TANF safety-net for low wage workers</li> </ul>
3) Short Absences of 1-2 days <ul style="list-style-type: none"> <li>• "Emergency Care"</li> <li>• "Appointments"</li> </ul>	3) "Short-term Absences to Tend to Family Business" <ul style="list-style-type: none"> <li>• "Emergency Care" 3 or fewer consecutive work days</li> <li>• "Appointments" 3 or fewer consecutive work days</li> </ul>	<ul style="list-style-type: none"> <li>• Up to 24 hours annual job-protected, unpaid leave (self-insurance)</li> <li>• TANF safety-net for low-wage workers</li> </ul>

39. In the case of domestic violence, if the worker is unavailable for work due to divorce, moving, counseling, etc., the worker's absence would instead be insured as a change in family structure or compelling family circumstance under category four.

<p>4) Absences for several days/weeks</p> <ul style="list-style-type: none"> <li>• “Continued Care”</li> <li>• “Changes in Family Structure”</li> </ul>	<p>4) “Extended Absences to Tend to Family Business”</p> <ul style="list-style-type: none"> <li>• “Continued Care” for more than 3 consecutive work days</li> <li>• “Changes in Family Structure” for more than 3 consecutive work days</li> <li>• Verifiable absence due to compelling family circumstances for more than 3 consecutive work days</li> </ul>	<p>New system funded by employee contributions</p>
<p>5) Separation from Employer</p> <ul style="list-style-type: none"> <li>• “Relocation Risks” such as Domestic Violence or Spousal Relocation</li> </ul>	<p>5) “Relocation-Related Absences”</p> <ul style="list-style-type: none"> <li>• Domestic Violence</li> <li>• Spousal Relocation</li> </ul>	<ul style="list-style-type: none"> <li>• “Good Cause” quit exception granted under UI</li> <li>• TANF safety-net for low-wage workers</li> </ul>

This allocation of risks is designed to preserve the fundamental goals of existing social insurance systems, while providing additional security to families. The risks selected for social insurance include those that cause the greatest shock to family income, that present the smallest moral hazard risks, and where it would be most troublesome to require a worker to make a choice between family needs and labor income.

## II. POSSIBLE SYSTEMS FOR INSURING FAMILY RISKS

This portion of the Article examines the various private and social insurance systems already in existence that might be used to insure family risks. It describes the programs that fall within each category, recent proposals to expand coverage to encompass family risks, and conclusions and recommendations regarding each.

### A. *Private Mechanisms*

Currently, the primary means workers have to deal with family risks are private. Workers leaving the work force to tend to family needs typically rely on their own resources or those of their employers. This Section describes



three private mechanisms for insuring family risks—self-insurance, employer-provided benefits, and individual insurance policies. It highlights their benefits and limitations, and why they have proven insufficient to provide a safety net for American workers.

*1. Self-Insurance and the Family and Medical Leave Act of 1993*

The primary federal legislation governing family risks is the Family and Medical Leave Act.<sup>40</sup> The Act mandates both that the employee's job be protected<sup>41</sup> and that the employer maintains group health plan benefits during the leave period.<sup>42</sup> The Act, however, does not require that the employee receive wage replacement while on leave.

At the time of the Act's inception, Congress created the Commission on Family Leave, a bi-partisan body that would evaluate the Act's successes and deficiencies. The Commission has undertaken two studies of the FMLA's impact on workers and employers. Relying on this data, the following Section describes how workers have operated under the FMLA's system of unpaid leave mandates and self-insurance. It also examines the limitations of the Act's coverage and recent proposals to expand protections.

a. Description of FMLA Leave

As previously described, the FMLA requires covered employers to provide eligible workers with up to twelve weeks per year of unpaid leave for the birth, adoption or placement of a child, the employee's own serious health condition, or to care for a child, spouse or parent with a serious health condition.<sup>43</sup> To receive FMLA protection, however, employees must work for a "covered employer," a category encompassing only public agencies and private employers with fifty or more employees.<sup>44</sup> Employees must also meet several eligibility requirements, such as completing twelve months of service with the employer and working at least 1,250 hours during the most recent twelve-month period.<sup>45</sup> In addition, employees are covered only if there are at least fifty employees at the worksite or within a seventy-five-mile radius of the worksite.<sup>46</sup>

These eligibility requirements exclude many workers from the Act's protection. The fifty-employee requirement has resulted in only 10.8% of

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40. *See supra* note 4.

41. 29 U.S.C. § 2614 (a)(1) (2000).

42. 29 U.S.C. § 2614 (c)(1) (2000).

43. 29 U.S.C. § 2612(a)(1) (2000).

44. 29 U.S.C. § 2611(4) (2000).

45. 29 U.S.C. § 2611(2)(A) (2000).

46. 29 U.S.C. § 2611(2)(B)(ii) (2000).

private worksites being covered by the leave mandate.<sup>47</sup> Surprisingly, this small proportion of worksites encompasses 58.3% of the private sector workforce (because a majority of employees work for large employers).<sup>48</sup> After applying employee service and hours criteria, only 46.9% of private sector employees are eligible for leave under the Act.<sup>49</sup>

A significant number of workers need family leave each year. One study covering an 18-month period found that 16.5% of workers had taken leave for a FMLA reason.<sup>50</sup> An additional 2.4% of workers reported that they needed leave but did not take it, meaning that 18.9% of all workers needed leave in the relevant period.<sup>51</sup> Of those employees who needed leave but did not take it, 77.6% reported that they did not take leave because they could not afford it.<sup>52</sup> Described differently, one out of every eight employees who needed FMLA leave could not afford to take it. When asked, "If you had received some or additional pay, would you have taken leave?" nearly 88% of this population responded in the affirmative.<sup>53</sup>

This affordability problem results because the FMLA requires only unpaid leave for qualifying absences.<sup>54</sup> More than half of workers taking FMLA leave report that they worried about not having enough money to pay bills during the leave period, and that they would have taken leave for a longer period if some or additional pay had been received.<sup>55</sup> A survey of leave-takers<sup>56</sup> reveals how families self-insure during these periods of unpaid leave: 47% reported living off savings earmarked specifically for family leave, 35.6% reported living off

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47. U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 3-3 tbl.3.1 (2001) [hereinafter BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS].

48. *See id.* When public sector employers are included in the calculation, 77.6% of American employees work for covered employers. *See id.* at A-2-21 tbl.A2-3.1.

49. *See id.* at A-2-21 tbl.A2-3.2 (showing that 80.5% of covered employees are also meet eligibility requirements). When public sector employees are included in the calculation, 61.7% of American employees are eligible for FMLA leave. *See id.* at A-2-21 tbl.A2-3.1.

50. *Id.* at 2-2 tbl.2.1. 52.4% of leaves were for the employee's own health condition, 7.9% for pregnancy, 18.5% for birth or placement of a child, 11.5% for the care of an ill child, 6.4% for the care of an ill spouse, and 13% for the care of an ill parent. *Id.* at 2-5 tbl.2.3.

51. *Id.* at 2-14 tbl.2.14. Within this group of workers who need leave but are unable to take it, over-represented populations include women, Blacks and Hispanics, individuals who are separated/divorced/widowed, those with children living within the household, those with less than a high school education, those earning \$20,000-\$30,000 annually, and those who work on an hourly basis. *See id.* at A-2-11 tbl.A2-2.10.

52. *Id.* at 2-16 tbl.2.17. Thus, within the 18-month period covered by the survey, roughly 1.9% of all American workers needed leave but could not afford to take it.

53. *Id.* at 2-17 tbl.2.18.

54. 29 C.F.R. § 825.207(a).

55. BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at 4-2 tbl.4.1, 4-9 tbl.4.9.

56. This survey included those who were either unpaid or received only partial pay during the leave period.

savings earmarked for something else, and 29% borrowed money; 8.7% resorted to public assistance.<sup>57</sup>

Many states have family leave mandates reaching beyond the requirements of the FMLA and providing greater protection to their citizens. Three states have comprehensive leave laws covering employers with fewer than 50 employees.<sup>58</sup> Twelve states cover smaller employers, but provide this population with narrower protections than the FMLA.<sup>59</sup> Eight states require leave for needs not covered by the FMLA, including leave for participation in children's educational activities or for routine medical needs such as doctors' appointments.<sup>60</sup> Several states provide leave for family members not covered by the FMLA.<sup>61</sup>

#### b. Proposals to Expand FMLA Leave

Noting the FMLA's deficiencies, Congress has considered expanding the FMLA on several occasions. Currently, the House of Representatives is considering Representative Woolsey's (D-CA) H.R. 226, known as "Family Income to Respond to Significant Transitions Insurance Act" (FIRST).<sup>62</sup> This bill would provide federally funded leave grants to states to offer paid leave through TDI or UI programs, private disability or other insurance programs, or

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57. The percentages do not total 100% because the categories were not mutually exclusive. In order to make money last longer, 75.5% limited spending on "extras," 38.8% put off paying bills, and 40.3% cut their leave short. *See id.* at 4-9 tbl.4.8. It should be noted that a disproportionate share of those resorting to public assistance are women (12% of women leave-takers, as opposed to 9% overall, resort to public assistance). National Partnership for Women & Families, *Providing Family Leave Benefits Through Unemployment Insurance, Questions & Answers*, <http://www.nationalpartnership.org/Content.cfm?L1=202&TypeID=1&NewsItemID=285> (last visited Mar. 22, 2002) [hereinafter *Questions & Answers*]; National Partnership for Women & Families, *Family Leave Insurance: Helping Families Afford to Take Leave*, <http://www.nationalpartnership.org/Content.cfm?L1=202&TypeID=1&NewsItemID=355> (last visited Mar. 22, 2002).

58. These states include Vermont (employers with ten or more employees must provide leave for families with new children, and those with 15 or more employees must provide leave for medical conditions), District of Columbia (20 employees), and Oregon (25 employees). National Partnership for Women & Families, *supra* note 31.

59. The majority of these states cover only maternity disability, including Hawaii (1 employee), Montana (1 employee), Connecticut (3 employees), Iowa (4 employees), California (5 employees), Massachusetts (6 employees), New Hampshire (6 employees), Louisiana (25 employees) and Puerto Rico (all employees). Minnesota covers leave for birth or adoption (21 employees), Kentucky covers leave to adopt a child under age seven (all employees) and Maine covers ten weeks of family and medical leave every two years (15 employees). *See id.*

60. States covering educational activities include California (40 hours/year, no more than 8 hours/month), District of Columbia (24 hours/year), Illinois (8 hours/year, no more than 4 hours/day), Louisiana (16 hours/year), Massachusetts (24 hours/year), Minnesota (16 hours/year), Nevada (no maximum limits, but protects employees who attend conferences or are notified of the child's emergency), and Vermont (24 hours/year, no more than 4 hours/month). Massachusetts and Vermont provide 24 hours of leave per year for medical needs. *Id.*

61. *See supra* note 31 and accompanying text.

62. H.R. 226, 107th Cong. (2001).

through other mechanisms provided by private employers.<sup>63</sup> The Senate is currently considering Senator Daschle's (D-SD) S. 18, also known as the "Right Start Act of 2001."<sup>64</sup> This bill would adopt FIRST's block grants. In addition, it would expand the FMLA to cover all employers with 25 or more employees, to provide unpaid leave to participate in activities related to domestic violence, and would allow up to 24 hours of leave per year for participation in a child's academic activities or in a family literacy training program.<sup>65</sup> Representative Maloney (D-NY) has introduced H.R. 2287, which would amend the FMLA to permit leave for care of a domestic partner, parent-in-law, adult child, sibling or grandparent with a serious health condition.<sup>66</sup> She has also introduced H.R. 2784, which would amend the FMLA to permit leave for attendance at a child or grandchild's educational or extracurricular activities up to four hours per month or twenty-four hours per year, and clarify that leave may be taken for routine medical needs and to assist elderly relatives.<sup>67</sup> One should not be too optimistic that Congress will adopt these FMLA amendments this term; Congress considered numerous bills that would have had similar effects last term, but passed none.<sup>68</sup>

### c. Evaluation of Self-Insurance and FMLA Leave

A review of the foregoing information demonstrates that the FMLA's coverage and job-protected leave are far from adequate to protect many Americans' income security. Coverage and eligibility limitations exclude almost one-half of American workers from its protections. Presumably, workers falling under the Act's purview often find that their particular family

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63. *Id.*

64. S. 18, 107th Cong. (2001). The companion bill is H.R. 265, 107th Cong. (2001).

65. *Id.*

66. H.R. 2287, 107th Cong. (2001).

67. H.R. 2784, 107th Cong. (2001).

68. *See, e.g.*, S. 201, 106th Cong. (1999) (lowering small business exemption from 50 to 25 employees); S. 1304, 106th Cong. (1999) (allowing up to 24 hours of leave per year to participate in school-related activities such as interviewing for a school, attending a parent-teacher conference, or participating in literacy training); S. 1069, S. 51 & H.R. 357, 106th Cong. (1999) (providing FMLA leave and UI for various services associated with domestic violence); S. 1355 and H.R. 2500, 106th Cong. (1999) (providing paid leave grants for FMLA leave); H.R. 91, 106th Cong. (1999) (lowering small business exemption from 50 to 25 employees, allowing up to 24 hours of leave per year to participate in school-related activities such as interviewing for a school, attending a parent-teacher conference, allowing leave to take child or elderly relative to routine medical or dental appointments, allowing leave to take an elderly relative to interview for a nursing/group home or other professional services related to the elder's care); HR. 2103, 106th Cong. (1999) (lowering small business exemption from 50 to 25 employees, allowing up to 4 hours each 30 days or 24 hours of leave per year for parental involvement in an activity sponsored by a school or community organization attended by a son or daughter); H.R. 1857, 106th Cong. (1999) (allowing FMLA leave for tests and procedures related to giving living organ donations); H.R. 2104, 106th Cong. (1999) (allowing family leave to care for a seriously ill grandparent, parent-in-law, domestic partner, adult child, or sibling); H.R. 1478, 106th Cong. (1999) (prohibiting discrimination against breastfeeding women); H.R. 3297, 106th Cong. (1999) (eliminating 1,250 hours of service requirement).

need is not covered, either because the family member who needs care does not fall within the definition of “family” or because the particular situation does not fit within the four categories meriting job protection. Moreover, the leave guarantee’s unpaid nature has the practical effect of stripping one in eight eligible workers who need leave of that protection, because they are unable to afford time off without pay.<sup>69</sup>

To remedy the Act’s deficiencies, FRIP would begin with the adoption of the Right Start Act of 2001. The federal leave grants under FIRST could be used to promote a national expansion of state TDI systems, to be discussed in Section II.B.2. The bill’s provision expanding coverage to employers with twenty-five or more employees would provide protection to an additional 13.8% of the private sector work force, bringing the share of the covered private sector work force to over seventy percent.<sup>70</sup> This considerable expansion could be accomplished without affecting a large number of employers and without a large impact on the employers’ costs.<sup>71</sup> It would also include adoption of the provision allowing 24 hours of unpaid leave per year to participate in a child’s academic activities,<sup>72</sup> or for routine and non-emergency health needs as proposed in H.R. 2784.<sup>73</sup> In all cases, FRIP would allow employees to use this time only after they make all reasonable attempts not to

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69. A survey of FMLA leave-takers revealed that groups least likely to receive paid leave included women, Blacks and “All Others” (those who are not Black, White, Hispanic, or Asian), single individuals, those who had a high school education or less, those earning less than \$20,000 per year, and hourly workers. BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at A-2-31 tbl. A2-4.1.

70. National Partnership for Women & Families, *Family Leave for More Working People: Expanding the FMLA to Cover Mid-Sized Businesses*, <http://www.nationalpartnership.org/> (last visited Mar. 22, 2002).

71. Only 3.8% of non-covered worksites have 25-59 employees and would be affected by the expansion. BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at 7-3 fig. 7.2. Currently, about 58,000 worksites of between 25 and 49 employees are covered by the Act (because “they are part of a larger company with at least 50 employees within a 75-mile radius”). According to the bipartisan Commission on Family Leave, the majority of these worksites found it easy and inexpensive to comply with the FMLA. Seventy-five percent experienced little or no increase in administrative costs, “83% experienced little or no increase in hiring and training costs, and 95% experienced little or no increase in other costs.” National Partnership for Women & Families, *supra* note 70.

72. This provision is an important addition to the FMLA, because parents are often unable to take the time they need to be involved in their children’s education. Twenty-eight percent report facing problems at work when they want to attend school activities, 23% report facing problems when they need to attend parent-teacher conferences, and 40% believe that they are not devoting enough time to their children’s education. National Partnership for Women & Families, *Family Leave for More Family Needs* (citing Carnegie Foundation, 1993), <http://www.nationalpartnership.org/Content.cfm?L1=202&TypeID=1&NewsItemID=278> (last visited Mar. 22, 2002).

73. These risks are also significant. Twenty-four percent of parents report that they are faced with problems at work when they have to care for a sick child. *Id.* Sixty-five percent of workers report having missed work in the past year because of a child’s illness or other emergency. *Id.* (citing GREATER CINCINNATI BUSINESS COALITION ON SICK AND EMERGENCY CHILD CARE (1996)). One in five workers reports having to provide care to a friend or relative age 50 or older. FUTUREWORK, *supra* note 3, at 31.

disrupt the operations of the employer, such as scheduling these activities outside of work hours where possible. Because the vast majority of employers surveyed reported that the FMLA had no noticeable effect on productivity, profitability or growth, such minor expansions of the act should have negligible impact on businesses.<sup>74</sup> In addition, FRIP would expand the Act's definition of family. A reasonable place to start would be with adoption of H.R. 2287, which would allow family leave to care for a seriously ill domestic partner, parent-in-law, adult child, sibling or grandparent.<sup>75</sup> While this would not capture all relationships that may be important to an employee, it would expand protection to most persons for whom an employee may be responsible. As a normative matter, a comprehensive program to insure family risks should include the expansion of FMLA leave to all workers. Without further data on the impact to small business of such a job-and-benefit-protected leave mandate, however, this position has not been adopted in FRIP.

## 2. *Private Employer Programs*

Not all employees taking FMLA leave are uncompensated during their absences. Both before and following passage of the Act, employers offered various types of paid leave that employees could apply to absences taken for such reasons. The FMLA recognized and encouraged these paid leave policies,<sup>76</sup> and the Department of Labor directly addressed the interaction of the FMLA with these leave policies in its FMLA regulations.<sup>77</sup> The regulations provide that either the employee or the employer may substitute paid accrued vacation, personal leave, or sick leave, for any otherwise unpaid FMLA leave, where the employer's policy would normally provide pay.<sup>78</sup> Similarly, if the employee meets the regular provisions of the employer's temporary disability benefit or workers' compensation plans, the employee may receive payments from those plans during the period of FMLA leave.<sup>79</sup>

This Section explores the use of employer-provided benefits as a means of protecting workers' income from family risks. It examines the benefits employers currently provide, as well as the feasibility of mandating that employers expand these benefits to insure family risks.

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74. BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at 6-11 tbl.6.5 (demonstrating that 76.5% reported no effect on productivity, 87.6% reported no effect on profitability, and 87.7% reported no effect on growth).

75. *See supra* note 66 and accompanying text.

76. *See, e.g.*, 29 U.S.C. § 2653.

77. *See, e.g.*, 29 C.F.R. § 825.207.

78. 29 C.F.R. § 825.207(c).

79. *See, e.g.*, 29 C.F.R. § 825.207(d).

a. Description of Employer-Provided Benefits

Almost no employers provide a benefit known as “paid family leave.”<sup>80</sup> Instead, the employer-provided benefits that workers receive during periods of leave fall under many different names. Of those individuals receiving pay during family leave, 61.4% receive sick leave, 39.4% vacation pay, 25.7% personal leave, 7.7% parental leave, 18% temporary disability insurance, and 11.4% receive income from other benefits.<sup>81</sup>

Employer-based benefits vary greatly across employing establishments. Provision of such benefits is voluntary, and coverage is by no means universal. The most prevalent benefit listed above is vacation, which is provided to 95% of full-time employees at medium and large companies,<sup>82</sup> and 86% of workers at small companies.<sup>83</sup> Sick leave, which is the predominant source of income during family leaves, is received by roughly half of employees,<sup>84</sup> most of whom are allowed to apply it to family risks such as funerals, medical appointments, personal business, or to care for a sick child.<sup>85</sup> Short-term disability insurance is less prevalent, and employees working for large employers are far more likely to receive this insurance than those working for small employers.<sup>86</sup> Fewer than one in five workers receive personal leave, and those who do receive an average of three days per year.<sup>87</sup> A growing trend amongst

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80. Only two percent of private sector employers provide a benefit labeled as such. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE: EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS 6 tbl.1. (1997), available at <http://www.bls.gov/ncs/ebs/sp/ebnr0005.pdf> [hereinafter BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS]; see also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE: EMPLOYEE BENEFITS IN SMALL PRIVATE INDUSTRY ESTABLISHMENTS 7 tbl.1. (1996), available at <http://www.bls.gov/ncs/ebs/sp/ebnr0004.pdf> [hereinafter BENEFITS IN SMALL PRIVATE INDUSTRY ESTABLISHMENTS].

81. BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at 4-6 tbl.4.5.

82. BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, *supra* note 80, at 6 tbl.1.

83. BENEFITS IN SMALL PRIVATE INDUSTRY ESTABLISHMENTS, *supra* note 80, at 7 tbl.1. Small employers were defined as those with fewer than 100 employees in this survey. Note that this includes all non-FMLA-covered employers, but also covered employers that have between 50 and 99 employees.

84. BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, *supra* note 80, at 6 tbl.1 (showing that 56% of medium and large employers provide sick leave); BENEFITS IN SMALL PRIVATE INDUSTRY ESTABLISHMENTS, *supra* note 80, at 7 tbl.1 (showing that 50% of small employers provide sick leave).

85. Seventy percent of those employees at medium and large companies are able to apply sick leave to other family risks. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2517: EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS 30 tbl. 31 (1997), available at <http://www.bls.gov/ncs/ebs/sp/ebbl0017.pdf> [hereinafter BULLETIN 2517]. Employees at small companies have slightly more sick leave flexibility, as 73% are allowed to apply sick days to other types of family risks. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2507: EMPLOYEE BENEFITS IN SMALL PRIVATE INDUSTRY ESTABLISHMENTS 30 tbl. 27 (1996), available at <http://www.bls.gov/ncs/ebs/sp/sml96.pdf> [hereinafter BULLETIN 2507].

86. Fifty-five percent of employees at medium and large establishments receive private short-term disability insurance coverage. BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, *supra* note 80, 6 tbl.1. Only 29% of employees at small establishments receive this benefit. BENEFITS IN SMALL PRIVATE INDUSTRY ESTABLISHMENTS, *supra* note 80, at 7 tbl.1.

87. Twenty percent of employees at medium and large establishments receive personal leave for an average of 3.5 days a year. BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, *supra* note

employers is to abandon the use of these separate paid leave accounts in favor of a single bank of paid time off.<sup>88</sup>

The Commission on Family Leave found that 65.8% of leave-takers received some wage replacement while out of work.<sup>89</sup> This apparently high rate of wage replacement for FMLA absences is misleading, and it masks the inability of existing employer-based benefits to provide income replacement during extended periods of non-disability leave. The seemingly high rates of wage replacement might be attributed to two phenomena: (1) more than half of all leaves lasted ten days or less, which can be completely covered with sick leave or vacation<sup>90</sup> and (2) the majority of leaves are taken for the employee's own serious health condition.<sup>91</sup> If this analysis is correct, paid leave is concentrated in these two areas, leaving workers who incur absences greater than ten days for non-disability reasons most vulnerable to a loss of family income.<sup>92</sup> This begs the question how to insure those family absences lasting more than ten days or those incurred by workers not fortunate enough to have employer-based benefits.

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80, at 6 tbl. 1; BULLETIN 2517, *supra* note 85, at 22 tbl.20. Only 14% of workers at small establishments receive personal leave for an average of three days a year. BENEFITS IN SMALL PRIVATE INDUSTRY ESTABLISHMENTS, *supra* note 80, at 6 tbl.1; BULLETIN 2507, *supra* note 85, at, at 22 tbl.16.

88. Twenty-one percent of organizations in a 2000 survey provided this type of all-purpose leave bank. CCH, 2000 CCH *Unscheduled Absence Survey*, <http://hr.cch.com/press/releases/2000-unscheduled-absence-survey.htm> (last visited Apr. 20, 2002).

89. BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at 4-5 tbl.4.4. Approximately 72% of those respondents reported receipt of full wage replacement during their leave period, and an additional 21.6% receive partial wage replacement. *Id.* at 4-6 tbl.4.6. An earlier study of employees who work for employers not covered by the Act, however, revealed that they do not fare as well. Only 32.6% of these employees receive full pay during periods of leave and 14.4% receive partial wage replacement. U.S. DEP'T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 108, fig.5.11 (1996) [hereinafter A WORKABLE BALANCE].

90. A WORKABLE BALANCE, *supra* note 89, at 97; BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at 2-4 fig.2.2 & tbl.2.2. The author believes the high level of workers with full wage replacement exists because most family leaves are less than ten days in duration, and because most workers can completely cover these absences with vacation and sick leave benefits. *See supra* notes 82-84 and accompanying text. Even employees with only one year of service have almost enough vacation days to cover a 10-day leave period. Employees of medium and large establishments average 9.6 days after one year, and 11.5 days with only three years of service. BULLETIN 2517, *supra* note 85, at 21 tbl.19. Employees of small establishments average 8.1 days after one year of service and 10.2 days after three years. BULLETIN 2507, *supra* note 85, at 21 tbl.15. Sick leave benefits have similar averages. Employees of medium and large establishments average 11.2 sick days after the first year of service and 13 days after three years. BULLETIN 2517, *supra* note 85, at 28 tbl.27. Employees of small establishments average eight days after one year of service and 8.7 days after three years. BULLETIN 2507, *supra* note 85, at 27 tbl.23.

91. *See* BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 50. The author believes the incidence of partial wage replacement can be primarily attributed to short-term disabilities. Between 14-22% of workers receive partial wage replacement during their entire absence. *See supra* note 89. This number could be reached by multiplying the percentage of FMLA leave taken for illness (52%) by the portion of employees receiving short term disability benefits (somewhere between the 29% for small employers and 55% for large employers—probably around 42%).

92. BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at 5-14 tbl.5.6 (showing that less than 32% of employers provide full or partial pay in these non-disability circumstances).



### b. Proposals to Expand Employer-Provided Benefits

Research has not revealed any recent legislative proposals to mandate that employers provide a comprehensive system of paid family leave, although Congress considered and rejected such ideas during the creation of the Family and Medical Leave Act. One type of leave benefit, however, has been singled out as the focus of recent legislative mandates. In both Minnesota and Washington, all employers providing sick leave benefits are required to allow employees to use them to care for sick children.<sup>93</sup> California passed a law in 1999 mandating that employers allow their employees to apply their own sick leave to absences for family leave reasons.<sup>94</sup> A similar bill was recently considered in Hawaii.<sup>95</sup>

While they have not reached the legislative process, there have also been proposals by academics suggesting that the government mandate employer-based family risk insurance. Professor Selmi, for example, suggested requiring employers to provide paid family leave to their employees as a condition of qualifying for certain government contracts.<sup>96</sup> In an article written before the passage of the FMLA, Professor Sugarman suggested replacing existing mechanisms for wage replacement during disability, vacations, holidays or unemployment with a new mandatory employee benefit that he called “Short Term Paid Leave.”<sup>97</sup>

### c. Evaluating the Potential of Employer-Provided Benefits to Insure Family Risks

While mandating that employers provide benefits to insure family risks would certainly cover the target population – those who need to leave the work force due to family reasons – this proposal is inappropriate for several reasons. First, America has adopted a national policy of encouraging voluntary, employer-provided benefits, and avoiding direct employer mandates. Congress has considered employer benefit mandates on several occasions, and these

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93. National Partnership for Women & Families, *Letting Parents Use Sick Leave for Sick Kids*, at <http://www.nationalpartnership.org/Content.cfm?L1=202&TypeID=1&NewsItemID=276> (last visited Mar. 22, 2002).

94. Kathleen Reagan, *The 'Illusion' of Family Leave in New York*, at <http://family.go.com/yourtime/money/feature/bapp129famleave/bapp129famleave.html> (last visited Mar. 22, 2002).

95. National Partnership for Women & Families, *Hawaii*, at <http://www.nationalpartnership.org/content.cfm?L1=8&L2=1.0&GuideID=51&ArticleID=7&CFID=1659499&CFOKEN=34292403> (last updated July 25, 2001) (discussing S.B. 891 (2001)).

96. Selmi, *supra* note 23, at 776.

97. Under his proposed arrangement, employees would earn one day of paid leave for every five days worked, and all absences between one day and six months would be compensated from this leave bank. Employers would be required to accumulate these paid-leave days in an account that employees could use on a relatively unrestricted basis. See Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CAL. L. REV. 465 (1987).

proposals were rejected in every instance.<sup>98</sup> Noting that this approach has been rejected in important areas such as health insurance and pension coverage, it is quite unlikely that Congress would mandate that employers provide direct income replacement to workers facing family risks.

Employer mandates also pose troubling problems, because employers rarely bear the full burden of the costs assigned to them. Economic theory suggests that employers will pass the costs of direct mandates on to the employee beneficiaries.<sup>99</sup> Examinations of various employer mandates reveal that employers largely succeed in this task.<sup>100</sup>

What is especially troubling about an employer mandate for paid family leave is that the entire cost of this benefit is likely to be passed on only to those who are expected to gain from it. In her framework for analyzing cost shifting in employer mandates, Professor Jolls classifies family leave as an "accommodation mandate," or one in which employers must "take special steps in response to the distinctive needs of particular, identifiable demographic groups of workers."<sup>101</sup> Her framework predicts that a paid family leave benefit would result in the costs being shifted to female workers, the apparent beneficiaries of this mandate, because they are more likely to take time off for family reasons.<sup>102</sup> If the full costs of a family leave benefit are imposed on the employer (such as through mandated provision of pay or through perfectly

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98. The most recent of these attempts was the Clinton Administration's Health Security Act of 1993 (HSA). H.R. 3600/S. 1757, 103d Cong. (1993) and S. 1775, 103d Cong. (1993). This bill (commonly regarded as the "Clinton Administration Health Care Debacle") would have required employers to purchase coverage for employees and their families, and to cover at least 80% of the premium costs. Dana M Muir, *From Yuppies to Guppies: Unfunded Mandates and Benefit Plan Regulation*, 34 GA. L. REV. 195, 235-36 (1999). The "best-known challenge to the voluntary pension system" came from President Carter's 1979 President's Commission on Pension Policy. When the commission issued its final report, it recommended a Minimum Universal Pension System (MUPS), which would have required employers to contribute 3% of each employee's compensation each year to a retirement plan. *Id.* at 213-214. Proposed legislation that contained many of the provisions developed in the MUPS proposal was never enacted. *Id.* (referencing H.R. 3396, 97th Cong. (1981)).

99. For a general discussion of the wage and employment effects of employer mandates, see Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000) (distinguishing between the effects of mandates that affect the employee population generally and those that benefit an identifiable segment of the employee population); Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177 (1989) (outlining a framework for analyzing the effects of mandates affecting the general employee population and concluding that the shift in costs is dependent on the value of the mandate relative to its cost).

100. "This was the finding of Jonathan Gruber's study of the effects of state mandates requiring the coverage of childbirth expenses in employer-provided insurance." Selmi, *supra* note 23, at 780 n.267 (citing Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 639 (1994)). "Economists generally agree that both the employers' and the employees' shares of social security taxes are borne by employees in the form of reduced wages." Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851, 867 (1987). Jonathan Gruber & Alan Krueger estimate that workers bear 85% of the cost of workers' compensation insurance. Selmi, *supra* note 23, at 780 n.268 (citing Jonathan Gruber & Alan Krueger, *The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance*, in TAX POLICY AND THE ECONOMY 111, 112 (David Bradford ed., 1991)).

101. Jolls, *supra* note 99, at 231.

102. *Id.* at 290.

experience-rated social insurance), the employer will pass the costs directly onto female employees in the form of lower wages.<sup>103</sup>

An extension of Jolls' analysis suggests that employer contributions will reach the intended beneficiaries only if they are mandated through a non-experience-rated social insurance framework. A scheme that taxed employers and redistributed benefits to workers with family risks would predictably result in lower real wages for all employees due to cost shifting. The decrease in wages, however, would be borne by all workers equally. This would be true because employers would not be able to affect their costs by discriminating against the beneficiaries – an employer's payroll taxes would be the same regardless of which workers it employed.<sup>104</sup> A tax-and-transfer form of social insurance would have less detrimental effects on the intended beneficiaries' wages than would private employer-based insurance, and could achieve redistribution to those workers experiencing family risks.

An additional concern attending an employer insurance mandate would be its impact on small employers. These employers are less likely than their larger counterparts to offer such insurance today, and may not be able to afford the costs of wage replacement if several employees collected benefits simultaneously. Small employers would likely require assistance in providing such insurance, such as by providing government subsidies or risk pooling mechanisms.<sup>105</sup>

Perhaps the most fundamental problem with an employer mandate is the question of who should bear this risk. Some suggest that employers should bear the costs, since they receive the benefits of increased employee morale, productivity and retention when workers have income security.<sup>106</sup> Others argue that while paid family leave may be desirable, it is inappropriate to make

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103. *Id.* at 291.

104. In other words, if the employer has to pay more as employees use the benefit, it will avoid hiring those employees (or will lower the wages of those employees) whom it believes will receive those benefits. If the employer pays the same regardless of the composition of its work force, there will be no incentive to discriminate against employees receiving the benefit.

105. Of a parallel situation in mandated employer-based health insurance, Professor Graetz explains, "[A]n employer mandate would raise the costs of hiring and retaining workers most for small business and thus would almost certainly be accompanied by some new subsidies for small or marginal businesses—additional charges on the Treasury that seem unlikely either to be well-targeted or equitable." Michael J. Graetz, *Universal Coverage Without an Employer Mandate*, DOMESTIC AFF. 79, 92 (Winter 1993/94).

106. See, e.g., NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, COMMENTS ON DEPARTMENT OF LABOR'S PROPOSED RULE ON BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION, <http://www.nationalpartnership.org/content.cfm?L1=8&L2=1.0&GuideID=54&ArticleID=3>; *Questions & Answers*, *supra* note 57. Employers experience a decrease in turnover when paid leave benefits are provided, allowing companies to retain trained and experienced workers, and decreasing permanent search and replacement costs. See *infra* note 168 and accompanying text. There is also growing recognition that family leave benefits increase worker productivity and morale. See National Partnership for Women & Families, *Introduction: The FMLA Helps Millions of American Work Families—Without Hurting Employers* <http://www.nationalpartnership.org/content.cfm?L1=8&L2=1.0&GuideID=9&ArticleID=1&CFID=1659499&CFTOKEN=34292403> (last visited Mar. 22, 2002).

employers bear the costs.<sup>107</sup> The position taken in FRIP is that employers already bear a decent share of the risk in the form of the costs of replacing absent workers. While the Proposal would impose some incremental costs on employers, it would not require them to bear the risk alone. Instead, because family risk insurance would impart benefits to employees, employers, and society in general,<sup>108</sup> the costs would be shared among all three.

### 3. *Private Insurance Market*

Another possibility for insuring family risks is to provide protection within the private insurance market. Individual policies are used to insure many other risks that workers face, such as damage to a home or a motor vehicle. This Section briefly explores the possibility of insuring family risks in this same manner.

#### a. Description of the Private Insurance Market

Private insurance is a mechanism that allows individuals to pool their risks. Individuals in the pool pay premiums expected to cover the insurer's costs of payments due to the occurrence of the insured event. In a private insurance

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107. See, e.g., Strategic Services on Unemployment & Workers' Compensation (UWC), *UWC Press Releases: June 28, 2000 - UWC Provides Legal Strategy for Joint Lawsuit Against Clinton Administration*, available at [http://www.uwcstrategy.org/PressReleases/body\\_062800.html](http://www.uwcstrategy.org/PressReleases/body_062800.html) (quoting Eric Oxfield as saying, "[T]he issue is not whether paid family and medical leave is desirable. Rather, whether it's appropriate to use the unemployment insurance system to compensate workers who take a leave of absence from work."). William Vernon, Massachusetts director of National Federation of Independent Business (NFIB), Washington, DC, agrees with Oxfield. He states, "Any new social program that promises new benefits for families with young children should be paid by general tax revenues, not by a small number of the state's employers." *Strategic Services on Unemployment & Workers' Compensation (UWC)*, *UWC Press Releases: June 26, 2000 - Massachusetts State Task Force asks Strategic Services on Unemployment & Workers' Compensation (UWC) for Expert Testimony on Unemployment Insurance Policy*, available at [http://www.uwcstrategy.org/PressReleases/body\\_062600.html](http://www.uwcstrategy.org/PressReleases/body_062600.html).

108. Babies' development hinges on a strong attachment to their parents. During the first few months after birth, babies' brain cell connections increase twenty-fold, and infants exposed to stimulating settings experience improvement in brain function that is both long-lasting and cumulative, having positive effects for the future labor force and economy. There is evidence that hospitalized children recover more quickly and suffer fewer complications when their parents are at their side, thus reducing the costs of medical treatment and insurance premiums. There is also evidence that parents with income available during leave are 5.2 times as likely to care for their sick children themselves, which prevents spread of communicable diseases to other children at schools or daycares. The care that American workers provide to elderly relatives, if replaced by paid workers, would have an economic cost of roughly \$196 billion, much of which would likely be provided by public programs like Medicaid. In the absence of paid leave, workers suffering from serious health conditions or pregnancy frequently have to shorten their leaves, with grave consequences for their health. Premature return to work leads not only to reduced productivity, but also increased need for later medical interventions. See, e.g., NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, COMMENTS ON DEPARTMENT OF LABOR'S PROPOSED RULE ON BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION, *supra* note 106 (citations omitted).

contract, the level of insurance is a function of two variables.<sup>109</sup> The first is the purchaser's desire for security.<sup>110</sup> A purchaser who desires greater protection from the risks will purchase a higher level of insurance (in this case, a higher wage-replacement rate). The second variable is the insurance company's concern about "adverse selection" and "moral hazard."<sup>111</sup> If an insurer believes that adverse selection is a problem in the market (that only individuals expecting to experience the insured event will purchase insurance), the insurer will set premiums at high levels, in order to cover its expected payments and administrative costs. Where the risk pool is adversely selected, there is little incentive to purchase insurance because the premium costs will be so high that individuals are better off trying to self-insure or gambling on the risk. Thus, no one will join the insurance pool and the market will experience failure. Moral hazard problems ("the likelihood that 'full compensation' might make the insured indifferent about whether the risk occurs")<sup>112</sup> can have similar implications for insurance markets. Where the presence of insurance makes the event more likely to occur,<sup>113</sup> reimbursement levels have to be set at sufficiently low levels to make the event unattractive and dissuade unnecessary claims. Alternatively, premiums will have to be set high enough to cover the added costs due to moral hazard. In either event, many individuals will be priced out of the insurance market, and as a result, the market might even fail to exist.

#### b. Proposals to Expand the Private Insurance Market

The Campaign for Family Leave Benefits, a project of the National Partnership for Women & Families, is investigating numerous methods for insuring family risks. One of the options they list as "under consideration" is the development of family leave insurance for the private market. While this approach has not been suggested by any legislative bodies, a brief evaluation of its potential for insuring family risks follows.

#### c. Evaluating the Private Market's Potential to Insure Family Risks

Private insurance policies for family risks are virtually unheard of. Such policies do exist, however, for at least one type of family risk—the worker's own temporary disability. While most temporary disability policies are

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109. MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING SOCIAL INSURANCE 42 (1999).

110. *Id.*

111. *Id.*

112. *Id.*

113. Such is the case with family risks. Eighty-eight percent of workers reported that if wage replacement were available they would have taken more family leave. See *supra* note 53 and accompanying text.

purchased as group plans by employers, they are also available for purchase by individuals. The adverse selection and moral hazard considerations, however, have resulted in individual policies providing low reimbursement levels and charging hefty premiums, and this subset of family risks has already experienced some degree of market failure.<sup>114</sup>

An examination of the temporary disability insurance market reveals why private family risk insurance is infeasible. First, as disabilities account for approximately 60% of all leaves taken under the Family and Medical Leave Act, disability insurance is a key component of family risk insurance. Second, disability, like family risk, is an area where the insured persons have much better information about their risks than do insurers.<sup>115</sup>

Private insurers are skeptical of anyone requesting to buy an individual disability insurance policy and assume that such individuals have a high risk of becoming disabled.<sup>116</sup> Accordingly, they charge an appropriate, steep premium, pricing most individuals out of the market.<sup>117</sup> Adverse selection is so prominent in the disability insurance market that there is virtually no market for individual policies,<sup>118</sup> and insurers who have attempted to write individual disability policies have often had disastrous experiences.<sup>119</sup> Moral hazard is also a difficult issue for private disability insurance, because workers are “more likely to find reasons to stop working if the cost of doing so is cushioned by replacement of most of their wages.”<sup>120</sup> While workers will not become seriously disabled simply to collect insurance, disability is heterogeneous and has varying effects on workers’ ability to participate in the labor force.<sup>121</sup> It is often difficult to determine to what extent malingering, as opposed to limitation of the disability itself, exacerbates the lost labor income. Family risks would have similar moral hazard considerations. To protect themselves from moral hazard, insurers typically provide meager replacement rates for disability policies<sup>122</sup> in an effort to leave some of the burden on the insured and to increase incentives to return to work. This combination of high price and low replacement rates has made private disability insurance unattractive and the market for individual policies very small. These same moral hazard and adverse selection considerations likely explain why there is currently no market for private family risk insurance.

In order to make family risk insurance available to substantially all working families, it would be necessary to force both high- and low-risk

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114. See GRAETZ & MASHAW, *supra* note 111, at 43.

115. *Id.* at 70.

116. *Id.*

117. *Id.*

118. *Id.* at 212.

119. *Id.* at 71.

120. *Id.* at 70.

121. *Id.* at 71.

122. *Id.* at 81.

individuals into a common pool. Similarly, in order to provide socially adequate replacement rates for low-wage workers, without having similarly high replacement rates that would attract too many high-wage workers out of the work force, there must also be redistribution in the benefits scale.<sup>123</sup> These functions belong uniquely to the domain of social insurance.<sup>124</sup>

### B. Social Insurance

Winston Churchill once commented that social insurance systems bring “the magic of averages to the rescue of millions.”<sup>125</sup> Professors Graetz and Mashaw describe social insurance as “dependent on government action, directed at a particular class of risks and designed to pursue societal purposes that could not or would not be achieved through individual contracting in private insurance markets.”<sup>126</sup> As discussed in the previous Section, family risks fit neatly within this description. There is no market for private family risk insurance, with the exception of disability, where adverse selection and moral hazard have made the purchase of individual policies impracticable. Social insurance is designed explicitly to counteract these market limitations of private insurance contracts.<sup>127</sup>

Graetz and Mashaw explain that: “The distinctive risk that social insurance addresses the risk of inadequate labor income.”<sup>128</sup> Society’s willingness to pay for social insurance depends, however, both on what it can afford and, “more fundamentally, on how it draws the line between collective and individual or family responsibility.”<sup>129</sup> Society’s tastes for social insurance change over time as economic and social circumstances change, and demographic shifts and changes in work and family circumstances affect people’s needs for social insurance protections.<sup>130</sup> In light of the demographic changes discussed in earlier portions of this Article, and the flurry of legislative activity concerning ways to respond to families’ needs for wage replacement, it appears that American society may now be ready to assume some responsibility for family risks.

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123. See *id.* at 71-72. Private insurance policies could be incorporated into a system of social insurance, for example, if a mandate to purchase a policy were placed on individuals and accompanied by tax credits or vouchers. See Graetz, *supra* note 105, at 102.

124. *Id.*

125. STEVE IDEMOTO, ECONOMIC OPPORTUNITY INSTITUTE, *Family Leave Insurance: A Proposal for Washington Workers*, at <http://www.econop.com/FLI-PolicyBrief2000-PragmaticSolutions.htm> (last visited Mar 26, 2002) (citing PETER A. CORNING, SOCIAL SECURITY ADMINISTRATION, *THE EVOLUTION OF MEDICARE . . . FROM IDEA TO LAW* (1969)).

126. GRAETZ & MASHAW, *supra* note 111, at 26.

127. *Id.* at 43 (“It provides insurance for people who could not otherwise afford it and in markets where moral hazard and adverse selection make private insurance unavailable or of limited value.”)

128. *Id.* at 27. Families live almost exclusively by labor income, and therefore demand protection against circumstances that take them out of the workforce and cut off this income. *Id.* at 47.

129. *Id.* at 43-44.

130. *Id.* at 42.

The following sections describe the various social insurance options for family risks, the recent proposals associated with each of those options, and an evaluation of how each option might be used as part of a national family policy. More specifically, it explains how each system would be incorporated into the Family Risk Insurance Proposal.

### 1. *Unemployment Insurance*

The first social insurance option for family risks, and the one receiving the most attention, is an expansion of the existing system of Unemployment Insurance. This Section of the Article describes the current UI system and the ways in which it already insures family risks. It discusses the Department of Labor's BAA-UC regulations, the surrounding controversy, and the states' responses. It then explores the many reasons why UI is not the best system for insuring family risks generally, but recommends several changes that would allow it to better serve working families. Because using the UI system to insure family risks is the proposal that has received the most attention nationally, it also receives the most attention in this Article.

#### a. Description of UI System

The Unemployment Insurance system began in 1935 during the Great Depression and New Deal eras. It was created as a federal/state partnership and has remained so for over sixty-five years.<sup>131</sup> This division of responsibility is rooted in federal UI laws: the Social Security Act and the part of the U.S. Internal Revenue Code known as the Federal Unemployment Tax Act (FUTA).<sup>132</sup>

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131. Both the federal and state governments have important responsibilities for unemployment compensation. Federal involvement is limited to three primary responsibilities: (1) control over taxes collected under state and federal unemployment laws; (2) financing administrative costs and controlling administrative practices; and (3) establishing minimum program standards where nationwide uniformity is essential. States must comply with such standards in order to remain eligible for tax offsets and administrative grants. States are responsible for establishing and maintaining unemployment insurance programs that meet federal requirements. UI is primarily administered pursuant to state law, and most substantive provisions are a state responsibility. Each state law prescribes its own tax structure, qualifying requirements, benefit levels, and disqualification provisions. See NATIONAL FOUNDATION FOR UNEMPLOYMENT COMPENSATION & WORKERS' COMPENSATION, HIGHLIGHTS OF FEDERAL UNEMPLOYMENT COMPENSATION LAWS 1 (Jan. 1997) [hereinafter HIGHLIGHTS OF FEDERAL UI LAWS].

132. The Social Security Act requirements are codified at 42 U.S.C. § 301 and the Internal Revenue Code requirements are codified at 26 U.S.C. §§ 3301-3311. The Federal Unemployment Tax Act (FUTA) was designed to encourage the creation of state systems for unemployment insurance by using a tax-offset approach. Frey, *supra* note 31, at 184 (footnote omitted). It imposes a payroll tax on most employers, but allows an offset against the federal tax to those employers paying taxes under an approved state unemployment compensation law. See STRATEGIC SERVICES ON UNEMPLOYMENT & WORKERS' COMPENSATION, HIGHLIGHTS OF STATE UNEMPLOYMENT COMPENSATION LAWS 1 (2000) [hereinafter HIGHLIGHTS OF STATE UI LAWS].



The UI system has multifarious purposes.<sup>133</sup> “Its principal purpose is to assist the unemployed worker in maintaining an adequate standard of living during periods of involuntary unemployment,”<sup>134</sup> thus providing economic relief to workers “unemployed through no fault of their own”<sup>135</sup> while they search for suitable employment. Other purposes include improving people-power utilization, stabilizing the supply of labor, and encouraging the stabilization of the economy.<sup>136</sup>

UI is funded almost exclusively by a payroll tax imposed on employers.<sup>137</sup> Each employer is assigned a tax rate based on its annual payroll and history of unemployment among its workers—a practice known as “experience rating.” Thus, the number of successful claims against it in the past directly influences an employer’s current costs.<sup>138</sup> This requirement is intended to provide an incentive for employers to stabilize employment.

In every state, unemployed individuals must file claims with the state employment agency in order to receive benefits. The employment agency makes several determinations, beginning with a determination on whether the applicant is covered by the state’s system and meets the qualifying requirements.<sup>139</sup> The objective of the qualifying requirement is to grant benefits only to those individuals who have demonstrated attachment to the labor force.<sup>140</sup> The tests include earnings requirements<sup>141</sup> and assessments to ensure that the applicant is without a job, involuntarily unemployed,<sup>142</sup> and able

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133. Frey, *supra* note 31, at 185 (footnote omitted).

134. *Id.* at 185 (footnote omitted).

135. Thompson, *supra* note 6, at 759.

136. *See* Frey, *supra* note 31, at 185 (footnote omitted).

137. “Alaska and New Jersey also tax employees, and Pennsylvania and West Virginia require employee contributions under certain circumstances.” Most employers are subject to a federal tax imposed by FUTA, which is equal to 6.2% of the first \$7,000 in wages paid to each employee. FUTA credits employers for up to 5.4% for any taxes paid under state UI laws. The net tax (0.8%) is collected by the federal government and used to finance administrative costs, the federal portion of extended UI benefits, and a loan fund for states that exhaust their UI funds. *See HIGHLIGHTS OF STATE UI LAWS, supra* note 132, at 2. Any covered employer not subject to state law would be liable for the full federal tax without an offset, and no unemployment insurance protection would be available to its employees. *See HIGHLIGHTS OF FEDERAL UI LAWS, supra* note 131, at 4. In response to such strong incentives, all states operate compliant UI systems. The Department of Labor is responsible for reviewing state programs to ensure they meet all federal requirements. *See HIGHLIGHTS OF STATE UI LAWS, supra* note 132, at 1.

138. Frey, *supra* note 31, at 185 (footnote omitted).

139. *Id.* at 186 (footnote omitted).

140. *HIGHLIGHTS OF STATE UI LAWS, supra* note 132, at 2.

141. The earnings requirement comes in many varieties. Some states require a specified number of weeks of work in which the claimant earned at least a minimum amount. Others express it as a multiple of the quarter in which the claimant’s earnings were the highest. In other states, the qualifying requirement is a multiple of the claimant’s weekly benefit amount. *See id.*

142. To ensure that the applicant is involuntarily without a job, states disqualify those workers who voluntarily quit without good cause, who are discharged for misconduct, or who refuse an offer of suitable work without good cause. The definitions of key terms such as “good cause,” “misconduct,” and “suitable work” vary across jurisdictions. *See id.* at 3. Some states have limited “good cause” to situations that are related to the work or attributable to the employer. Frey, *supra* note 31, at 186 (footnote omitted).

and available for work.<sup>143</sup> “If the applicant is covered and eligible, the agency computes the amount and duration of the weekly benefit amount.”<sup>144</sup> Benefits are typically based on a percentage of prior earnings and paid for up to twenty-six weeks.

While the UI system is not designed to provide family risk insurance, some states have granted exceptions to the qualifying requirements for employees who leave work for family-related reasons. Exceptions include excusal of voluntary quits, refusals of otherwise suitable work, and exceptions to the “able and available” and “seeking work” requirements.

The first exception is an exemption for employees leaving work voluntarily, but with “good cause.” Approximately two-thirds of states specify that “good cause” must be “connected with work” or “attributable to the employer.”<sup>145</sup> The remainder, however, utilize a variety of exceptions that may encompass family reasons. The broadest exception grants “good cause” for employees leaving for personal reasons that are “compelling and necessitous.”<sup>146</sup> Several states employ more specific good cause exceptions. These include forgiving quits in order to relocate with a spouse<sup>147</sup> or those necessitated by lack of childcare.<sup>148</sup> There is a recent trend among states to exempt quits in situations involving domestic violence.<sup>149</sup> A handful of states

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143. In all states, claimants must be able to work and available for suitable work. In most states, claimants must also register for work with the employment service and be actively seeking work. See HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 3.

144. Frey, *supra* note 31, at 186 (footnote omitted).

145. National Association of Child Advocates, *Issue Brief, Unemployment Insurance For Low-Income Families: New Challenges for Child Advocates, July 1998*, available at <http://www.childadvocacy.org/unemploy1.htm>.

146. Some states with such an exception are Arizona, Arkansas, Colorado, Massachusetts, Maryland, Pennsylvania, Virginia, Kansas, Utah, Iowa, (and also Texas and Washington if reason was work-related). See HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 70-71 nn.4 & 9; National Association of Child Advocates, *States Which Provide Unemployment Insurance Coverage for Voluntary Terminations Caused by Domestic Circumstances and Dependent Allowances*, at <http://www.childadvocacy.org/unemploy2.htm> (last visited Mar. 22, 2002).

147. California, Indiana, Kansas have such an exception. See U.S. Dep’t. Labor, *UI Law Tables § 430*, available at <http://www.ows.doleta.gov/unemploy/uilawstable.asp> (last visited Mar. 22, 2002) [hereinafter *DOL UI Law Tables*]. Oklahoma added such an exception in 1998. Diana Runner, *Changes in unemployment insurance legislation in 1998*, MONTHLY LAB. REV., Jan. 1999, at 20, 26. Washington state offers the exception only if the transfer is employer-mandated. See Robert Kenyon, Jr. & Loryn Lancaster, *Changes in unemployment insurance legislation in 2000*, MONTHLY LAB. REV., Jan. 2001, at 29, 34. Maine also offers the exception if the claimant can show attachment to new labor market within 14 days. HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 70-71 n.4.

148. Arizona and California have good cause exceptions for quits necessitated by lack of childcare. National Association of Child Advocates, *supra* note 145. North Carolina added this exception in 1999. See Robert Kenyon, Jr., *Changes in unemployment insurance legislation in 1999*, MONTHLY LAB. REV., Jan. 2000, at 27, 31. Connecticut has a similar exception in cases where the employee’s hours of work were changed. See CONN. GEN. STAT. § 31-236(a)(2)(A)(iv), CONN. AGENCIES REGS. § 31-236-21. Wisconsin recognizes the exception where a shift reassignment precludes child care. See HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 71 n.4.

149. California, Maine, New Hampshire, Colorado, Connecticut, New York, North Carolina, Wisconsin, and Wyoming offer this exception. *DOL UI Law Tables*, *supra* note 147, at § 430.01; HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 72 n.18; Kenyon, *supra* note 148, at 35. Delaware,

provide good cause exceptions if employment was left in order to tend to an illness in the immediate family,<sup>150</sup> and several other states allow the exceptions if the claimant left employment due to his or her own illness.<sup>151</sup> These illness exceptions, however, have limited impact. If the claimant left work because of illness, the claimant may not be “able and available” to work, which would result in a benefit denial during the period of incapacitation.<sup>152</sup> Quits because of pregnancy are treated in much the same manner.<sup>153</sup> Thirteen states provide benefits for employee-initiated, pregnancy-related separations,<sup>154</sup> and the most common approach among these states is to provide UI benefits only after childbirth, once the mother is ready to reenter the work force.<sup>155</sup>

A second category includes exceptions to the “able and available” and “seeking work” requirements. Many of these exceptions focus on the claimant’s own illness. In at least eleven states, claimants are eligible for UI if

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Nebraska, New Jersey, and Rhode Island just added the exception in the year 2000. See Kenyon & Lancaster, *supra* note 147, at 29.

150. Colorado, Connecticut, Illinois, Iowa, Wisconsin, Maryland, Washington, Maine, and New York offer this exception. *DOL UI Law Tables, supra* note 147, at tbl.401.1 n.4; National Association of Child Advocates, *supra* note 146. Similarly, Oklahoma and Texas allow the exception to care for minor children with an illness. *DOL UI Law Tables, supra* note 147, at tbl.401.1 n.4; see Runner, *supra* note 147, at 26. In most of these states, the claimant is required to make all reasonable efforts to preserve the employment before being eligible for the exception. See *DOL UI Law Tables, supra* note 147, at § 430.

151. There are many variations of the personal illness exception. Generally, Oklahoma, Wyoming, Colorado, Maryland, Maine, Ohio, South Dakota, West Virginia, Connecticut, and Illinois have exceptions for bona fide medical reason involving the claimant’s health or if continued working presents a health hazard. See *DOL UI Law Tables, supra* note 147, at tbl.401.1 n.4.; HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 70-71 nn.4-9; National Association of Child Advocates, *supra* note 146. In Kansas and Montana, the exception applies if the claimant left work under advice of a practicing health care provider, and after recovery, offered to return to work but regular or comparable work was not available. *DOL UI Law Tables, supra* note 147, at tbl.401.1 n.4.; HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 71 n.4. New Hampshire’s exception applies if the claimant left work due to personal illness, accidental injury or pregnancy, the absence was one year or less in duration, the employee/employer relationship was maintained, and a physician released the employee to return to work but no suitable work was available. HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 71 n.6. In North Dakota, the exception is granted if the employee furnishes a written note from a physician, notifies the employer of the physician’s requirement, and is capable and offers to return to work within sixty days of the last day of work. *DOL UI Law Tables, supra* note 147, at tbl.401.1 n.4. In Texas, the exception applies if the claimant left work due to his or her medically verified illness, injury, disability or pregnancy while claimant is still available for work. HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 71 n.4. In Vermont, the disqualification lasts for only the first one to six weeks if health problems preclude the discharge of the duties of the work left. *DOL UI Law Tables, supra* note 147, at tbl.401 n.10.

152. *DOL UI Law Tables, supra* note 147, at § 430.04.

153. FUTA’s § 3304(a)(12) forbids states from denying benefits based solely on pregnancy, but allows them to treat pregnancy like any other temporary disability. Mark R. Brown, *Part I: Unemployment Compensation and Eligibility: A Case for Pregnancy-Based Unemployment Insurance*, 29 U. MICH. J.L. REFORM 41, 42.

154. These states include Alabama, Arkansas, California, Colorado, Iowa, Kentucky, Massachusetts, Missouri, North Carolina, New York, Pennsylvania, Tennessee, and Texas. See *id.* at 47 n.27.

155. *Id.* at 50. Missouri, for example, has a special rule for pregnancy, which grants the exception if the claimant worked for the employer for at least one year and offers to return to work within ninety days of terminating the pregnancy. HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 71 n.8.

they are unavailable because of their own illness or disability, which occurs after filing the claim and registering for work, as long as no offer of work that would have been suitable at the time of registration is refused.<sup>156</sup> A few states allow exceptions for funeral and bereavement leave,<sup>157</sup> and some have a general exception for compelling personal circumstances.<sup>158</sup>

A third category of exceptions for family circumstances centers on the requirement that claimants accept any offer of "suitable" work. At least four states have exceptions for refusals if the position offered would interfere with care for family members, but most of these exceptions apply only if the position was on the third shift.<sup>159</sup> A few other states have more general suitability exceptions for family circumstances.<sup>160</sup>

### b. Proposals to Expand UI

The dominant proposal for insuring family risks is to expand the UI system to provide income replacement benefits for employees on family leave. This proposal is attractive primarily because it would utilize already-existing agencies for administration, its eligibility rules can be used to demonstrate work force attachment, and because many state UI trust funds have recently enjoyed surpluses that might be used to fund such benefits.

Because of these factors, insuring family risks through UI is the approach advocated by the Department of Labor (DOL) and under consideration by several states. This issue has garnered a great deal of attention since the DOL released its Birth and Adoption Unemployment Compensation (BAA-UC) regulations in 2000.<sup>161</sup> The BAA-UC regulations<sup>162</sup> allow states to develop

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156. States adopting this rule include Alaska, Delaware, Hawaii, Idaho, Maine, Maryland, Massachusetts, Montana, Nevada, Tennessee, and Vermont. *DOL UI Law Tables*, *supra* note 147, at tbl.400.

157. These states include California (four days), Arizona (four days), New Jersey (two days) and Alaska (seven days). *Id.* at tbl.400 n.3 and § 410.

158. Idaho offers the exemption if the labor market withdrawal was for less than the major part of week, as does Arkansas if withdrawal was for less than four days. *Id.* at tbl.400 n.3.

159. Exceptions apply to workers who refuse work on the third shift in Maine if the refusal is due to family obligations, in Massachusetts if the claimant is female, and in New Hampshire if the claimant is the only adult available during these hours to care for children under age fifteen or for an ill or infirm elderly person who is dependent on the claimant. North Carolina has an exception for undue family hardship when the individual is unable to obtain adequate child or elder care. *Id.* at § 440.01.

160. For example, in Utah the claimant is not disqualified if it would be contrary to equity and good conscience. In Maine, if the refusal was for a necessary and compelling reason, disqualification terminates when the claimant is again able and available for work. *Id.* at tbl.404 n.8.

161. The impetus for the regulations began several years ago when four states requested confirmation from the Clinton Administration that they could provide family leave benefits through their UI systems without violating FUTA. National Partnership for Women & Families, *supra* note 57. On May 23, 1999, President Clinton announced his intention to make parental leave more affordable in a commencement speech at Grambling State University. FMLA Technical Corrections Coalition, *supra* note 1. The following day, he issued an Executive Memorandum directing the Secretary of Labor to issue regulations permitting employees to collect UI while on FMLA leave. See Executive Memorandum (May 24, 1999), available at <http://saveui.org/execmemo.html>. By December 3, 1999,

methods for paying UI to “parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children.”<sup>163</sup> The regulations specify that biological parents, legal parents, or those with custody of a child pending adoption may be eligible for such compensation,<sup>164</sup> and that parents may utilize this benefit within the one-year period commencing with birth or placement.<sup>165</sup> Parents need not be covered by the FMLA to be eligible for BAA-UC.<sup>166</sup> The regulations apply only to birth or placement, and do not allow states to use UI to insure other categories of FMLA leave.<sup>167</sup> The DOL touts BAA-UC as an “experiment,” that “will test whether enabling these parents to have this time to be with their newborns and newly-adopted children by providing them with partial wage replacement will promote their long-term attachment to the work force.”<sup>168</sup> The agency takes the position that the regulation does not change federal UI requirements, and that it is merely using its interpretive powers to construe the federal “able and available” requirements to include an exception for experimental BAA-UC.<sup>169</sup>

The DOL also makes several recommendations to state legislatures through its Model State Legislation. The agency recommends that BAA-UC be limited to twelve weeks’ duration, that benefits count toward the maximum number of weeks of UI eligibility, that other income replacement be deducted from

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the Department of Labor issued a Notice of Proposed Rulemaking (NPRM) for its proposed rule on BAA-UC. In response, a “broad-based business group, led by the President of Strategic Services on Unemployment and Workers’ Compensation (UWC) and the Executive Director of the National FMLA Technical Corrections Coalition (a group launched by the Society for Human Resource Management (SHRM)) immediately created a national campaign against the proposal.” SHRM, *Business Coalition Launches National Campaign to Stop the Raiding of Unemployment Fund for Family Leave* (Nov. 30, 1999), at <http://www.shrm.org/press/releases/991130.htm>. The lobbying coalition, known as The UI Working Group, maintains a website at <http://www.saveui.org> opposing the regulations. Despite resistance, the DOL published the final BAA-UC regulations in the Federal Register on June 13, 2000. On June 26, 2000, SHRM, LPA and others filed a lawsuit in the D.C. district court asking to invalidate the regulations as an arbitrary agency action. See SHRM, *SHRM Denounces Clinton’s New Paid Family Leave Rule by Announcing Historic Lawsuit* (June 12, 2000), at <http://www.shrm.org/press/releases/000612.htm>; SHRM, *SHRM to Sue DOL over “Baby/UI” Rule* (June 26, 2000), at <http://www.shrm.org/hrnews/articles/062600.htm>.

162. Regulations for Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,209 (2000) (to be codified at 20 C.F.R. pt. 604).

163. *Id.* at 37,223 (to be codified at 20 C.F.R. § 604.1).

164. *See id.* at 37,224 (to be codified at 20 C.F.R. § 604.3(f)).

165. *See id.* (to be codified at 20 C.F.R. § 604.21).

166. *See id.* at 37,212.

167. *See id.* at 37,225.

168. *Id.* at 37,210. The bipartisan Commission on Family Leave found that nearly 84% of all employees taking FMLA leave return to their jobs, and that work force attachment increases if benefits are paid. 94% of workers whose leave was fully paid returned to their same employer, as compared with only 77% of those whose leaves were unpaid. See A WORKABLE BALANCE, *supra* note 89, at 114.

169. *See* Regulations for Birth and Adoption Unemployment Compensation, *supra* note 162, at 37,224 (to be codified at 20 C.F.R. § 604.10). The DOL notes that there are no explicit “able and available” requirements stated in federal law, and that the requirement is a creature of regulatory interpretation. *Id.* at 37,210. The Department also notes that it has used its interpretive powers to create other exceptions to the “able and available” rule, in areas such as job training, illness, jury duty, and temporary layoffs. *Id.* at 37,211.

benefits, and that the benefits be exempted from experience rating.<sup>170</sup> The DOL does not require that employees return to work to be eligible for benefits, although states may recover benefits if parents do not return to work.<sup>171</sup>

The issuance of the BAA-UC regulations sparked heated debate over the propriety of using UI for this purpose.<sup>172</sup> The debate has culminated in the filing of a lawsuit by several business-based organizations against the DOL, challenging the regulations' legality.<sup>173</sup>

Despite this legal challenge, numerous states have bills pending that would capitalize on the BAA-UC regulation and utilize the UI system to insure family risks. The very existence of the regulations is important to states considering using UI for family risk insurance. If states had amended their UI statutes to provide leave without the regulations, they would run the risk that the DOL would deem their statute noncompliant with FUTA, which could in turn subject

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170. *See id.* at 37,225.

171. *See id.* at 37,226.

172. Proponents argue that the rule will promote and update the goals of the UI system and that the regulations advance the current goals by increasing work force attachment. Proponents also argue that the regulations are necessary because current FMLA protections are inadequate. Proponents contend that the program's costs can be offset with UI fund surpluses and the considerable savings that will accrue to other social insurance programs, such as welfare, food stamps, Medicaid and other public programs that support workers leaving employment for family reasons, because fewer workers would apply for public assistance. They also cite savings from reduced job search and UI costs after the employee is ready to return to work again, if the worker preserves attachment to the previous employer. The main threat to the solvency of UI funds is not BAA-UC, they argue, but the dramatic employer tax cuts that have been returning these funds to employers. *See, e.g.*, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, COMMENTS ON DEPARTMENT OF LABOR'S PROPOSED RULE ON BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION, *supra* note 106.

The regulations' opponents begin with an assertion that UI and family leave have different and incompatible purposes. Furthermore, they argue, funding family leaves should not be an employer obligation. Whereas the UI system is designed to discourage employers from making poor use of the labor supply, employers have no ability to control whether their employees temporarily leave the work force to care for a new child. In addition, they claim that financial hardship caused by unpaid family leave is exaggerated, and that BAA-UC is poorly targeted to alleviate these financial concerns in any case. Even worse, opponents caution that BAA-UC benefits may actually harm the target population, because employers will likely reduce their own voluntary provision of benefits in response to the regulation. Finally, opponents caution that the BAA-UC regulation will lead to higher payroll taxes and depleted UI trust funds. *See, e.g.*, UWC, *Statement on Unemployment Compensation and the Family and Medical Leave Act Before the Special Legislative Task Force on Temporary Disability, Family Medical Related Leave, and Retirement And the Joint Committee on Commerce and Labor Of the Massachusetts Great and General Court* (statement of Eric J. Oxfeld), at [http://www.uwcstrategy.org/Issues/testimony\\_062600.html](http://www.uwcstrategy.org/Issues/testimony_062600.html) (last visited Apr. 20, 2002).

173. The plaintiffs include LPA, Inc. (a non-profit business organization representing more than two hundred leading U.S. corporations), the Society for Human Resource Management (the world's largest association of human resource practitioners), the Chamber of Commerce of the United States of America (representing more than three million businesses and organizations, with 92% of its 140,000 direct members being small businesses), as well as Counterpulsation, Inc. and Danneman's Auto Service, Inc. (small businesses with fewer than 50 employees). The complaint requests declaratory and injunctive relief requiring the withdrawal of the final rule that adopted the regulations and the regulation itself, as well as a declaration that the regulation and rule are otherwise invalid. *See* SHRM, *SHRM/LPA/Chamber of Commerce Complaint*, at <http://www.shrm.org/press/releases/uicomplaint.pdf> (last visited Mar. 22, 2002).

all employers in the state to a 700% payroll tax increase.<sup>174</sup> The regulations have provided employers a safe harbor for BAA-UC benefits, and assured states that their systems will be considered compliant if they comply with the regulations. States considering this safe harbor include Florida (H.R. 1245, S. 500), Illinois (S. 389), Kansas (H.R. 2232), Louisiana (H.R. 1572), Maryland (H.R. 933), Massachusetts (H.R. 774), Minnesota (H.R. 1866, S.F. 1597), Nebraska (H.R. 370), New Jersey (A.B. 3049, S.. 1923), New Mexico (H.R. 528), Oregon (S.. 241), Pennsylvania (H.R. 1690), and Texas (H.R. 240).<sup>175</sup> These states are all considering a system much like the DOL's model legislation, providing for twelve weeks of UI benefits for birth or adoption. The Arizona legislature is considering similar bills (H.R. 2458, S.. 1059), but is proposing ninety days of paid benefits.<sup>176</sup>

Several states have also considered bills that would provide benefits even beyond the scope permitted in the BAA-UC regulations. Georgia's House Bill 342 would pay UI benefits to employees separated from work due to "undue family hardship," which would include leave to care for a serious illness of the employee or a family member of the employee, as well as leave related to domestic violence.<sup>177</sup> Hawaii's House Bill 30 would provide twelve weeks of UI for birth or adoption, but would also provide benefits for leave due to the serious health condition of the employee's family member. Indiana's House Bill 1783 would provide similar coverage to Hawaii's House Bill 30, but also encompasses paid leave for the employee's own serious health condition.<sup>178</sup>

### c. Evaluation of UI's Potential to Insure Family Risks

The BAA-UC regulations are a far stretch from a system of family risk insurance. Even assuming that the regulations are legally sound, they are quite limited in scope and insure only one small area of family risks. Because the BAA-UC program is strictly voluntary on the states' part, it is also unlikely to have widespread impact. Beyond the regulations' limitations, however, are problems underlying the UI system that present serious impediments to

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174. The Department of Labor is responsible for ensuring that state laws meet all federal requirements. Failure of a state law to conform may result in denial of any credit against the federal tax for all employers in the state, denial of "additional credit" only (credit for the difference between the rate an employer actually pays under the state law and 5.4%), denial of administrative grants, or all three. See HIGHLIGHTS OF FEDERAL UI LAWS, *supra* note 131, at 3.

175. Unless otherwise noted, all further references to state legislative bills come from National Partnership for Women & Families, *State Family Leave Benefit Initiatives: Making Family Leave More Affordable*, at <http://www.nationalpartnership.org/content.cfm?L1=8&L2=1&GuideID=51&ArticleID=0> (last modified Dec. 1, 2001) and the individual state links contained therein.

176. See FMLA Technical Corrections Coalition, *Birth and Adoption Leave Compensation: Legislation in the States, 2001 Bills*, at [http://workingforthe future.org/in\\_the\\_states.html](http://workingforthe future.org/in_the_states.html) (last modified Nov. 26, 2001).

177. *Id.*

178. *Id.*

insuring family risks. Because its goals are fundamentally inconsistent with the goals of family risk insurance, and because work tests exclude those most in need of benefits, this system is a poor choice for insuring most family risks.<sup>179</sup>

The primary reason the UI system is inappropriate for insuring most family risks is that the programs have incompatible goals. Unemployment insurance is designed to provide income replacement to individuals who have incurred an involuntarily separation from their employer, but who are still willing and able to work and who are in fact seeking suitable work. While one can say that those facing family risks are also involuntarily out of work, in many cases they have not separated from their employer, but are merely absent or on leave. In most cases, those experiencing family risks are not willing and able to work, but are instead unable to work while tending to family needs. As such, these individuals typically are not actively seeking work. Furthermore, by imposing additional costs on those employers who lay employees off, UI's experience rating requirements are designed to provide employers with incentives to make more efficient use of the labor supply. In most family risk situations, the employer has no control over whether an employee leaves work. Imposing additional costs on employers would be less appropriate and more likely to result in wage discrimination. The rules, eligibility requirements, and legal precedent of the UI system have all been designed around the goal of helping individuals find new work, and that is where the system's expertise lies.

In addition, the UI system's work tests would exclude many of those workers most in need of family leave benefits.<sup>180</sup> Many states test for workforce attachment by requiring that claimants have had a minimum amount of earnings<sup>181</sup> within a specified base period, which is typically the first four of the last five completed calendar quarters before the application for benefits.<sup>182</sup> The combination of these requirements tends to disfavor those with low wages, mostly recent earnings, and those who work part-time.<sup>183</sup> These criteria

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179. Eligibility and work test requirements serve to exclude approximately 2/3 of unemployed workers from receiving benefits. *Issue Brief, Unemployment Insurance For Low-Income Families: New Challenges for Child Advocates*, *supra* note 148 (citing UNEMPLOYMENT INSURANCE SERVICE, U.S. DEP'T OF LABOR, UNEMPLOYMENT INFORMATION BY STATE FOR CY97.1, UI DATA SUMMARY (1997)).

180. All states require that claimants demonstrate attachment to the work force by working in statutorily approved employment for a specified number of hours or weeks, or earning a prescribed sum during a specified period before becoming unemployed. Maranville, *supra* note 37, at 297 (footnote omitted).

181. The minimum earnings requirement not only has a disparate impact on low-wage workers, but also can produce anomalous results. For example, a minimum wage worker might work twice as many hours as a high-wage counterpart, and yet be denied UI due to insufficient earnings while the high-wage counterpart is granted benefits (a bizarre result since the minimum wage worker has obviously demonstrated more attachment to the workforce). GRAETZ & MASHAW, *supra* note 111, at 204.

182. Maranville, *supra* note 37, at 299-300. ("Under this 'first four' base period approach, individuals whose recent work is concentrated in the current and immediately preceding quarters are unlikely to be eligible for benefits, even though they would meet the hours or earnings requirements if their most recent work were considered.")

183. GRAETZ & MASHAW, *supra* note 111, at 196.



systematically exclude women and low wage workers, who are those most likely to take time off for family needs or to need wage replacement.<sup>184</sup>

State laws regarding partial-week unemployment present another obstacle. Most states render ineligible those claimants whose earnings during a partial workweek exceed the weekly benefit amount<sup>185</sup> and many workers who work during part of a calendar week receive no benefits. Temporary absences from employment due to family risks are less likely to fall neatly in a Monday through Friday pattern than are typical unemployment situations, where employers can be expected to try to coordinate separations with the calendar week for payroll purposes. UI would be largely incapable of compensating employees who miss only partial calendar weeks for family reasons.

Making a UI system family-friendly would require extensive and costly changes. Altering the system's work tests, in an effort to increase UI eligibility of women and low-wage workers, would indeed be painting with a broad brush. Changes to the earnings and base period requirements would reach all claimants, regardless of family risks, and would entail huge cost increases.<sup>186</sup> In addition to work test changes, UI's basic pillars – separation from the employer, the “able and available” and “seeking work” requirements, and refusal of “suitable employment” – would all have to be waived in order to insure most family risks.

An alternative to universal UI reform is to create a new set of work tests and eligibility rules applied exclusively to those out of work for family reasons. This approach essentially involves the design and addition of a new insurance system and abandons UI entirely. So long as a new system is required, it is better to start on a clean slate than to work within the confines of a system that

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184. Low-income families are the least likely to have paid leave through an employer, and are also least likely to qualify for UI due to minimum earnings requirements. They are also more likely than others to work in jobs that require shift work, which makes child care problematic and contributes to frequent job loss. Also, because individuals who recently joined the work force are often ineligible for UI, low-income families' tendency to have less steady job histories excludes them for this reason. In addition, women are more likely to need leave for family reasons than are men; yet, because women earn less than their male counterparts, UI earnings rules disqualify twice as many women who leave the work force. *Issue Brief, Unemployment Insurance for Low-Income Families: New Challenges for Child Advocates*, *supra* note 148 (citation omitted). The base period requirements also exclude “women following the traditional homemaker script who are forced into the labor market by unexpected necessities until they can satisfy the work test. Similarly, many individuals who combine work and care-taking activities are likely to fail the ‘work test’ requirement at times, either because they move in and out of the work force, or because of insufficient part-time earnings.” Maranville, *supra* note 37, at 298.

185. HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 58 tbl. 22.

186. One possible modification would be to abandon the “first four” base period approach in favor of a “‘movable base period’ which allows claimants to qualify for benefits based on wages earned in a recent or current quarter.” Maranville, *supra* note 37, at 300. Another modification would be to lower the earnings threshold. Either lowering the total amount of earnings required or the total number of weeks would achieve this goal. Alternatively, a state could rely simply on a threshold number of hours worked, which would help low-wage workers qualify for benefits. *Id.* at 303.

was designed for a different purpose and that has sixty-five years of legal precedent biased against protecting family risks.

The approach to UI reform FRIP advocates is to preserve the integrity of UI's basic requirements, but to make targeted changes to accommodate those family risks that are compatible with the UI system's goals. It uses the UI system to provide wage replacement only to those workers who have suffered a complete separation from their most recent employer, and who are able, available, and actively seeking new work.<sup>187</sup>

Recognizing that the system requires some updating, FRIP also encompasses FUTA amendments to update the "voluntary quit," "able and available," and "suitable work" requirements in a manner more consistent with the needs of working families.

"[I]n all states, workers who 'voluntarily quit' their employment without good cause are disqualified from receiving unemployment benefits. To the extent that family reasons are not considered good cause, workers who leave their employment either due to family emergencies or because they are unable to comply with a change in their work schedule are disadvantaged by this requirement."<sup>188</sup> Recognizing that workers should not have to choose between their families and their incomes in times of crisis, a comprehensive system to insure family risks would ideally create a general good cause exception for workers who quit because of compelling family circumstances. At the very least, FRIP would excuse those who leave work due to domestic violence, those who must relocate with a spouse, and those who experience an FMLA-qualifying reason but are not provided job-protected leave because they don't satisfy coverage or eligibility requirements.<sup>189</sup> It also requires modifying good cause "attributable to the employer" to include circumstances where employers

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187. This accords with the Oregon Court of Appeals' position in *York v. Morgan*, 16 Or. App. 76, 517 P.2d 301, 302 (1973), which states, "While sound public policy indicates that concern for family is to be encouraged, it does not follow that unemployment compensation may be used to foster it. Unemployment compensation is designed to ease the burden of those who are generally available in the labor market but for whom no suitable gainful employment is available. It was not created to ease the burden of those who for one reason or another are not generally available."

188. *Maranville*, *supra* note 37, at 298 (footnote omitted). In cases where an employer refuses to allow an employee to take time off to attend to a family need or changes an employee's work schedule in a way that conflicts with the employee's care-giving responsibilities, the employee may be left with only two choices—to defy the directive and be fired or to resign rather than comply. In the former case, the employer will seek to disqualify the claimant for misconduct; in the latter, the employer may seek a disqualification based on a voluntary quit. *Malin*, *supra* note 10, at 136. Ironically, Professor Malin finds that the option the employee chooses is largely determinative of UI eligibility. Employees discharged for defying an employer directive fared much better in UI litigation than those who resigned from employment. *See id.* at 139. We see these anomalous results because most jurisdictions recognize family obligations as a mitigating factor precluding disqualification for willful misconduct, but do not excuse quits because the family obligation is considered "personal" and not "attributable to the employer"—even where the conflict is precipitated by employer action. *Id.* at 142-43.

189. To prevent moral hazard problems, states could adopt the Washington approach to spousal relocation, which limits UI benefits to those situations where the spouse's relocation was mandated by an employer. *See supra* note 147 and accompanying text.

refuse reasonable accommodations of family circumstances or where the employee is forced to quit work because the employer changed requirements in a way that makes care-taking arrangements unsuitable.<sup>190</sup> This good cause exception would not excuse claimants from meeting UI's other requirements, such as being able, available, and actively seeking work.<sup>191</sup>

UI availability requirements also present obstacles for family caretakers. Availability is generally "defined according to standards fitting the male breadwinner script," and workers are likely to be denied benefits unless they purport to be "available for employment on a full-time, year-round basis, regardless of the assigned shift" or the days of the work week.<sup>192</sup> Many caretakers, however, choose to or need to work part-time to accommodate family circumstances. Childcare considerations may preclude caretakers from working certain hours or days of the week. A comprehensive family risk insurance system would modify availability provisions to accommodate reasonable part-time work and shift restrictions. Some courts have addressed part-time work restrictions and provided guidance for determining availability. Following their example, FRIP would allow a claimant seeking part-time work to receive UI benefits so long as this limitation does not unduly restrict availability in light of the conditions of the surrounding market, and so long as the claimant has a reasonable opportunity to secure part-time employment.<sup>193</sup> It would apply this same standard of examining surrounding market conditions and the likelihood of finding employment when making availability determinations for workers who claim to have shift work and other similar restrictions.

In addition, employees who decline job offers due to work-family conflicts are frequently disqualified for refusal of suitable employment without just cause.<sup>194</sup> Suitability evaluations have traditionally been limited to the

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190. Malin advocates this position and develops specific recommendations for how it might be implemented. Among them is a requirement that employers make "reasonable" accommodations and have legitimate business reasons for denying employee requests. Malin, *supra* note 10, at 168-173. A rule denying benefits where the accommodation would be unreasonable or would legitimately harm the business may assuage employer concerns about operating flexibility and cost increases due to experience rating.

191. During the period in which the individual is not able and available for work, the worker may still receive benefits under other aspects of the Proposal. For example, victims of domestic violence could receive benefits under the supplemental system of insurance discussed in Part III. Individuals who are absent for reasons covered by FMLA, but who are not eligible for job-protected leave, could receive income replacement under an expanded TDI system as discussed in Section II.B.2.c.

192. Maranville, *supra* note 37, at 299 (footnote omitted). Treatment of shift availability varies across states. While a few states provide that caretakers need not be available during the "third" shift, this approach "fail[s] to address fully the broader need to accommodate domestic responsibilities for all workers." The availability of evening daycare for young children varies by locality. "[D]epending on the age and maturity of the children, the availability of other adults to assist with supervision, and the workers' own sleep patterns, the responsible adult might find the late-night shift either impossible or preferable." *Id.* at 324-25.

193. *Id.* at 322 nn.121-123 and accompanying text.

194. Malin, *supra* note 10, at 136.

position's required skill level, responsibility, and compensation.<sup>195</sup> This practice reflects a social policy determination that it is wasteful force employees into underemployment.<sup>196</sup> Social policy should also recognize that it is wasteful to use UI to force workers into employment incompatible with family circumstances. Some states already provide suitability exceptions for family circumstances, and allow workers to collect benefits either by finding that the work-family conflict renders the job "unsuitable," or by finding that the worker had "good cause" for refusing it.<sup>197</sup> FRIP would extend these nationally.

## 2. *Temporary Disability Insurance*

Another approach that might be used to insure family risks is expansion of the Temporary Disability Insurance programs found in California, Hawaii, New Jersey, New York, Rhode Island, and Puerto Rico. Some of these states are considering expanding TDI coverage to include family risks. Other states without TDI programs are considering their adoption, and would cover other family risks as well. This Section describes characteristics of TDI plans already in place, and why the TDI model is preferable to UI for insuring family risks. It then proposes a national TDI expansion for insuring family risks.

### a. Description of TDI System

Unlike the unemployment insurance system, there is no federal substantive statute providing baseline requirements with which TDI programs must comply. The only mention of TDI in a federal statute is a 1946 Social Security Act amendment allowing withdrawal of employee UI contributions for payment of disability benefits.<sup>198</sup> Most state Temporary Disability Insurance programs were created immediately after World War II, when there were UI fund surpluses. California, New Jersey, and Rhode Island took advantage of the Social Security amendment and used their employee UI contributions to start a disability income fund.<sup>199</sup>

All state TDI programs provide wage replacement to state residents who are unable to work because of a temporary, non-occupational disability.<sup>200</sup> This temporary disability requirement typically refers to the individual's inability to

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195. *Id.* at 148.

196. *Id.* at 171 (footnote omitted).

197. *Id.* at 148.

198. See HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 95. Only nine states require employee contributions. See DOL UI Law Tables, *supra* note 147, at § 600.

199. See DOL UI Law Tables, *supra* note 147, at § 615.

200. STEVE IDEMOTO, ECONOMIC OPPORTUNITY INSTITUTE, *Family Leave Insurance: A Proposal for Washington Workers*, at <http://www.econop.org/FLI-PolicyBrief2000-PublicPolicySolutions.htm#PublicPolicySolutions> (Nov. 2000).

perform his or her customary work because of a physical or mental condition.<sup>201</sup> Unemployed individuals with temporary disabilities must meet more stringent requirements, and are typically eligible only if they are unable to perform any work for which they are reasonably qualified.<sup>202</sup> Following the passage of the Pregnancy Discrimination Act<sup>203</sup> in the 1970s, TDI coverage was extended to provide benefits to women who were unable to work due to pregnancy or childbirth.<sup>204</sup> In covering these two reasons – temporary disability and pregnancy disability leave – state TDI systems provide income replacement benefits for approximately 60% of all FMLA leaves taken within the relevant states.<sup>205</sup>

Because there are no federal substantive requirements, each of the existing TDI programs is unique. The programs utilize different financing mechanisms, benefit levels, eligibility requirements and administrative bodies.

Funding methods vary across states. In Rhode Island, for example, “all contributions are paid into a pooled state fund and all benefits are paid from that fund.”<sup>206</sup> Three states have opted for a “play-or-pay” strategy rather than mandate participation in the state insurance pool.<sup>207</sup> California, New Jersey, and Puerto Rico allow employers to substitute coverage under a private plan for participation in the state fund so long as the plan receives state agency approval and meets minimum requirements.<sup>208</sup> TDI laws in Hawaii and New York require employers to take positive action to provide a minimum level of disability insurance for their workers, and allow them to collect small contributions from employees toward the cost of such coverage.<sup>209</sup> Both states also operate special funds for disability benefits to be paid to the unemployed.<sup>210</sup>

The states have used varying methods for imposing payroll taxes, with some requiring employer contributions, some employee contributions, and some collecting from both sources. In any scenario, contributions are very small. The California system is financed entirely by employee premiums. The contribution rate is currently 0.9% and applies to all wages up to a maximum of

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201. *DOL UI Law Tables*, *supra* note 147, at § 605.

202. *Id.*

203. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

204. IDEMOTO, *supra* note 200.

205. See BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, *supra* note 47, at 2-5 tbl.2.3.

206. *DOL UI Law Tables*, *supra* note 147, at § 615.01.

207. *See id.*

208. In order to opt-out of the state fund, “California law requires that private plans provide benefits rights greater than those under the State plan in all respects. In Hawaii, New Jersey, and Puerto Rico, private plan benefit must be at least as favorable as those under State plans.” *Id.* at § 620.06.

209. In Hawaii, “private plan benefits must be at least as favorable” as the state plan, but deviations are allowed so long as benefits provided “are actuarially equal or better. In New York adherence to a statutory formula is not required,” but “[b]enefits must be actuarially equivalent to the statutory formula. Cash benefits in the formula . . . may be reduced if the plan of insurance includes a shorter waiting period or other benefits, such as hospitalization benefits.” *Id.*

210. *Id.* at § 615.01.

\$46,327 per employee per calendar year.<sup>211</sup> Employees in Rhode Island finance the system through a payroll tax of 1.3% on all earnings up to a maximum of \$38,000.<sup>212</sup> In New Jersey, employees pay 0.5% “on wages up to the taxable wage base,” with employers contributing an additional 0.5% subject to experience rating.<sup>213</sup> In New York, employers are required to provide insurance, but employees may be required to contribute 0.5% of wages, up to \$.60 per week.<sup>214</sup> “Employee contributions in Hawaii are limited to half the cost of providing benefits,” but may not exceed 0.5% of weekly earnings.<sup>215</sup> Those “[e]mployees covered by private plans in California, New Jersey and Puerto Rico cannot be required to pay higher contributions than they would pay to the State fund,”<sup>216</sup> but employees in New York may be required to contribute more if the additional private benefits exceed the statutory formula and “warrant the additional cost.”<sup>217</sup> These relatively low contribution rates can be partially attributed to interest earned on the amounts placed in the disability funds early in the programs’ histories.<sup>218</sup>

TDI administration also varies across states. The most popular approach is to administer TDI in conjunction with the state’s UI program, with California, New Jersey, Puerto Rico, and Rhode Island selecting this option.<sup>219</sup> New York, in contrast, has linked the program to workers’ compensation insurance, and the workers’ compensation board administers its program.<sup>220</sup> Hawaii takes a different approach, and administers its program through a TDI division of the state Department of Labor and Industrial Relations.<sup>221</sup>

The benefits formula is another source of variation. In some cases, TDI simply adopts the state’s UI benefits formula verbatim. Hawaii and New Jersey, for example, pay unemployed workers with temporary disabilities

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211. California Employment Development Department, *Contribution Rate*, at <http://www.edd.ca.gov/disdi.htm#Rate> (last visited Mar. 22, 2002).

212. *DOL UI Law Tables*, *supra* note 147, at § 615.02.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at § 620.06.

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The separate New Jersey program for disability during unemployment for example is financed principally by interest on employee contributions withdrawn from the unemployment trust fund. . . . Hawaii levied a temporary contribution rate of 0.2 percent on the taxable wages of subject employers from July to December 1969 in order to establish the Special Disability Fund from which benefits are paid during unemployment. . . . In New York a temporary contribution from January 1 to July 1, 1950, of 0.1 percent on the first \$60 weekly wages by both employers and employees (i.e. not more than 6 cents a week each) established the fund from which benefits first were paid during unemployment. This fund has been maintained at \$12 million (by statute) by interest earned on the fund, by certain fines and penalties, and when necessary, by an [additional] assessment.

*Id.* at §615.03.

219. *Id.* at § 600.

220. *Id.*

221. *Id.*

exactly as if they were eligible for UI.<sup>222</sup> In other cases, states have adopted benefit formulas unique to TDI. This approach is used in California, New York, Rhode Island, and for employed workers in Hawaii and New Jersey.<sup>223</sup> The benefit levels demonstrate great variability in terms of reimbursement levels and caps.<sup>224</sup> Benefit levels may be equal to, more than, or less than UI depending on the state.

In several states, TDI eligibility is broader than UI eligibility due to more generous work tests. California, for example, uses the “first four” method to measure the base period, but claimants are required to have only \$300 of earnings during the base period (approximately one-fourth of the earnings required for UI).<sup>225</sup> In Hawaii, claimants must have worked half-time for at least fourteen weeks to be eligible, and the state’s “first four” UI base period is abandoned in favor of the four quarters immediately preceding the disability.<sup>226</sup> Puerto Rico expands eligibility by making TDI minimum earnings requirements equal to approximately half those required for UI.<sup>227</sup> In New York, any employee who has worked for four or more consecutive weeks qualifies for TDI benefits.<sup>228</sup>

All of the programs require a seven-day waiting period.<sup>229</sup> The states differ, however, in how this waiting period is applied. In some states, it must be satisfied at the beginning of each disability period, while in others it must be satisfied only once per benefit year.<sup>230</sup> In some cases, the TDI and UI waiting period are satisfied simultaneously.<sup>231</sup>

The duration of TDI benefits varies as well. The most generous state is California, which provides benefits for a maximum of fifty-two weeks. Rhode Island provides thirty weeks of benefits, and Hawaii, New Jersey, and New York all provide benefits for a maximum of twenty-six weeks.<sup>232</sup>

Workers who are absent for a partial week are more likely to receive benefits under TDI than UI. Employees who have satisfied the waiting period are compensated for each day of disability, at a rate that is a fraction of the weekly benefit rate. In Rhode Island, the daily rate is one-fifth of the weekly

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222. *See id.* tbl.600.

223. *See id.*

224. California pays “55% of previous wages up to \$490 per week,” Hawaii pays “58% of previous wages up to 121% of the state average weekly wage,” New Jersey “pays two-thirds of previous wages up to \$401 per week,” New York pays “50% of previous wages up to \$170 per week,” and Rhode Island pays “4.62% of [the employee’s] high quarter wages up to \$487.” IDEMOTO, *supra* note 200.

225. *See DOL UI Law Tables, supra* note 147, at tbl.600.

226. *See DOL UI Law Tables, supra* note 147, at tbl.600; HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 45 tbl.16.

227. *See DOL UI Law Tables, supra* note 147, at tbl.600; HIGHLIGHTS OF STATE UI LAWS, *supra* note 132, at 48 tbl.17.

228. *See DOL UI Law Tables, supra* note 147, at tbl.600.

229. *Id.*

230. *See id.*

231. *See id.*

232. *Id.* § 620.03.

rate and in California, New Jersey, and Puerto Rico, it is one-seventh of the weekly rate.<sup>233</sup> Hawaii and New York compute a daily rate for each claimant based on the employee's normal number of workdays per week.<sup>234</sup>

b. Proposals to Expand TDI

Several states with TDI have considered expanding their programs to cover FMLA-eligible reasons. In 1999, California passed a law to study the cost of extending the state's TDI program to include employees taking FMLA leave. New Jersey introduced two bills in 2000 that would award TDI benefits for FMLA leave—one covering all FMLA reasons (A.B. 1577) and another covering only serious health conditions of a family member (A.B. 2037). New York introduced several TDI bills in 2001 that would have covered leave for FMLA reasons (S. 4473, A. 7405, A. 7453).

This method of family insurance has also caught the eye of state legislatures in New Hampshire, Massachusetts, Hawaii, and Washington. In April 2000, New Hampshire passed a law establishing a committee to study options for insuring family risks.<sup>235</sup> In 2001, House Bill 744 was considered in that state, which would create a state TDI system and pay benefits for FMLA absences for up to twenty-six weeks.<sup>236</sup> The system would require a one-week waiting period, after which benefits would be paid at a level equal to 60% of prior wages (capped at 57.5% of the state average weekly wage).<sup>237</sup> The New Hampshire system would be administered in conjunction with UI, and would be financed by an employee payroll tax.<sup>238</sup>

Massachusetts Senate Bill 744 would create a system of temporary disability benefits covering up to twelve weeks for birth, adoption, or to care for a seriously ill family member, and up to twenty-six weeks for an employee's own serious health condition.<sup>239</sup> Benefits would be funded through employer contributions to a new fund called the Employment Security Trust Fund.<sup>240</sup> Benefits would be paid at the level of 66% of an employee's average

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233. *Id.* § 620.05.

234. *Id.*

235. See National Partnership for Women & Families, *Work and Family: New Hampshire*, at <http://www.nationalpartnership.org/content.cfm?L1=8&L2=1&GuideID=51&ArticleID=22> (last visited Apr. 21, 2002).

In December 2000, the committee issued a report reviewing TDI programs in other states and estimating the average weekly cost for starting such a program in New Hampshire at \$1.83 per covered employee. *See id.*

236. *See id.*; H.R. 744, 157th Leg. (N.H. 2001) §275-F:2(II).

237. *See* H.R. 744, 157th Leg. (N.H. 2001) § 275-F:3(III).

238. *See id.* § 275-F:6(II).

239. See National Partnership for Women & Families, *State Initiatives: Making Family Leave More Affordable*, at <http://www.nationalpartnership.org/workandfamily/fmleave/flinsur.htm> (last modified Mar. 29, 2001).

240. *See id.*



weekly wage (capped at 57.5% of the state average weekly wage).<sup>241</sup> The proposed program would be administered through the UI system, but would allow employers to provide qualifying private plans and opt-out of the state insurance fund.<sup>242</sup>

Hawaii's House Bill 31 would finance its proposed program by a tax imposed on both employers and employees, with each contributing one cent per hour.<sup>243</sup> This system would have a one-week waiting period, a maximum payment of \$250 per week, and would be administered in conjunction with the workers' compensation system.<sup>244</sup>

Washington's Senate Bill 5420 is similar in many respects to Hawaii's proposed program.<sup>245</sup> Provision of family leave benefits would be financed by a tax imposed on both employers and employees, with each contributing one cent per hour.<sup>246</sup> To qualify, individuals would have to work at least 520 hours in the qualifying year<sup>247</sup> and satisfy a one-week waiting period.<sup>248</sup> Additionally, applicants would have to comply with notice requirements and make efforts not to disrupt the employer's operations.<sup>249</sup> Benefits would be payable up to five weeks per year<sup>250</sup> at the rate of \$250 a week, and part-time workers would receive a prorated amount.<sup>251</sup> Individuals with paid family leave benefits from an employer or private disability insurance would be able to elect whether to first receive private benefits or those from the state program,<sup>252</sup> and self-employed individuals would be able to elect coverage.<sup>253</sup> The program would be administered by the Department of Labor and Industries, which also administers the state's workers' compensation and family leave laws.<sup>254</sup>

### c. Evaluation of TDI's Potential to Insure Family Risks

The TDI system is an attractive method for insuring family risks. Expanding this system would fill a void left by federal social insurance systems. Because disabled individuals are not eligible for Social Security Disability Insurance until after they have been disabled for five months, and because private disability insurance is limited in availability due to market

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241. *Id.*

242. *See* S. 744, 182nd Leg. (Mass. 2001) §§ 6(1)(a)-(b); 4(1)(a)-(d); 3.

243. *See* H.R. 31, 21st Leg. (Haw. 2001) § 2.

244. *See id.* §§ 1, 2.

245. S. 5420, 57th Leg. (Wash. 2001).

246. *See id.* § 21(1)(a).

247. *See id.* § 4(2).

248. *See id.* § 7(1).

249. *See id.* §§ 4(6)(a), (b), (b)(ii).

250. *See id.* § 7(1).

251. *See id.* § 8(1).

252. *See id.* § 9(2).

253. *See id.* § 13(1).

254. *See id.* § 2(4).

failure, there is no safety net for many Americans who become temporarily disabled and leave the work force.<sup>255</sup> Existing TDI programs already cover approximately sixty percent of FMLA absences and do so at low cost. Expanding coverage to the remaining FMLA categories would require small additional costs and would capitalize on an existing system of eligibility and administration.<sup>256</sup>

When compared with UI, TDI provides a superior model for insuring family risks. For example, TDI's goals are more compatible with family risks than are those of the UI system. Whereas UI's objective is to provide wage replacement to enable a claimant to search for suitable work, TDI provides wage replacement to allow a worker to remain out of work while he or she resolves a problem impeding work force participation. TDI's more generous eligibility requirements are also more likely to reach those who are most in need of family risk insurance – women and low-wage workers—because its work tests accommodate lower wages, recent earnings, and part-time work. The TDI system also utilizes an employee contribution, which is appropriate for family risks because they are more within an employee's control than the risk of involuntary unemployment.<sup>257</sup> The TDI system, unlike UI, has no complicating body of legal precedent that is biased against those most in need of leave. TDI has no availability rules excluding those working part-time or with restricted shift availability. The mechanism for compensating for partial-week absences is also more suitable, since it is more likely to provide benefits to those with partial-week absences. As evidenced by several states, TDI can be administered in conjunction with UI, in order to capitalize on an existing system.

California, New Jersey, and Puerto Rico also provide an excellent model for employer participation. Their “play or pay” model, which exempts employers from contributions if they provide benefits equal to or better than the state mandate, would preserve the incentive for employers to provide different

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255. Professor Hartmann speculates that this is again rooted in the male breadwinner assumption underlying many social insurance programs. She explains that if you assume the woman in the family is not working, then you assume she can go to work and take care of family income when the man is temporarily ill. See Symposium, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, 49 AM. U. L. REV. 851, 872-873 (2000).

256. The National Partnership for Women & Families has gathered cost estimates from several studies that examined the costs of expanding these three state TDI systems to cover all FMLA absences. They estimate that the expansion would cost between \$.07 and \$.21 per covered worker per week in New York, between \$.85 and \$.89 in New Jersey, and \$1.45 in California. The study ordered by the California state legislature estimated costs at only \$.88 per worker per week. National Partnership for Women & Families, *Summary Charts: Estimated Cost of Expanding State Unemployment Insurance (UI) or Temporary Disability Insurance (TDI) Programs to Cover Periods of Family and Medical Leave*, at <http://www.nationalpartnership.org/workandfamily/fmleave/expansion/uitdichart1.htm> (last visited Mar. 29, 2002).

257. Whenever a risk is partially within the insured's control, moral hazard becomes a concern, and is better controlled if the insured faces the possibility of increased premiums if the insurance is over-utilized.

and better benefits, while providing small employers with a competitive group plan for their employees. FRIP would allow this option, however, only for the portion of premiums attributable to insuring the employee's own disability.<sup>258</sup> This would encourage employers to provide group disability insurance and implement cost-effective disability management programs, which may in turn reduce employer costs and assist in employee rehabilitation. It would not allow an opt-out for the portion of premiums attributable to other family leave benefits. One factor influencing this determination is that employer-based benefits specifically for paid family leave are practically non-existent. Even more important is the employer perception that family leave benefits are a "women's issue." Under Jolls' framework for accommodation mandates discussed in Section II.A.2.c., employers directly providing this benefit are likely to shift the costs to female workers in the form of lower wages. By imposing the same costs on an employer regardless of how its employees utilize benefits, this limitation would remove any employer incentive for wage discrimination.<sup>259</sup> Disability benefits are less often perceived as a "women's issue," and so are less likely to produce discriminatory wage effects if self-insured. Furthermore, FRIP would allow self-employed individuals the option to join both insurance pools.

Ideally, FRIP would be implemented by creating a federal TDI program providing wage replacement for all absences listed as qualifying reasons in the FMLA (with the exception of its new requirement for twenty-four hours of leave for educational activities and medical appointments, which would remain unpaid). A national program is preferable for the purpose of equity, so that all Americans are provided with this important safety net. A federal substantive statute would avoid the variety in program design that exists in the UI system, which has resulted in a "race to the bottom," discriminating against workers facing family risks. FRIP limits the use of this system to FMLA-qualifying risks, because national consensus holds that these risks deserve federal support and protection, and a majority of employees are already guaranteed job-protected leave for such absences. Providing income replacement to workers through social insurance should not greatly increase costs for employers covered by the FMLA, since, at most, they should expect to see an eleven percent increase in leave take-up rates.<sup>260</sup> Those employers not covered by FMLA may also see an increase in absenteeism due to provision of paid

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258. Employers opting out of participation in the disability risk pool would still be charged a small portion of the premium. This would help defray the increased costs that the pool will experience if the lowest-risk employers opt out.

259. See *supra* notes 101-104 and accompanying text.

260. This estimate is based on the earlier discussion of the number of employees needing family leave. Since one in eight employees (about 12.5%) who need family leave do not take it because they cannot afford it, and 88% indicated that they would take leave if some pay were provided, we would expect to see an 11% increase in take-up rates if pay were provided through a social insurance system. See text accompanying notes 50-53.

benefits to their employees. Nevertheless, this effect should be minimal, and moral hazard should be limited for this population because these workers' leaves are not job-protected and these workers may lose their jobs even if collecting benefits.<sup>261</sup>

Because Congress may not yet be ready to provide a national paid-leave program, FRIP would include a phased-in TDI expansion by initially encouraging states to experiment with TDI for insuring family risks. Because employers, employees, and the larger society all benefit when workers receive paid leave benefits, all three would share in the funding. To promote experimentation, federal funding would be provided out of general revenues to participating states, as provided for in FIRST.<sup>262</sup> FIRST grants would be supplemented with payroll contributions from both employers and employees. While FRIP does not include a precise recommendation as to the amount of the payroll tax, it would be structured as a percentage of employee wages, similar to the TDI systems today. In order to protect low-income workers unable to afford additional payroll taxes, FRIP would exempt workers making less than a specified amount, perhaps workers at or slightly above the poverty level, from contributing. It would also structure benefit payments as a percentage of prior earnings, but would provide a minimum benefit level to insure income adequacy and would cap payments at some multiple of the state's average weekly wage. In relation to this cap on benefit levels, FRIP would likewise place an upper cap on taxable earnings, so that high-income employees do not make contributions far exceeding their expected benefits. Before benefits could be paid, claimants would have to satisfy a one-week waiting period within the benefit year. This combination of incomplete wage replacement and a waiting period are necessary to combat moral hazard considerations. The Proposal also follows Massachusetts' lead and would provide up to twenty six weeks of benefits for temporary disability (protecting the worker during the period preceding SSDI eligibility) and twelve weeks of benefits for other family risks (corresponding with the FMLA).

In order to defray costs associated with replacing absent workers, FRIP would use a portion of TDI benefits to reimburse those employers whose workers collected benefits, if those employers are not covered by the FMLA.<sup>263</sup>

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261. Under the Proposal, workers who collect benefits under this program would become eligible for UI benefits at the time they became able and available for work if denied reinstatement by the prior employer. See note 191 and accompanying text.

262. FRIP would also allow states to withdraw a portion of UI fund surpluses in order to start a TDI program. This could reduce the payroll taxes because the surpluses would accumulate interest that could offset program costs. See *supra* note 218 and accompanying text.

263. This idea is based on Issacharoff and Rosenblum's proposal to provide a similar benefit to employers whose employees receive pregnancy benefits through UI. Since firms suffer costs in terms of lost production or the need to pay for temporary labor, their proposal would have paid employers a contribution when workers leave due to pregnancy. This proposal would both defray replacement costs and eliminate disincentives to hire females of childbearing age. The greater the specialization of job skills, the greater the benefits that would go to the firm, as a reflection of the presumptively higher costs

This effort should assist small employers who incur replacement costs, and should help justify their contributions and reduce their tendency to shift the payroll tax to workers in the form of reduced wages.<sup>264</sup>

For ease of administration, FRIP would be administered in conjunction with the UI system. This would allow claimants to file a single application for benefits under either program, and to easily transition between TDI and UI as their eligibility and availability for work change. Although new employees and computer systems would be required, and administration costs would need to be funded from the taxes generated from the TDI system, this combination would have the benefit of a trained work force of administrators already in place.

Admittedly, combining family risk insurance with TDI will present the system with new problems and will require new solutions. Whereas moral hazard in disability can be combated with close medical monitoring and second opinions, moral hazard in family risks may be harder to deal with. However, by limiting the family risks insured by this system to those covered by the Family and Medical Leave Act—birth, adoption or placement of a child, or a serious health condition of an employee or family member—the system retains this ability to rely on medical science for most determinations. Those events that are not medically determinable—adoption or placement—are legally determinable. By limiting insurance coverage to these risks, the system may continue to rely on independent professionals to make the initial certification of eligibility, and may use independent examinations and monitoring to ensure continued compliance.

### 3. *Temporary Assistance to Needy Families (TANF)*

Whether a UI model or a TDI model is used to insure family risks, there will always be families who do not qualify for insurance because they fail to satisfy the work tests. Since the 1930s, America has provided a safety net for poor individuals with children who are out of work and do not qualify for other forms of social insurance.<sup>265</sup> Throughout much of the twentieth century, this safety net was primarily associated with the program known as Aid to Families with Dependent Children (AFDC). In 1996, with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),<sup>266</sup>

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of providing replacements. Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2218-19 (1994).

264. Employers opting to self-insure their disability benefits would remain eligible for this provision, since they would still be contributing a portion of the premium.

265. Approximately 9% of all families taking FMLA leave, and 20% of low-income families taking such leave, resort to such public assistance in order to survive during periods of unpaid leave. A WORKABLE BALANCE, *supra* note 89, at 110-111 & fig. 5.12.

266. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 8, 42 U.S.C.).

Congress replaced AFDC's federal-state match with a system of federal block grants under a replacement program known as Temporary Assistance to Needy Families (TANF). This Section does not examine details of benefit provisions under TANF, but instead examines how the system's block grant and Maintenance of Effort (MOE) structure might be used to create a new safety net for low-income families incurring family risks.

a. Description of TANF System

The TANF system "[p]rovides time-limited assistance to needy families with children to promote work, responsibility, and self-sufficiency."<sup>267</sup> Under the new system, each state is eligible to receive a block grant of federal TANF funds, with which it designs and operates a program to accomplish the purposes of TANF.<sup>268</sup> The amount of each state's block grant was based upon federal welfare spending in a base period, which was the higher of spending levels in 1994, 1995, or the 1992-94 spending average.<sup>269</sup> In order to continue receiving grants at this level, states have to meet Maintenance of Effort (MOE) requirements by continuing state spending at a level equal to eighty percent of their base period AFDC expenditures.<sup>270</sup>

Sustained economic growth throughout the late 1990's, combined with changes to federal and state welfare policies during the same period, have led to significantly reduced welfare caseloads in most states.<sup>271</sup> Meanwhile, the level of federal TANF block grants, based on the historically high caseload and spending levels of the mid-1990's, have remained constant.<sup>272</sup> This combination of reduced caseloads and fixed funding has led to a situation where available funds exceed amounts needed to fulfill existing TANF program commitments.<sup>273</sup>

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267. ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *Home Page*, at <http://www.acf.dhhs.gov/programs/acfdps/index.htm> (last visited Mar. 22, 2002).

268. *Id.* The purposes of TANF include: (1) providing assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) ending the dependence of needy parents on government benefits by promoting job preparation, work and marriage; (3) preventing and reducing the incidence of out-of-wedlock pregnancies and establishing annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encouraging the formation and maintenance of two-parent families. See 45 C.F.R. § 260.20 (2000).

269. MARK H. GREENBERG, CENTER FOR LAW AND SOCIAL POLICY, BEYOND WELFARE: NEW OPPORTUNITIES TO USE TANF TO HELP LOW-INCOME WORKING FAMILIES 4 (1999), available at <http://www.clasp.org/pubs/TANF/markKELLOGG.htm>.

270. *Id.* This level is reduced to 75% for states that satisfy the Act's work participation rate requirements. See MARK H. GREENBERG & STEVEN SAVNER, CENTER FOR LAW AND SOCIAL POLICY, A BRIEF SUMMARY OF KEY PROVISION OF THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT OF H.R. 3734 (THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996), available at <http://www.clasp.org/pubs/TANF/clbskp.html>.

271. CENTER ON BUDGET AND POLICY PRIORITIES, REINVESTING WELFARE SAVINGS: AIDING NEEDY FAMILIES AND STRENGTHENING STATE WELFARE REFORM 1 (1998), available at <http://www.cbpp.org/330rein.htm>.

272. *Id.*

273. *Id.*

These surpluses create opportunities to move to the “next stage of welfare reform.”<sup>274</sup> Proponents of the 1996 law maintained that the new structure of block grants would institute a “virtuous cycle,” whereby states achieving caseload declines would be able to reinvest the resulting savings in programs to expand help for low-income families and to assist harder-to-employ individuals.<sup>275</sup> This block grant structure is authorized through 2002, and it remains uncertain what Congress will do to the program’s structure during reauthorization.<sup>276</sup> The best way to ensure sustained funding after 2002, however, would be for states to use the currently available funds in a constructive way that helps low-income families.<sup>277</sup>

#### b. Proposals to Expand TANF

Each state has considerable discretion in spending its surplus funds, as long as the spending is consistent with TANF’s purposes. Several public policy organizations have suggested that these welfare reinvestment funds be used to fund wage replacement for low-income individuals taking family leave. In its Proposal for Paid Family Leave, the Economic Opportunity Institute (EOI) explored the idea of using part of Washington state’s \$200 million TANF surplus to fund a system of paid family leave for low-income workers.<sup>278</sup> The National Association of Child Advocates suggests using TANF or MOE dollars for a similar purpose, by creating an alternative UI system. This system would incorporate many of UI’s current features, but would base labor force attachment on more recent earnings, require a lower earnings threshold, and would incorporate job loss standards more consistent with the experiences of low-income workers with children.<sup>279</sup> The Illinois state legislature considered, but failed to pass, a proposal to use state MOE funds for this purpose in 1997.<sup>280</sup>

#### c. Evaluation of TANF’s Potential to Insure Family Risks

States may spend block grant and MOE funds “in any manner reasonably calculated to accomplish the purposes of TANF.”<sup>281</sup> Using welfare

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274. *Id.*

275. *Id.*

276. GREENBERG, *supra* note 269, at 4. At least two bills have already been introduced to address the renewal of the TANF program. H.R. 3113, 107th Cong. (2001); H.R. 3625, 107th Cong. (2001).

277. GREENBERG, *supra* note 269, at 4.

278. See ECONOMIC OPPORTUNITY INSTITUTE, *A PROPOSAL FOR PAID FAMILY LEAVE: FUNDING FAMILY LEAVE TO BOLSTER FAMILY VALUES* (1999), at <http://www.econop.org/pflbrief.htm>.

279. See National Association of Child Advocates, *supra* note 145 (citing CENTER ON BUDGET AND POLICY PRIORITIES, *REINVESTING WELFARE SAVINGS: AIDING NEEDY FAMILIES AND STRENGTHENING WELFARE REFORM* (1998)).

280. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 271, at 14.

281. GREENBERG, *supra* note 269, at 5.

reinvestment funds to insure family risks for low-income workers would meet two of TANF's objectives. The first purpose, assisting needy families so that children may be cared for in their own homes or in the homes of relatives, would be accomplished by allowing new parents to care for children following birth, adoption, or illness. The second purpose, promoting job preparation, work and marriage, would be furthered because evidence shows that workers who receive income during periods of FMLA leave are far more likely to return to work than those who were unpaid.<sup>282</sup>

Funds dedicated to such a program would need to be spent on "needy families," which include only those in which a child is living with a relative and the family meets state financial eligibility standards.<sup>283</sup> States have discretion in determining appropriate income eligibility limits, and may set different caps for different programs. Thus, income limits for family risk insurance could be set at levels substantially higher than the basic TANF cash assistance program, and could reach a greater segment of the low-income population.<sup>284</sup>

An important consideration in system design is selecting the precise source of funding. There are three basic funding options for utilizing welfare reinvestment dollars: (1) commingling federal TANF and state MOE funds in a single program, so that each family's assistance is funded with a mixture of state and federal funds; (2) segregating state from federal funds in the state's TANF program, so that among families in the program, some families are receiving federally-funded TANF assistance and some families are receiving state-funded MOE dollars; or (3) expending state MOE funds in a separate state program that receives no federal TANF funds.<sup>285</sup> The funding decision plays a key role because it determines whether recipients will be subject to federal TANF program requirements. In the first option (commingling), recipients are counted as part of the state's welfare caseload and subject to all federal TANF requirements, including the sixty-month lifetime assistance limit, work and participation requirements, and the requirement to assign child support to the state.<sup>286</sup> In the second option (segregation), families receiving only state MOE

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282. See *supra* note 168 and accompanying text.

283. GREENBERG, *supra* note 269, at 6.

284. *Id.*

285. STEVE SAVNER & MARK GREENBERG, CENTER FOR LAW & SOC. POLICY, THE NEW FRAMEWORK: ALTERNATIVE STATE FUNDING CHOICES UNDER TANF 1-2 (1997), available at <http://www.clasp.org/pubs/TANF/fnlfsnd.html>.

286. See *id.* at 2. Although the TANF regulations promulgated in 1999 waive this requirement for certain "non-assistance" benefits provided with TANF funds, it is not clear that family risk insurance would fall within any of the exceptions. The only exclusion that might encompass this program is that excluding non-recurrent short-term benefits that are designed to deal with a specific crisis situation or episode of need, are not intended to meet recurrent or ongoing needs, and that will not extend beyond four months. See MARK GREENBERG & STEVE SAVNER, CENTER FOR LAW & SOC. POLICY, THE FINAL TANF REGULATIONS: A PRELIMINARY ANALYSIS 3 (1999), available at <http://www.clasp.org/pubs/TANF/finalregs.html>. Because many family risks are recurrent, they would probably run afoul of the exception.



funds are not subject to the federal time limits, but are still considered part of the caseload and are subject to work and child support requirements.<sup>287</sup> In the third option (separation), the recipients are not considered “welfare recipients” or part of the state’s caseload, and none of the federal TANF requirements apply.<sup>288</sup>

The third funding approach would be the most appropriate for family risk insurance because it would enable states to reach a broader range of low-income families without adding to welfare caseloads or subjecting recipients to onerous requirements. This option would avoid the 60-month lifetime limits, and would allow states to provide income assistance to those who experienced a family risk after exhausting TANF eligibility. There should be little net cost to the system, since many of the workers receiving benefits under this new program would otherwise receive cash assistance under the state’s basic TANF program.

Providing an extra safety net for low-income workers is a sensible addition to a national family policy because this group is least likely to be able to self-insure and least likely to have employer provided benefits.<sup>289</sup> Furthermore, work force attachment requirements make them least likely to be eligible for UI or TDI assistance. FRIP would use such a system both to fill in the gaps where workers do not meet income requirements for UI or TDI, and to provide income replacement to low-wage workers whose employers do not provide pay during the short-term absences for which it would otherwise require self-insurance, if they exceeded ½ day in duration. While these absences, described as “emergency care” and “appointments” in Section I.D., may present more moral hazard risks than FMLA absences, most could easily be certified by a third-party professional as genuine and as requiring the employee’s presence. FRIP would drop from the list those risks that cannot be certified in this manner, because they present moral hazard risks too great for insurance. For example, attendance at school and community activities for the educational advancement of a child, while desirable, simply is not insurable because there is no objective criteria that could be used to determine whether a parent’s attendance was required, and because the personal consumption element would be too great.

In order to simplify administration, FRIP would combine administration of this program with UI and TDI. Again, a claimant could fill out a single application for benefits, and be seamlessly routed to the appropriate program and insurance fund. Administrators with an expertise in family risks would all be located within a single agency. Furthermore, by using state MOE dollars

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287. *Id.* at 2-3.

288. *Id.* at 3; see also GREENBERG, *supra* note 269, at 8.

289. See ECONOMIC OPPORTUNITY INSTITUTE, *supra* note 278.

and administering the program in this manner, applicants would avoid the stigma that they might otherwise associate with the receipt of welfare funds.

#### 4. *Tax Subsidies*

An alternative to creating new funds and administrative programs would be to provide income replacement through the income tax system. The use of tax incentives to promote social insurance goals is politically popular because, in the words of Professors Graetz and Mashaw, it offers "a way for government to 'sponsor' social insurance without making 'government' appear bigger."<sup>290</sup> This Section describes some tax incentives currently used to promote social insurance goals and their effectiveness. It then explores the implications of using tax incentives to provide family risk insurance, and ultimately concludes that this would be both inequitable and ineffective.

##### a. Description of Programs Currently Funded by Tax Subsidies

Tax incentives are a component of several social insurance programs. They are used, for example, to subsidize health insurance, old age pensions and childcare. The tax incentives provided by these three programs may be divided into two categories: (1) those designed to promote voluntary sponsorship of employer benefit plans, and (2) those providing a direct taxpayer subsidy.

Employers are encouraged to provide fringe benefits to their workers through tax code provisions that not only allow the employer to deduct the cost of premiums as a business expense, but also exclude the employer contributions from payroll taxes such as social security.<sup>291</sup> From an employee's viewpoint, employer premium contributions for health insurance are also excludable from gross income.<sup>292</sup> Contributions to a "qualified" pension plan are also excluded from gross income at the time of contribution, and contributions and investment returns become includable in the employee's income only at the time of subsequent distribution from the plan, thus allowing benefits to accrue more quickly over the employee's lifetime.<sup>293</sup> The Internal Revenue Code also includes provisions excluding from gross income money contributed to an employer-sponsored flexible spending account to fund dependent care

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290. GRAETZ & MASHAW, *supra* note 111, at 55.

291. See MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 113 (3rd ed. 1995).

292. See, e.g., I.R.C. § 106 (a). "Because of the tax advantages, employers find that about 65 cents of additional health coverage is worth as much as a dollar of cash wages for most of their employees, and, as a result, have preferred paying additional wages in the form of expanded health benefits." Graetz, *supra* note 105, at 82.

293. See, e.g., I.R.C. § 401 (a), (k); see also EMPLOYEE BENEFITS RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55 (5<sup>th</sup> ed. 1997).

expenses.<sup>294</sup> Some states also provide tax incentives to encourage employer sponsorship of childcare.<sup>295</sup>

The Code also provides tax subsidies that may be claimed by individual taxpayers for expenditures on health insurance, pension savings or childcare. Section 213 of the Code, for example, allows individuals to deduct from income the cost of health insurance premiums and other medical expenses exceeding 7.5% of Adjusted Gross Income.<sup>296</sup> Several types of Individual Retirement Accounts (IRAs) are also granted special tax treatment.<sup>297</sup> In the traditional IRA, for example, eligible taxpayers may claim a deduction up to \$3000 per year for contributions to the account, and income accruals are exempt from taxation until the time of distribution. Dependent care expenses are subsidized by allowing individual taxpayers to claim a tax credit for expenses, ranging from 20-30% of eligible expenses, depending on income. Up to \$2,400 of expenses for one child, or \$4,800 for two or more children, may be eligible under this provision.<sup>298</sup>

#### b. Proposals to Expand Tax Subsidies

A few states have explored the use of tax incentives to promote employer provision of family risk insurance. In 2001, the Hawaii state legislature considered House Bill 89, which would provide a tax credit to employers providing paid family leave.<sup>299</sup> The credit would be refundable and would reimburse a percentage of salary expenses for up to four weeks of leave, with a maximum cap per employee.<sup>300</sup> Likewise, Missouri considered Senate 453, which would have provided tax credits to employers that provide paid maternity leave.<sup>301</sup> Minnesota and Illinois are considered similar programs, but described them as “reimbursement” programs rather than tax credits. Under Minnesota’s House 1623 and Senate 1617, employers would be reimbursed for

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294. I.R.C. §§ 125 (allowing employers to provide employee benefits via a “cafeteria” plan), 129 (describing dependent care assistance programs). Employers sponsoring cafeteria plans may allow employees to set aside up to \$5,000 of tax-exempt income to be spent during the tax year on qualifying dependent-care expenses.

295. Gisele Sered, *Student Paper: Day Care and Tax Policy*, 12 AM. J. TAX POL’Y 194 n.183 and accompanying text (1995).

296. I.R.C. § 213.

297. The Internal Revenue Code provides for several types of IRAs, including traditional, Roth, educational and medical accounts. In the traditional IRA, individuals meeting statutory requirements are allowed to deduct up to \$3000 per year from income for contributions to the account. Investment returns accrue tax free until time of distribution. See I.R.C. § 408. A recent addition is the Roth IRA. In this arrangement, contributions are not deductible from income, but investment returns accrue tax-free, and are not taxed at the time of distribution. See I.R.C. §408A.

298. See I.R.C. § 21.

299. See H.R. 89, 21<sup>st</sup> Leg. (Haw. 2001).

300. See *id.* § 2.

301. See National Partnership for Women & Families, *Work and Family: Missouri*, at <http://www.nationalpartnership.org/content.cfm?L1=8&L2=1&GuideID=51&ArticleID=19> (last visited Apr. 21, 2002).

50% of their expenses of providing paid birth or adoption leave, with special reimbursement incentives for low-wage workers.<sup>302</sup> Illinois' House Bill 497 would reimburse up to \$250 per worker each week for up to twenty-six weeks.<sup>303</sup> Professors Twomey and Jones also suggest that family leave benefits might be provided through "tax deductions or benefits either on the part of the employer or the employee which would minimize the expense of paid leave for that party."<sup>304</sup>

### c. Evaluation of Tax Incentives' Potential to Insure Family Risks

Using tax subsidies as a method of social insurance offers several advantages. This type of program has the appearance of making government smaller, both by decreasing the size of the income tax revenues, and by avoiding the appearance of spending that accompanies appropriations bills. Furthermore, tax subsidies do not noticeably increase the size of the federal government's payroll, because programs financed in this manner rely exclusively on the Internal Revenue Service for administration. Professor Anne Alstott argues that tax-based transfers reduce bureaucratic cost and complexity by utilizing existing institutions of the federal income tax.<sup>305</sup>

Where tax subsidies have been used, Professors Graetz and Mashaw have described the results as "substantial expenditures for programs that have spotty coverage, limited durability, and little or no progressivity in their financing."<sup>306</sup> The use of tax incentives to promote employer-based, voluntary protections has not even approached universal coverage, even amongst the population of employed workers. Only 62.8% of Americans have health insurance provided by a private employer.<sup>307</sup> The distribution of health insurance benefits among employed Americans reveals that the system provides the least benefits to those who work for small employers,<sup>308</sup> a group tending to comprise of women,

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302. To qualify, employers would have to pay at least \$200 per week in benefits for those employees earning \$300 a week. Reimbursement for these employees is limited to 1/3 of their pre-leave earnings. For those workers earning less than \$300 per week, employers would have to pay at least \$100 in weekly benefits, with the state reimbursing up to \$100. Leave must be at least six consecutive weeks' duration, and reimbursement is limited to 26 weeks. H.F. 1623, 82nd Leg. (Minn. 2001).

303. H.R. 497, 92nd Leg., (Ill. 2001).

304. Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 EMPL. RTS. & EMPLOY. POL'Y J. 229, 249 (1999).

305. Anne Alstott, *The Earned Income Tax Credit and the Limitation of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 565 (1995).

306. GRAETZ & MASHAW, *supra* note 111, at 299.

307. ROBERT J. MILLS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: HEALTH INSURANCE COVERAGE 1999 fig.1 (1999).

308. Seventy-six percent of employees in medium and large establishments and 64% of employees in small private establishments have employer-sponsored medical coverage. BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, *supra* note 80, at 6 tbl.1., BENEFITS IN SMALL PRIVATE ESTABLISHMENTS, *supra* note 80, at 7 tbl.1. Only 30.6% of those who worked for employers with less than 25 employees have employment-based health insurance. MILLS, *supra* note 307, at 8 fig.3.

“minorities,” and low-wage workers.<sup>309</sup> While roughly half of American workers have private pension coverage,<sup>310</sup> plan provision is also skewed in favor of those working for large employers.<sup>311</sup> Only 13% of large and 4% of small employers offer cafeteria plans with dependent care reimbursement accounts.<sup>312</sup> In addition to the regressivity of plan availability, these employer-sponsored plans provide greater benefits to higher income employees, because the plans operate as an income exclusion, and workers with higher marginal tax rates receive greater savings from such an arrangement.<sup>313</sup>

Social insurance tax subsidies targeted to individual taxpayers are also plagued with problems. Again, the use of tax incentives favors higher-income employees. Tax subsidies offered in the form of tax deductions, such as the medical deduction or the deductible IRA, provide the greatest benefits to those with higher marginal tax rates. The medical insurance deduction is especially regressive, because it is available only to those who itemize their deductions, a population that tends to be wealthier on average than are those who take the standard deduction. Subsidies offered in the form of tax credits, such as the dependent care credit, may pose problems as well. Tax credits that are not “refundable” provide little or no tax benefit to those with little tax liability. Credits like the Dependent Care Credit that phase out as income raises help to ensure progressivity, but only by imposing higher marginal rates on those taxpayers with incomes falling within the phase-out range. An additional problem with tax credits is that the taxpayer does not receive them until taxes are filed in the following year, and so credits do little to alleviate income loss at the time the employee incurs the expenses. In order to be beneficial for family risk insurance, the tax credit would have to be both refundable and available on an advance basis. Structuring it in this manner, however, increases administrative complexity and moves beyond the services generally offered by the IRS, and any savings gained by utilizing the existing system of tax administration may quickly be lost. Data on the Earned Income Tax Credit’s

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309. See Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1, 11 (1990).

310. FUTUREWORK, *supra* note 3, at 15.

311. Whereas 79% of those who work for medium and large private establishments receive retirement pension benefits, only 46% of those working for small private establishments receive a pension. BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, *supra* note 80, at 6 tbl.1; BENEFITS IN SMALL PRIVATE ESTABLISHMENTS, *supra* note 80, at 7 tbl. 1.

312. BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, *supra* note 80, at 7 tbl.2; BENEFITS IN SMALL PRIVATE ESTABLISHMENTS, *supra* note 80, at 9 tbl.3.

313. Michael Graetz comes to the following conclusion regarding the use of tax incentives to promote voluntary provision of employer-based pensions:

The tax expenditure mechanism is naturally skewed in favor of high-earners, and it is not at all clear that even substantial tightening of the conditions necessary to obtain such tax benefits . . . will be sufficient to guarantee a distribution of benefits that is fair to the low- and moderate-income workers who should have first claim on public subsidies for retirement savings.

Graetz, *supra* note 100, at 907.

advance payment option suggest that taxpayers would be unlikely to take advantage of this option.<sup>314</sup>

For the reasons enumerated above, tax subsidies are inappropriate for insuring family risks. No social insurance program designed to replace labor income during the working years is structured as a tax incentive. Instead, these programs, which include UI, workers' compensation, TDI, and Social Security Disability benefits, all operate with a tax-and-transfer administrative process.

### III. RECOMMENDATIONS AND SOLUTIONS

This Article has explored and evaluated the recent proposals under consideration for the provision of family risk insurance. Throughout the Article, it has suggested changes that may be made to existing programs as part of the Family Risk Insurance Proposal. In this Section, those suggestions are pulled together to paint a clearer picture of this multifaceted proposal for insuring family risks. This Section also introduces the last component of FRIP - a new fund to insure family risks that have been largely left out of the current debate. Finally, this Section provides examples of how FRIP might help one family's income security as they journey through life, encountering various family risks along the way.

#### A. *Recapitulation and Proposals*

The first component of the Family Risk Insurance Proposal is an expansion of the Family and Medical Leave Act. Section II.A.1.c recommended adoption of the Right Start Act of 2001, which would provide federal leave grants to promote expansion of TDI systems, expand coverage to employers with twenty-five or more employees, and grant twenty-four hours per year to participate in a child's academic activities. FRIP would add to this twenty-four-hour grant the ability to use that time for routine and non-emergency health needs, but would preserve the requirement that such leave be unpaid.<sup>315</sup> In addition, FRIP supports expansion of the Act's definition of family and would begin by granting leave to care for a seriously ill domestic partner, parent-in-law, adult child, sibling, or grandparent. As the vast majority of employers surveyed reported that the FMLA had no noticeable effect on productivity, profitability, or growth, such minor expansions of the Act should have negligible impact on businesses.

As discussed in section II.B.1.c, the second component of the Proposal is a FUTA amendment adding a "good cause" exception to the UI system's voluntary quit and suitability rules. While the ultimate goal is adoption of a

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314. See Alstott, *supra* note 305, at 581 nn.184-188 and accompanying text.

315. These risks are significant. See *supra* note 73.

general “good cause” exception for workers who leave due to any compelling family circumstance, key to the Proposal are exceptions for employees who leave employment due to domestic violence, spousal relocations, FMLA-qualifying reasons experienced by non-FMLA-eligible employees, and job loss due to employer-induced separations. In all cases, FRIP would provide UI benefits only during the period in which the claimant is able, available, and actively seeking work. FRIP would also modify the “able and available” requirement to accommodate those who work part-time or with restricted shift availability, as long as the worker does not unduly restrict availability in light of the conditions of the surrounding market.

The third component of FRIP, as described in section II.B.2.c., is a national expansion of the TDI system, which would include FMLA qualifying reasons within the insured risks.<sup>316</sup> This system would provide up to twenty-six weeks of paid leave for an employee’s own illness, and up to twelve weeks for birth, adoption, or placement of a child, or for a qualifying family member’s serious illness.<sup>317</sup> These benefits would be available to workers regardless of whether they work for a covered employer or meet other FMLA eligibility requirements. Because the wholesale provision of TDI on a national level is not politically viable at present, FRIP would phase in this national program with a period of state experimentation encouraged by federal FIRST grants. It would require employers and employees to share in the funding through payroll contributions, since both parties, in addition to the larger society, would reap benefits from the provision of paid family leave.<sup>318</sup> While FRIP does not make a precise recommendation regarding the amount of the payroll tax, the tax would be structured as a percentage of employee wages, and benefit payments (after the one-week waiting period) would be structured in the same manner. While employers providing private disability insurance would be allowed to opt out of this portion of coverage, FRIP would mandate that all employers participate in the portion of the program insuring other family risks. In an effort to help small employers defray their replacement costs, FRIP would use a portion of TDI benefits to reimburse those employers not covered under the FMLA whose workers collected benefits. The system would be administered in conjunction with either UI or workers’ compensation, in order to capitalize on existing administrative structures.

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316. FRIP would except from this insurance the new 24-hour requirement for job-protected leave for children’s academic activities and routine medical appointments.

317. These benefit periods would not be cumulative. For example, an employee receiving 11 weeks of disability insurance would be eligible for only one week of family insurance during that benefit year.

318. While obtaining an appropriation from general revenues may be difficult or unlikely, it is recommended as a way of promoting TDI expansion, and as a symbolic measure reflecting society’s recognition of the benefits it receives when workers are able to take needed family leave. *See supra* note 108. General revenues, however, are not essential to this program, which could easily survive with just employer and employee contributions.

The fourth component of FRIP uses welfare reinvestment funds to create a new program for low-income workers, as described in section II.B.3.c. This program would help fill in the gaps for low-income workers, and provide benefits to those who would otherwise qualify for family risk insurance under the UI or TDI proposals but for the work tests. It would also pay benefits to workers who miss small quantities of work for the short-term absences described in sections I.D and I.E. for which FRIP would otherwise require self- or employer-insurance.<sup>319</sup> The Proposal would not insure risks where the necessity for the parents' attendance could not be certified by a third party professional, such as attendance at a child's school or community activities, because moral hazard risks are simply too great in these areas. The precise source of funding for this program would be state MOE dollars, rather than TANF block grant funds, in order to avoid federal TANF requirements and limitations. This system would also be administered in conjunction with UI and TDI, to simplify application procedures and administration, and to avoid any stigma that might be associated with receipt of welfare benefits.

Although there has been much discussion about insuring FMLA-eligible absences, there has been little consideration of other risks that families face. The fifth and final component of FRIP is to provide insurance for workers facing other family risks that produce shocks to labor income. FRIP would insure some of these additional risks, called "extended absences to tend to family business" in Section I.E. (and described in Section I.D and I.E. under the headings of as "continued care" and "changes in family structure") by creating a separate fund for family risk insurance. Since these risks have not received much national attention or merited an unpaid leave mandate, it would likely be difficult to convince politicians that they merit treatment equal to that for FMLA absences. Thus, these risks would be insured with a new system funded exclusively by employee contributions. For the same reasons, FRIP does not include immediate provision of insurance for these risks. Instead, this portion of the Proposal would be implemented after a national TDI expansion was firmly in place. Because these risks may be more susceptible to moral hazard than FMLA risks, the waiting period for these risks would be doubled to two weeks.<sup>320</sup> In addition, only those absences lasting more than three consecutive days in duration would qualify for benefits - a test for "seriousness" borrowed from the FMLA's definition of a serious health condition.<sup>321</sup> FRIP would also

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319. This program might also be used to assist workers who are eligible for TDI or UI during the one-week waiting period.

320. As previously discussed, most employees who have even one year of service would be able to cover an absence of this length with vacation or sick leave benefits. *Supra* note 90. Insurance would therefore be started only after the point when many workers would have exhausted employer-provided leave. Up to one week of the waiting period would be excused if the worker had previously satisfied the TDI waiting period.

321. Once qualified, subsequent reoccurrences of the risk within the benefit year, if traceable to the same underlying situation, would be compensable even if lasting fewer than three days' duration.



provide lower contribution and benefit levels for these risks, since they seem to be considered less worthy of income support, and because lower reimbursement levels would help to combat the greater moral hazard. Verification and monitoring mechanisms would also have to be developed to ensure that only the deserving receive benefits, but the details of those mechanisms are beyond the scope of this Article. Either eligibility requirements could be modified, or a TANF safety net could be made available, to ensure that low-wage workers are afforded reasonable insurance against these risks. Although this program is distinctly separate from TDI, it would likely be administered in conjunction with the UI and TDI systems, in order to capitalize on existing administrative structures.

### *B. Application and Examples*

To illustrate how a family might fare under FRIP, this Section considers by way of example a fictitious couple, Alan and Becky Cooper, and the family risks that they might experience as they journey through life.

The example begins when Alan and Becky are recently married and expecting a baby. Alan works for a local manufacturing firm, which employs approximately two-hundred workers. His wage rate is ten dollars per hour, and he receives employer-based benefits such as vacation, health insurance, and temporary disability insurance. Becky earns minimum wage as a cashier at a small grocery store with thirty employees, and receives no fringe benefits.

As Becky's due date approaches, she is no longer able to stand at the cash register throughout the entire work-day and her doctor advises her to leave work until after the birth of her child. Today, because her employer has fewer than fifty workers, she is not protected under the Family and Medical Leave Act and so is not entitled to job-protected leave while disabled due to her pregnancy. Under FRIP, FMLA would be expanded to cover employers with twenty-five or more workers, and Becky would be able to remain out of work for her pregnancy disability and childbirth for up to twelve weeks, while being guaranteed an equivalent position upon her return.

Because Becky's salary produces approximately one-third of the Coopers' income, Alan and Becky do not expect that they can make ends meet without it. Therefore, Becky visits the local unemployment agency and files a claim for benefits. Today, Becky is told that she does not qualify for UI because her disability renders her unable to work, and she is sent home without benefits. Under FRIP, Becky would also visit the unemployment agency, but her application would also serve as an application for the national TDI program. Becky would begin receiving TDI insurance after a one-week waiting period, and would continue to do so until after the birth of her child. She could then remain at home with her new infant until she had collected benefits for a total

of twelve weeks. Today, Alan would only stay home with Becky and their infant for the first ten days following the birth, because after that point he would have exhausted his vacation time, and would have no other source of income to support the family because his employer's private TDI policy does not insure family risks. Under FRIP, Alan would also be eligible to receive TDI for up to twelve weeks, because the birth of his child would be a qualifying event.

Becky's combined disability and maternity leave lasts for thirteen weeks, which is long enough for her to exhaust FMLA leave and again fall outside of the Act's coverage. Becky telephones her employer and requests reinstatement to her former position. Her employer advises her that it could not hold her position open for thirteen weeks and it has been filled with a permanent replacement. Becky resolves that as long as she must search for new employment, she will only look for part-time work in order that she may spend more time with her infant. Becky again files an application for unemployment benefits, this time to help support the family while she engages in a job search. Expecting to qualify for benefits because she is now able and available for work, Becky is surprised when she is told that she still is not "able and available" under today's requirements because she is seeking part-time work. Although she advises the administrator that the majority of the cashier positions in the local labor market are part-time, the administrator informs her that this is irrelevant to a determination under UI. Under FRIP, Becky would be considered able and available because the part-time requirement does not unduly restrict her job search in the local market.

Becky eventually finds a job working part-time at another local establishment, which employs twenty-three workers but offers no fringe benefits. A few years later, Becky's sister is in a serious accident, and Becky is the only relative who can care for her. Today, the FMLA does not provide leave for Becky to provide this care, because siblings are not qualifying family members under the Act. Becky must choose between her job and caring for her sister. Under FRIP, caring for a sibling would be a qualifying event under FMLA. Because Becky's employer has fewer than twenty-five employees, however, she still would not qualify for job-protected FMLA leave, even under the Proposal. Regardless, Becky would be eligible to apply for TDI benefits, which would not require her to be eligible for FMLA to collect wage replacement. Becky again travels to the unemployment office to apply for benefits, but the administrator determines that Becky's combination of minimum wage earnings and part-time work do not bring her above the TDI work tests' threshold. However, Becky would still receive benefits because the Coopers' low combined income renders them eligible for benefits from the supplemental fund of MOE dollars. Becky may not even be aware that she was receiving welfare benefits, because she would receive the same percent of pay

as she did following the birth of her child. Because Becky's employer is not covered by the FMLA, it would also receive paid benefits during her absence, to help compensate for its additional costs of hiring a replacement for Becky.

After Becky's sister's recovery, Becky's employer reinstates her on the basis of her superior work record. A few months later, the Coopers' daycare provider unexpectedly discontinues services, and they have no one to care for their child while they are at work. Alan takes time off and exhausts his entire allotment of vacation and sick leave time while searching for new daycare, but all of the child care facilities in town have waiting lists that are several months long. Today, either Alan or Becky has to completely forego income at this juncture, because there are no programs available to insure this risk. Under FRIP, the Coopers would be eligible to receive benefits for "extended absences to tend to family business." While these benefits would be less than they received under TDI, the income replacement would still be invaluable for paying expenses in the interim. The couple would likely determine it was better for Becky to remain home at this point, because Alan earns a higher wage rate. This benefit would require a two-week waiting period, but Becky would already have satisfied one week of it earlier in the year while caring for her sister. After an additional one-week period, Becky would begin collecting benefits while she continued to search for a new daycare provider. Alan and Becky would be able to pay their most important monthly bills and would not have to incur significant debt in the interim. While Alan and Becky would not have utilized all of the provisions of FRIP, they would benefit from each of the expanded systems for insuring family risks, and would have far more income security than under the current system.

### C. Conclusion

"As society has changed we have always adjusted our labor protections standards to meet the new circumstances."<sup>322</sup> The recent flurry of activity surrounding paid Family and Medical Leave benefits indicates that our society may now be ready to respond to recent demographic changes and to update our social insurance system to be more family-friendly. While FRIP may appear radical as compared with the current state of affairs, it is in line with the states' recent efforts to insure family risks. This Article has evaluated the various proposals under consideration by academics and state legislatures, and has selected those proposals that appear the most promising for inclusion in FRIP. Recognizing the realities of the political process, this Article has recommended a gradual phasing-in of several programs, but the proposals continually work

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322. Deirdre A. Whittaker, *The Conservative Era of the 1980's: Should We Have a National Leave Policy: A Survey of Leave Policies, Problems, and Solutions*, 34 HOW. L.J. 411, 417 (1991) (citing 136 CONG. REC. H2199 (daily ed. May 10, 1990) (statement of Rep. Roukema)).

towards the goal of improved income security. Overall, this proposal has the potential to provide true income security to all workers facing family risks.