Family Leave Legislation: Ensuring Both Job Security and Family Values

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FAMILY LEAVE LEGISLATION: ENSURING BOTH JOB SECURITY AND FAMILY VALUES

I. INTRODUCTION

Family medical leave laws are intended to provide employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security. The goal is to preserve the family unit in the wake of the ever-changing job market. The amended California Family Rights Act of 1991 (hereinafter FRA) and the Federal Family and Medical Leave Act of 1993 (hereinafter FMLA) both provide an eligible employee a total of twelve work weeks of leave during any twelve month period for the following reasons: the birth and subsequent care of a son or daughter, the placement of a child with an employee for foster care or adoption, the care of a serious health condition of a spouse, son, daughter, or parent, or for the care required for an em-


2. S. REP. NO. 3, 103d Cong., 1st Sess. 5 (1993). The Senate Report devotes an entire section to "The New Demands on Families and Workers," where it lays out the profound changes which have taken place in the workforce. Besides a significant demographic shift in the labor force, now consisting of 45% women, the number of single parent households has increased dramatically. As a result, a mother's employment is now essential to keeping families above the poverty line. Another change affecting the workforce is the elderly, which is the fastest growing segment of the American population, and a group which employees are currently providing home care for, at the cost of added stress on the job. Id. at 5-7.


ployee's own serious health condition which has precluded her.

Changing dynamics in the workplace compelled the passage of these laws. As ever-increasing numbers of women, who traditionally perform family caretaking functions, were entering the workforce at an unprecedented rate, employers were forcing many of these employees to make the unfair choice between work and family. Indeed, it did not seem work and family could successfully co-exist because there was no policy which supported such an arrangement. Also, with an increase in the number of elderly in society and a significant increase in the cost of nursing care, many employees have opted for homecare for these family members, as opposed to institutionalization. Such caretaking, coupled with nonstop employment, caused tension and conflict at home and on the job.

The goal of the Family Leave Laws was to overcome the challenges such employees faced. As the problem grew, employer inaction resulted in employees looking to law-making branches for a solution. The amended California Family Rights Act and the Federal Family and Medical Leave Act constitute a decisive legislative response. The laws strive to make family an active priority without jeopardizing job security. The primary purpose of both laws is to create a pro-employee "safety zone" where family and serious health conditions are involved. In fact, the FMLA implicitly encourages the states to pass family leave provisions even more...

8. Family Rights Act, § 2(a) (1991); S. REP. No. 3, supra note 2, at 7; H.R. REP. No. 8, supra note 4, at 31.
9. Family Rights Act, § 3(g), (h) (1991); H.R. REP. No. 8, supra note 4, at 23.
12. S. REP. No. 3, supra note 2, at 7, 17.
13. See supra notes 3-4.
15. Id.
favorable to the employee than its own.\textsuperscript{16} Congress realized that "most of the safeguards for businesses now present in the FMLA are the result of ... compromise,"\textsuperscript{17} and it did not want those compromises to preclude employee-favorable provisions. The intent of the amended FRA is clear, it represents an effort of the state legislature to "conform ... the FRA more closely to the employee-favorable aspects of federal law."\textsuperscript{18}

There are, however, provisions which undermine the entire purpose of the laws. In particular, the FRA now provides that an eligible employee who takes leave under the FRA is guaranteed reinstatement to the "same" or "comparable" position,\textsuperscript{19} rather than to the "same" or "equivalent" position as provided in the federal law.\textsuperscript{20} This comment proposes the word "equivalent" be substituted for the word "comparable," as provided in the FMLA.\textsuperscript{21} Although the "comparable" standard has not been "tested" under the FRA, the Equal Pay Act and its legislative history offer a persuasive solution to the debate between "comparable" and "equivalent."\textsuperscript{22}

In addition, the FRA and FMLA both provide an exemption to reinstatement of highly compensated employees.\textsuperscript{23} Specifically, employees who are compensated in the highest ranges within statutorily-delineated geographic regions are not completely assured a job when they return from leave, an assurance afforded other employees under the family leave laws.\textsuperscript{24} Further, guidelines designed to serve as benchmarks for such a situation are unclear and uncertain. The provision will primarily impact working women, the group which will take family leave most often.\textsuperscript{25} Specifically, those women who are highly compensated themselves, or whose spouses

\textsuperscript{17} H.R. Rep. No. 8, supra note 4, at 86.
\textsuperscript{18} See infra note 68 and accompanying text.
\textsuperscript{21} See discussion infra parts II.C., III.B.
\textsuperscript{22} See discussion infra parts II.C.1., III.B.
\textsuperscript{24} See infra note 87 and accompanying text.
\textsuperscript{25} See infra note 141 and accompanying text.
are so compensated, will be adversely affected. This comment proposes the exemption be eliminated to ensure all employees are guaranteed job security under family leave laws regardless of their salary.\textsuperscript{26} History and gender studies, including those cited in the legislative history of the FRA and FMLA, provide strong support for this proposal.\textsuperscript{27}

Finally, taking leave may unnecessarily compromise an employee's privacy interests. The FRA and FMLA provide for fitness-for-duty certification upon return from leave in order to prove the employee can perform her job functions.\textsuperscript{28} Without requiring employers to initially demonstrate a reasonable belief or doubt as to the employee's ability to perform her job functions, the employee is needlessly denied reasonable privacy expectations which are not initially forfeited when an employee takes family leave. Standards applied to random drug testing policies provide an effective model.\textsuperscript{29}

This comment addresses these inconsistencies, problems, and adjustments. Although these provisions have not yet been challenged in court, the goal is to obviate unnecessary, and otherwise likely, challenges. As the primary group intended to be protected by this legislation, employees must seek clarification of these provisions to avoid needless litigation.

This comment first provides the necessary background information on the family leave laws themselves and subsequent information which will be utilized in the analysis to illustrate the problems with some of the law's provisions.\textsuperscript{30} The analysis explores why these particular provisions as they now stand are detrimental to the employee-favorable purpose of the legislation and how these problems will manifest themselves in the workplace.\textsuperscript{31} Finally, this comment suggests three proposals to remedy issues existing in the California legislation so that job security and family values can co-exist for employees who take family leave.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{26} See discussion infra parts II.D., III.C.
\item \textsuperscript{27} See discussion infra parts II.D., III.C.
\item \textsuperscript{29} See discussion infra parts II.E., III.D.
\item \textsuperscript{30} See discussion infra part II.
\item \textsuperscript{31} See discussion infra part III.
\item \textsuperscript{32} See discussion infra part IV.
\end{itemize}
II. BACKGROUND

A. Legislative History

The California FRA and the federal FMLA are grounded in similar legislative findings documenting labor statistics, the societal importance of job security, and the sociological and economic importance of the family unit. The purpose of both the state and federal family leave laws is to favor the employee by ensuring necessary family care and job security without being unreasonable to the employer. The purpose of the legislation may be gleaned from the findings and stated purposes of the FMLA and FRA, the Congressional reports, and articles written on legislative intent of the FRA. The provisions of the FMLA itself, discussed in the following section of this comment, also provide insight into the purpose of the family leave laws. This purpose provides a foundation upon which the laws can be critiqued.

The findings and purposes in the California and federal legislation provide a clear view into the window of legislative intent. The findings describe the hardships employees face regarding family leave. The purposes of the legislation are set forth in an effort to help families facing those hardships. In fact, none of the legislative findings in either the state or federal laws document hardships employers have faced. Rather, Congressional reports document incident after incident where employees have been forced by their employers to choose between their job and loved ones when faced with a family medical emergency.

35. See discussion infra parts II.A., III.A.
36. See infra note 68 and accompanying text.
37. See infra notes 93-107 and accompanying text.
40. See supra note 1 and accompanying text.
42. S. Rep. No. 3, supra note 2, at 7-12; H.R. Rep. No. 8, supra note 4, at 24-27. Both houses of Congress documented testimony about the need for family leave. The House of Representatives, for instance, documented the following personal story. In 1988, Ms. Lorraine Poole, an employee of a large municipality, testified to her heartbreak when she could not accept a long-awaited adoptive baby that had become available to her. Her employer told her that she...
1. Federal Findings

The FMLA findings emphasize the importance of the development of the family unit.\textsuperscript{43} Fathers and mothers must be able to participate in early childrearing and the care of family members who have serious health conditions.\textsuperscript{44} The lack of employment leave policies which accommodate working parents force them to choose between job security and parenting.\textsuperscript{45} Today, 96% of fathers and 65% of mothers work outside the home.\textsuperscript{46} Yet, Congress found “numerous instances where parents had to choose between bringing their child to the hospital for much needed medical treatment and evaluation versus losing their jobs [and] . . . [i]n almost all cases the employers were aware [of the situation] . . .”\textsuperscript{47}

Employees face similar obstacles when other family members are faced with a serious health condition. Such health problems are common amongst the elderly, the most rapidly expanding segment of the American population.\textsuperscript{48} With the recent trend away from institutionalization, larger

would lose her job if she took time off from work to receive the child and the adoption agency would not place the child unless assured that she would take some time off to be with the child. Ms. Poole was left with no choice but to decline the placement. H.R. Rep. No. 8, supra note 4, at 25. The Senate Report, too, documented testimony recounted at congressional hearings. Ms. Frances Wright, despite 10 years of exemplary service, was fired after being diagnosed with colon cancer. Treatments required her to take off about 12 weeks of work, and she made efforts to schedule chemotherapy treatments on the weekends, losing only one day of work due to these treatments. In her 10 years of service, Ms. Wright had only been absent from work two other times. Despite her efforts and service record, she was fired because of her serious health condition. S. Rep. No. 3, supra note 2, at 12. These are just two examples of the extensive testimony Congress heard regarding employer mistreatment and the need for family leave.


\textsuperscript{44} S. Rep. No. 3, supra note 2, at 4; H.R. Rep. No. 8, supra note 4, at 16.

\textsuperscript{45} The Senate Report documents expert testimony on early childhood development, stressing the importance of infant-parent bonding during the primary months of a child’s life and advocating at least one parent have the necessary time to care for a newborn “in order to create a strong foundation for the child’s later development, . . . enable[ing] the parent to instill in the infant a sense of confidence and of being an important person.” S. Rep. No. 3, supra note 2, at 9. Also, pediatricians acknowledged children’s needs who have serious illnesses, whose recovery is greatly enhanced by parental care. Id. at 10.


\textsuperscript{47} Id. at 10 (quoting Dr. Stuart Siegal).

\textsuperscript{48} See supra notes 10-11 and accompanying text.
groups of elderly are being cared for by working family members who need the job protection family leave laws are designed to provide. 49 Studies have found that conflicting demands between caregiving and employment have caused approximately 11% of such caregivers either to quit or be fired from employment because of their caregiving function. 50

Further, job security is lacking for employees who have serious health conditions themselves which temporarily prevent them from working. 51 It is also established that due to the nature of the roles of men and women in society, women bear the primary responsibility of family caretaking. 52 As a result, caretaking affects the working lives of women to a greater degree than it affects men.

2. California Findings

California legislative findings encompass all of the aforementioned federal findings and more. 53 For instance, California findings specifically state that more than 60% of women in the United States of childbearing age are in the labor force, and 40% of these women actually have a child under three years of age. 54 In conjunction, the findings state that close contact between the parent and the child, especially in the early years, is in the child's best interest and promotes family stability. 55

The California legislature also acknowledges a rapid growth in the percentage of adults who care for their sick, disabled, and elderly parents. 56 Currently, there is a trend towards home care for the elderly, which can escalate the tension between work and family. 57 It is also established that

49. See supra note 10 and accompanying text.
50. S. Rep. No. 3, supra note 2, at 11. A recent survey revealed thirty-eight percent of employed caregivers had to change from full to part-time work because of their caregiving responsibilities. The same survey found that 20% of these caregivers suffered a reduction in their benefits. Id.
54. Id. § 2.
55. Id.
56. Id. § 3.
57. Id.
elder care is principally provided by daughters, who jeopardize their employment to provide such care.\textsuperscript{58}

These findings illustrate the necessity of family leave laws to combat the escalating incompatibility between work and family demands. As both law-making groups noted, before the passage of the FRA and FMLA, the United States was the only industrialized nation which did not have some kind of family leave provision.\textsuperscript{59} Consequently, employees needed a means through which to reconcile work and family because employers and unavoidable circumstances were forcing a choice between the two.\textsuperscript{60} An increase in the number of working mothers made the problem all the more evident.\textsuperscript{61} Government responded by enacting the FMLA and FRA.

B. \textit{Relevant Provisions of the FMLA and FRA}

In order to understand the proposals of this comment, it is imperative to familiarize oneself with the provisions of the legislation as it now stands. The FRA and FMLA both allow eligible employees unpaid medical leave for up to 12 weeks for the birth or adoption of a child\textsuperscript{62} or for a child's serious health condition,\textsuperscript{63} for the serious health condition of a par-

\begin{itemize}
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. § 3; H.R. Rep. No. 8, \textit{supra} note 4, at 31-32.
\item \textsuperscript{60} Family Rights Act, § 2 (1991); S. Rep. No. 3, \textit{supra} note 2, at 7-12.
\item \textsuperscript{62} The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101(12), 107 Stat. 8 (1993); Moore-Brown-Roberti Family Rights Act, Cal. Gov't Code § 12945.2(c)(1) (West 1992 & Supp. 1994). The term "child" is used in the FRA and "son" or "daughter" in the FMLA, but all the terms mean "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis," who is under 18 years or is 18 or older and is dependent due to a mental or physical disability. The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101(12), 107 Stat. 8 (1993); Moore-Brown-Roberti Family Rights Act, Cal. Gov't Code § 12945.2(c)(1) (West 1992 & Supp. 1994).
\item \textsuperscript{63} The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101(11), 107 Stat. 8 (1993); Moore-Brown-Roberti Family Rights Act, Cal. Gov't Code § 12945.2(c)(7) (West 1992 & Supp. 1994). "Serious health condition," as defined by both the FRA, means an illness, injury, impairment, or physical or mental condition which warrants the participation of a family member to provide care during a period of the treatment or supervision and involves either of the following:
\begin{enumerate}
\item Inpatient care in a hospital, hospice, or residential health care facility.
\end{enumerate}
ent or spouse, or for an employee's own serious health condition which renders performance of job functions impossible.

In particular, this comment discusses California Government Code section 12945.2, also known as the Family Rights Act of 1991. The FRA has been amended since its original passage to reconcile the state law with the employee-favorable aspects of the FMLA. The FRA, as it is now amended, is the focus of this comment. Two titles of the federal Family and Medical Leave Act of 1993 are pertinent: Title I and Title IV, which address general leave requirements and implementation.

(B) Continuing treatment or continuing supervision by a health care provider.


66. See supra note 3 and accompanying text.

67. Cassel, supra note 1, at 31. Assembly Bill 1460, which has become law, is effectively integrated into the Family Rights Act California Government Code Section 12945.2, currently referred to as Chapter 827 of this code. Chapter 827 of the Family Rights Act was passed in California to better integrate the FRA with the FMLA. Most of the changes make family leave in California more favorable to the employee. Changes pertinent to this comment include: amending the FRA to expand family care leave rights to employees whose own serious health conditions require them to take leave; adding "placement of a child in... foster care" to the list of occurrences for which an employee may request leave; repealing the FRA provision that allows an employer to deny leave because of undue hardship to the employer's business; and changing the limit on leave from four months in a 24-month period to 12 work weeks in a 12-month period. Cassel, supra note 1, at 35.

1. Who Must Comply

Employers need only comply with family leave laws and accommodate their employees if they fall within the parameters of the term "employer," as defined in the legislation. The term "employer," for the purposes of the FMLA, includes "any person engaged in commerce in any industry or activity affecting commerce who employs fifty or more employees for each working day during each of twenty or more calendar work weeks in the current proceeding calendar year." The FRA defines an employer as "any person or individual who directly employs, full or part time, fifty or more persons to perform services for a wage or salary." In effect, if a company is an employer under one act, it will also fall within the other, so it is important to reconcile the two laws and to clarify what must be done to comply. The 1993 California amendment to the FRA only partially eliminates such confusion in its attempt to reconcile the two laws.

2. Who Can Take Family Leave

In order to invoke the family leave laws, an employee must meet specific eligibility requirements. For purposes of the FMLA, an eligible employee is one who has been employed for "at least 12 months by the employer . . . and for at least 1,250 hours of service with such employer during the 12 month period." The FRA uses the same standard for eligibility. Both laws provide that if an eligible employee desires to take leave, she is entitled to it. An employer may,
however, require an employee who is taking leave for personal health conditions or serious health conditions of a parent or child, to support her request for leave with certification by the health care provider documenting the existence of a serious health condition. 76

3. Certification

The general certification provision is the same under both the FRA and the FMLA. 77 Certification must be provided in a timely manner and is sufficient if the information provided includes the date the condition commenced, the likely duration of the condition, an estimate of leave time needed, and a statement that the serious health condition warrants employee participation in providing necessary care and support for her child or spouse. 78 In the case of an employee taking leave for her own serious condition, the certification must include a statement that the condition will impair execution of job functions. 79 In both cases, the actual illness need not be divulged, which protects the employee’s privacy interest. 80 An employer may request a second opinion at its expense, but only if the employer has reason to doubt the validity of the original certification. 81 If the two opinions conflict, a third health care provider, approved by both the employer and employee, may be required to make a final determination. 82

4. Reinstatement

Both laws expressly guarantee reinstatement after medical leave. The positions of the two laws diverge, however, as to what standards govern reinstatement. The FMLA provides that any employee who takes leave under the act, upon return from leave, shall be restored by the employer to the “same” position of employment held by the employee when the leave began or to an “equivalent” position. The FRA, on the other hand, provides that an employee who takes family medical leave shall, upon return, be restored to the “same” or “comparable” position.

5. Exemptions to Reinstatement

The FRA and FMLA both contain exemptions to the general requirement of reinstatement in cases of highly compensated employees. An employer may deny restoration to any salaried employee who is a part of the highest paid 10% of the employees within a seventy-five mile radius. To make such a denial, an employer must show it is necessary in order to prevent “substantial and grievous economic injury to employer operations.” Further, the employer must notify the

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87. The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 104(b), 107 Stat. 13 (1993); Moore-Brown-Roberti Family Rights Act, Cal. Gov't Code § 12945.2 (West 1992 & Supp. 1994). The FRA alternatively applies the ten percent provision to a salaried employee who is one of the five highest paid employees, or is among the top ten percent of the highest compensated employees, whichever is the greater number of people in that location. The FMLA does not provide this alternative, and has only the ten percent provision. Since the ten percent provision under the FRA will most often be the higher number, and thus the standard used, this comment refers to this provision of the laws simply as the “ten percent provision.” It is also referred to as the “key employee” exemption. The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 104(b), 107 Stat. 13 (1993); Moore-Brown-Roberti Family Rights Act, Cal. Gov't Code § 12945.2 (West 1992 & Supp. 1994).
employee of denial of reinstatement when such denial is expected to occur.\textsuperscript{89} The FRA does not contain this notice requirement,\textsuperscript{90} but California otherwise mirrors the FMLA on this exemption.\textsuperscript{91}

6. **Encouragement of Employee-Favorable Family Leave Laws**

The FMLA has additional provisions which serve as recommendations for states passing or amending similar legislation.\textsuperscript{92} Section 401 of Title IV encourages states and municipalities to pass laws which are even more favorable to the employee than the federal legislation.\textsuperscript{93} The FMLA expressly provides it will not supersede any state or local family or medical leave laws which are more favorable to the employee.\textsuperscript{94} Section 402 of Title IV provides a similar statute for benefits, because though the FMLA is not an obstacle to greater family or medical leave rights, it will preempt policies which are less favorable to the employee.\textsuperscript{95} Finally, an entire section of the FMLA is devoted solely to the encouragement of more generous leave policies than the federal act.\textsuperscript{96}

The preceding legislative history and provisions of the family leave laws provide a foundation for the provisions of the legislation this comment examines. First, however, information is provided which will be useful to an in-depth critique of the specific provisions of the FRA and FMLA discussed in the analysis section of this comment.

\begin{itemize}
\item \textsuperscript{89} The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 104(b), 107 Stat. 13 (1993).
\item \textsuperscript{90} Moore-Brown-Roberti Family Rights Act, CAL. GOV'T CODE § 12945.2 (West 1992 & Supp. 1994).
\item \textsuperscript{91} Id.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 401(b), 107 Stat. 26 (1993).
\item \textsuperscript{96} Id. Section 403 of Title IV is entitled "Encouragement of More Generous Leave Policies," and states that, "[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act." Id.
\end{itemize}
C. "Comparable" and "Equivalent" Standards

1. Federal versus California

The FMLA provides an employee taking leave will be reinstated to a position which is the "same" as or "equivalent" to the one she was in before her leave commenced. 97 Section 104 of Title I specifies that an employee who is not restored to the "same" position must be restored to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 98 Further, the position "must entail substantially equivalent skill, effort, responsibility, and authority." 99

California's FRA, however, provides an employee on leave be restored to the "same" or merely a "comparable" position. 100 The statute defines a "comparable" position as "one that has 'similar duties'" and is in a "similar geographic location as the position held prior to leave." 101

The United States Senate, in fact, was aware of the significance of choosing the word "equivalent" over "comparable" in the FMLA. 102 The legislative records state clearly, "[t]he standard of 'equivalence' not merely 'comparability' or 'similarity' necessarily requires a correspondence to the duties and other terms, conditions and privileges of an employee's previous position." 103 The federal regulations for the FMLA state, "[t]he legislative history [of the FMLA] makes it clear that the standard for an equivalent position is not 'comparability.'" 104 The House of Representatives directly addressed the pre-amended FRA which had been passed two years previously and contained the "same or comparable" provision. 105 It used the California law as a baseline and encouraged more generous leave policies, regulations, and effective dates. 106

98. Id.
103. Id.
104. 29 C.F.R. § 825 (1994).
105. H.R. REP. NO. 8, supra note 4, at 32-33.
106. Id.
The difference between comparability and equivalence standards, while seemingly insignificant, is substantial. Lawmakers previously explored these differences when passing the Equal Pay Act of 1963, and these explorations ultimately provide a useful means for analyzing the FRA and FMLA standards for reinstatement.

2. The Equal Pay Act of 1963 and Effect of “Equal” Versus “Comparable” Standards

The Equal Pay Act (hereinafter EPA), an amendment to the Fair Labor Standards Act, requires employers pay equal wages to men and women “for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions.”107 Initial drafts of the EPA in the early 1960’s contained the following statement: “There should be no discrimination between employees whose production [was] substantially the same on comparable jobs.”108 With the comparability standard, which the War Labor Board used during World War II,109 however, enforcement efforts proved “woefully inadequate to secure equal pay even for identical jobs, and standards governing comparability never developed.”110

Legislative history of the EPA reveals Congress explicitly rejected a comparable work formula in favor of the equal work standard.111 In 1962, the word “equal” was substituted for the word “comparable” in the House Bill.112 The following

109. Mack A. Player et al., Employment Discrimination Law 21 (1990). The EPA was derived from the WWII’s War Labor Board’s “equal-pay-for-women” policy. At the end of the War, however, the Board’s authority expired. Consequently, “the Truman, Eisenhower, and Kennedy Administrations each sought to extend by statute the equal pay policy previously operative only in wartime.” The EPA was finally passed eighteen years later. On the wording of the EPA, “[w]hile the wartime experience served as an inspiration for the Equal Pay Act, Congress did not incorporate the ‘equal pay for comparable work’ policies of the War Labor Board. Congress instead adopted a more stringent ‘equal work’ standard.” Id. (citing Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970)).
110. Rhode, supra note 109, at 1227.
112. Id.
year, committee reports in both houses mandated equal pay for equal work. That is, Congress adopted the "more stringent 'equal work' standard." In advocating amendment of the standards of the EPA from "comparability" to "equivalence," one representative stated,

If, in fact we want to establish equal pay for equal work, then we ought to say so and not permit the trooping around all over the country of employees of the Labor Department harassing businesses with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States. Another expressed, "[E]quality is one thing, but when we go into these hazy words [such as comparable] it is another matter." Thus, it was suggested that comparability does not give full equality, and this was where the fundamental difference between the two standards became clear. Comparability gave latitude to employers, and thus undermined the main purpose of the EPA: equal pay for men and women.

Those who passed the Equal Pay Act studied the different effects the standards of "comparability" and "equivalence" would have in the workplace. The FRA and FMLA provide for reinstatement to "comparable" and "equivalent" positions respectively. The concerns raised in reference to the Equal Pay Act provide a basis for discussing these two standards with respect to family leave laws. Next, this comment provides the background necessary in understanding gender issues which are affected by specific provisions in the FRA and FMLA.

D. Gender Issues in the Workplace

Gender discrimination operates on many levels in the workplace. A precise and dynamic definition of gender discrimination continues to be the subject of vibrant discourse, as women still try to equalize themselves in a work environment which has not historically been receptive towards wo-
men.\textsuperscript{119} Traditional beliefs based on the natural differences between women and men continue to disguise themselves and permeate the workforce, though perhaps indirectly.\textsuperscript{120}

Until the 1960s, laws in the United States embraced and implemented an ideology of "separate spheres" of female and male activity, couched in natural differences between the sexes.\textsuperscript{121} The woman's sphere encompassed the hearth and family.\textsuperscript{122} Work outside the home dominated the man's sphere.\textsuperscript{123} Consequently, the United States maintained a tradition in which gender directed the geography of life in society. Generally, "men occupied the 'public' sphere of political and commercial activity, while women occupied the 'private' sphere of domestic life."\textsuperscript{124} Even during industrialization, where significant changes were apparent outside the home, "popular ideology sought to reaffirm the centrality of domestic life"\textsuperscript{125} for women. Consequently, the women's movement developed in the wake of a background which supported fundamental social, political, and economic inequalities between men and women.\textsuperscript{126} As a result, early employment policies continued to emphasize the proper place for women was the home, rather than the workplace.\textsuperscript{127}

These traditional stereotypes are no longer the norm.\textsuperscript{128} The female labor force over the past forty years has increased by approximately one million workers a year.\textsuperscript{129} Currently, fifty-six percent of mothers with children under the age of six years, and fifty-one percent of mothers with children under the age of one are in the labor force.\textsuperscript{130} As of 1990, the female labor force increased by more than two-hundred percent since 1950, and in the year 2000, two out of three new entrants into the workforce will be women.\textsuperscript{131}

\textsuperscript{119} DEBORAH L. RHODE, JUSTICE AND GENDER 9 (1989).
\textsuperscript{121} RHODE, supra note 120, at 9.
\textsuperscript{122} Wright-Carozza, supra note 121, at 557.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 11.
\textsuperscript{126} RHODE, supra note 120, at 9.
\textsuperscript{127} Wright-Carozza, supra note 121, at 553.
\textsuperscript{128} H.R. REP. No. 8, 103d Cong., 1st Sess, pt.1, at 23 (1993).
\textsuperscript{129} Id. at 22.
\textsuperscript{130} Id. at 23.
\textsuperscript{131} Id. at 22-23.
Despite the influx of women into the labor force, alarming disparities between men and women exist, even at the highest levels of professional status and financial achievement. For instance, in the late 1980s, women were only half as likely as men to be partners in law firms, claimed only eight percent of state and federal judgeships, and filled only two percent of executive positions in corporations in Fortune 500 companies. This low representation of women in top paying jobs exists despite the steady increase of women into the labor force.

While some suggest that differences in career investments explain gender differences in earnings and occupational status, these suggestions presume that women select female-dominated occupations in order to balance work and family. Such a conclusion assumes that female-dominated jobs do not require "extended training, long hours, inflexible schedules or skills that deteriorate with absence." This, however, is not the case. In short, standards of the workplace, including employer practices, have emphasized that a woman's proper place is in the home and not on the job. Consequently, a husband, rather than his wife, is more likely to hold a top position and, as a result, he will be compensated at a higher rate for his work.

Although there may be a new commitment to equal opportunity in employment, this commitment has not resulted in equal domestic responsibility. Women still act as the primary family caregivers a majority of the time. The legislature responded to this problem by enacting gender-neutral family leave laws, allowing both men and women to take leave. For husbands actually to take leave instead of their wives, however, it must be not only desirable but economic...
cally prudent.143 In other words, family leave laws must not only be neutral on their face, but also in effect if they are to overcome discrimination.144 The manner in which the work place has been structured, advancement criteria defined, and domestic responsibilities allocated have all tended to perpetuate gender inequalities.145 The result serves as a confirmation of the oppressive stereotypes that originally deterred female advancement in the workplace.146

Some feminists view gender discrimination as operating on “unconscious levels,” and it is these underlying barriers and cultural forces which these feminists advocate must be redirected to solve the persistent problem of gender inequality in the workplace.147 The crux of this theory is that “unconscious bias affects not only opportunities for individual employees, but also reward structures for females as a group.”148 Consequently, these feminists advocate changing male-designed occupational environments and the traditional belief-systems which sustain such environments in order to defeat gender discrimination.149

Those legislators who passed the family leave laws acknowledged the presence of the “traditions” women must overcome.150 Today, because the concepts of male and female roles in society remain, family caretaking responsibilities still primarily rest with women.151 Consequently, domestic responsibility affects the working lives of women to a greater degree.152 In fact, although women are no longer at home to be the primary caregivers to children, elderly parents, and

143. RHODE, supra note 120, at 167. Because men are generally compensated more highly than women, “it has been economically rational for working couples to give priority to the husband’s career, to relocate in accordance with his job prospects, and to assign wives a disproportionate share of family obligations,” which mutually reinforces outdated patterns when a woman’s place was unquestionably in the home. Id.

144. Id.
145. Id.
146. Id.
147. Id. at 169.
148. Id. at 170.
149. Id. at 167. Gender discrimination will always, at a certain level, be reconciled at the unconscious level if people never question why women were unequivocally directed to the domestic sphere in the first place. Id.
151. Id. at 7.
152. Id.
ailing spouses, these family responsibilities and expectations have not diminished.\textsuperscript{153}

It is imperative to understand the dynamics of the role women have played in society in order to predict whether family leave laws will effectively provide job security without jeopardizing family values for both male and female employees. The threat that the FRA and FMLA potentially pose to employee privacy rights raises separate questions and also merits discussion.

E. \textit{Employee Privacy Rights: Drug Testing in the Workplace}

1. \textit{Fitness for Duty Certification}

One provision in the family leave laws provides employers the right to require an employee to present a fitness-for-duty certification upon return from personal leave.\textsuperscript{154} Such a provision, however, is problematic because these exams, which may be required for certification, potentially interfere with employee privacy rights. California case law addressing privacy issues in the context of drug testing in the workplace provides a useful analogy for analyzing privacy issues and fitness-for-duty examinations under the FRA and FMLA.

2. \textit{Drug Testing in the Workplace}

a. \textit{Luck v. Southern Pacific Transportation}

In \textit{Luck v. Southern Pacific Transportation},\textsuperscript{155} appellant Barbara Luck was fired from her computer programming job when she refused to submit a urine sample as part of an unannounced drug test by her employer.\textsuperscript{156} She claimed such a test violated her right to privacy.\textsuperscript{157} The employer conceded that it had no reasonable belief that Luck was performing her job ineffectively.\textsuperscript{158} The court concluded the constitutional right to privacy prohibits employee urinalysis.\textsuperscript{159}

\textsuperscript{153} \textit{Id.} For instance, care for elderly parents is mostly provided by daughters, a majority of whom are jeopardizing their employment and potential career advancement to provide such care. \textit{Id.}

\textsuperscript{154} \textit{Cal. Gov't Code} § 12945.2(h)(1)(4) (West Supp. 1995)

\textsuperscript{155} 267 Cal. Rptr. 618 (Ct. App. 1990). The petition for review was denied by the California Supreme Court May 31, 1990. \textit{Id.} at 640.

\textsuperscript{156} \textit{Id.} at 620-21.

\textsuperscript{157} \textit{Id.} at 624.

\textsuperscript{158} \textit{Id.} at 620-21.

\textsuperscript{159} \textit{Id.} at 627.
found, however, that such an invasion may be appropriate if the state can show a compelling interest in drug testing.\textsuperscript{160}

In determining whether drug testing was a violation of Luck's privacy rights, the court balanced Southern Pacific's compelling interest in safety against the employee's privacy rights.\textsuperscript{161} Given the right set of facts, the court indicated a safety interest could be enough to tip the balance in favor of drug testing.\textsuperscript{162} The court, however, found no direct safety dangers present in Luck's position as a computer programmer, and therefore, held that drug testing violated her privacy rights.\textsuperscript{163}

The validity of an employer's safety interest can be determined by looking to job descriptions and focusing on the "immediacy of the threat" to safety.\textsuperscript{164} The court said occupations where safety is involved include: one who works in a nuclear power facility, one who is employed as a customs official involved in drug interaction, or one whose job requires her to carry a firearm.\textsuperscript{165} Significantly, the court stated indirect risks on safety are not enough to find that a compelling employer interest exists.\textsuperscript{166}

In addition to safety, factors presented by the employer to support drug testing which the court did deem relevant, although not present in the set of facts before it, included a reasonable belief of abuse or poor job performance, and a constitutional right or presumption of privacy.\textsuperscript{167} The court rejected abstract justifications such as deterrence, efficiency, and competence as compelling.\textsuperscript{168} Creating a drug-free environment, enforcing rules against drug use, and ensuring public confidence in the integrity in the railroad industry were also not accepted by the court as valid justifications.\textsuperscript{169}

Further, the court, in considering federal precedents, stated that if the state employer's interests were "not justifi-

\textsuperscript{161} Id.
\textsuperscript{162} Id. at 631.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{166} Id. at 631.
\textsuperscript{167} Id. at 631-32.
\textsuperscript{168} Id. at 631.
\textsuperscript{169} Id. at 631-32.
able under the less stringent Fourth Amendment test, *a fortiori*, they cannot constitute compelling interests under article I, section I of the California Constitution.” The court concluded that the employer did not articulate any clear, direct nexus in relation to any of the compelling interests.171

b. Semore v. Pool

In *Semore v. Pool*,172 the defendants were employee relations specialists for Kerr-McGhee, a chemical plant, who ordered plaintiff to take a drug test and terminated him when he refused to comply.173 On the issue of whether the drug test violated the employee’s right to privacy, the court declared it could not decide the issue without knowing the nature of the plaintiff’s job.174 Because the plaintiff did not allege the nature of his job in his complaint, the court had insufficient evidence to balance the employer’s compelling interest, the safe operation of its plant, against the employee’s right to privacy.175 In this case, the employer operated a chemical plant, so its concern for safety was clear and legitimate.176 The court, however, found it impossible to balance these concerns without inquiring into the type of work the particular employee performed.177 Privacy rights must be assessed on an individual basis.

The court did state that an employer “can always observe its employees to see if [job performance occurs] properly and safely.”178 An employer was permitted to take reasonable action if an employee seemed to be under the influence of alcohol or drugs.179 In such a case, however, employer action must be rooted in a reasonable belief that an employee was

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170. Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 632 (Ct. App. 1990). Because the right to privacy is not explicit in the United States Constitution, but it is under Article I, Section 1 of the California Constitution, California courts have universally held that if a particular practice is held unconstitutional under the right to privacy implied in the Fourth Amendment, it is automatically unconstitutional under the California Constitution. See id.

171. *Id.* at 632.

172. 266 Cal. Rptr. 280 (Ct. App. 1990). The petition for review was denied by the California Supreme Court May 31, 1990. *Id.* at 294.

173. *Id.* at 282.

174. *Id.* at 287-88.

175. *Id.*

176. *Id.* at 286.


178. *Id.* at 287.

179. *Id.*
abusing drugs on the job, a belief created via observation of job performance. 180

C. **Balancing Employee Privacy and Employer Concerns**

Article I, Section I of the California Constitution grants a specific right to privacy. 181 Private employers in the state also may not infringement on this right. 182 Consequently, employment policies must not trammel on an individual’s reasonable expectation of privacy. 183 California courts have recognized that the more stringent, express right to privacy found in the California Constitution encompasses Fourth Amendment privacy rights. 184

Under the Fourth Amendment, random drug testing constitutes a search because one has an actual expectation of privacy, and society recognizes this expectation as reasonable. 185 In fact, it has been held that urinalysis, the traditional means for drug testing, meets this criteria. 186 Because of this recognition of privacy rights, courts have usually required “some quantum of individualized suspicion” of drug use before testing. 187

Cases which have found employers do not need this individualized suspicion often include a strong government safety objective, and a situation where criminal investigation does not motivate the government’s inquiry. 188 In government, these are known as administrative searches. 189

Yet, even administrative searches have limits. In a public employer situation, there must be a long history of accept-

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180. Id.
181. CAL. CONST. art. I § 1.
183. Id.
184. Id. at 637.
185. Id. at 637-38.
186. Id. at 638. Courts have consistently expressed that the general taking of evidence from the human body involves an intrusion of a person’s reasonable expectation of privacy. Id.
187. Id. at 642.
188. Id. at 642.
189. Id. at 644. The administrative search rationale, which allows an employer to constitutionally conduct an unannounced search, applies where there exists a strong employer interest in conducting such a search and when the industry is subject to extensive regulation, where there is often an inherent diminution in employee privacy expectations. Id.
ance by the public and the judiciary, and the government must regulate such enforcement before drug testing is constitutional.\textsuperscript{190} Additionally, there must be strong interest to ensure public safety.\textsuperscript{191} Finally, there must be limited invasion of individual privacy.\textsuperscript{192} Thus, the message is clear even in settings where random drug testing is permitted—privacy rights must be respected.

In short, the general rule for drug testing in the workplace is that it may be legitimate to protect public health and safety, but only if specific precautions and conditions taking privacy into account are met.\textsuperscript{193} Concerning private employers, it is reported, "[a]lmost all of the companies (94.5\%) that perform urinalysis test job applicants and nearly three-fourths of the companies [seventy-three percent] test current employees on a 'for cause' basis."\textsuperscript{194} Random testing is usually only allowed for positions in a "sensitive or high risk" area.\textsuperscript{195} The controlling reason companies without drug testing have decided against it is employee privacy.\textsuperscript{196} Similarly, federal courts have not given a "broad endorsement" of drug testing in the workplace.\textsuperscript{197}

Generally, district court cases striking down drug testing fall into three broad categories: jobs which are not safety specific;\textsuperscript{198} situations where the employer has no reasonable belief of employee drug use;\textsuperscript{199} and situations where drug testing is administered on a random, mass basis.\textsuperscript{200} Drug testing has been permitted in situations where the employer reasonably suspected drug abuse\textsuperscript{201} and reasonably and legitimately determined the job categories in which testing should be performed.\textsuperscript{202} When an employer claims it has a reasonable suspicion of abuse which justifies the privacy intrusion,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{190} Id. at 646.
\item \textsuperscript{191} Id.
\item \textsuperscript{192} Id.
\item \textsuperscript{194} Id. at 703.
\item \textsuperscript{195} Id. at 704.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id. at 709-10.
\item \textsuperscript{198} Id. at 710.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} Id. at 731.
\item \textsuperscript{202} Id.
\end{itemize}
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employers “must point to specific, objective facts and rational inferences that they are entitled to draw from these facts in light of their experience,” a process known as testing on a “for cause” basis.  

The American Medical Association’s position on employer drug and alcohol testing is that it should be limited in the interest of employee privacy rights. Illustrations of recommendations made which respect these rights include limiting pre-employment examinations to those whose jobs will affect other’s safety and health. Also, drug testing should be limited to situations where there is a reasonable suspicion that employee’s job performance is impaired by drug and alcohol use. Finally, drug testing is acceptable where it serves a monitoring function as a part of a comprehensive program of treatment for drug and alcohol dependencies.

There are other views as to what constitutes an ethical and effective drug testing program. For example, some advocate that in order to have a drug testing program, there should be “no feasible alternatives to detecting [job] impairment . . . .” Also, testing should be limited to those employees who pose a safety risk not only to the public, but to themselves. All of these limitations are designed to ensure that drug testing by employers will not violate an employee’s right to privacy.

This background information provides a basis for discussion of the family leave laws, especially the particular provisions to be evaluated. The next section initially analyzes the history behind family leave legislation, which demonstrates the pro-employee focus from which the laws can be scrutinized. The problems with three provisions of the California and, in some cases, federal, family leave laws are subsequently examined.

203. Id. at 732.
204. Id. at 735.
205. Id.
206. Id.
207. Id. at 735.
208. Id.
209. Id. at 736.
210. Id. at 735.
III. Analysis

A. Purpose of the Legislation: Employee-Favorable

In documenting the problems employees encounter in the face of family exigencies, the legislative history does not explicitly state from whose perspective family leave laws should be applied. An examination of legislative findings, however, demonstrates that family leave legislation should be interpreted in an employee-favorable light. Analysis of the history behind the FMLA and FRA supports this perspective.

The intent of the family leave laws focuses on remedying conditions for employees. In fact, out of the five expressly enumerated purposes of the legislation, only one deals with employer concerns, concerns which must first be deemed "legitimate," rather than merely convenient or desirable, before they will be recognized. The remaining four focus on employees, particularly on balancing family and work by ensuring job security so that family choice becomes feasible. Focusing on the employee accomplished the legislative ends of promoting the economic security of families, promoting the national interest in preserving family integrity, providing secured leave for medical reasons, discouraging employment discrimination in the leave process, and promoting equal employment opportunities for women and men.

In setting out its purpose, the California legislature does not even explicitly acknowledge the consideration of legitimate employer interests. Instead, the findings provide

211. *See supra* notes 34-63 and accompanying text.

212. The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 2(b) (1993). The express purposes are as follows: first, to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; second, to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition; third, to accomplish the purposes described in (1) and (2) in a manner that accommodates the legitimate interests of employers; fourth, to accomplish the purposes in (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reason and for compelling family reasons, on a gender-neutral basis; and to promote the goal of equal employment opportunity for women and men, pursuant to such clause. *Id.*

213. *Id.*

214. *Id.*

support for the pro-employee purpose of the legislation. In addition, California made its act even more favorable to employees when it amended the FRA to include provisions of the FMLA more employee-favorable than its own.

Discussions found in the House and Senate Reports further indicate the Congressional goals behind the legislation. Both houses viewed family and medical leave laws as a necessary minimum response to "economic and social changes that have intensified tensions between work and family," since voluntary corrective measures by employers had proven inadequate. In fact, when left alone to provide family leave policies, employers have acted irresponsibly. The legislation is designed to allow employees who need leave time to demand it from their employers and get it as a matter of law.

Because of the changing dynamics in the workforce, legislation is needed to acknowledge these changes, while simultaneously protecting the family unit. Both Congressional Reports stressed the importance of parental participation in early child-rearing for positive development of children and the family unit. Family leave allows this participation to become a reality. Similar social tensions exist when the focus is on the caretaking of the elderly or family members with serious health conditions. Congress stressed the importance of participation by family members in the care of other

216. Family Rights Act, § 2-3 (1991). Sections two and three of the Family Rights Act of 1991 are presented before the statute documenting legislative findings and purposes of the law to be enacted. In the findings of the FRA, section two is devoted to the tension between parenting and employment, especially with the increase in the numbers of women entering the workforce, while the other section of legislative findings, section three is devoted solely to the stress of maintaining job security while caring for an elderly parent or spouse with serious health conditions. Id.

217. See supra note 18 and accompanying text.


219. Id. at 5. There is also the problem created for those employers who have acted responsibly, and have provided some sort of leave policy for their employees without government-imposed minimum standards. Consequently, another reason labor standards regulating family leave are necessary is "to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly... so that conscientious employers are not forced to compete with unscrupulous employers." Id.

220. See supra notes 1-2 and accompanying text.


222. See supra notes 10-11 and accompanying text.
family members with serious health conditions. These central objectives must not be compromised as employers implement the FRA and FMLA. Family leave serves no purpose if employees remain, in practice, forced to choose between work and family when confronted with situations supposedly protected by the family leave laws.

Further, employees are entitled to job security should they have to take leave for their own serious illness. Congressional records say, “The fundamental rationale for such a policy is that it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working.” Employers should not be allowed to capitalize on an employee’s serious health condition as a means of excusing their obligations as employers. Family leave laws deny employers those means and favor the employee on this issue. To ensure that the laws are carried out accordingly, their interpretation, must also reflect this emphasis.

Overall, families are weakened if they cannot perform their caretaking, child rearing, and economic functions. As a result, individuals become irreparably damaged and, ultimately, society at large suffers adverse consequences. Because of the lack of employment policies, the family leave legislation seeks to “accommodate . . . the important societal interest in assisting families by establishing minimum labor standards for leave.” The language of federal family leave law is to be interpreted broadly, and encourages states to pass more generous leave policies, regulations, and effective dates than provided in the federal legislation. As one Representative stated, “Most of the safeguards for businesses now present in the FMLA are the result of extensive negotiation and compromise.” Consequently, states less inhibited

223. S. REP. No. 3, supra note 2, at 10. In fact, one pediatrician testified to Congress that the recovery of seriously ill children is significantly enhanced because of parental care. Id.
224. Id. at 11.
225. Id. at 12.
226. Id. at 7. For instance, employees who are able to take family leave and keep their jobs are more loyal and skilled. As a result, society is not paying welfare and unemployment benefits to these families. Id. at 16.
227. Id. at 4.
228. See supra notes 93-97.
229. See supra notes 93-97.
230. H.R. REP. No. 8, supra note 4, at 17.
by such pressures should take the initiative and give employees even greater safeguards to ensure job security.

California, too, realizes the importance of supporting employees. The FRA adopts the purpose of the FMLA in seeking to "eliminate the necessity for employees to choose between job security and family exigencies." The pro-employee purpose is undisputed in the Senate majority position that, "[w]orkers should not have to choose between the welfare of their children, their parents who need care and a paycheck." California has applied its pro-employee attitude in amending the FRA in an effort to conform "the FRA more closely to employee-favorable aspects of federal law." California has recognized the challenge of the FMLA to enact more employee-favorable leave policies.

Legislative history on the federal and state level documents the legislative recognition of a need for employees to be able to take family leave without employer interference. From this pro-employee perspective, the family leave laws can be critiqued.

B. Problems with the "Comparability" Standard in the California FRA

Mandatory reinstatement provides the linchpin of family leave laws because it promotes family well-being without jeopardizing job security. Without a guarantee of reinstatement to the same position an employee had when she took leave, objectives of family leave laws cannot be achieved.

The FMLA is drafted to ensure reinstatement. The FMLA provides that an employee shall be restored to the "same" or "equivalent" position she held prior to leave. Specifically, the standard for equivalency is not open-ended, suggesting strict application. Indeed, "equivalent" means "identical," a synonym for "same." The FMLA clearly uses "same" or "equivalent" in the statute, and in defining how to apply the standard never substitutes other terms. Because "same" and "equivalent" are synonyms, the expecta-

231. Cassel, supra note 1, at 29.
234. See supra note 85 and accompanying text.
236. See supra note 100 and accompanying text.
tions of the employee and employer are clear, and reinstatement standards are objective and can be applied evenhandedly.

The FRA, however, provides that an employee shall be restored to employment to the "same" or "comparable" position.\textsuperscript{237} "Comparability" may ultimately jeopardize job security by providing a means by which employers can impair that security. The danger stems from the fact that "same" and "comparable" require different analysis, for a comparable job may not be necessarily the same or an equivalent one. Whether something is comparable to another requires an inherent degree of subjectivity, which results in uncertainty for the employee.

The FRA defines a comparable job as one with "similar duties" and a "similar geographic location."\textsuperscript{238} "Similar," as with "comparable," also requires subjective interpretations. How many similarities must exist between one job and another before it is "comparable" remain unclear. Comparability gives employers an opportunity to set ambiguous, and often pro-employer, standards for reinstatement.

Although the California law may appear just as favorable as the FMLA, the danger lies in its potential effect. This grey area must be clarified so as to circumvent the opportunity of employers to deny job security under the FRA. For instance, if a sales manager takes family leave, under federal standards, when that manager returns from leave, she is entitled to a sales management position. Although she may not be managing the same people as before taking leave, if she manages a group which is selling the same products at the same location, the job is "equivalent." Under the California law, however, the same sales manager may be reinstated to a "comparable" management position in the personnel department. Employers will argue the positions are comparable in that both positions involve management supervision of the same number of people with the same salary and benefits. Such an argument has potential validity because both jobs are at a similar level and require similar management skills, though the two jobs are also arguably polar. For instance, a sales manager may be required to ensure her employees achieve a particular quota each month and develop a rela-

\textsuperscript{237} See supra note 86 and accompanying text.
\textsuperscript{238} See supra note 102 and accompanying text.
tionship with outside clients. A personnel manager, on the other hand, may deal only with internal issues involving hiring decisions and compensation disputes, never having contact with the outside customer. The problem lies in the fact that an employee does not know the guidelines for "comparable" jobs, so she cannot be secure in her reinstatement upon taking leave. Further, if guidelines exist, "comparability," at some level, will require a subjective opinion to determine whether the reinstatement position is sufficiently "comparable". This uncertainty may lead to reluctance in taking leave, ultimately resulting in the degradation of family values.

Considering the hypothetical situation once again, assume the employer reinstated the employee who took leave under the FRA to an identical sales management position, but in a different location, fifteen miles further from home than her pre-leave job. Employers will argue that this management position is, despite the extra fifteen miles, "comparable." If this extra distance requires commuting through a major city, increasing daily commuting time by an hour, however, the position may not meet the comparability standard. The problem is that issues such as these may not be decided until after leave is taken by one who will have her own biases as to what geographic disparities are "comparable," such as whether actual commute time, as opposed to distance, should be a factor in that determination. Also unclear is the weight certain similarities and differences should be assigned. In the hypothetical situation, for example, the longer commute may or may not be outweighed by restoration to the same pre-leave position.

"Comparability" or "similarity," is like a spectrum, which can be realized at many different points, depending on one's point of view and the criteria compared. As a result, employees may be reluctant to risk an unfavorable, pro-employer interpretation of a standard which would be less favorable than that achieved under the federal "equivalency" standard. When the "equivalent" position is explicitly guaranteed, job security is more certain because objectivity is maximized.

The federal law provides that if its law is more favorable to the employee than a state's laws, then the FMLA will apply.239 It is unclear, however, if federal law in a particular

239. See supra note 95 and accompanying text.
case actually will be more favorable because a position may be so "comparable" that it is also "equivalent." To avoid this uncertainty, confusion between these two laws must be reconciled.

The legislative history of the EPA illustrates Congressional awareness of how legal dangers in using the word "comparable" rather than "equal" can manifest themselves in application. Initial pay equity statutes mandated equal pay for comparable work, which resulted in employment boards and courts defining comparability in different ways, creating various standards, none of which was predictable, uniform, or objective. The EPA, as ultimately passed, offered these qualities by substituting the word "comparable" for "equivalent," because "comparable" does not assure true equality.

Although "comparability" may be consistent with other principles reflected in work-related legislation, it is not helpful where the central objective is pay equity or where the work results in subjective and divisive issues regarding the intrinsic value of particular jobs. Similarly, in family leave legislation, the central objective is reinstatement to the same job she was in prior to leave, and, alternatively, a job as close as possible in all respects to that original job. With this goal, the legislation should be as clear as possible in its drafting. As one representative said in the EPA proceedings, "[i]f, in fact, we want to establish equal pay for equal work, then we ought to say so." Similarly, if, in fact, job security through reinstatement is the goal, then restoration to an equivalent position ought to be undisputed.

The goal in family leave legislation is job security, not an intrinsic comparison between other types of jobs which may be more convenient for the employer. A fundamental problem acknowledged when drafting the EPA was that, "'comparability' gave such latitude [to employers] in application that the main purpose of the bill is destroyed."
Equivalency, by definition, requires an objective comparison, which will give certainty to employees who take family leave.

The "comparability" standard of the FRA is not the only provision which undermines the purpose of the laws. The key employee exemption poses additional threats to harmony between job security and family caretaking.

C. Gender Inequality and the Key Employee Exemption

Both the FMLA and FRA contain a provision which provides that those employees who are compensated in the top ten percent of the businesses situated within a seventy-five mile radius may be denied reinstatement after taking leave if the employer can show "substantial and grievous economic injury" would result.\textsuperscript{247}

In effect, this provision forces those who are in this pay range to choose between family and job security. The adverse effect on career women is twofold. First of all, women who are in this pay range will be forced to choose between family and job security, which will further stunt female advancement up the corporate ladder. Second, career wives whose husbands are in the top ten percent of their company's pay scale will be the spouses to take leave because of the unwillingness to jeopardize the job security of their highly compensated husbands. As a result, the wives of these husbands, who will likely be in lower pay ranges,\textsuperscript{248} will take leave, thus perpetuating the traditional and outdated "women at home" mentality,\textsuperscript{249} causing them to set aside their own career. These women will "forego promotional and training opportunities . . . which makes advancement within the high paying sector more difficult."\textsuperscript{250} As a result, women as a whole will remain grouped in lower level positions, as is presently the case.\textsuperscript{251} This problem is exacerbated when the undefined "substantial and grievous economic injury" guideline is considered. Each of these issues is discussed in turn.

\begin{footnotesize}
247. See supra note 89 and accompanying text.
248. RHODE, supra note 120, at 167.
249. See supra note 123 and accompanying text.
250. See supra note 133 and accompanying text.
251. RHODE, supra note 120, at 161.
\end{footnotesize}
1. Adverse Affect on Women who are Highly Compensated

Women will be adversely affected by the key employee exemption because females who do make it to the top financially will have to make a choice between work and family, an undesirable choice which compelled the passage of both statutes. Women have a difficult time reaching upper pay-ranges, and so few women are at the top that once they are, forcing them to make a choice between work and family will only perpetuate gender inequality. Although the discrimination may be inadvertent, the effect is the same as if the discrimination was intentional.

Because of the nature of roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and this responsibility generally affects their lives to a greater degree. Consequently, women who achieve economic success in the male-dominated professional world are often still the family caregivers. Upon achieving such success, family leave laws, as written, cease to fully protect these women, and either their role as a caretaker or businesswoman is jeopardized. Once these women reach the top ten percent, job security is no longer an unconditional guarantee. In the wake of breakthroughs in obviating traditional expectations of women, the traditional roles have not automatically ceased to exist. Instead, women today must manage careers in addition to the family caregiving role, even if those women are highly compensated. "[The] problem of reconciling work with parenting is a woman's greatest problem with respect to eliminating discrimination."

252. See supra note 1 and accompanying text.
253. Rhode, supra note 109, at 1236.
254. See supra note 133 and accompanying text.
255. See supra notes 148-50 and accompanying text.
256. See supra notes 141-42 and accompanying text.
257. See supra note 153 and accompanying text.
258. See supra notes 141-42 and accompanying text.
259. RHODE, supra note 120, at 172.
260. See supra notes 141-42 and accompanying text.
261. See supra note 133 and accompanying text.
2. Adverse Affect on Women whose Spouses are Highly Compensated

Another problem arises from the ten percent exemption. Those working women whose husband's compensation falls within the top 10% pay range will not take family leave because of the unwillingness to jeopardize the job security and economic security of their family. The female spouse will take leave when economic circumstances compel her to do so, because her reinstatement, rather than her husband's is unconditionally ensured under the family leave laws, assuming she is in a lower paid position. Indeed, when the 10% provision applies, this will most likely be the situation, as studies reveal that "at the highest levels of professional and financial achievement, significant disparities [between men and women] have remained." Therefore, wives who are not in the highest compensated positions will, in effect, be forced to take leave if their highly compensated spouses are within the perimeters of this provision. In this sense, the main reason for making the bill gender-neutral, to encourage men to take a more active role in family caretaking, is severely undercut.

The effects of the provision in this situation are perhaps more damaging because of their subtlety and persistence. First, women who are, in effect, forced to take leave instead of their husbands will perpetuate the traditional roles women have played. The message conveyed is that if a man and a woman both have careers, and a family situation arises, it is the duty of the lower-paid spouse to be the caretaker.

The FRA and FMLA, however, do use gender-neutral terms, an approach which recognizes that men can and should share caregiving responsibilities. In determining whether a statute promotes equality, the relevant question to

262. The author acknowledges and believes that the problem discussed in this section is equally problematic where a husband's wife falls within the key employee exemption and her husband does not. This comment discusses the problem from the other perspective, however, simply because statistics demonstrate that, in most cases, men will be more likely than women to be subject to the key employee exemption. The focus here is on the detrimental effect the exemption has on the lower-compensated spouse.

263. See supra note 144 and accompanying text.
264. See supra note 133 and accompanying text.
266. See supra note 122 and accompanying text.
267. See supra note 143 and accompanying text.
ask is "whether the law substantively encourages and supports the overall integration of women's and men's roles in both the family and the workplace—in their responsibilities as parents and in their development through work."268

Additionally, a woman who takes leave because her husband is not guaranteed job security under the family leave laws is forced to forego an opportunity for personal career advancement.269 As a result, women remain clustered in inferior positions.270 Women who do not advance under these types of circumstances become "frustrated and opt for different employment, confirm[ing] the adverse stereotypes that had worked against their advancement in the first instance."271

In order to equalize the workforce and caretaking responsibilities, indirect problems must be recognized and reconciled. The purpose of the family leave laws is to create a balance by providing both job security and family values.272 The legal response has been gender-neutral: to allow women and men to take family leave. To accomplish this objective, however, it must be equally economically prudent for either spouse to take family medical leave.273 The 10% provision creates the potential of being denied job security by choosing family. This is a chance most families cannot afford to take.

Ultimately, even though women are making advances in the professional world, men continue to be in the most powerful and highly compensated positions. Advancement criteria, too, have been defined by power and economic status.274 Domestic responsibilities, however, are clearly still occupied by women a majority of the time.275 Legislation, such as family leave laws, have the potential to play a role in eliminating these biased structures and inequalities through proper drafting which addresses the structure of the workplace itself.

The only way to equalize work and caretaking responsibility within the family unit is to have family leave laws

268. Wright-Carozza, supra note 121, at 582.
269. See supra note 266 and accompanying text.
270. See supra note 257 and accompanying text.
271. Rhode, supra note 120, at 172.
272. See supra note 1-2 and accompanying text.
273. See supra note 143 and accompanying text.
274. Rhode, supra note 120, at 169.
275. See supra notes 141-42 and accompanying text.
whose provisions truly allow either spouse to take leave without jeopardizing job security. Progress toward gender equality in the workplace is being made. Consequently, the underlying effects of provisions of employment laws which have the potential of curtailing this progress must be stopped. The adverse effects of the key employee exemption are increased by the standard under which it may be invoked.

3. Problems With the “Substantial and Grievous Economic Injury” Guideline

For employees in these top pay ranges, job security under family leave laws is eviscerated by the guidelines given to determine whether an employer may deny reinstatement to its highest compensated employees. The standard, “substantial and grievous economic injury” potentially includes a broad range of situations, depending on one’s perspective and interpretation. For example, a sharp plunge in a company’s stock value may indicate “substantial and grievous economic injury” to some employers and a predictable setback to others.

It is unclear whether the harm shown must be permanent, temporary, or exist for a particular amount of time before it will be found sufficiently “substantial.” Further, if the economic harm results from negligent mismanagement decisions, it is contestable that employers should be able to rely on such substantial mistakes to their benefit under family leave laws and deny reinstatement to highly compensated employees who have taken family leave.

Also, the laws suggest no criteria by which economic hardship can be measured and adjudged “grievous.” For instance, one could take into account stock value, asset value, or departmental budgets and reach completely different conclusions. Leaving decisions to different judges and employment boards when no statutory benchmark exists will cause inconsistency and insecurity for the highest compensated employees.

As has been demonstrated, potential for serious problems in application of the 10% provisions of the family leave laws exists, and the standards provided to determine when this provision can be activated create no means for evenhanded

276. Rhode, supra note 120, at 161.
application. Finally, there a provision under the family leave laws potentially threatens employee privacy rights.

D. Reconciling Employee Privacy and the Fitness-For-Duty Certification

Under the FMLA and FRA, an employee who takes leave for personal illness may be required, as a matter of company policy, to provide fitness-for-duty certification as a condition for reinstatement. This provision has the potential to needlessly sacrifice employee privacy.

When an employee takes leave, she is required under leave laws to obtain certification. That certification, however, need not reveal the nature of the employee's illness, just that her condition prevents her from performing her job at that time. In theory, the leave time equals the period needed to remedy that inability. Employers, at this point, have no reasonable basis for believing an employee returning from leave cannot perform her job.

Essentially, employees who take leave for a personal condition sacrifice their privacy rights to a certain degree. They have the burden of proving through the certification process that they cannot work for a specific period of time. Privacy rights are sacrificed to the extent that the leave period is granted. On taking leave, employees are being certified to prove they cannot perform their job for a certain time period. In taking personal family leave, no presumption is to be made that an employee cannot do her job after that period. Requiring employees to go through fitness-for-duty certification, which may include medical examinations and tests, requires an additional, independent analysis of employee privacy rights. Employees only sacrifice their privacy expectations to a degree for the purposes of a leave period they affirmatively choose to take. Once the period ends, an employee's full privacy expectations are restored.

Fitness-for-duty policies allow employers to force employees who have taken leave because of personal illness to submit to medical examinations and tests without first demonstrating a legitimate belief that the employee cannot perform

277. See supra notes 87-92 and accompanying text.
278. See supra notes 78-83 and accompanying text.
279. See supra note 81 and accompanying text.
280. See supra note 79 and accompanying text.
her job. Theoretically, the employer does not even know the exact nature of the employee's condition.\textsuperscript{281} Employers should not be able to take advantage of an employee's previous reasonable belief that she cannot work to justify their own belief at a later date that an employee cannot work simply because she took leave, forcing the employee to affirmatively prove she can work via a medical exam before having an on-the-job opportunity to prove she can. At this point, reassessment of employee privacy interests and employer concerns must be considered before invasion of that interest.

The fitness-for-duty provision, in effect, runs counter to the intent behind family leave laws. Those who need to take leave may be deterred from doing so because fitness-for-duty needlessly threatens job security. Family leave laws seek to promote family values and job security while taking only employers' legitimate concerns into account.\textsuperscript{282} Here, employers have no reason to believe an employee returning from leave cannot perform her job because they have not seen her work. There are, however, conceivable situations where the balance between privacy and employer's independence tips in favor of a fitness-for-duty examination. Drug testing in the workplace provides an enlightening analogy to this tension.

Because drug testing is a "search" for privacy concerns,\textsuperscript{283} arguably physical examinations and tests which may be required to obtain a fitness-for-duty exam should be considered searches as well. California courts recognize an even stronger privacy right than the federal courts because the right is explicitly granted in California's Constitution.\textsuperscript{284} Even private employers must respect employee privacy rights.\textsuperscript{285} The FRA, then, must also comply with established privacy guidelines in enforcement.

With certain exceptions, random drug testing in the workplace has been held an unconstitutional violation of an employee's privacy rights.\textsuperscript{286} To preserve employee privacy rights, yet accommodate employer interest in a safe and drug-free workplace, two general rules of application have

\begin{itemize}
\item \textsuperscript{281} See supra note 81 and accompanying text.
\item \textsuperscript{282} See supra note 35 and accompanying text.
\item \textsuperscript{283} See supra note 186 and accompanying text.
\item \textsuperscript{284} See supra note 182 and accompanying text.
\item \textsuperscript{285} See supra note 183 and accompanying text.
\item \textsuperscript{286} See supra note 187 and accompanying text.
\end{itemize}
been established by the courts and advocated in many articles.

First, because privacy is a fundamental right, any violation of that right will be subject to strict scrutiny by the courts. Courts have held that employers do have a compelling interest in preventing drug abuse in the workplace. Consequently, employers may force an employee to submit to a urine test if they can show they have a reasonable belief that the employee is abusing drugs. The employer has the burden of proof to show why such an invasion into the employee's privacy is justified, a burden which requires specific, objective facts and rational inferences in order to avoid potential bias.

Currently, the FRA and FMLA do not set similar standards for employers who invade their employee's privacy rights by forcing them to present a medical certificate before any indication that the employee will not be able to perform her job upon returning from family leave. Further, there is nothing to suggest that employers have never previously entertained such a belief, since it is the employee whose affirmative action activates the family leave process in the first place. Fitness-for-duty exams allow employers to bootstrap their belief to the employee's pre-leave belief, invading the employee's fundamental right to privacy without shouldering any burden of proof. Employers cannot form such a belief unless they first evaluate post-leave performance because the employee should be presumed recovered when she returns to work.

The other general rule is that drug testing is allowed in the workplace where there is a legitimate safety concern on the part of the employer if danger in the work environment is increased by drug use. Here, employee drug testing and the privacy issues involved have been found outweighed by the employer's safety interest. Safety, however, is not an unsubstantiated excuse employers' can use for violating privacy rights and forcing drug testing. Case law has developed

287. See supra note 161 and accompanying text.
288. See supra notes 296, 198 and accompanying text.
289. See supra notes 188, 195, 202 and accompanying text.
290. See supra note 204 and accompanying text.
291. See supra notes 199, 207 and accompanying text.
292. See supra note 162 and accompanying text.
several criteria for determining whether an employer has a legitimate interest in drug testing. The legality of testing depends on job descriptions, the immediacy of the threat to safety, and the nature of the employee's job.293 Further, there must be a direct nexus between job safety and drug use.294 Significantly, the employer bears the burden of proving the necessity of invading its employee's privacy rights in the interest of safety.295 The stringent standard for employers maximizes privacy interests, while realizing that with respect to certain jobs, employers' have valid reasons for obtaining personal information.

Family leave legislation, however, although allowing an invasion of one's privacy rights, does not place such an exception in the fitness-for-duty provision. As a result, employers are entitled to place a blanket requirement on the entire company, subjecting employees, whose health poses no safety risks, to medical exams as a condition for returning to work. Such a provision, in effect, refuses to acknowledge that while some people may sacrifice some measure of privacy due to the nature of their jobs, it is unacceptable that everyone's rights automatically be forfeited.

For instance, the court held in Luck v. Southern Pacific Transportation that, although an employee works for a railroad company, a business where the legality of random drug testing is allowed as a safety precaution for some positions, a computer programmer for that company is not in such a position.296 Consequently, drug testing in this situation, without a reasonable belief of abuse on the job, is a privacy violation. In Semore v. Pool, the court held that it was impossible weigh employer and employee interests unless it is familiar with the nature of the particular employee's job.297 Not only does such a policy provide consistency and protection, but also notice to employees who have unsafe jobs. Thus, a balance is struck in the legislation which favors employee rights and job security, while taking the reasonable concerns of the employer into account. Coincidentally, these are also the objectives of family leave legislation.

293. See supra note 165-66 and accompanying text.
294. See supra note 167 and accompanying text.
295. See supra note 168 and accompanying text.
296. See supra note 164 and accompanying text.
297. See supra note 175 and accompanying text.
This comment proposes three changes to the California FRA, which will conform it to the employee-favorable intent of the legislature, and acknowledge the challenge of the FMLA to pass more favorable legislation than its own. All of these proposals are intended to solidify the purpose of family leave legislation: the strengthening of the family unit without jeopardizing job security. Although FRA provisions generally accomplish this purpose, realization of these proposals would ensure further security and, in turn, strengthen families for employees.

This comment proposes the following changes to the California FRA:

1) **Reinstatement to the “same” or “equivalent” position:** To absolutely ensure job security to an employee who takes family leave, the standard must be statutorily unequivocal. The “equivalence” standard requires objectivity in application, thus reinstatement is guaranteed before leave is taken. Consequently, the FRA should be amended to provide that an employee returning from family leave must be restored to the “same” position of employment held prior to leave or to an “equivalent” position, with equivalent job functions, salary, and responsibilities.

2) **Key employee exemption deleted:** To ensure job security to all employees who take family leave, the 10% key employee exemption should be stricken from the laws. An employee who takes family leave should be restored to the “same” or “equivalent” position regardless of her rate of compensation.

3) **Fitness-for-duty provision modified:** Recognizing that employees have constitutional privacy rights which are not forfeited upon taking medical leave, the provision allowing employers to require recertification upon return from leave should be modified. The following proposal is designed to balance both an employee’s privacy rights and an employer’s legitimate interests in job safety and quality of job performance:

   i) **Where there is no safety risk in the employee’s job:** An employee who returns from leave under the FRA due to personal illness should not be required to submit to a fitness-for-duty examination unless her employer can show a reasonable belief that she is not ad-
equately performing her job functions. The standard for proving that a reasonable belief exists should require the employer to point to specific instances where job performance has been deficient. Only after such a standard is met should an employee have to present fitness-for-duty certification to her employer. Absent a reasonable belief, privacy interests of the employee should prevail and no recertification process should be required.

ii) Where there is a safety risk inherent in the nature of the employee's job: When an employee who takes family leave is in a position where performance of that job poses an inherent safety risk to herself or others, an employee's privacy interests are reasonably outweighed by her employer's safety concerns. In these situations, an employee who takes family leave should be required to present fitness-for-duty certification if her employer's policy so mandates. Determining whether such a safety risk is present, however, must depend on the nature of that individual employee's job rather than the nature of the employer's business in general. This way, employee privacy rights are maximized while legitimate employer concerns are satisfied.

VI. Conclusion

Family leave laws represent legislative response to the changing dynamics in the workplace. The ultimate goal is to help employees participate in certain medical and family situations without the risk of job loss. If this is accomplished, job security and family values can successfully co-exist. For the most part, the amended California Family Rights Act of 1991 reflects this goal. There are, however, provisions in the current legislation which undermine this purpose. These provisions should be modified to meet the federal challenge to pass legislation more favorable to the employee.

The family leave laws are written for the employee and must be interpreted as such. If not, employees will not take leave, and the very values the laws seek to promote will be jeopardized. It is imperative, therefore, to discuss how these laws will work in practice and to correct ambiguities and foreseeable problems before they arise. Uncertainty is not secur-
ity. This comment has shown how the "comparability" standard, the key employee exemption, and the fitness-for-duty certification impair sought after job security when family values are realized. Consequently, the proposals, if effectuated, would make it possible for all employees to take advantage of family leave without the fear of being restored to a job they did not expect, of not being restored at all, of not having a true choice on whether to take leave, and of unfairly sacrificing privacy rights. In order to truly promote family values without sacrificing job security, these problems must be resolved.

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