

## Privatizing Family Leave Policy: Assessing the New Opt-in Insurance Model

Deborah A. Widiss\*

### I. INTRODUCTION

The United States is famously stingy when it comes to parental leave: it is the only developed country that fails to guarantee paid time off from work to care for a new child.<sup>1</sup> In the absence of paid leave, many new mothers take only a few weeks off with their new baby,<sup>2</sup> and new fathers take on average a week or less.<sup>3</sup> Nor does federal law

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\*Professor of Law, Associate Dean for Research and Ira C. Batman Faculty Fellow, Indiana University Maurer School of Law. Thanks to SJ Glynn, Asaf Lubin, Erin Macey, Bill Reynolds, Daniel Schwarcz, Molly Weston Williamson, and participants in the *Seton Hall Law Review* Symposium: Post-Dobbs: Institutionalizing Support for Women and Children for very helpful comments on earlier drafts. My thanks as well to the members of the *Seton Hall Law Review*, both for organizing an excellent symposium and for their conscientious work helping finalize this Article for publication, including allowing me to make extensive revisions to address legislation that was passed during the editing process. Finally, I want to express appreciation to my father, Alan I. Widiss, who studied and taught insurance law at the University of Iowa. He passed away more than twenty years ago, but as I worked on this piece, I found myself reflecting on dinner table discussions we had when I was growing up about the purpose and structure of insurance. This is the first time that his scholarly interests directly intersect with my own, and it has made working on this Article particularly gratifying. Copyright © 2023 by Deborah Widiss.

<sup>1</sup> See, e.g., OECD FAMILY DATABASE, PARENTAL LEAVE SYSTEMS 9, Chart PF2.1 (Dec. 2022), [https://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf) [<https://perma.cc/9T3W-WNB7>] (showing all OECD countries other than the United States provide paid time off to mothers and most also provide shorter periods of paid time off earmarked for fathers or usable by either parent). The federal Family and Medical Leave Act offers *unpaid* leave to care for a new child or a family member with a serious health condition, as well as for a worker's own serious health condition or for certain needs related to medical service. See 29 U.S.C. § 2612(a), (c).

<sup>2</sup> See, e.g., Maya Rossin-Slater, Christopher J. Ruhm & Jane Waldfogel, *The Effects of California's Paid Family Leave Program on Mothers' Leave-taking and Subsequent Labor Market Outcomes*, 32 J. POL'Y ANALYSIS & MGMT. 224, 225 (2013) (finding average duration of maternity leave in states without legislation to be three weeks).

<sup>3</sup> See, e.g., Richard J. Petts, Chris Knoester & Jane Waldfogel, *Fathers' Paternity Leave Taking and Children's Perceptions of Father-Child Relationships in the United States*, 82 SEX

guarantee paid time off to care for family members with serious health needs. Lacking a regular paycheck, new parents and family caregivers who take unpaid time off rely on partners, extended family, spending down savings, taking on debt, or government benefits.<sup>4</sup> For many leave takers, money is tight and stress is high.<sup>5</sup> A growing number of states have stepped into the breach by enacting laws that provide paid family and medical leave.<sup>6</sup> Funded by a small payroll tax, these policies ensure that virtually all workers within the state can afford to take a reasonable amount of time off with a new child or to care for a loved one.<sup>7</sup> But, at least as of the time of this writing, such comprehensive paid leave laws have only passed in states that trend blue, where Democrats have significant power in the state government.<sup>8</sup>

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ROLES 173, 175 (2020) (reporting that fathers typically rely on sick or personal days to take a short period of time off after the birth of a child).

<sup>4</sup> See Renee Stepler, *Key Takeaways on Americans' Views of and Experiences with Family and Medical Leave*, PEW RSCH. CTR. (Mar. 23, 2017), <https://www.pewresearch.org/fact-tank/2017/03/23/key-takeaways-on-americans-views-of-and-experiences-with-family-and-medical-leave> [<https://perma.cc/MR5U-BTQL>] (showing leave takers who do not receive paid leave cut back on spending, take on debt, or rely on family or government benefits).

<sup>5</sup> See *id.* (finding 69 percent of leave takers who took less time than they needed or wanted said they could not afford to lose more money, and about half feared they would lose their job).

<sup>6</sup> See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, A BETTER BALANCE (Jan. 5, 2023), <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart> [<https://perma.cc/SA5D-FE3G>] (indicating California, Colorado, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Washington, and Washington D.C. have enacted paid family and medical leave laws); see generally NAT'L P'SHIP FOR WOMEN & FAMS., STATE PAID FAMILY & MEDICAL LEAVE INSURANCE LAWS (2022), <https://nationalpartnership.org/wp-content/uploads/2023/02/state-paid-family-leave-laws.pdf> [<https://perma.cc/NU2D-GRVD>] (listing and describing the laws in these states). Days before the final publication of this Article, Minnesota also approved a comprehensive paid family and medical leave law. See *Fast Facts About Minnesota's New Paid Leave Law*, CTR. FOR AM. PROGRESS (May 19, 2023), <https://www.americanprogress.org/article/fast-facts-about-minnesotas-new-paid-leave-law>.

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *Electoral Map: Blue or Red States Since 2000*, 270TOWIN, <https://www.270towin.com/content/blue-and-red-states> [<https://perma.cc/7L5D-E3BP>] (last visited Apr. 30, 2023) (showing all of the states with comprehensive paid leave other than Colorado have voted Democratic in every presidential election since 2000); *Colorado*, 270TOWIN, <https://www.270towin.com/states/Colorado> [<https://perma.cc/2CBM-2BS9>] (last visited Apr. 30, 2023) (showing Colorado has voted Democratic in every presidential election since 2008). In the states with comprehensive paid leave, Democrats also generally control both legislative houses and the governorship. *State Government Trifectas*, BALLOTPEDIA (2023),

A new—and quite different—approach to paid family leave is expanding rapidly in purple and red-leaning states: authorization of commercial “family leave insurance” to be marketed as a group policy to employers.<sup>9</sup> Modeled on commercial short-term disability insurance, family leave insurance would provide partial salary replacement to workers who take time off work for family caregiving. In other words, this is an opt-in privatized approach to paid leave. In the spring of 2022, Virginia became the first state to pass a law approving the issuance of such insurance.<sup>10</sup> As of May 2023, just one year later, Arkansas, Florida, and Tennessee have passed similar laws, each with unanimous support, and Texas may soon pass one as well.<sup>11</sup> Additionally, Vermont and New Hampshire have taken a related approach, contracting with an insurance company to offer paid leave to state employees and allowing private businesses in the state to opt-in.<sup>12</sup> Republican lawmakers have celebrated these plans as preferable to comprehensive paid leave laws, in that they capitalize on the private marketplace to offer employers “choices,” not mandates.<sup>13</sup> The insurance lobby also embraced the idea, helping to draft a model law

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[https://ballotpedia.org/State\\_government\\_trifectas](https://ballotpedia.org/State_government_trifectas) [https://perma.cc/TD8M-WCU5] (showing that, as of May 2023, all of the states with comprehensive paid family leave policies have a Democratic trifecta). In some instances, when the paid leave policy was enacted, one of these bodies—most typically the governorship—was a (usually liberal) Republican. See, e.g., Brian Witte, *Maryland Paid Family Leave Program Bill Passed to Governor*, AP NEWS (Mar. 31, 2022), <https://apnews.com/article/legislature-larry-hogan-maryland-c9ac4a518f41302de112dd6f9264da8d> [https://perma.cc/P898-MXNZ] (noting that in Maryland the bill was passed by the legislature, which included a super-majority of Democrats before being sent to the Republican governor for signing).

<sup>9</sup> See *infra* Part III.

<sup>10</sup> See Chris Marr, *Opt-in Paid Leave Model Presents Growing Alternative to Mandates*, BLOOMBERG L.: NEWS (Nov. 7, 2022, 5:30 AM), <https://news.bloomberglaw.com/daily-labor-report/opt-in-paid-leave-model-presents-growing-alternative-to-mandates> [https://perma.cc/V535-Y3LF] (discussing law passed in Virginia as the “first” of its kind).

<sup>11</sup> See *infra* text accompanying notes 71–74.

<sup>12</sup> See Marr, *supra* note 10 (discussing new policy adopted in New Hampshire); Lola Duffort, *Gov. Phil Scott Sets a Voluntary Paid Leave Program into Motion*, VTDIGGER (Dec. 6, 2022), <https://vtdigger.org/2022/12/06/gov-phil-scott-sets-a-voluntary-paid-leave-program-into-motion> [https://perma.cc/J79W-N8EN] (discussing new policy in Vermont).

<sup>13</sup> See, e.g., Marr, *supra* note 10 (quoting Minnesota Republican state senator Paul Utke, co-sponsor of the NCOIL model bill, as praising the opt-in approach because businesses get “a lot of say” and there are not “mandates” with “unintended consequences”); see also Duffort, *supra* note 12 (quoting Vermont’s Republican governor Phil Scott characterizing the opt-in approach as “win-win-win”).

that was approved by the National Conference of Insurance Legislators at its fall 2022 meeting.<sup>14</sup> This Article offers the first discussion in the legal literature of opt-in family leave insurance.

The emerging blue state/red state divide on family leave policy mirrors a divide on abortion rights that has sharpened dramatically in the aftermath of *Dobbs v. Jackson Women's Health Organization*.<sup>15</sup> Each of the states that has passed a comprehensive paid leave law *also* has statutory or constitutional provisions generally securing the right to abortion.<sup>16</sup> By contrast, in vast swathes of the South, Midwest, and Great Plains, abortion rights are now sharply curtailed.<sup>17</sup> This means that women<sup>18</sup> are already being forced to carry pregnancies to term that, in the past, they might have opted to terminate. These women are disproportionately likely to have very limited incomes, and

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<sup>14</sup> See NAT'L COUNCIL OF INS. LEGISLATORS, NCOIL ADOPTS FOUR NEW MODEL LAWS AT ANNUAL MEETING IN NEW ORLEANS, LA (2022), <https://33afce.p3cdn2.secureserver.net/wp-content/uploads/2022/12/Models-PR-Final.pdf> [<https://perma.cc/L9WT-KEXF>] (noting that model paid family leave insurance bill was adopted); see generally NAT'L COUNCIL OF INS. LEGISLATORS, PAID FAMILY LEAVE INSURANCE MODEL ACT (2022) <https://33afce.p3cdn2.secureserver.net/wp-content/uploads/2022/11/NCOIL-PFL-Model-Draft-October-2022.pdf> [<https://perma.cc/M24G-UUYH>] (providing text of the Act); NAT'L COUNCIL OF INS. LEGISLATORS, LIFE INSURANCE & FINANCIAL PLANNING COMMITTEE 1-2 (2022), <https://33afce.p3cdn2.secureserver.net/wp-content/uploads/2022/08/Life-Cmte-Minutes-7-15-22.pdf> [<https://perma.cc/WP4R-AY37>] (explaining that the model bill language was originally introduced by the American Council of Life Insurers).

<sup>15</sup> See *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS. [hereinafter *After Roe Fell*], <https://reproductiverights.org/maps/abortion-laws-by-state> [<https://perma.cc/M3SV-PT4P>] (last visited Apr. 30, 2023) (providing an interactive map, updated in real time, of different states' abortion laws); Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CTR. FOR JUST. (Aug. 24, 2022), <https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion> [<https://perma.cc/HK8X-ETZX>] (explaining how pre-existing restrictive legislation became effective and how bills further restricting abortion were introduced in many states).

<sup>16</sup> See *After Roe Fell*, *supra* note 15 (showing that ten states have expanded access to abortion and that abortion access is protected in an additional thirteen states). See *id.* This group includes the twelve states, see sources cited *supra* note 6, that have enacted comprehensive paid family and medical leave laws.

<sup>17</sup> See *After Roe Fell*, *supra* note 15 (showing that twenty-three states are either hostile to abortion or have made it illegal).

<sup>18</sup> In the text, I typically refer to pregnant persons as "women," as the vast majority of pregnant persons are cis-gender women. I recognize, however, that trans-men and nonbinary persons may also bear children, and I am fully supportive of ensuring they can access the full range of supports for new parents, including parental leave policies discussed in the text.

disproportionately likely to be people of color.<sup>19</sup> They are also disproportionately *unlikely* to receive paid time off from work to care for a baby as a discretionary employer benefit.<sup>20</sup> Thus, *Dobbs* and the categorical restrictions it allows on abortion compounds the pre-existing problem caused by our country's failure to guarantee adequate support to new parents.<sup>21</sup>

Opt-in insurance is a pale substitute for the kind of comprehensive paid leave policy, enacted in blue states, that covers virtually all workers. It is also, perhaps, better than nothing.<sup>22</sup> It could offer businesses in conservative-leaning states an affordable way to offer paid leave, which could help them provide essential support for their existing workers and compete for talent.<sup>23</sup> Some new parents and

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<sup>19</sup> See, e.g., Lynn M. Paltrow, Lisa H. Harris & Mary Faith Marshall, *Beyond Abortion: The Consequences of Overturning Roe*, 22 AM. J. BIOETHICS 3, 3–11 (2022) (explaining the harms of banning or severely restricting abortion which will disproportionately harm women of color); Michelle Oberman, *What Will and Won't Happen When Abortion Is Banned*, J.L. & BIOSCIENCES 1, 8 (2022) (reporting that young women of color are disproportionately likely to be deterred from having an abortion); see generally DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* (2020) (documenting the negative impact of being denied an abortion on mental and physical health, careers, relationships, and other children).

<sup>20</sup> See U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, tbl.7 (2022) [hereinafter NATIONAL COMPENSATION SURVEY] (showing that although 25 percent of all civilian workers receive paid family leave, just 13 percent of the lowest quartile of earners do, and just 12 percent of part-time workers do); see also Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2183 (2021) (collecting studies); Stepler, *supra* note 4 (finding “[l]eave takers with lower incomes” are the least likely to receive full or partial pay while on leave).

<sup>21</sup> To be clear, I believe that all parents (including those who would not opt for an abortion even if available) should receive a generous period of paid leave, and other key supports like affordable childcare and medical services. Likewise, I believe that pregnant people should have significant autonomy to make choices regarding reproductive healthcare, including abortion services, regardless of the supports offered new parents. My point is simply that the harms of curtailing abortion access in the United States are compounded by the entirely inadequate support offered to new parents.

<sup>22</sup> See *infra* Part V.

<sup>23</sup> Cf. *Talent Trends & State Social Policies: 2023 Impact on Businesses in the U.S.*, MORNING CONSULT: CTR. FOR BUS. & SOC. JUST. 25 (2023), <https://www.bsr.org/files/BSR-Talent-Social-Policies.pdf> [<https://perma.cc/736N-V7D8>] (finding 73 percent of employed adults agree companies should provide workers with paid family and medical leave). See also *id.* at 10, 26 (reporting that a majority of workers would consider a state's policies on paid family and medical leave when considering a move, and that they would expect an employer to provide additional paid time off or benefits

family caregivers who would otherwise lack paid leave would receive it, and for each such family, that could make an enormous difference. On the other hand, past experience with privatized opt-in disability benefits suggests that employer take-up may be low, and that lower-paid and part-time workers will be particularly unlikely to receive these benefits.<sup>24</sup> And there is a significant risk that passage of an opt-in paid leave law will sap energy for enacting a comprehensive leave law, or at least make it seem less urgent than other policies supporting families.<sup>25</sup> Lawmakers may claim they have “addressed” the need for paid leave, but an opt-in approach is likely to leave out many of the most vulnerable workers. In fact, if new family leave insurance policies offer the same—low—level of income replacement that is typical of short-term disability policies, they could actually exacerbate inequality by making it easier for relatively affluent workers to take extended time off but still failing to provide sufficient support for low-wage workers to do so.<sup>26</sup>

This Article assesses strengths and weaknesses of the new model and suggests policy terms that would make it more likely that opt-in policies would achieve their stated purpose of helping new parents and family caregivers.<sup>27</sup> These include specifying a reasonably ample period of benefits, a level of wage replacement that is sufficient for low-wage workers to actually take time off, and ensuring definitions of family are flexible enough to meet the needs of contemporary families. The Article also explores potential adverse selection challenges—both *within* workplaces and *across* workplaces—that may arise under a private opt-in approach. The mandatory paid leave policies implemented by states include virtually all workers; this ensures a diverse risk pool, which tends to keep per-person costs exceptionally

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to offset barriers and costs resulting from state-level policies that do not match their personal values).

<sup>24</sup> See *infra* Part IV.

<sup>25</sup> For example, the Vermont legislature, controlled by Democrats, twice passed a comprehensive leave policy that was vetoed by the Republican governor, who then implemented the opt-in policy. See Duffort, *supra* note 12. Once the voluntary program was in place, the incoming Democratic leader of the state senate said he had “doubts” about pushing for comprehensive paid leave at the same time as the Democrats were pushing for an expansion of public support for child care. See *id.*

<sup>26</sup> See *infra* text accompanying note 114–116 (discussing research finding that low-wage workers were less likely than more highly paid workers to utilize leave under California’s paid family leave policy when reimbursement rates were 55 to 70 percent of regular wages); see also *infra* text accompanying note 92 (discussing research showing most short-term disability policies provide 50 to 60 percent of regular wages).

<sup>27</sup> See *infra* Parts IV and V.

low. By contrast, there is a possibility that under an opt-in approach, only employees who expect to claim benefits would participate, which would likely raise the per-person costs considerably. There are related questions regarding whether insurance companies will be permitted to consider the age- and sex-makeup of workforces in pricing policies, and how these costs in turn might affect access. Future study will be essential to determine whether a privatized approach can provide reasonably robust support in a cost-effective manner. Ultimately, it may well be that both businesses *and* workers are better served by a comprehensive policy.

This Article proceeds as follows. Part II explains the basic structure of state comprehensive paid leave laws already enacted, as well as the federal Family and Medical Leave Act. Part III discusses the voluntary family leave insurance model, and Part IV discusses how it relates to the pre-existing private market of commercial short-term disability insurance. Part V discusses how states could help ensure that policies offered under an opt-in approach would be reasonably robust. Part VI concludes by suggesting that opt-in insurance could be part of a broader strategy for supporting new parents' needs but that it is not a sufficient solution in and of itself.

## II. COMPREHENSIVE STATE LEAVE POLICIES

As is well known, American federal law is woefully inadequate in providing time off to new parents. The federal Family and Medical Leave Act (FMLA) provides up to twelve weeks of leave, but it only applies to employers with at least fifty employees, and it only covers workers who have worked for the employer for at least a year with an average of about twenty-five hours per week.<sup>28</sup> These restrictions mean that less than 60 percent of the private workforce is eligible for FMLA leave, with low-wage workers disproportionately unlikely to be covered.<sup>29</sup> Moreover, FMLA leave is generally unpaid.<sup>30</sup> Many workers, even well into the middle class, live paycheck to paycheck, meaning

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<sup>28</sup> See 29 U.S.C. §§ 2611(2)(A)–(B), 2612(a)(1).

<sup>29</sup> See SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOCS., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS 6 (2020) (“Overall, 56 percent of employees are eligible for FMLA, on the basis of their reported tenure, hours, and worksite size.”); see also WIDISS, *Equalizing Parental Leave*, *supra* note 20, at 2204–05 (gathering sources on FMLA eligibility).

<sup>30</sup> See 29 U.S.C. § 2612(c).

that unpaid leave is of very limited utility.<sup>31</sup> And, in the absence of legal requirements, relatively few workers receive paid leave as a discretionary benefit.<sup>32</sup>

A growing number of states have addressed this problem by mandating paid leave for new parents, as well as other care-related needs. As this Article goes to press, in mid-May 2023, twelve states plus the District of Columbia have enacted laws that ensure virtually all workers can receive paid time off when they take leave to care for a new child.<sup>33</sup> These laws also provide paid time off to care for family members with serious health conditions and for certain care needs related to a family member's military service; several also provide time

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<sup>31</sup> See, e.g., BROWN ET AL., *supra* note 29, at iv (reporting that 66 percent of workers who needed FMLA leave, but did not take it, could not afford to); Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2185 n.53 (collecting sources on households living paycheck to paycheck).

<sup>32</sup> In 2022, 25 percent of civilian workers received paid family leave as an employer-provided benefit; while still low, the percentage has increased considerably since 2008, when it was only 9 percent. See *Employee Benefits Survey: What Data Does the BLS Publish on Family Leave?*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ebs/factsheets/family-leave-benefits-fact-sheet.htm> [<https://perma.cc/AN9T-8V6W>] (last visited Apr. 19, 2023) (looking at chart 2). The BLS compensation survey monitors “employer-sponsored benefits,” i.e., benefits for which the employer pays the cost. See *National Compensation Survey: Glossary of Employee Benefit Terms*, U.S. BUREAU OF LAB. STAT. (Sept. 2022), <https://www.bls.gov/ebs/publications/pdf/national-compensation-survey-glossary-of-employee-benefit-terms-2022.pdf> [<https://perma.cc/F8M6-Z349>]. The funding for family leave benefits under the paid leave laws currently-operative generally are funded by a small tax paid by *employees* rather than *employers*. See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, *supra* note 6 (showing in RI, CA, NJ, NY, WA, MA, and CT workers cover the costs of family leave, while in Washington DC, costs are covered by employers). Thus, the BLS survey currently excludes state and local-government mandated plans. See *Employee Benefits Survey: Questions and Answers*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ebs/questions-and-answers.htm> [<https://perma.cc/4ACQ-8F4H>] (last visited Apr. 19, 2023) (looking, specifically, at the question: “[w]here can I find information on paid family leave?”). Accordingly, the 25 percent figure significantly undercounts the share of civilian workers who receive paid family leave *either* as an employer-sponsored benefit *or* through benefits under a state paid leave law. My thanks to SJ Glynn for explaining this distinction to me and helping identify pertinent BLS resources.

<sup>33</sup> See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, *supra* note 6 (indicating California, Colorado, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Washington, and Washington DC have enacted paid family and medical leave laws). There are additional states that are considering comprehensive leave plans during the 2023 legislative session. See also *Fast Facts About Minnesota's New Paid Leave Law*, *supra* note 6 (noting Minnesota approved a paid family and medical leave law in May 2023).



off to address domestic or sexual violence.<sup>34</sup> And, importantly, these laws provide benefits when an employee must miss work because of her *own* serious health condition, similar to the short-term disability coverage discussed in Part IV. Four of these states passed laws mandating short-term disability benefits back in the 1940s;<sup>35</sup> thus, the family leave provisions were built on this pre-existing structure.<sup>36</sup> Other states enacted the entire benefits scheme within the past few years. In general, the laws have become more generous over time, and a string of recent successes suggests growing momentum.<sup>37</sup> As of May 2023, however, all the states that have passed comprehensive leave laws lean Democratic; efforts to pass comparable bills in red, or even purple, states have not yet been successful.<sup>38</sup>

I have discussed these laws in detail elsewhere.<sup>39</sup> Here, I will only briefly describe their general structure. Most of these laws cover all, or virtually all, private employers; several also cover public employers. Employees need to have worked a requisite number of hours to participate, but the requirements are quite modest. Most employees (including those working very limited part-time hours, irregular hours,

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<sup>34</sup> See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, *supra* note 6.

<sup>35</sup> See U.S. SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS IN THE UNITED STATES 44–49 (1997) (discussing mandatory short-term disability policies enacted in California, New Jersey, New York, and Rhode Island); see also, Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 988 (2013) (discussing how prior to the enactment of the Pregnancy Discrimination Act both public and private short-term disability policies typically excluded pregnancy-related needs).

<sup>36</sup> See, e.g., Eileen Appelbaum & Ruth Milkman, *Leaves that Pay: Employer and Worker Experiences with Paid Family Leave in California* 2 (2011) (noting that California and New Jersey's paid family leave programs were built on the states' pre-existing short-term disability programs). Rhode Island and New York subsequently built on their pre-existing programs as well. See *id.* (identifying these states as also having temporary disability programs).

<sup>37</sup> See Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2205–06 (discussing how more recently enacted laws provide both higher levels of income replacement and longer periods of parental leave).

<sup>38</sup> See sources cited *supra* note 8. For example, the Vermont policy—providing benefits to state employees and allowing private businesses and individuals to opt-in—was put in place through negotiations between the Republican governor and the state employees' union, after the governor twice vetoed comprehensive paid leave plans passed by the Democratically controlled legislature. See Duffort, *supra* note 12.

<sup>39</sup> See Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2204–08; see also sources cited *supra* note 6; *State Paid Family & Medical Leave Insurance Laws*, *supra* note 6 (providing detailed information regarding the contours of each existing law).

or a mix of different part-time jobs) will qualify. Most state laws also allow self-employed workers to opt into the policies. In most of the states, an employee with a new (biological, adopted, or foster) child will be eligible for up to twelve weeks of benefits to care for their child. Both mothers and fathers are eligible for equal amounts of this “bonding” leave. Birth mothers may also claim an additional period of medical leave (typically six to eight weeks) to recover from the physical effects of childbirth. As noted, these laws also authorize paid leave to care for family members with serious health conditions and needs related to military service. Several of the newer laws also cover absences related to domestic or sexual violence.

While the first-enacted laws typically provided 50 to 60 percent of regular earnings, many of the newer laws provide close to full income replacement, up to a cap set around median wage, which is usually at least \$1,000 per week.<sup>40</sup> Some of the older laws have since been amended to provide fuller income replacement.<sup>41</sup> Thus, the state laws are progressive. Low-wage to medium-wage workers often receive almost their regular wages while on leave, whereas workers who make more than median wages will receive a smaller percentage of their regular salary, but still a benefit that provides significant support.

These policies are transformative. In states with paid leave, almost all workers can receive an ample period of paid time off to care for a new child.<sup>42</sup> Paid leave improves maternal and child health, encourages fathers to be involved caretakers, and provides a host of other benefits.<sup>43</sup> (Although, as I have detailed elsewhere, the policies

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<sup>40</sup> See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, *supra* note 6.

<sup>41</sup> See Melody Gutierrez, *California Raises Wage Replacement for New Parents, Sick Workers*, L.A. TIMES (Sept. 30, 2022, 12:24 PM), <https://www.latimes.com/california/story/2022-09-30/california-raises-wage-replacement-for-new-parents-sick-workers> [<https://perma.cc/77MA-PF9N>] (noting California’s wage replacement rate will rise from 60 percent to upwards of 90 percent).

<sup>42</sup> See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, *supra* note 6 (noting that in most states, new parents are eligible for at least 12 weeks of leave to bond with a new child); *Fast Facts About Minnesota’s New Paid Leave Law*, *supra* note 6 (noting that under Minnesota’s law, new parents are eligible for twelve weeks of leave; birth mothers can receive up to another eight weeks for medical leave).

<sup>43</sup> See generally Maureen Sayres Van Niel et al., *The Impact of Paid Maternity Leave on the Mental and Physical Health of Mothers and Children: A Review of the Literature and Policy Implications*, 28 HARV. REV. PSYCH. 113 (2020) (reviewing recent studies showing positive effect of paid leave on mental and physical health of mothers and children and increase in breastfeeding initiation and duration); Richard J. Petts, Chris Knoester & Jane Waldfogel, *Fathers’ Paternity Leave-Taking and Children’s Perceptions of Father-Child*

treat single-parent families unfairly, as they are eligible for only half as much leave as two-parent families.<sup>44</sup>) They also provide essential support to workers who need to miss work for their own serious health condition or to care for a loved one with a serious health condition, as well as needs related to military service or domestic or sexual violence.

The key to making the comprehensive state policies work from an economic perspective is that they use an insurance-based model to pool risks and, crucially important, that pool includes virtually all workers. Employers or employees pay a very small payroll tax into a fund which is either administered by the state itself or through a contract with a private insurance company or companies.<sup>45</sup> The total tax is typically less than 1 percent of wages—an amount calibrated to fully cover the cost of the program in terms of both benefits for absences due to the employee’s own health needs (akin to short-term disability benefits on the private marketplace) and family care needs.<sup>46</sup> Several states apportion responsibility for these distinct benefits separately, with the family leave (including parental and family caregiving) typically ranging from 0.1 percent to about 0.4 percent of wages.<sup>47</sup> In other words, for a worker making the median income of about \$55,000, the tax for family leave would be less than \$220 annually—or about \$4 per week.<sup>48</sup> As various legislative campaigns have emphasized, that is often less than a cup of coffee.<sup>49</sup> This low cost

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*Relationships in the United States*, 82 *SEX ROLES* 173, 173 (2020) (finding that fathers’ use of leave helped “nurture high-quality father-child relationships”); Deborah A. Widiss, *The Hidden Gender of Gender-neutral Paid Parental Leave: Examining Recently-enacted Laws in the United States and Australia*, 41 *COMP. LAB. L. AND POL’Y J.* 723, 743–45 (2021) (discussing how paid leave policies increase fathers’ use of leave).

<sup>44</sup> See Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2236–54.

<sup>45</sup> See *STATE PAID FAMILY & MEDICAL LEAVE INSURANCE LAWS*, *supra* note 6, at 12–14 (describing whether costs are paid by the employer, employee, or both); *Fast Facts About Minnesota’s New Paid Leave Law*, *supra* note 6 (noting costs under Minnesota’s law will be split between employers and employees).

<sup>46</sup> See sources cited *supra* note 45 (describing payroll rates).

<sup>47</sup> See *id.*

<sup>48</sup> See *Median Earnings and Percent Change by Work Status and Sex*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/visualizations/2021/demo/p60-273/figure4.pdf> [<https://perma.cc/PGG7-Z4VX>] (reporting median wage for full-time year-round workers as \$56,287).

<sup>49</sup> See, e.g., Press Release, José M. Serrano, Sen., N.Y. State Senate, New York Enacts Paid Family Leave (Feb. 14, 2018), <https://www.nysenate.gov/newsroom/press-releases/jose-m-serrano/new-york-enacts-paid-family-leave> [<https://perma.cc/93RM-G2JW>] (“This comprehensive family benefit costs less than \$2 a week—the price of a typical cup of coffee!”).

reflects the reality that in any given year, relatively few employees claim benefits.

Then, when an employee is eligible, she files a claim with the state and it is the state—not her own employer—that provides her payment while on leave. If the employee earns any amount up to the median wage, she will receive close to her regular pay. The *employer*, on the other hand, may treat her absence as an unpaid leave, freeing up money to hire a replacement worker if necessary. Or, the policy may be structured so that the employer continues to pay the employee her regular wages or salary and is reimbursed for most of those costs from the state pool. In either case, virtually all employees are covered. The insurance model means the costs incurred by both businesses and workers, however allocated, are predictable and small.

### III. OPT-IN PAID FAMILY LEAVE INSURANCE

In states *without* a mandatory leave policy—including all of the states with post-*Dobbs* stringent abortion regulations—many new parents will have a nominal right to unpaid leave, either under the FMLA or discretionary employer policies.<sup>50</sup> Yet, just one in four workers, and virtually no low-wage workers, receive paid family leave benefits under an employer-provided policy.<sup>51</sup> It is easy to look at such statistics and bemoan the stinginess of employers absent government mandates. And to some extent, that is certainly warranted. From the *employer's* point of view, however, particularly for small businesses, it can be difficult to provide an extended paid parental leave.

To see this, consider that more than 7.5 million Americans become parents each year,<sup>52</sup> about 5 percent of the total number of

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<sup>50</sup> NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl. 7 (reporting 90 percent of all workers receive unpaid family leave).

<sup>51</sup> *See id.* (reporting 25 percent of all civilian workers, and 13 percent of the lowest quartile of workers, receive paid family leave under an employer-provided policy). *See supra* note 32 (discussing how these figures do not include workers receiving paid leave under a state policy). Birth parents may also be eligible for benefits under a short-term disability policy for the period of time where they are physically recovering from childbirth. In some cases, employees may also be able to use paid time off such as sick days, personal days, or vacation days during a period of parental leave. *See* 29 U.S.C. § 2612(d)(2).

<sup>52</sup> There are about fifty-six births per 1,000 women aged fifteen to forty-four, for a total of about 3.6 million women giving birth each year. *See* Brady E. Hamilton et al., *Births: Provisional Data for 2021*, NAT'L CTR. FOR HEALTH STAT. (May 2022), <https://www.cdc.gov/nchs/data/vsrr/vsrr020.pdf> [<https://perma.cc/GXJ4-FXLJ>]. Of course, roughly the same number of men are biological fathers, although not all of them will be recognized legally as a parent and thus may not be eligible for parental

U.S. workers.<sup>53</sup> And consider that the majority of U.S. businesses have fewer than five employees, and almost 95 percent of businesses have fewer than fifty employees.<sup>54</sup> If a business provides paid leave under an internal discretionary policy, it is promising to pay the salary of a worker who may be out for an extended period of time, with no way of knowing how many employees will be eligible in any given year. An accurate statistical assessment of how often a business would be asked to provide parental leave would likely vary based on numerous factors, including, for example, the demographics of the business's workforce in terms of age and sex; the generosity of the policy in terms of percentage of income replacement; and the workplace culture around taking leave. But back-of-the-envelope calculations suggest that for a large business with 1,000 employees, such requests would be relatively routine and predictable; by contrast, for a small business with ten employees, they would be relatively rare and highly unpredictable.<sup>55</sup> If

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leave. See Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2219–22 (discussing paths to recognition of legal parenthood for unmarried fathers). Additionally, there are about 135,000 children adopted annually. *U.S. Adoption Statistics*, ADOPTION NETWORK, <https://adoptionnetwork.com/adoption-myths-facts/domestic-us-statistics> [<https://perma.cc/S9FF-6X3L>], (last visited Mar. 9, 2023). Finally, in 2020 about 200,000 children entered a foster placement. See *Children Ages Birth to 17 Entering Foster Care in the United States*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/6268-children-ages-birth-to-17-entering-foster-care?loc=1&loct=2#detailed/2/2-53/true/574,1729,37,871,870,573,869,36,868,867/any/13034,15620> [<https://perma.cc/BV7A-VCAC>] (last visited Apr. 30, 2023).

<sup>53</sup> See *The Employment Situation—January 2023*, BUREAU OF LAB. STAT. 5 (2023), <https://www.bls.gov/news.release/pdf/empst.pdf> [<https://perma.cc/PDX9-858D>] (reporting non-farm employment in 2022 ranging from 150 million to 155 million). Not all new parents are in the workforce prior to a birth, adoption, or foster placement, so the actual percentage of the U.S. workforce with a new child is likely somewhat less than 5 percent.

<sup>54</sup> Andrew W. Hait, *The Majority of U.S. Businesses Have Fewer Than Five Employees*, U.S. CENSUS BUREAU (Jan. 19, 2021), <https://www.census.gov/library/stories/2021/01/what-is-a-small-business.html> [<https://perma.cc/5QQA-W32V>]. Of course, a single large business employs many more employees than the aggregate of many very small businesses, which explains why about 60 percent of the total workforce is employed at an FMLA-covered entity, meaning an entity with at least fifty employees. See *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, ABT ASSOCS. 6 (July 2020), [https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD\\_FMLA2018SurveyResults\\_FinalReport\\_Aug2020.pdf](https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf) [<https://perma.cc/CJR9-6QRK>] (FMLA-covered worksites account for 59 percent of employees employed at U.S. firms).

<sup>55</sup> For example, in a 1,000-employee business, around fifty employees (5 percent of 1000) would become parents each year (although the actual number would depend to some extent on the age make-up of the employer's workforce). If there were equal numbers of female and male employees, and women are somewhat more likely than

a business wanted to offer broader benefits, such as paid leave to care for family members with serious health conditions, military needs, or other needs addressed in the mandatory laws, there would be somewhat higher numbers of leave requests, but still considerable uncertainty as to when leave would be claimed.

Moreover, if we assume that a business would seek to provide at least twelve weeks of paid leave to new parents, in line with the FMLA and the emerging norm of paid leave laws, the business would be committing to paying employees for roughly one quarter of a year while out on leave. Some businesses would also need to pay an additional employee to cover the work that would have been performed by the employee out on leave, or they would operate somewhat less productively than when fully staffed. In other words, from the perspective of a small business, guaranteeing employees a paid parental leave, or family leave more generally, is a relatively costly and unpredictable expense.<sup>56</sup>

In many contexts, the prudent response to costly but unpredictable risks is to purchase insurance.<sup>57</sup> For example, in the related context of employer-provided support for medical expenses incurred by employees, employers often purchase group insurance, a policy that covers eligible employees (and often their dependents) collectively.<sup>58</sup> In this scenario, the employer contracts with an

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men to take paid parental leave, then perhaps thirty-five employees would seek parental leave in any given year, and the sample size is large enough that leave requests would likely be relatively consistent. In a small business of ten employees, that same statistical analysis would suggest that about *one third of one* employee would seek leave in any given year. In many years, no employee would seek leave; in a given year, two might.

<sup>56</sup> See, e.g., *Paid Leave Policies on Main Street*, SMALL BUS. FOR AM.'S FUTURE, <https://www.smallbusinessforamericasfuture.org/small-business-for-america-s-future-releases-paid-leave-survey-results> [<https://perma.cc/678L-JEXY>] (reporting that cost and disruption of business operations are the reasons most often cited for why small businesses do not provide paid leave).

<sup>57</sup> See ROBERT H. JERRY II & DOUGLASS R. RICHMOND, UNDERSTANDING INSURANCE LAW 11–17 (1996) (discussing how insurance is a mechanism for transferring and spreading risk).

<sup>58</sup> See Sam Hughes, Emily Gee & Nicole Parfogel, *Health Insurance Costs Are Squeezing Workers and Employers*, CTR. FOR AM. PROGRESS (Nov. 29, 2022), <https://www.americanprogress.org/article/health-insurance-costs-are-squeezing-workers-and-employers> [<https://perma.cc/6CD6-T7H5>]. This market is further divided into large-group and small-group policies. See, e.g., Amy B. Monahan & Daniel Schwarcz, *Saving Small-Employer Health Insurance*, 98 IOWA L. REV. 1935 (2013) (citing KENNETH S. ABRAHAM & DANIEL SCHWARCZ, HEALTHCARE SUPPLEMENT TO ABRAHAM'S INSURANCE LAW AND REGULATION 3–4 (5<sup>th</sup> ed. 2010)).

insurance company to assume financial responsibility for enrollees' medical claims. Or an employer may choose to self-insure, meaning that they generally pay costs directly, but purchase stop loss insurance which offers protection against unusually high costs in any given year.<sup>59</sup> Or they may self-insure entirely.<sup>60</sup> These choices offer different financial and administrative benefits and costs, including implications for how and if they are regulated under the Employee Retirement Income Security Act (ERISA).<sup>61</sup> The nuances of these distinctions are not relevant to this Article. The point is simply that group insurance lets an employer spread and transfer risk associated with offering an employee benefit to an insurance company, rather than bearing the risk for unpredictable expenses directly. Group insurance policies are particularly important for small employers, where the size of the employee pool makes it hard to predict risk accurately and where unusually high costs are comparatively more difficult to absorb.<sup>62</sup>

In our country, the insurance market is tightly regulated. In most instances, insurance products can only be offered if a state authorizes sale of the product to individuals or companies within its jurisdiction.<sup>63</sup> States pass legislation approving certain kinds of insurance, and such laws also often include some substantive standards for certain kinds of policies.<sup>64</sup> They may also delegate authority to insurance commissions to set standards or otherwise regulate the policies offered.<sup>65</sup>

Until 2022, no state had approved “family leave” insurance as a voluntary, commercial product that could be offered as group insurance to employers.<sup>66</sup> That is now rapidly changing. In the spring

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<sup>59</sup> *See id.* at 1965–66 (discussing how employers may offer a self-insured health plan along with stop loss insurance).

<sup>60</sup> *See id.* at 1966.

<sup>61</sup> *See id.*

<sup>62</sup> *See, e.g.*, Paul Fronstin, *Trends in Self-Insured Health Plans Since the ACA*, EBRI ISSUE BRIEF 5 (2021) (finding that employers with 500 or more employees are much more likely than smaller employers to self-insure at least one plan).

<sup>63</sup> *See, e.g.*, KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 36–41 (1986) (discussing nature of state regulation).

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> In the absence of such a policy, employers that offer paid family leave as discretionary benefit functionally self-insure; it is not surprising that larger employers have been more likely than smaller employers to do so. *See* NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl. 7 (reporting twice as many employees at enterprises with at least 500 employees receive paid family leave than employees at enterprises with fewer than fifty employees).

of 2022, Virginia passed the first law authorizing insurance companies to market such policies to employers in the state.<sup>67</sup> Also in 2022, New Hampshire and Vermont contracted with insurance companies to provide paid leave to state employees and allowed private businesses in the state to opt into the pool.<sup>68</sup> And at its annual meeting in fall 2022, the National Conference of Insurance Legislators (NCOIL), an organization made up of state legislators serving on insurance and financial institution committees, approved a model bill authorizing the marketing of family leave group insurance.<sup>69</sup>

This new approach quickly gained traction during the 2023 state legislative season, making inroads not only in purple-ish states such as Virginia, Vermont, and New Hampshire,<sup>70</sup> but also in solidly red states. Florida, Tennessee, and Arkansas, each a state in which Republicans control both houses of the state legislature and the governorship,<sup>71</sup> passed laws authorizing family leave group insurance policies.<sup>72</sup> These

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<sup>67</sup> VA. CODE ANN. § 38.2-107.2 (2022).

<sup>68</sup> See Marr, *supra* note 10; Duffort, *supra* note 12.

<sup>69</sup> See PAID FAMILY LEAVE INSURANCE MODEL ACT, *supra* note 14; LIFE INSURANCE & FINANCIAL PLANNING COMMITTEE, *supra* note 14; NAT'L COUNCIL OF INS. LEGISLATORS, History & Purpose, <https://ncoil.org/history-purpose> (last visited Mar. 26, 2023) (describing membership of the organization and its mission as helping educate state legislators on insurance issues and proposing model legislation); see also NCOIL ADOPTS FOUR NEW MODEL LAWS AT ANNUAL MEETING IN NEW ORLEANS, LA, *supra* note 14. The sponsors of the NCOIL Model Act signal its bipartisan-to-conservative appeal: the lead sponsors were a Republican senator in purple Minnesota and a Democratic senator in solidly red Arkansas. See *id.* (identifying lead sponsors as Republican Senator Paul Utke of Minnesota and Democratic Representative Deborah Furguson of Arkansas); see also *State Government Trifectas*, *supra* note 8 (showing Minnesota has had a divided government for all but three years between 1992 and 2022, and Arkansas has been under unified Republican control since 2015).

<sup>70</sup> See *State Government Trifectas*, *supra* note 8 (showing that Virginia has had divided state government for twenty-four of the past thirty-two years, including all of the past ten years; Vermont has had divided government for twenty-two of the past thirty-two years, including all of the past seven years; and New Hampshire, now fully Republican-controlled, has had a divided government for sixteen of the past thirty-two years, including eight of the last thirteen).

<sup>71</sup> See *State Government Trifectas*, *supra* note 8 (showing Arkansas, Florida, and Tennessee are under unified Republican control).

<sup>72</sup> See S.B. 111, 94th Gen. Assemb., Reg. Sess. (Ark. 2023), 2023 Ark. Laws Act 84; H.B. 721, 125th Reg. Sess. (Fl. 2023); S.B. 454, 113th Gen. Assemb., First Reg. Sess. (Tenn. 2023).



laws passed unanimously.<sup>73</sup> In May 2023, when this Article was being finalized for publication, a similar bill was also advancing in Texas.<sup>74</sup>

Virginia’s new law authorizes commercial insurance providers to market group plans to employers that would pay for a “percentage or portion” of an employees’ income loss due to:

- (i) the birth of a child or adoption of a child by the employee; (ii) placement of a child with the employee for foster care; (iii) care of a family member of the employee who has a serious health condition; or (iv) circumstances arising out of [active duty military service of a family member].<sup>75</sup>

The new laws in Arkansas, Florida, and Tennessee likewise authorize insurance to provide an unspecified “percentage or portion” of income loss due to the same general needs, defined using slightly different language.<sup>76</sup> These purposes mirror the federal FMLA and the growing body of state law providing paid leave, discussed above. Each of the new laws further provides that the insurance may be written as an amendment or rider to a group disability income policy, or as a separate group policy.<sup>77</sup> The Arkansas and Tennessee laws provide very little detail on additional requirements that might apply as companies develop the new product, although regulations may provide further

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<sup>73</sup> See Arkansas House Vote, SB 111, ARKANSAS STATE LEGISLATURE, <https://www.arkleg.state.ar.us/Bills/Votes?id=SB111&rcs=208&chamber=House&ddBienniumSession=2023%2F2023R> [<https://perma.cc/J7NC-5J97>] (last visited Apr. 19, 2023) (showing ninety-eight yeas and zero nays); Arkansas Senate Vote, SB 111, ARKANSAS STATE LEGISLATURE, <https://www.arkleg.state.ar.us/Bills/Votes?id=SB111&rcs=92&chamber=Senate&ddBienniumSession=2023%2F2023R> [<https://perma.cc/55FT-ZF77>] (last visited Apr. 19, 2023) (showing thirty-two yeas and zero nays); FLA. SENATE: CS/CS/HB 721, <https://www.flsenate.gov/Session/Bill/2023/721> [<https://perma.cc/T2LD-A9DL>] (last visited May 1, 2023) (showing bill passed unanimously in House and Senate); TENNESSEE GENERAL ASSEMBLY: S.B. 0454, <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0454> [<https://perma.cc/DEF4-RMLR>] (last visited Apr. 19, 2023) (showing the bill passed unanimously in the Senate and then by consent in the House).

<sup>74</sup> See H.B. 1996, 88th Reg. Sess. (Tex. 2023) (showing the bill had passed the Texas House and was being considered in the Texas Senate).

<sup>75</sup> See VA. CODE ANN. § 38.2-107.2 (2022).

<sup>76</sup> See S.B. 111, 94th Gen. Assemb., Reg. Sess. (Ark. 2023), 2023 Ark. Laws Act 84, Sec. 1 (to be codified at 23-62-112); H.B. 721, 125th Reg. Sess. (Fl. 2023), Sec. 2(1); S.B. 454, 113th Gen. Assemb., First Reg. Sess. (Tenn. 2023), Sec. 4(3).

<sup>77</sup> VA. CODE ANN. § 38.2-107.2 (2022); S.B. 111, 94th Gen. Assemb., Reg. Sess. (Ark. 2023), 2023 Ark. Laws Act 84, Sec. 1 (to be codified at 23-62-112(c)); S.B. 454, 113th Gen. Assemb., First Reg. Sess. (Tenn. 2023), Sec. 5.

guidance.<sup>78</sup> The Florida law (and pending Texas bill) have somewhat more specificity, as discussed further below.

All of the new laws, as well as the NCOIL Model Act, propose that the new family leave insurance policies could be added to existing short-term disability benefits policies, as well as offered as a standalone product.<sup>79</sup> In many respects, this makes sense. Birth parents are already able to claim benefits under short-term disability policies for physical effects of pregnancy and childbirth that interfere with work, and the first generation of state paid family leave laws built on earlier state laws had long required employers in those states to provide short-term disability benefits. This suggests, however, that many of the limitations of relying on the private market to offer short-term disability coverage could well be replicated in this new context, at least insofar as states leave the contours of the policies simply up to negotiation between employers and insurance companies. There are ways, however, in which a state could build on the Model Act framework but substantively address some of these limitations. Part IV discusses existing patterns of use of short-term disability insurance, and Part V then turns to how legislation authorizing paid leave insurance could be strengthened to better meet the needs of all workers.

#### IV. OPT-IN SHORT-TERM DISABILITY INSURANCE AS A (POTENTIALLY TROUBLING) BASE

In general, policymakers in the United States have done very little to protect workers against income loss or job loss caused by non-permanent medical needs.<sup>80</sup> Very short-term absences are typically addressed through sick days. Although there is no federal mandate, a growing number of states and localities have passed sick day laws,<sup>81</sup> and sick days are relatively common as a discretionary employee benefit even in the absence of legal requirements.<sup>82</sup> The picture is quite

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<sup>78</sup> See LIFE INSURANCE & FINANCIAL PLANNING COMMITTEE, *supra* note 14 (reporting testimony by Karen Melchert stating that Virginia was, as of summer 2022, working on regulations); S.B. 454, 113th Gen. Assemb., First Reg. Sess. (Tenn. 2023), Sec. 5(c) (authorizing the insurance commissioner to promulgate rules to carry out the new policy).

<sup>79</sup> See PAID FAMILY LEAVE INSURANCE MODEL ACT, *supra* note 14, § 110(b).

<sup>80</sup> Permanent disabilities are addressed (at least to some extent) through Social Security Disability Insurance. See 42 U.S.C. § 423(a).

<sup>81</sup> See Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J. F. 215, 227–230 (2021) (discussing rapid growth of paid sick day laws).

<sup>82</sup> See NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl.7 (showing 79 percent of all workers, and 88 percent of full-time workers, receive paid sick days).

different for medical needs that cause an absence of weeks or months, typically known as a short-term disability. The FMLA may protect an employee's job during such an absence, but it does not mandate that the employee be paid.<sup>83</sup> As noted above, all of the existing state paid family leave laws also provide benefits for time that an employee must take off work for the employee's own medical needs, and one additional state mandates short-term disability benefits.<sup>84</sup> There is no such mandate, however, in thirty-nine of the fifty states.

In the absence of legal requirements under state law, some employers provide short-term disability benefits as a discretionary employment benefit. All states have long authorized the marketing of commercial short-term disability insurance, and most employers that provide disability benefits purchase group insurance to help manage the costs and risks of doing so.<sup>85</sup> The Bureau of Labor Statistics collects data on the prevalence and nature of these benefits. This track record suggests there may be significant limitations in relying on opt-in employer-provided family leave group insurance to meet workers' caregiving needs.

First, experience suggests that many employees would not receive benefits at all under an opt-in approach. Despite the widespread availability of commercial insurance for short-term disability benefits, only about 40 percent of all civilian workers receive such benefits from their employer.<sup>86</sup> Even this likely overstates the level of truly

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<sup>83</sup> See 29 U.S.C. § 2612(c).

<sup>84</sup> See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, *supra* note 6 (showing all eleven of the state laws, including Washington D.C., provide benefits for an employee's own medical needs); see also 21 HAW. REV. STAT. § 392-21 (2012) (mandating short-term disability benefits).

<sup>85</sup> Most small employers use commercial insurance, while some larger employers self-insure. See NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl.23 (showing 75 percent of employers with fewer than 100 workers use commercial insurance, and 55 percent of employers with more than 100 employees do so). States also authorize insurance companies to market short-term disability policies directly to individuals. This typically requires an assessment of medical conditions to avoid the moral hazard questions that would arise if it could be purchased when an individual had reason to think she would likely need it.

<sup>86</sup> See NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl.5 (showing that 41 percent of all civilian workers have access to employer-provided short-term disability benefits). This number has risen only modestly over the past decade, even as more states have implemented paid leave laws that offer somewhat similar benefits. See BLS DATA FINDER (search results on file with author) (showing percentage of all civilian workers with access to short-term disability has risen from 36 percent in 2011 to 41 percent in 2022). This is because compliance with state paid family and medical leave laws will not necessarily count as employer-provided short-term disability insurance.

“voluntary” actions by employers to offer disability benefits, in that some high population states—including California and New York—have long required employers to provide such benefits.<sup>87</sup> In the South, for example, where no state currently requires short-term disability benefits, just 32 percent of civilian workers receive them.<sup>88</sup>

Like most discretionary benefits, low-wage workers are less likely to receive short-term disability benefits than more highly paid earners: just 22 percent of the lowest-quartile of earners receive these benefits, as compared to 57 percent of the highest quartile.<sup>89</sup> Part-time workers are much less likely than full-time workers to receive disability benefits.<sup>90</sup> Women are more likely to be low-wage and part-time workers.<sup>91</sup> In other words, it seems likely that vulnerable workers—those who particularly need income support during an absence to meet basic needs such as food and rent—are comparatively less likely to receive benefits under an opt-in approach.

Second, building on the framework of temporary disability suggests that income replacement under family leave policies could be too low to truly allow an extended leave for bonding with a new child or family caregiving, especially for low-wage workers. Short-term disability policies typically provide a flat percentage of income replacement—generally between 50 and 60 percent—up to a maximum benefit, which is on average about \$880.<sup>92</sup> By contrast, most

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Yet, employer-provided benefits in the states that have had longstanding requirements that employers provide short-term disability benefits (CA, NJ, NY, RI, and HI) may count for purposes of this survey. My thanks to SJ Glynn, U.S. Department of Labor, for explaining this to me.

<sup>87</sup> See *id.*; see also *supra* text accompanying note 36.

<sup>88</sup> See NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl.5.

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* (showing 48 percent of full-time workers receive them as compared to 19 percent of part-time workers).

<sup>91</sup> See, e.g., Lauren Hoffman & Bela Salas-Betsch, *Including All Women Workers in Wage Gap Calculations*, CTR. FOR AM. PROGRESS (May 24, 2022), <https://www.americanprogress.org/article/including-all-women-workers-in-wage-gap-calculations>

[/#:~:text=Incorporating%20all%20women%20workers%2C%20including,urgent%20for%20policymakers%20to%20act](https://perma.cc/F45Z-ADTT) [https://perma.cc/F45Z-ADTT] (noting nearly 60 percent of part-time workers are women, and that more than two-in-three part-time workers in low-paid jobs are women).

<sup>92</sup> See NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl.5 (showing average percentage reimbursement rate is 60 percent, and that 69 percent of all workers receive 50 to 60 percent reimbursement); *id.* (showing average maximum benefit

of the state mandatory paid leave laws, discussed in Part II, provide close to full income-replacement for low- to median-wage earners. In practice, for low- to middle-wage workers living paycheck to paycheck, the reimbursement rate under the existing short-term disability policies—where benefits would be only around half of regular pay—is too low to provide a meaningful opportunity for an extended parental leave.

Third, there are questions about how the family leave insurance policies would be priced to employers. Typically, insurance products are priced by using actuarial tables to pool similar risk levels together, so that the market can respond to different levels of risk. That said, when authorizing commercial insurance, states sometimes preclude consideration of certain factors that correlate with risk—thus, in many states, insurers cannot use race or religion when setting prices, at least for certain products.<sup>93</sup> There is no such categorical exclusion of consideration of age or sex.<sup>94</sup>

In the existing short-term disability market, many states allow insurance providers to vary the price of a group policy based on the age make-up of the employer's workforce.<sup>95</sup> The extent to which insurance providers may consider the sex make-up of the employer's workforce varies more widely, with many states prohibiting or significantly limiting it, and others explicitly permitting consideration or simply having no rule in place.<sup>96</sup> As discussed below, it is likely that there could be both sex-based and age-based variation in claim rates for family leave insurance, so key questions around fairness would be implicated on whether states would allow insurance companies to

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amount is \$903). Twenty percent of workers receive benefits without a maximum benefit. *See id.*

<sup>93</sup> *See, e.g.,* Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195, 235–43 (2014).

<sup>94</sup> This is distinct from the question of whether *employers* may charge their employees different amounts for access to employer-provided benefits on the basis of age or sex. If certain conditions are met, this may be permissible with respect to age, but is generally illegal with respect to sex. *See generally* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2001-1, SECTION 3 EMPLOYEE BENEFITS (2000), <https://www.eeoc.gov/laws/guidance/section-3-employee-benefits#I.%20Introduction%20%28T%29> [https://perma.cc/8VX9-7FRD] (explaining it may be permissible under federal antidiscrimination laws to pass on differences in costs based on age associated with disability benefits but not with respect to sex).

<sup>95</sup> *See* Avraham et al., *supra* note 93, at 262.

<sup>96</sup> *See id.* at 247.

consider such variation in employers' workforces when pricing policies.

It is also important to consider whether employees would be expected to provide contributions for the cost of such benefits. Here, the short-term disability model is helpful, in that virtually all employers that choose to offer this benefit fully cover its costs, and thus virtually all employees given the option of participating, do so.<sup>97</sup> This helps keep the per-person cost reasonable by diversifying the risk pool and avoids what otherwise could be a serious adverse selection problem. By contrast, if employers were to require employees to bear a significant portion of the premium costs for a short-term disability policy (as is common, for example, with employer-provided health insurance plans), it is foreseeable that younger and healthier employees who did not expect to need to claim benefits might be unlikely to participate. The pool would therefore become less diversified and the per-person cost would likely increase. A family leave insurance policy that required an employee contribution would probably be even more susceptible to adverse selection, since—at least as far as parental leave is concerned—it is relatively foreseeable to most employees whether they would expect to claim benefits. Thus, ideally, this aspect of short-term disability policy design would be carried over to any family leave insurance policies.

Finally, there are questions regarding how short-term disability benefits for medical needs related to pregnancy and childbirth would be handled if such policies were expanded to also cover family leave for bonding with a new child. Under existing short-term disability policies, birth parents<sup>98</sup> can usually receive benefits for the period of time that they are physically recovering from pregnancy and childbirth; usually, this is six to eight weeks, but it may be longer if there are medical complications that meet the requisite standard of disability.<sup>99</sup> In fact, under many employers' policies, an employer-provided "maternity leave" is funded in part or wholly by a short-term

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<sup>97</sup> See NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl.5 (showing 41 percent of employees are offered access, and 40 percent participate, meaning there is a 98 percent take-up rate); *see id.* (showing just 13 percent of employees are required to make a contribution to help cover the cost). Part-time workers are much less likely to be offered access (19 percent) and much more likely to be asked to contribute if they are (39 percent), but even so the take-up rate is 95 percent. *See id.*

<sup>98</sup> Most typically birth mothers, but also non-binary or transmen who have given birth.

<sup>99</sup> See Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2183.

disability policy.<sup>100</sup> To add to what is already provided, a family leave rider on an existing short-term disability policy should allow a birth parent to receive benefits for a period of bonding with a new child *in addition* to the period of time she is eligible for medical benefits.

More generally, any family leave policy would need to determine how many weeks of bonding benefits a parent is eligible to receive. This would differ from existing short-term disability policies, which typically allow up to twenty-six weeks of benefits, but only if there is ongoing medical need.<sup>101</sup> And depending on how family leave policies were written and how they were funded, there might be complicated questions as to whether ERISA would have any application in this context.<sup>102</sup>

In summary, existing short-term disability policies offered to employers as a commercial product typically provide far less generous benefits, in terms of level of income-replacement, than the comprehensive paid leave policies, and they typically reach far fewer employees than the comprehensive paid leave policies. State legislators considering authorizing family leave insurance could mitigate these problems by specifying some required aspects of coverage. The next Part takes up this question.

#### V. STRENGTHENING THE MODEL

State policymakers considering authorizing commercial family leave insurance could take steps to help ensure it would better meet the needs of workers, particularly vulnerable workers, than existing short-term disability policies do. The new laws passed in Virginia, Arkansas, and Tennessee do very little to specify aspects of policy design.<sup>103</sup> The NCOIL Model Act, the Florida law, and the bill pending in Texas, go further in anticipating key questions—and provide suggested language that raises some serious alarm bells when compared to the contours of the mandatory comprehensive paid leave laws discussed in Part II. This Part describes some of the key provisions

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<sup>100</sup> *See id.*

<sup>101</sup> *See* NATIONAL COMPENSATION SURVEY, *supra* note 20, tbl.5 (showing virtually all employer-provided short-term disability plans allow up to twenty-six weeks of benefits).

<sup>102</sup> My thanks to Bill Reynolds for helping explain to me how ERISA might have relevance. A full explication of these issues is beyond the scope of this Article—or my expertise—but there may be uncertainty at least at first as to whether and if ERISA might have any applicability to group family leave insurance policies offered by employers.

<sup>103</sup> *See supra* text accompanying notes 75–78 (discussing these laws).

included in the Model Act and the new laws and then proposes ways in which they could be modified to better meet the intended purpose of supporting family caregivers. At the margins, there may be trade-offs between the scope of policies and ensuring they remain affordable to employers. That said, the successful implementation of comprehensive laws in numerous states make clear that—if a risk pool is big enough and varied enough—these products can offer robust support at a quite modest price.<sup>104</sup>

Legislation authorizing family leave insurance should require policies to be structured to provide a meaningful amount of time off of work to care for a new child, as well as to care for family with serious medical conditions. The Model Act, Florida law, and Texas bill suggests policies might provide as little as just two weeks of benefits per year,<sup>105</sup> and the new laws in Virginia, Arkansas, and Tennessee fail to specify any minimum period.<sup>106</sup> By contrast, the emerging trend in state legislation for comprehensive leave policies is to provide at least twelve weeks of leave for new parents and family caregivers.<sup>107</sup> In most of these states, birth parents are eligible for an additional period of medical leave during the period of time that they are recovering from the physical effects of pregnancy and childbirth.<sup>108</sup> A private insurance policy that offers just a few weeks of paid time off falls far below the emerging norm and far short of what new parents and family caregivers need. This is particularly true given the extraordinarily high cost and scarcity of childcare for infants.<sup>109</sup> Relatedly, the Model Act, Florida law, and Texas bill suggest a series of potential limitations, including for periods of family leave where more than one person

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<sup>104</sup> See *supra* text accompanying notes 46–49.

<sup>105</sup> See PAID FAMILY LEAVE INSURANCE MODEL ACT, *supra* note 14, § 105; H.B. 721, 125th Reg. Sess. (Fl. 2023), Sect. 3, to be codified at 627.445(3)(b); H.B. 1996, 88th Reg. Sess. (Tex. 2023), Sect. 2.

<sup>106</sup> See sources cited *supra* notes 75–76.

<sup>107</sup> See sources cited *supra* note 6 (indicating ten of the twelve states with paid family leave policies provide at least 12 weeks of family leave).

<sup>108</sup> See sources cited *supra* note 6 (identifying several states as providing separate benefits for medical conditions and not specifying a cumulative amount of available leave, and others as providing an additional 2–4 weeks of medical leave for pregnancy and childbirth-related health conditions); see also Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2249–52 (discussing why this additional leave promotes a substantive conception of equality and may be particularly important to solo mothers).

<sup>109</sup> See Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2186–88 (discussing extreme shortages in infant care).



seeks leave to care for the same family member.<sup>110</sup> By contrast, most state laws permit new parents to take leave concurrently, which can be important for sharing caregiving responsibilities and helping shift gendered norms around caregiving after a period of leave.<sup>111</sup>

Legislation authorizing family leave insurance should ensure that the income replacement level is sufficient to allow low-wage workers to take a reasonable amount of time off. None of the new laws nor the Model Act suggest a minimum for the level of income replacement. As discussed in Part IV, the norm for short-term disability policies is that workers receive only about half of their regular pay.<sup>112</sup> By contrast, virtually all of the existing paid family leave laws now guarantee at least 80 percent of regular wages, with many states providing at least 90 percent of wages for low- to median-earners.<sup>113</sup> California recently raised its income replacement rate for its paid family leave policy to 90 percent of income for low-wage workers.<sup>114</sup> This change responded to studies showing that low-wage workers—disproportionately women, Black, and Latinx Californians—were far less likely than more highly-paid workers to use paid family leave when wage replacement rates were low.<sup>115</sup> Research suggests this was because they simply could not meet their basic needs on a fraction of their regular pay.<sup>116</sup> The NCOIL Model Act, Florida law, and Texas bill also anticipates that policies

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<sup>110</sup> See PAID FAMILY LEAVE INSURANCE MODEL ACT, *supra* note 14, § 108(g); H.B. 721, 125th Reg. Sess. (Fl. 2023), Sect. 3, to be codified at 627.445(5)(g); H.B. 1996, 88th Reg. Sess. (Tex. 2023), Sect. 2.

<sup>111</sup> See Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2207–08 (discussing this flexibility).

<sup>112</sup> See *supra* text accompanying note 92.

<sup>113</sup> See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, *supra* note 6 (showing nine of the twelve states—including Washington D.C.—now guarantee at least 80 percent of average wages up to the median income, and several provide at least 90 percent of regular wages); see also *See Fast Facts About Minnesota's New Paid Leave Law*, *supra* note 6 (describing Minnesota's progressive wage replacement rate that provides effectively 90 percent of regular wages for low-wage workers, 82 percent for median-wage workers, and lower percentages for higher-paid workers).

<sup>114</sup> See Jeanne Kuang, *Newsom Signs Bill Making Family Leave Affordable to More Workers*, CAL MATTERS (Sept. 30, 2022), <https://calmatters.org/california-divide/2022/09/paid-family-leave> [<https://perma.cc/8CST-2NU2>].

<sup>115</sup> See Kristin Schumacher, *Paid Family Leave Payments Don't Add Up for California Workers*, CAL. BUDGET & POL'Y CTR. (Feb. 2022), <https://calbudgetcenter.org/resources/paid-family-leave-program-is-out-of-reach-for-many-californians>. The prior policy originally offered just 55 percent income replacement, which has been raised to 60 percent for most workers and 70 percent to workers earning less than \$27,000 per year. See Kuang, *supra* note 114.

<sup>116</sup> See *id.*

could require an unpaid waiting period before benefits would begin, also a standard feature of many short-term disability policies.<sup>117</sup> Again, this differs markedly from state laws; virtually none of the existing state laws include a waiting period for family leave benefits.<sup>118</sup> And again, this matters most for low-wage workers, for whom even a week without pay can make it difficult to cover necessary expenses such as rent or groceries.

States could also specify that employees would not be required to contribute to the cost of family leave policies or, at least, cap such contributions at a reasonable level. Here, as discussed above, the short-term disability framework is helpful. In that context, it is already standard that employers fully cover the cost of this benefit, which helps ensure the risk pools remain diverse and avoid adverse selection problems. There is a possibility, however, that, if left up to private negotiation, an employer and insurance company would require workers to cover some or all of the cost of family leave insurance. This may be particularly likely because time off to provide care to a family member is often deemed more “voluntary” than time off work necessitated by the employee’s own health condition. Relatedly, there might be complicated questions around open enrollment policies, particularly whether an employee who was already pregnant, or whose spouse or partner was already pregnant, would be allowed to enroll. Requiring employers to simply bear the cost of the policies, rather than passing them onto employees, would largely address these problems.

Legislators should ensure that policies are written to recognize the diversity of modern families. The federal law on point—the FMLA—defines eligible family for whom care may be provided very narrowly, including only child, parent, and spouse.<sup>119</sup> State laws establishing comprehensive leave policies, by contrast, have increasingly adopted more flexible definitions of eligible family. Most

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<sup>117</sup> See PAID FAMILY LEAVE INSURANCE MODEL ACT, *supra* note 14, § 106 (draft, specifying that the policy shall indicate if there is a waiting period and whether an employee could work or receive paid time off during any such waiting period); H.B. 721, 125th Reg. Sess. (Fl. 2023), Sect. 3, to be codified at 627.445(3)(c) (specifying the policy must indicate whether there is an unpaid waiting period); H.B. 1996, 88th Reg. Sess. (Tex. 2023), Sect. 2 (similar).

<sup>118</sup> See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, *supra* note 6 (indicating that—including Washington D.C.—eleven of the twelve existing state laws have no waiting period for family leave benefits).

<sup>119</sup> See 29 U.S.C. § 2612. The FMLA allows care for children under the age of eighteen, or for adult children who “incapable of self-care because of a mental or physical disability.” See *id.* § 2611(12).

include adult children, siblings, parents, in-laws, grandparents, and unmarried domestic partners, and many also include extended family and chosen family, or use a functional definition that simply asks whether it is a person to whom one provides care.<sup>120</sup> As I explore elsewhere, this flexibility is essential. There has been a rapid growth of nonmarital and blended families, which departs from the traditional nuclear family structure, and communities of color, immigrant communities, and the LGBTQ community, are particularly likely to rely on multigenerational or chosen families' networks of care.<sup>121</sup>

The NCOIL Model Act takes a step in the direction of flexibility. Its proposed definition of eligible family member specifies it “may include a child, spouse, or parent . . . or any other person defined as a ‘family member’ in the policy of insurance.”<sup>122</sup> The Florida law, Tennessee law, and Texas bill include similar language.<sup>123</sup> This, however, leaves the scope of coverage to private negotiation between an insurance company and employers. This fails to ensure that the policies will allow time off to care for nonmarital partners, siblings, or grandparents, let alone broader conceptions of family. There is also a particular risk that employers would seek to impose their own moral beliefs regarding appropriate families on to their employees, which would raise questions similar to those that have arisen around employer-provided coverage for contraception.<sup>124</sup> For example, would an employer be able to purchase a policy that excludes coverage for the same-sex partner of a new parent? Or for an unmarried woman giving birth? State legislation could address these issues, while also

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<sup>120</sup> See Widiss, *Chosen Family, Care, and the Workplace*, *supra* note 81, at 231–34.

<sup>121</sup> See *id.* at 218–24.

<sup>122</sup> See PAID FAMILY LEAVE INSURANCE MODEL ACT, *supra* note 14, § 102(4) (emphasis added). The Model Act also broadens the definition of “child” beyond the FMLA approach to explicitly include a “son or daughter of a domestic partner,” but it does not include a definition of “spouse” that similarly protects the right to take time off to care for a nonmarital partner. See *id.* § 102(2).

<sup>123</sup> See H.B. 721, 125th Reg. Sess. (Fl. 2023), Sect. 3, to be codified at 627.445(1)(d) (providing family member means “a child, a spouse, a parent, or any other person defined as a family member of the employee in the policy”); S.B. 454, 113th Gen. Assemb., First Reg. Sess. (Tenn. 2023), Sec. 4(4) (providing family member means a “child, spouse, or parent” or “another person defined as a family member in a policy of insurance issued under this part”); H.B. 1996, 88th Reg. Sess. (Tex. 2023), Sect. 2 (similar).

<sup>124</sup> Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (allowing privately held for-profit corporation with religious objections to be exempted from the requirement of providing certain forms of contraception).

potentially addressing specific needs that might arise for religious entities as employers.

Finally, legislators should carefully consider whether insurance companies should be able to consider the sex- and age-based demographics of an employer's workforce when setting policy premiums. This is a question of equity and fairness, on which the NCOIL Model Act and the newly enacted laws are silent. For decades, American antidiscrimination laws and leave policies have been designed to shift the gender norms around leave and encourage fathers to take more time off with a new child.<sup>125</sup> Early evidence from the states with paid leave suggests that may be happening.<sup>126</sup> Nonetheless, women still take more, and longer, leaves.<sup>127</sup> In terms of family caregiving, women are also more likely than men to assume a family caregiving role where they would need leave.<sup>128</sup>

An insurance company might try to guess how likely members of a given employer's workforce are to take family leave and calibrate the price accordingly.<sup>129</sup> This could mean that employers with relatively young and female workforces are charged higher premiums, which in turn might (at the margins at least) foster discrimination at the hiring

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<sup>125</sup> See, e.g., Widiss, *The Hidden Gender of Gender-Neutral Paid Parental Leave*, *supra* note 43, at 735–39 (discussing requirements under American law that fathers and mothers be treated generally the same with respect to caregiving responsibilities).

<sup>126</sup> See *id.* at 744–45.

<sup>127</sup> See, e.g., N.Y. DEP'T OF FIN. SERVS., NEW YORK STATE PAID FAMILY LEAVE REPORT 2018–2021, [https://www.dfs.ny.gov/reports\\_and\\_publications/pfl](https://www.dfs.ny.gov/reports_and_publications/pfl) [<https://perma.cc/A5E3-J2KJ>] (last visited Apr. 18, 2023) (showing 68 percent of newborn bonding leaves were taken by women, as compared to 31 percent by men, and that women on average received 8.4 weeks of benefits for newborn bonding while men on average received 5.7 weeks of benefits for newborn bonding); N.J. DEP'T OF LAB. & WORKFORCE DEV., FAMILY LEAVE INSURANCE WORKLOAD IN 2020 SUMMARY REPORT, tbl. 4 (2021) (showing women accounted for 75 percent of newborn bonding claims).

<sup>128</sup> See, e.g., NAT'L P'SHIP FOR WOMEN & FAMS., THE FEMALE FACE OF FAMILY CAREGIVING I (2018), <https://nationalpartnership.org/wp-content/uploads/2023/02/female-face-family-caregiving.pdf> [<https://perma.cc/X5BB-8XZ5>] (reporting that 60 percent of caregivers for adult family members are women).

<sup>129</sup> For parental leave, the age at which persons typically become parents would be key. For most women, this is between age twenty and age thirty-five. See Gretchen Livingston, *They're Waiting Longer, but U.S. Women Today More Likely to Have Children than a Decade Ago*, PEW RSCH. CTR. (Jan. 18, 2018), <https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago> [<https://perma.cc/HJ3B-HP39>]; see also, Anne Morse, *Stable Fertility Rates 1990-2019 Mask Distinct Variations by Age*, U.S. CENSUS BUREAU (2022) (showing in 2019 the median age for mothers was thirty). For family caregiving, however, the age range might be broader.

stage or further depress wages in female-dominated industries if employers are instead purchasing family leave insurance. On the other hand, establishing an affordable mechanism for providing paid leave might decrease turnover and costs associated with new parents and actually reduce discrimination that women who are expected to bear children currently face. Further study would likely be necessary to gauge how such actuarial calculations would affect price and ultimately how allowing consideration of sex or age in pricing such policies might affect employment opportunities. But policymakers should at least consider precluding pricing based on sex for these products.

Ultimately, providing family leave insurance through a privatized opt-in approach, rather than a comprehensive public policy, poses two distinct risks of adverse selection.<sup>130</sup> First, there is risk of “within group” adverse selection—that is, that under any given employer’s plan, only employees who expect to use the benefit will choose to participate. Second, at a more macro level, there is a risk of “across group” adverse selection—that is, that only employers that expect many of their employees to need family leave (i.e., employers with comparatively high percentages of new parents or family caregivers) will opt to purchase the policies. The first risk can likely be addressed by employers paying the full cost of the benefit; as discussed above, this is standard practice with group short-term disability policies, and the result is that virtually all employees offered the opportunity to participate do so.<sup>131</sup> But placing the full cost of the policies on employers could increase the latter risk, making questions of whether insurance companies may consider the age and sex of a given employers’ workforce when pricing policies all the more important.

Indeed, it is possible that comprehensive state paid family and medical leave plans work well precisely *because* they ensure that virtually all employees participate, and thus that there is a diverse pool and no possibility of adverse selection. An opt-in privatized approach may turn out to be both more expensive and less effective. It will thus be important for future research to assess both the scope of coverage and cost of private plans relative to the public plans.

This analysis also suggests that states that would like to expand access to paid family leave, but stop short of enacting a comprehensive plan covering all businesses, should perhaps seek to emulate New Hampshire and Vermont, rather than Virginia, Tennessee, and

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<sup>130</sup> My thanks to Dan Schwarcz for helping clarify to me these risks and the relationships between them.

<sup>131</sup> See *supra* text accompanying note 97.

Arkansas.<sup>132</sup> As discussed above, New Hampshire and Vermont have each contracted with an insurance company to provide paid leave for all state employees, and then allowed private businesses, individual employees, and self-employed workers to opt into the plan.<sup>133</sup> States are themselves large employers with negotiating strength. Since the state policy covers all state workers, this ensures a diverse risk pool and presumably a relatively low per-person cost, which is then made available to individual businesses and workers. Smaller businesses and individuals thus benefit from the economies of scale the state enjoys. So long as the state policy was relatively robust in its coverage—akin, say, to the policies being implemented in states with comprehensive leave laws in place—this could be an attractive option for all.

#### VI. CONCLUSION: YES, AND . . .

Opt-in family leave insurance laws have quickly become a presence on the paid leave landscape. The rhetoric of choice and private marketplace resonates in more conservative jurisdictions. It is also a way for Republican legislators to respond to the reality that proposals for paid parental leave are very popular with voters across the board—typically supported by large percentages of Republicans and Independents as well as Democrats.<sup>134</sup> And they help address criticism, particularly in the wake of *Dobbs*, of the inadequacy of existing supports for new parents in states that have strictly limited abortion.<sup>135</sup>

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<sup>132</sup> See *supra* text accompanying note 62.

<sup>133</sup> See, e.g., Ethan DeWitt, *Council Approves Provider Contract for Paid Leave Program Amid Some Skepticism from Republicans*, N.H. BULL. (June 30, 2022, 5:41 AM) (describing the New Hampshire policy as including the possibility that individual workers can opt into the state policy and that premiums cannot exceed \$5 per week).

<sup>134</sup> See, e.g., Kristen Soltis Anderson, *What the Public Thinks About Paid Family Leave*, ETHICS & PUB. POL'Y CTR. (Jan. 27, 2020), <https://eppc.org/events/what-the-public-thinks-about-paid-family-leave> [<https://perma.cc/J38B-Y2N6>] (reporting high levels of support across party, gender, and ideological lines).

<sup>135</sup> See, e.g., Eleanor Mueller, *Dobbs Decision Spotlights Care Policies*, POLITICO: WOMEN RULE (July 8, 2022, 11:00 AM), <https://www.politico.com/newsletters/women-rule/2022/07/08/dobbs-decision-spotlights-care-policies-00044680> [<https://perma.cc/W9XG-FB3V>] (quoting a GOP consultant as admitting that there was a “major disconnect,” in that blue states have a “much more robust safety net for women,” while red states are eliminating access to abortion); Sara Rosenbaum, *A Public Health Paradox: States with Strictest Abortion Laws Have Weakest Maternal and Child Health Outcomes*, COMMONWEALTH FUND (Mar. 8, 2022), <https://www.commonwealthfund.org/blog/2022/public-health-paradox-states-abortion-laws-maternal-child-health-outcomes> [<https://perma.cc/P27Y-Y42H>]; Patrick T. Brown, *The Pro-Family Agenda Republicans*

The new laws in Arkansas, Florida, and Tennessee passed unanimously. This suggests that Democratic lawmakers in these red states see the opt-in approach as a step forward, even if they might prefer a truly comprehensive plan. And to be sure, some employers likely will welcome the possibility of buying insurance that can spread the risk of offering family leave as an employee benefit. This could be important for any employer that understands paid leave is a key support for workers, both because it is the “right” thing to do and because it can reduce turnover.<sup>136</sup> In surveys, employees, particularly women employees, indicate that paid parental or paid maternity leave is a benefit they value very highly, suggesting it could be a strategy for recruiting talent.<sup>137</sup> This may be especially valuable for employers located in red states that are competing with businesses operating in other states with comprehensive paid leave programs, as well as for multistate employers where some workers are covered by state-paid leave plans and others are not.<sup>138</sup> The growth of states authorizing opt-in family leave insurance, particularly in conjunction with the growth of mandatory paid leave policies in blue states, could snowball, perhaps leading to greater levels of coverage than has been typical with short-term disability. In time, it is possible that the norm will shift and

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*Should Embrace After Roe*, N.Y. TIMES (May 7, 2022), <https://www.nytimes.com/2022/05/07/opinion/republican-policy-after-roe.html> [<https://perma.cc/ZMA2-VCJM>]; Abigail Adcox, *Republicans Struggle with Cohesive Message on Family Policies Post-Dobbs*, WASH. EXAM’R: ABORTION (Oct. 1, 2022, 6:10 AM), <https://www.washingtonexaminer.com/restoring-america/community-family-republicans-cohesive-message-family-policies-post-dobbs> [<https://perma.cc/PPL5-58E3>].

<sup>136</sup> See, e.g., PAID FAMILY LEAVE LEGISLATIVE TOOLKIT 11, <https://sagamoreinstitute.org/wp-content/uploads/2022/07/Legislative-Toolkit-2.pdf> [<https://perma.cc/39L2-JFJC>] (last visited Apr. 18, 2023) (explicitly conservative publication advocating for paid family leave as good for business); see also NAT’L P’SHP FOR WOMEN AND FAMS., PAID FAMILY AND MEDICAL LEAVE: GOOD FOR BUSINESS 1 (2018), <https://nationalpartnership.org/wp-content/uploads/2023/02/paid-leave-good-for-business-2.pdf> [<https://perma.cc/B7L2-NEQW>].

<sup>137</sup> See, e.g., Mike Brown, *Majority of Women Want Paid Parental Leave, Not the 4-day Work Week*, BREEZE (Nov. 8, 2022), <https://www.meetbreeze.com/blog/paid-parental-leave-employee-benefits-survey> [<https://perma.cc/V7NW-AS8H>] (reporting survey of 1000 employed adults between twenty-two and forty finding employees want paid parental leave much more than other commonly provided employee benefits). Notably, this survey was done by a company selling paid parental leave insurance. See *id.*

<sup>138</sup> See, e.g., DeWitt, *supra* note 133 (quoting D.J. Bettencourt, Deputy Commissioner of the New Hampshire Insurance Department, as noting that the opt-in policy would allow businesses to better compete with businesses in Massachusetts, which has a state-run program).

workers will increasingly expect paid family leave to be provided in competitive benefits packages.

On the other hand, the experience with short-term disability benefits suggests it is possible that relatively few employers will purchase this insurance and that low-wage, part-time, and otherwise vulnerable workers are less likely than more highly paid workers to receive benefits under a discretionary program.<sup>139</sup> Additionally, if the level of income replacement remains in the 50-to-60 percent range typical of short-term disability policies, the growth of commercial paid family leave insurance could actually exacerbate inequality. Highly paid workers would be able to take extended leaves by using savings to supplement the benefits; low-wage workers, on the other hand, would likely continue to be unable to afford to go on leave. Modifying the Model Act's language, as suggested in Part V, to ensure that commercial policies offer a reasonably ample period of benefits at a reasonably generous income replacement rate, and that they are flexible in their definition of eligible families, would help ensure the policies help the workers most likely to need them. But ultimately, an opt-in policy will not provide the same kind of comprehensive coverage that the mandatory state paid family and medical leave laws provide.

Thus, many progressive legislators and advocates may choose to adopt a "yes, and" approach, recognizing that opt-in group insurance policies can offer some real benefits to companies and workers—but they are only a partial solution. To truly meet the needs of new parents, they would need to be combined with other policy supports. Other proposals that have garnered Republican or bipartisan support in the paid leave space include allowing a portion of the child tax credit to be advanced and used for paid leave or child care after a birth; allowing parents to borrow against their social security savings for the same needs; providing tax credits for employers who voluntarily offer leave; and considering ways to restructure unemployment insurance benefits to meet these needs.<sup>140</sup> These options likewise have pros and

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<sup>139</sup> See generally *supra* Part IV.

<sup>140</sup> See, e.g., Widiss, *Equalizing Parental Leave*, *supra* note 20, at 2212–15 (discussing federal bills proposing several of these approaches to paid parental leave); PAID PARENTAL LEAVE LEGISLATIVE TOOLKIT, *supra* note 136, at 56 (discussing similar approaches to paid parental leave); JULIE M. WHITTAKER & KATELIN P. ISAACS, CONG. RSCH. SERV., IF10643, UNEMPLOYMENT COMPENSATION (UC) AND FAMILY LEAVE 2 (2018) (discussing historical proposals to allow states to use unemployment insurance funds for paid family leave and noting that President Trump's FY 2019 budget proposal suggested a paid parental leave program built on the unemployment compensation administrative framework).



cons, and in my mind they are all less optimal than a comprehensive mandatory paid leave policy—but they also might more easily gain traction in conservative-leaning states or a divided Congress. And paid leave needs to be considered as a piece in a broader spectrum of policies to support families, such as offering more robust support for childcare, increasing the child tax credit, and expanding Medicaid coverage. In short, opt-in policies may be a viable step forward that can offer some real benefits to some new parents, but they should be viewed as just that: a *step* towards truly meeting the needs of new parents and family caregivers, not an end goal.

