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Explanation of and Experience Under the Family and Medical Leave Act

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Congressional Research Service

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Explanation of and Experience under the Family and Medical Leave Act

Summary

Congress passed the Family and Medical Leave Act of 1993 (FMLA, P.L. 103-3) as one means of easing the time conflicts that have developed in the past few decades as more married mothers began to work, increasingly on a full-time basis, outside the home. While employed single parents always have felt the pressure of trying to fulfill both workplace and child-rearing responsibilities, this work-family juggling act increasingly has spread to married couples with young children. The aging of the population and the lengthening of life spans makes it increasingly likely that individuals also will have to grapple with the demands of their jobs and the obligations of caring for elderly relatives.

The Family and Medical Leave Act requires private employers with at least 50 employees on their payrolls for at least 20 workweeks in the current or preceding calendar year and public employers, regardless of size, to extend job-protected, *unpaid leave* of at least 12 weeks to employees who meet length-of-service and hours-of-work eligibility requirements (e.g., worked for the employer at least 12 months and for a minimum of 1,250 hours in the 12 months preceding the start of their FMLA leave). Employees may elect, and employers may require them, to substitute accrued paid leave for FMLA leave. Leave under the Act is available to employees upon the birth of a child or placement of an adopted or foster child; to care for a newborn, newly adopted, or newly placed foster child; and to care for their own, a child's, a spouse's or a parent's "serious health condition." Employees are entitled to take leave associated with a serious health condition on an intermittent basis or work a reduced schedule (e.g., fewer hours per day or days per week).

Experience under the FMLA is assessed in a 2001 report, which is based upon an employee and an employer survey commissioned by the U.S. Department of Labor. Almost 62% of public and private sector employees worked at covered employers and met the Act's eligibility criteria during the 18-month survey period that spanned 1999 and 2000. Although the share of eligible employees at covered worksites who took FMLA leave increased significantly over time, FMLA leave-takers accounted for only 1.9% of all employees. Estimates of the number of employees who took leave under the Act in 1999-2000 ranged from 2.2 million to 6.1 million. One-fifth of FMLA leaves were taken on an intermittent basis. Employees most often took FMLA leave to care for their own health conditions. Two-thirds of persons who took leave for FMLA-reasons received some pay. Employees most often said "lack of funds" was the cause of their not taking leave for FMLA reasons. Almost 64% of employers rated the Act as very/somewhat easy to administer in 1999-2000, which was greatly below the 85% recorded 5 years earlier. Many more employers reported in 2000 than in 1995 that the law had a negative impact on individual productivity and absences. The human resources professionals who responded to a 2000 survey of the Society for Human Resource Management indicated that productivity loss was the most costly consequence of the FMLA. In addition, 63% of respondents said that, because of the FMLA, their firms had had to retain some employees who otherwise would have been terminated for poor attendance.

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Explanation of and Experience Under the Family and Medical Leave Act

Congress passed the Family and Medical Leave Act of 1993 (P.L. 103-3) as one means of easing the time conflicts that have developed in the past few decades as more and more married mothers began to work outside the home. “The majority of American women have always been mothers, and now a majority of mothers are also employees.”¹ While employed single parents always have felt the pressure of trying to fulfill both workplace and child-rearing responsibilities, the work-family juggling act increasingly has spread to married couples with dependent children (i.e., under age 18). Both spouses have been breadwinners in the majority of these families since 1978.² In 2000, for example, the husband and wife were in the labor force in 67% of married-couple families with dependent children. The share of married mothers caring for their own infants (i.e., less than 1 year old) and bringing home paychecks has grown greatly as well. The labor force participation of mothers with infants was 53%, and 648% of them were employed full-time (i.e., 35 or more hours per week). More broadly, 60% of all women were in the labor force, 75% of all working women held full-time jobs, and 47% of all labor force participants were women.

Because of the aging of the baby-boom generation and the lengthening of life spans, it also is increasingly likely that individuals will have to grapple with the competing demands of their jobs and of caring for parents or elderly relatives. In the mid-1990s, the typical informal or family caregiver of an older friend or relative was an employed, married, middle-aged woman who sometimes had a dependent child at home.³ According to one estimate, about one-fifth of working parents are members of the “sandwich generation” (i.e., providers of both elder care and child care).⁴ With women more likely than men to be unpaid caregivers and with mothers more likely than not to be in the labor force, working women in general — and working mothers in particular — are widely viewed as the chief beneficiaries of the Family and Medical Leave Act (FMLA).

This report summarizes the major provisions of the FMLA, the regulations (at 29 CFR Part 825 for most employers and employees) issued by the Clinton

¹ Spain, Daphne, and Suzanne M. Bianchi. *Balancing Act: Motherhood, Marriage, and Employment among American Women*. New York, Russell Sage Foundation, 1996.

² U.S. Bureau of Labor Statistics.

³ National Alliance for Caregiving and the American Association of Retired Persons. *Family Caregiving in the U.S.: Findings from a National Survey*, 1997.

⁴ James T. Bond, with Ellen Galinsky and Jennifer E. Swanberg, *The 1997 National Study of the Changing Workforce*. NY, Families and Work Institute, 1998.

Administration, and a related Supreme Court decision. It also examines results from the latest survey commissioned by the U.S. Department of Labor (DOL) about experience under the Act.

An Overview of the FMLA and Its Regulations

Prior to passage of the FMLA, the provision of family and medical leave—like that of many employee benefits—was at the discretion of individual employers. Some employers offered their employees sick leave to care for their own illness and family leave to care for the illnesses or immediate family members, while other employers did not. An employee's request for leave—whether paid or unpaid—could be denied, and the family caregiver risked losing his/her job if absent from work. Further, some employers had formal leave policies that were applied uniformly to their workforces while others had informal policies and the granting of leave depended on the particular circumstances.

The FMLA, described in detail below, prescribes *a minimum level of family/medical leave benefits*. In those jurisdictions that have enacted their own statutes, employees are entitled to the most generous benefit provided under the federal or state law.⁵ For example, in 2002, California became the first state to provide for (partially) paid family and medical leave. In addition, employers may offer or negotiate with unions for family/medical leave that is more generous than contained in P.L. 103-3 (e.g., covers employees who have worked for the employer less than 12 months).⁶

By Whom, To Whom, and For What Reason

The Act *requires*

- private employers who have had 50 or more employees on their payrolls for at least 20 workweeks in the current or preceding

⁵ For example, several states have passed legislation that allows employees to take family leave for reasons other than those in the FMLA. Laws in such states as California, Illinois, Massachusetts, Minnesota, North Carolina, Rhode Island, Vermont, and the District of Columbia require employers to provide employees varying amounts of time away from work to attend some of their children's school activities. Employers in Utah must grant employees leave to accompany their children to court appearances, and those in Oregon cannot take adverse actions against employees required to attend court hearings involving their children. In Massachusetts, employers must give employees time-off to accompany children or elderly relatives to medical or other appointments. In Vermont, employers must grant employees leave to go to medical appointments or to meet similar obligations. U.S. Bureau of Labor Statistics. State Labor Laws. *Monthly Labor Review*, various January issues since 1994.

⁶ According to the Society for Human Resource Management's *2003 FMLA Survey*, 57% of the human resources professionals who responded said their locations offered job-protected leave beyond that required by the federal statute.

calendar year and who are engaged in commerce or in any industry/activity affecting commerce, and

- public employers (i.e., federal, state, and local governments;⁷ and local education agencies)⁸

to extend *job-protected*,⁹ *unpaid leave* to employees who have worked for these organizations

- at least 12 (not necessarily consecutive) months,
- a minimum of 1,250 hours (excluding paid or unpaid leave time) in the 12 months preceding the start of their FMLA leave, and
- who work at a facility where 50 or more persons are employed by the employer within 75 miles

for the following reasons:

- the birth of a child of the employee and to care for the newborn child,
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child,¹⁰
- to care for an immediate family member (i.e., spouse, child under age 18 unless incapable of self-care due to an activity-limiting disability, or parent)¹¹ with a “serious health condition” that necessitates the employee’s presence, or

⁷ In 1996, P.L. 104-1 (the Congressional Accountability Act) extended FMLA coverage from staff of the House and Senate to employees of other legislative branch agencies and P.L. 104-331 extended FMLA coverage to staff of the White House and to specified presidential appointees.

⁸ The FMLA contains special rules for employees of local educational agencies (as defined in the Elementary and Secondary Education Act) and any private elementary or secondary school.

⁹ Generally, employees returning from FMLA leave must be restored to their original jobs or to jobs equivalent in pay, benefits, and other terms/conditions of employment. Employers do not have to reinstate employees or continue their FMLA leave if the individuals would have been terminated had they been working during the leave period (e.g., as part of a mass layoff). Employers also may refuse to reinstate to their jobs the highest paid 10% of employees, namely, *key employees*, if doing so will cause “substantial and grievous economic injury” to business operations. Employers are required to provide written notification to employees who request leave for FMLA-purposes of their status as key employees and the reason(s) for which they are being denied job restoration. (In determining whether restoration of key personnel would cause substantial/grievous injury, employers can consider such things as their ability to do without the individual or the expense of restoring the employee if a permanent replacement had been hired during the leave period.) Employers must give these employees a reasonable period to return to work after receipt of the notification.

¹⁰ FMLA leave taken to care for a newborn child or a newly placed child must end within 12 months after the birth or placement.

¹¹ In some states, a common law spouse would be eligible.

- to care for the employee's own serious health condition (including maternity-related disability) that makes them unable to perform the functions of their position.

A *serious health condition* has been interpreted to mean an illness, impairment, injury or mental/physical condition that involves

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential mental facility;
- a period of incapacity requiring absence of more than 3 consecutive days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider;
- any period of incapacity due to pregnancy or for prenatal care;
- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, and terminal diseases); or
- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on a referral by, a health care provider for a condition that likely would result in incapacity of more than 3 consecutive days if left untreated (e.g., chemotherapy, physical therapy, and dialysis).

If the need for leave is related to a serious health condition, employers may require employees to obtain multiple certifications from health care providers.¹² Employees have a minimum of 15 calendar days to get certification in support of their own or an immediate family member's serious health condition.

Continuing treatment means treatment at least twice by a health care provider or once if it results in a continuing regimen of care. Courts have disagreed about what constitutes continuing treatment (e.g., some have ruled differently as to whether taking prescription medication after having seen a health care provider meets the definition).

Employees may opt, and employers may require them, to use *accrued paid* vacation, personal, or family leave for unpaid FMLA leave taken due to and for the care of a new born/adopted/placed child and for the care of eligible family members with serious health conditions. Employees may opt, and employers may require them, to use *accrued paid* vacation, personal, and medical or sick leave to care for their own or an eligible family member's serious health condition. Substitution of

¹² In addition to licensed doctors of medicine or osteopathy and licensed podiatrists, dentists, clinical psychologists, optometrists, or chiropractors, health care providers include nurse practitioners, nurse-midwives, clinical social workers, Christian Science practitioners, any health care provider recognized by the employer or the employer's group health plan manager, and an aforementioned health care provider who practices outside the United States according to the laws of the country in question.

accrued paid sick or family leave for unpaid FMLA leave is subject to the employer's policies concerning the use of these benefits.

Length and Form of Leave

Eligible employees at covered employers are entitled to a maximum of *12 workweeks of leave for FMLA reasons in a 12-month period*.¹³ To give employees not only the time but also the flexibility to balance the demands of work and family, P.L. 103-3 allows employees to take their 12-week entitlement on an *intermittent* basis. In other words, the leave may be taken in separate blocks of time for the same FMLA reason. Flexibility also was built into the Act by permitting eligible employees to work a reduced schedule (i.e., fewer hours per week or per day).

Employees are entitled to intermittent/reduced schedule leave to care for their own, a spouse's, a child's, or a parent's serious health condition. They must obtain the agreement of their employers to use these work arrangements in connection with the two other FMLA-qualifying reasons.

In those cases where employees can foresee the need to take intermittent or *reduced schedule* leave, they must work with their employers to schedule it to avoid disrupting business operations. Employers may temporarily transfer employees to a job with equivalent compensation that more easily accommodates their altered work hours. Employers must account for intermittent FMLA leave in the shortest increment that their payroll system uses for other types of leave, so long as it is 1 hour or less.

Employee and Employer Notification

When employees can foresee the use of FMLA leave, they should provide 30 days' notice to their employers. When the need to take leave is unforeseen, employees are to provide notice "as soon as practicable." This has been interpreted to mean that *employees give employers notice within 1-2 business days of realizing their need to take leave*. Employees should provide enough information to allow employers to determine whether the leave is for a FMLA reason, although employees do not have to refer to the Act when notifying employers. In those cases in which employers were not made aware that an employee was away from work for a reason covered under the statute and in which employees want the leave to be counted toward their 12-week entitlement, employees are to give timely notice of their intent (i.e., within 1-2 business days of returning to work).

Covered employers must provide information to their employees about the law. The information is to be conveyed in a posting approved by the DOL and in employee handbooks or other written material.

¹³ For the 12-month period, employers may choose a calendar year, a fixed 12-month leave or fiscal year, or a 12-month period before or after an employee's leave under the FMLA begins.

In addition, *employers must provide written notice within 1-2 business days of having received an employee's notice of need for leave stating that the leave will count against the employee's FMLA entitlement; detailing whether the employee must furnish medical certification; and, among other things, explaining the employee's right to substitute accrued paid leave for unpaid FMLA leave and whether the employer is requiring such substitution, the employee's right to job restoration upon returning from leave and whether the individual is a key employee (see footnote 8), and the employee's obligation to make co-premium payments for maintenance of employer-provided group health insurance.*

Supreme Court Decision. The *Supreme Court* decided in March 2002 (*Ragsdale v. Wolverine Worldwide Inc.*) that, even if an employer does not timely designate leave as falling under the Act, the appropriate remedy is not the automatic provision of an additional 12 weeks of FMLA leave. The divided court held that the employee has to prove he/she was harmed as a result of the employer's failure. In this instance, the employee had taken the maximum amount of leave allowed by the company (30 weeks), which is more than twice the mandated minimum in the FMLA. The Supreme Court's decision overrides the DOL's regulation at 29 CFR 825.700(a), which states that if employees take paid or unpaid leave but their employers do not designate it as FMLA leave, the leave taken does not count against the 12-week FMLA entitlement. The court noted that the duration of leave under the statute was a carefully balanced compromise that the regulation would have extended for some employees and that it might have prompted employers with more generous leave policies to curtail them, which is antithetical to the intent of lawmakers expressed at the time of the Act's passage.

Maintenance and Accrual of Benefits

The only fringe benefit that employers are required to continue providing to employees on FMLA leave is group health insurance. If employees have chosen cash payments in lieu of group health benefits, employers need not maintain those payments.

The obligation to continue the absent employees' health coverage ceases if/when employees tell employers that they do not intend to return to work when the leave period ends or if they do not return to work at that time. For those employers who require employee contributions toward health insurance, the employers' obligation also stops if employees are more than 30 days late in paying their share of the premium and if employers have given them 15 days' advance written notice informing them of the impending cessation of coverage.

Other kinds of benefits (e.g., paid leave and seniority) do not accrue while employees are on unpaid FMLA leave, if these benefits do not accumulate for individuals while they are on other types of unpaid leave. Although FMLA leave is not considered a break in service under an employer's retirement plan, the leave time does not count toward the plan's eligibility or vesting requirement.

Record-Keeping Requirements

Employers are required to keep records in accordance with the Fair Labor Standards Act and with the FMLA's regulations. Unless the DOL believes a violation has occurred or it is investigating a complaint, the Department cannot require an employer to submit records more than once over a 12-month period.

Covered employers with eligible employees must maintain certain information, in no particular form, for at least 3 years. The information includes basic payroll records (e.g., the employee's name and other identifying information, compensation, and hours worked); dates of FMLA leave; hours of leave if taken in increments of less than 1 workday; copies of employee notices of leave submitted to the employer; copies of employer notices given to employees; any documents describing benefits, policies, or practices concerning the taking of paid and unpaid leaves; and records of any disputes between an employee and the employer regarding designation of leave under the Act.

Enforcement

It is unlawful for employers to interfere with employees exercising their rights under the statute. Further, employers cannot retaliate or discriminate against employees based on their FMLA usage when making decisions regarding such things as hiring, promotion, discipline, or termination.

For all private, state, and local government employees and for some federal employees, the Wage and Hour Division in the DOL's Employment Standards Administration administers and enforces P.L. 103-3. It operates a **nationwide toll-free referral service (1-866-487-9243)**.

If, after investigating complaints, the Wage and Hour Division cannot resolve the matter to its satisfaction, the DOL's Office of the Solicitor may seek to compel compliance through the courts. Employees also may bring a private civil action if they believe there has been a violation of the Act; they do not have to file a complaint with the government before filing suit. If an employer violates the FMLA, the employee may recover such things as wages, benefits, other lost compensation, and liquidated (not punitive) damages in the case of willful violations. (See **Appendix Table 1.**)

In the case of the Congress and some congressional agencies (e.g., Congressional Budget Office), the Office of Compliance handles FMLA enforcement. Some other legislative branch agencies (e.g., General Accounting Office (GAO) and the Library of Congress (LOC)) handle FMLA enforcement internally.¹⁴

¹⁴ See Board of Directors of the Office of Compliance, *Review and Report on the Applicability to the Legislative Branch of Federal Laws Relating to Terms and Conditions of Employment and Access to Public Services and Public Accommodations*, Appendix III, Dec. 31, 1998.

The Office of Personnel Management issues the FMLA regulations applicable to federal employees. Employees in the executive branch — unlike those at private firms, the GAO, and the LOC for example — are not entitled to sue for alleged violations of the FMLA. Executive branch employees can only obtain appellate judicial review of Merit Systems Protection Board decisions in the federal circuit.

The FMLA has a 2-year statute of limitations that starts from the last date of a violation. The statute of limitations is extended 1 year for willful violations.

Experience Under the Act

P.L. 103-3 established the Commission on Leave, which sponsored surveys of employees and employers covering an 18-month period in 1994 and 1995, to assess the impact of family/medical leave policies. In January 2001, the DOL released *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*. It is derived from surveys of employees and employers covering an 18-month period in 1999 and 2000. The information that follows is drawn from this report, unless otherwise indicated.

It should be noted that various business groups raised objections and suggested changes to the survey. They believed it was meant, in part, to elicit support for the Clinton Administration's desire to broaden the Act (e.g., by minimizing the negative consequences of the law for employers and for the co-workers of FMLA leave-takers).

Employer Coverage and Employee Eligibility

According to the employer survey, the FMLA applied to 10.8% of private sector establishments in 1999-2000.¹⁵ Yet at the same time, 58.3% of employees who worked at private sector employers were covered by the Act. These disparate proportions reflect the fact that most worksites in the private sector are relatively small and therefore exempt from P.L. 103-3, but most people are employed by relatively large firms.

According to the employee survey, which covered both public and private sector workers, *88.9 million persons worked at covered establishments and met the FMLA's eligibility criteria in 1999-2000. Covered, eligible workers accounted for 61.7% of all employed persons in the United States. An additional 21.5 million individuals (or 14.9% of all employees) worked at covered employers but did not fulfill the Act's length-of-service and hours-of-work eligibility requirements. Thus, almost one in five employees at covered worksites were ineligible to utilize the FMLA during the latest survey period. Another 33.6 million people (or 23.3% of all employees) did not work at covered establishments.*

¹⁵ The actual unit surveyed was an establishment (i.e., a worksite) rather than an employer. These words will be used interchangeably in this report.

Knowledge of the FMLA

Almost 60% of employees — regardless of whether they worked at covered or non-covered employers — reported that they were aware of the FMLA’s existence in 1999-2000. About one-half of employees at all worksites said they did not know if the law applied to them personally, however. Employees at covered establishments were significantly more likely than those at non-covered establishment to know their correct status under the statute. Nonetheless, just *37.9% of employees at covered employers correctly knew that the FMLA applied to them.*

Far more covered establishments (84.0%) than employees correctly knew that the law applied to them. Non-covered establishments showed greater confusion about their status, however, with 55.5% reporting that they did not know whether the Act applied to them.

Although employers stated that they most often got their information about the FMLA from “existing company policies or practices” (89.4%), the number that also obtained information from the Labor Department increased significantly between the 1994-1995 (53.9%) and 1999-2000 (83.1%) survey periods. The third most often cited source of FMLA information, which also posted a significant increase over the 5-year period (from 57.0% to 77.9%), was attorneys or consultants.

Use of FMLA Leave

Use of the FMLA increased substantially over time. According to the employee surveys, 18.3% of all eligible persons at covered worksites who took leave for FMLA reasons in 1999-2000 did so under the Act.¹⁶ This was significantly above the 11.6% recorded for 1994-1995. As shown in **Table 1**, those who exercised their FMLA entitlement during the latest survey period also accounted for a significantly larger share of all leave-takers and of all employees.

The rate of leave-taking under P.L. 103-3 also increased significantly over time according to the employer surveys.¹⁷ In 1994-1995, there were 3.6 FMLA leave-takers per 100 covered employees; in 1999-2000, the figure was a substantially higher 6.5 FMLA leave-takers per 100 covered employees.

The absolute number of employees who took leave under the Act in 1999-2000 was much higher according to the employer survey (4.6-6.1 million employees) than

¹⁶ Leave-takers in the employee survey who said that they had heard of the Act were asked whether their longest leave was taken under the FMLA. Much of the information presented from the two rounds of employee surveys concerns the longest leave taken (if more than one leave was taken) because respondents were not asked about multiple leaves in the initial survey.

¹⁷ Establishments that stated they were covered by the FMLA were asked the number of employees who had taken leave under the Act.

according to the employee survey (2.2-3.3 million employees).¹⁸ Some of this discrepancy could be because employees were unaware that employers counted their leave toward their FMLA entitlement, or because employers counted employees who took leave under the FMLA multiple times.

Table 1. Employees Taking Their Longest Leave Under the FMLA

Employees taking their longest leave under the FMLA, as a percent of:	Survey period	
	1994-1995	1999-2000
All employees	1.2	1.9
All leave-takers ^a	7.2	11.7
All eligible, covered leave-takers	11.6	18.3

Source: DOL, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*, Washington, D.C., January 2001.

^a Leave-takers are individuals, regardless of their status under the FMLA, who took leave during the survey period for FMLA-reasons.

Intermittent Leave. Although P.L. 103-3 allows persons who need family/medical leave to take it for short periods of time so long as it does not exceed 12 workweeks in a 12-month period, *the great majority of FMLA leave is not taken intermittently*. According to both the employee and employer surveys, about 20% of FMLA leaves were taken intermittently in the latest survey period.

Reasons for Using FMLA Leave. As shown in **Table 2**, employees said attending to their own health was the predominant reason for taking leave under the FMLA in both survey periods. Caring for a newborn, newly adopted, or newly placed foster child was the second most common reason.

Returning to Work After FMLA Leave. Virtually all FMLA leave-takers said they resumed working for their same employer (about 98.0% in both survey periods). The establishment survey yielded much different results, however, with 29.8% of covered worksites reporting non-returning FMLA leave-takers in 1999-2000 for example. While 52.6% of those employers with non-returning FMLA leave-takers said only one person did not come back to work, those with two or more non-returning leave-takers increased significantly between the survey rounds (from 14.6% to 47.4%).

Under certain circumstances, the law permits employers that have maintained the health benefits of employees on FMLA leave to ask non-returnees to repay

¹⁸ The results of the establishment survey were adjusted to take into account public as well as private worksites.

costs.¹⁹ More than 13% of employers with non-returnees tried to recover health insurance costs and about 46% said they were successful in their efforts. (The issue of the cost of P.L. 103-3 to employers is addressed later in this section.)

Table 2. Reasons for Longest Leave Taken Under the FMLA

Reason for longest leave	Percent of leave-takers under the FMLA	
	1994-1995	1999-2000
Own health	48.1	37.8
Maternity-disability	11.3	10.9
Care of a newborn, newly adopted, or newly placed foster child	21.2	24.4
Care of ill child	—	13.5
Care for ill spouse	—	—
Care of ill parent	—	10.6

Source: DOL. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*. Washington, D.C., January 2001.

Note: A “—” indicates less than 10 unweighted cases and accounts for figures not totaling 100%.

Impact on Employees

Not surprisingly, many of the 23.8 million individuals who took leave for FMLA reasons in 1999-2000 — whether or not they were eligible, covered employees — felt the experience was positive. Sizeable majorities of these leave-takers thought the time away from work had a positive impact on their ability to care for family members (78.7%), on their own or a family member’s emotional well-being (70.1%), and on their own or a family member’s physical health (63.0%).²⁰ In addition, *most of these leave-takers (72.6%) were very/somewhat satisfied with the length of their longest absence.*²¹

More than 9 out of 10 persons who took leave for FMLA reasons were able to maintain their benefits (e.g., health, life, and disability insurance; pension

¹⁹ Employers cannot seek repayment if the employee does not return to work because of continuation of the same health condition that precipitated the FMLA leave or because of circumstances beyond the employee’s control.

²⁰ Of those leave-takers who thought the leave had a positive effect on their own or a family member’s physical health, 93.5% reported that they felt the time-off made it easier for them to comply with a doctor’s instructions and 83.7% that it led to a quicker recovery time. A substantial minority (32.0%) said the leave delayed or avoided the need to enter a long-term care facility.

²¹ The median length of the longest leave taken was 10 days.

contributions; and vacation or sick time). In addition, *about two-thirds of leave-takers said they received some pay during their time off*, and 42.9% of paid leave-takers had money coming in from multiple sources.²² Most paid leave-takers (72.2%) received their full paychecks for the whole leave period, but 58.2% of the leave-takers who received no or partial pay reported difficulty making ends meet.²³ And, *virtually all leave-takers who returned to their same employers went back to the same or an equivalent position (97.1%)*.

Among individuals whose co-workers had taken leave for FMLA reasons, 46.2% indicated that they assumed additional duties, 32.1% worked more than their usual number of hours, and 22.9% worked a different shift. Nevertheless, *a majority (67.4%) said that their co-worker's leave for FMLA reasons did not have any impact on them*. This question touches on the idea of “work-family backlash” (i.e., young, unmarried, or childless employees who resent or are demoralized by co-workers for taking leave because they are asked to perform extra work to compensate for the leave-takers’ absence). It is raised again in the policy issues section of this report when the subject of intermittent leave is taken up.

Employer Compliance with P.L. 103-3

Employers indicated that they most often conveyed information about the Act through postings on bulletin boards (92.4%) or through employee handbooks (91.9%). The law requires covered employers to notify their workforce by these two means. Fewer employees at covered establishments (55.8%) reported that their employers had posted notices about the statute.

Under the statute, covered employers may require employees to provide documentation if they need leave for a serious health condition. Virtually all establishments (92.0%) did so for employees who took leave under the FMLA in 1999-2000. Employers also may require employees to use their accrued paid leave rather than unpaid FMLA leave. A majority of covered employers (63.2%) said they followed this practice. Covered employers also are supposed to provide employees with written notice of how much FMLA leave they have taken and how the law relates to pre-existing leave and benefit policies. Most establishments said they complied, with 82.3% providing the former and 92.6% providing the latter.

Despite employers presumably having gained greater familiarity with the 1993 law and its 1995 final regulations, they appear to continue to have difficulty complying with it. The Society for Human Resource Management (SHRM), in its *2000 FMLA Survey*, declared that the Act “stands in contrast with other employment laws which have caused less confusion over the years as the law becomes settled and

²² Sick leave was the source of pay most commonly reported by leave-takers (61.4%), followed by vacation leave (39.4%) and personal leave (25.7%).

²³ Of the 23.8 million leave-takers who were away from work for FMLA-reasons in 1999-2000, 8.2 million (or 34.5%) received no pay and 4.4 million (or 18.5%) received partial pay. Those leave-takers with no or partial pay frequently coped with their loss of wages by limiting extras, using savings earmarked for this or another situation, putting off paying bills, or cutting leave time short.

more understood by both employers and employees.” In the first full fiscal year following the FMLA’s implementation, the Wage and Hour Division found violations in 61.6% of the complaints lodged by employees. The ratio of violations to total complaints has varied little over the ensuing years, and in FY1999 stood at 61.2%.

*Complaints lodged under the law have most often involved an employer’s failure to reinstate an employee returning from FMLA leave to the same or an equivalent position (46% of the complaints filed, on average, since the Act’s implementation). Another 22% dealt with an employer’s refusal to grant leave, and an additional 16% were related to employer discrimination against employees who took leave under the Act. (See **Appendix Table 1.**)*

According to the DOL’s summary of litigation, the Department’s Solicitor brought suit in 32 cases through FY1999 for unresolved FMLA violations.²⁴ The court cases most often concerned an employer who had terminated an employee while they were on FMLA leave. Other cases dealt with employers who failed to restore returning employees to their same or an equivalent position and with employers who denied requests for FMLA leave.

Employer Administration of the FMLA

In 1999-2000, employers most often (98.3%) handled the work of FMLA leave-takers by temporarily assigning it to other employees.²⁵ Hiring an outside temporary replacement came in a distant second at 41.3%. The use of this option as well as hiring a permanent replacement fell significantly since 1994-1995, possibly due to the tightening of the labor market between survey periods.

In terms of the ease or difficulty of administering the Act, employer responses varied widely. At one end of the spectrum, 86.0% of employers said they found it very/somewhat easy to determine whether the law applied to their organization and 83.4% found it very/somewhat easy to determine whether certain employees were eligible. At the other end of the spectrum, 54.4% of employers replied that they found it very/somewhat difficult to administer the FMLA’s notification, designation, and certification requirements and 52.8% found it very/somewhat difficult to coordinate the FMLA with other federal laws. On an overall basis, a majority of employers (63.6%) rated the Act as very/somewhat easy to administer, but the proportion dropped significantly from its 1995 level (85.1%). This finding could be related to the need for more employers to become familiar with the law and its regulations because, as previously discussed, the rate of FMLA leave-taking increased significantly over the 5-year period.

²⁴ The Wage and Hour Division reported that it resolved 88% of all complaints filed from August 1993 through FY1999.

²⁵ This also was the most frequently used option among employers who said they relied on more than one method to cope with an employee’s absence.

Impact of the Benefit Mandate on Covered Employers

Several provisions were included in P.L. 103-3 to minimize its impact on employers. Employers indicated they found the requirement that employees give advance notice of foreseeable leave to be the most useful of these provisions, followed by the requirement that employees provide written medical certification for serious health conditions. The least useful provision intended to help employers manage FMLA leave was allowing them to deny job restoration to key employees.

A large majority of employers said that the FMLA had no noticeable effect on their establishment's performance (i.e., 76.5% said it had no effect on productivity; 87.6%, on profitability; and 87.7%, on growth). In the relatively few instances that employers thought the Act had any impact, they were much more likely to believe it hurt rather than helped their bottom line: two to three times as many employers reported a negative as opposed to positive effect on the three measures of business performance.

Similarly, most employers reported that P.L. 103-3 did not have a perceptible impact on the individual performance of employees (i.e., 67.0% said it had no effect on productivity; 76.3%, on absences; 85.9%, on turnover; 95.6%, on career advancement; and 64.7%, on morale). However, significantly more employers reported in 2000 than in 1995 that the statute had a negative impact on individual productivity and absences. According to the SHRM's 2000 FMLA Survey, the human resources (HR) professionals who responded indicated that productivity loss was the most costly consequence of the FMLA. In addition, 63% of respondents said that, because of the Act, their firms had had to keep some employees who otherwise would have been terminated for poor attendance.

The opportunity to take FMLA leave intermittently has concerned employers because it could be more disruptive to business operations and be more burdensome from a record-keeping standpoint than if the leave entitlement were exercised just once in a 12-month period. According to the DOL-commissioned establishment survey, however, *81.2% of covered employers stated that intermittent leave did not have any impact on productivity and 93.7% said that it did not affect profitability.*

Another measure of the FMLA's impact on covered employers is the costs it imposes, such as those involved in administration, benefit continuation, and the temporary replacement of leave-takers (e.g., hiring and training costs). *Although a majority of establishments said in response to the DOL-commissioned survey that these costs had not changed since they became covered by the Act, a sizeable minority reported higher FMLA-related expenses. (See Table 3.) Respondents to the SHRM's 2000 FMLA Survey indicated that after productivity losses, the next costliest items associated with the law were the time and effort expended by HR staff and the replacement of leave-takers. However, the majority of survey respondents said that it was too difficult to quantify the overall cost of FMLA administration (30%) or that they had not done so (66%).*

Table 3. Changes in Selected Costs Since Coverage Under the FMLA Began, by Establishment Size

Type of employer expenditure	Percent of covered establishments with:		All covered establishments
	1-250 employees	251 or more employees	
<i>Administrative costs</i>			
Increased	41.9	63.3	43.4
Decreased	—	—	—
Unchanged	58.0	36.7	56.6
<i>Cost of continuing benefits during leave</i>			
Increased	26.9	45.7	28.1
Decreased	—	—	—
Unchanged	73.0	54.0	71.8
<i>Hiring/training costs</i>			
Increased	21.6	35.6	22.5
Decreased	—	—	—
Unchanged	78.3	64.3	77.4

Source: DOL. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*. Washington, D.C., January 2001.

Note: Figures may not total 100% due to rounding.

Appendix Table 1. Compliance Activity Under the FMLA

Completed compliance activity	Fiscal year							
	1993 ^a	1994	1995	1996	1997	1998	1999	Total
<i>Total number of complaints</i>	98	1,881	2,619	2,534	2,670	3,795	2,912	16,509
<i>Type of compliance action</i>								
Conciliation	76	894	1,495	1,671	2,039	2,189	1,794	10,158
Investigation	22	987	1,124	863	631	1,606	1,118	6,351
<i>Nature of employee complaints</i>								
Refusal to grant FMLA leave	36	404	574	585	699	716	589	3,603
Refusal to restore to same or equivalent position	38	875	1,053	949	1,276	1,841	1,505	7,537
Health benefits	6	96	90	76	77	91	49	485
Discrimination	9	150	293	279	468	849	624	2,672
Other	2	113	235	278	95	298	145	1,166
Multiple reasons ^b	7	243	374	367	55	—	—	1,046
<i>Status of compliance</i>								
No violations, total	27	723	1,095	1,074	1,187	1,424	1,131	6,661
Employer not covered	4	54	81	75	66	70	53	403
Employee not eligible	5	141	169	189	146	201	139	990
Complaint not valid	13	425	733	671	885	774	713	4,214
Other ^c	5	103	112	139	90	379	226	1,054

Completed compliance activity	Fiscal year							
	1993 ^a	1994	1995	1996	1997	1998	1999	Total
<i>Violation findings^d</i>								
Grand total, employees	71	1,158	1,524	1,460	1,483	2,371	1,781	9,848
Monetary damages (in thousands)	\$8.8	\$784.5	\$2,872.4	\$2,152.6	\$2,867.4	\$4,520.6	\$5,851.5	19,058

Source: U.S. Department of Labor.

^a The FMLA was in effect only from August 5, 1993 through September 30, 1993 in FY1993.

^b Since FY1998, only the primary complaint that an employee files is reported.

^c Includes cases terminated before completion generally at the complainant's request.

^d Through FY1999, 88% of the grand total of cases were successfully resolved and the remainder were reviewed for potential litigation. The DOL filed 32 court cases, of which four are pending, and a friend-of-the-court brief in six cases, of which none are pending.