FAMILY LEAVE

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FOREWORD

This study on family leave was undertaken in response to Act 328, Session Laws of Hawaii 1991.

This study was authored by Peter G. Pan, who was assisted by Charlotte A. Carter-Yamauchi. Charlotte wrote chapter 5, helped review chapter 4 -- which was researched and drafted by Doreen Mohs, summer student intern -- and contributed to chapter 7.

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Samuel B. K. Chang
Director

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Chapter 1

SCOPE OF THE STUDY

I. Requirements of Act 328, Session Laws of Hawaii 1991

Act 328, Session Laws of Hawaii 1991, directs the Bureau to undertake a study of family leave to include:

(1) The fiscal impact of family leave as provided by this Act and any other provisions that may be proposed, and the concept of granting income tax credits for employers who would implement the family leave portions of the Act;

(2) The experience of public sector employers and any other employers already granting family leave;

(3) The respective responsibilities that would result from this Act for the Director of Labor and Industrial Relations and the Director of Taxation; and

(4) Guidelines for determining when a health condition is acute, traumatic, or life-threatening.

In chapter 2, the concept of an income tax credit for employers who comply with the Family Leave Law is examined. This is followed by an analysis of the fiscal impact of family leave legislation in chapter 3. Chapter 4 presents a brief review of the statutes of family leave legislation across the country. Chapter 5 is devoted to an examination and analysis of problems arising from the nexus of "serious health conditions" and situations that are "acute, traumatic, and life-threatening." Chapter 6 presents and analyzes data collected from a survey of public agencies in Hawaii and addresses potential problems with Hawaii's leave law. Chapter 6 also summarizes the responses from the Directors of Taxation and Labor and Industrial Relations regarding their responsibilities relative to the Family Leave Law. Chapter 7 concludes this study with recommendations.

II. Types of Family Leave

Some states do not provide family leave of any sort. Of those that do, only a few provide relatively comprehensive family leave. Some states offer variations that are subsets of comprehensive family leave. For example, some states may provide only parental leave; some provide only maternity leave for biological and not adoptive mothers during pregnancy, childbirth, and a period after childbirth. Fathers are often not covered. Some states do not mandate personal medical leave for an employee's own illness. The definitions below compiled by the Women's Legal Defense Fund are useful for purposes of discussion:[1]

Family leave: leave to care for family members in certain specified circumstances. Circumstances commonly specified include the serious illness of children and other family members, and the birth or adoption of a child.

- *Parental leave:* a form of family leave referring to leave to care for employees' children -- generally for birth, adoption, or serious illness;

- *Elder-care leave:* another form of family leave, and distinct from parental leave, referring to leave to care for elderly family members -- generally employees' parents when they are seriously ill;

- *Spousal-care leave:* also a form a family leave that is not parental leave referring to leave to care for employees' spouses -- generally when they are seriously ill.

Medical leave: leave for an employee's **own** serious illness that renders an employee temporarily unable to work.

- *Pregnancy disability leave:* actually a form of medical leave referring to leave for women only for periods of actual physical disability due to pregnancy, childbirth, or related medical conditions.

Maternity leave: leave for women only to be used during pregnancy and childbirth and for a period after childbirth, regardless of disability.

Hawaii's Family Leave Law provides for all three elements of family leave: **parental, elder-care**, and **spousal-care** leave. In the case of parental leave, the "child" may be a biological newborn of the employee or an adopted child. A child with a serious health condition can also be a stepchild or a foster child. The "parent" may be a biological, foster, or adoptive parent, a parent-in-law, a stepparent, and even a legal guardian, grandparent, or grandparent-in-law.

In this study, the term "family care" is used to mean spousal- and elder-care as well as that part of parental leave used to care for a seriously ill or injured child. Birth or adoption leave, although only one component of parental leave, is treated separately from the family care of children.

However, Hawaii's law does not provide unpaid **medical leave** -- sometimes referred to as "personal leave" -- for the employee's own use.

As for **pregnancy disability leave**, chapter 392, *Hawaii Revised Statutes*, provides temporary disability benefits for up to 26 weeks in a benefit year. The first seven consecutive

days of any period of disability do not count. The disability must also be non job-related resulting from various events including pregnancy.[2] One purpose of the temporary disability insurance (TDI) law is to partially replace lost wages during a period of non job-related disability. As such, a TDI law **implies a partially paid leave** but **does not guarantee the employee a return to the same or an equivalent job**. Neither a definite period of leave nor a job guarantee, which are typical of family leave laws, are statutorily specified in Hawaii's TDI law.

III. Study Restricted to Family Leave

This study focuses on family leave and its components including parental, elder-care, and spousal care leave. Inasmuch as Hawaii's Family Leave Law does not incorporate them, disability, pregnancy disability, and medical leaves are not subjects of the present study. Although some states provide both family and medical leave, for the purposes of this study, only the family leave provisions are considered.

However, where the parental or maternity leave aspects of leave laws may shed light on the operation of family leave in general, they become valid subjects of study. An example of this is the use of the 1991 four-state parental leave study by Bond et al., first introduced in chapter 2. That study focused on the **subset of parental leave provisions** which are part of the comprehensive **family leave laws** of Rhode Island and Wisconsin. The distinct **parental leave laws** of Minnesota and Oregon are also examined in that study. (Since the parental leave study, Oregon has enacted a comprehensive family leave law.)

*[**Note:** The federal Family and Medical Leave Bill vetoed by President Bush in September, 1992 but which President-elect Clinton supports, provides both family **and** medical leave. There is a possibility that both family and medical leave may become a national mandate in the future. (See discussion in chapter 6.)]*

ENDNOTES

1. Roberta M. Spalter-Roth, Heidi I. Hartmann, Sheila Gibbs, Donna Lenhoff, and Sharon Stoneback, Unnecessary Losses: Costs to Workers in the States of the Lack of Family and Medical Leave (Washington, D. C.: Family and Medical Leave Act Coalition), August, 1989, p. 8.

2. Hawaii Rev. Stat., §§392-2, 392-3, 392-21, 392-23, and 392-24.

Chapter 2

TAX CREDITS

> *It should be noted that income tax credits are designed to reduce the tax burden by providing relief for taxes paid. Tax credits are justified on the basis that those with a lesser ability to pay should be granted relief for taxes imposed ... the tax system is a poor means for trying to achieve ... economic or social goals ....*[1]

Section 3 of Act 328, Session Laws of Hawaii 1991, requires this study to include a discussion of ". . . the concept of granting income tax credits for employers who would implement the family leave portions of this Act." The current law does not grant tax credits. The hypothetical credit would cover employers of 100 or more employees. Of course, any such credit would apply only to the private sector. If enacted, a credit would, in all likelihood, take effect only after January 1, 1994 when leave provisions become effective for private sector employers.

Criteria for good tax policy are reviewed in section I of this chapter. In section II, the concept of granting employers a tax credit is examined in light of these and other criteria. Section III reviews tax policy in other jurisdictions relating to family leave. Section IV concludes the chapter with a general discussion of pre- and post-leave statute employer costs.

I. Criteria for Good Tax Policy

The reason taxes are imposed and collected is to raise revenues to operate governmental programs that generate public goods. Traditionally defined, a public good is a jointly consumed good whose consumption by one consumer does not subtract from the remainder for consumption by other consumers.[2] A lighthouse is a classic example. It can benefit each mariner without reducing any benefits for other mariners. Once built, all can benefit. In all likelihood, no private individual would fund construction of a public lighthouse. There is no way to restrict the usage or benefits of the lighthouse by those who did not pay for it. In other words, the entrepreneur cannot personally, fully, and exclusively expropriate the fruits of that individual's investment. Paying for the collective national defense and for pollution control are other often-cited examples. The cost would be prohibitive for private individuals. The benefits of national security and clean air enjoyed by all (the public goods produced) justify government funding. Taxation is the source of the needed revenues.

Keeping in mind the purpose of taxation, in general, shaping good tax policy takes into account several criteria including: **equity** or **fairness**; **progressivity**, **proportionality**, and **regressivity**; **neutrality**; **adequacy**; **stability**; **efficiency**; **predictability**; and **conformity**.[3]

Equity, Progressivity, and Regressivity

Simply put, **equity**[4] involves fair treatment for all. Vertical equity involves fair treatment across income classes while horizontal equity involves fairness within any one income class. In other words, those in different income ranges should be treated differently while those in the same income range should be treated equally. Tax policy is **progressive** when an individual's or a group's incidence of tax (tax burden) increases as ability to pay increases.[5]

For example, most consider the current federal income tax mildly progressive because the tax rate is higher for higher income taxpayers. Personal exemptions and the standard deduction also reduce tax liability proportionately more for lower income taxpayers. Furthermore, the earned income credit directly reduces their tax burden.

Conversely, tax policy is **regressive** when incomes do not keep pace with increases in the incidence of tax for an individual or group. For example, Hawaii's general excise tax (GET), which is levied at a flat four percent on all goods and services, is a regressive tax. Lower income groups tend to spend disproportionately more of their incomes for daily necessities -- which are taxed at the same rate as for higher income groups. In other words, the lower income taxpayer uses proportionately more income to pay the GET (higher tax incidence) than the higher income taxpayer.

Neutrality

Good tax policy should not be used to influence or implement economic policy. That is, a **neutral** tax policy does not alter an individual's economic behavior. Often, taxes are imposed or tax preferences (such as credits, deductions, and exemptions) are granted to implement or support some sort of economic or social goal. To the extent that this is the case, a tax policy is not neutral. Tax policy that is not neutral makes that use of the tax system less justifiable.

Adequacy

Good tax policy should not impair the *adequacy* of the revenue collection system. Tax credits should not decrease revenues required to run government programs and should not overly erode the tax base.

Stability

Good tax policy reduces volatility in the tax collection system. The system needs a **stable** tax base. The government needs to be able to rely on a constant group of taxpayers for revenues. A tax or a tax preference should not cause mercurial shrinkage or expansion of a *targeted tax base*.

Efficiency

Good tax policy should be **efficient.**[6] A government's efforts to administer and collect a tax or to implement a tax preference should not outweigh the benefits that result from the gain in revenues or the reduction in tax burden. A tax measure should also be amenable to easy taxpayer compliance.

When the tax system is used to implement economic or social goals, efficiency is generally not well-served. Using the tax system in this way, especially for tax preferences, precludes legislative **control**, **evaluation**, and **accountability** of revenues or losses that would otherwise be available through annual budget appropriations. Once enacted, credits, deductions, or exemptions continue -- regardless of their actual effects -- until repealed. Because the fiscal effects continue, inefficiency and inequities can become institutionalized.

Predictability

Good tax policy should be **predictable** for taxpayers. A tax or tax preference should not have to undergo repeated or radical changes over time so that taxpayers can plan activities affected by the tax policy.

Conformity

To enhance administrative ease and taxpayer compliance, good tax policy at the state level should also **conform** to tax policy at the federal level. Conformity with federal policies and those of other states provides guidance and case precedents in the event of litigation.

II. Granting Employer Tax Credits for Unpaid Family Leave in Hawaii

Act 328, Session Laws of Hawaii 1991, does not provide for a tax credit. The original draft of S.B. No. 818, 1991, did propose granting corporate resident taxpayers an unspecified amount of tax credit. The credit was to have been applied against corporate net income tax liability for each employee taking the full twelve-week[7] family leave. Employers could claim credits only for full leaves taken within one taxable year. The Senate Committee on Employment and Public Institutions reported the deletion of the tax credit provision from all subsequent versions of S.B. No. 818 (S.D. 1, H.D. 1, H.D. 2, and C.D. 1) in Standing Committee Report No. 387 dated February 22, 1991.

Comments by the Tax Foundation of Hawaii

On February 5, 1991, the Tax Foundation of Hawaii digested and commented on the original version of S.B. No. 818 which included the tax credit. It noted that the credit was:

> . . . being offered as an attempt to blunt some of the criticism that government is dictating how employers should run their businesses. . . . To the extent that the real thrust of this measure is to require employers to provide such family leaves, the credit is merely a means of thwarting criticism and rejection of this effort. In that respect, the proposed credit sets a bad precedent and establishes poor tax policy. . . . There is no rationale for the credit other than it would be an indirect government subsidy of such family leaves. The credit does not recognize the employer's ability to pay state taxes nor does it have any relationship to the financial impact of the employee's leave. (Emphasis added)[8]

Testimony by the Department of Taxation

In written testimony dated February 14, 1991, the Director of Taxation submitted testimony in opposition to the original version of S.B. No. 818 concerning the tax credit. (See also chapter 6.) The Director of Taxation testified that:

> Although providing family leave as an employment benefit may be meritorious, the Department does not perceive any relationship between the family leave and income taxes. Since this bill provides that an employee shall be entitled to a family leave of twelve weeks, there is no reason to provide a tax credit to corporations for employees that utilize their family leave benefit. This is not sound tax policy. Moreover, corporations paying for such leave are allowed business expense deductions on their net income tax return to lower their taxes. The proposed tax credit would result in a double tax benefit for the [corporate] taxpayers. If the leave is unpaid, the corporation incurs no cost due to that employee. The Department does not support the enactment of an income tax credit to benefit a relatively small group of taxpayers for fairness and equity reasons. (Emphasis added)

Equity, Progressivity, and Regressivity

The foregoing testimony suggests that the tax credit is **not equitable.** The credit requires all taxpayers to subsidize a particular group of businesses for an activity that is not related to tax relief from an unfair tax burden that a taxpayer is unable to pay. Lost revenues from the tax preference given to this one group must be made up for elsewhere in taxes by other taxpayers.

Even among employers, only those with 100 or more employees[9] would be eligible to claim tax credits. That is, only a select few would benefit. According to data based on the

United States Bureau of the Census as of March, 1988, only 4.78 percent of private employers in Hawaii employ 50 or more employees.[10] In other words, if the employer size limit were 50 or more, only 4.78 percent of Hawaii employers would have been eligible for any contemplated tax credit. At the current level of 100 or more, only 1.87 percent of Hawaii employers and 36.6 percent of Hawaii's employees[11] would be covered. Even if the size limit were lowered to 20 or more employees, only 13.29 percent of Hawaii employers would be covered.

Furthermore, it has been well documented that smaller employers provide less generous parental or maternity leaves voluntarily and that smaller businesses employ a greater proportion of women than larger businesses. Consequently:

> To the extent a requirement excludes smaller employers it thus will be less effective . . . in extending [leave policies] to disproportionately lower-wage female workers whose families might benefit most. . . . [a law] that applied only to large corporations would affect relatively fewer women (who are more likely to take leave, especially unpaid), will be less relevant because in many cases liberal practices were already in effect, and disproportionately affecting higher-status persons whose infants and families are less at-risk for problems.[12]

In 1991, a study was done regarding the effects of the parental leave aspects of leave laws in four states (Minnesota, Oregon, Rhode Island, and Wisconsin). It was estimated for the country as a whole that if the size of the firm were limited to fewer than 50 employees, 95 percent of all employers and 60 percent of all workers would be excluded from leave laws.[13] (The national figure of 5 percent of those who would be subject to a leave law is almost identical to Hawaii's 4.78 percent at the same level.) Only two of the states that have enacted some form of family leave law (Washington and Hawaii) have set the employer size exclusion limit at 100 or more employees (New Jersey's 100 limit and Connecticut's 250 limit will drop to 50 and 75, respectively, by 1993). Some mandate leaves only for state employees. The four-state study does not even estimate the percentage of employers who would be excluded at the 100 employee size level.

To the extent that an employer incurs costs, one would expect that the smaller the employer, the greater the burden of cost. Conversely, due to larger economies of scale, one would expect that the larger the firm, the easier costs can be absorbed. Thus, for the sake of **progressivity**, smaller firms should be eligible for the tax credit. For the sake of **fairness**, especially those uncovered small firms who nonetheless voluntarily comply should be eligible for credits. (Any credit should still be justifiable and meet all other criteria for good tax policy.) The proposed credit was to have been given to the group of larger firms of 100 or more employees. This is precisely the group with the least need who could have best absorbed costs. Not exempting smaller firms would have been **regressive**. However, regardless of exemptions and credits for uncovered smaller firms in voluntary compliance, the

basic flaw of using a tax preference to make an irrelevant subsidy can neither be disguised nor rectified.

Neutrality

In principle, to the extent that a tax credit is used to further an economic or social goal, a tax credit is **not neutral**. In practice, despite the issue of neutrality, tax preferences have often been used to either compensate targeted groups or to encourage them to alter their behavior. In such cases, lawmakers have viewed both the appropriateness of using a tax preference as a tool and the validity of the substantive goal as matters of policy choice. That is, policy makers have taken it upon themselves to decide two things: (1) whether the goal of the compensatory or incentive measure is sufficiently meritorious, and (2) whether the tax preference, as a tool to implement that goal, is justified.

There is no dearth of examples of the use of tax preferences to encourage certain commendable behavior. However, viewed as **compensation** for employers who incur leave costs, a tax credit is difficult to justify. Employers have always incurred certain generic leave costs. Employers continue to incur these costs after enactment of leave laws. (See discussion on costs in chapter 3.)

It is when a tax credit is viewed as an **incentive** to promote the commendable social goal of encouraging (not compensating) employers to grant family leaves, that it becomes more reasonable. The financial benefit of a proposed tax credit should not be offered as compensation -- dollar for dollar or in some other formulaic fashion -- for employers' leave-taking costs. Employers are neither entitled to nor deserve such monetary compensation in exchange for certain behavior. Rather, if given, benefits should be extended in the spirit of encouraging employers to alter their behavior for the better socially.

However, once that behavior has changed, the incentive would no longer be needed. Accordingly, the **duration** of any proposed tax credit **should be limited** and not be allowed to continue in virtual perpetuity. If not limited upon enactment, it is not difficult to imagine the enormous effort it would take to repeal any tax preference once beneficiaries begin receiving benefits. On the other hand, leave-taking costs will continue regardless of any tax credit. As the credit continues year after year, employers may correspondingly continue to reap windfalls for costs incurred as a part of doing business (see section IV in this chapter and the discussion of overestimates of the costs of leave-taking reported by the United States Chamber of Commerce study in chapter 3).

However, if action is deemed necessary, it would be preferable to first determine which employers need the greatest compensation or encouragement and then appropriate general funds yearly for direct grants. This would be more efficient and equitable than giving a tax credit. In addition, rather than giving up a stream of revenue and decreasing the tax base once and for all, this would enable the Legislature to retain continuing control over the

moneys involved. The Legislature could monitor the situation and periodically decide whether employers still need the credit.

Adequacy and Stability

Would marginal employers (those approaching the mandated size limit) hire a few more employees to become eligible for credits? If so, to what extent would this further erode the tax base **(stability)** and decrease tax revenues **(adequacy)** that must be made up by all other taxpayers including the competitors of those receiving the credit **(equity)**?

Predictability

If a credit is instituted, how likely would the employer size limit be subsequently amended? Will there be a need to revise the amount of credit? Will the claim procedure, including what documentation to submit and who reviews it, need to be changed? Most leave laws elsewhere are much less restrictive. Furthermore, at the 100 or more employee level, very few employers can benefit. Any change, especially a series of changes, would make the situation less **predictable** for tax credit recipients as well as all other taxpayers subsidizing the credits.

The effects of a state tax credit would be less predictable in view of the possible enactment of the federal Family and Medical Leave Act. If that were to happen, the minimum federally mandated provisions would, in all likelihood, remain more generous to employees than Hawaii's statute. (See section II of chapter 6.) Would this require changes to the credit, including repeal?

Federal family leave legislation was vetoed in 1990. Senator Dodd of Connecticut and Senator Bond of Missouri offered a modified version in S. 5 which was passed by the Senate on October 2, 1991. H.R. 2, a slightly different House version, was passed on November 13, 1991. The compromise bills retain the 12 weeks of unpaid leave for a 12-month period for childbirth, adoption, or serious illness of either the employee, a child, spouse, or parent. At the end of the leave period, the employee would be entitled to return to the same or similar job with no loss of health or other benefits. However, the new compromise versions raised the number of hours an employee must work from 1,000 to 1,250 per year in order to qualify for unpaid leave. The bills also allowed employers to deny leave to "key employees" defined as those who are the highest paid ten percent of the company's work force.

The conference report was cleared for House action on August 1, 1992 and S. 5 was cleared for action by President Bush on September 10, 1992. President Bush has vetoed it on September 22, 1992. Congress was not able to override the veto. (See chapter 4 for a fuller treatment of the proposed federal Family and Medical Leave Act.)

Efficiency

In order to be **efficient**, the administration of any tax preference should not be overly cumbersome in relation to the amount of relief awarded. The language in the original draft proposing the tax credit allowed the Director of Taxation to:

> . . . require the taxpayer to furnish reasonable information in order to ascertain the validity of the claim for credit . . . and may adopt rules necessary. . . .

The Department of Taxation may not necessarily have the expertise to properly validate claims for credit. The family leave tax credit is **neither efficient nor accountable** because there is no control over the loss of revenues. The amount of lost revenues is dictated by the extent of the response from eligible employers. **A more efficient, as well as equitable, strategy would be to target for the greatest need through annual budget appropriations over which the Legislature does have control.**

Conformity

If the federal Family and Medical Leave Act were to be enacted, much of Hawaii's law would be superseded where the federal requirements exceed current Hawaii minimum standards. President Bush has proposed tax credits as an alternative to the Family and Medical Leave Act. Assuming that the two options remain mutually exclusive, and assuming the Family and Medical Leave Act of 1991 proposed by Congress or comparable legislation becomes a reality, there may be **conforming** pressures to repeal any contemplated state tax credit.

III. Employer Subsidy in Other Jurisdictions

At present, of the states that have enacted some form of family leave law, none provides any type of tax subsidy as a credit, deduction, or exemption to either covered or exempt employers.

California Reviewed and Recommended Against Tax Credit

However, California examined the feasibility of a tax subsidy in conjunction with parental leave mandates in 1987 in *Time Off for Parents: The Benefits, Costs, and Options of Parental Leave*. That study rejects the option of a tax subsidy. The California Family Rights Act of 1991 eventually became law and provides for family care (spousal- and elder-care) leave (§12945.2 of the Government Code of California). The Act does not offer a tax preference for employers. The study observes that granting a subsidy:

> . . . leads to several hard-to-answer questions, such as: Why should we pay companies to do what they are already doing? and Why should we pay for this when no other country does? . . . tax credits or incentives may be useful for employers too small to fall under a requirement and for related measures inappropriate for a requirement, as in the creation of new part-time jobs.[14]

The California study recognizes that implementing an equitable and efficient subsidy would be complex, costly, and subject to extensive litigation. Such a subsidy would have to reimburse businesses for their actual "least-cost" expenses, leaving no residual costs to be passed on through the system. In reality, any subsidy would have to be a less efficient one based:

> . . . on a standard formula in which the employer's actual replacement costs are irrelevant and firms simply subsidized based on the number of employees taking the leave. . . It needs to justify its administrative cost by, in fact, reducing economic inefficiency and political opposition.[15]

In addition, the study notes unresolved problems relating to equity and efficiency: how should employers who offer the same benefits to employees without state reimbursement be treated? Furthermore, how should an employer be reimbursed for keeping a job open for an employee who initially intended to return after leave but quit instead?

On the other hand, the study states that a subsidy in conjunction with mandated family leave requirements would reduce "net costs" and result in ". . . less cost either to absorb at the business, to encourage substitution of machinery for labor, or otherwise to shift to workers or consumers."[16] According to the study, a tax credit has a fairness advantage in that ". . . a social benefit is paid for through taxes instead of being tacked onto consumer and employee bills."[17] That is, the costs of a social goal should be spread out to all taxpayers and not be limited to smaller groups such as leave-takers, employers, or consumers of businesses to whom costs are passed on.

However, this concept of fairness involves a judgment of distributional equity that is based on neither wealth nor income. It does not advocate reimbursement of employers because they are less wealthy or less able to afford costs. Neither does it do so because leave-takers or consumers are poor or unable to pay. This particular concept of fairness appeals more to a political judgment of distributional equity -- that certain groups should not be saddled with costs that may enhance a social good. Indeed, the study claims that the tax credit ". . . should alleviate [political] opposition to a parental leave requirement in the business community."[18]

This concept of fairness also fails to take into account the many employers who already offer leave and, thus, already incur the costs associated with leave.[19] For example,

the granting of paid sick leave presumably also enhances a social good and incurs extra cost for the employer because leave is **paid**. If employers are not reimbursed for **paid** sick leave as a cost of doing business, why should they be subsidized for **unpaid** parental or family leave? Since government does not do one, why should it do the other?

Ultimately, the California study finds the cost and complexity of subsidies coupled to a parental leave requirement too disadvantageous. It recommends that ". . . **a state requirement without subsidy appears the most promising approach at this time, despite current political opposition** . . . ."[20]

Iowa Failed to Enact a Tax Credit

Iowa appears to be the only state to have progressed to the point of having a tax preference included in a leave law bill in final form. On January 28, 1991, H. F. 121, a bill providing parental leave (not family leave) and only for state employees -- was introduced in the Iowa General Assembly. The bill also included a tax preference for private employers who voluntarily complied. H. F. 121 did not pass in the 1991 session and as of June 10, 1992, Iowa still did not have a parental leave law.[21]

The unsuccessful Iowa bill requires employees to have worked 20 hours or more a week for at least one year. Parental leave would be limited to 12 weeks within a two-year period for the birth of a child or the adoption of a child under age eight or who had special needs. An employee must give 30 days notice before the start of leave which must begin no later than six weeks after the birth or adoption. Accrued paid and unpaid leave could be substituted provided that an employee retains at least ten and five days of accrued vacation and sick leave, respectively, throughout the leave period. Neither vacation nor sick leave would be allowed to accrue for an employee while on leave.

Health insurance or benefits coverage must continue to be available during the leave period. However, the employee must prepay both the employee and the employer portions of health insurance or benefits coverage costs. Upon return to work, the employer portion would be refunded to the employee. Of course, the leave-taker would be guaranteed the same or an equivalent position at the same pay grade. In cases where two parents qualified for parental leave, only one would be eligible for unpaid parental leave. For all practical purposes, this would have eliminated parental leave for fathers in those cases.

H. F. 121 also proposed a tax deduction for private employers, regardless of size, who offer parental leave. An amount "equal to sixty-five percent of the wages paid to an employee during the employee's parental leave" can be deducted. The bill caps the amount at $2,500 per employee retroactive to tax years beginning January 1, 1991.

The tax measure appears to be meant as an incentive for **private** employers to provide what would have been mandated by law for **public** employers. However, the bill does not

specify what degree of compliance is necessary for private employers to claim the deduction. Furthermore, it appears that the "employee" being paid and the "employee" taking leave were meant to be one and the same person. If so, the tax deduction would have been available only to employers who granted **paid** parental leave. In any case, the power of the incentive would have been diluted because no reimbursement would have been allowed for the cheaper, and presumably preferred, alternative of **unpaid** leave. On the other hand, with **paid** leave, men may be more likely than women to take leave assuming that men would be less willing to forego their relatively higher wages. This is consistent with the findings in Bond et al. who report that:

> While it is customary for new fathers to take a few of their accrued vacation or sick days to help out following childbirth or adoption, it is rare that they take unpaid leave -- perhaps because they do not feel they can sacrifice the earnings from their jobs, because historically they have not been offered unpaid leave options, or because they received subtle pressure not to make their family commitment obvious to their employers by using parental leave policies. . . the amount of leave taken by biological fathers fell far short of the leave benefits available to them under state laws. Virtually all fathers (97 percent pre- and 98 percent post-statute) who took time off from work after the birth of their children spent that time assisting their wives or partners or caring for the baby rather than pursuing their own interests.[22]

IV. The Nature of Employer Costs

An employer may incur certain basic costs when employees take and continue to take unpaid leave regardless of whether a leave law exists.[23] Employers continue to incur the same costs after a leave law is enacted. To the extent that the minimum leave requirements exceed the employer's past practice and require greater expenses, the employer incurs additional cost that can be attributed to the leave law.

All family leave laws require a job guarantee, that is, a return to the same or an equivalent job. Prior to most leave laws, an employer essentially had two options:

(1) Grant unpaid leave, keeping the job open (and either redistribute work, leave work undone, or hire a temporary, etc.); or

(2) Hire a permanent replacement.

Some employers -- those who flatly and consistently refuse to grant any amount of unpaid leave -- would always hire permanent replacements. Depending on each employer's circumstances, one particular option should be consistently less expensive than the others in the long run. For example, granting unpaid leave (including the possible cost of hiring a

temporary replacement) may be consistently cheaper for Employer "L(eave)." On the other hand, the nature of the job market for Employer "R(eplace)" and the structure or size of R's business may require ongoing recruiting, hiring, and training to deal with R's endemic high staff turnover rate. This is routine for R. Furthermore, R may have worked out certain strategies to make the cyclical process economical, or perhaps even cheaper than the more commonplace routine used by L.

After the enactment of a typical family leave law, employers would no longer have the option of hiring permanent replacements. However, Employer L would still incur the same post-statute costs for granting unpaid leave -- up to a point -- unless minimum leave requirements exceed L's previous practice. Why should government, through **all** taxpayers' money, subsidize Employer L for **post-statute costs** that L had already been incurring as **pre-statute costs of doing business**? If L needs to grant longer unpaid leave than before, L may incur additional costs, as discussed above. However, L would incur these additional costs only to the extent that L's employees, in actuality, take more unpaid leave than they would otherwise have taken. The extra leave must also result in expenditures greater than the savings from not paying wages to leave-takers.

Alternatively, L may incur additional costs hiring temporaries during the extra leave period. However, savings from unpaid wages may offset the cost of temporaries. If so, and if L's employees do not take extra newly available unpaid leave, a tax credit will give L a windfall to offset a previously privately-borne cost of doing business.

Employer R would have incurred certain costs for the routine recruiting, hiring, and training of permanent replacements. For R, with the enactment of a typical leave law, that option would no longer be available. Assuming that the lost option was cheaper for R, only that cost **in excess of** the cost of the lost option would be an additional cost incurred as a result of the leave law.

Most employers have already been bearing the cost of unpaid leave or staff turnover as a cost of doing business. Employees will continue to make **basic** decisions that require taking leave (see discussion in chapter 3, section VI) regardless of the existence of a leave law. As long as they do, employers will continue to incur some cost regardless of any leave law.

Employers bear presumably even greater costs for benefits such as **paid** sick leave when employee productivity is lost entirely but the employee continues to be paid. If tax credits are not granted for the cost of doing business associated with paid sick and vacation leaves, why should government reimburse employers for another cost of doing business associated with unpaid leaves? Presumably, granting paid sick leave also contributes to a worthy social good. Would it make more sense to subsidize employers for unpaid family leave than paid sick leave for the sake of encouraging a social good? Both would be subsidies unrelated to relief for an unfair incidence of tax.

One may argue that vacation and sick leaves are basic labor standards but that family leave is a mandated benefit and therefore should be reimbursed by government. Government's traditional policy is to avoid mandating employee benefits. (The Tax Foundation of Hawaii termed the Hawaii legislation a "mandated benefit" and cited it as ". . . an example of government intrusion and an indirect taxing of businesses.")[24]

However, mandated benefits may become labor standards over time. Regardless of nomenclature, as already noted, the legitimate use of a tax preference is to reduce the tax burden due to the taxpayer's inability to pay. Furthering a social goal by using the tax system would not be good tax policy. Good tax policy would specifically target legislative appropriations regardless of the political implications. Finally, alleging the improper use of a tax preference, the Tax Foundation of Hawaii further cautions that ". . . once enacted, a tax benefit is difficult to reduce or eliminate. Thus, while the credit[25] . . . may be reviewed and statistically analyzed, it will more than likely become a permanent fixture of the tax system . . . ."

ENDNOTES

1. Tax Foundation of Hawaii, Legislative Tax Bill Service (Honolulu: Tax Foundation of Hawaii, 1991), p. 6; hereafter referred to as "Tax Foundation."

2. Francis M. Bator, Question of Government Spending: Public Needs and Private Wants (New York: Harper & Row, 1960), p. 94.

3. For all practical purposes, no tax policy can satisfy all the criteria. In fact, it is argued that the two criteria of efficiency and equity may be mutually exclusive. "Efficiency," as it is used in this note, is a somewhat different concept from that discussed in the body of the text. Here, it is not used to refer to efficiency of administration and implementation of, and compliance with, a tax policy in proportion to the revenues collected or benefits realized. See also footnote no. 6 below.

   In Harvey S. Rosen, Public Finance (Homewood, Illinois: Richard D. Irwin, Inc., 1985), p. 304, Rosen points out that:

   > "Corlett and Hague [1953] showed that efficient taxation requires taxing the good that is complementary to leisure at a relatively high rate. To understand why, recall if it were possible to tax leisure, then a 'first-best' result would be obtainable -- revenues could be raised with no excess burden [also termed 'deadweight loss' or 'welfare cost' and which is a loss of welfare (making the taxpayer worse off) above and beyond the tax revenues collected]. Although the tax authorities cannot tax leisure, they can tax goods that tend to be consumed jointly with leisure, indirectly lowering the demand for leisure. If yachts are taxed at a very high rate, people will consume fewer yachts and spend less time at leisure. In effect, then, taxing complements to leisure at high rates provides an indirect way to 'get at' leisure, and hence, move closer to the perfectly efficient outcome that would be possible if leisure were taxable."

   Rosen also discusses the unpleasant policy implications of the efficient tax theory. For example, the inverse elasticity rule states that inelastically demanded goods should be taxed at relatively high rates. Demand is said to be inelastic if it does not change as price increases. Demand for plain vanilla ice cream by an "average" person is elastic and should drop drastically as its price increases. The person will either go

without or substitute a cheaper alternative. On the other hand, demand for yachts by the very rich may slacken only slightly as price rises. However, a diabetic, unfortunately, requires and must continue to pay for the same amount of insulin regardless of how high the price of insulin may rise. To the extent that a tax policy may be efficient, equity may suffer. Rosen observes: "Efficiency thus becomes only one criterion for evaluating a tax system; fairness is just as important. In particular, it is widely agreed that a tax system should have vertical equity: it should distribute burdens fairly across people with different ability to pay."

4. The following discussion on criteria for good tax policy draws loosely from a workshop conducted on May 26, 1992 by Lowell Kalapa, President and Secretary of the Tax Foundation of Hawaii.

5. In Joseph A. Pechman, "Why We Should Stick with the Income Tax" in The Brookings Review, Spring 1990, vol. 8, no. 2, pp. 12-13, Pechman discusses equity and progressivity:

> "Most people support tax progressivity on the ground that taxes should be levied in accordance with ability to pay, which is assumed to rise more than proportionately with income. . . . In the latter half of the 19th century, progressive income taxation was justified by 'sacrifice' theories that emerged from discussions of ability to pay. Under this doctrine, ability to pay is assumed to rise as incomes rise, and the objective is to impose taxes on a basis that would involve 'equal sacrifice' in some sense. If the marginal utility of income declines more rapidly than income increases and the relation between income and utility is the same for all taxpayers, equal sacrifice leads to progression. (emphasis added) Whether or not one believes in sacrifice theory, the concept of ability to pay has been a powerful force in history and has undoubtedly contributed to the widespread acceptance of progressive taxation."

6. See Rosen's discussion of efficient taxation and excess burden in footnote no. 3 above. In terms of modern welfare economics, a tax measure approaches efficiency when no excess burden is generated. That is, according to Rosen (pp. 278-279), a tax is efficient when it does not change relative prices in the sense that it does not lower individual utility more than is necessary to raise a given amount of revenue. (Utility is roughly defined as consumer-taxpayer happiness resulting from the ability to satisfy individual wants and preferences.) At any time before reaching the point where this occurs, there is "slack" or waste (excess taxpayer burden) in the system. Analogously, in terms of allocation of resources, this point is called Pareto efficient. This is the point at which one person is made better off only by making another person worse off -- where all slack (inefficiency) has been squeezed out of the system.

7. The final draft of S.B. No. 818 that became Act 328 provides only four weeks of family leave a year.

8. Tax Foundation, pp. 87-88.

9. The original draft of S.B. No. 818 subjected only employers of 50, rather than 100, or more employees to its provisions.

10. George Mason in Pacific Business News, January 28, 1991, p. A-4. Mason notes that the data he cites are limited to businesses with taxable payrolls. Thus, one-person proprietorships, family businesses with no payrolls, and part-time businesses run by regularly employed persons, if included, would have made the percentage of employers subject to the family leave law even smaller.

11. Lisa Sementilli-Dann, Eva Gasser-Sanz, Alison Lowen, Stephen T. Middlebrook, Glenn Northern, Janice Steinschneider, and Sharon Stoneback, Family and Medical Leave: Strategies for Success (Washington, D.C.: Center for Policy Alternatives), December 1991 (unpaginated).

12. Steve Koppman, Time Off for Parents: The Benefits, Costs, and Options of Parental Leave, California Senate Office of Research, September, 1987, pp. 39-40.

13. James T. Bond, Ellen Galinsky, Michele Lord, Graham L. Staines, and Karen R. Brown, Beyond the Parental Leave Debate: The Impact of Laws in Four States (New York: Families and Work Institute, 1991), pp. 5-6.

14. Koppman, p. 28.

15. Ibid., pp. 24-25.

16. Ibid., p. 24.

17. Ibid., p. 27.

18. Ibid., p. 24.

19. Rosen (p. 352) further expounds that:

> . . . a tax credit is a subtraction from the tax liability (not taxable income), and hence, its value is independent of the individual's marginal tax rate. A tax credit of $100 reduces an individual's tax liability by $100 [regardless of the] tax rate. . . . If the motivation is to correct for the fact that a given expenditure reduces ability to pay, then a deduction seems appropriate. If the purpose is mainly to encourage certain types of behavior, it is not at all clear whether credits or deductions are superior. A credit reduces the effective price of the favored good by the same percentage for all individuals; a deduction decreases the price by different percentages for different people. If people differ with respect to their elasticities of demand, it may make sense to present them with different effective prices. For example, it is ineffective to give any subsidy to someone whose elasticity of demand for the favored good is zero. [Employers who already grant unpaid leave will not grant more unpaid leave just because a law requires it and a tax credit is available.] The subsidy is 'wasted' because it encourages no new demand.

20. Ibid., p. 44.

21. Telephone interview with Diane Bollander, Director, Iowa Legislative Service Bureau, June 10, 1992.

22. Bond et al., p. 78.

23. See also discussion in chapter 3.

24. Tax Foundation, p. 87.

25. Ibid., p. 67, referred to a tax credit for the care of elderly relatives proposed in S.B. No. 509, 1991, but which comment applies to tax benefits in general.

CHAPTER 3

FISCAL IMPACT

> *It is a daunting task to pit unquantifiable social benefits against unquantifiable economic costs.*[1]
>
> *The costs to businesses are often misperceived because the costs of absence from work due to childbirth or illness -- which are unavoidable -- are confused with the costs of providing family and medical leave.... The question for workers is whether they will have a job to come back to. The question for employers is whether there are any additional costs when they hold jobs open for absent employees rather than replacing them permanently. (Emphasis added)*[2]
>
> *... in evaluating the potential costs of a new state parental leave policy, only those additional temporary replacement costs for time taken beyond what employees are already taking can be considered.*[3]

Act 328, Session Laws of Hawaii 1991, requires the Bureau to include in this study the "fiscal impact" of the family leave law. The primary definition of "fiscal" is "of or pertaining to the public treasury or revenues".[4] The impact of Hawaii's Family Leave Law extends beyond the public treasury or public revenues. Therefore, for the purposes of this study, a secondary but broader definition of "fiscal" is adopted: "of or pertaining to financial matters in general."[5]

This chapter examines the fiscal impact of family leave laws in general as a way of shedding light on the potential impact of Hawaii's Family Leave Law. This approach is used because the available data in the field indicate two things: (1) costs to employers are minimal, and (2) quantifying the economic costs of leave laws is a very risky affair. In addition, private employers in Hawaii will not be affected by the law until January 1, 1994 and government employees have been eligible for only less than a year. Thus, any attempt to analyze actual fiscal costs in Hawaii would be incomplete, at best, and probably misleading at this early stage.

I. Arguments for Minimal Costs

Generic Costs of Leave-Taking and Costs Attributable to Leave Laws in Excess of Generic Costs

The costs of leave-taking are generic to all businesses and are inevitable regardless of any law. These costs are not the same as the **additional costs** that an employer may incur by complying with a new leave law. (See discussion in section IV of chapter 2.) Employers have always incurred certain costs for employees wanting to take leave -- before family leave laws

of any sort had been enacted. Employers continue to incur the same costs after leave laws are enacted. **Only to the extent that the minimum leave law requirements exceed employers' past practice and require greater expenses do employers incur additional cost attributable to leave laws.**

Job Guarantees and Unpaid Leave

To the extent that employers already offer job guarantees and bear leave-taking costs, a new family leave law should incur minimal, if any, costs for these employers. Family leave laws generally require that a leave-taker's job -- the same or an equivalent one -- be guaranteed, that is, held open for a returning leave-taker. No permanent employee can be hired to replace the leave-taker. Before a leave-taker returns, leave (usually unpaid) must be granted for a specified minimum period.

A lack of uniformity characterizes employers' leave policies in states that do not have family leave laws. Although, in practice, an employer may grant unpaid leave or guarantee a job, such policies are often unwritten and informal. Many employers judge whether a request is reasonable and consider if they can afford it. In some cases, the employee can negotiate.

How long a leave an employee actually takes depends largely on how much wages the employee can afford to lose. To the extent that employees cannot afford long leaves, employer costs, if any, should be reduced. Without a family leave law, some employers may only grant accrued vacation or sick leaves for family reasons. Some may grant a further period of unpaid leave. According to a study done for the United States Small Business Administration (SBA), ". . . few small employers give job guarantees or continue health insurance benefits [during leave]."[6]

The effects of the parental leave requirements of leave laws in four states (Minnesota, Oregon, Rhode Island, and Wisconsin) were studied in 1991 ("parental leave study"). In that study, it was found that 83 and 63 percent of employers claimed to offer job-guaranteed disability leave to biological mothers before leave laws were enacted. Another 63 percent claimed to offer job-guaranteed post-disability leave.[7] Such employers would incur additional cost due to a family leave law only if they exceed the expenses they already bear for job guarantees and leaves. However, it was pointed out that these claims may not necessarily be enforced without formal written policies. (Only 25 and 17 percent of employers had formal policies regarding disability and post-disability leaves, respectively.)[8]

Options and Costs of Handling Leave-Taking

Because leave laws guarantee jobs for leave-takers and prohibit the hiring of permanent replacements, such laws typically narrow an employer's options. Such laws may force certain employers to adopt what they believe to be less preferable and perhaps more costly strategies to handle leave-taking. For example, an employer could choose among

several **pre-statute** options: leave work undone, redistribute work to colleagues, pay overtime, or hire temporary or permanent replacements. The only **post-statute** prohibition is the hiring of permanent replacements.

However, leave laws may encourage employers to alter their behavior in a wholly unintended manner. Employers may adopt new hiring practices that screen out those perceived more likely to take unpaid leaves. Recently married jobseekers in their prime procreative years fall into this category as do the elderly who are believed to be physically more fragile and thus more prone to take sick leave. The "sandwich" generation which is expected to care for both young children and aging parents may face a double barrier to employment. Those with previous medical conditions are feared for potentially large and recurrent medical costs. Thus, those already at a disadvantage may be subject to further barriers to hiring.

However, if one assumes that employers will not adopt unfair hiring practices, the overall costs associated with leave-taking may still exceed the savings from leave-takers' unpaid wages. Various factors play a role including the wage rates of leave-takers and temporary replacements, productivity loss, additional overtime, and the nature and complexity of the work -- which may or may not require further cost for training. On the other hand, costs may not exceed wage savings. The cost of each option varies with each employer. If the savings from not paying leave-takers' wages exceed that cost, the employer will experience a net savings due to leave-taking.

If a leave-taker's work cannot be left undone, one option is to hire a temporary replacement. Thus, an employer could incur a cost for granting unpaid leave, discounting for a productivity loss. The United States Chamber of Commerce study (discussed in detail in a later section) offset this productivity loss by the temporary replacement's lower wages and benefits. However, there is evidence that family leave laws **increase** worker productivity by helping to resolve family stress that may be distracting, debilitating, or disruptive to work. In support, there is evidence indicating higher productivity and lower absenteeism among part-time workers taking leave in New York State and in the federal government.[9]

For most employers, hiring a permanent replacement may entail the greatest cost. According to the SBA study, the costs associated with terminating an employee includes the cost of recruiting, hiring, and training a permanent replacement. The SBA study found that these costs are greater than those associated with granting unpaid leave:

> . . . businesses would not incur significant costs as a result of granting leave, since all employers manage worker absences as a matter of course. . . . Findings show that the costs of terminating an employee on account of illness, disability, pregnancy, or childbirth (costs vary from $1131 to $3152 per termination) are significantly greater than those associated with granting family leave. The average costs of granting leave varies

> from $.97 to $97.78 per week depending on the circumstances [for non-managers in medium-sized firms and in firms of 100-plus employees, respectively]. The study concluded that family leave may actually save businesses money. Since employee absences due to family responsibilities are inevitable, small firms are already accustomed to managing workers' absences. Firms use a multitude of strategies to deal with shifts in their workforce, including reassigning work temporarily to another employee, sending work home to the employee on leave, leaving lower priority work undone until the employee returns, and hiring temporary replacements. (Emphasis added)[10]

In 1991, Virginia conducted a study on parental leave policy for state employees. That study reported that "The recruitment, hiring, and training costs associated with employing full-time classified replacements for employees who resign from state service for parental reasons was estimated to be approximately $2,263 per replacement."[11] In contrast, the study estimated the wages for a temporary replacement for an employee taking 30 work days (i.e., six weeks) of parental leave at $1,829.[12]

Because recruiting, hiring, and training new employees is a costly process, the job guarantee provision of leave laws may actually help to force employers to reduce these costs. In fact, research to date indicates that the provision of better leave policies improve employee retention. One study reported that a firm with a 12-month leave had a 94 percent return rate for leave-takers. Another reported that employers were much more likely to return to companies that offered family-friendly policies and practices such as parental leave. That study reported that 78 percent of leave-takers returned to firms that accommodated their needs while only 52 percent returned to firms that did not.[13]

General Estimates of Leave Costs

The United States General Accounting Office (GAO) projected the financial effects of the 1987 proposed federal Family and Medical Leave Act. It surveyed 80 small, medium, and large firms in two major cities and found that: "An employer's savings in worker salary and benefits for those on unpaid leave exceed an employer's cost of replacement." (Emphasis added)[14] That is, a leave law could possibly mandate employer savings by prohibiting the costlier option of hiring a permanent replacement. A subsequent GAO study of the projected effects of the proposed federal Family and Medical Leave Act of 1989 found that:

> For a proposed federal law that would exempt employers with fewer than 50 employees, and allowed for 10 weeks of family leave and 13 weeks of medical leave, the GAO calculated a cost of $188 million in 1989, with the major cost coming from continuing the employer contribution to health insurance plans rather than from the use of temporary workers. (Emphasis added)[15]

A separate 1989 GAO document echoes the same finding:

> A study of current employer practices by the U. S. General Accounting Office found that employers incur little or no additional replacement costs when they hold jobs open for absent employees. GAO has estimated the costs to employers as solely the cost of maintaining health insurance during the leave an amount which comes to about $200 million annually for all covered employers. GAO's study shows that employers replace fewer than one in three absent workers and that the cost of the temporary replacements is similar to or less than the cost of the workers replaced. (Emphasis added)[16]

The SBA study asked employers to provide their best estimate of the cost of the most recent leave, including the value of the lost output and lost sales in addition to labor costs. The study found that in companies with fewer than 100 employees, the net cost (covering leave-takers' work, minus wages, but excluding continuing health insurance) was $22.00 a week per employee. In larger firms, it was $90.00 per week. Continuing health care insurance added $32.00 per week. Contrary to expectation, the cost per employee was found to be lower in small companies.[17]

Estimates from the Parental Leave Study

Parental leave-taking constitutes a major portion of all family leaves. The parental leave study, published in 1991, focuses only on parental leave. (Minnesota and Oregon had only parental leave requirements when the study was done. Since the parental leave study, Oregon has expanded its leave law to include family leave. Rhode Island and Wisconsin have a full complement of family and medical leave provisions but the study limited its focus on parental leave.) The study examined the impact of laws mandating parental leave on the operating costs of covered businesses in four areas: training, administrative, unemployment insurance, and health insurance contribution costs. Its findings have direct relevance for the parental leave requirements of the family leave statutes of other states. Furthermore, the pattern of findings relating to perceived costs can likely be extrapolated to apply to other types of family leave.

The parental leave study reported that 71 percent of covered employers perceived no increase in costs for training while 81 percent perceived no increase in unemployment insurance costs. As for health insurance costs, 73 percent saw no rise; 55 percent perceived no increases in administration costs.[18] In contrast, only four percent of covered employers perceived a significant increase in costs for training, two percent for unemployment insurance, and six percent for administration.[19]

Regarding health insurance costs only, employers were not asked to distinguish between "significant" and "some" increase. As a result, the responses were limited to yes or no: 73 percent of employers felt insurance did not cost more while 27 percent felt it did. However, Bond et al. argue that the relatively large 27 percent may be misleading. They point to the absence of significant differences and the actual pattern of reported increases among the states that do and do not require continued employer contributions to pre-existing health insurance plans. They believe that this suggests the reported increased costs may be due to general across-the-board increases in health insurance costs rather than to increases occasioned by compliance with leave laws.[20]

II. Arguments for Increased Costs

High Leave Costs: the United States Chamber of Commerce Position

The United States Chamber of Commerce has estimated much higher costs for a national parental and medical family leave policy.[21] The 1987 study compared the $300-plus weekly wage and benefit costs of a Los Angeles word processor with the costs of hiring locally surveyed temporary agency replacements. (The authors considered the $315.25 cost representative of the typical full-time female worker.)

The study found that the employer cost for hiring temporaries was nine percent higher than for a typical "permanent" employee. The study also factored in a ten percent "productivity loss" which was offset by the temporary replacement's lower wages and benefits. The Chamber estimated that, in 1987, 4.6 million parents were qualified for leave nationally based on earlier proposed federal legislation. The average net cost of hiring temporary word processors in seven cities was extended to estimate replacement costs for the 4.6 million parents. The study assumed **all** eligible parents (including fathers) to take **the full 18 weeks** of unpaid leave proposed at that time. It also assumed employers to **replace all** absent employees on an hour-for-hour basis **with agency temporaries**, regardless of cost.

As a result, the Chamber study estimated the total cost of family leave nationally in 1987 to be **$12.6 billion**. It subsequently reduced this figure by over half to **$5.2** billion by taking out those employers already conforming with the proposed law. It continued to assume a 100 percent take-up (that is, all parents taking full leave). The Chamber also provided an alternate estimate of **$2.6 billion** assuming a 50 percent take-up.[22]

United States Chamber of Commerce Study's Estimates Are Inflated

Three sets of factors render the Chamber's estimates inflated.

Overestimates of Length of Leave and Population of Eligible Employees Based on Outdated Assumptions: The first set unrealistically overstates the length of unpaid leaves and

inflates the number of eligible employees and covered employers. The Chamber based its 1987 study on leave requirements as they existed in proposed legislation at the time of the study. These were much broader than they are being proposed now. First, the 1987 study figured **costs based on 18 weeks of unpaid leave**. The current proposal is for 12 weeks. Second, in 1985, the federal proposal covered **all** employers. **There was no exemption for small businesses**. By the end of 1987, employers with fewer than 15 employees were exempted. The current proposal expands the exemption to all employers with fewer than 50 employees. Third, the number of hours an employee must work in a year to be eligible has **increased to 1,250, up from 1,000**. Therefore, not as many employees would be eligible. Fourth, the original proposal **did not allow employers to refuse unpaid leave to "key employees"** defined as the highest paid ten percent of a company's work force.

Overestimates of Leave Take-up, Replacement by Temporaries, and Leave-taking Costs Not Reduced by Savings on Unpaid Wages Based on Unreasonable Assumptions: The second set of factors involve several assumptions that unreasonably inflate costs. First, it is **unreasonable to assume that take-up could be 100 percent or even approach 50 percent**. In the case of biological childbirth, not all eligible female employees can be expected to be fertile nor can all fertile employees be expected to give birth every year. Similarly, not all male employees can be expected to take parental leave. Neither can all employees or their family members be expected to fall ill each year.

Connecticut, which collects data annually on the use of family leave in the public sector, reports that a total of 369 and 332 public employees took unpaid leave from May to April of 1989-1990 and 1991-1991, respectively. This represents **only 0.9 and 0.6 percent of the total state workforce** -- nowhere near 100 percent take-up.[23] Even at a 50 percent take-up rate, it is unreasonable to expect **both** men and women to be absent from work for all types of family leave. Far fewer men than women would be expected to take leave, further reducing the base from which to estimate employer costs. The Connecticut study reports that men accounted for only 16 percent of all state employees taking leave.[24]

It is also **unreasonable to assume that leave-takers will take the maximum amount of leave**. For example, the parental leave study found that there was little change in the way most mothers took parental leave before and soon after the enactment of leave legislation. It also found that there was no change in the amount of leave taken by biological mothers. The study suggests that "It is likely that little change has occurred because most mothers cannot afford to take more time off without some protection against loss of income. . . . The major reason given for returning to work was economic necessity." (Emphasis added)[25]

The Connecticut studies also found that a plurality, 45.7 and 35.8 percent of all public employees who took family or medical leave from 1989-1990 and 1990-1991, respectively, completed their leaves in 0 to 5.9 weeks.[26] This is far below the maximum of 24 weeks over a two-year period mandated by Connecticut's law. (Hawaii public employees averaged only about one week of leave (5.6 days) for leaves taken in the first half of 1992. See chapter 6.)

It would be unreasonable to infer that Connecticut's employees are unique in cutting their leaves short because they are unable to afford more of it than employees elsewhere. The practical options of those who cannot afford longer unpaid leaves in the first place do not seem to have been greatly affected by family leave. This is supported by findings in the four-state parental leave study:

> Mothers were more likely to return to their jobs when they earned more per hour, when they placed a higher value on paid employment, and when their families were more dependent on their earnings.[27]

It is further **unreasonable to assume that all leave-takers will be replaced by temporary replacements and at the same cost**. The parental leave study reported that relatively few employers relied on temporary workers to replace employees on leave. Specifically, for both large and smaller employers, only 23 percent hired outside temporaries. Sixty-seven percent assigned work temporarily to others. Three percent paid overtime to existing employees. Four percent hired outside permanent replacements. One percent each assigned work permanently to another employee, assigned work to the leave-taker to complete at home, or left work undone.[28]

The method most often used -- redistribution of work to a leave-taker's colleagues -- incurred no extra wage costs. Overtime pay was minimal and the wages saved could likely exceed the cost of any overtime paid. The study further pointed out that the cost due to the use of temporaries depends on ". . . the length of leave, the number of employers covered, the exemption level, and the extent to which it is assumed that temporary replacements would be used."[29] In addition, not all temporaries need to be agency-hired. Even if they were, not all agency temporaries cost the same. More specifically:

> . . . 60 percent of the smallest employers (1 to 15 employees) and 80 percent of all other firms (over 15 employees) re-routed the work of managers on leave, while between 23 percent of the smallest firms and 8 percent of mid-sized firms (16 to 99 employees) hired temporary replacements for managers. When the employee on leave in the study was non-management, 70 percent of companies re-routed work; between 44 percent of small companies and 70 percent of the larger firms (over 100 employees) also brought in temporary workers to replace non-managers.[30] (See also Part II in chapter 4.)

The Connecticut study reports that the majority (57.2 percent) of leave-takers were not replaced during their absences. "Temporary agency personnel provided coverage for seventeen employees [out of 332 leave-takers or 5.1 percent]."[31]

Furthermore, it is **unreasonable not to discount some percentage of women leave-takers who receive TDI benefits**. These women may decide not to take unpaid family leave after having received partial wages during a temporary disability leave.

Although the Chamber's study used net costs, the SBA found that the cost of giving unpaid leave was relatively small **if the unpaid wages saved were taken into account** and if unpaid leave was cheaper than letting the employees quit and hiring permanent replacements. Furthermore, "The cost of such [leave] coverage differs little from the cost of maintaining workers in their position [*sic*] without leave."[32] This is consistent with the GAO studies' conclusion that the primary, or even sole, cost of family leave lies in maintaining employer-contributed health insurance premiums during unpaid leave.

Overestimates Based on Post-Statute Leave Costs Not Reduced by Pre-Statute Leave Costs: In addition to the two sets of factors discussed above, the third factor that inflates the Chamber's cost estimates is a point that has already been made. To estimate the true costs attributable to a leave law, **an employer's customary pre-statute leave costs must be deducted from the post-statute leave costs associated with guaranteeing jobs and granting unpaid leave**.

Employers have always had options. Leave laws guarantee jobs and remove one of those options (of hiring permanent replacements). However, leave-taking is inevitable as long as employees need to take care of newborn, parents, children, or spouses, regardless of any law. Employers have always incurred certain generic leave costs. Consequently, a leave law cannot be made responsible for **all** expenses incurred for leave-taking which employers had previously incurred as a cost of doing business. These costs are not the same as the **additional cost** that may be borne by an employer as a result of new leave law requirements.

In summary, employers are still left with many post-leave law options. They can still hire temporaries, leave work undone, re-route work to existing employees gratis, and pay overtime, among other strategies. Even if the assumptions are reasonable, leave-taking costs cannot all be automatically attributed to a leave law precisely because these options, and their costs, have always existed. Employers continue to incur certain of these costs after enactment of leave laws. Only if the cost of minimum leave requirements exceeds the employer's past practice and requires greater expenses can this **excess cost** be attributable to a leave law.

Additional Costs Possibly Attributable to Leave Laws

There can be a financial impact, to be sure. There can be exceptions. It is possible for employers to incur additional costs by being forced to abandon a certain cheaper replacement strategy, for example, when:

(1) An employer who, because of either the nature of the job market or the structure or size of the employer's business, chronically experiences a high rate of staff turnover and:

(a) Does not guarantee jobs or grant unpaid leaves as a customary or feasible option because of its higher cost; and

(b) Hires permanent replacements as a customary and feasible least-cost option;[33] or

(2) An employer who, before the enactment of a typical family leave law -- without regard to feasibility or cost -- simply chose not to grant unpaid leaves or provide job guarantees.

The small minority of employers who already grant **unpaid** family leave would incur the same or similar post-statute costs. The majority who did not previously have compliance level leave policies in place may indeed incur additional costs for providing a social good. Family leave laws force (or enable, depending upon one's perspective) employers to provide a social good that benefits employees as parents and family members -- and thus, society as a whole -- while incurring its associated costs. Whether the social good generated should be treated as a deserved labor standard or as an improper mandated benefit is a matter of policy choice.

III. Other Common Arguments and Rebuttals

Leave Laws Increase Leave-Taking

Opponents of leave laws caution that leave mandates will swell the number of leave-takers to unprofitable levels for employers. This warning is often sounded together with employers' claims that the needs of employees are already being met without mandating legislation. The assumption is that the greater the number of leaves, the greater the employers' costs.

Although data are limited, there are some indications to the contrary. For example, the parental leave study in four states reported that **the proportion of mothers taking parental leave for childbirth did not change after the passage of leave laws.** Before leave laws were established, 78.6 percent of all biological mothers in that study took this leave. At six to 12 months after the passage of leave laws, an almost identical 78.4 percent of mothers took parental leaves.[34] **The data suggest that leave laws do not increase the number of leave-takers.** Leave laws do not seem to have encouraged mothers to take parental leaves. Consequently, the notion that taking leave for childbirth is a basic decision that is made regardless of the existence of leave laws gains currency. (See also related discussion in section VI concerning elasticity of demand for various types of leave.) The data can be

interpreted to suggest that employers do not bear additional costs due to leave-taking laws because leave-taking has not increased as a result.

Employees Abuse Leave Laws by Taking Unnecessarily Long Leaves

Opponents of leave laws contend that leave-takers abuse the law by taking an excessive amount of leave. Because leave is usually unpaid, most leave-takers gain no **monetary** advantage by taking excessive leave. The longer the leave, the more wages are lost. However, some leave-takers may have an incentive to do so. This could occur in states that require employers to continue providing health insurance coverage and premiums. In such a jurisdiction, a leave-taker **who has decided to quit in any case** may take longer than necessary unpaid leave to maintain health benefits up to the time the employee quits.

However, this loophole is not a universal one. For example, although a Minnesota employer must continue providing health insurance coverage, the employer may require a leave-taker to pay the entire cost of coverage during leave.[35] In Rhode Island, an employer must continue providing coverage but the leave-taker must pay the employer **in advance** the full premium for the duration of the leave. The employer must return this amount within ten days of the employee's return to work. In Wisconsin, an employer may require the leave-taker to deposit in an escrow account the premium to cover the maximum leave period.[36] Provisions such as these reduce the incentive for leave-takers who intend to quit to take advantage of employer-contributed health insurance premiums by unnecessarily extending leaves.

The parental leave study data suggest that post-statute leave-takers do not tend to take more leave than pre-statute leave-takers. The same biological mothers in the study took 12.6 weeks of pre-statute leave and actually took a slightly shorter post-statute leave of 12.1 weeks.[37]

Again, this statistic can be interpreted in opposing ways. On the one hand, leave-takers do not take longer leaves after passage of leave laws as feared by critics. On the other hand, leave laws do not seem to have lived up to proponents' expectations that employees who need it will be encouraged to take leaves, or longer leaves.

Various other data indicate that employees tend to take less than the maximum allowed leave. For example, a Portland, Oregon newspaper reported the results of a phone-in reader survey on family leave. In 1991, legislation was proposed in Oregon requiring companies with 25 or more employees to grant up to 12 weeks of unpaid family leave over a two-year period. A total of 168 people responded to the survey of which 63.2 percent were employees and 36.8 percent were business owners or top executives. Of the respondents identifying themselves as employees ". . .69 percent said they couldn't afford to be away from work without pay more than two weeks, and 39 percent said they could not afford to take any

unpaid leave. (Emphasis added) About 5.7 percent said they could afford to take 12 weeks or longer."[38]

Employees Abuse Leave Laws by Quitting After Taking Leave

Employees sometimes quit employment after taking leave. Sometimes, but not always, the decision is made before taking leave. This occurs with or without leave laws. However, opponents of leave laws contend that leave-takers are encouraged to abuse the system by quitting work after taking leave. A leave-taker who intends to quit may also take advantage of a leave law by taking an unnecessarily long leave (see section above).

An employee who quits after taking leave creates additional employer costs beyond any that may be incurred for keeping a job open. The employer needs to recruit, hire, and train a permanent replacement (unless the position is cut) to replace the quitting leave-taker. On the other hand, leave-takers who return save the employer these replacement costs.

In the parental leave study, before the enactment of leave laws, 85 percent of biological mothers taking leaves returned to work. At six to 12 months after passage of the leave laws, the percentage of biological mothers returning to work was exactly the same at 85 percent.[39]

It is unlikely that an employee will quit **because** of a leave law. The parental leave study reports that almost identical pre- and post-statute proportions of biological mothers (12.6 and 12.4 percent, respectively), did not take leave but quit instead to become full-time mothers. Similarly 5.4 and 5.2 percent quit for "other reasons;" and 1.3 and 1.6 percent were fired or laid off.[40] These data show that biological mothers at least -- **both before and after leave laws were enacted** -- quit for reasons unrelated to leave policies.

Some biological mothers quit **without** taking leave. The pre- and post-statute percentages are 18 and 17.6 percent, respectively.[41] Although these latter two figures do not indicate how many mothers quit **after** taking leave, they appear to echo that proportion.

Given that leave laws did not seem to increase employee retention, the parental leave study also examined why biological mothers decide to take leave and return to work for the same employer. Of ten variables, five were found to be statistically significant (ranging from $p < .0001$ to $p < .01$). A biological mother is more likely to take leave **but return to work**:[42]

- The more per hour the mother earns;
- The more the mother gains self-esteem from having paid employment;
- The greater the proportional contribution of the mother's income to total household income;

- The more supportive the mother's co-workers and management are; and
- The more help from friends or relatives a mother could depend on to care for the child when needed.

In summary, data from the parental leave study do not show that more leave-takers quit after taking leave. However, neither do they evidence a greater number of leave-takers returning to work because of generous leave conditions. (Other studies do indicate greater retention rates for firms with employee-friendly policies. See "Options and Costs of Handling Leave-Taking" in section I.) In any case, a non-returning leave-taker incurs costs for the employer. However, it appears these costs cannot be automatically charged to a leave law.

Employers Reduce Other Employee Benefits to Accommodate Specific Benefits Mandated by Inflexible Leave Laws

Opponents frequently warn against specific leave mandates. The charge is that these mandates deprive employers of flexibility to tailor benefits, including leaves, to suit their employees. The corollary assertion is that other benefits -- primarily health insurance -- will have to be sacrificed in exchange for mandated family leave benefits. (See sections II and III above on the large role played by health insurance costs.) Underlying this belief is the assumption that family leave entails employer costs and that they are sufficiently large to require offsetting some other employee benefit.

However, in the parental leave study, 85 percent of covered employers maintained pre-existing health insurance benefits while an additional eight percent actually **increased** these benefits. Only six percent of employers reported having reduced health insurance benefits.[43] Furthermore, some doubt has been raised over how clearly employers were able to differentiate between changes regarding health insurance benefit levels in general and changes specifically due to compliance with leave laws.[44] Sementilli-Dann et al. report that "The experience of employers adopting leave as a result of collective bargaining or employer-initiated policy also shows that other benefits are not traded off for leave. This is because leave has little or no costs."[45]

Leave Laws Are Difficult to Comply With

Leave laws are frequently predicted to be very difficult to implement. Data from the parental leave study indicate that this fear may be exaggerated. Only 9 percent of covered employers with post-statute leave experience found implementation difficult. Almost four out of ten (39 percent) found implementation neither easy nor difficult. A fair number (19 percent) found implementation moderately easy while a third (33 percent) actually found it extremely easy.[46]

The relative ease of implementation reported by employers only **indirectly suggests** that increased cost, if any, due to compliance is not significant. The study does not equate difficulty of implementation with cost. However, the study does examine why employers reported difficulty. Ten factors were analyzed to see how strongly they were correlated to employers' reported difficulty with implementation. Five were identified.

The strongest positive correlation was the employer perception of reduced managers' performance. That is, the more employers felt their managers' performance to decline, the more they were apt to report difficulty in implementing the leave law.

The second strongest correlation involved actual post-statute leave-taking experience. Employers who had actual experience implementing the leave law reported less difficulty in implementation. The third strongest predictor involved increases in administrative costs. The greater the increases, the more likely a report of difficulty. The fourth related to employers' perception of difficulty in filling vacant positions during the preceding 12 months. If they had a hard time, they were more likely to report difficulty. Fifth, if employers had complied with statutory leave requirements for biological mothers before the enactment of a parental leave law,[47] the less likely they were to report difficulty.[48]

Only the third correlation concerning administrative costs relates directly to employer cost. To a limited extent, a report of difficulty in implementing the law may mean higher costs. However, the other four correlations suggest that costs were not a major concern and that other considerations were more important. It is more instructive to realize that two factors directly related to cost (training and health insurance) were found **not** to be significantly correlated to reports of implementation difficulty.[49] This suggests that employers either do not perceive training and health insurance costs as significant or consider these costs as unrelated to leave-taking.

Leave Law Mandates Are Unfair to Small Employers

Opponents of leave laws often contend that smaller businesses have more difficulty absorbing the costs of leave requirements than their larger brethren. However, findings in the parental leave study contradict this assertion:

> Small companies did not have more difficulty in complying with the leave laws than did larger ones, nor were they more likely to report increased costs. Within the size range covered by laws in the four states (21 or more employees in Minnesota, 23 or more in Oregon, and 50 or more in Rhode Island and Wisconsin), company size was not related to reported difficulty implementing the parental leave benefits required by law. Moreover, smaller companies (21 to 49 employees) were no more, or less, likely than large companies (50 to 99, and 100 or more employees) to report increased costs related to compliance with state laws. (Emphasis added)[50]

The authors of the parental leave study theorize that ". . . voluntary implementation of parental leave benefits prior to enactment of state statutes is a good indicator of the relative burden of statutory requirements on employers of different sizes or in different industries. . . ."[51] Under this assumption, data from that study ". . . do not suggest that small employers or employers in particular business sectors would suffer unduly from the imposition of leave requirements. . . ."[52] Be that as it may, all states that have passed family leave laws exempt "small businesses" of varying sizes from the requirements of family and medical leave laws.

Leave Law Mandates Impair Business Effectiveness

Critics of leave laws argue that mandates would lower productivity and reduce business effectiveness, jeopardizing the viability of some businesses. Supporters counter that generous leave benefits should improve employee morale and enhance loyalty to the company. Proponents also point out that if employers had already been meeting their employees' needs as claimed, incremental costs due to leave mandates would be minimal.

The parental leave study data reveal no substantial impact on business effectiveness soon after passage of the leave laws. This finding is based on measurements of changes in the five areas below. The percentages of employers reporting no change (NC), improvement (+), or deterioration (-) are:[53]

	NC	+	-
Managers' ability to handle work responsibilities	89%	1%	9%
Ability to recruit employees'	96%	1%	4%
Employee morale	89%	9%	2%
Employee turnover	94%	4%	2%
Employee loyalty	94%	4%	2%

It appears parental leave mandates had very little effect on productivity or business effectiveness for employers who actually implemented the leave laws. The performance of managers did seem to suffer slightly. On the other hand, the same percentage of employers reported a slight improvement in employee morale.

IV. Cost of Continued Health Insurance Benefits

As previously discussed, the GAO found that premium payments for continued health insurance coverage constituted the major cost of unpaid family and medical leave for employers.[54] In 1989, the Women's Economic Justice Center estimated the annual cost of a national leave policy to be $6.50 per eligible worker.[55] Twenty-seven percent of employers in the parental leave study perceived an increase in health insurance costs. However, that report suggests that this perceived increase may be attributable to general increases in health

insurance costs rather than to specific compliance with parental leave laws. (See related discussion of insurance costs in section I.)

Family and medical leave laws do not necessarily require that leave-takers' health insurance coverage be continued. If employers are required to continue coverage, they are not necessarily required to continue premium payments. For example, an employer may be allowed to shift premium costs to the leave-taker for the duration of the leave. If **both** continued health coverage **and** employer premiums (otherwise shifted to the employee) are required, those costs are attributable to the leave law. If an employer hires a temporary worker and pays for additional health benefits, the employer would incur a further cost. Therefore, under certain circumstances, an employer can incur additional costs relating to health insurance benefits as a result of a leave law.

The scenarios depicted in *Figure 3-1*, where a job is held open and unpaid leave is granted, reflect several possibilities. Note that the matrices do not factor in savings from unpaid leave-takers' wages but deal only with insurance premium costs.

V. *The Cost of Not Granting Leaves*

Estimates of costs associated with proposed family and medical leave laws have mostly focused on **employer** costs. In 1988, the Institute for Women's Policy Research (IWPR) argued that two kinds of costs are incurred **because** there is no leave law protection for employees:

- Costs to employees whose jobs are not protected who suffer dollar losses while looking for new jobs after taking leave and who receive lower wages from the same or other employers.

- Costs to society in general through taxpayer subsidy of various welfare and assistance programs that are used to a greater extent by leave-takers whose jobs are not protected.

For employees who take leave, Spalter-Roth et al., the authors of the IWPR study, estimate -- from a base of approximately 111 million employees -- a total annual loss of $100 billion nationally by:[56]

- 2.3 million employed women who give birth or adopt a child;

- 3.2 million employed men who have wives who give birth or adopt a child;

- 11.4 million women and 8.5 million men employees who are off the job for more than 50 hours due to their own or other family members' illnesses.

Figure 3-1

Employer Hires Temporary Replacement And			
Pays Temporary's Premiums		Doesn't Pay Premiums	
Pays Leavetaker's Premium	Doesn't Pay or Shifts Cost to Leave-taker	Pays Leavetaker's Premiums	Doesn't Pay or Shifts Cost to Leave-taker
. . . .	. . . .	. . . .	. . . .
Incurs cost: pays 2 "units" of premium in return for the work of only 1 temporary	Wash: pays 1 unit of premium for the work of only 1 temporary	Wash: pays 1 unit of premium for the work of only 1 temporary	Saves cost: pays 0 units of premium but receives the work of 1 temporary

Figure 3-2

Employer Does Not Hire Temporary Replacement and Reroutes Work to Colleagues (Assumes No Overtime Cost or Productivity Loss)	
Pays Leave-taker's Premiums	Doesn't Pay or Shifts Cost to Leave-taker
. . . .	. . . .
Wash: pays 1 "unit" of premium and gets leave-taker's work performed	Saves cost: pays 0 units of premium but gets leave-taker's work performed

Figure 3-3

Employer Does Not Hire Temporary Replacement and Lets Leave-taker's Work Remain Undone	
Pays Leave-taker's Premiums	Doesn't Pay or Shifts Cost to Leave-taker
. . . .	. . . .
Incurs cost: pays 1 "unit" of premium and leave-taker's work remains undone	Wash: pays 0 units of premium but leave-taker's work remains undone

The IWPR study defines current annual earnings losses to include the year of birth or adoption plus the two previous years for all women employees who gave birth or adopted a child but had no form of leave. The IWPR estimated **the portion of employee losses specifically attributable to the lack of a national parental (not family) leave policy at $606.8 million.** "These additional losses of childbirth occur because when new mothers without any form of leave return to the labor force they experience lower relative wages and more unemployment than those with leave."[57]

The IWPR's estimate of **the cost of society's support of welfare and assistance programs specifically attributable to the lack of a national parental leave policy to be $108 million.** Both figures are underestimates because the losses are limited to parental leave for childbirth or adoption. Costs would be greater if losses due to illness of the employee and the employee's children or other family members were included. In summary:

> On the national level, the lack of parental leave alone costs working women and their families $607 million annually. This figure represents the additional earnings lost by those new mothers who return to work, but are unable to return to their former jobs because their employers do not have parental leave policies in place. When these new mothers without job-protected leaves return to work but are unable to return to their former jobs, they experience more unemployment and lower wages than those mothers who return after a period of protected leave. In addition, working mothers without job-protected leave receive $108 million more in assistance from such programs as unemployment insurance, supplemental security income, and welfare than do mothers working for employers with parental leave policies. Taxpayers, through their support of these assistance programs, bear some of the cost of the employers' failure to provide leave.[58]

VI. Elasticity of Demand for Leaves and Effectiveness of Leave Laws

Proponents of family leave laws argue that employees, particularly women, are forced to choose between job and family. Both supporters and critics of family leave have generally expected that leave laws will encourage more employees to take leave more often and for longer periods. To the extent that this may prove to be true, leave laws can be said to be effective.

What has been generally overlooked is the **elasticity of demand** for family leave. The data from the Bureau's survey (see chapter 6) suggest that different types of family leave have different elasticities of demand. As elasticities vary, the effectiveness of leave laws become uneven. Post-statute behavioral data of employees, sparse though it may be, shed some light on these elasticities, and thus, on the ultimate effectiveness of leave laws.

Demand for family leave appears neither monolithic nor uniform but differentiated. In general, employees have a relatively **inelastic** demand for certain types of leave and relatively **elastic** demand for others. Demand is inelastic (or unchanging) if, as the price that must be paid (unpaid wages) for taking leave increases, the demand for it does not correspondingly decrease. Demand is also inelastic if, as price decreases, demand does **not** correspondingly increase. (A diabetic will continue to buy insulin even if it becomes tremendously expensive but will not have any greater need for it even if insulin becomes very cheap.)[59] On the other hand, demand is elastic (or changeable) if, as the price that must be paid for taking leave increases, the demand for it decreases. Demand is also elastic if, as price decreases, demand increases.

In terms of family leave, employees' demand for certain types of leave seems more flexible, or elastic, than for others. Demand is less rigid for leaves that employees value less highly -- that satisfy a less basic or immediate **need** -- and over which they have some **control** over "price." That is, it can be hypothesized that employees decide to take leave depending on how basic the perceived need is and on their degree of control over the situation.

For example, altruism aside, the need to care for one's own health is more basic and immediate than the need to care for, say, a grandparent-in-law. Accordingly, one would expect high demand that is relatively inelastic for personal sick leave. Similarly, the same inelastic demand is expected for family medical leave, in states that provide it, to care for oneself regardless of the cost. The employee does not have much choice, therefore, little control over price, when forced to take personal sick or family medical leave.

In contrast, when an eligible relative becomes ill, on the one hand, the need to provide care may be less basic or immediate. On the other hand, many employees have a customarily wider array of care and support options than just oneself to choose from. A spouse or other relatives or even friends may be able to help. The **need** becomes less immediate and the employee gains some **control** over price: the employee can substitute another's cost in lieu of sacrificing one's own wages by taking leave.

If no one is available, the employee may be forced to take leave to provide care. The need then becomes more immediate and the employee loses control over price: it must be fully paid by sacrificing lost wages. That is, the less basic the **need** and the greater the array of available care options, the greater the employee's **control** over price to be paid and the more elastic the employee's demand.

In other words, the demand for family care leave (for spouses, elders, or children -- see definition in chapter 1) is relatively elastic despite current leave laws. **This does not necessarily mean that employees will take fewer family care leaves. Elasticity could result in a great many leaves but of shorter duration.** (See chapter 6.) Although leave laws have reduced the **overall price** for taking family leave, they do not yet require wage replacement. Lost wages, it appears, are still a relatively heavy price for employees to pay.

The need to take family birth or adoption leave can be considered relatively basic to employees. Most employees who become pregnant and their spouses, for the most part, can be assumed to have chosen to have a child. This is certainly true for adopting parents. That is, demand for self-medical and parental leave appear to be more inelastic. Because of this inelasticity, an employee would be unlikely to decide **not** to become a parent **just because** no unpaid leave or job guarantee were available.[60] **Again, this inelasticity does not necessarily mean that employees will take a great number of family birth or adoption leaves. After all, illnesses and injuries occur more frequently than births or adoption. Rather, inelasticity may result in few birth or adoption leaves, compared with family care leaves, but of much longer duration.** (See chapter 6.)

In sum, one would expect either fewer family care leaves -- a less immediate need -- or relatively shorter leaves. Similarly, one would expect either more birth or adoption leaves -- a more immediate or basic need -- or relatively longer leaves. In other words, the more basic or immediate the need, the greater the likelihood of taking leave or taking longer leaves. If true, the impact of family and medical leave laws may vary according to the inherent elasticities of demand for various types of family leave.

In addition to **need**, employees seem to have relatively greater **control** over one's own health, including becoming pregnant. Control implies some degree of voluntary planning. However, an employee often cannot foresee nor control the serious illness of a spouse, child, or parent. Faced with an involuntary and unintended situation, an employee is forced to choose between family and job. Absent leave law guarantees and faced with the threat of losing one's job, employees may reject the unplanned obligation to care for other family members. Alternatively, they could take reduced responsibility by taking shorter leaves. That is, the steep price of losing one's job outweighs the demand to fully satisfy less immediate and unintended needs. In such cases, the reduced "price" (lost wages rather than a lost job) made possible by a job guarantee may sway an employee to take unpaid leave.

The study of the parental leave aspects of various leave laws in four states illustrates the relative **inelasticity** of demand for parental leave. That study reported that 78.6 percent of all pre-statute mothers took leave. After leave laws were established, 78.4 percent of mothers took parental leaves.[61] Demand did not rise as the price to be paid for parental leave dropped.

Data from Connecticut offer indirect supporting evidence regarding the elasticity of certain types of leave. For 1989-1990, the two largest categories of leave were 44.2 percent for birth or adoption and 46.0 percent for the employee's own illness. In 1990-1991, they were 45.7 and 45.8 percent. In both years, only 4.4 and 3.7 percent, respectively, of all leaves were to care for an ill parent; 3.7 and 2.8 percent for an ill child; and 1.9 and 2.0 percent for an ill spouse.[62] The "price" for all leaves is the same. Although no pre- and post-statute data exist for Connecticut, the consistently large proportions of leaves taken for

parental and self-medical purposes indicate that demand for these is relatively inelastic. Similarly, the elasticity of demand for family care leaves is reflected in the consistently small percentages for these categories. Data from the Bureau's study indicate the same elasticities but expressed in terms of relative length of leave rather than raw incidence of leave-taking. (See chapter 6.)

In Connecticut (or elsewhere), there is no reason to believe that employees are inherently more liable than their parents, children, or spouses to get sick. Neither is there reason to believe that births and adoptions occur almost as frequently as illnesses and injuries. Employees appear to take more of one kind of leave than another -- or to take longer leaves of one kind than another. Leave laws have reduced the price for all needs and situations. However, it appears that leave-takers' behavior is still governed by differing inherent elasticities of demand for different types of leave.

ENDNOTES

1. Steve Koppman, Time Off For Parents: The Benefits, Costs, and Options of Parental Leave, California Senate Office of Research, September, 1987, p. 26.

2. Roberta M. Spalter-Roth, Heidi I. Hartmann, Sheila Gibbs, Donna Lenhoff, and Sharon Stoneback, Unnecessary Losses: Costs to Workers in the States of the Lack of Family and Medical Leave (Washington, D. C.: Family and Medical Leave Act Coalition), August, 1989, p. 2.

3. Koppman, p. 14.

4. Random House Dictionary of the English Language, 2nd edition, unabridged (New York: Random House, 1987).

5. Ibid.

6. James T. Bond, Ellen Galinsky, Michele Lord, Graham L. Staines, and Karen R. Brown, Beyond the Parental Leave Debate: The Impact of Laws in Four States (New York: Families and Work Institute, 1991), p. 4, citing Eileen Trzcinski and William T. Alpert, Leave Policies in Small Business: Findings from the U. S. Small Business Administration Employee Leave Survey, Bulletin No. 2363 (Washington, D. C.: U. S. Small Business Administration, Office of Advocacy), October 1990.

7. Ibid., p. 29.

8. Ibid., pp. 29, 32.

9. Koppman, p. 16, referring to a 1976 United States General Accounting Office report entitled Part-Time Employment in Federal Agencies.

10. Lisa Sementilli-Dann, Eva Gasser-Sanz, Alison Lowen, Stephen T. Middlebrook, Glenn Northern, Janice Steinschneider, and Sharon Stoneback, Family and Medical Leave: Strategies for Success (Washington, D.C.: Center for Policy Alternatives), December 1991 (unpaginated), citing the SBA study.

11. Virginia, Governor's Personnel Advisory Board, Parental Leave Policy For State Employees, House Document No. 26, 1991, p. 2.

12. Ibid.

13. Bond et al., p. 11.

14. U. S. General Accounting Office, GAO's Estimate of the Costs of the "Parental and Medical Leave Act of 1987" (S. 249), GAO/T-HRD-88-5 (Washington, D. C.: U. S. GAO), October 29, 1987.

15. Bond et al., p. 4, citing U. S. General Accounting Office, GAO's Cost Estimate of the Family and Medical Leave Act of 1989 (H.R. 770), GAO/T-HRD-89-4 (Washington, D. C.: U. S. GAO), February 7, 1989.

16. Spalter-Roth et al., p. 2, citing U. S. General Accounting Office, GAO's Cost Estimate of the Family and Medical Leave Act Proposal. Statement of William J. Gainer before the Subcommittee on Children, Families, Drugs, and Alcoholism, Committee on Labor and Human Resources, U. S. Senate, February 2, 1989.

17. Bond et al., p. 10.

18. Ibid., p. 53.

19. Ibid.

20. Ibid., pp. 53-54.

21. U. S. Chamber of Commerce, "Statement of the Chamber of Commerce of the United States on H. R. 925 to the Subcommittees on Labor-Management Relations and Labor Standards of the Committee on Education and Labor, House of Representatives" (Washington, D. C.: U. S. Government Printing Office), February 25, 1987.

22. Summary from Koppman, pp. 49-50.

23. Connecticut, Department of Administrative Services, Personnel Division, Family and Medical Leave Report, May 1, 1990 to April 30, 1991 (Hartford: 1990), p. 2 and Family and Medical Leave Report, May 1, 1990 to April 30, 1991 (Hartford: 1991), p. 3, hereafter jointly referred to as "Connecticut studies."

24. Ibid.

25. Bond et al., pp. iv-v.

26. Connecticut studies: 1989-1990, p. 4; 1990-1991, p. 5.

27. Bond et al., p. vii.

28. Ibid., pp. iv, 51.

29. Ibid., p. 9.

30. Ibid., p. 10, citing the SBA study.

31. Connecticut studies: 1990-1991, p. 6. Also, Sementilli-Dann et al. cite slightly different figures for Connecticut in the previous year from May 1, 1989 to April 30, 1990. In the earlier year, men accounted for 13.8 percent of leave-takers; 46.9 percent were not replaced; 10.9 percent were replaced by agency *temporaries*.

32. Bond et al., p. 10.

33. Ibid., (p. 32) report that 13 percent of employers in four states with parental leave laws did not even allow the medically recommended six weeks of disability leave following childbirth.

34. Ibid., p. 64.

35. Ibid., p. 18.

36. Ibid., pp. 18, 31.

37. Ibid., p. 65. 12.6 and 12.1 weeks reflect post-partum leave. Both pre-statute and post-statute mothers also took two weeks of leave before birth. Thus, they took a total of 14.6 and 14.1 weeks, respectively.

38. Daily Journal of Commerce (Portland, Oregon), June 10, 1991.

39. Bond et al., p. 71.

40. Ibid., p. 64.

41. Ibid.

42. Ibid., pp. 72-73.

43. Ibid., p. 60.

44. Ibid.

45. Sementilli-Dann et al. (unpaginated).

46. Bond et al., pp. 56-57.

47. Ibid., pp. 37, 39. The fact that 77 percent and 65 percent of covered employers in the four states were already in partial compliance and full compliance, respectively, before leave laws were enacted probably contributed to businesses' reports of ease of implementation. This appears to dovetail with the earlier finding that employers had had some experience with granting job-guaranteed leaves (83 percent and 63 percent of employers provided job-guaranteed disability and post-disability leaves, respectively, for biological mothers in the four-state parental leave study). See footnote no. 10, above.

48. Ibid., pp. 56-57.

49. Ibid., p. 58.

50. Ibid., p. iv.

51. Ibid., p. 35.

52. Ibid.

53. Ibid., pp. 55-56.

54. The GAO has estimated the annual cost to be $4.34 and $5.30 per covered employee.

55. National Center for Policy Alternatives, Policy Choices in Family and Medical Leave: A legislative Checklist (Washington, D.C.: Women's Economic Justice Center, 1989).

56. Spalter-Roth et al., p. 3.

57. Heidi I. Hartmann and Roberta M. Spalter-Roth, Family and Medical Leave: Who Pays for the Lack of It? (Washington, D. C.: Women's Research and Education Institute, 1989), p. 15.

58. Spalter-Roth et al., p. 1.

59. The effect of hoarding is discounted as demand will level off at some point regardless of how low the price falls. A diabetic may take advantage of very low prices to buy a lifetime supply. One of a more entrepreneurial bent may consider acquiring more than is personally necessary for resale. However, given universally low prices, there would be no extra demand to take advantage of by re-selling at a price higher than the would-be profiteer's own buying price. Under circumstances that led to universally low prices, it would be highly unlikely for any one person or group to corner the market (artificially limiting the supply) in order to force prices up. These circumstances, in many instances, do not occur in real life. Certain pharmaceutical companies have been accused of successfully raising and maintaining artificially high prices for proprietary prescription medications.

60. Although unpaid leave and the guarantee of a job to return to are different things, it makes no sense to speak of one without the other. When an employer keeps a job open for a period, the implication is that the employee will not be on the job during that period working to keep the job. A job guarantee therefore implies some sort of leave. Although an employer is free to grant paid leave, a job guarantee usually implies the granting of unpaid leave. Conversely, granting leave implies that the employer will not fire the employee; and taking it implies that the employee will return (although the guarantee is required but the return is not). Otherwise, the correct term would be termination.

61. Bond et al., p. 64.

62. Connecticut studies: 1989-1990, p. 2; 1990-1991, p. 3.

Chapter 4

PUBLIC SECTOR AND OTHER EMPLOYER EXPERIENCE

Section 3 of Act 328, Session Laws of Hawaii 1991, directs the Bureau to study "The experience of public sector employers and any other employers already granting family leave." Section I of this chapter reviews the federal and state family leave debate. State family leave statutes are examined in section II along with a review of problems and costs in general. Finally, the family leave policies of selected private employers are presented in section III.

I. Family Leave: Federal and State Initiatives

A. Legislation Considered by Congress

Congress first attempted to mandate the provision of unpaid leave by public and private employers in 1985. Representative Patricia Schroeder of Colorado introduced the Parental and Disability Leave Act in 1985 (H. R. 2020). That bill proposed 18 weeks of unpaid leave for the birth, adoption, or serious illness of an employee's child and 26 weeks of medical leave for the employee's own illness.[1] No employers were exempt. Employers had to continue leave-takers' health benefits during leave. The bill also commissioned a study of the concept of wage replacement during leave.[2]

The 1987 House and Senate bills saw compromises. Neither bill passed. The Parental and Medical Leave Act of 1987 (S. 249) first exempted employers with fewer than 15 employees. It reduced birth, adoption, and family care leave, and employee medical leave to ten and fifteen weeks, respectively.[3] S. 249 also required employees to have worked for their current employer an average of 20 or more hours a week for a year to be eligible for family leave. The Family and Medical Leave Act (H. R. 925), phased in coverage of employers by exempting employers with fewer than 50 employees dropping to fewer than 35 employees by the fourth year. The House proposal also provided elder-care.[4]

The Family and Medical Leave Act of 1989 (H. R. 770 or "FMLA") provided a reduced 12 weeks for both family and medical leave. It also exempted employers from granting leave to the highest paid ten percent of employees. However, employers had to show a "business necessity." Granting leave had to cause substantial economic injury to the employer's operations to justify a claim of business necessity. Employers with fewer than 50 employees were exempted and the phase-in period was dropped. The definition of "parent" was limited to only the biological parent or individual who was the employee's parent when the leave-taker was a child. The bill passed both houses but was not put to a final vote until 1990.

Subsequently, it was vetoed by President Bush and Congress could not muster enough votes to override that veto.[5]

In 1991, Representative William Clay of Missouri and Senator Christopher Dodd of Connecticut reintroduced the FMLA in their respective houses as H.R. 2 and S. 5 which passed both houses in the fall of 1991.[6] *[**Note:** S. 5 was presented to the President for action and was vetoed by President Bush on September 22, 1992. The Senate overrode the veto two days later by a vote of 68 to 31. However, one week later, the House failed to override by a vote of 258 to 169 (it need 289 votes). With the election of Bill Clinton, the FMLA may be enacted during the 103rd Congress.]*

B. Legislative Initiatives on the State Level

While Congress has been stalled, various states have experimented with family leave programs. Much of the activity at the state level mirrors the national debate. The difference is that some states have enacted legislation. Fewer participants and more personal relationships in state legislatures may make enacting legislation easier at the state than at the federal level.[7]

Nineteen states and the District of Columbia[8] now have family leave laws requiring employers to provide family or family and medical leave to state or private employees, or both. However, provisions regarding specific leave types, length of leave, employee eligibility, employer coverage, and continuation of health benefits differ greatly across states.

As defined in chapter 1, only statutes that provide at least family leave are considered in this study. For example, statutes providing **only** parental leave do not fall within the scope of this study.[9] Only a handful of states provide **both** family and medical leave.

State legislatures often diluted family leave proposals in order to get these programs started. Shortening leaves, exempting more employers, and phasing in less restrictive provisions were frequent compromises. A few states, like Hawaii, adopted legislation incrementally by allowing **private** employers to delay compliance. Hawaii's statute requires private employers to provide family leave beginning in 1994, two years after public employers.[10] Similarly, Connecticut phased in its program for various-sized employers as follows:

(1) 12 weeks of leave for companies with 250, 100, and 75 or more employees until June 30, 1991, 1992, and 1993, respectively; and

(2) 16 weeks of leave for companies with 250, 100, and 75 or more employees after July 1, 1991, 1992, and 1993, respectively.[11]

In 1988, Maine used a sunset provision to phase in its family and medical leave law.[12] The sunset provision, in effect, created a two-year trial period after which the law would be repealed unless Maine's legislature made the law permanent. When the time came, Maine repealed the sunset provision, making the law permanent when no one opposed the law with any evidence of negative impact on either the public or private sectors.[13]

1. *Universal Attributes of Family Leave Legislation*

All the states with leave laws require unpaid leave[14] as well as a guarantee of job reinstatement. Regardless of the length of leave an employer may give and an employee can afford, an employee needs to be assured of job security.[15] Supporters of family leave believe that a job guarantee keeps employees from being forced to choose between family and their jobs. This is especially true in an economy where many families are headed by a single parent or where both parents are working.[16] The importance of family is further recognized in states that extend job protection to employees who take family care and medical leave. Employees are also protected from the threat of being unfairly denied promotions, training, seniority, and other benefits that accrued before leave. Most importantly, job guarantees prevent employers from intimidating employees into not taking leave.[17]

2. *Differing Attributes of Family Leave Legislation Across the States*

Types of Leave

As noted earlier, the scope of leaves granted varies among states. For example, Minnesota grants only parental birth and adoption leave (and family care for sick children only) and Iowa grants only maternal disability leave.[18]

Types of Employer

Eight states[19] provide family leave for state employees only. Nine states[20] and the District of Columbia require both public and private employers to provide family leave.

Length of Leave

Leave length ranges from four to twelve weeks within a year and up to sixteen weeks within two years. Illinois provides one full year of unpaid family leave for its state employees.[21] Laws that allow leave to be taken within two years are more flexible for their leave accumulation feature.

Some statutes[22] limit the length of leave if both parents work for the same employer. This occurs when they want to take leave simultaneously or want to take the full amount of leave allowed to each of them. California's statute does not require family leave to be granted if the other parent has already taken leave. The California employer also could limit the

length of leave so that the aggregate amount of leave time of the two parents does not total more than the 16 weeks every two years provided by law.[23] The 1991 federal bills require that if both the husband and wife are employed by the same employer, the parents together can take a maximum of 12 work weeks over a 12-month period.[24]

Job Security Guarantee Waivers

Family leave laws guarantee leave-takers' jobs. However, employers in some states can obtain waivers. For example, if a business has undergone a bona fide layoff or if changed circumstances make it impossible or unreasonable to reinstate the employee, the job guarantee can be waived.[25] In essence, if employees would have lost their jobs had they remained at work, they would not be guaranteed those jobs after taking family leave. The interpretation of "changed circumstances" is left to the employer. However, Oregon's statute requires the employee to be reinstated, if necessary, in another available and suitable job. Wisconsin's statute is clearer regarding an employer's responsibility:

> If the employment position which the employee held immediately before the family leave or medical leave began is not vacant when the employee returns, [the employer shall immediately place the employee] in an equivalent position having equivalent compensation, benefits, working shift, hours of employment and other terms and conditions of employment.[26]

Most leave statutes allow an employee to challenge the employer's actions. The employee must believe that the employer acted in bad faith to avoid reinstating the employee. Most statutes allow an employee to request an examination and resolution of the layoff or "changed circumstances" by reporting to the labor department or initiating a civil action in court.[27]

Employers are exempted from reinstating certain employees in the District of Columbia and New Jersey. In the District of Columbia, these are: (1) the five highest paid in a company of 50 or fewer employees, or (2) the highest paid ten percent in a company of more than 50 employees.[28] New Jersey waives the reinstatement of either the highest-paid five percent of employees or the seven highest paid individuals, whichever is greater.[29] Employers must demonstrate that they cannot reinstate because ". . . it is necessary to prevent substantial economic injury to the employer's operations and the injury is not directly related to the leave . . . ." The employee must also be notified of the intent not to reinstate as soon as the employer determines the need to prevent injury.[30] Business believes that giving executives too much time off severely burdens the employer's operations. Providing key employee waivers may have been a response. Such waivers limit family leave but still benefit most employees.

Size of Business

Many leave statutes exempt small businesses. What qualifies as a small business varies among states, ranging from a firm with ten employees (in Vermont) to 100 employees.

Employee Eligibility Requirements

Most leave laws require an employee to have worked for the employer between 30 to 40 hours a week for at least one year. Hawaii[31] only requires six consecutive months. Alaska requires employees to have worked 35 hours a week for six consecutive months or 17.5 hours a week for 12 months.[32] Proposed federal legislation requires an employee to have worked at least 1,250 hours within the prior 12 months (about 24 hours per week in a 52-week year).[33] Eligibility provisions help counter employer opposition to providing leave benefits to people who may not have worked for the employer very long, including temporary workers.

Employee Notice and Certification

Most leave statutes require a leave-taker to notify the employer in a reasonable and practicable manner before taking leave for family care, if possible, and to schedule medical treatment to avoid unduly disrupting the employer's operations.[34] Requiring advance notice allows employers to plan how to handle leave-takers' work. Leave statutes often allow employers to require certification of birth or adoption, or illness or injury.[35] The federal bill requires certification only for medical illness and not for childbirth or adoption.[36] Requiring certification of illness assures against fraudulent use of family leave.

Employer Notice

Some states[37] require employers to adequately inform employees of their right to take family leave. Employers who fail to do so could be fined. For example, Wisconsin requires employers to post, in at least one conspicuous place, a notice detailing the employees' family leave rights. Failure to do so could incur a penalty of up to $100 for each violation.[38] Hawaii does not require employers to notify employees.

Substitution of Paid Leave for Unpaid Leave

Employers in some states are allowed to require leave-takers to substitute their accrued vacation or sick leave for unpaid family leave, thus possibly minimizing total available leave time. In California, an employee may ". . . elect, or an employer may require the employee, to substitute . . ." paid accrued leave.[39] Vermont's statute allows accrued sick or vacation time to be substituted for unpaid family leave but specifically requires that the mandated family leave not be extended by the use of vacation leave. Furthermore, only six of the 12 weeks of family leave can be substituted.[40] A few family leave statutes further require

that an employee cannot substitute paid sick leave for unpaid family leave unless the employer agrees to the substitution. For example, in California, both employer and employee must agree before paid sick leave can be substituted.[41]

Continuation of Health Care Coverage

Many family leave statutes require the employer to maintain coverage or to continue to make health care coverage available to the leave-taker. For example, New Jersey requires the employer to maintain a leave-taker's coverage at the same level and under the same conditions that existed prior to the leave.[42] However, in some states, employers may require the leave-taker to pay the cost of the insurance premiums.[43] For example, Rhode Island requires continued coverage but, prior to taking leave, the leave-taker must pay the employer the cost of the premiums needed to maintain health benefits during the leave. The employer must return these payments within ten days of the leave-taker's return to work.[44] Wisconsin requires the employer to continue **both** health coverage **and** employer premiums if the employee continues paying the employee's share of premiums. However, the employer may require a leave-taker to put into escrow an amount sufficient to cover premiums for the total duration of the leave.[45]

On the whole, state leave statutes provide little guidance for implementation, leaving the job to regulating agencies or the courts. It is within this framework that family leave legislation has been working and that has given rise to some problems.

II. Experience of Selected States

After the enactment of the Pregnancy Discrimination Act of 1978 (42 U.S.C. 2000e), several states began to define family and maternity leave legislation to provide benefits beyond maternity disability. Most states that have adopted a family leave policy have done so since 1988. Because family leave laws are a recent phenomenon and minimal records have been kept, the full effects of this type of legislation are not known. However, a few states have recorded a limited amount of data that may help provide some insight. The prospect for future analysis is improving as more states begin requiring data collection and specific reporting procedures.[46]

A. Connecticut's Experience

Connecticut has reported state employee family leave data annually since 1989. Its *Family and Medical Leave Report*, May 1, 1989 to April 30, 1990, reports that state departments granted 405 leaves, including multiple leaves. Of the 405, 355 were completed with 309 leaves taken by females and 36 by males.

The subsequent 1991 issue reports that fewer leaves were granted (354). However, of the 274 completed leaves, a higher percentage of males took leaves (42 males vs. 232 females). Personal medical leave was the most frequent in both years (46 and 45.8 percent in 1990 and 1991, respectively). Birth leave was the second most frequent (42 and 44.9 percent). Other reasons paled in comparison as can be seen in the table below.

Leave Type	Percentage of Total Leaves Taken 1990	1991
Personal Medical	46.0	45.8
Childbirth	42.0	44.9
Adoption	2.2	0.8
Child's Illness	3.7	2.8
Spouse Illness	1.9	2.8
Parent's Illness	4.4	3.7

(Percentages total more than 100 due to rounding.)

Male employees averaged 8.3 weeks of leave in 1990 and 5.8 weeks in 1991. Female employees averaged 10.4 and 10.9 weeks. Most leave-takers were professionals (32 and 35.2 percent in 1990 and 1991, respectively). About one-quarter (28.5 and 22.6 percent) were office and clerical workers. State employers most often chose not to replace the worker (46.9 and 57.2 percent), but rather left the work undone.[47]

Overall, Connecticut reports that its Family Leave Program continues to be used as intended with little negative impact.

B. Minnesota, Oregon, Rhode Island, and Wisconsin

In 1989 and 1990, The Families and Work Institute conducted a survey of the parental leave aspects of the leave laws of Minnesota, Oregon, Rhode Island and Wisconsin ("parental leave study").[48] The survey reported that employers faced few problems or added costs in complying with the laws. (See chapters 2 and 3 for a more detailed discussion on costs.) For example, mothers took about the same amount of leave and returned to their jobs at the same rate as before the laws went into effect. Opponents of parental leave claim this proves family leave laws are not needed. On the other hand, supporters believe that only by mandating leave policies can benefits become available for some parents who might not otherwise receive them.[49] Although the parental leave study focuses only on parental leave, its analyses provide valuable insight into how one aspect of family leave has fared in four states.

The study found[50] that the use of parental leave did not affect productivity. The ability to recruit employees, to reduce employee turnover, and to enhance employee loyalty remained the same or improved by only one to four percent. Nine percent of surveyed

employers said their managers' ability to handle work responsibilities decreased. However, another nine percent reported an improvement in employee morale.

The study concludes that ". . . overall, the adverse effects of mandatory leave requirements on private sector employers, including smaller employers, were not at all severe. . . ."[51] However, the FWI identified certain implementation problems in Wisconsin and Oregon. Problems were not examined in Minnesota apparently due to the lack of a specific state enforcement agency. Rhode Island was omitted for lack of complaints. However, this was attributed to low awareness of parental leave rights. The FWI determined the two main problems in Wisconsin to be:

(1) Determination of whether accrued paid vacation and sick leave or compensatory time can be substituted for parental leave (substitution provision); and

(2) The definition of a serious health condition.

Oregon's problems were identified to be:

(1) The substitution provision;

(2) The definition of covered employers; and

(3) Restoration of leave-takers to equivalent positions.

Substituting Paid Leave for Unpaid Leave

According to Wisconsin's family leave law: "An employee may substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by employer."[52]

Wisconsin's Department of Industry, Labor, and Human Relations' (DILHR) rules state:

> At the option of the employee, an employee entitled to family or medical leave under the Act may substitute, for any leave requested under the Act, any other paid or unpaid leave which has accrued to the employee. The employer may not require an employee to substitute any other paid or unpaid leave available to the employee for either family or medical leave under the Act.[53]

Some employers in Wisconsin object that the rule exceeded the statutory substitution provision: "The rules interpretation do not . . . require that the [substituted] leave be similar

nor that the worker be otherwise eligible to take the leave -- requirements we believe would be both fair and reasonable."[54] They contend that the rules unfairly let employees substitute paid leave that create unanticipated fiscal problems for both public and private employers. Furthermore, some believe the rules interfere with collective bargaining agreements that specify employee eligibility for particular types of paid leave.

The City of Milwaukee and other employers challenged the DILHR rule. A longstanding policy of the city required employees to use up their accrued paid **vacation** leave before unpaid leave is granted. An administrative court judge ruled[55] that the statute did not restrict the type of paid leave an employee could substitute. Consequently, Milwaukee allowed employees to substitute earned vacation or floating holidays for their unpaid leave, but still restricted sick leave for actual illnesses. At the time of the FWI report, Milwaukee's new policy was being challenged in 26 cases.[56]

Wisconsin's statute does not specifically prohibit "stacking" which is taking unpaid family leave **after** having taken any other type of accrued paid leave. In effect, stacking extends the mandated period of leave. However, Wisconsin's DILHR rules explicitly limit the stacking of leave to certain situations. Specifically, leave-takers must meet employers' requirements for taking the other non-family leave or otherwise obtain employers' consent.[57]

In a court case,[58] the employer denied the statutory leave upon being notified of the employee's intention to take that leave **after** taking all accrued sick and vacation leave. The employer argued that the statutory leave and the paid sick and vacation leaves provided by collective bargaining ran concurrently. However, the court decided that the leaves ran consecutively, allowing stacking. The FWI reports that this type of situation occurs rarely if only because employees are unaware that they can extend leave and because they cannot afford to stay off the job for too long.[59]

Oregon's leave statute states:

> The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave. The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bargaining agreement, or by employer policy. (Emphasis added)[60]

The statute's enforcing agency, the Oregon Bureau of Labor and Industries (BOLI), argued that an employee may substitute paid leave despite not having satisfied collective bargaining terms relating to leave.[61] Employers and employer associations have challenged the BOLI's interpretation. Oregon's Attorney General agreed with employers, opining that the BOLI had misinterpreted the statute and that an employee cannot substitute sick leave for unpaid parental leave unless provided for in a collective bargaining agreement.[62] Because

most agreements allow sick leave only for actual employee illness, using it for parental leave would violate the terms of the agreement.

The BOLI commissioner disagreed in a specific instance, requiring an employer to pay to a claimant the amount of sick leave taken during parental leave and $2,000 for mental anguish and distress.[63] This ruling raised the issue of whether a statute can override collective bargaining agreements.[64]

Oregon's statute allows employers to offset the amount of parental leave taken by one parent by the amount taken by the other employed parent. However, disagreement arose over whether both employers need to be covered employers. In *Oregon Bankers Association v. Oregon Bureau of Labor and Industries,*[65] the employer petitioner argued that the statute allows employers to offset leave taken by the other parent even if that parent **did not work** for a covered employer. If so, employers would have more opportunity for offsetting leaves taken. The BOLI argued that leave can be offset only if **both** parents' employers were covered.[66]

However, the Oregon Court of Appeals disagreed and ruled that employers could offset parental leave time by the time off taken by a parent "also employed" **but not necessarily by a covered employer**. Therefore, Oregon currently requires only one parent or employer to be covered for employers to offset leave and to limit combined parental leave to no more than the maximum twelve weeks.[67]

Determining What is a "Serious Health Condition"

Wisconsin also encountered difficulties over the definition of "serious health condition." See chapter 5 for a detailed discussion.

Reinstatement of Leave-Takers

In Oregon, the question arose as to when an employer's obligation to reinstate a leave-taker ends. The BOLI regulations do not require an employee to accept an unsuitable job. If no suitable jobs were available, an employer is not relieved of the obligation to reinstate the leave-taker but must find a suitable job whenever it does becomes available. In contrast, an employer petitioner[68] argued that the obligation to reinstate exists only at the moment the leave-taker returns to work. That is, if no positions were immediately available at that time, the employer's obligation had already been met.[69] The Oregon Court of Appeals agreed with the BOLI. The court ruled that an employer has an absolute obligation to reinstate a leave-taker to any job that is available and suitable, if it were impossible for the leave-taker to return the former or equivalent position.[70] In spite of court challenges, the BOLI commissioner found enforcement accomplishable although difficult.[71]

Parental leave constitutes the major component of family leave laws. To this extent, the implementation problems encountered in the FWI study point to potential problems for family leave laws as a whole.

III. Private Employers' Experience with Family Leave

A. Two Surveys of the Private Sector

1. The Small Business Administration Survey

In 1990, the United States' Small Business Administration (SBA) surveyed 10,000 private sector business executives concerning employee leave policies. (See also chapter 3.) The survey covered paid sick and vacation leave, unpaid leave, maternity or parental leave, leave to care for sick family members, benefits and guarantees during leave, sickness and accident insurance, and strategies for handling leave-takers' work.[72] The SBA found that employers of 100 to 499 employees are more likely to offer leave for infant care than all other employers. Only 6.7 percent guaranteed jobs during leave while 2.7 percent did not. Of employers with 50 to 99 employees, only 5.2 percent offered leave. For firms with 16 to 49 employees, 3.4 percent granted leave. Only 1.8 percent of the smallest firms with 1 to 15 employees did so.[73]

The SBA also reported that private employers use six basic strategies to handle leave-taking:

(1) Holding over some work until the leave-taker returns;

(2) Rerouting the work to fellow employees;

(3) Using an existing employee as a temporary replacement;

(4) Hiring an outside temporary replacement;

(5) Sending the work home to the leave-taker; and

(6) Filling the position and transferring the leave-taker to another position upon returning from leave.

Most employers (between 64 and 72 percent) rerouted the work of managers who took leave while about 70 percent of all firms adopted this strategy for non-managers. A substantial minority (6 to 36 percent) temporarily replaced management employees while 42 percent of the small firms and 64 percent of the larger ones did so for non-managers.[74]

The survey also examined the direct costs of wages, fringe benefits, and overtime, and the indirect costs of lost output, sales and training associated with granting family leave. The weekly costs ranged from a low of $326.81 per person weekly for non-managers of medium-sized firms to a high of $695.33 for managers in firms with 100 or more employees.[75] (See *Figure 4-1.*) However, when adjusted for the savings from leave-takers' unpaid wages and fringes, weekly net costs ranged from a low of $0.97 for non-managers in medium-sized firms to a high of $97.78 for non-managers in firms of 100 or more employees.[76] (The costs for **managers** in these two categories of firms were $30.66 and $1.20, respectively -- the former an actual savings. In small firms, the weekly cost for a non-manager was $12.69 while that for a manager was $42.11.) The cost of handling leave differed from the normally paid full-time salary and benefits by about only four percent.

Two factors significantly linked to increased reported leave costs are the hiring of temporary replacements and sending work home to the leave-taker. According to the SBA's analysis, two highly debated issues -- firm size and duration of leave -- **do not** independently increase family leave costs.[77] These findings rebut claims that smaller firms bear an unfair cost burden and that longer leaves are more costly to employers.

The SBA's analysis implies that an employer may experience increased costs depending on how family leave policies are implemented and how leave-takers' absences are covered. The study assumes that employers have the flexibility to choose alternative strategies to handle leave-takers' work. In actuality, an employer may only have an option that increases costs.

According to SBA's estimates, if the Family and Medical Leave Act of 1989 had passed, it would have cost employers $454 million a year if all eligible employees were granted unpaid leave. This is about $22 per week for firms of under 100 employees; the cost for larger firms is about $90 a week. However, this cost is small compared to the savings from unpaid leave-takers' wages during unpaid leave. If health insurance continuation costs are included, the figure would rise by $374 million per year.[78] However, the total estimate would be less than $828 million ($454 + $374) if adjusted for employers who already provide leave and for less than 100 percent uptake.

Termination of employees when they are unable to take leave because of illness, disability, pregnancy, or childbirth is a rare event for firms of all sizes. However, over time, most firms will experience some terminations. The study estimated termination costs to range from $1,000 to over $3,000 depending upon employer size and type of industry. These figures included the cost to recruit, hire, and train a replacement as well as the loss of production time.[79] The study also found that the cost of providing for family leave is less than that of terminating an employee.

Figure 4-1

Average Cost Per Full-Time Week of Handling Leave-Takers' Work and Usual Wages and Fringes Per Full-Time Week of Leave-Taker: Means by Firm Size and Managerial Status

	Firm Size -- Number of Employees					
	1 to 15		16 to 99		100 or more	
	Non-Managers	Managers	Non-Managers	Managers	Non-Managers	Managers
Average Cost/Full-Time Week of Handling Leave-Taker's Work	333.67	475.29	326.81	481.47	475.27	695.33
Usual Wages & Fringes/ Full-Time Week of Leave-Taker	320.98	433.18	325.84	512.13	377.49	694.13
Difference	12.69	42.11	0.97	-30.66	97.78	1.20

Source: Trzcinski and Alpert, Leave Policies in Small Business: Findings from the U. S. Small Business Administration Employee Leave Survey, October, 1990. Table I.1.

2. *The Families and Work Institute Private Sector Survey*

Between 1988 and 1990, the Families and Work Institute (FWI) conducted and updated a survey called the Corporate Reference Guide Survey which examined the family leave policies of 188 of the largest *Fortune* 1,000 companies in 30 industry areas. Of the employers surveyed, about 28 percent provide "parenting," "family," or "child care" leaves beyond maternity disability as entitlements not subject to managerial discretion. Of these special leaves, 81 percent are available to either parent and 85 percent can be used by adoptive parents. A smaller 60 percent allow for care of seriously ill family members.[80]

The length of leave varies. Of employers who grant leaves, 20 percent offer eight weeks; 23 percent grant up to three months; a second 23 percent grant four to 12 months; and a final 23 percent grant one year or more. The remaining ten percent do not indicate a specific leave length but allow supervisors and employees to determine the appropriate length. The FWI cautions that the extent of leave policies may be exaggerated because leave programs may exist only informally and not as official policy. In addition, some programs are restricted to certain employee positions or departments. Furthermore, the opportunity to take advantage of family leave benefits is limited and the usage rate is usually low.[81]

The survey reported that 20 percent of the employers who provide family leave do not guarantee jobs for leave-takers. Nine percent guarantee jobs for only part of the leave. The remaining 71 percent provide job guarantees.[82]

Most employers who provide leave cited improved employee morale and the high costs of recruiting and retaining new employees as the major reasons for implementing family care benefits. Other reasons included reducing employee absenteeism, reducing stress, keeping up with other firms, and improving public relations. Employee needs assessment surveys commonly find that employees' concentration and productivity suffer from worry over unmet child care or family illness needs.[83] An employer expresses a typical comment regarding the need for a company family need policy:

> When my management asks what the return on investment will be with the proposed family-supportive policies, I tell them that I can't promise anything in return, but I can say that the problems are costing us more than the programs will.[84]

B. Policies of Selected Private Companies

The FWI reports on selected innovative companies and their programs, some of which are similar to state family leave programs. The FWI examines program implementation, obstacles, and results. The information presented below is meant to be illustrative only, not exhaustive.

BellSouth Corporation[85]

BellSouth, a communications services firm employing 95,000 workers, provides unpaid leave to care for a ". . . seriously ill member of the employee's immediate family . . . for either six months or one year, but no more than 12 months during a 24-month period." A benefit committee must approve the leave. The applicant must certify any illness and show why leave is needed. BellSouth continues to pay life insurance premiums for the leave-taker. It also pays up to six months of medical and dental benefits. The leave-taker is responsible for premiums beyond six months. BellSouth employs clear eligibility guidelines. At the time of the FWI report, no real implementation obstacles had emerged. Within the program's first six months, 23 women and one man took dependent care leave. However, BellSouth did not analyze the cost of offering the benefits.

Eastman Kodak Company[86]

Eastman Kodak Company offers its 83,000 employees in the United States unpaid leave for up to 17 weeks within a two-year period, beginning the first day of the first leave. Birth and adoption leave includes placement of a foster child. Family care extends to children, spouses, parents, and the spouse's parent. Health coverage is continued but the leave-taker must pay the co-share premiums. Jobs are guaranteed. From December, 1987 to March, 1991, Kodak reported that women averaged 13.9 weeks of leave, and men, 12.1 weeks. (About 6 percent of all leave-takers were men.) The most common leave taken was for birth for both men and women. No implementation obstacles were reported. However, Kodak did not measure the cost of leaves.

In spite of the leave policy, 13.5 percent of Kodak's leave-takers quit during, or after taking, family leave. Another 10.3 percent terminated within a year of returning from leave. However, Kodak believes that if it did not have a leave policy, it would have experienced many more voluntary terminations.

ARCO[87]

ARCO, an oil and petroleum products company with 20,507 employees, provides two leave programs: "family illness days" and "urgent business days." The former allows six days of paid leave per calendar year for the illness of an employee's child, spouse, or parent, or for the employee's own illness. The latter allows five paid days for employees' personal business that must be conducted during work hours. Both are in addition to paid sick leave. In 1989, of all eligible employees, 16 and 28 percent took family care and business leave, respectively. The family illness program cost $2 million, or between 0.1 and 0.2 percent of the total payroll. No unresolved implementation obstacles were reported. Any issue that does arise is reportedly handled by managers on a case-by-case basis. ARCO considers its leave policies ". . . as part of its normal cost of doing business and are simply a tool." (Emphasis added) Absenteeism is low and employees usually do not take the full amount of leave.

International Business Machines Corporation[88]

IBM claims it provides a general "lifetime opportunity" leave program for parenting, childbirth, family care, educational pursuits, and military or Peace Corps service. IBM guarantees employees their jobs for up to five years of leave. An employee can take full leave during the first year. During the next four years, the employee must usually work at least part-time. However, high-level and supervisory managers cannot take extensive leave because of their critical roles. Managers are allowed discretion to grant leaves and set flexible work arrangements. IBM believes those who best know whether a job can be covered should decide whether or not to grant leave. IBM has found from employee interviews that most employees are satisfied with the leave program. Determining company costs and benefits is difficult, but IBM believes employee loyalty and satisfaction help prevent staff turnover, reducing the costs associated with hiring and training new employees.

The Travelers Insurance Company[89]

Travelers offers their full- and part-time employees (who work at least 17.5 hours per week) three days of paid leave to care for an ill child, spouse, parent, or any relative living with the employee. Employees can also take up to 12 months of unpaid birth or adoption leave, or to attend to other family-related matters. Travelers guarantees reinstatement to original or commensurate positions if the leave-taker returns within six months. After six months, Travelers will pay employees up to four weeks while searching for a suitable job. If no job is available, the employee will be terminated.[90]

However, salaried employees, including upper level management, are not eligible. Travelers found that women took more and longer leaves than men. Although no costs were calculated, Travelers looks at attrition rates to determine the success of their program. In 1990, Travelers experienced 100 fewer voluntary terminations that usually result from family associated reasons than for 1989. The cost savings was valued at $2.5 million, the dollar amount paid to leave-takers who might have left the company had leave not been provided.

Hewlett-Packard Company[91]

Hewlett-Packard (HP) provides four months of unpaid birth and adoption leave within a two-year period. However, employees often substitute paid vacation leave. HP maintains that statutory family leave policies, such as the one in California, are usually less generous than HP's and that obtaining state approvals for its own program can sometimes be troublesome. However, HP realizes that mandated family leave may enable employees of other companies to take family leave who would not otherwise have been able to do so.

ENDNOTES

1. H. R. 2020 §§102(a)(1) and 103(a)(1).

2. Ibid., §201.

3. Lisa Sementilli-Dann, Eva Gasser-Sanz, Alison Lowen, Stephen T. Middlebrook, Glenn Northern, Janice Steinschneider, and Sharon Stoneback, Family and Medical Leave: Strategies for Success (Washington, D.C.: Center for Policy Alternatives), December 1991 (unpaginated).

4. Ibid.

5. Ibid.

6. See in the Congressional Quarterly, (1) Julie Rovner, "Family Leave's Fate Uncertain Despite Two-Thirds Support," October 5, 1991, p. 2870; (2) Jill Zuckman, "House Approves Family Leave But Can't Beat Veto Threat," November 16, 1991, p. 3385; and (3) "Vote Studies: Family and Medical Leave," December 28, 1991, p. 3776.

7. Charles Dervarics, "Family Leave: Is it Good Business?" in State Legislatures, August 1991, p. 33. Peter McLaughlin, a former Minnesota Assistant House Majority Leader, stated ". . . when the federal government is paralyzed, it's important for states to take the lead. Passing state programs helps build support at the national level."

8. These are: Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Maine, Maryland, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, Washington, Wisconsin, Washington, and West Virginia.

9. However, see chapters 1 and 3 in which the 1991 parental leave study is discussed as an exception.

10. 1991 Haw. Sess. Laws, Act 328, sec. 5.

11. Conn. General Stat. Ann., secs. 31-51cc to 31-51ff.

12. Maine Rev. Stat. Ann., tit. 26, sec. 849. The Georgia Legislature recently used the same sunset strategy to repeal the law on July 1, 1995. Georgia Code Ann., sec. 89-2509.

13. Sementilli-Dann et al. (unpaginated).

14. Ibid. Four states have considered legislation providing for paid leave. Massachusetts considered a plan where employees would contribute to a fund through a payroll tax and receive a percentage of their income from this fund when on family leave. For more information on paid leaves, see Dr. Ann Bookman, "Parenting Without Poverty: The Cases for Funded Parental Leave," in Parental Leave and Child Care: Setting a Research and Policy Agenda, Janet Shibley Hyde and Marilyn Jessex, eds., Temple University Press, 1991. According to Sementilli-Dann et al., "The many low income families in this country, which are disproportionately female headed and families of color, will not be able to take advantage of leave unless there is wage replacement."

15. Ibid. Dr. Edward F. Zigler of the Bush Center for Child Development and Social Policy at Yale University advises a minimum of 24 weeks for a parent and child to develop a healthy bond.

16. Ibid.

17. Matia Finn-Stevenson and Eileen Trzcinski, "Mandated Leave and Analysis of State and Federal Legislation," in American Journal of Orthopsychiatry, vol. 61 (October 1, 1991).

18. Minn. Stat. Ann., secs. 181.940 and 181.941 and Iowa Code Ann., sec. 601A.6(2)(e).

19. These are: Alaska, Florida, Georgia, Illinois, Maryland, North Dakota, Oklahoma, and West Virginia.

20. These are: California, Connecticut, Maine, New Jersey, Oregon, Rhode Island, Vermont, Wisconsin, and in 1994, Hawaii. Washington provides for parental leave and family care leave but only to care for a terminally ill child.

21. Ill. Ann. Stat., ch. 127, para. 63b108c(5). According to Sementilli-Dann et al., Illinois was the first state to enact a family leave law without compromising originally proposed length of leave or area of coverage.

22. These are: Alaska, Connecticut, California, Georgia, North Dakota, Washington, and Washington, D. C.

23. Cal. Gov't Code, sec. 12945.2(o).

24. H.R. 2 and S. 5, sec. 102(f).

25. N.J. Stat. Ann., sec. 34:11B-7; Alaska Stat., sec. 23.10.500(e); and Hawaii Rev. Stat., sec. 398-7(a).

26. Wis. Stat. Ann., sec. 103.10(8)(a)(2).

27. See Wis. Stat. Ann., *sec. 103.10(12) and (13).*

28. D.C. Code Ann., sec. 36-1305(f)(1).

29. N.J. Stat. Ann., sec. 34:11B-4h(1).

30. N.J. Stat. Ann., sec. 34:11B-4h(2); D.C. Code Ann., sec. 36-1305(f)(1)(A) and (B).

31. Hawaii Rev. Stat., sec. 398-1.

32. Alaska Stat., sec. 23.10.500(b).

33. H.R. 2 and S. 5, sections 101(2)(A)(i) and (ii).

34. See Alaska Stat., sec. 23.10.510. According to Finn-Stevenson, the notice requirement is usually waived if the birth is premature or when there is a severe medical emergency.

35. Hawaii Rev. Stat., sec. 398-6 and Cal. Gov't Code, sec. 12945.2(i)(1).

36. H.R. 2 and S. 5, section 103(a).

37. These are: Georgia, New Jersey, Rhode Island, Oregon, Wisconsin, West Virginia, and the District of *Columbia.*

38. Wis. Stat. Ann., sec. 103.10(14).

39. See Cal. Gov't Code, sec. 12945.2(d). Section 398-4, Hawaii Revised Statutes, leaves the issue ambiguous in that either the employee or employer may elect to substitute.

40. Vt. Stat. Ann., tit. 21, sec. 472(b).

41. Cal. Gov't Code, sec. 12945.2(d) and Ga. Code Ann., sec. 89-2502(b).

42. N.J. Stat. Ann., sec. 34:11B-8.

43. For example, North Dakota: N.D. Cent. Code, sec. 54-52.4-06.

44. R.I. Gen. Laws, sec. 28-48-3(c).

45. Wis. Stat. Ann., sec. 103.09(b) and (c).

46. See Ga. Code Ann., sec. 89-2507 and N.J. Stat. Ann., sec. 34:11B-15.

47. Connecticut Studies: 1989-1990, pp. 4-5; 1990-1991, pp. 5-7.

48. James T. Bond, Ellen Galinsky, Michele Lord, Graham L. Staines, and Karen R. Brown, Beyond the Parental Leave Debate: The Impact of Laws in Four States (New York: Families and Work Institute, 1991).

49. See "At A Glance," in National Journal, May 25, 1991, p. 1246.

50. Bond et al., p. 55.

51. Ibid., p. 59.

52. Wis. Stat. Ann., 103.10(5)(b).

53. Bond et al., p. 82.

54. Ibid. Statement of John Metcalf, Director of Human Resources Policy for the Wisconsin Manufacturers and Commerce Association.

55. Ibid., p. 83. Equal Rights Division of Department of Industry, Labor and Human Relations Case No. 9052486 (Aug. 21, 1990).

56. Ibid., p. 84.

57. Ibid.

58. Ibid., p. 85: Kailas v. West Bend School District, Equal Rights Division of Department of Industry, Labor and Human Relations, Wisconsin Case No. 9051575 (Sept. 13, 1990).

59. Ibid., p. 85, quoting Susan Brehm, an attorney with the Center for Public Representation in Madison, Wisconsin.

60. Or. Rev. Stat., sec. 659.360(3).

61. Bond et al., p. 88.

62. Ibid., referring to Oregon Attorney General Opinion 8195 (August 18, 1988).

63. Portland General Electric Company v. Mary Wendy Roberts, Commissioner, Bureau of Labor and Industries, *Case No. A51280, on appeal at the Oregon Court of Appeals.*

64. Section 398-10(c), Hawaii Revised Statutes, requires that if the family leave statute conflicts with any existing contract rights or collective bargaining agreements, ". . . the provisions that provide greater benefits to the employees shall control."

65. Appellate Court Case No. A50241 (July 25, 1990).

66. Bond et al., p. 92.

67. Ibid., p. 92.

68. In Oregon Bankers Association v. Oregon Bureau of Labor and Industries, Appellate Court Case No. A50241 (July 25, 1990).

69. Bond et al., p. 93.

70. Ibid.

71. Ibid., p. 94.

72. Eileen Trzcinski and William T. Alpert, Leave Policies in Small Business: Findings from the U. S. Small Business Administration Employee Survey, October, 1990, p. ii. The response rate was 31.3 percent.

73. Ibid., figure 4.

74. Ibid., p. 55.

75. Ibid., p. 38.

76. Ibid., Table I.1.

77. Ibid., pp. 40-41.

78. Ibid., p. ix: health insurance costs firms with fewer than 100 employees were $185 per employee for six weeks and $199 for larger firms.

79. Ibid., pp. 42 and 46.

80. Ellen Galinsky, Dana E. Friedman, and Carol A. Hernandez, The Corporate Reference Guide to Work-Family Programs, Families and Work Institute (New York: The Families and Work Institute, 1991), pp. 88-89.

81. Ibid., p. 84.

82. Ibid., p. 89.

83. Ibid., p. 114.

84. Ibid., p. 115, citing from D.E. Friedman, Linking Work-Family Issues to the Bottom Line, Report No. 962 (New York: The Conference board, 1991). Comment by Allen Bergerson, director of personnel policy development at Eastman Kodak Company.

85. Ibid., pp. 156-157.

86. Ibid., pp. 158-160.

87. Ibid., pp. 164-165.

88. Telephone interview with Sara Weiner and Mike Shum, Human Resources Department, IBM, July 7, 1992.

89. Telephone interview with Beth Clark, Human Resources Office, The Travelers Insurance Company, July 1, 1992.

90. Your Travelers Passport to Family Care and Your Career: A Guide to Family Care Programs and Services, The Travelers Insurance Company, Human Resources Office, brochure.

91. Telephone interview with Pat Garcia-Luna, Human Resources Office, Hewlett-Packard Company, July 1, 1992.

Chapter 5

SERIOUS HEALTH CONDITION

As noted earlier in this report, Hawaii's family leave law entitles an employee to a "total of four weeks of family leave during any calendar year upon the birth of a child of the employee or the adoption of a child, or to care for the employee's child, spouse, or parent with a serious health condition."[1] It is this latter phrase and its reference to "serious health condition" with which this chapter is concerned. "Serious health condition" is defined by the Hawaii family leave law as meaning "an acute, traumatic, or life-threatening illness, injury, or impairment, which involves treatment or supervision by a health care provider."[2] Act 329, Session Laws of Hawaii 1991, directed the Bureau, in its study on family leave, to include "guidelines for determining when a health condition is acute, traumatic, or life-threatening."[3]

In an effort to formulate these guidelines, the Bureau undertook the following tasks:

(1) Examined the medical definitions of the terms "acute," "traumatic" and "life-threatening";

(2) Elicited input from a variety of health care providers and their professional associations;

(3) Reviewed the statutes and rules of other states providing for family leave;

(4) Made detailed comparisons of statutory and rule provisions with respect to family leave for serious health conditions.

This chapter presents the pertinent information obtained through these efforts and contains conclusions regarding guidelines for determining when a health condition is acute, traumatic or life-threatening.

I. Medical Definitions

As will become apparent in the comparison of Hawaii's family leave law with other state statutory provisions discussed in this chapter, Hawaii's definition of "serious health condition" is unique among the states. No other state statute employs the adjectives "acute, traumatic or life-threatening" to describe an illness, injury or impairment for which one may take family leave. In an effort to determine exactly what health conditions would be encompassed within Hawaii's definition of "serious health condition," it was felt that a clear understanding of the medical connotations of the words "acute," "traumatic" and "life-threatening" was necessary.

Accordingly, several medical dictionaries were consulted for the medical definitions of the words "acute," "traumatic," and "life-threatening." None of the dictionaries consulted contained the term "life-threatening." However, the following definitions of acute were found:

> "Acute" (1) Of or characterized by sudden onset, marked symptoms, and a short course: said especially of a disease; (2) sharp or severe, as pain; (3) sharply pointed; needlelike; acute. Compare chronic.[4]
>
> "Acute" - Denoting a short period of time. Opposite of chronic.[5]
>
> "Acute" (1) Of short or sharp course, not chronic; said of a disease. (2) Sharp; pointed at the end.[6]

In view of these definitions, it is clear that acute refers to conditions that arise suddenly and are of relatively short duration. All of these definitions refer to "acute" as being the opposite of "chronic." Accordingly, the medical definitions of "chronic" were also reviewed. The medical dictionaries consulted contained the following definitions of "chronic":

> "Chronic" - of or characterized by extended duration and typically by slow development or a pattern of recurrence: said especially of a disease. (compare acute).[7]
>
> "Chronic" - Denoting a disease of slow progress and persisting over a long period of time; opposite of acute.[8]
>
> "Chronic" - of long duration; denoting a disease of slow progress and long continuance.[9]

Given these definitions of "chronic," it would seem that many diseases, particularly those of a more serious nature, would accurately be described as chronic, as opposed to acute, in nature.

With respect to the word "traumatic," the following medical definitions were found:

> "Traumatic" of or resulting from trauma; relating to or causing physical injury or psychological shock.[10]
>
> "Traumatic" - Caused by, or related to, injury.[11]
>
> "Traumatic" - relating to or caused by trauma.[12]

Because the word "trauma" is such an essential part of the definition of "traumatic," it is also included in this review:

"Trauma" (1) an injury to the body, especially one resulting from an external force. (2) A psychological shock, esp. one having a lasting effect on the personality.[13]

"Trauma" - injury or damage.[14]

"Trauma" - traumatism; an injury, physical or mental.[15]

II. Input from Health Care Providers

In an effort to determine the types of health conditions that would come under the purview of Hawaii's definition of serious health condition, a variety of health care providers were consulted. The family leave law defines "health care provider" as meaning "a physician as defined under section 386-1" of the *Hawaii Revised Statutes*, which is the definitional section of the workers' compensation law. Section 386-1 defines "physician" as "includ[ing] a doctor of medicine, a dentist, a chiropractor, an osteopath, a naturopath, a psychologist, an optometrist, and a podiatrist."

A survey of individual practitioners in the fields of medicine, dentistry, chiropractic medicine, osteopathic medicine, naturopathy, psychology, optometry and podiatry was deemed to be impractical. Instead, it was decided to contact the various state health care provider associations for input. Accordingly, the Bureau corresponded with the Hawaii Medical Association (HMA) and interviewed Dr. Stephen Wallach, President of the HMA along with several staff members. At Dr. Wallach's suggestion, also Dr. Patricia Blanchette, a geriatrics specialist, and Dr. Robert Wilkinson, a pediatric oncologist were also contacted. After some initial correspondence, lengthy telephone interviews with both Dr. Blanchette and Dr. Wilkinson were conducted.

Letters, and an accompanying questionnaire soliciting input, were sent to the following: the Hawaii Dental Association, the Hawaii Optometric Association, the Hawaii State Chiropractic Association, the Hawaii Psychological Association, and the Hawaii Podiatric Medical Association. (After reviewing the limited number of practitioners of osteopathy and naturopathy, it was felt that, at best, they would play a relatively minor role and, therefore, their input would be of limited assistance.) The response to this solicitation was somewhat disappointing. Despite a number of follow-up calls, only the Hawaii Podiatric Association, the Hawaii Dental Association and the Hawaii State Chiropractic Association chose to provide input. What follows is summary of the input the Bureau received from the various health care providers contacted.

Definition of "Serious Health Condition"

Although a few health care providers indicated that the definition of "serious health condition" is sufficiently clear to them, most of those providing input felt that the phrase "acute, traumatic and life-threatening" is problematic and needs further clarification. Several of the health care professionals observed that the current definition of "serious health condition" can be unequally and unfairly applied.

One of the major problems cited in this regard specifically concerned the use of the word "acute." The health care providers generally agreed with the medical definitions of "acute" as provided above.[16] One or two health care providers observed that these definitions gave "acute" a fairly broad meaning and that, accordingly, "acute" could be used to describe a wide variety of conditions, including situations that one might not normally consider, such as: the physical, mental or emotional impact on a child who has been molested; or even the psychological effect on the sibling of a molested child.

There also was general agreement among the health care providers that the term "acute" definitely would apply to short-term illnesses such as influenza, upper respiratory infections, and such typical childhood diseases as measles, chicken pox, and ear infections. Given the relatively minor nature of many of these acute illnesses, a few health care providers questioned whether the word "acute" should be included in the definition of "serious health condition." However, several health care providers pointed out that many acute illnesses occurring in young children should legitimately be considered serious. Furthermore, most health care providers agreed that any illness serious enough to require a young child to stay home from school or from a child care setting also warranted the presence and care of a parent or other adult. Consequently, the majority thought that family leave was appropriate in the case of a child with an acute condition requiring home care by a parent or other adult.

The major objection, however, to the definition of "serious health condition" cited by the majority of health care providers is that the inclusion of the word "acute" effectively excludes chronic conditions. Although one health care provider specifically noted that "chronic illnesses (cancer)" and "alzheimer's" would fall within the scope of "serious health condition," most health care providers disagreed that the current definition includes chronic conditions. As may be seen by a review of their definitions,[17] "acute" has the opposite meaning of "chronic." Consequently, these health care providers reasoned that, unless the word "chronic" also appears in the definition of "serious health condition," chronic conditions are excluded.

The following were universally mentioned as examples of chronic conditions: recovery from stroke or heart attack; heart conditions; high blood pressure; any structural abnormality; Parkinson's disease, Alzheimer's, cancer, and leukemia. Health care providers explained that, although most chronic illnesses have acute or life-threatening episodes, particularly at the beginning of the disease, once the condition is stabilized, it is considered "chronic" in

medical terms (although perhaps not in lay terms). The majority of health care providers also questioned whether even acute or life-threatening episodes of chronic conditions would fall within the definition of "serious health condition" as it currently is worded. Although a few health care providers expressed the opinion that an argument could be made for including these episodes under the definition of "serious health condition," even they acknowledged that its current wording leaves the issue in doubt.

Most health care providers felt that this exclusion of chronic conditions from the definition of "serious health condition" is extremely unfair. They pointed out that chronic conditions usually are no less serious than acute conditions and frequently are even more serious. The following example was offered to illustrate how the definition of "serious health condition" could be unfairly applied. An ear infection, which is acute, would qualify as a serious health condition under the current definition, while a serious illness such as Parkinson's disease, which is considered a chronic condition, would not qualify, unless the health care provider could say it was an "acute decompensation of a chronic condition." And even then, it is unclear whether an acute decompensation would qualify as a "serious health condition" as defined by law.

Several health care providers pointed out that, particularly in geriatrics, one frequently encounters situations in which an employee needs to provide care for a family member who has a medical condition that decompensates, such as Alzheimer's. One scenario given as an example is that of an elderly couple where one spouse has a chronic condition. Then the other spouse, who has been the primary care giver, also becomes ill or dies. The child/employee then has to take over caring for the parent with the chronic condition. At the very least, this may mean taking off from work until the child/employee can make arrangements for another primary care giver to come in to care for the parent. This frequently means advertising for and interviewing care givers, which can be a time-consuming process. The employee may run into trouble with the employer for having taken off; or if the employee cannot take off, the chronically ill parent often is put in a nursing home or long-term care home, many times at state expense.

Other scenarios specifically mentioned by health care providers include: a stroke victim who has to be taken for physical therapy once a week; a leukemia victim whose condition is stabilized, but has to be taken to the hospital for chemotherapy treatment and is ill for several days thereafter; a patient with kidney problems requiring dialysis; and a patient with chronic dementia whose full-time, paid care giver has to take time-off for a personal emergency. As one health care provider noted, "such chronic conditions are every bit as valid for requiring family leave as a child with an acute sore throat." A number of health care providers echoed this sentiment, arguing that there should be no difference with respect to family leave between caring for a person with an acute illness and caring for someone with a chronic condition who needs intermittent care. Another health care provider observed that the current definition of "serious health condition" unfairly excludes a certain percentage of the population.

Health care providers made the following recommendations with respect to amending the definition of "serious health condition":

(1) Include the phrase "chronic condition requiring constant or intermittent care";

(2) Include "chronic conditions";

(3) Include "acute exacerbation of chronic conditions"; or

(4) Include "acute episodes or early phases of chronic diseases or degenerative disorders."

There were a few other comments concerning the definition of serious health condition. At least one health care provider questioned whether the current definition covered mental illnesses. Another suggested that the term "impairment" needs to be clarified because what might be considered an impairment in performing certain functions may not be an impairment in performing others. Another indicated that any condition where the patient is ambulatory and able to function sufficiently in providing self-care on a daily basis should not qualify as a "serious health condition" for purposes of family leave.

With respect to the phrase "involves treatment or supervision by a health care provider," one health care provider indicated this meant constant monitoring of a patient's condition, and another felt it meant treatment or periodic follow-ups or monitoring within a four week period. However, most health care providers took a more liberal view. Several pointed out that the current trend is toward outpatient care, and depending upon the competency of the parents or family members providing care, they are encouraged to handle much of the treatment or care at home. This appears to be particularly true in the case of many chronic conditions. A Wisconsin hearings officer made a similar observation about the evolving state of medical practices in a telecommunications age in the course of interpreting the phrase "continuing treatment or supervision by a health care provider:

> Today continuing health care supervision does not necessarily depend on continuing face-to-face contact. Doctors and nurses in offices have managed home-based care for more than a few cases of chidlhood pneumonia, red measles, flu, giardiasis, or injuries. Cellular phones keep doctors in charge even while they are in traffic jams or on golf courses. Technology, knowledge, and economic forces are changing the means of service delivery in medicine, like all fields, without eliminating the nature or responsibilities of the professional relationship. More to the point, the health care system is moving moderately complicated medical treatments, e.g., kidney dialysis, to the home, using computer controls and telemetry; this will expand.[18]

Furthermore, as another health care provider noted, many conditions (particularly many acute illnesses as well as certain injuries, such as broken bones) will run their natural course and do not necessarily require continued supervision if proper home care is given.

Certification of Serious Health Condition

Health care providers universally agreed that it would be impossible to generate a "grocery list" of illnesses that could be classified as "serious health conditions" because of the danger of creating a list that is either overinclusive or underinclusive. In the alternative, several health care providers suggested requiring some type of certification by a health care provider, similar to a doctor's certificate required by many employers when an employee takes extended sick leave (e.g., five or more days), to validate the existence of a serious health condition.

Hawaii's family leave law currently authorizes an employer to require a certification to support a claim for family leave only in the case of birth or adoption of a child.[19] Oddly, no certification is required in the case of a family member with a serious health condition. In contrast, at least ten states mandating family leave to care for a family member with a serious health condition authorize an employer to require that a request for leave be supported by certification by a health care provider.[20]

Two health care providers initially pointed out that a certification requirement might result in inconsistency because some health care providers may be more liberal and some more conservative in what they would be willing to certify as a serious health condition. Upon reflection, however, both acknowledged that health care providers are in a much better position to identify a serious health condition, and thus would be less inconsistent, than would be employers or their personnel officers.

One health care provider favoring a certification of serious health condition requirement in the law urged that guidelines be drafted for the health care provider. She suggested that an appropriate guideline would be as follows:

> That refusal of [family] leave would result in some type of crisis or damage, i.e., the employee's presence is required [to care for the patient] or the result would be serious consequences to the patient or to a family member -- it would somehow destabilize the family.

For example, the serious consequences of denying the employee leave could be that the patient would end up in the hospital.

The health care provider contended that such a guideline might preclude employees from using leave to care for family members with certain acute illnesses that really do not require the employee's presence. For example, if there are no serious consequences to the

patient or the patient's family as a result of denying family leave, then one could conclude that the health condition is not serious. On the other hand, the health care provider pointed out that such a guideline would be flexible enough to ensure that family leave is available to an employee with an acutely sick child, when the child would not be accepted at school or a child care setting and there is no one else available with whom to leave the child. Applying this guideline, refusal of family leave would result in the serious consequences of leaving the child home alone and unattended. The health care provider observed that putting the emphasis on the serious consequences resulting from a denial of family leave, rather than on the health condition itself, gives better guidance to the health care provider making the certification.

Finally, the health care provider noted that there is precedence for giving guidelines to physician using the type of language suggested. For example, in certifying people for handi-van passes, the physician is required to complete a form that includes the question: "What would happen if the person had to use regular buses?" Accordingly, she suggested that the law require that a standardized form, stating "Please describe the serious consequences if leave is not granted to the employee," be completed by the certifying health care provider. In a similar vein, two other health care providers suggested requiring an assessment by a health care provider of the need for family leave time.

Confidentiality Issue

The health care providers were asked what information should be contained in the certification. Although a few health care providers indicated that the certificate should contain a description of the patient's condition or a diagnosis and anticipated treatment, most expressed concern that this could raise confidentiality problems, especially given that it is the employee/family member, not the patient, who is requesting the certification to give to his or her employer. Several suggested that, at the least, there should be a signed consent or release form, signed by the patient, authorizing the release of information to the employee/family member's employer.

Others indicated that the certification should be limited to a statement that the patient's condition requires the presence of the employee/family member to care for the patient. One health care provider suggested that the certification also include a statement that the inability of the employee/family member to be present would result in serious consequences. Other factors mentioned for inclusion in the certification were: date the condition started; estimate of the length of its duration; and estimate of the amount of time the employee's presence is needed.

With respect to the issue of confidentiality, the American Medical Association's (AMA) Principles of Medical Ethics clearly indicates that a patient has the right to confidentiality. A statement of the Fundamental Elements of the the Patient-Physician Relationship provides in pertinent part that:

> The patient has the right to confidentiality. The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest.[21]

Furthermore, the AMA's specific guideline with respect to confidentiality states:

> **Confidentiality.** The information disclosed to a physician during the course of the relationship between the physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the consent of the patient, unless required to do so by law.[22]

The guideline notes that certain ethical and legally justifiable exceptions exist to the obligation to safeguard patient confidences and cites, as an example, where a patient threatens to inflict serious bodily harm to another person and there is a reasonable probability the patient will carry out the threat.[23]

Although not directly on point, the AMA's guideline with respect to physicians in industry sheds some light on the issue. It states in pertinent part:

> **CONFIDENTIALITY: PHYSICIANS IN INDUSTRY.** Where a physician's services are limited to pre-employment physical examinations or examinations to determine if an employee who has been ill or injured is able to return to work, no physician-patient relationship exists between the physician and those individuals. Nevertheless, the information obtained by the physician as a result of such examination is confidential and should not be communicated to a third party without the individual's prior written consent, unless it is required by law. If the individual authorized the release of medical information to an employer or a potential employer, the physician should release only that information which is reasonably relevant to the employer's decision regarding the individual's ability to perform the work required by the job.[24]

It seems clear then that, even when no formal physician-patient relationship exists, a physician still has an obligation of confidentiality concerning patient information in the physician's possession.

Thus it would appear that the AMA, at least, puts a great deal of emphasis on patient confidentiality. This was confirmed by one health care provider who explained that physicians

receive a great deal of training in patient confidentiality and are extremely restricted in the information that they may divulge. The health care provider observed that, because an employer or personnel officer has no similar obligation of confidentiality, there would be no further guarantee of confidentiality once the health care provider revealed information about the patient's medical condition to the family member's employer or personnel officer. Accordingly, the health care provider recommended that only the minimal amount of information necessary to justify family leave should be required on a health care provider's certification.

One health care provider summarized her views on requiring a health care provider's certification for family leave for the Bureau. Those views are paraphrased as follows: Requiring certification will alleviate most concerns of abuse of family leave. Although some abuse may be present, it will be limited. It would be difficult to eliminate all abuses and still provide for needed leave and maintain patient confidentiality. The issue of determining a serious health condition should be left up to a health care provider. This takes the onus off the employer or personnel officer who is in a poor position for making that judgment.

III. State Comparison

In an effort to shed more light on how guidelines might be structured for determining when a serious health condition exists, laws and rules governing family leave in other states were reviewed. Although most state family leave laws entitle an employee to take leave for the birth or adoption of a child and to care for a family member with a serious health condition, it should be noted that this discussion is limited solely to those statutory provisions of family and parental leave laws authorizing leave to care for a family member with a serious health condition. What follows is a summary of those provisions.

Alaska

Alaska's 1992 Family Leave Act entitles public employees to take family leave to care for the employee's child, spouse or parent with a serious heath condition for a total of 18 work weeks during any 24-month period.[25] "Serious health condition" is defined as:

> [A]n illness, injury, impairment, or physical or mental condition that involves[:]
> (A) inpatient care in a hospital, hospice, or residential health care facility; or
> (B) continuing treatment or continuing supervision by a health care provider.[26]

"Health care provider" means a licensed dentist, physician or psychologist.[27]

California

California's Family Rights Act of 1991 requires employers of 50 or more employees to allow any eligible employee to take up to four months of family care leave in a 24-month period to care for a child, parent or spouse with a serious health condition.[28] "Serious health condition" is defined as:

> [A]n illness, injury, impairment, or physical or mental condition which warrants the participation of a family member to provide care during a period of the treatment or supervision and involves either of the following:
> (A) Inpatient care in an hospital, hospice, or residential health care facility.
> (B) Continuing treatment or continuing supervision by a health care provider.[29]

"Health care provider" means an individual holding either a physician's and surgeon's certificate or an osteopathic physician's and surgeon's certificate issued under California law.[30]

Regulations proposed, but not yet approved, by the California Fair Employment and Housing Commission regarding the minimum duration of family care leave shed additional light on the nature of health conditions that might qualify for family leave care. The guidelines provide for a basic minimum duration of two weeks, but require an employer to approve a request for family care leave of at least one day but less than two week's duration on any two occasions during the 24-month period. In addition, an employer must grant leaves of at least one day for "health care provider-certified recurring medical treatments such as chemotherapy, radiation, kidney dialysis, or other treatments of a similar nature."[31]

Certification

California law allows an employer to require an employee requesting the leave to present a certificate, issued by the health care provider of the individual requiring care, in support of the request.[32] The law specifies that the certificate is sufficient if it includes all of the following:

(1) The date the serious health condition commenced;

(2) The probable duration of the condition;

(3) An estimate of the amount of time the health care provider believes the employee needs to care for the individual; and

(4) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual.[33]

Furthermore, the employer may require the employee to obtain re-certification, if additional leave is required after the time originally estimated by the health care provider expires.[34] The Commission's proposed regulations specifically state that the nature of the serious health condition involved does not need to be identified in the certificate.[35]

Connecticut

Connecticut law entitles permanent state employees with a maximum of 24 weeks of family leave within any two-year period upon the serious illness of a child, spouse or parent of the employee.[36] "Serious illness" is defined as an:

> [I]llness, injury, impairment or physical or mental condition that involves (1) inpatient care in a hospital, hospice, or residential care facility or (2) continuing treatment or continuing supervision by a health care provider.[37]

Connecticut also guarantees a maximum of 16 weeks of family leave in any two-year period to private employees upon the serious illness of a child, spouse or parent of the employee.[38]

Certification

Connecticut law requires an employee, prior to the inception of leave, to submit to the employer "sufficient" written certification from the physician of the patient concerning the nature of the illness and its probable duration.[39]

Florida

Florida law provides state employees with up to six months of family medical leave, which is defined as:

> [L]eave requested by an employee for a serious family illness including an accident, disease, or condition that poses imminent danger of death, requires hospitalization involving an organ transplant, limb amputation, or other procedure of similar severity, or any mental or physical condition that requires constant in-home care.[40]

Compared with other states, this statutory language seems fairly harsh, allowing family medical leave only for extremely severe medical conditions. However, by virtue of the Family Support Personnel Policies Act,[41] state employees also may take leave for family responsibilities other than for family medical leave for a period not to exceed 30 days.

The Act required the Florida Department of Administration to develop and adopt a model rule establishing family support personnel policies for all executive branch agencies. The Florida Legislature stated in the Act that its intent was to "encourage state agencies to

establish personnel policies that will enable state employees to balance employment responsibilities with family responsibilities."[42]

"Family support personnel policies" were defined as:

> [P]ersonnel policies affecting employees' ability to work and devote care and attention to their families and include policies on flexible hour work schedule, compressed time, job sharing, part-time employment, maternity or paternity leave for employees with a newborn or newly adopted child, and paid and unpaid family or administrative leave for family responsibilities.[43]

The rules adopted by the Department of Administration state that family responsibilities may include but are not limited to the following: caring for aging parents; involvement in settling parents' estate upon their death; relocating dependent children into schools; and visiting family members in places that require extensive travel time.[44] Conceivably, an employee could use this family leave to care for a family member whose illness is not so severe as to fall within the scope of the family medical leave, but whose care nonetheless requires the presence of the employee. Furthermore, the rules also permit a Florida state employee to use the employee's own sick leave for the illness or injury of an immediate family member, up to a maximum of six days during any calendar year, when the employee's presence with the family member is necessary.[45]

Georgia

In April 1992, the Georgia Legislature passed Senate Bill 831 providing for family leave for state employees, effective January 1, 1993. The law allows an eligible employee to take 12 work weeks of family leave during any 12-month period to care for the employee's child, spouse, parent or spouse's parent who has a serious health condition.[46] "Serious health condition" is defined as:

> [I]llness, injury, impairment, or physical or mental conditions which involve:
> (A) Inpatient care in a hospital, hospice, or residential health care facility; or
> (B) Continuing treatment by a health care provider."[47]

"Health care provider" is defined as "a doctor of medicine, doctor of chiropractic, or doctor of osteopathy legally authorized to practice in [Georgia]."[48] Family leave may be taken intermittently, subject to a minimum of two work weeks for each separate incident of leave.[49]

Certification

Georgia law permits an employer to require that a request for family leave to care for a sick family member be supported by a certification issued by the health care provider.[50] The law specifies that the certificate is sufficient if it states: the date on which the serious health condition commenced; the probable duration; the "appropriate medical facts within the health care provider's knowledge regarding the condition"; and an estimate of the amount of time the employee is needed to care for the family member.[51]

Furthermore, the law permits an employer who has reason to doubt the validity of the certification to require, at the employer's expense, that the employee obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information provided in the certification.[52] If the second opinion differs from that in the original certification, the employer may require, again at the employer's own expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee, concerning the information certified. The opinion of the third health care provider is to be considered final and binding on the employer and the employee.[53] However, the employer may require subsequent re-certifications on a reasonable basis.[54]

Illinois

Illinois law authorizes the establishment of a family responsibility leave plan under which a state employee may take a leave of absence of up to one year to enable the employee to meet a bone fide family responsibility.[55] The statute specifies that:

> [C]ircumstances which constitute a bona fide family responsibility...shall include...the responsibility to provide regular care to a disabled, incapacitated or bedridden resident of the employee's household or member of the employee's family, and the responsibility to furnish special guidance, care and supervision to a resident of the employee's household or member of the employee's family in need thereof....[56]

The law also states that bona fide family responsibilities are not limited to those mentioned in the law and that the procedure for determining and documenting the existence of a bona fide family responsibility shall be provided by rule.[57]

Maine

Maine law requires employers with 25 or more employees to grant eligible employees up to eight consecutive work weeks of family medical leave in any two years.[58] "Family medical leave" includes leave to care for a child, parent or spouse with a serious illness.[59] "Serious illness" is defined as:

> [A]n accident, disease or condition that:
> A. Poses imminent danger of death;
> B. Requires hospitalization involving an organ transplant, limb amputation or other procedure of similar severity; or
> C. Any mental or physical condition that requires constant in-home care.[60]

The law requires that the employee, unless prevented by medical emergency, must give at least 30 days notice of the intended date upon which the family medical leave will commence and terminate.[61]

Certification

It further provides that the employer may require certification from a physician to verify the amount of leave requested.[62] Unlike a number of other state statutes, however, it neither defines "physician," nor elaborates on the information to be contained in the certification.

Maryland

Maryland law provides state employees with a total of 12 weeks within any 12-month period of either seasonal or family leave. Family leave includes leave to care for a seriously ill child of the employee or a seriously ill spouse, parent or legal dependent of the employee.[63] The term "seriously ill" is not defined in the statute; however, the statute directs the Maryland Secretary of Personnel to promulgate regulations establishing procedures under which any employee may be granted leave. The regulations are to provide, among other things, that, in each instance of leave application, the head of the agency involved must make a determination whether seasonal or family leave may be granted based upon:

> (i) The potential disruption to the efficient operation of the agency; and
> (ii) The agency's anticipated workload during the period for which the leave is requested.[64]

The Maryland Department of Personnel subsequently adopted administrative rules, but these do not provide any additional guidelines concerning what constitutes a serious health condition. In fact, they contain little more than a restatement of the statute itself, other than to state that the appointing authority shall approve or disapprove the employee's request for family leave and that the appointing authority may adopt policies and procedures regarding the timing and granting of requests for seasonal or family leave.[65]

New Jersey

New Jersey law entitles eligible employees to 12 weeks of family leave within any 24 month period.[66] Family leave includes leave to care for a child, parent, or spouse with a serious health condition. The law defines "serious health condition" as:

> [A]n illness, injury, impairment, or physical or mental condition which requires:
> (1) inpatient care in a hospital, hospice, or residential medical care facility: or
> (2) continuing medical treatment or continuing supervision by a health care provider.[67]

Leave for this purpose may be taken intermittently, subject to certain conditions.[68] The statute does not define the term "health care provider."

The New Jersey Director of the Division of Civil Rights, Department of Law and Public Safety, was charged with promulgating rules and regulations necessary for the implementation and enforcement of the law.[69] The Division adopted family leave rules on August 12, 1991 (effective September 16, 1991). These rules provide some additional guidance with respect to the scope of serious illnesses. For example, in the definition section, the terms "care" and "health care provider" are defined rather broadly as follows:

> "Care" means, but is not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, assistance with essential daily living matters and personal attendant services.
>
> * * *
>
> "Health care provider" means any person licensed under Federal, state, or local law, or the laws of a foreign nation, to provide health care services; or any other person who has been authorized to provide health care by a licensed health care provider.[70]

The rules also specifically state that the "care an employee provides need not be exclusive and may be given in conjunction with any other care provided."[71]

A summary of the public comments and the agency responses on the proposed new rules provides further insight. One commenter, who expressed the opinion that the Act was intended to deal with very serious family illnesses, not ordinary childhood illnesses, complained that:

> [T]he definition of "serious health condition" [in the rules] could be construed to apply to common situations, such as when a child is home sick for a few days or a week with the flu or an ear

> infection and [only] requires babysitting, nonprescription medication or prescription medication, such as antibiotics.[72]

After noting that the definition of "serious health condition" in the rules is the same definition that appears in the Act, the agency responded by stating that "the extent to which a serious health condition will include childhood and other illnesses will be decided on a case-by-case basis, in accordance with the definition provided by the Legislature."[73]

Another commenter expressed concern that the definition of "care" is overly broad because it includes emotional support and visitation. The agency responded that it had received testimony from several individuals who urged that the term "care" be interpreted broadly to include a situation in which both parents visited their child in a hospital and provided emotional support, even though the child was receiving all physical and medical care from the hospital staff. The agency concluded that "the Family Leave Act, as remedial legislation, is deserving of liberal construction" and that, consequently, its interpretation of "care" is in accordance with the Legislature's intent.[74] The same commenter also thought that the rules allow "too much flexibility regarding who may be a 'health care provider' for the purposes of who may define the nature of serious health condition and for providing certification." In response, the agency stated that it believed the definition in the rules of health care provider "is consistent with the Legislature's intent and could include a social worker who is providing, to an individual with mental illness, counselling services under the supervision of a psychiatrist."[75]

Thus, it would appear from the rules and the commentary provided that the agency charged with implementing and enforcing New Jersey's family leave law has taken a broad view as to what constitutes a serious health condition.

North Dakota

State employees in North Dakota are permitted to take family leave of absence to care for a child, spouse or parent with a serious health condition.[76] North Dakota law defines "serious health condition" as a "disabling physical or mental illness, injury, impairment or condition" involving: inpatient care in a hospital, long-term care facility, or hospice program; or outpatient care that requires continuing treatment by a health care provider.[77] The term "health care provider" is defined very broadly to mean a licensed registered nurse, physician, psychologist, or certified social worker.[78]

In addition to providing family leave, North Dakota law permits state employees to use up to forty hours, in any 12 month period, of paid sick or medical leave to care for a child, spouse or parent with a serious health condition.[79]

Certification

An employee requesting family leave to care for a child, parent or spouse with a serious health condition may be required to provide certification from the provider of health care to the child, parent or spouse. However, the employer may not require certification of more than: the fact that the child, parent or spouse has a serious health condition; the date it commenced and its probable duration; and the medical facts within the knowledge of the health care provider regarding the serious health condition.[80]

Oklahoma

In 1989, Oklahoma adopted a law requiring the Administrator of the Office of Personnel Management to promulgate emergency and permanent rules that entitle state employees to family leave for the birth or adoption of a child or to care for a "terminally or critically ill child or dependent adult."[81]

The rules state that an employee is limited to 12 weeks of family leave in any 12-month period and may choose to account for time lost because of family leave from among the following options: charged to accumulated compensatory time; charged to accumulated annual leave; charged to accumulated sick leave; recorded as enforced leave; or recorded as leave without pay. The rules also require an employee to submit a written leave request in advance, describing the reason for the leave, indicating the type of leave requested, and containing any information or documentation required for the type of leave requested. If an employee fails to submit a leave request in advance, the request must be submitted as soon as possible and include a description of why it was impossible to submit the request in advance.[82]

The rules do not further define the phrase "terminally or critically ill" and contain no criteria or guidelines for determining when such a medical condition exists.

Oregon

Oregon law prohibits an employer of 50 or more persons from refusing to grant an employee's written request for a family medical leave of absence for up to 12 weeks within a two-year period for the care of any family members who suffer serious health conditions.[83] Under the law, "family member" means a child, spouse, parent or parent-in law.[84] "Serious health condition" is defined as:

> (a) An illness of a child of an employee requiring home care; or
> (b) An injury, disease or condition that according to the medical judgment of the treating physician:
> (A) Poses an imminent danger of death;
> (B) Is terminal in prognosis with a reasonable possibility of death in the near future; or

> (C) Is any mental or physical condition that requires constant care.[85]

The law defines "treating physician as "a physician licensed to practice medicine and surgery, including a doctor of osteopathy, who is primarily responsible for the treatment of the family member."[86]

Certification

With respect to certification, the Oregon law simply states that an employer "may require an employee to provide written verification from the treating physician of need for the leave."[87]

Rhode Island

Rhode Island law entitles employees (including all public employees and employees of employers who employ 50 or more employees) to take up to 13 consecutive work weeks of parental or family leave in any two calendar years.[88] "Family leave" is leave to care for a family member with a serious illness.[89] "Serious illness" is defined in the Rhode Island Parental and Family Medical Leave Act as a:

> [D]isabling physical or mental illness, injury, impairment or condition that involves inpatient care in a hospital, a nursing home or a hospice; or outpatient care requiring continuing treatment or supervision by a health care provider.[90]

Certification

The law permits an employer to request an employee taking family leave to provide written certification from the attending physician. However, the only information required in the certification is the probable duration of the employee's leave. It is interesting to note that this certification requirement is less stringent than under prior law.

Under an earlier version of Rhode Island's parental leave law, leave was permitted for births, adoptions, or to care for a "seriously ill child," meaning a child under the age of 18, who by reason of accident, disease or condition was in imminent danger of death or faced hospitalization involving an organ transplant, limb amputation or other procedure of similar severity. Governing rules required the employee requesting leave to submit a certified statement from the child's physician to the effect that the procedure requiring hospitalization was of "'similar severity' to organ transplants or limb amputations."[91] The rules also entitled an employer to request necessary medical records to verify the attending physician's certification by consulting with a physician of its own choice. If the first two physicians disagreed, the rules provided that the matter would be referred for final disposition to a third physician selected mutually by the two physicians. The rules further provided that the

employee must present documented medical evidence and non-medical evidence as may be necessary.[92]

It may well be that this stricter certification process, allowing for second and third opinions and submission of medical records to verify doctors' statements even in the case of such extremely serious illnesses, was found to be too burdensome. In any case, it seems significant that, under the new family leave law allowing leave for health conditions less serious than an organ transplant or a limb amputation, an employer is permitted to request only one certification which is limited to a statement of the probable duration of the leave.

Vermont

In 1992, the Vermont General Assembly enacted a parental and family leave law. Under that law, employees working for an employer who employs 15 or more employees may take up to 12 weeks of unpaid family leave during any 12-month period.[93] Family leave includes a leave of absence from employment by reason of the serious illness of the employee's child, stepchild or ward who lives with the employee, foster child, parent, parent-in-law or spouse.[94] "Serious illness" is defined as:

> [A]n accident, disease or physical or mental condition that: (A) poses imminent danger of death; (B) requires inpatient care in a hospital; or (C) requires continuing in-home care under the direction of a physician.[95]

Certification

The law permits an employer to require certification from a physician to verify the serious illness and the amount of and necessity for the leave requested.[96]

Virginia

The 1991 state budget for Virginia contained language directing the Secretary of Administration to "revise the state's current leave without pay policy to require state agencies to provide unconditional leave without pay for a maximum of 30 working days to all employees requesting unpaid leave for parental reasons."[97] As the Bureau has been unable to obtain further information on the leave policy, it is unclear whether the leave covers serious health conditions.

Washington

Washington law entitles qualified employees to 12 work weeks of family leave during any 24-month period.[98] However, the scope of the Washington family leave law is extremely narrow. In addition to leave to care for a newborn or a newly adopted child, "family leave" includes only leave to care for a child under 18 with a "terminal health condition," which is

defined as "a condition caused by injury, disease, or illness, that, within reasonable medical judgment, is incurable and will produce death within the period of leave to which the employee is entitled."[99] Leave for this purpose is allowed only once for any given child.[100]

Certification

In the event of a dispute regarding the terminal condition of a child, an employer may require confirmation by a health care provider that the child has a terminal condition.[101] "Health care provider" means a licensed physician or osteopath.[102] The employer, at the employer's expense, may require the employee to obtain the opinion of a second health care provider concerning any information contained in the confirmation. If there is any disagreement between the two health care providers on any factor that is determinative of the employee's eligibility for family leave, the two shall select a third health care provider whose opinion shall be conclusive.[103]

Family Care Law

Similar to Florida (whose restrictive family medical leave law is tempered by its Family Support Personnel Policies Act which provides additional leave for family responsibilities and the use of employee accrued sick leave) and North Dakota (which also allows an employee to use sick leave or medical leave in addition to family leave), Washington's family care law allows an employee to use the employee's accrued sick leave to care for a child of the employee under the age of eighteen with a health condition that requires treatment or supervision.[104] Administrative rules that implement Washington's family care law define the phrase "health condition that requires treatment or supervision" to include:

> (a) Any medical condition requiring medication that the child cannot self administer;
> (b) Any medical or mental health condition that would endanger the child's safety or recovery without the presence of a parent or guardian; or
> (c) Any condition warranting preventive health care such as physical, dental, optical, or immunization services, when a parent must be present to authorize and when sick leave would be used for the employee's preventive health care.[105]

In this definition, Washington's administrative rules provide the most specific and detailed guidelines of any state with respect to health conditions for which an employee may take family leave. It must be acknowledged, however, that because the adjective "serious" modifying the phrase "health condition" does not appear in this definition, these guidelines may not necessarily be appropriate for the scope of "serious health conditions" intended by most state statutes. Nevertheless, they provide some guidance as to the type of situations in which a sick child under the age of 18 might validly require the presence of a parent or guardian.

West Virginia

The Parental Leave Act of West Virginia entitles state and county board of education employees to a total of 12 weeks of unpaid family leave, following the exhaustion of annual and personal leave, during any 12-month period.[106] Leave may be taken to care for the employee's child, spouse, parent or dependent with a serious health condition and may be taken intermittently when medically necessary.[107] "Serious health condition" is defined as:

> [A] physical or mental illness, injury or impairment that involves:
> (1) Inpatient care in a hospital, hospice or residential health care facility; or
> (2) Continuing treatment, health care or continuing supervision by a health care provider.[108]

The terms "health care" and "health care services" are defined rather broadly and mean:

> [C]linically related preventive, diagnostic, treatment or rehabilitative services whether provided in the home, office, hospital, clinic or any other suitable place, provided or prescribed by any health care provider or providers. Such services include, among others, drugs and medical supplies, appliances, laboratory, preventive, diagnostic, therapeutic and rehabilitative services, hospital care, nursing home and convalescent care, medical physicians, osteopathic physicians, chiropractic physicians, and such other surgical, dental, nursing, pharmaceutical, and podiatric services and supplies as may be prescribed by such health care providers.[109]

Certification

The law allows an employer to require an employee seeking leave to care for a family member with a serious health condition to provide certification by a health care provider.[110] The certification is sufficient of it states: that the family member has a serious health condition; the date the serious health condition commenced and its probable duration; and the medical facts regarding the serious health condition.[111]

Wisconsin

Wisconsin law permits eligible employees[112] to take up to two weeks of family leave in a 12-month period to care for the employee's child, spouse or parent with a serious health condition.[113] The law defines "serious health condition" as a disabling physical or mental illness, injury, impairment or condition involving any of the following: inpatient care in a hospital, nursing home or hospice; or outpatient care that requires continuing treatment or supervision by a health care provider.[114]

Certification

Under the law, an employer may require an employee requesting family leave to provide certification by the health care provider or Christian Science practitioner of the family member.[115] However, the law specifies that the employer may require no more than the following information in the certification: that the family member has a serious health condition; the date the serious health condition commenced and its probable duration; and the medical facts regarding the serious health condition that are within the knowledge of the health care provider or the Christian Science practitioner.[116] The employer also may require the employee to obtain the opinion of a second health care provider, chosen and paid for by the employer, concerning any certified information.[117]

Summary

Compared to other states, Hawaii's family leave law and its definition of "serious health condition" is both broader in some instances and narrower in others. Clearly, it is more liberal than Florida, Maine, Oklahoma or Washington which generally require a serious health condition to be terminal or, as in the case of Florida and Maine, involve an organ transplant, limb amputation or procedure of similar severity or require constant in-home care before the leave provision is triggered.[118]

In contrast to this limited interpretation of a serious health condition, a number of other states have adopted what appears to have become standard language for defining "serious health condition," i.e., an illness, injury or impairment or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility or continuing treatment or supervision by a health care provider.[119] Hawaii's definition of "serious health condition is broader and at the same time narrower than this. It is broader in that it clearly covers acute conditions.[120] This appears to be an area of dispute elsewhere.[121] On the other hand, Hawaii's definition is narrower in that, at least in the view of the majority of health care providers giving input to the Bureau, it does not cover chronic conditions such as cancer, leukemia, heart disease, structural abnormalities, etc.[122] Also, whereas mental conditions specifically are included in the foregoing definition, it is unclear whether mental conditions are covered under Hawaii's law since they are not specifically mentioned.[123]

Furthermore, Hawaii's definition of health care provider" is far broader than most states. The majority of states generally limit health care provider to physicians, osteopaths and psychiatrists (see also part II, chapter 6 and chapter 7). A few states have a somewhat broader definition than this but still not as inclusive as Hawaii's. The only states that include a field not covered by Hawaii law are: New Jersey (rules indicate social worker could be included), North Dakota (includes registered nurse and social worker), and West Virginia (includes nursing and pharmaceutical services). Hawaii's law also differs from a number of

other states in not providing for certification of a serious health condition by a health care provider.[124]

IV. Conclusions

The Scope of "Serious Health Condition"

The current definition of "serious health condition," with its phrasing "acute, traumatic, or life-threatening illness, injury or impairment," raises serious questions about its intended scope. The Legislature had the opportunity to adopt a definition of "serious health condition" that has become somewhat standardized language, but instead, chose to adopt the foregoing language containing the word "acute."[125] No other state family leave law contains wording similar to Hawaii's.

Accordingly, it may be fair to assume that the Legislature included the word "acute" specifically to ensure that short-term illnesses would be covered. Indeed, a few individual legislators interviewed indicated that they felt strongly that the word "acute" should be given liberal interpretation to include childhood illnesses, measles, flu and the like. Moreover, in a conference committee report, the Conference Committee that reported the final version of the family leave law out of committee described acute health conditions as those that come on suddenly and are of short duration.[126] On the other hand, other legislators have expressed the position that conditions such as measles, influenza and ear infections are not sufficiently serious as to be included.

However, the medical definitions of the word "acute" clearly indicate that it applies to such short-term illnesses as influenza, measles, ear infections and other childhood diseases. Furthermore, the input from the health care providers reveals they generally agreed that "serious health condition," as presently defined using the word "acute," includes these types of illnesses. Although a few health care providers also questioned whether family leave was appropriate for some acute health conditions, most agreed that, at the least, it was appropriate in the case of a child with an acute condition requiring home care by a parent. The Hawaii Legislature needs to decide clearly the scope of health conditions it intends to cover under the term "serious health condition." If the Legislature does not intend that such acute illnesses as influenza, measles, ear infections and other childhood diseases be considered as "serious health conditions" for purposes of family leave, it should amend the definition to clarify its intent.

Even more problematic perhaps is the definition's apparent exclusion of chronic medical conditions. The Legislature's intent with respect to whether chronic medical conditions are included under "serious health conditions" is not altogether clear. The previously mentioned Conference Committee noted in its report that family leave "shall be available only for those health conditions of a seriously demanding nature, requiring urgent

attention by a health care provider."[127] Certainly this language might infer that such serious illnesses as cancer and leukemia are included. However, the very next sentence of the report states: "It is expected that such acute health conditions will have come on suddenly and be of short duration."[128] This language seems to indicate that only acute and not chronic conditions are contemplated by the Legislature.

On the other hand, several legislators have insisted that illnesses such as cancer and leukemia are included under the family leave law's definition of "serious health condition." This view is not altogether surprising, considering that the references in other state's definitions of serious health conditions to "inpatient care in a hospital, hospice, or residential health care facility or continuing treatment or continuing supervision by a health care provider" infer that these are exactly the kinds of illnesses for which family leave is intended. Indeed, California's law provides for a specific exception to its minimum duration of two weeks of family care leave in the case of health care provider-certified recurring medical treatments such as chemotherapy, radiation, kidney dialysis, or similar treatments.[129]

Nevertheless, the majority of health care providers responding to the Bureau's request for input have concluded that, because Hawaii's definition of "serious health condition" contains the word "acute" but not the word "chronic," inclusion of chronic medical conditions such as cancer and leukemia is highly uncertain.[130] From a medical point of view, health care providers clearly felt that the current definition of "serious health condition" is unfair and should be amended specifically to cover chronic conditions or, at the least, their acute episodes. The Bureau concurs with the view that allowing family leave for an employee to care for a family member with an acute illness or injury but not when a family member needs recurring medical treatment such as chemotherapy, radiation, or kidney dialysis is unfair. The Legislature should clarify its position, and if its intent is to include chronic conditions under the family leave law, it should amend the law accordingly.

The Bureau also notes that, unlike almost all other states providing leave to care for a seriously ill family member, Hawaii's law does not specifically include the word "mental" to describe "acute, traumatic, or life-threatening illness injury, or impairment." One could argue that because this phrase is not limited by the adjective "physical," it includes physical and mental conditions. This argument may be further supported by the inclusion of psychiatrists in the definition of "health care provider." However, at least one health care provider is of the opinion that mental conditions are not included. Furthermore, most mental conditions of a serious nature would likely be considered chronic and this would not be included under the present definition of "serious health condition." In the event the Legislature amends the definition of "serious health condition" to include chronic health conditions, it would be arguable that mental as well as physical chronic conditions would be included. Nevertheless, the Bureau believes that, in drafting law, it is preferable to use specific language when possible rather than using language that is open to interpretation. Accordingly, if the Legislature intends mental as well as physical conditions to be covered, it should amend the definition to state specifically that mental conditions are included.

Determining the Existence of a Serious Health Condition

As noted earlier in this chapter, it seems unwise to attempt to formulate a laundry list of serious health conditions because of the danger that the resulting list would be under or over inclusive. Indeed, no other state with family leave laws has attempted such a listing. In fact, no state, with the exception of Washington, has even formulated guidelines for determining when leave is appropriate.[131] Accordingly, the Bureau supports the recommendation made by several health care providers that the determination of whether a serious health condition exists is best left up to the patient's health care provider. Although this may not totally eliminate disparity in the granting of family leave, the amount of disparity certainly should be less than if the determination were left up to individual employers or their personnel officers. Moreover, a health care provider treating an individual is undeniably in a far better position to judge the seriousness of the individual's condition than is an employer of a family member. Leaving the determination up to the health care provider also eliminates problems with interpreting the meaning of the phrase "treatment or supervision by a health care provider." Again, the health care provider is in a better position to judge what constitutes sufficient treatment or supervision in a given instance.

However, the Bureau believes an employer should be allowed to verify the existence of a serious health condition by requiring that the employee seeking family leave submit certification by the treating health care provider. The Bureau also favors the idea of providing some type of guideline or standard for the health care provider, as suggested by one health care provider. The guideline that was suggested is that refusal of family leave in a particular instance would result in serious consequences either for the patient or the family.

As an alternative, the guideline could simply state that the patient's condition is such that it warrants the participation of a family member to provide care during a period of treatment or supervision. This phrasing is similar to that found in California's family care leave law defining "serious health condition."[132] Such a guideline has the advantage of being broad enough to cover the acute episodes of chronic health conditions and acutely sick children who require home care, while limiting family leave in the case of other acute health conditions that are not sufficiently serious as to interfere with a person's ability to provide self-care.

The observation has been made that health care providers might have some reservations about making such a determination because it requires what could sometimes be an administrative as opposed to a clearly medical determination. For example, a determination that the refusal of family leave would result in the serious consequence of leaving a sick child home alone is more of an administrative determination versus the determination that refusal of family leave would result in the serious consequence of having to hospitalize a patient. However, if some standard or guideline is to be imposed, someone must be charged with determining whether the standard or guideline has been met in a

particular instance. As previously noted, the patient's health care provider is in a far better position to make that determination that the patient's family member's employer. Health care providers under California's family care leave law already are required to certify that the patient's condition warrants the participation fo the family member to provide care. Furthermore, as noted earlier, similar determinations are required of health care providers in Honolulu in certifying patients for handi-van passes. Accordingly, the Bureau is of the opinion that such a determination does not impose an unreasonable burden upon health care providers.

Certification Requirements

Although a few health care providers indicated the certificate should contain a description or diagnosis of the patient's condition, a number of others clearly had some concern over releasing confidential patient information to the employer of a family member. The AMA's Principles of Medical Ethics unquestionably recognize a patient's right of confidentiality, even when no formal physician-patient relationship exists. Even though confidential information may be released upon a patient's consent, it seems somewhat harsh to require a person to consent to the release of medical information to the caregiver's employer as a prerequisite to having the caregiver present to provide care. Moreover, if the health care provider is the sole determiner of whether a serious health condition exists, it would seem unnecessary to require disclosure of the nature of the serious health condition to the caregiver's employer.

While a number of states require that the health care provider-certification include information regarding the serious medical condition, there nevertheless is sufficient precedence for limiting the information on the certification.[133] For example, California law requires only the following information on the certification: the date the health condition commenced, its probable duration, an estimate of the amount of leave time the health care provider believes the employee needs to care for the patient, and a statement that the patient's condition warrants the participation of a family member to provide care during a period of the patient's treatment or supervision.[134] Furthermore, the law specifically states that the nature of the health condition need not be disclosed on the certification.[135] The Bureau favors the approach taken by California, requiring minimal disclosure of information in the certification.

ENDNOTES

1. Haw. Rev. Stat., §398-3.

2. Haw. Rev. Stat., §398-1.

3. 1991 Session Laws of Hawaii, Act 329, §3(4).

4. International Dictionary of Medicine and Biology (New York: John Wiley & Sons, 1986), vol. I [hereinafter cited as International Dictionary].

5. Melloni's Illustrated Medical Dictionary (Baltimore: Williams & Wilkins, 1985; 2nd ed.) [hereinafter cited as Melloni's].

6. From Stedman's Medical Dictionary (Baltimore: Williams & Wilkins, 1990; 25th ed. (illustrated)) [hereinafter cited as Stedman's].

7. International Dictionary (Vol. I).

8. Melloni's.

9. Stedman's.

10. International Dictionary (Vol. III).

11. Melloni's.

12. Stedman's.

13. International Dictionary (Vol. III).

14. Melloni's.

15. Stedman's.

16. See notes 4-6 supra and accompanying text.

17. See notes 4-9 supra and accompanying text.

18. Teunissen v. EST Co., ERD Case No. 9051262 (Wis.).

19. Haw. Rev. Stat., §398-6.

20. These include California, Georgia, Maine, North Dakota, Oregon, Rhode Island, Vermont, Washington, West Virginia and Wisconsin. For further discussion of the certification requirement, see the individual state summaries.

21. American Medical Association, Council on Ethical and Judicial Affairs, 1992 Code of Medical Ethics: Current Opinions (1992) at xi.

22. Id. at 25.

23. Id.

24. Id. at 28.

25. Alaska Stat., §23.10.500(b) (1992).

26. Id. at §23.10.550.

27. Id.

28. Cal. Gov't Code, §12945.2.

29. Id.

30. Id.

31. Text of Proposed Regulations of the Fair Employment and Housing Commission Regarding Family Care Leave (AB 77- Chapter No. 462, §7297.4(e), Subchapter 12. Family Care Leave), October 7, 1992 [hereinafter cited as Proposed Regulations].

32. Id. at §12945.2(i).

33. Id.

34. Id.

35. The text of the regulations define "certification" as a "written communication from the health care provider of the child, parent or spouse with a serious health condition to the employer of the employee requesting a family care leave to care for the child, parent or spouse. This certification need not identify the serious health condition involved, but shall contain:

    (1) the date, if known, on which the serious health condition commenced,
    (2) the probable duration of the condition,
    (3) an estimate of the amount of time which the health care provider believes the employee needs to care for the child, parent or spouse, and
    (4) a statement that the serious health condition warrants the participation of a family member to provide care during a period of treatment or supervision of the child, parent or spouse." Proposed Regulations, supra note 31, at §7297.1.

36. Conn. Gen. Stat., §5-248A(a).

37. Id. at §5-2484(c).

38. Id. at §31-51cc. It should be noted that "serious illness is defined slightly differently in this section, referring to a "disabling" illness, etc. and referring to a licensed nursing home instead of a residential care facility. Also the adjective "continuing" is not repeated before the word "supervision." Id.

39. Id. at §5-248a(c). Section 31-55cc(e) also includes "or other health care provider."

40. Fla. Stat., §110.221(1).

41. 1991 Fla. Laws, Act 91-184.

42. Id. at §2.

43. Id. at §4.

44. §22K-31.007, Rules of the Department of Administration, Personnel Management System (Chapter 22k-31 Family Supportive Work Program).

45. Id. at §22K-31.006(2).

46. Ga. Code Ann., §45-24-2(a)(1).

47. Id. at §45-24-1(8).

48. Id. at §45-24-1(6).

49. Id. at §45-24-2(a)(2).

50. Id. at §45-24-3.

51. Id. at §45-24-3(b).

52. Id. at §45-24-3(d). *The health care provider so approved or designated by the employer may not employed* on a regular basis by the employer.

53. Id. at §45-24-3(e).

54. Id. at 45-24-3(f).

55. Ill. Rev. Stat., ch. 127, para 63b108c(5).

56. Id.

57. Id.

58. Me. Rev. Stat. Ann., tit. 26, §844. Employee must have been employed by the same employer for 12 consecutive months.

59. Id. at §843(4).

60. Id. at §843(5).

61. Id. at §844(1).

62. Id.

63. Md. Ann. Code, art. 46A, §37C.

64. Id.

65. Maryland Department of Personnel Rules, §06.01.01.43H.

66. N.J. Stat. Ann., §34:11B-4. The law contains a phase-in provision for family leave based upon the employer's number of employees: it applies to employers with: 100 or more employees in 1990; 75 or more employees in 1991; and 50 or more employees in 1993. Id. at §34:11B-3(f).

67. Id. at §34:11B-3(l).

68. Id. at §34:11B-4(a).

69. Id. at §34:11B-16.

70. N.J. Admin. Code, §13:14-1.2.

71. Id. at §13:14-1.5(d).

72. 23 N.J.R. 2864 (September 16, 1991).

73. Id.

74. Id.

75. Id.

76. N.D. Cent. Code, §54-52.4-02. The amount of leave an employee may take is determined by the employer on a pro rata basis according to a formula based on the average number of hours per week that the employee is employed; provided that any employee who is employed for an average of 40 or more hours per week during the preceding 12 months may not take more than four months of family leave.

77. Id. at §54-52.4-01(8).

78. Id. at §54-52.4-01(5).

79. Id. §54-52.4-03.

80. Id. at §54-52.4-05.

81. Okla. Stat. Ann., tit. 74, §840.7c.

82. Oklahoma Office of Personnel Management Administrative Rules, §530:10-15-45.

83. Or. Rev. Stat., §659.570. However, if the serious health condition is not life threatening or terminal, the employer is not required to grant an employee family medical leave of absence during time period in which another family member also is taking leave or is otherwise available to care for the family member.

84. Id. at §659.565(2).

85. Id. at §659.565(3).

86. Id. at §659.565(4).

87. Id. at §659.570(5).

88. R.I. Gen. Laws, §28-48-2.

89. Id. at §28-48-1(g). "Family member" means a parent, spouse, child, parent-in-law or the employee. Id. at §28-48-1(f).

90. Id. at §28-48-1(e).

91. Administrative Regulations for the Rhode Island Parental Leave Law (28-48 GLRI 1956, as amended) (filed December 8, 1989) at 1.

92. Id. at 1-2.

93. Vt. Stat. Ann., tit. 21, §472.

94. Id. at §471(3).

95. Id. at §471(5).

96. Id. at §472(e).

97. Telephone conversation with Mark Pratt, Division of Legislative Services, Commonwealth of Virginia, July 14, 1992. Mr. Pratt indicated that a parental leave bill had been introduced each of the last five years, but has always been held in committee.

98. Wash. Rev. Code, §49.78.030. Law covers employees of employers who employs 100 or more employees.

99. Id. at §49.78.020.

100. Id. at §49.78.030.

101. Id. at §49.78.050.

102. Id. at §49.78.020.

103. Id. at §49.78.050.

104. Id. at §49.12.270. The same requirements governing the employee's personal use of accrued sick leave apply to the use of sick leave for the child's treatment and supervision. Furthermore, the law applies only where accrued sick leave benefits exist; the law does not require an employer to provide sick leave. Washington Administrative Code §296-130-030.

105. Washington Administrative Code, §296-130-020(6).

106. W. Va. Code, §21-5D-4.

107. Id.

108. Id. at §21-5D-2(i).

109. Id. at §21-5D-2(f).

110. Id. at §21-5D-5.

111. Id.

112. Wis. Stat. Ann., §103.10(1). The law applies to employees of the State or of an employer who employs 50 or more employees.

113. Id. at §103.10(3). An employee may take up to six weeks of family leave upon the birth or adoption of a child.

114. Id. at §103.10(1).

115. Id. at §103.10(7).

116. Id.

117. Id.

118. It should be remembered, however, that both Florida and Washington have laws, in addition to their family leave laws, that guarantee leave to care for family members with less severe health conditions. See notes 40-45 and 104-105 supra and accompanying text.

119. The following states have substantially adopted this language with the exception of a few minor changes in wording: Alaska, California, Connecticut, Georgia, New Jersey, North Dakota, Rhode Island, West Virginia and Wisconsin.

120. See discussion of input from health care providers supra.

121. For example, some hearing officers in Wisconsin have denied family leave in instances of chicken pox, bronchitis and cold, but have allowed it for ear infection. See Susan R. Maisa, Wisconsin Family & Medical Leave Act (Milwaukee: 1991) (pamphlet).

122. See discussion of input from health care providers supra.

123. Id.

124. See note 20 supra and accompanying text.

125. At a minimum, the Legislature had before it House Bill No. 510 which contained the standardized language found in other state statutes. The Legislature instead chose to move Senate Bill No. 818 out of committee. Furthermore, the original draft of Senate Bill No. 818 provides only for parental leave upon the birth or adoption of a child. When the bill was expanded to include family leave for serious health condition by the House Committee on Labor and Public Employment, there clearly was an opportunity to define "serious health conditions" similar to the majority of the states and federal legislation. Indeed, testimony submitted to the Committee by the Hawaii Women's Political Caucus recommended this standard language for the definition of "serious health condition." The Bureau has been unable to uncover any testimony proposing the present language. It would appear then, that the Legislature consciously rejected this definition in favor of the definition present in the law.

126. Conference Committee Report No. 123, Sixteenth Legislature, 1991 Regular Session, State of Hawaii.

127. Id.

128. Id.

129. See note 31 supra and accompanying text.

130. See discussion of input from health care providers supra.

131. Washington has adopted rules defining the phrase "health condition that requires treatment or supervision," under its family care law which allows an employee to use accrued sick leave to care for a sick child. For further discussion, see notes 104 and 105 supra and accompanying text.

132. See note 129 supra and accompanying text.

133. California, Rhode Island and Vermont do not require disclosure of the medical condition or facts relating to it. See the individual state summaries.

134. See note 33 supra and accompanying text.

135. See note 35 supra and accompanying text.

Chapter 6

DATA FROM HAWAII

Section I of this chapter presents and examines the data collected by the Bureau's family leave survey of 101 state and county public agencies in Hawaii. Section II examines problematic aspects of Hawaii's Family Leave Law in light of the data and the situation nationally and in Hawaii. Finally, section III presents the respective responsibilities of the Directors of Taxation and Labor and Industrial Relations.

The experiences of public and private employers in other jurisdictions are discussed in chapter 4. This chapter deals with the experience of **public** employers in Hawaii. The experience of **private** employers in Hawaii is not discussed in depth in this study for several reasons.

First, the chances of obtaining meaningful data by including private employers in the Bureau's survey were remote. This is so because the leave policies of private employers in Hawaii, like those of their counterparts in other states, are characterized by a lack of formality and uniformity. (See also part I, chapter 3.) Private employers tend to consider family-type leaves on a discretionary case-by-case basis using widely differing and informal rules and standards.[1] Consequently, any data collected from Hawaii private employers would not be directly relevant to Hawaii's Family Leave Law.

Second, some data have already been collected from Hawaii private employers in 1985 and 1988. In 1985, the Department of Labor and Industrial Relations jointly carried out a parental leave study ("1985 study") with the Office of Collective Bargaining in response to Senate Resolution No. 102, 1985. The 1985 study surveyed private employers of 250 or more employees[2] who had unemployment insurance, unions, and recent parents in Hawaii. Of the 1,179 surveys mailed, 428 were returned -- a response rate of 36 percent. Most employers (65.9 percent) reported allowing up to four weeks of vacation leave for parenting if the employee planned for it and 52.6 percent reportedly gave unpaid leave to female employees. However, the length of unpaid leaves was granted at management's discretion in terms of reasons for leave, workload, employee performance, and so forth.[3]

In 1988, the Bureau conducted a parental or family leave survey ("1988 study") in response to House Resolution No. 273, H.D. 1, 1988. The 1988 study surveyed Hawaii private employers of 50 or more employees who had unemployment insurance. The response rate fell to 19 percent (222 of 1,170). The 1988 study did not attempt to discover or project the number of private employers granting family leave. Rather, it tried to gain a sense of then-current leave policies, the effects of such leaves, and the acceptability of a specific proposal for unpaid leave. The 1988 study found that in many instances, leaves were still granted on a judgmental or discretionary basis where no written policies were involved.[4] It

was also found that many employers do not keep records regarding employee demand for unpaid leave.[5]

Third, covered Hawaii private employers will not be required to grant family leave until January 1, 1994. Obviously, any data collected before then would not be able to show the effect of Hawaii's Family Leave Law on the private sector. A favorable response rate from private employers to a third survey could not be relied upon. The first drew a 36 percent response; the second, only three years later, drew a 19 percent response. A third survey of private employers, coming four years after the last one, would seem superfluous especially given that the law will not affect them until 1994. Furthermore, it is unlikely that private employers have changed their leave policies in anticipation of 1994. Accordingly, private sector data obtained two years prior to their effective date of the law would probably be inconclusive at best or, worse, possibly misleading.

Fourth, a "captive" target population -- for which the law is already effective -- exists in the **public** sector. Rather than collecting data that will most likely change as private employers begin to adapt to the law in 1994, this study opted to focus on public sector data that are both available and relevant. The appropriateness of this approach has been borne out with the collection of relevant data based on a 78 percent response rate.

I. Family Leave Survey of Public Employers in Hawaii

On August 14, 1992, the Bureau mailed three-page questionnaires to 101 state and county public agencies. The surveys were sent to the state Legislature and county councils, state and county executive agencies, and the Judiciary. (See Appendix E for the questionnaire, Appendix D for the list of departments, and Appendix H for summary descriptive statistics.)

In addition to answering the questionnaire, the Bureau also requested each public employer to provide (see Appendix C):

(1) Copies of all forms used by employees to request family leave (see Appendix F) or forms containing similar data, or other records of family leave for the period from January 1, 1992 to June 30, 1992 only; and

(2) A copy of the employer's administrative rules or guidelines for implementing the Family Leave Law.

Survey Response

As of the date of this report, 78 of the 101 agencies contacted responded. Of the Senate, the House of Representatives, and the three state legislative service agencies, only

the Office of the Auditor and the Legislative Reference Bureau provided information. The Auditor noted that:

> The Memorandum of Agreement [among the Auditor, the Ombudsman, and the Bureau] must be amended to accommodate the family leave law. The directors and acting directors agreed that we would generally follow DPS guidelines but were awaiting the new Ombudsman's assumption of office on July 1, 1992, to amend the Memorandum.

The Bureau reported that it did not notify its employees of their right to take family leave. However, the Bureau noted that it "Will notify all employees when memorandum of agreement is executed by Auditor, Ombudsman, and LRB." [**Note**: The Memorandum was amended by "Supplemental Agreement No. 5 to Memorandum of Agreement Dated August 7, 1987" which was backdated and made effective as of January 2, 1992. Copies were distributed to staff of the LRB on November 5, 1992. In fact, one employee did take family leave during the period under study.] The Bureau also noted that:

> Specific consideration of the family leave law was not undertaken until inquiries were received from an employee. Upon looking into the matter, it is evident family leave applies to the LRB and the other legislative services agencies. The Auditor's office is preparing a memorandum of agreement to be executed by all 3 agencies that basically adopts whatever applies to the executive branch.

Neither the Senate nor the House responded to the survey. It is unknown what guidelines, if any, they have adopted.

The Judiciary responded but the Office of Hawaiian Affairs (OHA) did not. According to the Department of Personnel Services (DPS), interim guidelines for state agencies were circulated only to state executive departments and bodies administratively attached to these departments. Because OHA is not attached to any department, DPS did not send guidelines to OHA. DPS staff were uncertain about the status of OHA's employees regarding the application of the Family Leave Law.[6]

All state executive departments responded. However, the Department of Education (DOE) was not able to make available copies of any actual leave forms. As a result, data regarding types of leave taken (birth, adoption, or for a serious health condition) are not available. In fact, the DOE used two types of leave application forms. Leaves were requested by all bargaining units other than units 05 and 06 on forms which report all the data required for the survey. However, these account for only 20 percent of all DOE leaves. Units 05 and 06 used forms which do not report the required data. In any case, the DOE contended that it did not have the personnel to obtain and collate copies of the forms that do contain required data.[7] Consequently, it must be noted that all subsequent statistics and graphical

presentations of data involving **types of leave** as a variable are missing a big chunk of DOE data. However, all other statistics not involving **types of leave** such as total number of leaves, total leave hours, average leave length, proportion of leaves taken by women and men, and so forth, are complete and do include DOE data.

Of the four county councils, only the Honolulu and Maui councils responded. As for county executive departments, 21 of 25 Honolulu county departments responded[8] and 13 of 18 Hawaii county departments, 11 of 15 Kauai county departments, and 10 of 14 Maui county departments responded.

Number and Types of Leaves Taken

Question 1 of the survey asks how many applications for family leave were received for the period from January 1, 1992 to June 30, 1992. Question 1.1 asks how many leaves were for the birth of a child, the adoption of a child, or the care of a child, spouse, or parent with a serious health condition. Questions 2 and 2.1 ask how many applications were denied and why.

Overall, 841 applications for family leave (including multiple leaves by individual employees) were received for the six months under study.[9] Of this number, 829 leaves were granted and 12 leaves, or 1.4 percent, were denied. Anecdotal data indicate that many employees inquired about family leave but decided not to formally apply for it for various reasons. A total of 37,211.95 hours or 4,651 days of family leave (inclusive of DOE leaves) were requested in applications received during the period January 1, 1992 to June 30, 1992. The mean length of leave was 44.9 hours or 5.6 days. More women (583, or 69 percent) took leave than men (256, or 31 percent). See *Figure 6-1.*

Leaves for Birth, Adoption, and Care of a Family Member with a Serious Health Condition

Data regarding leaves differentiated by type are not available from the DOE. Thus, figures in this section only represent about two thirds of all leaves reported by respondents. Employees took 411 leaves to care for a spouse, child, or parent. Family birth leave ranked a distant second at 95 leaves. Only 10 leaves, or two percent, were for adoption. See *Figure 6-2.* Birth leaves accounted for about 18 percent of all leaves while family care leaves for care of spouses, elders, or children, accounted for about 80 percent.

However, the 1,157 days taken for birth leave accounted for about 38 percent of all leave days while the 1,762 days of family care leave accounted for about 58 percent. See *Figure 6-3. Figure 6-4* shows the mean length of leave in days and hours for all three types of leaves. The mean length of a birth leave was 12.2 days while that for a family care leave

Figure 6-1

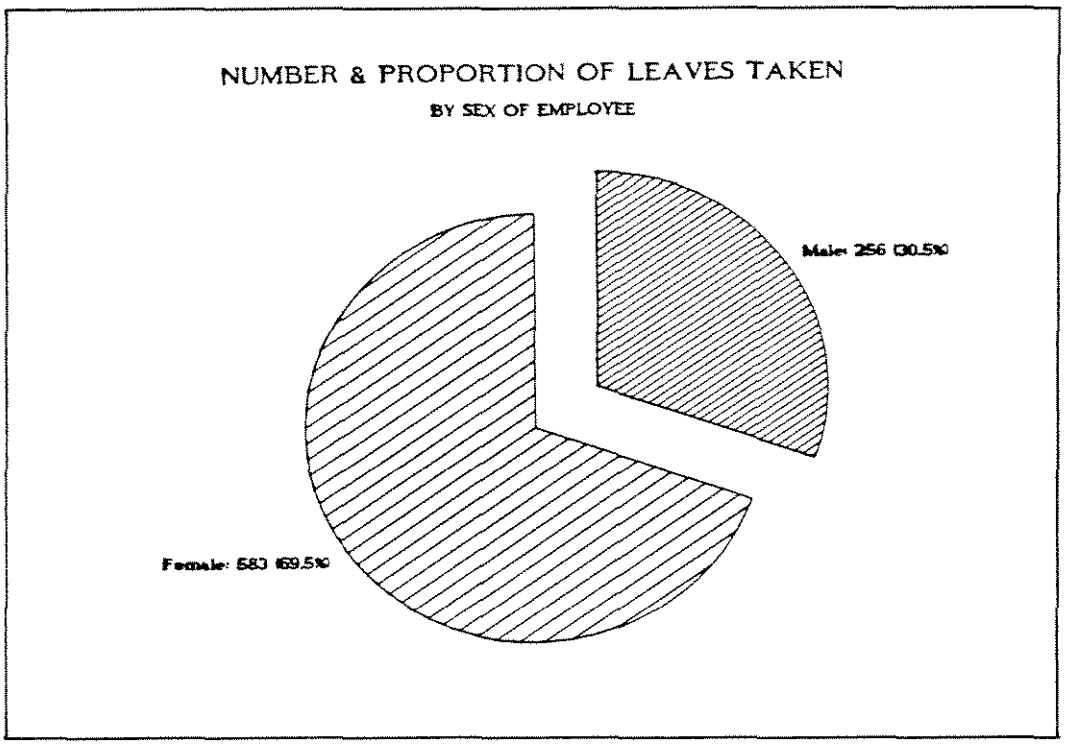


Figure 6-2

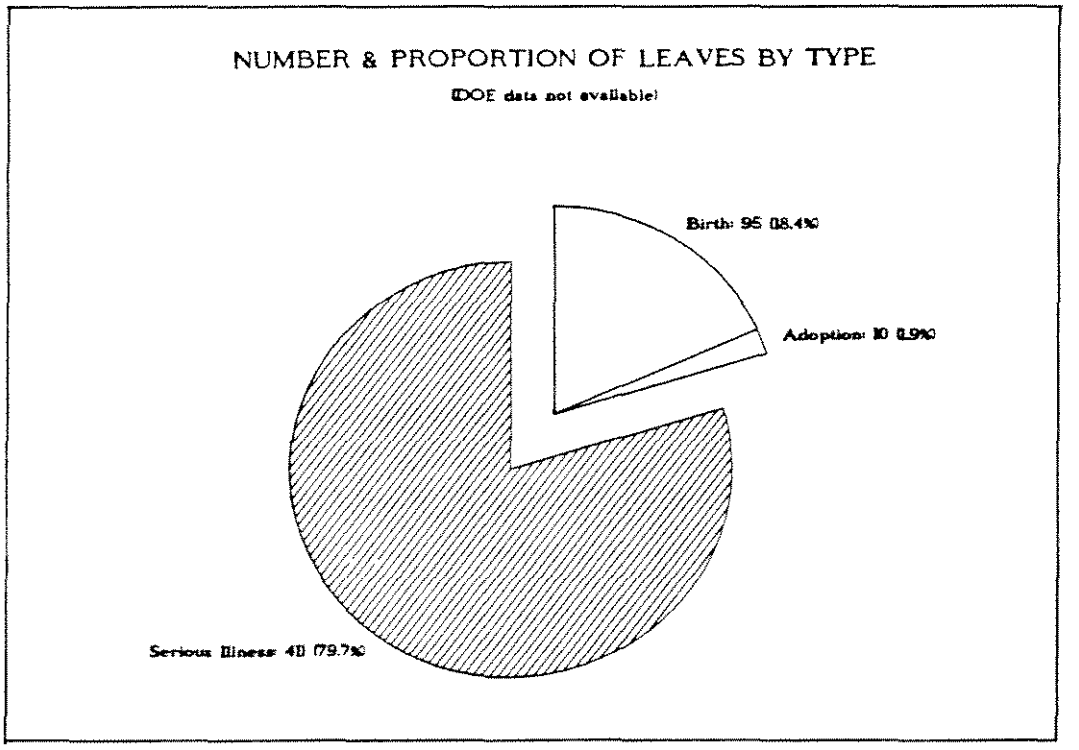


Figure 6-3

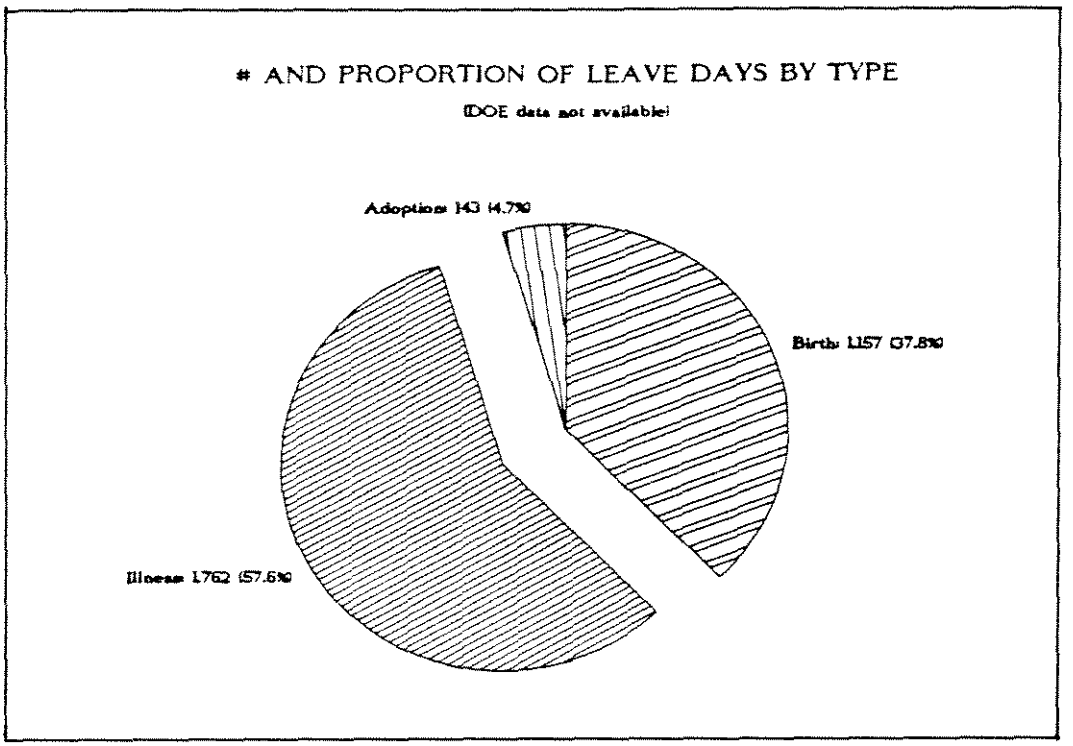
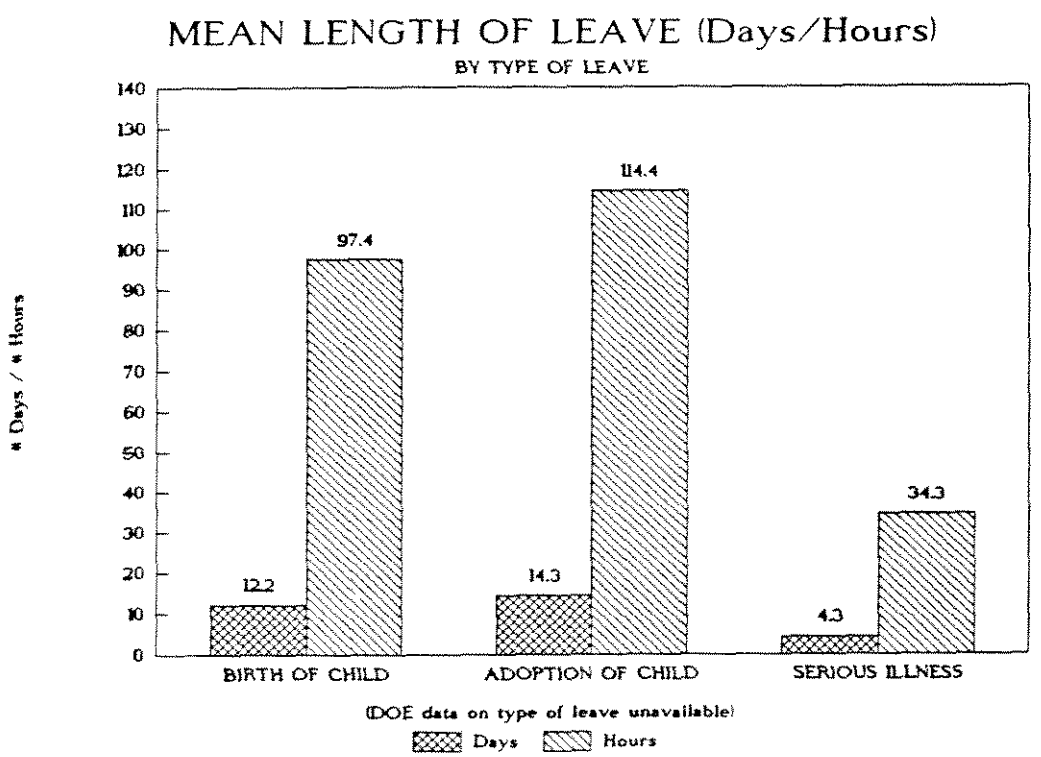


Figure 6-4



was only 4.3 days. That is, employees took fewer, but much longer, birth leaves than family care leaves. In fact, leaves for the adoption of a child, which were the rarest, were also the longest at 14.3 days per leave. Just as employees took fewer but longer birth leaves, they took many more, but much shorter family care leaves.

Hawaii's pattern of leave-taking by type of leave (minus DOE data) contrasts sharply with data from Connecticut. In that state, for 1989-1990, 42 percent (170) leaves were taken for the birth of a child while only 10 percent (41) were for the illness of a child, spouse, or parent. In 1990-1992, the proportions were 45 percent and 8.5 percent (159 and 30 leaves), respectively.[10] Hawaii's much lower rate for family birth leave and much higher rate for family care leave could be due to any number of reasons. However, existing data are insufficient to determine the causes.

Nonetheless, one can speculate. For example, one can theorize that Hawaii public employees are somehow biologically less fertile than their counterparts in Connecticut although this is unlikely. The data could also merely indicate that serious health conditions occur more frequently than childbirths in the universe of eligible Hawaii public employees. However, there is no valid reason to believe that Connecticut public employees' family members are more healthy.

Perhaps existing leaves in Hawaii are relatively sufficient and a proportion of local public employees have less need to take unpaid family birth leave. Two facts seem to support this. First, family leave taken for childbirth, as a category, in Hawaii is low. Second, the instance of female birth leaves is much lower than for male birth leaves. Of all birth leaves, only 22 were taken by women while 73 were taken by men. See *Figure 6-5.* Men also accounted for more total days of birth leave than women (see *Figure 6-6*). This suggests that some mothers may find existing leaves relatively sufficient. Because most mothers can be expected to use their available paid leave for childbirth first, as a group, they may experience less need for additional unpaid family birth leave. For example, the State's temporary disability insurance law provides partial wage replacement during a period of non job-related disability, including pregnancy. (See section I in chapter 3.) Mothers can also use paid sick or vacation leave as maternity leave to care for a newborn.

On the other hand, the data suggest several other possibilities. First, the low incidence of family birth leave for both women and men in Hawaii may be occasioned by economic necessity: they may not be able to afford much unpaid leave. After having taken all available paid leave, mothers may not be able to afford additional unpaid family leave. Furthermore, although more men than women take birth leave, on the average, fathers take shorter leaves -- 10.7 days vs. 17.0 days for women. See *Figure 6-7.* This, in turn, suggests that fathers may be less able to sacrifice lost wages. Second, in the existing family-work environment for Hawaii public employees, the data seem to indicate that men do have a need for family birth leave. Third, mothers -- as primary caregivers for newborn children -- seem to need longer leaves than fathers. This divergent pattern is particularly clear for adoption

Figure 6-5

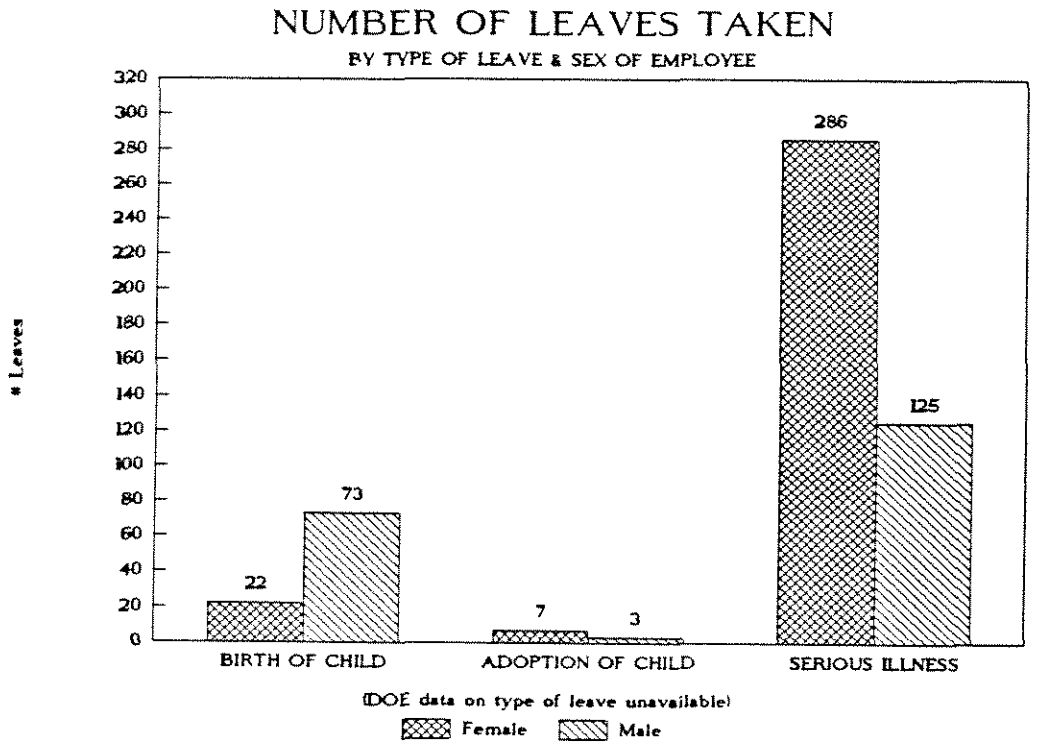


Figure 6-6

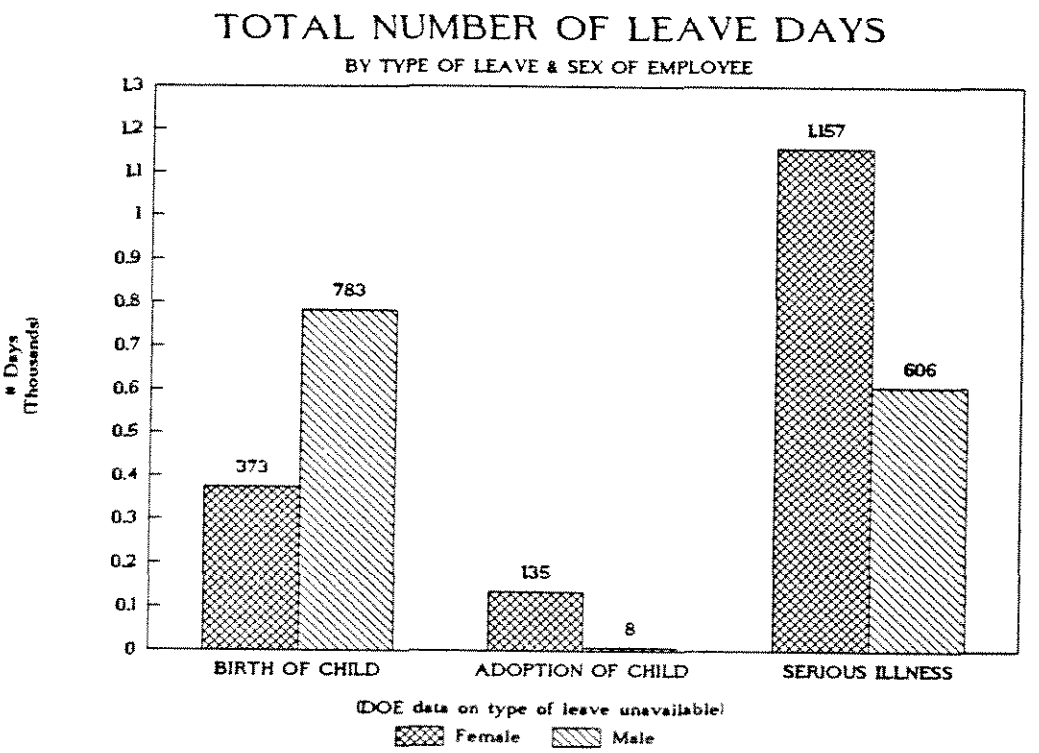
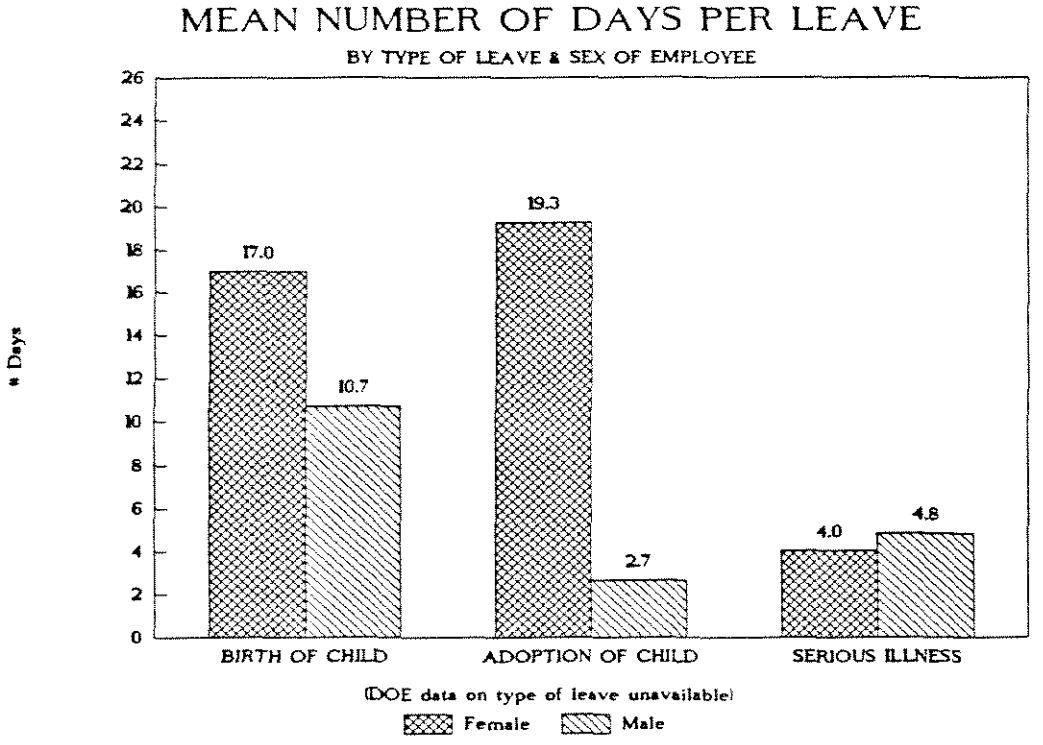


Figure 6-7



leaves where men averaged only 2.7 days of leave while women averaged 19.3 days. One could further speculate that adoptive parents (or at least adoptive fathers) do not value adoptees as greatly as biological parents. However, it could also be that adoptive fathers take less leave because adoptive mothers do not need to be physically assisted in the home in the same way as birth mothers.

It is further possible that leaves have taken the path of least resistance. That is, employees may have taken family care leaves most frequently because they are easiest to take. Family care leaves account for four of every five family leaves. The State's law does not require medical certification of a serious health condition. Moreover, ambiguity over the term may have encouraged employers to exercise wider latitude in granting leaves than otherwise. Or, at the least, employers may have preferred to accede rather than "play doctor" and chance wrongfully denying family care leaves.

There are some indications of this in the voluntary disclosures or claims of illness or injury. Reasons such as "stomach flu," "severe cold," "child care for daughter," and "medical check-ups" for unspecified reasons may not be "acute, traumatic, or life-threatening." These successful claims suggest that some supervisors may have been quite

generous in granting family care leaves. (See Appendix J for a list of successfully claimed injuries or illnesses.) Whatever the reason or mix of reasons for the relatively large proportion of family care leaves, uncertain interpretation of "serious health condition" has made for uneven and thus, perhaps unfair, implementation of the law.

It is clear, however, that many more family care leaves are taken by women than men at a ratio of 2.3 to 1.[11] During the period under study, 286 family care leaves were taken by women while only 125 were taken by men. See *Figure 6-5.* Women took a total of 1,157 days of family care leave while men took 606 days, a ratio of 1.9 to 1 (*Figure 6-6*). The mean length of all family care leaves for both men and women was 4.3 days. The mean length for men was 4.8 days and for women, 4.0 days. This reverses the pattern of leave-taking with regard to birth leaves. Where men took many more but significantly shorter birth leaves, they took much fewer but slightly longer family care leaves.

The very slight difference in average leave length between men and women may be due to the relative brevity of the average leave. That is, when leaves are short and not much wages need to be sacrificed, it may not matter much whether relatively higher-paid men or relatively lower-paid women take unpaid family care leave.

The mean length of leave, both in the aggregate and differentiated by sex, serves to measure the extent to which women and men are willing to sacrifice wages for each type of leave. That is, women are willing to give up 17 days of wages for birth leave while men are only willing to give up 10.7 days' worth. As for adoption leave, men are willing to forgo only 2.7 days as opposed to 19.3 days for women. When caring for family members, both women and men are willing to sacrifice about the same amount -- 4.0 and 4.8 days each, respectively.

The Pattern of Leave-Taking by State and County Respondents

Employees of state executive departments took 640 leaves, or 77.2 percent of all leaves granted. The Department of Education, by itself, accounted for 313 leaves or almost as much as the 327 leaves taken by all other state executive departments combined. See *Figure 6-8.* The DOE's employees took 37.8 percent of all leaves while all other state executive departments accounted for 39.4 percent. Honolulu county employees were next with 95 leaves, or 10 percent. Judiciary employees followed with 66 leaves, or 8 percent of the total. Hawaii, Maui, and Kauai county employees took 22, 12, and 5 leaves, respectively. Only one employee of a state legislative service agency took family leave -- about 0.1 percent.

Figure 6-8

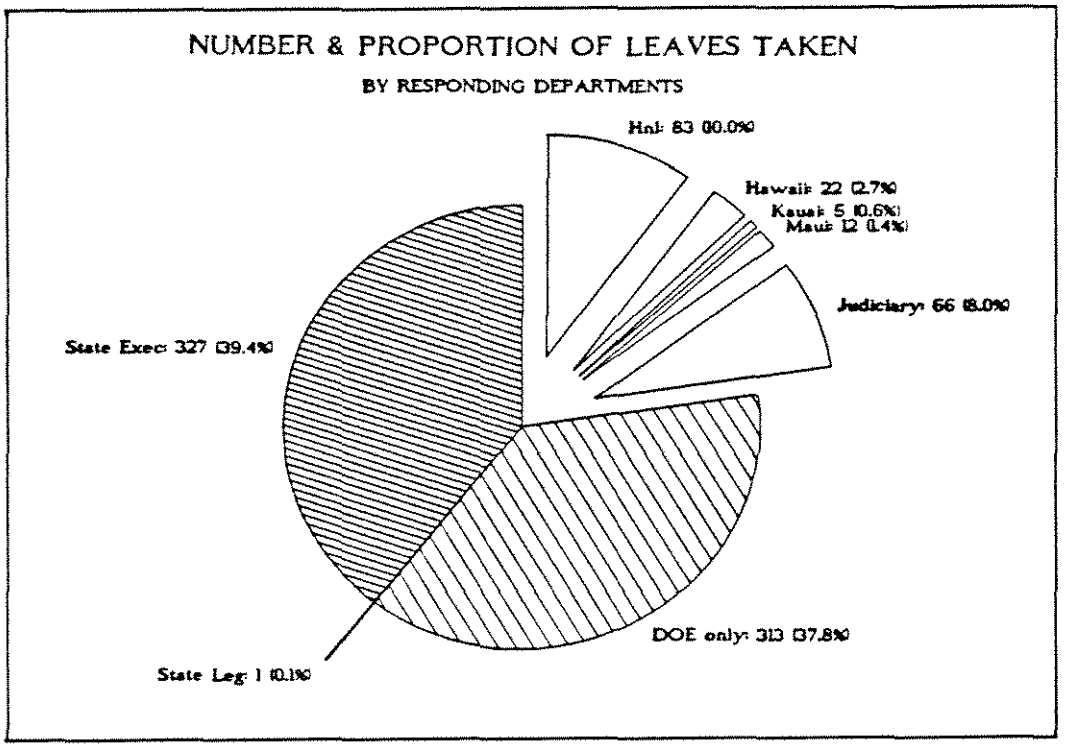
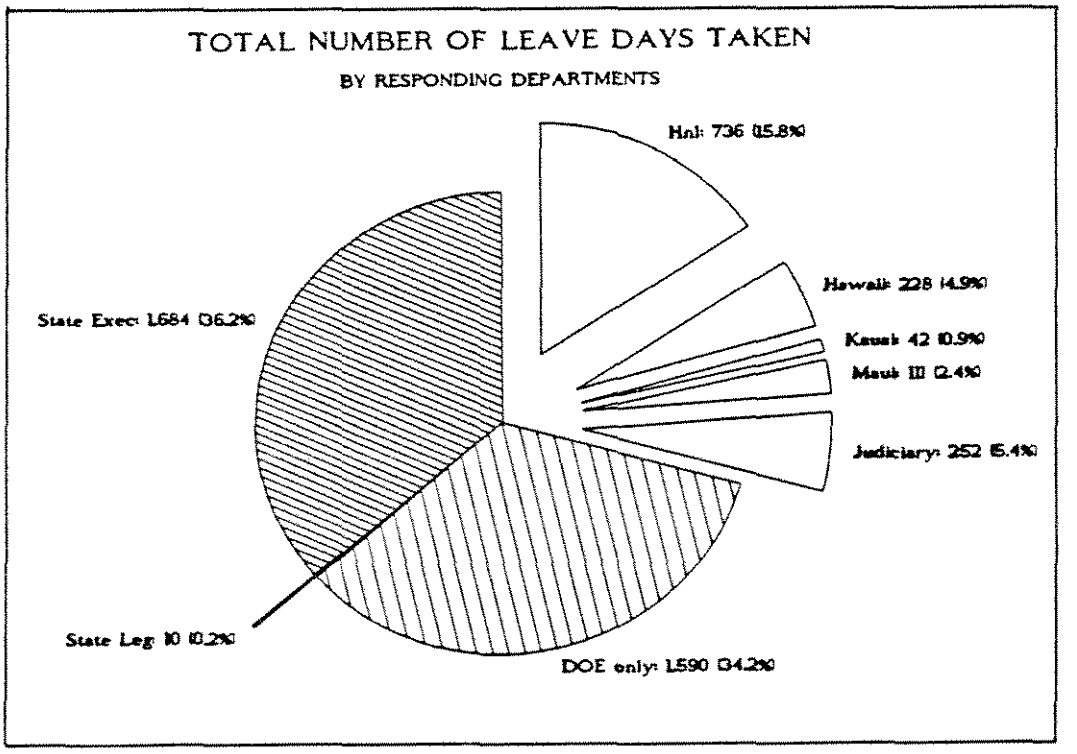


Figure 6-9



The two county councils that responded to the survey both reported no leaves. If no employees of the two non-responding county councils took family leaves, then no one employed by any county councils took family leave.

The relative rankings among responding groups remain the same for **total number of leave days**. Again, state executive department employees led with 3,274 days of leave, or 70.4 percent of all leave days. The DOE accounted for 1,590 days of leave, or 34.2 percent of all leave days. The remaining state departments accounted for 1,684 leave days, or 36.2 percent. Next were Honolulu county employees with 736 days for 15.8 percent of all leave days. Judiciary employees followed with 252 days for 5.4 percent. Hawaii, Maui, and Kauai county employees took 228, 111, and 42 days of leave, respectively. The state Legislature accounted for only 10 days, barely 0.2 percent. See *Figure 6-9.*

However, the rankings change somewhat for the **mean number of leaves taken per department reporting leaves** (*Figure 6-10*). Including the DOE, state departments ranked first among responding groups with an average of 35.6 leaves per department. If the DOE wereexcluded, the mean number of leaves for the rest of the state executive departments would drop sharply to 19.2 leaves per department -- still highest among all respondent groups. (The DOE and Judiciary "averages" of 313 and 66 leaves each are shown in *Figure 6-10* only for purposes of comparison.) Honolulu averaged only 5.9 leaves per department. Maui moved ahead of Hawaii with 6 leaves per department while Hawaii averaged only 2.8 leaves. Kauai saw only 2.5 leaves per department.

Figure 6-11 reflects the **mean length of leave by responding departments**. Here, the DOE matched the other state departments' 5.12 days with an average of 5.08 days of leave. Combined, the overall state executive department average was 5.1 days per leave -- shorter than all other responding groups except the Judiciary which averaged only 3.8 days per leave. Honolulu county employees averaged 8.9 days per leave, slightly ahead of Kauai's 8.4 days. Maui employees averaged 9.2 days leave while Hawaii had the longest average leave of 10.4 days per leave.

Neighbor island public employees took very few leaves for a very small total number of days. However, neighbor island leaves have generally been longer. There has been but one leave among all law-making and legislative service agencies at both the state and county levels.

Figure 6-12 shows the number of leaves taken by each group of respondents by type of leave (no DOE data). Family care leaves consistently accounted for the greatest proportion of leaves across all groups of respondents. The Judiciary heads the list with 94 percent of its leaves taken for family care. State executive departments (no DOE data) and Hawaii county departments were only slightly behind with 81.9 and 81.8 percent, respectively. Kauai had a similarly high proportion of family care leaves of 80 percent. Maui and Honolulu had the lowest proportions with 66.7 and 61.4 percent, respectively.

Figure 6-10

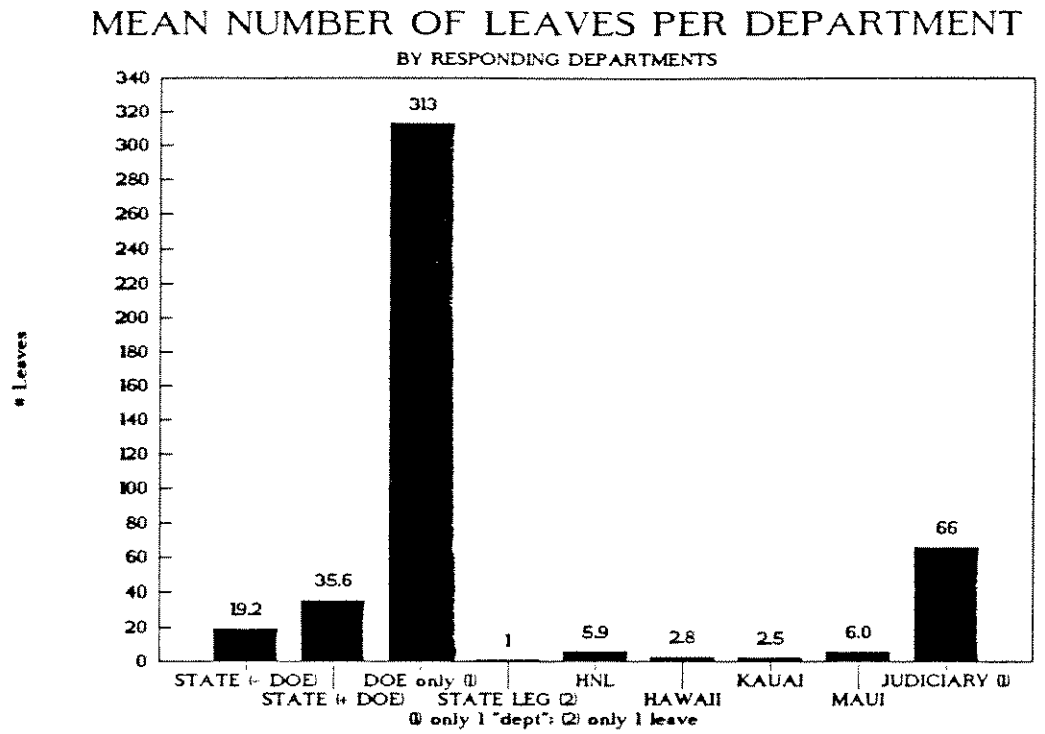


Figure 6-11

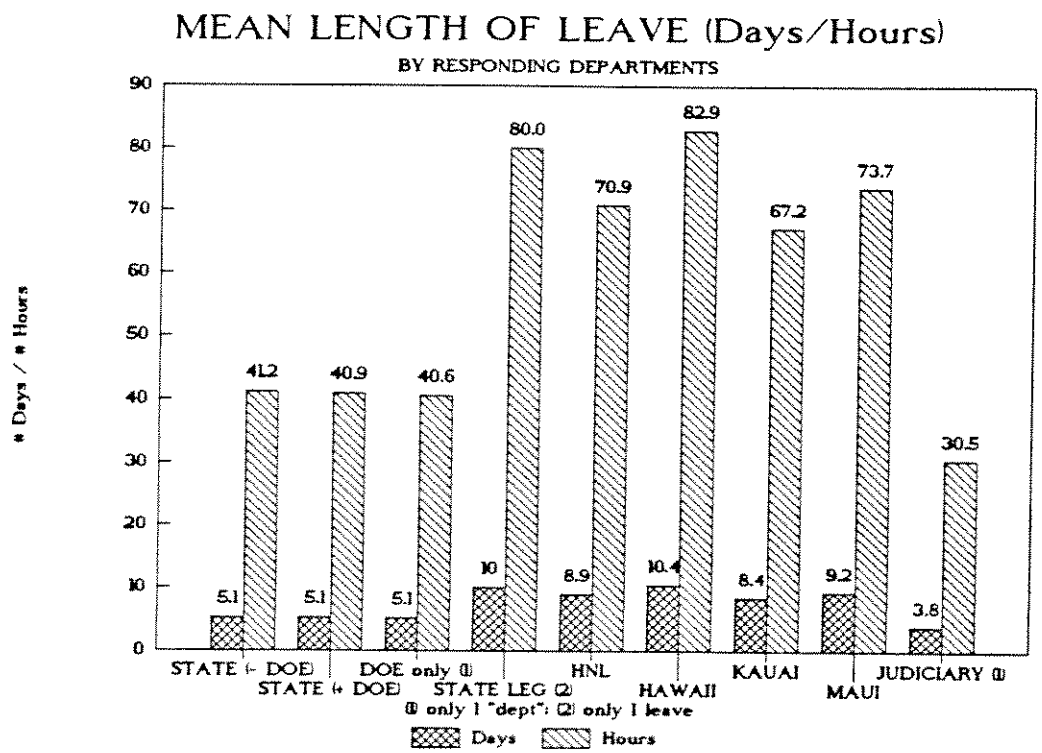
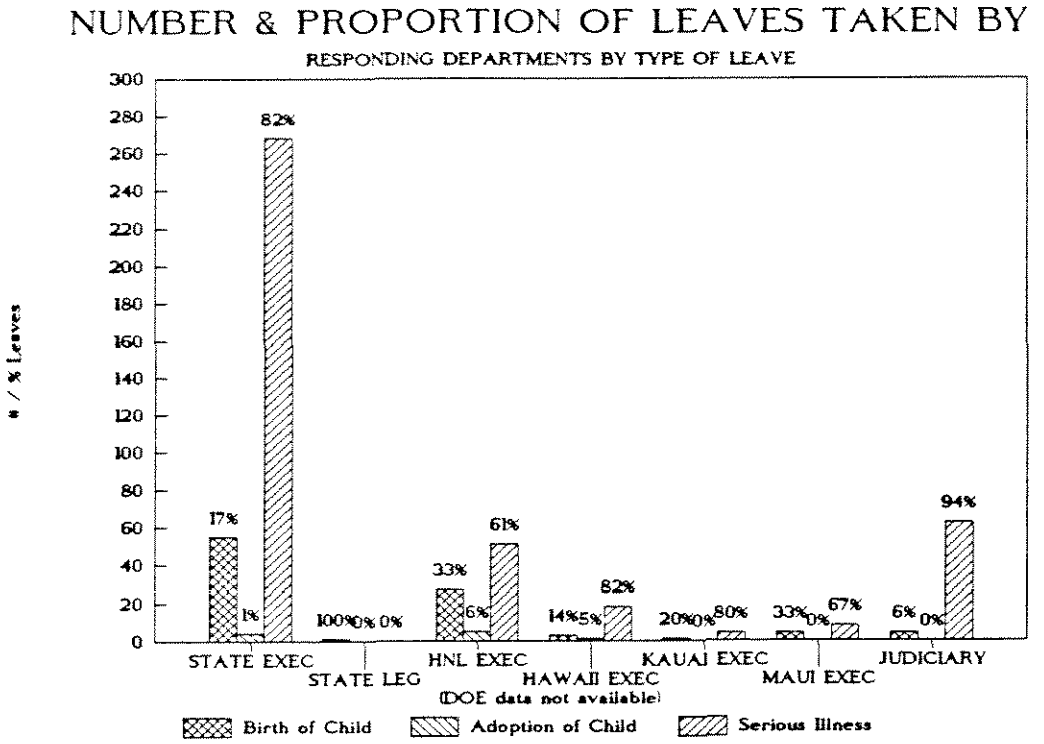


Figure 6-12



Family birth leave constituted almost all of the remainder. Maui had the greatest proportion of birth leaves among respondent groups with 33.3 percent, closely followed by Honolulu with 32.5 percent. Kauai was third with 20 percent. State departments (other than the DOE) were fourth with 16.8 percent. Hawaii was fifth with 13.6 percent and the Judiciary was sixth with only 6 percent. (The state Legislature's 100 percent reflects the only leave of any kind taken.)

Employers' Methods for Handling Leave-Takers' Work

Question 3 of the survey asks how employers handled leave-takers' work. The data show that it is not customary for Hawaii public employers to hire outside temporaries to handle leave-takers' work and incur additional cost. Only a very small proportion of employers reported hiring temporaries for the purpose. See *Figure 6-13.*

A substantial number of respondents (32 agencies, or 41 percent of all respondents) did not answer this particular question. Any method that was used "frequently" was assigned a value of 1 while any method used "sometimes" was assigned a value of 0.5. Methods

Figure 6-13

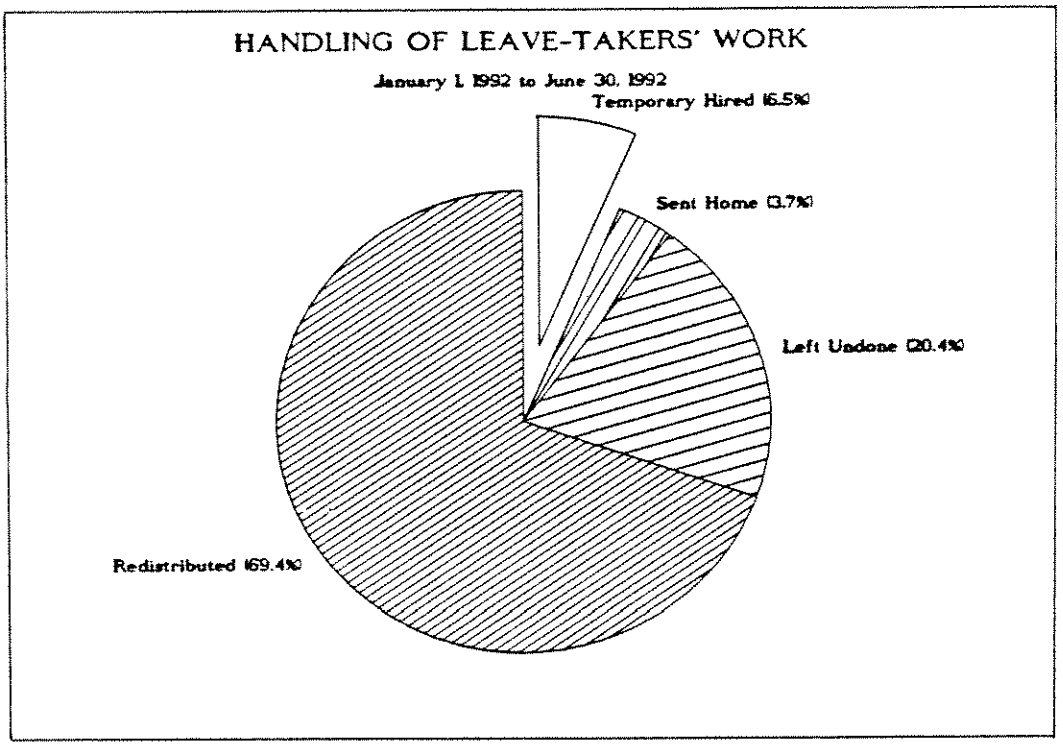
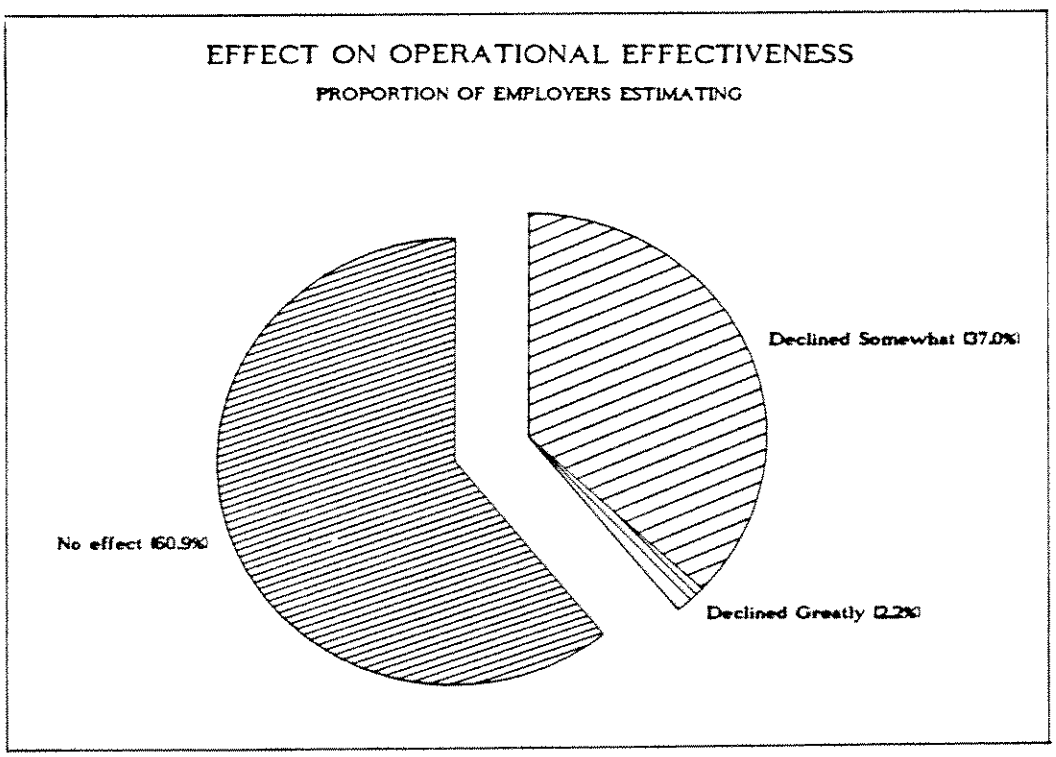


Figure 6-14



"seldom" used and blanks were assigned a value of 0. Because employers could, and occasionally did, choose more than one method, the total score does not necessarily equal the number of respondents answering this question. (See Appendix H of summary survey statistics.)

Discounting agencies that did not answer this question, frequent redistribution of work to fellow workers scored the highest at 37.5, or 69.4 percent of all responses. Work left undone scored 11, or 20.4 percent. Work sent home to the leave-taker scored a very low 2, or 3.7 percent. Temporaries hired for the purpose scored only 3.5 for 6.5 percent.

Effect of the Family Leave Law on Operational Effectiveness

Question 4 of the survey asks employers to estimate how operational effectiveness has been affected by employees taking family leave. Again, only 59 percent of respondents answered this particular question. Of those who answered, a clear majority believed that the law did not affect operational effectiveness one way or the other. See ***Figure 6-14.*** Discounting the "no responses", 28 agencies, or 60.9 percent reported no effect on operational effectiveness. However, a substantial number -- 17, or 37 percent of those who answered the question -- reported that effectiveness declined somewhat as a result of employees taking family leave. One department indicated a great decline in operational effectiveness.[12] As expected, no Hawaii public employer who responded to this question reported any **increase** in operational effectiveness as a result of the Family Leave Law.

Among the 18 agencies estimating a decline were four county public works departments, two county fire departments, one department of water supply, one parks department, and one police department. Much of the work of these nine agencies require relatively more physical than mental effort and work in shifts when compared to the work of other departments. However, others among the 18 agencies are characterized by work that requires relatively more mental than physical effort. Examples are a prosecuting attorney's office, a county attorney's office, the Department of the Attorney General, the Department of Personnel Services, the Department of Land Utilization, and the Department of Labor and Industrial Relations.

Perhaps the common thread lies in the difficulty of handling leave-takers' work. That is, the more problems that arise from options for handling leave-takers' work, the more likely employers would be to estimate a decline in operational effectiveness. For some, this could mean leaving work undone. For others, work cannot be left undone (for example, the various fire, police, and public works departments and the Department of Defense) but options such as redistribution of workload, for example, juggling shifts, pose special problems.

Effect of the Family Leave Law on Employee Morale

Question 5 asks employers to estimate the effect of the new family leave policy on employee morale. In general, the law either improved employee morale or had no effect. See *Figure 6-15.* Twenty of the 78 respondents (26 percent) did not answer this particular question. Of those who did answer, exactly one-half reported that the law had no effect on employee morale. A slightly smaller percentage (40 percent) reported a slight improvement in employee morale. Five agencies, or nine percent, reported a great improvement in morale. Only one agency reported a slight decline in morale[13] while none indicated a great decline.

Ease of Implementation of the Family Leave Law

Question 6 asks employers to estimate how easy or difficult it was to implement the Family Leave Law. Three of every four agencies (59 of 78) answered this question. Over 90 percent of these agencies indicated that implementation of the law was easy, or neither easy nor difficult. A bare majority of 51 percent (30 respondents) indicated that implementation was neither easy nor difficult. Eleven respondents (19 percent) reported that implementation was somewhat easy. Thirteen respondents (a larger 22 percent) reported that implementation was very easy. Four agencies (seven percent) reported some difficulty while one agency reported great difficulty. See *Figure 6-16.*

It is not clear what factors employers considered or how these factors were weighted. An employer could have felt the law was very easy to implement simply because there were very few leave applications. On the other hand, an employer who processed numerous applications could have felt the same. For example, all things being equal, it would probably be easier to apply laxer criteria to numerous serious health condition requests than to wrestle with the medical validity of just a few such applications. Finally, an employer -- regardless of the amount of paperwork actually processed -- may have reported difficulty because of uncertainty or confusion over guidelines, rules, and enforcement.

Notification of Employees, Method of Notification, and Employees' Level of Awareness of Family Leave Policy

Question 7 asks whether governmental departments notified their employees of their right to take family leave. Question 7.1 asks how employees were notified. Question 7.2 asks for an estimate of employees' level of awareness of the law and their rights as of January 1, 1992 and June 30, 1992.

Figure 6-15

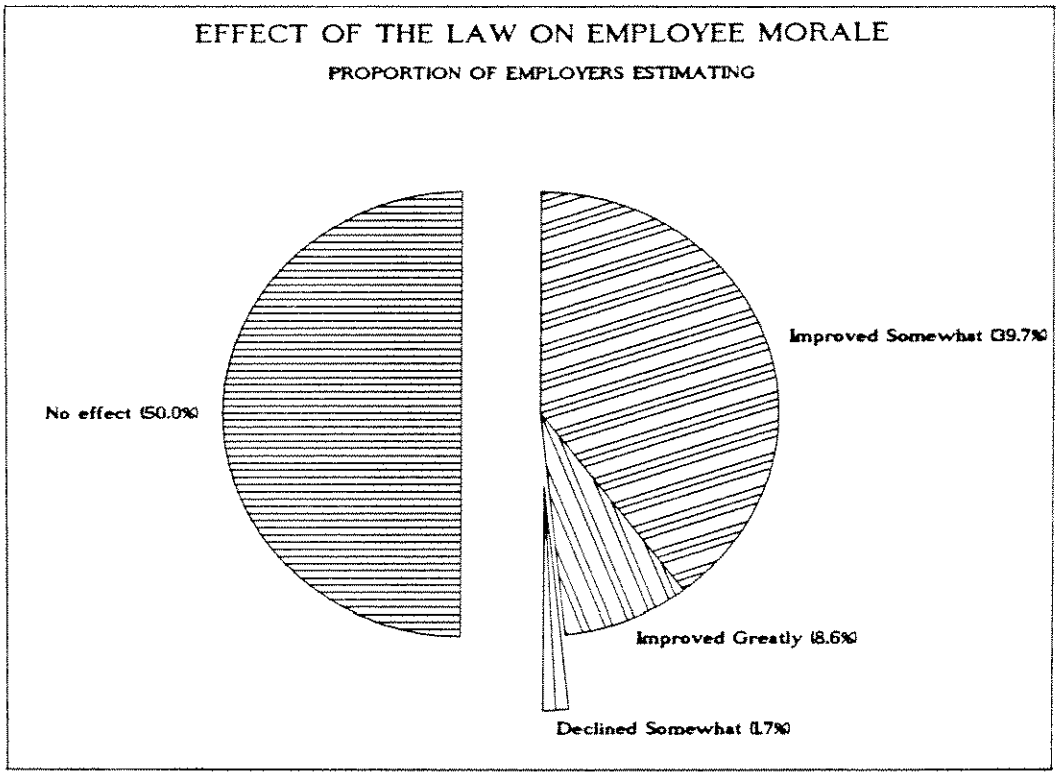
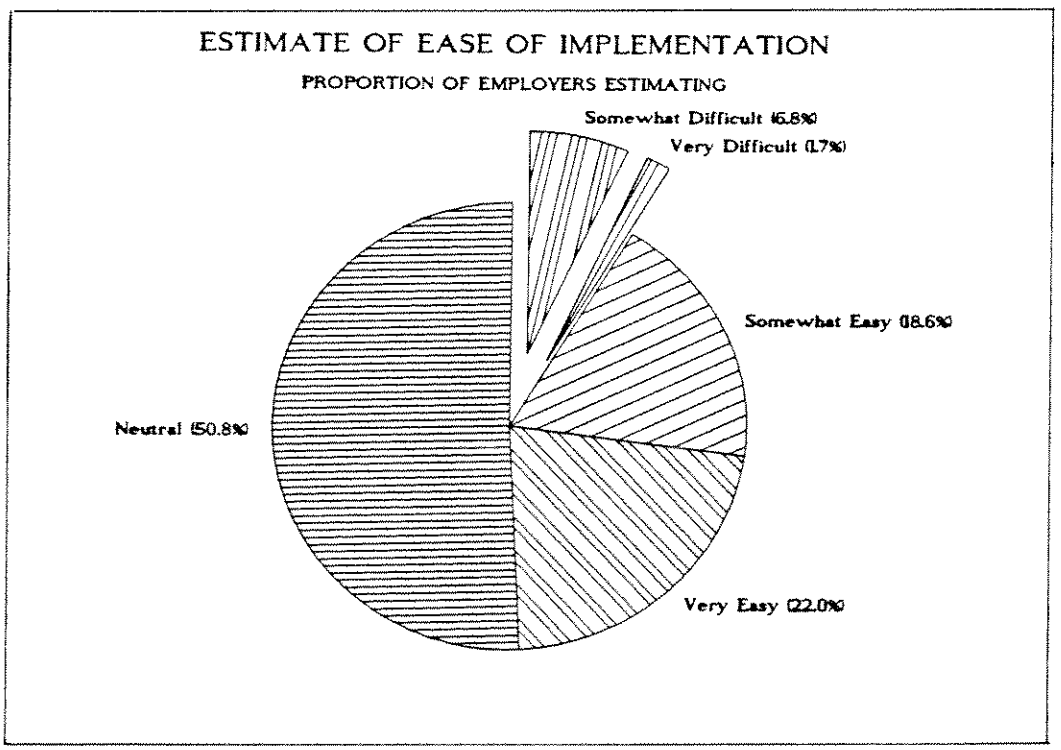


Figure 6-16



Four respondents did not answer question 7.1. Of the 74 who did, 92 percent reported having notified their employees in some way (*Figure 6-17*). Six agencies, or eight percent, reported that they did not notify employees: the Departments of Budget and Finance (B&F), Commerce and Consumer Affairs (DCCA), Education (DOE), and Hawaiian Home Lands (DHHL), the Legislative Reference Bureau, and the Kauai Liquor Control Commission. The B&F gave no explanation. The DCCA stated that:

> Our understanding is that the family leave guidelines we have received thus far are interim guidelines. We are awaiting administrative rules to be promulgated or memoranda of agreements to be negotiated. We are planning to include family leave benefits in our employee handbook which is distributed during orientation. Mention of family leave benefits is made in the Summary of Employee Benefits put out by DPS and given out to all employees. Also information about family leave is included in abinder given out to employees who attend the departmental training/orientation sessions; attendance is usually within a new employee's first six months of hire.

The DOE's response, dated September 30, 1992, remarked that "DOE procedures are currently in the consult and confer process and will be disseminated to the field upon approval."[14] The DHHL noted that a notification memo was to have been distributed one week after it responded to this survey in September, 1992. The Bureau's reason is noted earlier in this chapter. The Kauai Liquor Control Commission did not give notice but reported that all employees were made aware of the law as of August 20, 1992 when an employee began taking family leave.

As expected, those departments that either did not give notice or did so at a late date[15] reported very low employee awareness of the law as of June 30, 1992.

Public employers used a variety of methods to notify employees of their right to family leave. Overall, 35 percent used some method of notifying individual employees. Thirty percent informed section heads; 28 percent posted notices; and nine percent claimed to have used some other method including staff meetings of unspecified attendance. At times, a respondent reported using more than one method. For example, some departments did several or all of the following:

(1) Held a meeting to inform selected staff;

(2) Gave written guidelines to division, branch, or section heads with instructions to either inform their respective unit members or to circulate those guidelines to each employee;

Figure 6-17

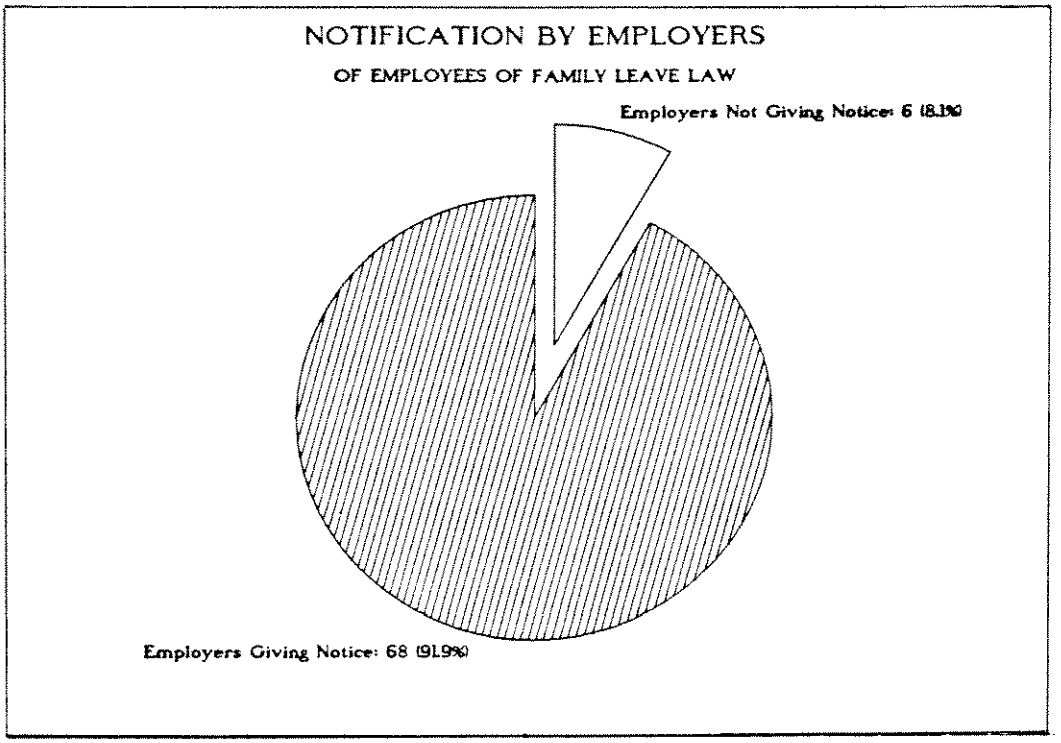
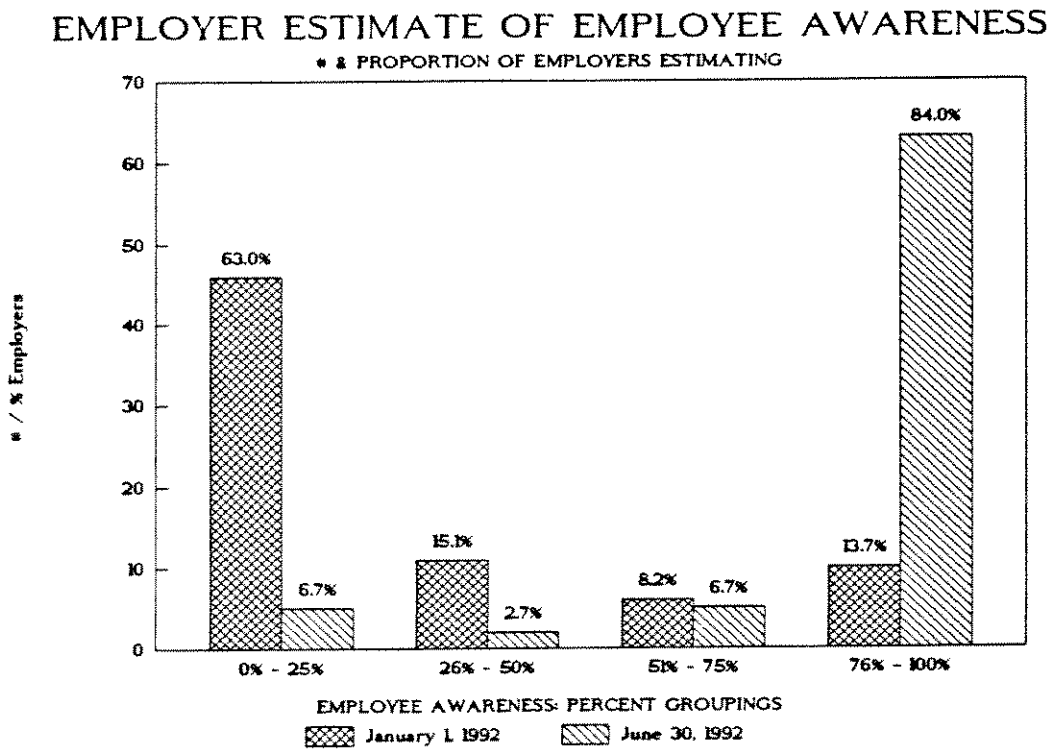


Figure 6-18



(3) Bypassed section heads and circulated written notice to each individual employee; and

(4) Posted leave guidelines.

Employers were also asked to estimate the proportion of employees who were aware of the law and their rights when the law first took effect on January 1, 1992 and six months later on June 30, 1992. (It should be remembered that the responses reflect only **employers'** estimates, which could be inflated. Except for the smallest of agencies, it is highly unlikely that employers exhaustively polled individual employees to arrive at more accurate estimates.) As expected, the proportion of employees estimated to be aware of the law rose from very low at the beginning to very high at the middle of the year. Four respondents did not answer this part of the question. Discounting these, most employers (46, or 63 percent) reported that as of January 1, 1992, no more than one-quarter of their employees were aware of the law or their rights to take family leave. See *Figure 6-18* and summary statistics in Appendix H. As of June 30, 1992, the proportion of employers reporting this estimate decreased to seven percent. Whereas at the start of the year, only 13.7 percent of employers estimated that more than three-quarters of their employees were aware of their rights, by the middle of the year, this proportion had increased to 84 percent.

From another perspective, at the time employees first became eligible to take family leave, almost four out of five employers estimated that half their employees were unaware of the law or their rights. After six months, this figure dropped to ten percent. (Some employees may have yet to be notified as of the date of this report.) This lag time as well as the number of unaware employees could have been reduced if employees were required to be notified. This has obvious implications for implementation in the private sector in 1994.

Multiple Survey Responses from Individual Departments

Three respondents submitted multiple copies of the questionnaire that were completed by their respective divisions rather than returning a consolidated report. Accordingly, the multiple responses were "averaged" for each respondent for questions 3 through 7.2. Of greatest interest are responses regarding employee notification.

First, the University of Hawaii returned 30 questionnaires from its decentralized units.[16] On the "average," the University notified its employees. Two of the 30 units reported not having notified their employees. Of the two, one reported giving notification only upon receipt of guidelines on August 25, 1992. The other offered no explanation. Both reported 0 to 25 percent of employees were aware of the law six months after the law went into effect. Two other units reported the same very low proportion, three units reported 26 to 50 percent, and one indicated 51 to 75 percent. Four units did not respond to this question. Overall, the University estimated that 51 to 75 percent of its employees were aware of their

family leave rights after six months. The various University units used a variety of methods to notify its employees.

Second, the state Department of Health submitted 13 completed questionnaires -- one consolidated for all its divisions except the Division of Community Hospitals (DCH) and 12 covering the thirteen community hospitals (Maui Memorial Hospital and Hana Medical Center shared one). All reported having notified their employees.[17] Postings took place at eight hospitals. Section heads were given written notice at six, and individual employees were notified at two hospitals. The overall estimate of the proportion of employees aware of their leave rights as of June 30, 1992 for the community hospitals is high at 51 to 75 percent.[18]

The DOH reported in its consolidated response for its other divisions that written notices were distributed to section heads, that staff meetings were held, and that a memo was circulated to staff. It reported the usual pattern of very-low-to-very-high employee awareness from the beginning to the end of the study period.

Also of note is the DCH's estimate of an overall slight decline in operational effectiveness as opposed to an estimate of "no effect" for the rest of the DOH. Three DCH units reported this slight decline while five units reported "no effect." The consolidated DOH estimate for its remaining divisions was "no effect."

Third, the Honolulu Department of Public Works (DPW) submitted separate questionnaires for its seven divisions. All seven posted notices and distributed explanatory material to employees in a newsletter. The overall estimate of employee awareness as of January 1, 1992 was low at 26 to 50 percent.[19] All seven divisions estimated that the highest proportion of employees (75 percent and above) were aware of the law as of June 30, 1992.

Employer-Employee Complaints or Controversies

Question 8.2 of the Family Leave survey asks the question:

"How would you characterize the nature of these complaints or other employer-employee controversies?

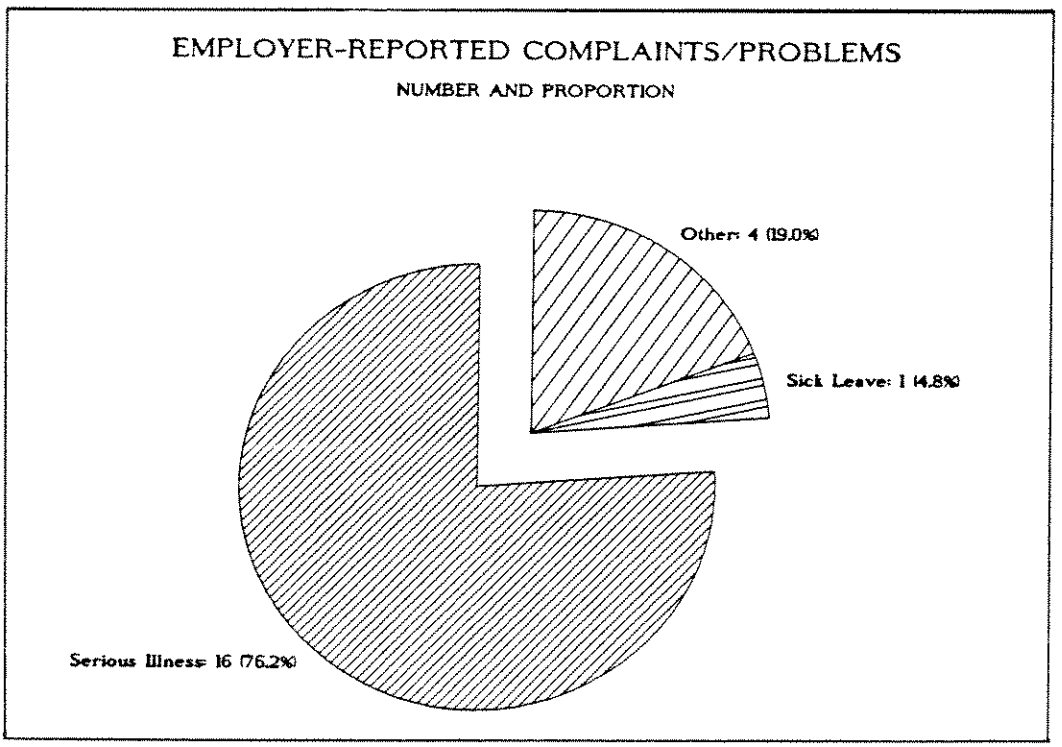
a) Interpretation of 'serious health condition'
b) Using paid sick leave for family leave purposes after taking four weeks of unpaid family leave
c) Using paid vacation leave for family leave purposes after taking four weeks of unpaid family leave
d) Other (please explain)"

Only 21 of 78 respondents (27 percent) answered this question. Of those answering, sixteen specifically cited the definition of "serious health condition" as a problem. (See

following section and Appendix J on types of injury or illness reported. See also chapter 5.) One agency suggested allowing all types of illness or injury to be eligible. Others cautioned that the vagueness of the term could lead to potential abuse.

Four respondents indicated "other" problems and one respondent reported a problem with taking sick leave. See *Figure 6-19.* Other objections included the substitution of sick leave for family leave on philosophical grounds, and that family leave is superfluous, inefficient, or detrimental to operations. One respondent asked how soon family leave for birth or adoption of a child must be taken. Another questioned the validity of a verbal rule that such leave must be taken immediately after the event. (See "Deadline for Taking Family Birth or Adoption Leave" in section II, below.) Respondents' answers, including any additional comments, are as follows:

Figure 6-19



State Executive Departments

Definition of Serious Health Condition

Departments that did not indicate any additional specific comments regarding the definition of serious health condition are:

(1) Department of Accounting and General Services;

(2) Department of Defense; and

(3) Department of Labor and Industrial Relations.

Those that included additional specific comments are:

(1) Department of Commerce and Consumer Affairs:

> "We are anticipating that the interpretation of 'serious health condition' will pose possible problems. What is considered a serious health condition; how serious is 'serious'? Will doctors spell out in their certifications that in their opinion, the illness, injury or impairment is considered to be 'acute, traumatic or life-threatening'?"

(2) Department of Human Services:

> "In addition to the two formal complaints, of which one filed an appeal, there were several disagreements/inquiries regarding 'serious health condition.' . . . Also, terms such as 'acute' or 'traumatic' are vague and can be subject to various interpretations."

(3) Department of Taxation:

> "Inquiries were received regarding mostly interpretation of "serious health conditions'."

(4) Department of Transportation:

> "While there have been no complaints a further interpretation as to what constitutes a 'serious health condition' is required. Example a spouse has diabetes that has degenerated to the point where he cannot drive -- is that a serious health condition or an inconvenience? Birth certificates and adoption papers are required but no doctor's statement regarding the serious illness of the family member is required. Because of the potential for abuse in this area a doctor's statement should be required

concerning the condition of the family member to substantiate the request."

(5) University of Hawaii:

"The Application for Family Leave form did not question the nature of the serious health condition. Therefore, the supervisor/administration has to question each applicant to determine whether or not it meets the criteria. Also, when an employee used 5 or more days of sick leave to care for a child, spouse or parent with a serious health condition, the employee is required to provide (1) medical certification and (2) evidence of family relationship. This appears to be a burden to some employees, as one employee chose to change it and use 4 days of sick leave and 1 day of vacation leave when asked to provide such documentation." [Comment from a community college.]

"I received an inquiry from someone who was with another UH department but who worked in one of our facilities, and trying to get clarification of the law was very frustrating and time consuming. I ended up calling DLIR and was told that although they were responsible for implementing the law, guidelines had not yet been developed. I was referred to DPS, and while the personnel there were very helpful and defined for me their interpretation, they reminded me that the final and binding guidelines should come from DLIR. It is not easy trying to help our employees interpret 'serious health condition.' It is not clear who provides the final interpretation within the UH and it is inappropriate for the field to make their own decisions without any guidelines from our Personnel Management Office."

Comments on Other Problems

(1) Department of Commerce and Consumer Affairs:

"Our understanding is that the family leave guidelines we have received thus far are interim guidelines. We are awaiting administrative rules to be promulgated or memoranda of agreements to be negotiated. We are planning to include family leave benefits in our employee handbook which is distributed during orientation. Mention of family leave benefits is made in the Summary of Employee Benefits put out by DPS and given out to all employees. Also information about family leave is included in a binder given out to employees who attend the departmental training/orientation sessions; attendance is usually within a new employee's first six months of hire."

(2) Department of Health:

"Prior to July 1, 1992, the[re] was no written notices to our employees other than what was provided by the Union (HGEA). Presently [September, 1992] I would say that about 75% of our employees are aware of the family leave policy." [Comment from a community hospital.]

"Employees have freedom to take vacation and LWOP [leave without pay] for various reasons, and I don't think it makes a difference that they now have family leave." [Comment from a second community hospital.]

"New leave benefit makes it more difficult for affected units to operate effectively. Some functions can be transferred to others -- most remain undone. We did not have any 'care providing' positions on such leave as call-back or other premium pay options [illegible] likely solution to replacing the missing employee. HMC employee is a care provider -- only position to provide services. RNS had to cover." [Comment from a third community hospital.]

(3) Department of Human Services:

"Eligibility of an employee who had been on emergency hire."

"It is difficult to determine the full impact on operations because the program is still new. . . . Implementation would have been easier if DLIR had issued program rules rather than leaving everything up to DPS."

(4) Department of Labor and Industrial Relations:

"Using paid sick leave for family leave purposes (birth of a child) after taking 6-8 weeks of paid sick leave w/ a doctor's certificate."

(5) University of Hawaii:

"Additional labor costs associated with filling behind employees who are on family leave need to be supported through budget increases for personal services."

State Legislature and Legislative Offices

No complaints or controversies were reported.

Office of Hawaiian Affairs

OHA did not respond to the survey.

Judiciary

No complaints or controversies were reported.

Honolulu County Executive Departments

Definition of Serious Health Condition

(1) Department of Civil Service:

"The phrase (serious health condition) is not clearly defined. DLIR needs to provide rules."

(2) Department of Community Housing and Development:

"Can I take family leave to care for my sick child from the common cold. What is the definition of acute, traumatic. If I receive a call from my child's school because of fever or vomiting can I take FL."

(3) Board of Water Supply:

"Employees want clarification as to what conditions qualify as 'serious health conditions'."

Comments on Other Problems

(1) Department of Civil Service:

"The utilization of sick leave is philosophically improper. Such leave is earned as 'insurance' for the employees sickness. Vacation leave may be properly utilized for Family Leave."

(2) Fire Department:

"The Family Leave gives the supervisor another leave, in addition to vacation, sick, military and other leaves to manage. This provision has made it difficult for the Captains to staff the daily complements necessary for public safety and fire protection."

(3) Department of Community Housing and Development:

"Is there a time limit after birth/adoption of child to FL. If FL is taken as leave without pay, is this period counted towards my years of service."

(4) Department of Land Utilization:

"The law is too vague to administer in any consistent and fair manner. City & County of Honolulu, Dept. of Civil Service came out with guidelines, but even these guidelines are not clear enough. Each department appears to be interpreting the law on their own, resulting in inconsistent application of the law. There is no central agency to monitor the application of the law. In some cases, there is serious negative impact on the operation of a branch or division due to employees taking family leave.

The requirement that family leave due to birth/adoption of a child be taken immediately following the birth/adoption; this requirement is not stated in writing; however, we were verbally informed by the Civil Service Dept. about this requirement. An employee challenged this requirement."

(5) Department of Public Works:

"1. Family leave does not lead to greater operational efficiency in City Government but, may instead, detract from efficiency. The City, by bargaining unit contract, and civil service rules, already has a very generous leave policy, 21 days of vacation leave, 21 days of sick leave, and up to 1 year of leave without pay.

2. City policy which permits the use of sick leave when the employee is ill, and permits the use of vacation or leave without pay for other personal reasons, is reasonable. The concept of family leave which permits the use of sick leave when the employee is not sick contradicts this reasonable policy.

3. In addition, it makes little sense to add on an additional 4-week family leave period to a 1 year leave without pay period, already a generous period of time.

Family leave makes sense when implemented in a work sector that has restrictive leave policy. It does not have merit in a work sector that has a generous leave policy."

Honolulu City Council

No complaints or controversies were reported.

Hawaii County Executive Departments

Definition of Serious Health Condition

(1) Office of Aging:

"Question concerning 'serious health condition' has been raised. It may be more preferable for Family Leave (sick leave) to be allowed for any type of illness (i.e., a child may have a fever or the flu which may not warrant a visit to a health care provider; but may be unable to attend school or must remain at home from the sitter's). In this case, an employee must remain at home to be with the child. The employee is certainly not on vacation nor is the employee him/herself sick. The child is 'family' and is sick. Why not allow the employee to use 'family sick leave'?"

(2) Fire Department:

"Employees placed on emergency vacation instead as illnesses were not 'serious health condition.' Whenever possible the department has always allowed employees to take emergency vacation during family emergencies." [Three leave applications were denied for: gastroenteritis, recovery from appendectomy surgery, and influenza.]

Comments on Other Problems

None were reported.

Hawaii County Council

The Hawaii County Council did not respond to the survey.

Kauai County Executive Departments

Definition of Serious Health Condition

(1) County Housing Agency:

"The leave requested [and denied] was for supervision of a child [which is not a serious health condition]."

Comments On Other Problems

(1) Liquor Control Commission:

"All employees of the department are now aware of the family leave law because one of our employees is taking family leave effective 8/20/92." [The Commission had reported employee awareness as of 6/30/92 at 26% to 50% and that employees had not been notified of the family leave provisions.]

Kauai County Council

The Kauai County Council did not respond to the survey.

Maui County Executive Departments

Definition of Serious Health Condition

(1) Department of Public Works:

"An employee . . . has refused to identify the health care provider and has also refused to allow the employer the right to verify the information contained on the [leave] form."

Comments on Other Problems

None were reported.

Maui County Council

No complaints or controversies were reported.

Nature of Serious Health Conditions

Family leave application forms do not require the nature of serious health conditions to be identified. The forms typically request only the name of the health care provider, if known, at the time of application and the probable duration of the serious health condition. Most leave forms submitted to the Bureau give no hint of the nature of the eligible illness or injury. Those applications for family care leave that voluntarily identify illnesses -- and which are decipherable -- are listed in Appendix J. (See chapter 5 for a detailed discussion of the problems surrounding the definition of "serious health condition.")

II. Problematic Aspects of the Hawaii Family Leave Law

[NOTE: With the election of President Clinton, there is a strong probability that the generally more liberal national Family and Medical Leave Bill, which has Clinton's support, will become law, perhaps in the 103rd Congress. The federal law, if passed, would preempt most of Hawaii's Family Leave Law provisions by virtue of exceeding the currently established minimum standards.

However, some current Hawaii standards are more liberal. For example, Hawaii requires only six consecutive months of employment for employee eligibility whereas the federal bill requires slightly more than half-time work for 12 months. The federal bill limits family care leave for children under age 18 or age 18 and over if incapable of self-care due to a mental or physical disability. Hawaii has no such restrictions. The federal bill prohibits taking intermittent birth or adoption leave unless both employer and employee agree otherwise. Hawaii's law allows all types of leave to be taken intermittently. The federal bill requires medical certification (and subsequent recertifications) for a serious health condition. Hawaii's law does not.[20] *The federal bill also allows an employer to require the employee to obtain a second opinion of a health care provider designated by the employer, at the employer's expense, regarding such certification. Hawaii's law does not. Hawaii's law does not deny eligibility and benefits to certain highly paid employees while the federal bill does.]*

Notwithstanding the possible enactment of a federal Family and Medical Leave Law, several aspects of Hawaii's Family Leave Law, in its current form, pose actual or potential problems. These are examined below.

Health Care Providers and Treatment

To the extent that confusion exists over what type of treatment by what health care provider satisfies the requirement for "treatment or supervision by a health care provider," application of the law may be inefficient and uneven and, thus, inequitable.

Section 398-1, *Hawaii Revised Statutes* (HRS), defines "health care provider" as ". . . a physician as defined under section 386-1" under the Workers' Compensation Law. Section 386-1, HRS, defines "health care provider" to include any person qualified by the Director of Labor and Industrial Relations to render health care and is licensed to practice medicine, dentistry, chiropractic, osteopathy, naturopathy, optometry, podiatry, and psychology. Although section 386-1 does not define "**health care**," it does define "**medical care**," to mean every type of care, treatment, surgery, and hospitalization, as the nature of the work injury requires, and includes such care rendered or furnished by a licensed or certified physician, dispensing optician, physical therapist, nurse, or masseur.

Although it may fail the definition of "serious health condition," treatment by a podiatrist for an ingrown toenail could possibly satisfy an employer regarding treatment or supervision by a health care provider. The same could possibly hold for an optometrist conducting an eye examination or a dentist filling a cavity. The point is that it is unclear whether or not this was the Legislature's original intent or whether a more restrictive intent was meant (see chapter 5).

The Purpose of Family Birth and Adoption Leave and Requiring Leave to be Taken Immediately After the Event

In Hawaii's law, the intent to protect jobs is clear. However, the underlying reasons having do to with **nurturing and bonding with the newborn or adopted child** have not been made explicit. To the extent that nonrecognition of these unspecified purposes have given rise to uncertainty and confusion, the application of the law may have been uneven and, thus, inequitable.

For example, some employers may be contravening part of the true intent and spirit, but not the letter of, the law by requiring family birth and adoption leaves to be taken **immediately after** the event (see section I, above). Section 398-3, HRS, entitles employees to family leave ". . . upon the birth of a child of the employee or the adoption of a child . . ." The law does not require the leave to be taken **beginning** at a certain time, only that leave be taken within the calendar year. Some employers may be restricting parents who wish to postpone birth or adoption leave to taking leave immediately after the event while other employers may not be.

This is not to say that such leave cannot be taken intermittently. Both the law and the DPS guidelines (section 398-3(b), HRS, and Part III, paragraph E, as amended on June 18, 1992, respectively) specifically provide for intermittent leave. The question is whether or not an employee should be required to **begin** leave, intermittent or not, immediately after the event.

In the body of literature on family leave, the purposes of granting family birth leave are clear. One of these is to allow both parents **to care for, nurture, and bond with the natural born or adopted child**. Family birth leave is also meant to **provide support, at a critical time, to the family into which the child has been born or adopted**. With regard to birth leave, the federal Family and Medical Leave bill explains:

> It is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing . . . . It is the purpose of this Act . . . to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. . . .

Why do some employers feel family birth leave should be taken immediately after birth? A look at past practice may help. Before Hawaii's leave law, most biological mothers began taking maternity leave (paid sick or vacation leave or leave without pay) before birth and continue it **immediately after birth**. The medically recommended minimum period for physical recuperation after normal pregnancy and childbirth is six weeks, increasing to eight weeks for women who deliver by Caesarean section.[21] (Twenty-four weeks has been recommended as the minimum for parent-child bonding.)[22] Some mothers became physically incapacitated for a longer period as a result of abnormal pregnancy or complications of childbirth. Most mothers **remained at home beginning immediately after childbirth** both to physically recover and to care for the newborn.

Unfortunately, the two concepts of disability or recovery from childbirth, and nurturing the infant have at times been viewed as one if only because they occur at the same time. It is, therefore, understandable that employers may be reluctant to grant leave if one of these two concepts no longer seem to apply.

For example, an employer may not wish to grant family birth leave to a mother who has returned to work but wants to care for an infant some time after birth. However, family birth leave is not meant to be interchangeable with either disability or maternity leave. No longer qualifying for disability or maternity leave, according to either written or informal rules, should be no reason to deny or restrict the timing of taking family birth leave.

Furthermore, family birth leave is also meant for fathers. Why, then, should a biological father -- whose ability to remain at work is never at issue -- be required to take

family leave only immediately after birth? Similarly, adoptive parents are neither physically incapacitated nor need to recover due to the adoption. Why should nurturing be limited to the four weeks immediately after the date of adoption?

No one believes that caring for, nurturing, and bonding with natural born or adopted children stops four weeks after the birth or adoption or when the employee can return to work. The law can be clarified by specifying that birth or adoption leave need not be taken immediately after the event (but see following section).

Non-Cumulative Leaves Within a Calendar Year

An unfair situation exists for employees who, by force of circumstance, cannot use up all their entitled leave after having begun taking it because there are an insufficient number of working days left in the calendar year. In other words, not all employees may be entitled to a full four weeks of family leave in each calendar year.

Section 398-3(a), HRS, entitles eligible employees ". . . a total of four weeks of family leave during any calendar year upon the birth of a child of the employee or the adoption of a child, or to care for the employee's child, spouse, or parent with a serious health condition." Section 398-3(c) requires that "Leave shall not be cumulative." That is, if the four weeks of leave not are not used, they are lost and cannot be accumulated for use in subsequent years. For example, one cannot "save" four weeks of family birth leave and carry them forward to a subsequent year in order to take off more than four weeks in that year.

However, what if a child is born or adopted, or a seriously ill or injured family member requires care with less than four weeks left in the calendar year? Consider the extreme case of an employee who has not taken any family leave since January 1, but who must begin caring for a parent on December 31. This employee can take only one day of family leave before the calendar year expires. Nineteen leave days are lost.

If care must be continued into the second calendar year, the employee would have available a new 20-day entitlement. However, because of purely coincidental timing, this employee would have been limited to a total of 21 and not 40 days over two calendar years. A luckier, or more astute, employee who took leave early enough in the first calendar year to consume all 20 days would have another full 20-day complement in the second year.

The non-cumulative leave provision can be modified to rectify this inequity for employees who begin a leave at a point in a calendar year when there is insufficient leave time remaining to accommodate the entire leave. The unusable portion should be carried over to the subsequent year, leaving the second year's 20-day entitlement intact. However, carry-over of unused leave should be allowed only if the length of the unused portion exceeds

the amount of leave time remaining in a calendar year and the unused leave, intermittent or not, had actually begun with insufficient leave time remaining.

Inconsistent Definitions of Employee and Employer

Section 398-1, HRS, defines "employee" as ". . . a person who performs services for hire for not fewer than six consecutive months. . . ." The same section defines "employer" as one ". . . who employs one hundred or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year." (Emphasis added)

The issue of employee eligibility could be a contentious issue between employers and employees. First, it is not clear whether **temporary** employees who accumulate six consecutive months of work over a calendar year are eligible. Second, it is not clear whether **part-time** employees are eligible. If so, was it the Legislature's intent for part-time employees to earn eligibility after putting in relatively less time in six months than full-time employees? For example, would a part-time employee become eligible after having worked 2.5 days per week for six consecutive months? To delay employee eligibility, an employer could argue that eligibility begins only after work amounting to six full months has been done. On the other hand, to hasten employee eligibility, an employee could argue that part-time work for six months is sufficient.

Appeal to the twenty or more calendar weeks in the definition of "**employer**" to resolve the issue of **employee** eligibility is irrelevant. The twenty weeks **qualifies an employer** for coverage. They **do not serve as a standard for employee eligibility.**

However, the issue of part-timers working twenty weeks also makes **employer coverage** problematic. If part-time employees can become eligible with at least .5 full-time equivalency (FTE) as in the DPS's guidelines,[23] then all those with less than .5 FTE would not qualify as "employees." Applied to the private sector where it makes more sense, an employer could have 110 employees of which 20 are less than half-time. That employer could argue the company is not covered because only 90 workers who work at least half-time would qualify as "employees." As a result, the company would fall below the 100-employee threshold and escape coverage under the law. Employers with a marginal number of employees would not find it difficult to persuade enough to work a few hours less to be disqualified from eligibility and thus exempt the company from coverage. What if an employer employs 200 workers of which 190 **work only part-time at less than .5 FTE?**

If part-time employees can be eligible, it would not make sense to exclude them in calculating employer coverage. However, employers with **all or a large number of at least .5 FTE part-time employees** would be covered as long they worked for the six months. This may result in a greater number of covered employers and eligible employees than if only full-time work is considered.

The DPS interim guidelines of February 19, 1992 go beyond the statutory definition of employee by including those ". . . with at least 50% full-time equivalency (FTE) . . . ."[24] On the other hand, the DPS guidelines exclude emergency hires whose appointments are terminated every thirty days or less (see Appendix G). However, many public sector emergency hires have been working continuously for the same employer for lengthy periods, some for years, albeit with technical breaks in service every thirty days.

It does not appear that the DPS has the authority to include part-time workers or to exclude emergency hires in the public sector. The Legislature needs to further clarify which employers should be covered and which employees should be eligible by clarifying separately the definitions of employer and employee.

Control Over Substitution of Accrued Paid Leaves

To the extent that it is unclear who can substitute accrued paid leave for unpaid family leave when employee and employer disagree, efficiency and equity suffer. Section 398-4, HRS, allows substituting accrued paid leaves for any part of the four-week family leave period by either the "employee or employer." What if one wants to substitute but the other does not? Some employers may always defer to employees who wish to substitute. Other employers may insist on deciding whether leaves can be substituted. To the extent that this occurs, application of the law may be uneven and, thus, inequitable. To the extent that doubt exists over who has control over substitution, implementation would become less efficient.

In some jurisdictions, employees are explicitly given the right to substitute. Vermont allows only the employee to substitute accrued sick or vacation leave provided that the substitution of vacation leave does not extend the family leave.[25] In Wisconsin, "An employee may substitute, for portions of family leave, paid or unpaid leave of any other type provided by the employer."[26] In the District of Columbia, the employee is allowed to substitute accrued paid leave for unpaid family leave.[27] This protects employees who need to take lengthy leave from being forced to go unpaid.

Although employees prefer getting paid, leave-takers who have not accrued sufficient paid leave but are forced by their employers to substitute suffer because their leaves would be cut short. Section 398-4, HRS, allows substitution. However, the law can be clarified by specifically ensuring employees' right to substitute and by prohibiting employers from forcing that substitution.

The law could also be clarified and remain facially neutral by allowing employers to force substitution. However, this would not eliminate problems concerning consistency because, in reality, some employers would force substitution while others would not.

Continued Payment of Employer Insurance Premiums

To the extent that employers continue to pay their share of health insurance premiums of leave-takers who take advantage by quitting after taking leave, the law may be abused.

The effect of section 398-7(c), HRS, is to prevent health coverage and premiums (among other things) from being affected by the Family Leave Law during the period of leave. Normally, if the leave-taker substitutes paid vacation or sick leave, the employer's share of the health insurance premium continues to be paid. The leave-taker's share usually continues to be paid by way of a payroll deduction. However, if family leave is unpaid, it is up to the leave-taker to elect whether or not to continue coverage and to continue paying the employer's share.

In the case of **unpaid** family leave, the effect of potential abuse by a leave-taker who intends to quit after taking leave is minimized. To keep health coverage in effect, the leave-taker must pay part of the premium during leave. The only part that is "lost" is the employer's share paid during leave. The intent of the law is circumvented when a leave-taker benefits from a law that guarantees a job to which the leave-taker has no intention of returning.

The Legislature may wish to consider whether or not to require the leave-taker to pay in advance the employer's share of the premium for the duration of the leave, reimbursable upon return to work. Alternatively, a leave-taker may be required to deposit the amount of the premium into an escrow account. One may argue that these requirements are too onerous for leave-takers. However, just how onerous a requirement needs to be in order to prevent abuse is a matter of policy to be decided by the Legislature.

No Requirement for Employers to Notify Employees of Leave Rights

Hawaii's statute does not require employees to be notified nor does it require employers to notify their employees. To the extent that not all employees are aware of the law, there is inefficiency, or slack, in the system and leave benefits will be distributed unevenly and, thus, inequitably. Employees cannot take family leave if they do not know it is available. The data show that not all public employees are aware -- even now -- of Hawaii's Family Leave Law. At least ten percent of public agencies estimated that up to half their employees were not aware of the Family Leave Law as of June 30, 1992.

The more employees are aware of family leave benefits, the more effective the law will be. Vermont, Wisconsin, Rhode Island, Oregon, New Jersey, and Georgia require employers to notify their employees of the leave law and related complaint and appeals procedures. Oregon requires the enforcing agency to post notices. Vermont, Wisconsin, and Rhode Island

require that notices to be posted must be on forms approved by the enforcing agency.[28] Several states also provide a maximum $100 civil fine for violation of the posting requirement.

The party best suited to notify an employee is the employer. After all, taking leave is an event that occurs within each company's particular employment situation between employee and employer which may involve other types of leave. Each employer should know best how the law's requirements mesh with the company's own personnel and leave policies.

More public sector employees are becoming aware of the leave law as time passes. However, it would be both prudent and farsighted to require **private** employers to notify their employees in advance of 1994 when the law becomes effective for the private sector.

Inadequate Prior Notice to Employers

First, to the extent that it is neither reasonable nor practicable to provide prior notice for most instances of leave for serious health conditions, a requirement to do so may detract from efficient implementation of the law. However, it is unlikely that inequity occurred due to employers denying leaves because of inadequate notice by employees.

Section 398-5, HRS, requires the leave-taker to give the employer ". . . prior notice of the expected birth or adoption or serious health condition in a manner that is reasonable and practicable." However, serious health conditions are often unexpected, making it impractical to give prior notice. In the Legislature's own words:

> It is expected that such acute health conditions will have come on suddenly and be of short duration.[29]

Confusion Over Implementing Authority

To the extent that confusion exists over the validity of interim DPS guidelines in view of the continued absence of administrative rules, application of the law may be inefficient and uneven and, thus, inequitable. To dispel confusion over implementation and to strengthen enforcement, the law can be modified to specifically require the DLIR to adopt administrative rules pursuant to chapter 91, HRS.

Because the law affected public employees first, the DPS, understandably, became involved by issuing interim guidelines dated February 19, 1992 and amended on June 18, 1992 (see Appendix G). The respective county personnel or civil service departments adopted the DPS guidelines, some with very slight modifications. In turn, the county councils (at least those of Honolulu and Maui which responded to the survey) adopted their respective executive department guidelines.

The law grants the DLIR certain specific powers. However, given the absence of administrative rules and the issuance of guidelines for public employees by the DPS, some public employers have been unsure about who the responsible authority is. Confusion could have been minimized if administrative rules had been adopted at an early date.

Inadequate Complaint and Resolution Procedure

To the extent that individuals may not have the same recourse as persons belonging to a class, application of the law may be inequitable. To the extent that it is not clear what redress or recourse is available, if any, to either individuals or a class of persons, application of the law may be inefficient. To the extent that the complaint and resolution procedures are undefined, implementation of the law may be inefficient.

Section 398-9, HRS, grants the Director of Labor and Industrial Relations jurisdiction over certain prohibited acts. For example, the law allows the Attorney General or the Director to file a complaint **on behalf of a class**. Such a complaint can be investigated, conciliated, heard, and litigated on a class action basis. However, it appears the only recourse for an aggrieved **individual** is to file a "verified complaint" with the Director. The law does not appear to provide the same protections for **individuals** as it does when complaints are heard on a **class action** basis.

The law empowers the DLIR to litigate through the courts. However, it is also empowered to hear complaints, investigate, and conciliate. Nonetheless, it is unclear what the extent of its investigatory and conciliatory powers are in resolving complaints. It is further unclear what redress or compensatory actions, if any, the Department can take. If there are none, it is not clear whether the DLIR has any meaningful power to resolve complaints. Aside from redress and compensation to handle complaints, the law does not provide penalties, fines, or administrative sanctions for the commission of prohibited acts.

Finally, aside from **substantive powers**, it is not clear exactly what constitutes the various steps in the complaint and resolution **processes**. These can be provided for either by detailed amendment of the law itself or through administrative rules.

Assisting Private Employers to Train and Place Temporaries

As part of the DLIR's responsibilities, the Director is required by section 398-9(c) to ". . . assist employers in the training and placement of temporary help to perform the work of those employees on family leave." Requiring the DLIR to assist **private sector** employers to train and place temporaries for leave-takers is a policy decision. Whatever the policy justification, this task may prove fiscally overwhelming given the State's restricted current and

foreseeable financial resources and the range of job positions and skills for which temporaries may have to be trained.

The DLIR may be able to handle requests from public employers. Experience in other states has shown that hiring temporary replacements is a seldom-chosen option. Nonetheless, because the DLIR is mandated to aid private as well as public employers for free, more private employers may be encouraged to choose the more costly option of hiring temporary replacements.

In addition, because only employers of 100 or more employees are affected, it appears that the law may operate inequitably by not assisting smaller employers who nevertheless incur the same costs of leave-taking.

III. Respective Responsibilities of the Director of Labor and Industrial Relations and the Director of Taxation

Section 3 of Act 328, Session Laws of Hawaii 1991, requires this study to include the ". . . respective responsibilities that would result from this Act for the director of labor and *industrial relations and the director of taxation*. . . ."

Act 328 places no requirements on the Director of Taxation. However, the Director of Taxation's views were sought (Appendix N) regarding the concept of a tax credit for employers and the Director's potential responsibilities were such a tax credit to become law in the future. The Director's response is attached as Appendix O. The Director's views are summarized as follows:

(1) The Department is opposed to the enactment of an income tax credit for employers providing family leave.

(2) The Department does not perceive any relationship between family leave and income taxes, however meritorious the provision of family leave as an employment benefit may be.

(3) The enactment of an income tax credit for employers already required by statute to provide family leave does not represent sound tax policy. Using the tax system to reward employers for performing a legally mandated duty is not well thought out.

(4) A tax credit would result in a double tax benefit for employers because the costs of family leave (salaries and benefits) are already allowable as a business deduction which reduces their federal and state income taxes. If family leave is

unpaid, the employer incurs no cost for which the employer cannot justify a tax credit.

(5) An employers' tax credit would also increase the administrative and compliance burden of the Department, requiring modification of the the computerized net income tax system, additional auditing of tax returns for tax credit claimants, and further complicating state tax forms.

(6) The proposed tax credit would also decrease revenues to the general fund at a time of an apparent overall downturn in the economy.

The role and responsibilities of the Director of Labor and Industrial Relations are defined in section 398-9, HRS:

> **§398-9 Enforcement and administration.** (a) The director shall have jurisdiction over those prohibited acts made unlawful by this chapter. Any individual claiming to be aggrieved may file with the director a verified complaint in writing that shall state the name and address of the employer alleged to have committed the unlawful act complained of, set forth the particulars thereof, and contain other information as may be required by the director. The attorney general, or the director upon the director's initiative, may, in like manner, make and file a complaint.
>
> (b) A complaint may be filed on behalf of a class by the attorney general or the director, and a complaint so filed may be investigated, conciliated, heard, and litigated on a class action basis.
>
> (c) The director shall assist employers in the training and placement of temporary help to perform the work of those employees on family leave.
>
> (d) The director may also hire, subject to chapters 76 and 77, assistants and clerical, stenographic, and other help as may be necessary to administer and enforce this chapter.

The Director of Labor and Industrial Relations was asked to comment on the Director's statutory responsibilities (see Appendix L).

Furthermore, the Bureau requested the Department's position regarding final authority for implementing the law and the Department's plan and timetable for improving statewide implementation for both the public and private sectors. The Director's response is attached as Appendix M.

The Director's response is summarized as follows:

(1) The Director has overall jurisdiction over enforcement and administration of the Family Leave Law and has designated the Department's Enforcement Division as the lead division for enforcement and administration.

(2) The Department has developed forms and internal procedures to handle the complaint filing process and plans to adopt corresponding administrative rules.

(3) The Department foresees problems in assisting private employers to train and place temporaries for leave-takers and fears that without additional funding, these services will be limited.

(4) The Department believes that more specific language is needed to address remedies, penalties, and procedures regarding complaint filing, investigation, hearing, and litigation. The Department also wishes to protect employers by according them the right to the appeal and hearing process and suggests imposing a time limit for filing complaints. The Department is in the process of preparing proposed legislation for the 1993 session to address these issues.

(5) The Department emphasizes that the Director has the final authority and responsibility for interpreting the law and establishing appropriate administrative rules. The Department plans to submit proposed legislation to amend the law to grant the director the authority to adopt such rules.

(6) The Department acknowledges that public sector employers face a common difficulty in developing or revising policies to comply with the law. The Department has made its services available to employers and employees when conflicts have arisen between interpretation of the law and employers' policies. The Department intends to work closely with all employers to identify and resolve common issues and to ensure consistent interpretation of the law.

(7) In addition to rulemaking, the Department intends to embark on a statewide education program to ensure awareness of and compliance with the law but cautions that progress depends greatly upon future budget and legislative considerations.

ENDNOTES

1. Warren Iwasa, Parental or Family Leave in Hawaii (Honolulu: Legislative Reference Bureau), Report No. 3, 1989, chapter 5.

2. The 1985 survey also surveyed a random five percent sample of employers with fewer than 250 employees.

3. Iwasa, pp. 28 and 29.

4. Ibid., pp. 31 and 32.

5. Ibid., p. 32.

6. Telephone interview with DPS staff, August 5, 1992.

7. Telephone interview with Ed Jim, Personnel Specialist, Office of Personnel Services, Department of Education, October 13, 1992.

8. The Department of Parks and Recreation returned a questionnaire but did not include data for hours of leave taken, when leaves were taken, the sex of the employee, and the types of leaves taken by sex of employee. Therefore, the response was treated as a "no response" when no further data were forthcoming.

9. Some applications that were dated after June 30, 1992 were included in the report if most or all of the leave was actually taken before June 30, 1992. Some agency responses contained discrepancies between the reported number of leaves in Question 1 of the questionnaire and the actual number of leave forms submitted. Other discrepancies arose as a consequence of disqualified applications. In these situations, the actual forms received, less the disqualified applications, were used. With regard to applications that were denied, not all departments reported the sex of those applicants. This accounts for the slight discrepancies between the total number of leave requests received, the total number of leaves by type, and the sum of male and female leave requesters.

10. Connecticut studies: 1989-1990, p. 1; 1990-1991, p. 2. Connecticut's family and medical leave law also allows for medical leave for the employee's own illness. In both 1989-1990 and 1990-1991, this type of leave accounted for 46 percent of all leaves.

11. Again, calculated without data from the DOE, and accounting for about two-thirds of all reported leaves.

12. The Department of the Attorney General granted 46 leaves for 135 days and reported that work was left undone.

13. Honolulu's Department of Housing and Community Development reported the sole instance of deterioration in employee morale. The DHCD also commented that many questions were received from staff regarding a wider application of family care leave and the definition of serious health condition. It also fielded questions regarding deadlines for taking family birth leave and accumulation of years of service during family leave. It is possible that confusion over rules and the application of the law could have contributed to the employer's estimate of worsening employee morale.

14. Despite the lack of notice, the DOE still accounted for a third of all family leaves taken in the public sector for the period under study.

15. Several employers reported not giving notice until the period from February through April, 1992, claiming that leave guidelines from their respective personnel offices had either not been issued or not received until then.

16. Of the 30, 4 did not identify their office of origin, 2 were from the School of Architecture, and 6 were from the Office of Planning and Policy (Institutional Research, Management Systems, Information Technology, and Planning and Policy).

17. One hospital declined to answer "yes" to this question because it questioned whether it had notified "all" of its employees. It was decided to give the benefit of the doubt and register the response as a "yes."

18. Five estimated 75 percent and above, three estimated 51 to 75 percent, 2 estimated 26 to 50 percent, and 2 estimated 25 percent and below.

19. Three divisions estimated 25 percent and below, 2 estimated 26 to 50 percent, and 2 estimated 75 percent and above.

20. In contrast, the federal bill does not require certification for birth or adoption while Hawaii's law does.

21. James T. Bond, Ellen Galinsky, Michele Lord, Graham L. Staines, and Karen R. Brown, Beyond the Parental Leave Debate: The Impact of Laws in Four States (New York: Families and Work Institute, 1991), p. 30.

22. Recommendation by Dr. Edward Zigler of the Bush Center for Child Development and Social Policy, Yale University, in Sementilli-Dann et al. (unpaginated).

23. State of Hawaii Family Leave Guidelines For Employees of the Executive Branch, February 19, 1992, section III. B. 1.

24. The federal Family and Medical Leave Bill requires an employee to have worked at least 1,250 hours in the preceding 12 months to be eligible. This works out to about 24 hours per week for each of 52 weeks, or about 60 percent of a full 40-hour working week.

25. Vt. Stat. Ann., tit. 21, sec. 472(b).

26. Wis. Stat. Ann., sec. 103.10(5)(b).

27. D.C. Code Ann., sec. 36-1302(e)(2).

28. See Vt. Stat. Ann., tit. 21, sec. 472(d); Wis. Stat. Ann., sec. 103.10(14)(a); R.I. Gen. Laws, sec. 28-48-10; Or. Rev. Stat., sec. 659.560-570; N.J. Stat. Ann., sec. 34:11B-6; Ga. Code Ann., sec. 89-2506.

29. Conference Committee Report No. 123 relating to S.B. No. 818, S.D. 1, H.D. 2, C.D. 1, dated April 23, 1991, p. 3.

Chapter 7

RECOMMENDATIONS

Recommendations for Amending Hawaii's Family Leave Law

Relating to Serious Health Conditions

First, the Legislature should decide whether it intended family leave to be used for acute health conditions such as influenza, measles, ear infections and childhood diseases. If so, the current definition of "serious health condition" accomplishes this. At the least, it seems that family leave is justifiable to care for sick children who are unable to attend child care or school and thus require home care. Therefore, if the Legislature decides to limit family leave for acute health conditions in adults but continue to allow it in the case of acutely sick children requiring home care, it could still accomplish this using several options:

(1) The Legislature could amend the definition of "serious health condition" by deleting the word "acute" and by including specifically the "illness of a child of an employee requiring home care," similar to Oregon's family leave law; or

(2) The Legislature could delete the word "acute" from the definition of serious health condition and adopt guidelines for family leave for the care of sick children similar to those governing Washington's family care law. These could include:

(a) Any medical condition requiring medication that the child cannot self-administer;

(b) Any medical or mental health condition that would endanger the child's safety or recovery without the presence of a parent or guardian; or

(c) Any condition warranting preventive health care such as physical, dental, optical, or immunization services that a parent must be present to authorize and that use of the employee's sick leave would be appropriate for if the preventive care were for the employee.

Second, the Legislature should seriously consider whether it intended to exclude chronic medical conditions, such as cancer, leukemia, heart disease, structural abnormalities, Alzheimer's, etc., from coverage under the family leave law. If the Legislature intends to cover such conditions, the definition of "serious health condition" needs to be amended. Health care providers suggested a number of phrases to accomplish this, including:

(1) "Chronic conditions requiring constant or intermittent care";

(2) "Chronic conditions";

(3) "Acute exacerbation of chronic conditions"; and

(4) "Acute episodes or early phases of chronic diseases or degenerative disorders."

If the Legislature is concerned that a reference to "chronic health conditions is too broad, it could choose either the third or fourth suggested phrase, or a variation thereon, as a limiting measure. The Bureau prefers the fourth phrase because it best describes the period when family leave might be necessary to care for a family member with a chronic medical condition.

Third, the Legislature should clarify whether it intends to cover mental as well as physical conditions. If so, the definition of "serious health condition" should be amended to specifically include "mental" conditions.

Fourth, the Legislature should leave the determination of when a serious health condition exists up to the patient's health care provider. To assist the health care provider in determining whether a condition is serious for purposes of triggering family leave, the Legislature should consider adopting a guideline for the health care provider, such as:

(1) Refusal for family leave in the particular instance will result in serious consequences for the patient or the patient's family; or

(2) The patient's health condition is such that it warrants the participation of a family member to provide care during the period of treatment or supervision.

Fifth, to allow an employer to verify the existence of a serious health condition, the Legislature should amend the law to authorize an employer to require that an employee requesting family leave submit certification by the treating health care provider. Because of concerns for confidentiality of patient information, the certification should be limited to only the minimal amount of information necessary to justify family leave. For example, the certification could be limited to the following:

(1) The date the health condition commenced;

(2) An estimate of its probable duration;

(3) An estimate of the amount of leave time the health care provider believes the employee needs off to care for the family member; and

(4) A statement that either:

(a) Refusal of leave will result in serious consequences to the patient or to the family; or

(b) The patient's condition warrants the participation of the employee to provide care during a period of patient's treatment or supervision.

Re-definition of *Health Care Provider* and Treatment or Supervision Given

Depending on whether the Legislature amends the law to redefine "serious health condition," (see above) the definition of "health care provider" and the scope of treatment or supervision given by these providers may also have to be redefined. Depending on whether these terms are redefined to be more generous or restrictive for the employee, the law may also need to be amended to include or exclude certain types of treatment or supervision.

Not Requiring Immediate Family Birth or Adoption Leave

The law should be amended to specify that birth or adoption leave need not be taken immediately after the event. (Some states set arbitrary deadlines. For example, North Dakota grants birth and adoption leave as long as they are taken with 16 weeks of the event; in Georgia, it is six months.)[1] An example of how Hawaii's law could be amended is presented in the subsequent section which incorporates an amendment regarding the cumulative nature of family leave under certain circumstances.

Exception to Non-Cumulative Leaves Within a Calendar Year

The law should be amended to allow the carry-over of leave into the subsequent year under certain circumstances. The unusable portion should be carried over to the subsequent year, leaving the second year's 20-day entitlement intact. However, carry-over of unused leave should be allowed only if the length of the unused portion exceeds the amount of leave time remaining in a calendar year and the unused leave had actually begun with insufficient leave time remaining. The sample amendment below also incorporates an amendment to subsection (b) prohibiting employers from requiring birth and adoption leave to begin immediately after the event:

> **§398-3 Family leave requirement.** (a) An employee shall be entitled to take a total of four weeks of family leave during any calendar year [upon] for the birth or adoption of a child of the employee [or the adoption of a child], or to care for the employee's child, spouse, or parent with a serious health condition.
>
> (b) During each calendar year, the leave may be taken intermittently[.]; provided that leave taken for the birth or adoption of a child shall not be required to commence immediately

after the birth or adoption and that the leave shall be taken in accordance with subsection (c).

(c) Leave shall not be cumulative[.]; except that if a portion of an employee's leave entitlement cannot be used within the calendar year due to an insufficient amount of leave time remaining in the calendar year when the leave commences, the unused portion may be carried over to the subsequent year without deducting from the subsequent calendar year's full leave entitlement. The unused remaining portion of leave may be carried over only if the length of the unused portion actually exceeds the amount of available leave time remaining in the first calendar year and the leave had actually commenced with insufficient leave time remaining. Leave once carried over shall thereafter not be cumulative under any circumstances. An employee may not carry over leave twice in three consecutive years.

(d) If unpaid leave under this chapter conflicts with the unreduced compensation requirement for exempt employees under the federal Fair Labor Standards Act, an employer may require the employee to make up the leave within the same pay period.

(e) Nothing in this chapter shall entitle an employee to more than a total of four weeks of leave in any twelve-month period[.] except as provided in subsection (c).

Re-defining Employee and Employer

The legislature should clarify the parameters for **employee eligibility** and **employer coverage**. These are:

(1) Should **part-time** employees be eligible? If so, they should be explicitly included and "part-time" work should be defined for both the public and private sectors?

(2) Can the six months required for **employee eligibility** be satisfied by part-time work or must the work be full-time?

(3) If part-time work can be used to satisfy employee eligibility, should part-timers also work six calendar months or should they be required to work the equivalent of six months of full-time work, that is, twelve months of part-time work?

(4) Can the twenty weeks required for **employer coverage** be satisfied by part-time work or must the work be full-time?

(5) If part-time work can be used to satisfy employer coverage, should the condition of having hired employees for twenty or more calendar weeks in a calendar year apply to part-time as well as full-time employees? If so, should

part-timers be required to have worked the equivalent of twenty weeks of full-time work, that is, forty weeks of part-time work?

Employee Control Over Substitution of Accrued Paid Leaves

The law should be amended to specifically prohibit employers from requiring accrued paid leave to be substituted for unpaid family leave. At the same time, the law should be clarified to allow the employee to unilaterally decide to substitute accrued paid leave for unpaid family leave, for example:

> [[]§398-4[]] **Unpaid leave permitted; relationship to paid leave.** Pursuant to section 398-3, an employee shall be entitled to four weeks of family leave. The family leave shall consist of unpaid or paid leave or a combination of paid and unpaid leave. If an employer provides paid family leave for fewer than four weeks, the additional period of leave added to attain the four-week total may be unpaid. Further, an employee [or employer] may elect to substitute any of the employee's accrued paid leaves such as sick, vacation, personal, or family leave for any part of the four-week period. However, an employer shall not require an employee to substitute any of the employee's accrued paid leaves for any portion of family leave.

Requiring Leave-Takers to Pay Employer's Share of Health Insurance Premiums in Advance -- Reimbursable Upon Return to Work

The Legislature may wish to consider allowing the employer to require a leave-taker to pay the employer in advance the **employer's** share of health insurance premium to maintain coverage for the duration of the leave. The employer's share of the premium would be returned to the employee within a certain time after the employee's return to work.

If leave taken is paid, the employee need only pay the **employer's** share in advance because the **employee's** share is normally paid through a payroll deduction. For unpaid leave, if the employee wishes to continue coverage, the employee must pay the employee's own share first. If the employee does **not** wish to continue coverage, or does not pay the employee's own share, then coverage discontinues and the employee need not pay the employer's share.

If the employee does not abuse the law by quitting, both employer and employee continue to pay their fair shares of the cost of health insurance. If the employee quits after taking advantage of health coverage during leave, the employee may be made to assume the employer's cost for health insurance. For example:

> §398- **Advance payment of health insurance premiums by employee; reimbursed upon return to work.** (a) Prior to the

commencement of family leave, the employer may require the employee to pay to the employer a sum equal to the employer's share of the premium required to maintain the employee's health insurance benefits in force during the period of family leave.

(b) The employer shall use any payment made by the employee to maintain the employee's health insurance benefits in force during the period of family leave.

(c) Within ten days following the employee's return to employment, the employer shall return the amount of the payment to the employee.

An alternative would exempt employers entirely from paying the cost of any health insurance or health costs during the period of leave.[2]

Requiring Employers to Notify Employees of Family Leave Rights

The law should be amended to require all covered employers to notify their employees of their family leave rights. All covered employers should be required to give written notice to their employees. Although most public employers have already given notice, they should not be exempt from this requirement.

§398- **Notice to employees; civil penalty.** (a) The employer shall post in one or more conspicuous places where notices to employees are customarily posted, a notice in a form approved by the director setting forth the employee's rights under this chapter.

(b) Any employer who violates this section shall be subject to a civil penalty of not more than $100 for each offense. Each day during which the violation persists shall be considered a separate offense.

Inadequate Prior Notice to Employers No Cause for Denial of Leave

The law should specify that, although intending leave-takers are required to give notice to their employers that is reasonable and practicable, leave cannot be denied if notice is deemed inadequate, for example:

[[]§398-5[]] **Notice.** In any case in which the necessity for family leave is foreseeable, the employee shall provide the employer with prior notice of the expected birth or adoption or serious health condition in a manner that is reasonable and practicable[.]; provided that notice that is deemed by the employer to be unreasonable or inadequate shall not be grounds for denial of leave.

Clarifying Implementing Authority by Requiring the DLIR to Adopt Administrative Rules

To dispel confusion over which agency is the ultimate implementing authority, the law should be amended to specifically allow the DLIR to adopt administrative rules pursuant to chapter 91, Hawaii Revised Statutes (the Hawaii Administrative Procedure Act).

> §398- Rules. The director may adopt rules pursuant to chapter 91 to carry out the purposes of this chapter.

Strengthening Complaint and Resolution Procedures

The law should be amended to clarify the protections afforded to all parties involved either by amending the statute or through the adoption of administrative rules.

The DLIR has informed the Bureau that it is already in the process of preparing proposed legislation to address the Department's concerns regarding remedies, penalties, and adequate complaint filing, investigation, hearing, and litigation procedures. It has already developed forms and internal procedures on the complaint filing process. The Department has experience in complaint filing, conduct of hearings and appeals, investigation, including the issuing of subpoenas, and resolution of complaints through conciliation, mediation, persuasion, administrative order, or litigation. In view of this, the DLIR already appears to be implementing this study's recommendation to flesh out the procedural aspects of the law that serve to solidify the protections afforded to all parties.

Reconsidering Public Training and Placing of Temporaries for Private Employers

Given the State's current and foreseeable economy and, thus, budget, the Legislature may wish to reconsider requiring the DLIR to assist all employers in training and placing of temporaries hired to replace leave-takers. *[For example, on November 20, 1992, the Council on Revenues met and revised its original 1992-1993 projection for already very low 0.4 percent growth to a -0.5 percent decline in tax revenues -- resulting in a drop of $25 million from the originally projected 1992-1993 forecast.]*[3] It would make little sense to require this if resources are insufficient to accomplish the task.

No Income Tax Credit

A tax credit is not recommended for covered employers who implement the Family Leave Law.

ENDNOTES

1. N.D. Cent. Code, sec. 54-52.4-02(1)(a) and (b); Georgia Code Ann., sec. 89-2502(a)(2)(A).

2. For example, North Dakota requires the leave-taker to pay the cost of any health insurance during leave, N.D. Cent. Code, sec. 54-52.4-06.

3. Andy Yamaguchi, "Further slide in state tax revenue seen" in Honolulu Advertiser, November 24, 1992.

Appendix A

ACT 328

S.B. NO. 818

A Bill for an Act Relating to Family Leave.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER
FAMILY LEAVE

§ -1 Definitions. As used in this chapter, unless the context clearly requires otherwise:

"Child" means an individual who is a biological, step, adopted, or foster son or daughter of an employee.

"Director" means the director of labor and industrial relations.

"Employee" means a person who performs services for hire for not fewer than six consecutive months for the employer from whom benefits are sought under this chapter.

"Employer" means any individual or organization, including the State, any of its political subdivisions, any instrumentality of the State or its political subdivisions, any partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or receiver or trustee in bankruptcy, or the legal representative of a deceased person, who employs one hundred or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.

"Employment" or "employed" means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, express or implied, with an employer.

"Employment benefits" means all benefits (other than salary or wages) provided or made available to employees by an employer, and includes group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether the benefits are provided by a policy or practice of an employer or by an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)).

"Health care provider" means a physician as defined under section 386-1.

"Parent" means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, a grandparent, or a grandparent-in-law.

"Serious health condition" means an acute, traumatic, or life-threatening illness, injury, or impairment, which involves treatment or supervision by a health care provider.

§ -2 Inapplicability. The rights provided under this chapter shall not apply to employees of an employer with fewer than one hundred employees.

§ -3 Family leave requirement. (a) An employee shall be entitled to a total of four weeks of family leave during any calendar year upon the birth of a child of the employee or the adoption of a child, or to care for the employee's child, spouse, or parent with a serious health condition.

(b) During each calendar year, the leave may be taken intermittently.

(c) Leave shall not be cumulative.

(d) If unpaid leave under this subsection conflicts with the unreduced compensation requirement for exempt employees under the federal Fair Labor Standards Act, an employer may require the employee to make up the leave within the same pay period.

(e) Nothing in this chapter shall entitle an employee to more than a total of four weeks of leave in any twelve-month period.

§ -4 Unpaid leave permitted; relationship to paid leave. Pursuant to section -3, an employee shall be entitled to four weeks of family leave. The family leave shall consist of unpaid or paid leave or a combination of paid and unpaid leave. If an employer provides paid family leave for fewer than four weeks, the additional period of leave added to attain the four-week total may be unpaid. Further, an employee or employer may elect to substitute any of the employee's accrued paid leaves such as sick, vacation, personal, or family leave for any part of the four-week period.

§ -5 Notice. In any case in which the necessity for family leave is foreseeable, the employee shall provide the employer with prior notice of the expected birth or adoption or serious health condition in a manner that is reasonable and practicable.

§ -6 Certification. An employer may require that a claim for family leave be supported by certification of the birth of the child issued by a health care provider, the family court, or certification of the placement of the child for adoption with the employee issued by a recognized adoption agency, the attorney handling the adoption, or by the individual officially designated by the birth parent to select and approve the adoptive family.

§ -7 Employment and benefits protection. (a) Upon return from family leave, the employee shall be entitled to be restored by the employer to the position of employment held by the employee when the leave commenced, or restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. If, however, during a leave, the employer experiences a layoff or workforce reduction and the employee would have lost a position had the employee not been on family leave, the employee is not entitled to reinstatement in the former or equivalent position. In such circumstances, the employee retains all rights, including seniority rights, pursuant to the good faith operation of a bona fide layoff and recall system.

(b) The taking of family leave shall not result in the loss of any employment benefit accrued before the date on which the leave commenced, except for any paid leave that may have been expended in conjunction with the family leave.

(c) Nothing in this chapter shall be construed to entitle or deny any employee to the accrual of any seniority or employment benefits during any period of leave, or any right, employment benefit, or position to which the employee would have been entitled had the employee not taken the leave.

§ -8 Prohibited acts. (a) It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this chapter.

(b) It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this chapter.

(c) It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because the individual has:

(1) Filed any charge, or instituted or caused to be instituted any proceeding, under or related to this chapter;

(2) Given or is about to give any information in connection with any inquiry or proceeding relating to any right provided under this chapter; or

(3) Testified or is about to testify in any inquiry or proceeding relating to any right provided under this chapter.

§ -9 Enforcement and administration. (a) The director shall have jurisdiction over those prohibited acts made unlawful by this chapter. Any individual claiming to be aggrieved may file with the director a verified complaint in writing that shall state the name and address of the employer alleged to have committed the unlawful act complained of, set forth the particulars thereof, and contain other information as may be required by the director. The attorney general, or the director upon the director's initiative, may, in like manner, make and file a complaint.

(b) A complaint may be filed on behalf of a class by the attorney general or the director, and a complaint so filed may be investigated, conciliated, heard, and litigated on a class action basis.

(c) The director shall assist employers in the training and placement of temporary help to perform the work of those employees on family leave.

(d) The director may also hire, subject to chapters 76 and 77, assistants and clerical, stenographic, and other help as may be necessary to administer and enforce this chapter.

§ -10 Applicability. (a) Section -3 shall set a minimum standard that is not intended to replace family leave policies that exist as of the effective date of this Act and that provide for equal or greater employment benefits than those benefits afforded under this chapter.

(b) Nothing in this chapter shall be construed to modify, eliminate, or otherwise abrogate any existing family leave policies, employment benefits, or protections that employees may have pursuant to any employment contracts or collective bargaining agreements, to the extent that the contracts and agreements provide greater protections than those afforded under this chapter.

(c) To the extent the provisions of this chapter contradict or otherwise conflict with any contract rights or collective bargaining agreements in existence as of the date of this Act, the provisions that provide greater benefits to the employees shall control."

SECTION 2. Chapter 79, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§79- Family leave.** All officers and employees who have been employed for not fewer than six consecutive months by the State or its political subdivisions shall be entitled to family leave of four weeks as provided under chapter ."

SECTION 3. The legislative reference bureau shall undertake a study of family leave and report its findings to the legislature twenty days prior to the convening of the regular session of 1993. The study shall include at least the following:

(1) The fiscal impact of family leave as provided by this Act and any other provisions that may be proposed, and the concept of granting income tax credits for employers who would implement the family leave portions of this Act;

(2) The experience of public sector employers and any other employers already granting family leave;

(3) The respective responsibilities that would result from this Act for the director of labor and industrial relations and the director of taxation; and

(4) Guidelines for determining when a health condition is acute, traumatic, or life-threatening.

SECTION 4. New statutory material is underscored.[1]

SECTION 5. This Act shall take effect on January 1, 1992; provided that the Act shall not apply to employees of private sector employers as defined in this Act until January 1, 1994.

(Approved July 2, 1991.)

Appendix B

SECTION 398-1 OF THE HAWAII REVISED STATUTES, DEFINES "SERIOUS HEALTH CONDITION" AS "AN ACUTE, TRAUMATIC, OR LIFE-THREATENING ILLNESS, INJURY, OR IMPAIRMENT WHICH INVOLVES TREATMENT OR SUPERVISION BY A HEALTH CARE PROVIDER."

(1) Do the terms "**acute, traumatic, or life-threatening illness, injury, or impairment**" have any medically recognized meaning or significance for the health care community? Please explain?

(2) From a medical point of view, what is your opinion of this language? (i.e., Is it clear or confusing? Is it sufficiently inclusive or does it exclude certain important health conditions?, etc.)

(3) Do you think other language would be more appropriate? If so, what language do you suggest?

(4) In your opinion, what kinds of illnesses, injuries, or impairments would fall within the scope of "serious health condition"?

What types of conditions would not?

(5) In your opinion, does the term "acute" ensure that short term illnesses (such as measles, chicken pox, or flu) would qualify for family leave?

(6) How would you interpret the phrase "involves treatment or supervision by a health care provider"?

(7) From a medical point of view, do you think the following definition of "serious health condition" is preferable to that contained in the Hawaii law?

"An illness, injury or impairment or physical or mental condition requiring inpatient care in a hospital, nursing home or hospice, or outpatient care that requires continuing treatment or supervision by a health care provider."

Why or why not?

(8) If the legislature were to amend the law to require a certificate from a health care provider to justify family leave for purposes of a serious health condition, what information do you think should be included in the certificate?

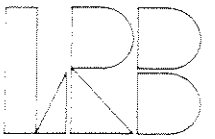
(9) Is there any information that should not be included? (For example, would the confidentiality that arises in a doctor-patient relationship preclude disclosure of certain information?)

(10) Are there any other comments or suggestions you wish to make?

Appendix C

Samuel B. K. Chang
Director

Research (808) 587-0666
Revisor (808) 587-0670
Fax (808) 587-0720



LEGISLATIVE REFERENCE BUREAU
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

August 14, 1992

4634A

Ms. Dianne Matsuura
Personnel Officer
Department of Accounting and
General Services
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

Similar letters sent to all potential survey participants

Dear Ms. Matsuura:

Re: Family Leave For Public Employees

Act 328, Session Laws of Hawaii 1991, mandates family leave for all Hawaii public employees beginning January 1, 1992. The Act also requires the Legislative Reference Bureau to conduct a study on the implementation of the family leave law.

According to the guidelines for implementing family leave issued by the Director of Personnel Services dated February 19, 1992 and revised on June 18, 1992, employees requesting family leave are required to complete "Family Leave Form 1 (1-1-92)."

In connection with the statutorily required study, the Bureau would appreciate your sending the following to Mr. Peter G. Pan of the Bureau by September 4, 1992:

(1) Copies of all "Family Leave Form 1 (1-1-92)" containing employee (i.e., employees of your department and all agencies attached to your department for administrative purposes) records of family leave for the six-month period from January 1, 1992 to June 30, 1992 only. Please also note whether the employee is male or female by indicating an "M" or an "F" next to "Employee Name" as shown on the attached sample form; and

(2) The attached brief questionnaire.

Please be assured that these forms will be used for tabulation of data only. Employees' identities will be kept strictly confidential. Data will not be used in any way that can identify any

particular employee. If you prefer, employee names and signatures can be blacked out before forwarding the forms to us.

If you have any questions, please contact Mr. Pan at 587-0666.

Sincerely,

Samuel B. K. Chang
Director

SBKC:PGP:mm
Encs.

Appendix D

LIST OF STATE AND COUNTY DEPARTMENTS AND AGENCIES SURVEYED

Legislature and Legislative Service Agencies

Hawaii State House of Representatives
Hawaii State Senate
Office of the Auditor
Office of the Ombudsman
Legislative Reference Bureau

Judiciary

State Departments

Department of Accounting and General Services
Department of Agriculture
Department of the Attorney General
Department of Budget and Finance
Department of Business, Economic Development and Tourism
Department of Commerce and Consumer Affairs
Department of Defense
Department of Education
Department of Hawaiian Home Lands
Department of Health
Department of Human Services
Department of Labor and Industrial Relations
Department of Land and Natural Resources
Department of Personnel Services
Department of Public Safety
Department of Taxation
Department of Transportation
University of Hawaii

Office of Hawaiian Affairs

City and County of Honolulu

Department of Auditoriums
Department of the Budget
Department of Civil Service
Department of the Corporation Counsel
Department of Data Systems
Department of Finance
Department of General Planning
Department of Health
Department of Housing and Community Development
Department of Human Resources
Department of Land Utilization
Department of the Medical Examiner
Department of Parks and Recreation
Department of the Prosecuting Attorney
Department of Public Works
Department of Transportation Services
Board of Water Supply
Building Department
Fire Department
Honolulu Public Transit Authority
Municipal Reference & Records Center
Oahu Civil Defense Agency
Office of Information and Complaint
Police Department
Royal Hawaiian Band

County of Hawaii

Department of Civil Service
Department of Finance
Department of Liquor Control
Department of Parks and Recreation
Department of Public Works
Department of Research and Development
Department of Water Supply
Civil Defense Agency
County Physician
Division of Industrial Safety
Fire Department
Mass Transit Agency
Office of Aging
Office of the Corporation Counsel
Office of Housing and Community Development
Planning Department
Police Department
Prosecuting Attorney's Office

County of Kauai

Department of Finance
Department of Personnel Services
Department of Planning
Department of Public Works
Department of Water
Civil Defense Agency
County Housing Agency
Fire Department
Kauai County Office of Elderly Affairs
Kauai War Memorial Convention Hall
Liquor Control Commission
Office of the County Attorney
Office of Economic Development
Office of the Prosecuting Attorney
Police Department

County of Maui

Department of the Corporation Counsel
Director of Finance
Department of Fire Control
Department of Human Concerns
Department of Liquor Control
Department of Parks and Recreation
Department of Personnel Services
Department of Planning
Department of Police
Department of the Prosecuting Attorney
Department of Public Works
Department of Water Supply
Civil Defense Agency
Office of Economic Development

County Council

City Council of Honolulu
County Council of Hawaii
County Council of Kauai
County Council of Maui

Appendix E

LEGISLATIVE REFERENCE BUREAU
FAMILY LEAVE SURVEY

The following questions pertain to the period from January 1, 1992 to June 30, 1992.

1 How many applications for family leave were received? _____

1.1 How many were for:
- Birth of child _____
- Adoption of child _____
- Care of child, spouse, or parent with a serious health condition _____

2 How many applications for family leave were denied? _____

2.1 What were the reasons for denial? _____

_____

_____

3 What method was used to handle the work of an employee who took family leave? (Check any that applies)

		Frequently	Sometimes	Seldom
a)	Left undone	_____	_____	_____
b)	Redistributed to fellow workers	_____	_____	_____
c)	Sent home to leave-taker	_____	_____	_____
d)	Done by a temporary hired for the purpose	_____	_____	_____

e) Other (explain) _____

_____

_____

4 How has operational effectiveness of your department been affected by employees taking family leave? (Check one)

a) Declined greatly _____
b) Declined somewhat _____
c) No effect _____
d) Improved somewhat _____
e) Improved greatly _____

5 How has employee morale been affected by the new family leave policy? (Check one)

a) Declined greatly _____
b) Declined somewhat _____
c) No effect _____
d) Improved somewhat _____
e) Improved greatly _____

6 How difficult was it for your department/agency to implement the family leave law for your employees? (Check one)

a) Very difficult _____
b) Somewhat difficult _____
c) Neither difficult nor easy _____
d) Somewhat easy _____
e) Very easy _____

7 Did you notify all covered employees of their right to take family leave? Yes_____
No_____

7.1 If yes, how did you give notice? (Check any that applies) *(Attach a copy of any written notice.)*

a) Written notices distributed to each employee _____
b) Written notices to branch/section heads only _____
c) Notices posted in conspicuous locations at work _____
d) Other (specify)_____
_____

7.2 How many employees in your department/agency do you estimate were aware of the family leave law and their right to take family leave? *(Check one for each date)*

		As of 1/1/92	As of 6/30/92
a)	76% to 100%	_____	_____
b)	51% to 75%	_____	_____
c)	26% to 50%	_____	_____
d)	0% to 25%	_____	_____

8 How many employee complaints or appeals were received regarding the granting of family leave? _____

8.1 How many have been resolved as of June 30, 1992? _____

8.2 How would you characterize the nature of these complaints or other employer-employee controversies? (Check any that applies)

a) Interpretation of "serious health condition" _____

b) Using paid sick leave for family leave purposes after taking four weeks of unpaid family leave _____

c) Using paid vacation leave for family leave purposes after taking four weeks of unpaid family leave _____

d) Other (please explain)_____

_____

_____

_____

_____

9 Additional observations or comments:_____

_____

_____

_____

_____

_____

_____

ATTACHMENT A

FAMILY LEAVE FORM 1 1-1-92
(To be attached to Form G-1)

Employee Name:_____
Job Title:_____
Bargaining Unit:_____
Division/Branch/Unit:_____

1. Specify the reason for the family leave:

   _____ Birth of an employee's child
   _____ Adoption of a child by an employee
   _____ Care of an employee's child, spouse, or parent with a serious health condition

2. If family leave is being taken to care for your child, spouse or parent with a serious health condition, please provide the following information:

   A. Family relationship to the person being cared for:
   _____

   B. The serious health condition must be an acute, traumatic, or life-threatening illness, injury, or impairment and which involves treatment or supervision by a health care provider.
   If so, list name of health care provider. (If not known at this time, indicate "not known" and name of health care provider may be submitted at a later date.).
   _____

   C. Probable duration of the serious health condition if known:
   _____

3. Period of leave (dates) and total number of working hours being utilized for family leave by categories listed:

Leave	Date(s)	No. of Working Hours
FL - LWOP	_____	_____
FL - Sick	_____	_____
FL - Vacation	_____	_____
Total # Working Hours		_____

The information contained in this form may be subject to verification by the employer.

I certify that the above information is true and accurate:

_____ _____
Employee Signature
Date

JOHN WAIHEE
GOVERNOR OF HAWAII

SHARON Y. MIYASHIRO
DIRECTOR

LAWRENCE ISHIMI
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF PERSONNEL SERVICES
830 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

LR:534

February 18, 1992

TO: All Departmental Personnel Officers

FROM: Sharon Y. Miyashiro
Director of Personnel Services

SUBJECT: FAMILY LEAVE INTERIM GUIDELINES

FEB 24 2 52 PM '92
PERSONNEL

As a result of Act 328, SLH 1991, relating to family leave, the attached Family Leave Guidelines have been established as a guide for the departments to use in administering the family leave law. These are interim guidelines until either administrative rules are promulgated by the Department of Labor and Industrial Relations or memoranda of agreements are negotiated.

The guidelines specify who is entitled to family leave and the basic provisions as contained in Act 328, SLH 1991. Please note that for any eligible employee taking family leave, a new form (Family Leave Form 1) must be completed by the employee and attached to the Form G-1 (Application for Leave).

The law provides that the Legislative Reference Bureau (LRB) will be conducting a study on the implementation and impact of the family leave law. In anticipation of the LRB's study, we recommend that data regarding family leave be kept in a manner that is readily retrievable, e.g., xeroxing a copy of the Family Leave Form 1 and maintaining a separate file.

An orientation session for the departmental personnel officers on the guidelines will be scheduled in the near future by our Labor Relations Division.

Questions involving the guidelines are to be directed to the Labor Relations Division at 587-0911.

Attachments

cc: Division Chiefs, DPS

STATE OF HAWAII
FAMILY LEAVE GUIDELINES
FOR EMPLOYEES OF THE EXECUTIVE BRANCH

I. PURPOSE

The purpose of these guidelines is to provide advice on the application of Act 328, SLH 1991, Family Leave which took effect on January 1, 1992. These are interim guidelines until either administrative rules and/or memoranda of agreements are executed.

II. DEFINITION OF TERMS

A. Act: Act 328, SLH 1991, Family Leave.

B. Child: An individual who is a biological, step, adopted, or foster son or daughter of an employee.

C. Employee: A person who has worked at least six (6) consecutive months with at least 50% full-time equivalency (FTE) for the employer from whom benefits are sought.

D. Employer: State of Hawaii, Executive Branch.

E. Health Care Provider: A physician as defined under Section 386-1, HRS.

F. Parent: A biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, a grandparent, or a grandparent-in-law.

G. Serious Health Condition: An acute, traumatic, or life-threatening illness, injury, or impairment, which involves treatment or supervision by a health care provider.

III. ADMINISTRATION OF FAMILY LEAVE

A. The Family Leave Act provides that all employees are entitled to a total of four weeks of family leave during any calendar year for the following reasons:

1. The birth of an employee's child,

2. The adoption of a child by an employee,

3. The care of an employee's child, spouse, or parent with a serious health condition.

B. Employee eligibility and entitlement:

1. Any employee who has worked at least six (6) consecutive months for the employer and has at least 50% full-time equivalency (FTE).

   Emergency hires whose appointments are terminated every 30 days or less are not eligible. Temporary employees are eligible as long as their appointments are for at least six (6) consecutive months without a break in service during the six-month period.

2. Full-time employees shall be entitled to 160 hours of Family Leave. Eligible part-time employees shall be allowed up to four weeks of family leave. The four weeks allowable for part-time employees shall be based on an amount equivalent to their FTE per week.

3. The family leave period for non-regular employees shall not extend beyond the employee's temporary appointment expiration date.

C. Family leave shall consist of unpaid or paid leave or a combination of both. An employee may elect to substitute any of the employee's accumulated paid leaves (vacation or sick) for any part of the four-week family leave period. The minimum amount of paid leave that an employee may elect to substitute shall be no less than one (1) hour.

D. Procedural requirements for the application, documentation, and reporting of family leave:

1. Departments shall be responsible for the documentation and recordkeeping of family leave taken by their employees to assure provisions of the Act are appropriately administered.

2. Employees shall complete a Form G-1 (Application for Leave of Absence) and submit it to their immediate supervisor. "Family Leave" is to be entered in the space provided for "Type of Leave".

3. The employee shall indicate whether the period of family leave is for leave of absence without pay and whether all or any part of the four-week period is to be charged to vacation or sick leave.

   If the family leave period is to be charged to vacation, indicate "Family Leave - Vacation". If the family leave period is to be charged to sick leave, indicate "Family Leave - Sick".

4. Family Leave Form 1 (1-1-92) (Attachment A) shall be completed by the employee and attached to Form G-1.

5. Family leave shall be monitored and administered on a calendar year (January - December) basis. State DPS Form 7 (Revised 6-1-86) should indicate "FL - LWOP" for leave without pay taken for family leave; "FL - V" for vacation leave taken for family leave; and/or "FL - S" for sick leave taken for family leave.

6. An employee shall provide the employer with prior notice of the expected birth or adoption or serious health condition in the manner determined by the department that is reasonable and practicable.

7. Instructions for the preparation and processing of SF-5 for family leave has been developed by the Administrative and Audit Division, Department of Personnel Services, and will be transmitted to the departments in a separate memorandum.

E. Under the Act, family leave may be taken intermittently for a total of four weeks during any calendar year. An employee's request for additional leave in excess of the four weeks required under the family leave law, shall be administered in accordance with applicable leave provisions contained in the collective bargaining agreements, administrative rules, or executive orders.

F. Under the Act, unused family leave shall not be cumulative from year to year.

G. To ensure compliance with the Act, each department may require that an application and/or claim for family leave be supported by certification of the birth of the child or expected date of birth issued by a health care provider, the family court, or certification of the placement of the child for adoption with the employee, issued by a recognized adoption agency, the attorney handling the adoption, or the individual officially designated by the birth parent to select and approve the adoptive family.

H. Employees shall be covered by the following employment and benefits protection:

1. An employee returning to work after family leave shall be restored to the position of employment last held by the employee when the leave commenced, or restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

2. An employee is not entitled to reinstatement in the former or equivalent position if during the leave period, the employer experienced a layoff or workforce reduction and the employee would have lost a position had the employee not been on family leave. The employee retains all rights, including seniority rights pursuant to layoff procedures, if layoff procedures are applicable to such employee.

3. An employee shall not lose any employment benefit accrued before the date of leave commencement, except for any paid leave that may have been used for family leave.

4. The accrual of any seniority or employment benefits while on family leave would be administered in the same manner as any other leave without pay (LWOP) and/or paid leave situation.

IV. PROHIBITED ACTS

A. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise or the attempt to exercise any right provided for under the Act.

B. It shall be unlawful for any employer to discharge or discriminate against any individual for opposing any practice made unlawful by the Act.

C. It shall be unlawful for any person to discharge or discriminate against any individual because the individual has:

1. Filed any charge, or instituted or caused to be instituted any proceeding, under or related to the Act;

2. Given or is about to give any information in connection with any inquiry or proceeding relating to any right as provided in the Act; or

3. Testified or is about to testify in any inquiry or proceeding relating to any right as provided in the Act.

V. Any question or conflict concerning the interpretation and application of these guidelines shall be resolved by the Director of Personnel Services.

SUPPLEMENTAL ADVISORY ON THE APPLICATION OF FAMILY LEAVE

This advisory addresses the leave provisions under the collective bargaining agreements, administrative rules, and executive orders, and their relationship to the Family Leave Act.

Collective Bargaining Agreements, Administrative Rules, Executive Orders

Under the various agreements, administrative rules, and executive orders, various types of leaves are provided to employees. These include vacation and sick leave, leave without pay for purposes of child care, child adoption, personal business of an emergency nature. In addition, BU 13 agreement provides for leave without pay for the purpose of caring for an immediate family member (as defined under funeral leave) who is ill or injured, and caring for parents, spouse, children and/or grandparents who are unable to perform one or more Activities of Daily Living (ADL).

For the majority of these leaves, an employee would apply for and seek approval from the supervisor on the granting of these leaves (with the exception of BU 09 adoptive leave whereby a regular employee who has completed at least one year of continuous service prior to the adoptive leave, shall be entitled to leave without pay). However, under the Family Leave law, an employee is automatically entitled to a total of four weeks of family leave (provided the employee has at least six (6) consecutive months of service and has at least a 50% full-time equivalency (FTE)).

Application of Leaves in Conjunction with Family Leave

1. Employee who utilizes the four weeks of family leave and wishes to continue leave.

   If an employee requests leave in excess of the four weeks of family leave, the department should administer the request for additional leave in accordance with the applicable collective bargaining agreements, administrative rules or executive orders. For example, a BU 03 employee takes four weeks of family leave for child adoption and requests an additional six months of leave without pay. The BU 03 agreement allows the department to grant leave without pay for purposes of child adoption.

2. Substitution of paid sick leave for any part of the four-week family leave period.

   Under the Act, an employee may substitute sick leave for any part of the four-week family leave period. Thus, an employee may utilize sick leave to care for his/her child, spouse or parent with a serious health condition only during the first four weeks of family leave.

3. Differences between family leave law and BU 13 provisions on leave without pay.

As a result of the 1991 re-opener negotiations for BU 13, two new provisions were added to Article 41 - Other Leaves of Absence. Under subparagraph H. Other Leaves Without Pay, any employee may be granted leaves without pay to:

a. Care for an immediate family member (as defined in Article 38 - Funeral Leave) who is ill or injured.

b. Care for parents, spouse, children and/or grandparents who are unable to perform one or more Activities of Daily Living (ADL).

The definitions under the BU 13 provision and the Family Leave law are not the same and should not be used interchangeably.

For example, the BU 13 provision defines immediate family member as contained in Article 38 - Funeral Leave: parents, brothers, sisters, spouses, children, parents-in-law, grandparents, grandchildren, or an individual who has become a member of an immediate family through the Hawaiian "Hanai" custom. Whereas, the family leave law defines parent as a biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, a grandparent, or a grandparent-in-law and defines child as a biological, step, adopted, or foster son or daughter.

Another major difference between the BU 13 provision and the family leave law involves the degree of illness or disability. The BU 13 provision does not specifically define illness or injury and allows leave to care for a family member who is unable to perform one or more Activities of Daily Living (ADL) which may not involve acute, traumatic or life-threatening conditions. Whereas, the family leave law allows leave to care for a child, spouse or parent with a serious health condition defined as acute, traumatic, or life-threatening illness, injury, or impairment, which involves treatment or supervision by a health care provider.

idea

JOHN WAIHEE
GOVERNOR OF HAWAII

STATE OF HAWAII
DEPARTMENT OF PERSONNEL SERVICES
830 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

SHARON Y. MIYASHIRO
DIRECTOR

LAWRENCE ISHIMI
DEPUTY DIRECTOR

LR.146

June 18, 1992

TO: All Departmental Personnel Officers

FROM: Sharon Y. Miyashiro, Director
Department of Personnel Services

SUBJECT: FAMILY LEAVE UNDER ACT 328, SLH 1991

In conjunction with the State of Hawaii "Family Leave Guidelines For Employees Of The Executive Branch" dated 2-19-92, we are amending Part III, ADMINISTRATION OF FAMILY LEAVE, paragraph "E", by specifically stating that family leave for any of the three reasons (childbirth, adoption, and serious health condition) may be taken on an intermittent basis.

Based on this amendment, please disregard any previous guidance relative to the ineligibility of using family leave on an intermittent basis for childbirth.

To assist you in maintaining a current copy of the guidelines, we are issuing replacement pages for pages 2 and 3 of our 2-19-92 Guidance. (See attached.) The specific amendment is underscored for ease of identifying the change, and it is on replacement page 3. While replacement page 2 has no substantive changes, it is being amended due to the need for space on page 3 for the new language under paragraph "E".

Should you have any questions regarding this matter, please call our Labor Relations Division at 587-0911.

Thank you for your attention.

cc: Alan Asao, DLIR
Personnel Directors

B. Employee eligibility and entitlement:

1. Any employee who has worked at least six (6) consecutive months for the employer and has at least 50% full-time equivalency (FTE).

   Emergency hires whose appointments are terminated every 30 days or less are not eligible. Temporary employees are eligible as long as their appointments are for at least six (6) consecutive months without a break in service during the six-month period.

2. Full-time employees shall be entitled to 160 hours of Family Leave. Eligible part-time employees shall be allowed up to four weeks of family leave. The four weeks allowable for part-time employees shall be based on an amount equivalent to their FTE per week.

3. The family leave period for non-regular employees shall not extend beyond the employee's temporary appointment expiration date.

C. Family leave shall consist of unpaid or paid leave or a combination of both. An employee may elect to substitute any of the employee's accumulated paid leaves (vacation or sick) for any part of the four-week family leave period. The minimum amount of paid leave that an employee may elect to substitute shall be no less than one (1) hour.

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If the family leave period is to be charged to vacation, indicate "Family Leave - Vacation". If the family leave period is to be charged to sick leave, indicate "Family Leave - Sick".

4. Family Leave Form 1 (1-1-92) (Attachment A) shall be completed by the employee and attached to Form G-1.

5. Family leave shall be monitored and administered on a calendar year (January - December) basis. State DPS Form 7 (Revised 6-1-86) should indicate "FL - LWOP" for leave without pay taken for family leave; "FL - V" for vacation leave taken for family leave; and/or "FL - S" for sick leave taken for family leave.

6. An employee shall provide the employer with prior notice of the expected birth or adoption or serious health condition in the manner determined by the department that is reasonable and practicable.

7. Instructions for the preparation and processing of SF-5 for family leave has been developed by the Administrative and Audit Division, Department of Personnel Services, and will be transmitted to the departments in a separate memorandum.

E. Under the Act, family leave for any of the three reasons (childbirth, adoption, and serious health condition), may be taken intermittently for a total of four weeks during any calendar year. An employee's request for additional leave in excess of the four weeks required under the family leave law, shall be administered in accordance with applicable leave provisions contained in the collective bargaining agreements, administrative rules, or executive orders.

F. Under the Act, unused family leave shall not be cumulative from year to year.

G. To ensure compliance with the Act, each department may require that an application and/or claim for family leave be supported by certification of the birth of the child or expected date of birth issued by a health care provider, the family court, or certification of the placement of the child for adoption with the employee, issued by a recognized adoption agency, the attorney handling the adoption, or the individual officially designated by the birth parent to select and approve the adoptive family.

Appendix H

Updated 10/27/92	Requests		Type *			Sex		Leave Length		Leavetaker's Work						Oper Effectiveness						Employee Morale						Ease of Implementation					
	Rec'd	Deny	Bir	Adop	Ill	M	F	Hours	Days	Undone	Redis	Home	Temp	Oth	NR	--	-	Neut	+	++	NR	--	-	Neut	+	++	NR	--	-	Neut	+	++	NR
STATE LEG																																	
Auditor	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	1
Ombudsman	DID NOT RESPOND TO SURVEY																																
Senate	DID NOT RESPOND TO SURVEY																																
House	DID NOT RESPOND TO SURVEY																																
LRB	1	0	1	0	0	0	1	80	10	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
	1	0	1	0	0	0	1	80	10	0	1	0	0	0	1	0	0	1	0	0	1	0	0	2	0	0	0	0	0	1	0	0	1
STATE EXEC																																	
DAGS	15	2	2	0	11	2	13	508.75	64	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0
DOA	8	0	1	0	7	6	2	237	30	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
DAG	46	0	3	1	42	10	36	1,081.75	135	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0
B&F	10	0	7	0	3	7	3	277	35	0.5	0.5	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0
DBEDT	4	0	1	0	3	1	3	79.5	10	1	1	0.5	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0
DCCA	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
DOD	7	0	0	0	7	0	7	45.5	6	0.5	0.5	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
DOE *	313	0	NOT AVAILABLE			49	264	12,716.5	1,590	0	0.5	0	0.5	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0
DHHL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
DOH	94	0	4	0	90	31	63	3,071.5	384	0.5	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
DHS	61	2	15	2	42	11	48	3,690.5	461	0.5	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0
DLIR	12	0	7	1	4	9	3	1,246.5	156	1	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0
DLNR	5	0	2	0	3	3	2	211	26	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
DPS	4	0	1	0	3	1	3	96	12	0	1	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
PUB SAF	4	0	1	0	3	2	2	312	39	0	1	0.5	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
TAX	1	0	1	0	0	0	1	160	20	0	0.5	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
DOT	26	0	0	0	26	18	8	1,148.25	144	0	1	1	0.5	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
UH	35	1	10	0	24	16	19	1,306.5	163	0.5	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
	645	5	55	4	268	166	477	26,188.3	3,274	5.5	13	2	1	0	0	1	4	10	0	0	3	0	0	5	8	2	3	0	2	6	5	2	3
OHA	DID NOT RESPOND TO SURVEY																																
JUDICIARY	67	1	4	0	62	12	55	2,014.75	252	0.5	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
HNL EXEC																																	
DCS	3	0	0	0	3	0	3	10	1	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
PROS ATTY	3	0	1	0	2	1	2	200	25	0.5	0.5	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0
OIC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0	0
AUD'RIUMS	6	0	2	0	4	3	3	185	23	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
BUDGET	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
BLD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0
CORP COUN	DID NOT RESPOND TO SURVEY																																
DATA SYS	DID NOT RESPOND TO SURVEY																																
FIN	5	0	0	0	5	1	4	156.5	20	1	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
FIRE	12	0	6	1	5	12	0	1,272	159	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0
PLANNING	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	1	0	0
HEALTH	6	0	3	0	3	3	3	488	61	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
DHCD	2	0	2	0	0	0	2	320	40	0	1	0	0.5	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
DHR	2	0	0	2	0	2	0	24	3	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0
DLU	3	0	1	1	1	1	2	320	40	0.5	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0
MED EXAM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	0
PARKS	INSUFFICIENT DATA RECEIVED																																
POLICE	9	0	4	0	5	6	3	659.25	82	0.5	0.5	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0
DPW	23	2	8	1	12	19	4	1,696	212	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
DTS	DID NOT RESPOND TO SURVEY																																

Notify Employee			Notification Method				Percent Employees Aware of Family Leave Rights (As Of 1/1/92)					(As Of 6/30/92)				Complaints		Complaint/Controversy				
Yes	No	NR	Indiv	Heads	Post	Other	76+	51-75	26-50	0-25	NR	76+	51-75	26-50	0-25	Rec'd	Resiv	Hlth Cond	Sick	Vac	Other	
																						STATE LEGISLATURE
1	0	0	0	0	0	1	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	Auditor
																						Ombudsman
																						Senate
																						House
0	1	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	LRB
1	1	0	0	0	0	1	0	1	0	1	0	1	1	0	0	0	0	0	0	0	0	STATE LEG Subtotal
																						STATE EXECUTIVE
1	0	0	1	1	1	0	0	0	1	0	0	1	0	0	0	1	1	1	0	0	0	DAGS
1	0	0	1	1	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	DOA
1	0	0	0	1	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	DAG
0	1	0	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	B&F
1	0	0	0	1	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	DBEDT
0	1	0	0	1	1	0	0	0	0	1	0	0	0	0	1	0	0	1	0	0	0	DCCA
1	0	0	0	1	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0	0	DOD
0	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	DOE (no leave type data)
0	1	0	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	DHHL
1	0	0	1	1	1	0	0	0	1	0	0	0	1	0	0	0	0	0	0	0	0	DOH
1	0	0	0	1	1	0	0	0	0	1	0	1	0	0	0	2	2	1	0	0	1	DHS
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	1	1	1	0	0	1	DLIR
1	0	0	0	1	0	0	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	DLNR
1	0	0	1	0	1	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	DPS
1	0	0	0	1	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	PUB SAF
1	0	0	0	1	1	0	0	0	0	1	0	1	0	0	0	0	0	1	0	0	0	TAX
0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0	1	0	0	0	DOT
1	0	0	1	1	1	1	0	0	0	1	0	0	1	0	0	0	0	1	0	0	0	UH
13	4	1	6	12	9	2	0	1	4	13	0	11	2	0	4	4	4	8	0	0	2	STATE EXEC Subtotal
																						OHA
1	0	0	0	1	0	0	0	0	0	1	0	1	0	0	0	1	1	1	0	0	0	JUDICIARY
																						HONOLULU EXECUTIVE
1	0	0	0	1	0	1	0	0	1	0	0	1	0	0	0	0	0	1	1	0	0	DCS
1	0	0	0	0	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	PROS ATTY
1	0	0	1	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	OIC
1	0	0	0	1	1	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	AUD'RIUMS
1	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	BUDGET
1	0	0	1	0	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	BLD
																						CORP COUN
																						DATA SYS
1	0	0	0	1	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	FIN
1	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	FIRE
1	0	0	1	0	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	PLANNING
1	0	0	1	0	1	0	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	HEALTH
1	0	0	0	1	0	1	0	0	0	0	1	1	0	0	0	0	0	1	0	0	1	DHCD
1	0	0	0	1	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	DHR
1	0	0	1	1	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	1	DLU
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	MED EXAM
																						PARKS
1	0	0	0	1	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	POLICE
1	0	0	1	0	1	0	0	0	1	0	0	1	0	0	0	5	5	1	0	0	0	DPW
																						DTS

Updated 10/27/92	Requests		Type *			Sex		Leave Length		Leavetaker's Work						Oper Effectiveness						Employee Morale						Ease of Implementation					
	Rec'd	Deny	Bir	Adop	Ill	M	F	Hours	Days	Undone	Redis	Home	Temp	Oth	NR	--	-	Neut	+	++	NR	--	-	Neut	+	++	NR	--	-	Neut	+	++	NR
PTA	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	1
MRRC	0	0	0	0		0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0	0
CIV DEF	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0	0
BAND	7	0	0	0	7	5	2	72	9	0	1	0	1	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
BWS	4	0	0	0	4	3	1	482.5	60	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0
	85	2	27	5	51	56	29	5,885.25	736	2.5	12	0	1.5	0	8	0	5	9	0	0	7	0	1	8	8	1	3	1	0	13	4	1	2
HNL COUNCIL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
HAWAII EXEC																																	
DCS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	1	0
PROS ATTY	1	0	0	0	1	1	0	16	2	0	0.5	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0
C'NTY PHY	DID NOT RESPOND TO SURVEY																																
OFF AGING	1	0	0	0	1	0	1	16	2	1	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0
CIV DEF	DID NOT RESPOND TO SURVEY																																
CORP COUN	3	0	1	0	2	1	2	184	23	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0
FIN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0
FIRE	5	3	0	0	2	4	1	252	32	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0
OFF HCD	DID NOT RESPOND TO SURVEY																																
INDUS SAF	DID NOT RESPOND TO SURVEY																																
LIQ CTRL	2	0	0	0	2	2	0	16	2	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0
MASS TRAN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	1	0
PARKS	1	0	0	0	1	0	1	160	20	0	0	0	1	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
PLANNING	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
POLICE	5	0	1	0	4	2	3	491.2	61	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0
DPW	5	0	0	0	5	2	3	368	46	0.5	1	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0	0
R & D	DID NOT RESPOND TO SURVEY																																
WATER SUP	2	0	1	1	0	0	2	320	40	0.5	1	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0
	25	3	3	1	18	12	13	1,823.2	228	2	6.5	0	1	0	4	0	5	4	0	0	4	0	0	8	2	2	1	0	1	5	2	3	2
HI COUNCIL	DID NOT RESPOND TO SURVEY																																
KAUAI EXEC																																	
DPS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	1	0
PROS ATTY	DID NOT RESPOND TO SURVEY																																
CNTY ATTY	4	0	0	0	4	2	2	176	22	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0
FIN	DID NOT RESPOND TO SURVEY																																
FIRE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
PLANNING	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	1
POLICE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0
DPW	1	0	1	0	0	1	0	160	20	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
WATER	DID NOT RESPOND TO SURVEY																																
CIV DEF	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	1	0
EXE AGING	DID NOT RESPOND TO SURVEY																																
WAR MEM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
LIQ CTRL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
O ECO DV	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
HOUSING	1	1	0	0	0	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0	0
	6	1	1	0	4	4	2	336	42	0	2	0	0	0	9	0	2	1	0	0	8	0	0	3	3	0	5	0	0	3	0	4	4
KI COUNCIL	DID NOT RESPOND TO SURVEY																																
MAUI EXEC																																	

Notify Employee			Notification Method				Percent Employees Aware of Family Leave Rights (As Of 1/1/92)					(As Of 6/30/92)				Complaints		Complaint/Controversy				
Yes	No	NR	Indiv	Heads	Post	Other	76+	51-75	26-50	0-25	NR	76+	51-75	26-50	0-25	Rec'd	Resly	Hlth Cond	Sick	Vac	Other	
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	PTA
1	0	0	0	0	0	1	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	MRRC
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	CIV DEF
1	0	0	0	0	1	1	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	BAND
1	0	0	0	1	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	BWS
21	0	0	11	8	7	4	3	2	3	11	2	21	0	0	0	5	5	3	1	0	2	HNL EXEC Subtotal
1	0	0	0	1	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	HONOLULU COUNCIL
																						HAWAII EXECUTIVE
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	DCS
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	PROS ATTY
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	1	0	0	0	C'NTY PHY
1	0	0	0	0	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	CIV DEF
1	0	0	0	1	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	CORP COUN
1	0	0	0	0	0	1	0	0	0	1	0	1	0	0	0	0	0	1	0	0	0	FIN
																						FIRE
																						OFF HCD
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	INDUS SAF
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	LIQ CTRL
1	0	0	1	1	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	MASS TRAN AG
1	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	PARKS
1	0	0	0	1	1	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	PLANNING
1	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	POLICE
																						DPW
1	0	0	0	1	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	R & D
13	0	0	8	4	4	1	1	0	2	10	0	13	0	0	0	0	0	2	0	0	0	WATER SUP
																						HAWAII EXEC Subtotal
																						HAWAII COUNCIL
																						KAUAI EXECUTIVE
1	0	0	0	1	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	DPS
1	0	0	0	0	0	1	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	PROS ATTY
																						CNTY ATTY
1	0	0	0	0	1	0	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	FIN
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	FIRE
1	0	0	0	1	1	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	PLANNING
1	0	0	0	1	1	0	0	0	0	1	0	0	1	0	0	0	0	1	0	0	0	POLICE
																						DPW
1	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	WATER
																						CIV DEF
0	0	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	EXE AGING
0	1	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	0	WAR MEM
1	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	LIQ CTRL COM
1	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0	1	1	1	0	0	0	O ECO DV
																						HOUSING
9	1	1	4	3	3	1	3	1	0	6	1	6	2	1	1	1	1	2	0	0	0	KAUAI EXEC Subtotal
																						KAUAI COUNCIL
																						MAUI EXECUTIVE

Updated 10/27/92	Requests		Type *			Sex		Leave Length		Leavetaker's Work						Oper Effectiveness						Employee Morale						Ease of Implementation					
	Rec'd	Deny	Bir	Adop	Ill	M	F	Hours	Days	Undone	Redis	Home	Temp	Oth	NR	--	-	Neut	+	++	NR	--	-	Neut	+	++	NR	--	-	Neut	+	++	NR
DPS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
CORP COUN	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0
O ECO DV	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
FIN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
FIRE	DID NOT RESPOND TO SURVEY																																
H C'CERNS	4	0	0	0	4	0	4	103.5	13	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
LIQ CTRL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
PARKS	DID NOT RESPOND TO SURVEY																																
PLANNING	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1
POLICE	DID NOT RESPOND TO SURVEY																																
PROS ATTY	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	1	0
DPW	8	0	4	0	4	6	2	781	98	0.5	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0
WATER SUP	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	0	1	0
CIV DEF	DID NOT RESPOND TO SURVEY																																
	12	0	4	0	8	6	6	884.5	111	0.5	2	0	0	0	8	0	1	1	0	0	8	0	0	1	2	0	7	0	1	0	0	3	6
MI COUNCIL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0

	Requests		Type *			Sex		Leave Length		Leavetaker's Work						Oper Effectiveness						Employee Morale						Ease of Implementation					
	Rec'd	Deny	Bir	Adop	Ill	M	F	Hours	Days	Undone	Redis	Home	Temp	Oth	NR	--	-	Neut	+	++	NR	--	-	Neut	+	++	NR	--	-	Neut	+	++	NR
TOTALS	841	12	95	10	411	256	583	37,211.95	4,651	11	37.5	2	3.5	0	32	1	17	28	0	0	32	0	1	29	23	5	20	1	4	30	11	13	19
		1.4%	18%	2%	80%	30%	69%	44.9	5.6	20%	69%	4%	6%	0%		2%	37%	61%	0%	0%		0%	2%	50%	40%	9%		2%	7%	51%	19%	22%	

* Department of Education data not available for TYPE OF LEAVES only; all other totals include DOE data.

Notify Employee			Notification Method				Percent Employees Aware of Family Leave Rights (As Of 1/1/92)					(As Of 6/30/92)				Complaints		Complaint/Controversy				
Yes	No	NR	Indiv	Heads	Post	Other	76+	51-75	26-50	0-25	NR	76+	51-75	26-50	0-25	Rec'd	Resly	Hlth Cond	Sick	Vac	Other	
1	0	0	1	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	DPS
1	0	0	1	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	CORP COUN
0	0	1														0	0	0	0	0	0	O ECO DV
1	0	0	0	1	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	FIN
																						FIRE
0	0	1	0	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	H C'CERNS
1	0	0	1	0	1	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	LIQ CTRL
																						PARKS
1	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	PLANNING
																						POLICE
1	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	PROS ATTY
1	0	0	0	0	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	DPW
1	0	0	1	0	1	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	WATER SUP
																						CIV DEF
8	0	2	6	1	4	0	3	1	1	3	1	9	0	0	0	0	0	0	0	0	0	MAUI EXEC Subtotal
1	0	0	0	0	1	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0	MAUI COUNCIL

Notify Employee			Notification Method				Percent Employees Aware of Family Leave Rights (As Of 1/1/92)					(As Of 6/30/92)				Complaints		Complaint/Controversy			
Yes	No	NR	Indiv	Heads	Post	Other	76+	51-75	26-50	0-25	NR	76+	51-75	26-50	0-25	Rec'd	Resly	Hlth Cond	Sick	Vac	Other
68	6	4	35	30	28	9	10	6	11	46	4	63	5	2	5	11	11	16	1	0	4
92%	8%	5%	34%	29%	27%	9%	14%	8%	15%	63%		84%	7%	3%	7%			76%	5%	0%	19%

Appendix I

SUPPLEMENTAL AGREEMENT NO. 5 TO MEMORANDUM OF AGREEMENT DATED AUGUST 7, 1987

This SUPPLEMENTAL AGREEMENT NO. 5 is entered into as of the 2nd day of January, 1992, by and between the undersigned.

WITNESSETH THAT:

WHEREAS, by MEMORANDUM OF AGREEMENT dated August 7, 1987, as amended by Supplemental Agreements Nos. 1, 2, 3, and 4, dated September 28, 1988; July 1, 1989; March 1, 1990; and July 1, 1991, respectively (hereinafter referred to as "MOA"), the Legislative Auditor, Director of the Legislative Reference Bureau, and Acting Ombudsman agreed to certain adjustments in their employeees' compensation, benefits, and terms and conditions of employment; and

WHEREAS, the undersigned mutually desire to further adjust their employees' compensation, benefits, and terms and conditions of employment.

NOW, THEREFORE, the undersigned mutually agree as follows:

1. Part I of the MOA, relating to Clerical Personnel, is amended by the addition of a new Section N to read as follows:

> N. Family Leave - An employee shall be entitled to family leave of four weeks during any calendar year as provided under HRS Chapter 398, HRS Section 79-32, and DPS guidelines.

2. Part II of the MOA, relating to Professional Personnel, is amended by the addition of a new Section N to read as follows:

> N. Family Leave - An employee shall be entitled to family leave of four weeks during any calendar year as provided under HRS Chapter 398, HRS Section 79-32, and DPS guidelines.

3. This Supplemental Agreement No. 5 is effective as of the date first above written and shall remain in full force and effect until modified by written agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Supplemental Agreement No. 5 effective as of the date first above written.

MARION M. HIGA
Legislative Auditor

SAMUEL B. K. CHANG
Director of the Legislative
Reference Bureau

YEN L. LEW
Ombudsman

Appendix J

Below is a list of voluntarily claimed serious health conditions written on leave applications that were sufficiently decipherable.

- Accident; collapsed lung, broken ribs, broken shoulder
- Acute health condition
- Alzheimer's
- Angiocardiography and angioplasty
- Ankle, broken; complicated by history of polio
- Arthritis, degenerative (knees); fell; home supervision would be ideal
- Arthritis, juvenile rheumatoid
- Appendix, ruptured
- Asthma
- Asthma, dehydration from
- Back injury
- Broken knee
- Bronchitis, possible
- Cancer
- Cancer biopsies
- Cancer, colon
- Chicken pox
- Child care provided for daughter
- Cold-flu, severe
- Colonoscopy
- Coma
- Craniopharyngioma, recurrent: surgical removal of
- Death of father
- Driving of automobile, care until doctor approves
- Ear infection
- Emphysema, acute
- Fever, high
- Fractures, multiple left leg
- Fracture: hips; & pneumonia & cardiac problems
- Fractures: compound, spinal
- Fractures: compound, vertebrae
- Gout
- Heart attack
- Heart; Alzheimer's; bedridden
- Heart attack; lack of oxygen in blood system; pneumonia
- Heart and liver tests
- Heart problem
- High blood pressure & heart condition
- Hospital discharge: care
- Hospitalization and supervision at home
- Hospice
- Leukemia: acute lymphobastic
- Leukemia: blood disorder that can lead to; oncologist ordered admission on outpatient basis for blood transfusions
- Life-threatening illness

- Lifetime
- Liver disease
- Medical checkup: one-day
- Medical checkup: post-operative
- Medical checkup: yearly follow-up; exploratory surgery
- Oncology, treatment by
- Oxygen at all times
- Otitis media (bilateral), acute
- Pneumonia
- Poison ulcers -- opened inside; died in hospital
- Respiratory distress: chronic with acute periods
- Retino blastoma; annual CAT scan for cancer
- Retina specialist
- Skull fracture and back abrasions due to accident
- Stomach flu
- Surgery
- Surgery, aftercare
- Surgery, amputation
- Surgery, foot; difficult time ambulating; need to drive spouse to doctor for checkup
- Surgery, internal infection
- Surgery, major
- Surgery, open heart
- Surgery, outpatient
- Surgery, radical
- Terminal illness

Appendix K

CONFERENCE REPORT ON S. 5, FAMILY AND MEDICAL LEAVE ACT OF 1992

Mrs. SCHROEDER submitted the following conference report and statement on the Senate bill (S. 5) to grant employees family and temporary medical leave under certain circumstances, and for other purposes:

CONFERENCE REPORT (H. REPT. 102-816)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 5) to grant employees family and temporary medical leave under certain circumstances, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Family and Medical Leave Act of 1992".

(b) TABLE OF CONTENTS.—

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) PURPOSES.—It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

VENS, and Mr. HATFIELD, to be the conferees on the part of the Senate.

The message also announced that the Senate insists upon its amendments to the bill (H.R. 5503) "An act making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1993, and for other purposes," requests a conference with the House on the disagreeing votes of the two Houses thereon, and appoints Mr. BYRD, Mr. JOHNSTON, Mr. LEAHY, Mr. DECONCINI, Mr. BURDICK, Mr. BUMPERS, Mr. HOLLINGS, Mr. REID, Mr. NICKLES, Mr. STEVENS, Mr. GARN, Mr. COCHRAN, Mr. RUDMAN, Mr. DOMENICI, Mr. GORTON, and Mr. HATFIELD, to be the conferees on the part of the Senate.

The message also announced that the Senate insists upon its amendments to the bill (H.R. 5518) "An act making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1993, and for other purposes," requests a conference with the House on the disagreeing votes of the two Houses thereon, and appoints Mr. LAUTENBERG, Mr. BYRD, Mr. HARKIN, Mr. SASSER, Ms. MIKULSKI, Mr. D'AMATO, Mr. KASTEN, Mr. DOMENICI, and Mr. HATFIELD, to be the conferees on the part of the Senate.

The message also announced that the Senate had passed bills of the following titles, in which the concurrence of the House is requested:

S. 1578. An act to recognize and grant a Federal Charter to the Military Order of World Wars;

S. 1607. An act to provide for the settlement of the water rights claims of the Northern Cheyenne Tribe, and for other purposes;

S. 2044. An act to assist Native Americans in assuring the survival and continuing vitality of their languages; and

S. 2661. An act relating to Native Hawaiian Health Care, and for other purposes.

WELCOME OF BISHOP GILBERT E. PATTERSON

(Mr. STOKES asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. STOKES. Mr. Speaker, on behalf of Congressman HAROLD FORD, who was unavoidably delayed, I am pleased to welcome Bishop Gilbert E. Patterson. Bishop Patterson is a spiritual giant in the Memphis, TN, community. He is the founder and pastor of the Temple of Deliverance Church of God in Christ in Memphis with an active membership of more than 3,000 members.

Bishop Patterson is the founder and president of Bountiful Blessings Ministries. His illustrious messages are heard nationwide on numerous television stations, including Black Entertainment Television Cable Network. He is also the president and general manager of a gospel radio station.

His untiring dedication to his ministries has led to many honors. Bishop Patterson was appointed jurisdictional prelate of the Church of God in Christ, Tennessee Fourth Ecclesiastical Jurisdiction in 1988.

He brings his message of hope to thousands of persons. During his ministerial career, he has organized seven churches in Memphis, TN; Detroit, MI; Toledo, OH; and Forrest City, AR.

On behalf of Congressman HAROLD FORD, I am pleased to introduce a spiritual leader of Bishop Patterson's dedication and standing. We have all been inspired by his words today and I want to thank him for coming to Washington to spread his message of hope.

EASTERN MUSIC AND APPALACHIAN FESTIVALS

(Mr. COBLE asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. COBLE. Mr. Speaker, August 1 past was a significant day for the arts in North Carolina. It marked the season's conclusion of two important cultural events.

At the crown of the Blue Ridge Mountains the inimitable Chet Atkins and Doc Watson concluded the ninth season of an Appalachian Summer, a festival of music, arts, theater, and dance for the Appalachian State University students, tourists, and summer residents of the high country. Gil Morgenstern served as artistic director.

One hundred five miles to the east on the campus of the University of North Carolina at Greensboro under the directorship of music director Sheldon Morgenstern and Walter Heid, executive director, the Eastern Music Festival concluded its season. Founded 31 years ago on the campus of Guilford College, Eastern Music Festival is a program combining a 6-week world class concert series with a training program for exceptionally gifted young musicians from the United States and beyond.

Enthusiastic, appreciative audiences enjoyed these final 1992 performances, and we extend best wishes to an Appalachian Summer and the Eastern Music Festival.

CONFERENCE REPORT ON S. 5, FAMILY AND MEDICAL LEAVE ACT OF 1992

Mrs. SCHROEDER submitted the following conference report and statement on the Senate bill (S. 5) to grant employees family and temporary medical leave under certain circumstances, and for other purposes:

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The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 5) to grant employees family and temporary medical leave under certain circumstances, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

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(b) TABLE OF CONTENTS.—

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(a) FINDINGS.—Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) PURPOSES.—It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

TITLE I—GENERAL REQUIREMENTS FOR LEAVE

SEC. 101. DEFINITIONS.

As used in this title:

(1) COMMERCE.—The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (3) and (1), respectively, of section 120 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (3) and (1)).

(2) ELIGIBLE EMPLOYEE.—

(A) IN GENERAL.—The term "eligible employee" means any "employee", as defined in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)), who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 102; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) EXCLUSIONS.—The term "eligible employee" does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code (as added by title II of this Act); or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) DETERMINATION.—For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply.

(3) EMPLOY; STATE.—The terms "employ" and "State" have the same meanings given such terms in subsections (g) and (c), respectively, of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (g) and (c)).

(4) EMPLOYEE.—The term "employee" means any individual employed by an employer.

(5) EMPLOYER.—

(A) IN GENERAL.—The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer; and

(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)).

(B) PUBLIC AGENCY.—For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(6) EMPLOYMENT BENEFITS.—The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)).

(7) HEALTH CARE PROVIDER.—The term "health care provider" means—

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(8) PARENT.—The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(9) PERSON.—The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(10) REDUCED LEAVE SCHEDULE.—The term "reduced leave schedule" means leave that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(11) SECRETARY.—The term "Secretary" means the Secretary of Labor.

(12) SERIOUS HEALTH CONDITION.—The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(13) SON OR DAUGHTER.—The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

SEC. 102. LEAVE REQUIREMENT.

(a) IN GENERAL.—

(1) ENTITLEMENT TO LEAVE.—Subject to section 103, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) EXPIRATION OF ENTITLEMENT.—The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) INTERMITTENT LEAVE.—

(A) IN GENERAL.—Leave under subparagraph (A) or (B) of paragraph (1) shall not be taken by an employee intermittently unless the employee and the employer of the employee agree otherwise. Subject to subparagraph (B), subsection (e), and section 103(b)(5), leave under subparagraph (C) or (D) of paragraph (1) may be taken intermittently when medically necessary.

(B) ALTERNATIVE POSITION.—If an employee requests intermittent leave under subparagraph (C) or (D) of paragraph (1) that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that—

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(b) REDUCED LEAVE.—On agreement between the employer and the employee, leave under subsection (a) may be taken on a reduced leave schedule. Such reduced leave schedule shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a).

(c) UNPAID LEAVE PERMITTED.—Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave.

(d) RELATIONSHIP TO PAID LEAVE.—

(1) UNPAID LEAVE.—If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title may be provided without compensation.

(2) SUBSTITUTION OF PAID LEAVE.—

(A) IN GENERAL.—An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) SERIOUS HEALTH CONDITION.—An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this Act shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) FORESEEABLE LEAVE.—

(1) REQUIREMENT OF NOTICE.—In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or adoption, the employee shall provide the employer with not less than 30 days notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or adoption requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) DUTIES OF EMPLOYEE.—In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee—

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee; and

(B) shall provide the employer with not less than 30 days notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) SPOUSES EMPLOYED BY THE SAME EMPLOYER.—In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken—

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

SEC. 103. CERTIFICATION.

(a) IN GENERAL.—An employer may require that a request for leave under subparagraph (C)

or (D) of section 102(a)(1) be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) SUFFICIENT CERTIFICATION.—Certification provided under subsection (a) shall be sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 102(a)(1)(C), a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 102(a)(1)(D), a statement that the employee is unable to perform the functions of the position of the employee; and

(5) in the case of certification for intermittent leave for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment.

(c) SECOND OPINION.—

(1) IN GENERAL.—In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 102(a)(1), the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) for such leave.

(2) LIMITATION.—A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) RESOLUTION OF CONFLICTING OPINIONS.—

(1) IN GENERAL.—In any case in which the second opinion described in subsection (c) differs from the opinion in the original certification provided under subsection (a), the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b).

(2) FINALITY.—The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employer and the employee.

(e) SUBSEQUENT RECERTIFICATION.—The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

SEC. 104. EMPLOYMENT AND BENEFITS PROTECTION.

(a) RESTORATION TO POSITION.—

(1) IN GENERAL.—Any eligible employee who takes leave under section 102 for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) LOSS OF BENEFITS.—The taking of leave under section 102 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) LIMITATIONS.—Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) CERTIFICATION.—As a condition of restoration under paragraph (1), the employer may have a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of employees taking leave under section 102(a)(1)(D).

(5) CONSTRUCTION.—Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 to report periodically to the employer on the status and intention of the employee to return to work.

(b) EXEMPTION CONCERNING CERTAIN HIGHLY COMPENSATED EMPLOYEES.—

(1) DENIAL OF RESTORATION.—An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) AFFECTED EMPLOYEES.—An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) MAINTENANCE OF HEALTH BENEFITS.—

(1) COVERAGE.—Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 102, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously from the date the employee commenced the leave until the date the employee is restored under subsection (a).

(2) FAILURE TO RETURN FROM LEAVE.—The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 if—

(A) the employee fails to return from leave under section 102 after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1); or

(ii) other circumstances beyond the control of the employee.

(3) CERTIFICATION.—

(A) ISSUANCE.—An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(D); or

(ii) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(C).

(B) COPY.—The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) SUFFICIENCY OF CERTIFICATION.—

(i) LEAVE DUE TO SERIOUS HEALTH CONDITION OF EMPLOYEE.—The certification described in subparagraph (A)(i) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) LEAVE DUE TO SERIOUS HEALTH CONDITION OF FAMILY MEMBER.—The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

SEC. 105. PROHIBITED ACTS.

(a) INTERFERENCE WITH RIGHTS.—

(1) EXERCISE OF RIGHTS.—It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.

(2) DISCRIMINATION.—It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.

(b) INTERFERENCE WITH PROCEEDINGS OR INQUIRIES.—It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.

SEC. 106. INVESTIGATIVE AUTHORITY.

(a) IN GENERAL.—To ensure compliance with the provisions of this title, or any regulation or order issued under this title, the Secretary shall have, subject to subsection (c), the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)).

(b) OBLIGATION TO KEEP AND PRESERVE RECORDS.—Any employer shall keep and preserve records in accordance with section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) and in accordance with regulations issued by the Secretary.

(c) REQUIRED SUBMISSIONS GENERALLY LIMITED TO AN ANNUAL BASIS.—The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this title or any regulation or order issued pursuant to this title, or is investigating a charge pursuant to section 107(b).

(d) SUBPOENA POWERS.—For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

SEC. 107. ENFORCEMENT.

(a) CIVIL ACTION BY EMPLOYEES.—

(1) LIABILITY.—Any employer who violates section 105 shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 proves to the satisfaction of the court that the act or omission which violated section 105 was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including, without limitation, employment, reinstatement, and promotion.

(2) STANDING.—An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) FEES AND COSTS.—The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) LIMITATIONS.—The right provided by paragraph (1) to bring an action by or on behalf of any employee shall terminate, unless such action is dismissed without prejudice on motion of the Secretary, on—

(A) the filing of a complaint by the Secretary of Labor in an action under subsection (d) in which—

(i) restraint is sought of any further delay in the payment of the damages described in paragraph (1)(A) to such employee by an employer liable under paragraph (1) for the damages; or

(ii) equitable relief is sought as a result of alleged violations of section 105; or

(B) the filing of a complaint by the Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1).

(b) ACTION BY THE SECRETARY.—

(1) ADMINISTRATIVE ACTION.—The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 105 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(2) CIVIL ACTION.—The Secretary may bring an action in any court of competent jurisdiction to recover on behalf of an eligible employee the damages described in subsection (a)(1)(A).

(3) SUMS RECOVERED.—Any sums recovered by the Secretary on behalf of an employee pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) LIMITATION.—

(1) IN GENERAL.—Except as provided in paragraph (2), an action may be brought under subsection (a) or (b) not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) WILLFUL VIOLATION.—In the case of such action brought for a willful violation of section 105, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) COMMENCEMENT.—In determining when an action is commenced by the Secretary under subsection (b) for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) ACTION FOR INJUNCTION BY SECRETARY.—The district courts of the United States shall have jurisdiction, for cause shown, over an action brought by the Secretary to restrain violations of section 105, including actions to restrain the withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees.

SEC. 108. SPECIAL RULES CONCERNING EMPLOYEES OF LOCAL EDUCATIONAL AGENCIES.

(a) APPLICATION.—

(1) IN GENERAL.—Except as otherwise provided in this section, the rights (including the rights under section 104, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this Act shall apply to—

(A) any "local educational agency" (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2891(12))) and an eligible employee of the agency; and

(B) any private elementary and secondary school and an eligible employee of the school.

(2) DEFINITIONS.—For purposes of the application described in paragraph (1):

(A) ELIGIBLE EMPLOYEE.—The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1); and

(B) EMPLOYER.—The term "employer" means an agency or school described in paragraph (1).

(b) LEAVE DOES NOT VIOLATE CERTAIN OTHER FEDERAL LAWS.—A local educational agency and a private elementary and secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this Act.

(c) INTERMITTENT LEAVE FOR INSTRUCTIONAL EMPLOYEES.—

(1) IN GENERAL.—Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 102(a)(1) that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either—

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that—

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) APPLICATION.—The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 102(e)(2).

(d) RULES APPLICABLE TO PERIODS NEAR THE CONCLUSION OF AN ACADEMIC TERM.—The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) LEAVE MORE THAN 5 WEEKS PRIOR TO END OF TERM.—If the eligible employee begins leave under section 102 more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) LEAVE LESS THAN 5 WEEKS PRIOR TO END OF TERM.—If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 102(a)(1) during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) LEAVE LESS THAN 3 WEEKS PRIOR TO END OF TERM.—If the eligible employee begins leave under paragraph (A), (B), or (C) of section 102(a)(1) during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) RESTORATION TO EQUIVALENT EMPLOYMENT POSITION.—For purposes of determinations under section 104(a)(1)(B) (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary and secondary school, such determination shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements.

(f) REDUCTION OF THE AMOUNT OF LIABILITY.—If a local educational agency or a private elementary and secondary school that has violated title I proves to the satisfaction of the administrative law judge or the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of such title, such judge or court may, in the discretion of the judge or court, reduce the amount of the liability provided for under section 107(a)(1)(A) to the amount and interest determined under clauses (i) and (ii), respectively, of such section.

SEC. 109. NOTICE.

(a) IN GENERAL.—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

(b) PENALTY.—Any employer that willfully violates this section shall be assessed a civil money penalty not to exceed $100 for each separate offense.

SEC. 110. REGULATIONS.

Not later than 60 days after the date of enactment of this title, the Secretary shall prescribe such regulations as are necessary to carry out this title.

TITLE II—LEAVE FOR CIVIL SERVICE EMPLOYEES

SEC. 201. LEAVE REQUIREMENT.

(a) CIVIL SERVICE EMPLOYEES.—

(1) IN GENERAL.—Chapter 63 of title 5, United States Code, is amended by adding at the end the following new subchapter:

"SUBCHAPTER V—FAMILY AND MEDICAL LEAVE

"§ 6381. Definitions

"For the purpose of this subchapter—

"(1) the term 'employee' means an individual who has been employed for at least 12 months on other than a temporary or intermittent basis—

"(A) as an employee as defined by section 6301(2) (excluding an individual employed by the Government of the District of Columbia); or

"(B) in a position referred to in clause (v) or (ix) of such section;

"(2) the term 'health care provider' means—

"(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; and

"(B) any other person determined by the Director of the Office of Personnel Management to be capable of providing health care services;

"(3) the term 'parent' means the biological parent of an employee, or an individual who stood in loco parentis to an employee, when the employee was a son or daughter;

"(4) the term 'reduced leave schedule' means leave that reduces the usual number of hours per workweek, or hours per workday, of an employee;

"(5) the term 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves—

"(A) inpatient care in a hospital, hospice, or residential medical care facility; or

"(B) continuing treatment by a health care provider; and

"(6) the term 'son or daughter' means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

"(A) under 18 years of age; or

"(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

"§ 6382. Leave requirement

"(a)(1) An employee shall be entitled, subject to section 6383, to a total of 12 administrative workweeks of leave during any 12-month period for one or more of the following:

"(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

"(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

"(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

"(D) Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

"(2) The entitlement to leave under subparagraph (A) or (B) of paragraph (1) based on the birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

"(3)(A) Leave under subparagraph (A) or (B) of paragraph (1) shall not be taken by an employee intermittently unless the employee and the employing agency of the employee agree otherwise. Subject to subparagraph (B), subsection (e), and section 6383(b)(5), leave under subparagraph (C) or (D) of paragraph (1) may be taken intermittently when medically necessary.

"(B) If an employee requests intermittent leave under subparagraph (C) or (D) of paragraph (1) that is foreseeable based on planned medical treatment, the employing agency may require such employee to transfer temporarily to an available alternative position offered by the employing agency for which the employee is qualified and that—

"(i) has equivalent pay and benefits; and

"(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

"(b) On agreement between the employing agency and the employee, leave under subsection (a) may be taken on a reduced leave schedule. In the case of an employee on a reduced leave schedule, any hours of leave taken by such employee under such schedule shall be subtracted from the total amount of leave remaining available to such employee under subsection (a), for purposes of the 12-month period involved, on an hour-for-hour basis.

"(c) Except as provided in subsection (d), leave granted under subsection (a) shall be leave without pay.

"(d) An employee may elect to substitute for leave under subparagraph (A), (B), (C), or (D) of subsection (a)(1) any of the employee's accrued or accumulated annual or sick leave under subchapter I for any part of the 12-week period of leave under such subparagraph, except that nothing in this subchapter shall require an employing agency to provide paid sick leave in any situation in which such employing agency would not normally provide any such paid leave.

"(e)(1) In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or adoption requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

"(2) In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee—

"(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee; and

"(B) shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

"§ 6383. Certification

"(a) An employing agency may require that a request for leave under subparagraph (C) or (D) of section 6382(a)(1) be supported by certification issued by the health care provider of the employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employing agency.

"(b) A certification provided under subsection (a) shall be sufficient if it states—

"(1) the date on which the serious health condition commenced;

"(2) the probable duration of the condition;

"(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

"(4)(A) for purposes of leave under section 6382(a)(1)(C), a statement that the employee is needed to care for the son, daughter, spouse, or parent, and an estimate of the amount of time that such employee is needed to care for such son, daughter, spouse, or parent; and

"(B) for purposes of leave under section 6382(a)(1)(D), a statement that the employee is unable to perform the functions of the position of the employee; and

"(5) in the case of certification for intermittent leave for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment.

"(c)(1) In any case in which the employing agency has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 6382(a)(1), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a second health care provider designated or approved by the employing agency concerning any information certified under subsection (b) for such leave.

"(2) Any health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employing agency.

"(d)(1) In any case in which the second opinion described in subsection (c) differs from the original certification provided under subsection (a), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employing agency and the employee concerning the information certified under subsection (b).

"(2) The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employing agency and the employee.

"(e) The employing agency may require, at the expense of the agency, that the employee obtain subsequent recertifications on a reasonable basis.

"§ 6384. Employment and benefits protection

"(a) Any employee who takes leave under section 6382 for the intended purpose of the leave shall be entitled, upon return from such leave—

"(1) to be restored by the employing agency to the position held by the employee when the leave commenced; or

"(2) to be restored to an equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment.

"(b) The taking of leave under section 6382 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

"(c) Except as otherwise provided by or under law, nothing in this section shall be construed to entitle any restored employee to—

"(1) the accrual of any seniority or employment benefits during any period of leave; or

"(2) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

"(d) As a condition to restoration under subsection (a), the employing agency may have a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work.

"(e) Nothing in this section shall be construed to prohibit an employing agency from requiring an employee on leave under section 6382 to report periodically to the employing agency on the status and intention of the employee to return to work.

"§ 6385. Prohibition of coercion

"(a) An employee shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of the rights of the employee under this subchapter.

"(b) For the purpose of this section, 'intimidate, threaten, or coerce' includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation).

"§ 6386. Health insurance

"An employee enrolled in a health benefits plan under chapter 89 who is placed in a leave status under section 6382 may elect to continue the health benefits enrollment of the employee while in such leave status and arrange to pay currently into the Employees Health Benefits Fund (described in section 8909), the appropriate employee contributions.

"§ 6387. Regulations

"The Office of Personnel Management shall prescribe regulations necessary for the administration of this subchapter. The regulations prescribed under this subchapter shall be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1992.".

(2) TABLE OF CONTENTS.—The table of contents for chapter 63 of title 5, United States Code, is amended by adding at the end the following:

(b) EMPLOYEES PAID FROM NONAPPROPRIATED FUNDS.—Section 2105(c)(1) of title 5, United States Code, is amended—

(1) by striking "or" at the end of subparagraph (C); and

(2) by adding at the end the following new subparagraph:

"(E) subchapter V of chapter 63, which shall be applied so as to construe references to benefit programs to refer to applicable programs for employees paid from nonappropriated funds; or"

TITLE III—COMMISSION ON LEAVE

SEC. 301. ESTABLISHMENT.

There is established a commission to be known as the Commission on Leave (hereinafter referred to in this title as the "Commission").

SEC. 302. DUTIES.

The Commission shall—

(1) conduct a comprehensive study of—

(A) existing and proposed policies relating to leave;

(B) the potential costs, benefits, and impact on productivity of such policies on employers; and

(C) alternative and equivalent State enforcement of this Act with respect to employees described in section 108(a); and

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report concerning the subjects listed in paragraph (1).

SEC. 303. MEMBERSHIP.

(a) COMPOSITION.—

(1) APPOINTMENTS.—The Commission shall be composed of 12 voting members and 2 ex officio members to be appointed not later than 60 days after the date of the enactment of this Act as follows:

(A) SENATORS.—One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) MEMBERS OF HOUSE OF REPRESENTATIVES.—One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) ADDITIONAL MEMBERS.—

(i) APPOINTMENT.—Two Members each shall be appointed by—

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) EXPERTISE.—Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor-management issues and shall include representatives of employers.

(2) EX OFFICIO MEMBERS.—The Secretary of Health and Human Services and the Secretary of Labor shall serve on the Commission as nonvoting ex officio members.

(b) VACANCIES.—Any vacancy on the Commission shall be filled in the manner in which the original appointment was made. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(c) CHAIRPERSON AND VICE CHAIRPERSON.—The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) QUORUM.—Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

SEC. 304. COMPENSATION.

(a) PAY.—Members of the Commission shall serve without compensation.

(b) TRAVEL EXPENSES.—Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of title 5, United States Code, when performing duties of the Commission.

SEC. 305. POWERS.

(a) MEETINGS.—The Commission shall first meet not later than 30 days after the date on which all members are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) HEARINGS AND SESSIONS.—The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) ACCESS TO INFORMATION.—The Commission may secure directly from any Federal agency information necessary to enable it to carry out this Act, if the information may be disclosed under section 552 of title 5, United States Code. Subject to the previous sentence, on the request of the chairperson or vice chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(d) EXECUTIVE DIRECTOR.—The Commission may appoint an Executive Director from the personnel of any Federal agency to assist the Commission in carrying out the duties of the Commission. Any appointment shall not interrupt or otherwise affect the civil service status or privileges of the employee appointed.

(e) USE OF FACILITIES AND SERVICES.—Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(f) PERSONNEL FROM OTHER AGENCIES.—On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to assist the Commission in carrying out the duties of the Commission. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(g) VOLUNTARY SERVICE.—Notwithstanding section 1342 of title 31, United States Code, the chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

SEC. 306. TERMINATION.

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. EFFECT ON OTHER LAWS.

(a) FEDERAL AND STATE ANTI-DISCRIMINATION LAWS.—Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) STATE AND LOCAL LAWS.—Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State and local law that provides greater employee leave rights than the rights established under this Act or any amendment made by this Act.

SEC. 402. EFFECT ON EXISTING EMPLOYMENT BENEFITS.

(a) MORE PROTECTIVE.—Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family and medical leave rights to employees than the rights provided under this Act or any amendment made by this Act.

(b) LESS PROTECTIVE.—The rights provided to employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

SEC. 403. ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES.

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

SEC. 404. REGULATIONS.

The Secretary of Labor shall prescribe such regulations as are necessary to carry out sections 401 through 403 not later than 60 days after the date of the enactment of this Act.

SEC. 405. EFFECTIVE DATES.

(a) TITLE III.—Title III shall take effect on the date of the enactment of this Act.

(b) OTHER TITLES.—

(1) IN GENERAL.—Except as provided in paragraph (2), titles I, II, and V and this title shall take effect 6 months after the date of the enactment of this Act.

(2) COLLECTIVE BARGAINING AGREEMENTS.—In the case of a collective bargaining agreement in effect on the effective date prescribed by paragraph (1), title I shall apply on the earlier of—

(A) the date of the termination of such agreement; or

(B) the date that occurs 12 months after the date of the enactment of this Act.

TITLE V—COVERAGE OF CONGRESSIONAL EMPLOYEES

SEC. 501. LEAVE FOR CERTAIN SENATE EMPLOYEES.

(a) COVERAGE.—The rights and protections established under sections 101 through 105 shall apply with respect to a Senate employee and an employing office. For purposes of such application, the term "eligible employee" means a Senate employee and the term "employer" means an employing office.

(b) CONSIDERATION OF ALLEGATIONS.—

(1) APPLICABLE PROVISIONS.—The provisions of sections 304 through 313 of the Government Employee Rights Act of 1991 (2 U.S.C. 1204–1213) shall, except as provided in subsections (d) and (e)—

(A) apply with respect to an allegation of a violation of a provision of sections 101 through 105, with respect to Senate employment of a Senate employee; and

(B) apply to such an allegation in the same manner and to the same extent as such sections of the Government Employee Rights Act of 1991 apply with respect to an allegation of a violation under such Act.

(2) ENTITY.—Such an allegation shall be addressed by the Office of Senate Fair Employment Practices or such other entity as the Senate may designate.

(c) RIGHTS OF EMPLOYEES.—The Office of Senate Fair Employment Practices shall ensure that Senate employees are informed of their rights under sections 101 through 105.

(d) LIMITATIONS.—A request for counseling under section 305 of such Act by a Senate employee alleging a violation of a provision of sections 101 through 105 shall be made not later than 2 years after the date of the last event constituting the alleged violation for which the counseling is requested, or not later than 3 years after such date in the case of a willful violation of section 105.

(e) APPLICABLE REMEDIES.—The remedies applicable to individuals who demonstrate a violation of a provision of sections 101 through 105 shall be such remedies as would be appropriate if awarded under paragraph (1) or (3) of section 107(a).

(f) EXERCISE OF RULEMAKING POWER.—The provisions of subsections (b), (c), (d), and (e), except as such subsections apply with respect to section 309 of the Government Employees Rights Act of 1991 (2 U.S.C. 1209), are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate. No Senate employee may commence a judicial proceeding with respect to an allegation described in subsection (b)(1), except as provided in this section.

(g) SEVERABILITY.—Notwithstanding any other provision of law, if any provision of section 309 of the Government Employee Rights Act of 1991 (2 U.S.C. 1209) or of subsection (e) is invalidated, both such section 309 and subsection (e) shall have no force and effect, and shall be considered to be invalidated for purposes of section 322 of such Act (2 U.S.C. 1221).

(h) DEFINITIONS.—As used in this section:

(1) EMPLOYING OFFICE.—The term "employing office" means the office with the final authority described in section 301(2) of such Act (2 U.S.C. 1201(2)).

(2) SENATE EMPLOYEE.—The term "Senate employee" means an employee described in subparagraph (A) or (B) of section 301(c)(1) of such Act (2 U.S.C. 1201(c)(1)) who has been employed for at least 12 months on other than a temporary or intermittent basis by any employing office.

SEC. 503. LEAVE FOR CERTAIN CONGRESSIONAL EMPLOYEES.

(a) IN GENERAL.—The rights and protections under sections 102 through 105 (other than section 104(b)) shall apply to any employee in an employment position and any employing authority of the House of Representatives.

(b) ADMINISTRATION.—In the administration of this section, the remedies and procedures under the Fair Employment Practices Resolution shall be applied.

(c) DEFINITION.—As used in this section, the term "Fair Employment Practices Resolution" means the resolution in rule LI of the Rules of the House of Representatives.

And the House agree to the same.

From the Committee on Education and Labor, for consideration of titles I, III, and IV (except section 404) of the Senate bill, and titles I, III, and IV of the House amendment, and modifications committed to conference:

WILLIAM D. FORD,
WILLIAM CLAY,
GEORGE MILLER,
DALE E. KILDEE,
PAT WILLIAMS,
MATTHEW G. MARTINEZ,
MAJOR R. OWENS,
CHARLES A. HAYES,
TOM SAWYER,
DONALD M. PAYNE,
JOLENE UNSOELD,
CRAIG A. WASHINGTON,
JOSE E. SERRANO,
PATSY T. MINK,
JOHN W. OLVER,
ED PASTOR,
MARGE ROUKEMA,

From the Committee on Post Office and Civil Service, for consideration of title II of the Senate bill, and title II of the House amendment, and modifications committed to conference:

WILLIAM CLAY,
PAT SCHROEDER,
MARY ROSE OAKAR,
GERRY SIKORSKI,
GARY ACKERMAN,
BENJAMIN A. GILMAN,
CONSTANCE MORELLA,

From the Committee on House Administration, for consideration of section 404 of the Senate bill, and title V of the House amendment, and modifications committed to conference:

WILLIAM CLAY,
MARY ROSE OAKAR,
SAM GEJDENSON,
Managers on the Part of the House.

EDWARD M. KENNEDY,
HOWARD M. METZENBAUM,
CHRISTOPHER J. DODD,
TOM HARKIN,
B.A. MIKULSKI,
DAN COATS,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill S. 5, to grant employees family and temporary medical leave under certain circumstances, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

TITLE I—GENERAL REQUIREMENTS FOR LEAVE

Leave entitlement—Birth of son or daughter

The Senate bill provides that an employee shall be entitled to leave "because of the birth of a son or daughter of the employee". The House amendment adds the requirement "and in order to care for such son or daughter".

The conference agreement adopts the House provision.

TITLE II—LEAVE FOR CIVIL SERVICE EMPLOYEES

Definition of employee

The Senate bill defines the term employee as an individual "who has been employed for at least 12 months by an employing agency and completed at least 1,250 hours of service with an employing agency during the previous 12-month period.". The House amendment defines the term employee as an individual "who has been employed for at least 12 months on other than a temporary or intermittent basis;".

The conference agreement adopts the House provision.

Definition of parent

The Senate bill defines the term parent as "the biological parent of the child or an individual who stood in loco parentis to a child when the child was a son or daughter". The House amendment defines the term parent as "the biological parent of an employee or individual who stood in loco parentis to an employee when the employee was—

"(A) under 18 years of age; or

"(B) 18 years of age or older and incapable of self-care because of a mental or physical disability".

The conference agreement provides that the term parent means "the biological parent of an employee, or an individual who stood in loco parentis to an employee, when the employee was a son or daughter;".

Definition of serious health condition

The Senate bill defines the term serious health condition as "an illness, injury, impairment, or physical or mental condition . . .". The House amendment defines the term serious health condition as "a disabling illness, injury, impairment, or physical or mental condition . . .".

Leave entitlement—Birth of son or daughter

The Senate bill provides that an employee shall be entitled to leave "because of the birth of a son or daughter of the employee". The House amendment adds the requirement "and in order to care for such son or daughter".

The conference agreement adopts the House provision.

Unpaid leave

The Senate bill provides that "leave granted under subsection (a) [family and medical leave] may consist of unpaid leave". The House amendment provides that "leave granted under subsection (a) shall be leave without pay".

The conference agreement adopts the House provision.

Substitution of paid leave

The Senate bill provides that an employee may elect, or an employing agency may require the employee, to substitute any of the employee's accrued annual leave for a period of unpaid leave based on the birth or adoption of a son or daughter or to care for a spouse, son, daughter, or parent who has a serious health condition. In addition, the Senate bill provides that an employee may elect, or an employing agency may require the employee, to substitute any of the employee's accrued annual or sick leave for the period of unpaid leave based on a serious health condition of the employee, except that the agency is not required to provide paid sick leave in any situation in which the agency would not normally provide such paid leave.

The House amendment does not permit an agency to require an employee to substitute accrued annual or sick leave for any period of unpaid family or medical leave. In addition, the House amendment permits an employee to substitute any of the employee's sick or annual leave for any period of unpaid family or medical leave, except that the agency is not required to provide paid sick leave in any situation in which the agency would not normally provide such paid leave.

The conference agreement adopts the House provision.

Certification of health care provider

The Senate bill provides that the employing agency may require an employee to obtain subsequent recertifications from a health care provider on a reasonable basis. The House amendment provides that such recertifications will be at the expense of the agency.

The conference agreement adopts the House provision.

Prohibition of coercion—Authority of the Merit Systems Protection Board and the special counsel

The Senate bill provides that an employee allegation of coercion is within the jurisdiction of the Merit Systems Protection Board and may be investigated by the Special Counsel as a prohibited personnel practice. The House amendment has no similar language. Under section 1216 of title 5, United States Code, the Special Counsel has authority to investigate any activity prohibited by any civil service law, rule, or regulation and may investigate and seek corrective action in the same way as if a prohibited personnel practice were involved.

The conference agreement adopts the House provision.

Health insurance

The Senate bill provides that an agency may in certain circumstances recover health benefit premiums paid on behalf of an employee while on family or medical leave if the employee does not return to work upon the expiration of the leave. The House amendment has no similar provision.

The conference agreement adopts the House provision.

TITLE III—COMMISSION ON LEAVE

There are no differences between the Senate bill and the House amendment.

TITLE IV—MISCELLANEOUS PROVISIONS

With the exception of section 404 of the Senate bill, which is discussed below under

Title V, there are no differences between the Senate bill and the House amendment.

TITLE V—COVERAGE OF CONGRESSIONAL EMPLOYEES

Coverage of congressional employees

Section 404 of the Senate extends coverage to employees of the Senate. Title V of the House amendment extends coverage to employees of both the Senate and the House of Representatives.

The conference agreement extends coverage to employees of both the Senate and the House of Representatives. The agreement makes technical changes to conform the Senate procedure for consideration of alleged violations to the procedure provided under existing law, including initial review by the Office of Senate Fair Employment Practices. The provisions for Congressional employees are intended to be exclusive remedies and are considered to be Constitutional exercises of rulemaking by the respective chambers.

From the Committee on Education and Labor, for consideration of titles I, III, and IV (except section 404) of the Senate bill, and titles I, III, and IV of the House amendment, and modifications committed to conference:

WILLIAM D. FORD,
WILLIAM CLAY,
GEORGE MILLER,
DALE E. KILDEE,
PAT WILLIAMS,
MATTHEW G. MARTINEZ,
MAJOR R. OWENS,
CHARLES A. HAYES,
TOM SAWYER,
DONALD M. PAYNE,
JOLENE UNSOELD,
CRAIG A. WASHINGTON,
JOSÉ E. SERRANO,
PATSY T. MINK,
JOHN W. OLVER,
ED PASTOR,
MARGE ROUKEMA,

From the Committee on Post Office and Civil Service, for consideration of title II of the Senate bill, and title II of the House amendment, and modifications committed to conference:

WILLIAM CLAY,
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MARY ROSE OAKAR,
GERRY SIKORSKI,
GARY ACKERMAN,
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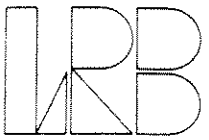
CHRISTOPHER J. DODD,
TOM HARKIN,
B.A. MIKULSKI,
DAN COATS,
Managers on the Part of the Senate.

Appendix L

Samuel B. K. Chang
Director

Research (808) 587-0666
Revisor (808) 587-0670
Fax (808) 587-0720



LEGISLATIVE REFERENCE BUREAU
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

October 7, 1992

4634A

Mr. Keith W. Ahue
Director
Department of Labor and Industrial Relations
Keelikolani Building
830 Punchbowl Street
Honolulu, Hawaii 96813

Dear Mr. Ahue:

As you know, Act 328, Session Laws of Hawaii 1991, requires the Bureau to conduct a study on various aspects of the State's Family Leave Law. One of these is the "...responsibilities that would result from this Act for the director of labor and industrial relations...."

The Bureau would appreciate your written comments on the Director's statutory responsibilities as outlined in section 398-9, Hawaii Revised Statutes:

> **§398-9 Enforcement and administration.** (a) The director shall have jurisdiction over those prohibited acts made unlawful by this chapter. Any individual claiming to be aggrieved may file with the director a verified complaint in writing that shall state the name and address of the employer alleged to have committed the unlawful act complained of, set forth the particulars thereof, and contain other information as may be required by the director. The attorney general, or the director upon the director's initiative, may, in like manner, make and file a complaint.
>
> (b) A complaint may be filed on behalf of a class by the attorney general or the director, and a complaint so filed may be investigated, conciliated, heard, and litigated on a class action basis.
>
> (c) The director shall assist employers in the training and placement of temporary help to perform the work of those employees on family leave.

> (d) The director may also hire, subject to chapters 76 and 77, assistants and clerical, stenographic, and other help as may be necessary to administer and enforce this chapter.

In addition, the Bureau has received comments from various public sector employers regarding difficulty in implementing the law. A recurrent theme among these remarks is the perception that there is no one agency to enforce and administer the law. Although the law gives the DLIR this role, implementation guidelines were issued by the Department of Personnel Services for public employees for whom the law first becomes effective. For some state and county departments, the dissemination of these guidelines came relatively late or not at all, according to respondents in our survey. This, combined with several ambiguities in the law itself, especially the definition of "serious health condition" for family care leave, seems to have made for uneven implementation in the first half of this year.

Accordingly, the Bureau would appreciate the Department's position regarding final authority for administrative rulemaking and interpretation and the Department's plan and timetable for improving statewide implementation for both the public and private sectors. I would appreciate your reply before October 30.

Should you have any questions, please call me at 7-0665. Thank you very much for your help in this completing this study.

Sincerely,

Peter G. Pan
Researcher

PGP:ay

Appendix M

JOHN WAIHEE
GOVERNOR

KEITH W. AHUE
DIRECTOR

KANANI HOLT
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
830 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

October 27, 1992

Peter G. Pan, Researcher
Legislative Reference Bureau
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Pan:

This responds to your letter of October 7, 1992, regarding Chapter 398, Hawaii Revised Statutes, Relating to Family Leave. Responsibility for the law was delegated to the Director of Labor and Industrial Relations, and we have designated the department's Enforcement Division as the lead division for the enforcement and administration of the law.

The director has overall jurisdiction with respect to enforcement and administration of the law. Subsection 398-9(a) provides the mechanism for an individual, the director, or the attorney general to file a complaint against an employer alleged to have violated the chapter. To meet this responsibility, the department has developed forms and internal procedures on the complaint filing process. We plan to expound on this process through administrative rules.

The department is concerned with Section 398-9(c) which mandates the training and placement of temporary help to perform work of those employees on family leave. Although the department has not received any request for assistance from public sector employers, we do foresee problems in having to assist employers in the private sector. Offices affected by this mandate are all operating under growth restrictions at present. Without additional funding, services to employers would be limited.

The department is concerned that the statutory responsibilities in Section 398-9 do not address remedies, penalties, and adequate complaint filing, investigation, hearing, and litigation procedures for the department to effectively enforce and administer the law. We believe that more specific language is necessary so that those aggrieved by an employer's decision denying family leave are not denied their right to due process. Likewise, employers should be accorded the right to an appeal and hearing process, and protection from being subjected to outdated complaints by placing a statutory cap on the period for filing complaints. The department is in the process of preparing proposed legislation for 1993 to address these concerns.

It is the position of the department that the director has final authority and responsibility for interpreting the law and establishing appropriate rules to ensure effective enforcement and administration. Although the authority to establish rules may be assumed to be inherent by statute, it is our position that the Act should be amended to clearly state this authority. We will be submitting proposed legislation giving the director authority to adopt, amend, or repeal rules relating specifically to the Family Leave Law.

As you have indicated in your letter, public sector employers face a common difficulty in developing or revising policies in order to comply with the family leave requirements. The department is fully aware of its responsibility to assist when conflicts arise between interpretations of the law and employers' policies or guidelines, and has made its services available to employers and employees alike. Since most of public sector employment is subject to either collective bargaining or civil service, the Department of Personnel Services and the University of Hawaii Personnel Management Office have issued guidelines to the various personnel offices under their jurisdiction. Although much of the burden of incorporating provisions of Chapter 398 into existing employment policies rests with the employer, the overall responsibility for interpreting the law remains with the director. It is the department's intent to work closely with all employers in order to identify and resolve common issues, and to ensure consistent interpretation of the law.

One of the main focuses of the department in 1993, will be on preparing rules and related procedures necessary for statewide implementation of the law. The department is also poised to embark on a statewide education program in order to ensure awareness and compliance with the law, and to expand our role in compliance and training. However, the overall progress toward improved implementation of the law and the breadth and scope of our compliance, education, and training programs greatly depends upon future budget and legislative considerations.

We hope that the above comments will be of significance in your study. We are approaching a critical stage in the implementation of the law and welcome any opportunity to fully present its impact on the department. Because it is difficult to convey by correspondence the depth of the issues relating to director's responsibilities under the law, we are open to meet with you in order to elaborate further.

Please do not hesitate to call me at 586-8844, or Mrs. Stephanie Kunishima of the Enforcement Division at 586-8757.

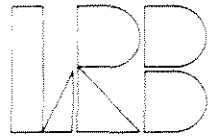
Very truly yours,

Keith W. Ahue
Director of Labor and
Industrial Relations

Appendix N

Samuel B. K. Chang
Director

Research (808) 587-0666
Revisor (808) 587-0670
Fax (808) 587-0720



LEGISLATIVE REFERENCE BUREAU
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

October 7, 1992

4634A

Mr. Richard F. Kahle, Jr.
Director
Department of Taxation
Keelikolani Building
830 Punchbowl Street
Honolulu, Hawaii 96813

Dear Mr. Kahle:

As you know, Act 328, Session Laws of Hawaii 1991, requires the Bureau to conduct a study on various aspects of the State's Family Leave Law. One of these is the "...responsibilities that would result from this Act for the director of...taxation."

Although Act 328 places no responsibilities on your Department, it does require the Bureau to include in our study some discussion of "...the concept of granting income tax credits for employers who would implement the family leave portions of the Act...."

Accordingly, the Bureau would appreciate your written views on both the wisdom of such a tax credit and the Department's responsibilities should such a tax preference ever become law. I would appreciate your reply before October 30.

Should you have any questions, please call me at 7-0665. Thank you very much for your help in completing this study.

Sincerely,

Peter G. Pan
Researcher

PGP:ay

Appendix O

JOHN WAIHEE
GOVERNOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU HAWAII 96809

RICHARD F. KAHLE, JR.
DIRECTOR OF TAXATION

ALFRED C. LARDIZABAL
DEPUTY DIRECTOR

LLOYD I. UNEBASAMI
DEPUTY DIRECTOR

October 21, 1992

Mr. Peter G. Pan
Legislative Researcher
Legislative Reference Bureau
State of Hawaii Research Office
6th Floor
Honolulu, Hawaii 96813

Dear Mr. Pan:

Thank you for your letter of October 7, 1992, requesting our comments on the concept of granting an income tax credit for employers providing family leave.

The Department of Taxation is opposed to the enactment of such an income tax credit for a number of reasons. Although providing family leave as an employment benefit may be meritorious, the Department does not perceive any relationship between family leave and income taxes. The enactment of an income tax credit for employers already required by statute to provide family leave for employees does not represent sound tax policy.

If an employer provides paid family leave, the costs (salaries and benefits) are allowable as a business deduction on their federal and state income tax returns to lower their taxes. A tax credit would result in a double tax benefit for employers (deduction and credit). If the family leave is unpaid, the employer incurs no cost due that employee. A tax credit is not justified for an employee benefit for which the employer incurs no cost.

A tax credit for family leave at the state level reduces the amount of state income taxes paid by an employer. This means a lower expense deduction for state income taxes on the federal income tax return and merely increases the federal income taxes to be paid by the employer. The State collects less revenues but increases federal revenues, a result to be avoided.

An employer's tax credit also increases the administrative and compliance burden for the Department. Our computerized net income tax system will require modification to

accommodate the tax credit. Additionally, the credit will require the addition of another line on the already crowded income tax forms. The tax credit also will require additional auditing of tax returns for the taxpayers claiming the tax credit. Overall the department will incur administrative costs that cannot be quantified.

It also should be noted that the tax credit will result in a decrease of revenues to the general fund at a time of an apparent overall downturn in the economy.

Finally, giving a family leave tax credit seems to be predicated on rewarding employers for giving family leave as required by law. As I have pointed out there is no relationship between family leave and income taxes, and to use the tax system as a reward for performing a legally mandated duty is not well thought out.

I appreciated the opportunity to comment on the impact of an employer tax credit for family leave.

Very truly yours,

RICHARD F. KAHLE, JR.
Director of Taxation

RFK-RCC-JL