

Extended Time Off Overview

Workplace Flexibility 2010 defines Extended Time Off (EXTO) as time taken off from work for a single reason that extends for more than five days but less than one year.

EXTO may be brief in nature (e.g., a few weeks), when taken, for example, for a vacation, to recover from minor surgery, or to comply with a public health quarantine request. EXTO may also be longer in nature (e.g., a month or more), when taken, for example, for maternity/paternity purposes, for elder care, for military duty, or for a sabbatical from work.

EXTO (either brief or prolonged) may be unpaid (e.g., when taken under the Family and Medical Leave Act (FMLA)) or paid (e.g., when taken under California's paid family leave law or under an employer's benefit plan).

EXTO is distinguished from other extended absences from the workplace by two primary variables. With EXTO, an employee wants to and/or expects to be able to return to his/her **original job**; and an employee wants to and/or needs **wage replacement** during the time off.

There are eight different reasons that should account for most employees' needs for EXTO:

- bonding with/caring for a new child;
- caring for an employee's own serious health condition;
- caregiving for a family member;
- military service;
- education/training;
- sabbatical/volunteerism/extended travel;
- vacation; and
- public health emergency needs (voluntary or mandatory quarantine).

This memo discusses the general parameters of EXTO, including the need for EXTO and who currently has access to EXTO, paid and unpaid. The memo then describes various existing laws relating to EXTO and provides a conceptual model for considering various forms of providing EXTO, some unpaid and some paid.

I. The Current Need for EXTO and Access to EXTO

The need for EXTO is increasing as the demographics of our workforce change. More women are working, increasing the number of families with children in which both parents work.¹ As a result, workers, both male and female, often need extended periods of time off to care for and bond with their children. According to a survey of employees conducted in 2000 regarding the federal Family & Medical Leave Act (FMLA), nearly 1 in 5 (20%) of workers who took FMLA leave utilized their longest leave to care for their newborn, newly adopted, or newly placed foster child.² In another survey, when adults (parents and non-parents) were asked what they

thought was the ideal length of time a new mother should have off from work in order to care for her new baby, 37% indicated 3 months or less, 22% indicated 4 to 11 months, and 32% said the ideal length was a year or more.³

Many individuals also need time off to address personal illness or injury. According to the 2000 FMLA survey of employees, among those who took FMLA leave, more than half (52.4%) used their leave to attend to their own health condition.⁴ While most FMLA leaves were for ten days or less, about a tenth of individuals who took FMLA leave reported taking between 41 and 60 days, and another tenth reported taking longer than the 60 days provided under the FMLA.⁵

Another demographic change is the growth of the elderly population. Many older individuals continue to work; between 2002 and 2012, the number of workers 55 years and older is expected to grow by 50%.⁶ Many such individuals, however, may need periods of extended time off to address, for example, age-related medical conditions or to recover from surgery. Federal survey data indicate that 38.4% of people 65 to 69 years old report having a disability.⁷

In addition, many elderly individuals depend on the care and assistance of working family members, often for extended periods of time, sometimes in locations far from where the worker works.⁸ According to the 2000 FMLA survey of employees, among those who took FMLA leave, 13% reported taking time off to care for a parent.⁹

Likewise, according to a national survey on caregiving, of 44.4 million caregivers, including those not covered by the FMLA, the majority (59%) are employed and balancing work and caregiving responsibilities at the same time.¹⁰ In some instances, the burden of caregiving has forced workers to give up work entirely (6%) or take a leave of absence (17%).¹¹ Similarly, among parents of children with special health care needs, 17% reported having to cut back on work, and 13% stopped work entirely due to their children's needs.¹²

EXTO is generally provided by employers under a variety of voluntary employer-sponsored benefits and pursuant to only a few government mandates. Access to EXTO, including paid EXTO, hence varies widely.

One federal law, the FMLA, requires employers to provide up to 12 weeks of unpaid time off in various circumstances. More than 40% of working Americans, however, work for employers who, because they have fewer than 50 employees, are not covered by the FMLA.¹³ In addition, among those who work for employers covered by the FMLA, more than 20% of such workers do not meet the FMLA's other eligibility requirements (such as working more than part-time) and are thus ineligible for the leave required under the statute.¹⁴

Findings from the Family and Work Institute's (FWI) 2005 National Survey of Employers also suggest that some employers may not be following the law. Among employers with 50-99 employees at a single location – who are therefore covered by the FMLA – up to 30% of such employers report offering fewer than 12 weeks of unpaid family leave.¹⁵

In five states (California, Hawaii, Rhode Island, New York, and New Jersey) and Puerto Rico, workers have a statutory right to paid short term disability benefits under a state temporary disability insurance (TDI) program if they incur a disability that makes them unable to work.¹⁶ In those states, the TDI program also provides paid maternity benefits.¹⁷ Workers in the 45 other states, however, have access to disability benefits, including maternity benefits, only if their employers choose to provide such benefits.

Since July 1, 2004, workers in California have also had access to additional state-mandated paid family leave benefits that cover caregiving needs for new children and for sick family members – California provides wage replacement for time taken off to bond with a new child or to care for an ill family member.¹⁸ In 2008, New Jersey also expanded its TDI program to provide workers with up to six weeks of benefits to care for a sick family member or to care for a newborn or newly adopted child.¹⁹

The state of Washington has also enacted a paid family leave law.²⁰ Without an existing state TDI program to provide a funding and organizational structure, however, that state has struggled with implementation issues.²¹ The law, scheduled to become effective in 2009, provides partial wage replacement to workers for up to 5 weeks to care for newborn or newly adopted children.²²

Given the paucity of federal and state laws governing EXT0, access to EXT0 is dependent largely on voluntary employer practices. Perhaps not surprisingly, therefore, such access tends to vary widely based on variables such as the size of a business, occupational category, and full-time or part-time work status of the employee.

According to a survey of human resource professionals, large businesses are more likely to offer better maternity/paternity/adoption benefits than small ones, and companies in the education, finance and government industries generally offer more generous maternity/paternity benefits than companies in the high technology, service, and manufacturing industries.²³ A Bureau of Labor Statistics (BLS) survey shows that white collar workers are twice as likely to receive paid time off for maternity/paternity purposes and long-term disability as are blue collar workers.²⁴ The same survey indicates that full time workers are significantly more likely to receive EXT0 benefits, such as time off for maternity/paternity purposes and short and long term disability, than their part-time counterparts.²⁵

According to the BLS survey, only 37% of all private-sector employees have access to paid short-term disability insurance (which is the primary source of funding for maternity leave, as well as for traditional disability leave).²⁶ Among employees who make \$15/hour or more, 52% have access to such benefits.²⁷ Only 8% of all private sector employees have access to benefits that are specifically denoted as paid maternity, paternity or adoption benefits.²⁸

According to the 2000 FMLA survey of employees, approximately 65% of employees who took FMLA leave did receive at least *some* pay during their time off. When asked about the source of pay during their longest leave, 61% of leave takers reported sick leave, 40% reported vacation leave, and 26% reported personal leave. Nearly one in 5 (18%) reported temporary disability insurance.²⁹

Those who may have a significant need for and legal access to EXT0 may, nonetheless, not take such time off as long as the EXT0 is unpaid. A majority of all workers (78%) report that they would be financially unable to take advantage of unpaid FMLA leave.³⁰

Indeed, the 2000 FMLA survey of employees found that lack of pay was the number one reason that workers who needed time off did not take it.³¹ Surveys show that workers taking unpaid time off under the FMLA worry about having sufficient money to pay their bills, and that nearly 10% of leave takers who did not receive full pay while taking time off relied on public assistance as a result of their diminished income.³²

There is much less data available with regard to EXT0 provided for reasons other than caring for new children or for dealing with health issues. One survey, however, indicates that the majority of companies do not provide time off (paid or unpaid) for sabbaticals or volunteerism.³³

II. The Current Policy Landscape

A. Existing Models for Unpaid EXT0

1. THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)³⁴

The FMLA permits eligible employees to take up to 12 weeks off for each 12-month eligibility period. This time off is unpaid, but job-protected. That means that the same or equivalent job must be available to the employee upon his or her return, and that the employer must maintain certain benefits for the employee during and following the time off.³⁵

FMLA is available for reasons related to:

- (i) the birth or adoption of a child;
- (ii) the "serious health condition" of an employee; or
- (iii) the "serious health condition" of an employee's immediate family member.

To be eligible for time off, an employee must have been employed by the employer for at least 12 months (which need not be consecutive), must have provided at least 1,250 hours of service to the employer during the previous 12-month period,³⁶ and must work for an employer who employs at least 50 employees at the employee's worksite or in total at other worksites within 75 miles of the employee's worksite.³⁷

EXT0 taken under the FMLA for parenting purposes is relatively straightforward. A male or female employee may take EXT0 under the FMLA for the "birth of a son or daughter" of the employee, "to care for such son or daughter," or because of the "placement of a son or daughter with the employee for adoption or foster care."³⁸

EXT0 taken for medical reasons under the FMLA is more complicated.

The FMLA defines a "serious health condition" as an illness or injury "that involves inpatient care" or "continuing treatment by a health care provider."³⁹ The Department of Labor (DOL) regulations define "inpatient care" to mean at least one overnight stay in a hospital, hospice, or residential medical care facility including any period of incapacity or any subsequent treatment related to the inpatient care.⁴⁰ The regulations define "continuing treatment" as including five distinct scenarios:

- being incapacitated by a condition for longer than three days and seeing a doctor for the condition twice or more.⁴¹ (Note: DOL has proposed changing this regulation to specify that the two visits to the doctor must take place within a 30-day period.);⁴²
- incapacity of any length because of pregnancy or prenatal care;⁴³
- incapacity of any length for chronic conditions, such as asthma and diabetes;⁴⁴ (Note: DOL has proposed changing the definition of chronic condition to specify that a chronic serious health condition requiring periodic visits is one requiring at least two visits per year);⁴⁵
- permanent or long-term incapacity due to conditions that lack effective treatments, such as Alzheimer's or a severe stroke;⁴⁶ or
- absences to receive multiple treatments for restorative surgery or a condition that would likely result in more than three days of incapacity if not treated (e.g., treatments like chemotherapy or dialysis, which might make the employee "unable to perform the functions" of his or her job only by virtue of the need for absence to receive treatments).⁴⁷

The FMLA also permits eligible employees to take EXTO to "care for" an immediate family member (namely, a spouse, son, daughter or parent) with a "serious health condition" including providing physical and/or psychological care to the family member, making arrangements for changes in care, or providing respite care for others who normally provide such care.⁴⁸

While FMLA leave is unpaid the statute permits other forms of paid time off to be substituted, or to run concurrently with, FMLA leave, either at the employee's election, or as required by the employer.⁴⁹

Currently, employees may substitute paid vacation or personal leave for FMLA leave without restriction.⁵⁰ However, employees may substitute paid sick or medical leave for FMLA leave only where the employers' existing sick or medical leave policies would permit time off for the reasons the employee is taking leave, unless the employer specifically permits such substitution.⁵¹

DOL has proposed changing the regulations to clarify that employees must follow the terms and conditions of their employer's paid leave policies when substituting any form of paid leave for FMLA leave, thus eliminating the distinction between paid sick leave and paid vacation or personal leave.⁵²

An employee's benefits are protected while the employee is on FMLA leave. For example, the employee has the right to remain covered under the employer's group health plan, under the same terms as when he or she was working, including maintaining the same employer and employee premium contribution levels.⁵³ During FMLA leave, an employee's entitlement to benefits other than group health benefits is determined in accord with the employer's established policies for other forms of paid or unpaid time off.⁵⁴

The fact that FMLA leave is "job-protected" means that an employee is entitled to return to the same or an equivalent position, with equivalent pay, benefits and other terms of employment, even if the employee has been replaced or the position has been restructured to accommodate the employee's absence.⁵⁵ However, an employee does not have the right to return to his or her position, if that position has been eliminated due to a reorganization or reduction in force that would have occurred regardless of whether the employee took leave.⁵⁶

An employee is entitled to any unconditional pay increases which occurred during his/her FMLA leave, but is only entitled to conditional pay increases (e.g., those based on seniority, length of service, work performed) if the employer normally grants these pay increases to employees under its standard "leave without pay" policies.⁵⁷ An employee is also entitled to continue his/her entitlement to bonuses that are not related to the employee's performance (e.g., attendance or safety bonuses) after the employee's return from FMLA leave.⁵⁸ For bonuses related to performance (e.g., a monthly production bonus), employees are entitled to the same consideration for the bonus as other employees on paid or unpaid leave.⁵⁹

The FMLA's job protection requirement does not apply to "certain highly compensated employees" (called "key employees" under the FMLA regulations) in certain circumstances.⁶⁰ A highly compensated employee is defined as 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.⁶¹

Because of an inquiry made by the Department of Labor at the end of 2006 soliciting views on how the FMLA is working, we have a substantial amount of information about employer and employee viewpoints on the law.⁶² After receiving more than 15,000 comments in response to its request for information, the Department of Labor issued a Report summarizing and commenting on the responses.⁶³ Lawyers at Workplace Flexibility 2010 also reviewed 575 comments submitted to the DOL and issued a series of memos summarizing those comments.⁶⁴

According to the DOL Report, employers reported that the FMLA generally worked well when taken in planned blocks of time: to care for children following childbirth or adoption, to address an employee's own "indisputably" serious health conditions, or to care for family members with "indisputably" serious health conditions.⁶⁵ By contrast, the DOL Report summarized extensive employer concerns with how the intermittent leave provisions of the FMLA were operating in practice.⁶⁶

The DOL Report also documented employees' statements that the job-protected time off provided under the FMLA was critical to their ability to fulfill their job responsibilities and their responsibilities for their own well-being and the well-being of their families. The Report also noted that employees described a great need to expand the benefits available under the law, in particular the need for such leave to be paid.⁶⁷

On February 11, 2008, the DOL, based in part on the public comments it had received, issued a notice of proposed rulemaking with a number of changes the DOL was recommending for implementation of the FMLA.⁶⁸

Over the last several years, federal legislators have introduced a number of proposals to **expand** the benefits provided under the FMLA. The only area in which this has been successful, however, has been with regard to military families.

The National Defense Authorization Act for FY 2008 amended the FMLA to extend unpaid job protected time off to military families in two situations.⁶⁹ First, workers are provided with up to twelve weeks of job-protected leave for "any qualifying exigency" (as defined in regulations to be issued by the DOL) arising from an impending call or order to active duty in support of a contingency military operation.⁷⁰ Second, workers are provided with up to 26 weeks of job-protected leave to care for a service member in the military with a serious injury or illness.⁷¹

As noted, federal legislators have consistently introduced proposals to expand the FMLA. One of the most common approaches is to expand coverage under the Act to employees of employers with 25 or more employees or with 15 more employees.⁷² Another common approach is to expand the categories of family members for whom an employee can take job-protected time off to provide care or to expand the activities for which time may be taken.⁷³

A bill that was passed by the House of Representatives in May 2008, the Airline Flight Crew Technical Corrections Act, amended the FMLA to reduce the hours of service flight crews needed to qualify for leave under the law.⁷⁴ The Senate did not act on the bill during the 110th Congress.

2. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

USERRA is a federal law enacted in 1994 to provide job protection (and protection of benefits) to employees who take time off from their jobs to serve as members of the uniformed services.⁷⁵

USERRA generally entitles an employee to reemployment by an employer after an absence due to service in the uniformed services, provided that the employee (or an appropriate military officer) has given the employer advance notice of the service and provided that the employee returns to work in a timely fashion or applies for reemployment.⁷⁶ The maximum amount of time that an employee may be absent due to uniformed service and receive job protection is five cumulative years.⁷⁷

There are three circumstances in which an employer is not required to rehire an employee who has left for uniformed service:

- if the employer's circumstances have changed so as to make reemployment "impossible or unreasonable" (e.g., when there has been an intervening reduction in force that would have included that employee);⁷⁸
- in the case of an employee who has suffered a disability (or who has had a disability aggravated) during service, or in the case of an employee who is not qualified for the job, "if such employment would impose an undue hardship on the employer;"⁷⁹ or
- if the employee's position from which he or she has left for uniformed service was "for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."⁸⁰

For each of these defenses, the employer bears the burden of demonstrating the required standard – e.g., impossibility, undue hardship, or brief, non-recurrent job.⁸¹

The defense of undue hardship is worth explicating a bit further given the ambiguity of the statute. The statute provides that, in the case of employees noted in several cross-references, an employer has an "undue hardship" defense to re-employment.⁸² One cross-reference is to an individual who has a disability incurred in, or aggravated, during service.⁸³ The "undue hardship" defense can logically apply to such an individual.

The second cross-reference is to an individual who is "not qualified" to be employed in the position.⁸⁴ It is unclear whether the "undue hardship" defense is simply another way of saying that the employer need not rehire an individual who is not qualified for the job or whether there are additional factors the employer must show in such a circumstance.

Interestingly, the regulations issued by the Department of Labor in 2005 do not require that an employer show that *re-employing an unqualified individual* would impose an undue hardship on the employer. Rather, the regulatory provision simply requires that an employer must demonstrate "that assisting *the employee in becoming qualified for reemployment* would impose an undue hardship."⁸⁵ This regulation then cross references a separate regulation that discusses what efforts an employer must make to help an employee become qualified for a reemployment position.⁸⁶ As noted in the following paragraph, this obligation on the employer is statutory.

USERRA ensures that an employee on leave for uniformed service will continue to accrue seniority in his or her workplace. The statute requires that an employer reinstate an employee to a position comparable in seniority, status, and pay as that to which the employee would have been entitled to but for the absence for uniformed service.⁸⁷ The regulations describe this requirement as an "escalator principle."⁸⁸ If the employee is not qualified to hold a position of such seniority and status (presumably due to the employee's absence), the employer is required to make "reasonable efforts" to qualify the employee for such a job.⁸⁹ Only if such efforts are unsuccessful may an employer place the employee into a position that is comparable to the position that the employee held when he or she *left* for uniformed service.⁹⁰

Finally, a reinstated employee is significantly protected with regard to benefits. The statute treats health benefits, pension benefits, and other employer-provided benefits separately. For any benefits based on seniority, the employee's absence does not count against the individual at all.⁹¹ With regard to benefits that are not based on seniority, the employer must treat the employee as if he or she were on furlough or leave of absence.⁹² Thus, an employer must continue to provide any benefits to the employee that it would have provided to other

employees on a leave of absence, but need not provide any benefits that would not have been provided to such employees. In addition, if an employee on a leave of absence would have been required to pay an employee cost of a benefit, the employee who is absent for uniformed service may similarly be required to pay that cost.⁹³

With regard to health benefits, employers must provide COBRA-like benefits to their employees on military service.⁹⁴ Employee health plans are required to offer up to 36 months of continued coverage to such employees (and their dependents), and generally may not require the employees to pay more than 102% of the full premium during that time.⁹⁵

Unlike COBRA protection, in most circumstances only the employee (and not the employee's beneficiaries) has the right to continued USERRA health care coverage. If, at the end of an employee's absence, the employee is reemployed, a health plan may not impose an exclusion or waiting period on the employee (or dependents), other than for coverage of an illness or injury incurred in or aggravated during the employee's uniformed service.⁹⁶

With regard to pension benefits, the employee is treated as if continually employed by the employer during the time of the absence.⁹⁷ If a pension or retirement plan requires an employee contribution, the employee must make such contributions in order to receive any employer contributions.⁹⁸ However, the employee is given a period of either five years, or three times the length of uniformed service (whichever is shorter), in which to make the contributions to the pension plan, once reemployed.⁹⁹

After an employee has been reemployed under USERRA's protections, an employer may not discharge that employee, except for cause, for up to a year following the individual's reemployment.¹⁰⁰

USERRA is a job-protection statute, not a paid leave statute. Thus, employers have no obligation to pay employees while they are in uniformed service. Many reservists who are activated to serve (particularly those who are self-employed) make a significantly lower military salary while on reserve than they do in their civilian employment.¹⁰¹ Some private employers have voluntarily made up the difference in pay for their employees called to military service, but the law imposes no such requirement.¹⁰²

The HOPE at HOME Act, first introduced on February 2, 2005 and most recently reintroduced on January 24, 2007, amends USERRA to require federal employers to pay the difference, if any, between an employee's federal civilian salary and the employee's military compensation.¹⁰³ This requirement would apply to federal employees who are reservists and who are called to serve on active duty for more than ninety days.¹⁰⁴ The proposed bill would also give self-employed reservists in active duty a self-employment tax credit for the period of active service.¹⁰⁵

3. STATE EXTO LAWS

Many state governments have enacted "state FMLA" laws that provide EXTO to workers in a manner similar to the federal FMLA. Requirements under these laws vary, with some laws providing broader protection to employees, and others providing narrower protection. For example, eligibility under these laws varies significantly. Some cover only a subset of employees (e.g., only state employees, only pregnant employees) and others have different eligibility requirements based on the employee's hours worked, the length of service, or the number of employees that work for a particular employer.

A few examples:

- Alaska offers up to 18 weeks of unpaid time off per two-year period to state employees who have worked at least 35 hours per week for six months (or 17.5 hours per week for 12 months).¹⁰⁶
- The District of Columbia provides 16 weeks of unpaid medical leave and 16 weeks of unpaid family leave per two-year period to employees of any employer who employs 20 or more persons.¹⁰⁷
- Massachusetts provides job-protected time off for up to 8 weeks to female employees who are absent for pregnancy-related reasons.¹⁰⁸

Under these state laws, EXTO is generally available for pregnancy and childbirth, as well as for medical conditions of the employee or a family member.¹⁰⁹ Several states have a more expansive definition of the "family member" for whose illness an employee may take time off, thus offering broader coverage than the federal FMLA.¹¹⁰ For example, Arizona's definition of family member includes the employee's spouse, child (natural, adopted, foster, step), parent (natural, step, adoptive), grandparent, grandchild, brother, sister, brother-in-law, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, nephew and niece.¹¹¹ Three states' family leave statutes include caring for domestic partners or civil union spouses, as well as marital spouses, within the definition of family leave.¹¹²

The benefits provided by state law also vary. Some state laws mirror the FMLA's benefits and length of time off,¹¹³ while others specify different amounts of time off.¹¹⁴ State laws also vary as to whether other forms of time off are required to run concurrently with or may be substituted for "state FMLA" time off, or whether these other time off benefits are in addition to "state FMLA" benefits.¹¹⁵ Many state laws require that health insurance benefits, and in some cases additional benefits, be continued during the time off.¹¹⁶

A few state laws also require that EXTO be offered for reasons not covered in the FMLA, such as miscarriage and abortion, organ or bone marrow donation and non-medical family responsibilities.¹¹⁷ Some states even offer paid job-protected time off for state employees competing in the Olympics.¹¹⁸

Ohio's Civil Rights Commission recently undertook an initiative to expand unpaid maternity leave benefits.¹¹⁹ In October 2007, the Ohio Civil Rights Commission approved regulations that would require employers with as few as four employees to provide 12 weeks of unpaid maternity leave.¹²⁰ Unlike the FMLA, the regulations did not require employees to have worked a certain number of hours to be entitled to maternity leave.¹²¹ On December 3, 2007, the Commission submitted the regulations to the Joint Committee on Agency Rule Review (JCAAR) for review and approval. JCAAR did not approve the regulations, and sent them back to the Commission for further fiscal analysis.¹²² No further action has been taken.

4. FOREIGN EXTO LAWS

Various foreign countries have also enacted laws that provide unpaid EXTO to parents, in some cases in significant amounts. Many foreign countries provide both maternity and paternity leave (for the time immediately preceding and following a child's birth) and parental leave (for the time following maternity/paternity leave, generally anywhere up to the child's first to fifth birthday).

For example, Australia offers 52 weeks of unpaid time off to parents following the birth or adoption of a child up to age 5 years. Employees are eligible for the benefit if they are in full or part time permanent positions and have served 12 continuous months of service with the same employer by the time the child is born. The time off may be taken in conjunction with other kinds of paid time off (e.g., time off for maternity purposes offered

by an employer), but the maximum amount of time off when using a combination of paid and unpaid time off is 52 weeks. In addition, while both parents may take time off together during the week following the child's birth, the parents must split the remainder of the time off.¹²³

The United Kingdom provides 13 weeks of unpaid time off per parent per child to care for the child.¹²⁴ The time off may be taken at any time up to a child's fifth birthday or eighteenth birthday, if the child is disabled), for employees who meet certain job tenure requirements, though only four weeks may be taken each year.¹²⁵ Employees are eligible for this leave if they have completed one year of continuous employment with their present employer and they have, or expect to have, parental responsibility for a child.¹²⁶ Both mothers and fathers are eligible for parental leave, but the leave is an individual right that may not be transferred to the other parent.¹²⁷

The United Kingdom also provides for 52 weeks of time off for unpaid maternity leave.¹²⁸ Following the Work and Families Act of 2006 and subsequent regulatory changes, all pregnant women are entitled to 52 weeks of job-protected time off (prior to the Act some pregnant women were only entitled to 26 weeks, while others, because of longer job tenure, were entitled to 52).¹²⁹

III. Existing Models for Paid EXT0

As noted above, some employees receive EXT0 only on an unpaid basis. Other employees receive full or partial wage replacement during their time off.

Assuming one believes that wage replacement is appropriate during EXT0, the following section discusses various ways in which such paid EXT0 might be funded.

In thinking about these programs, there are two questions to consider: 1) *who* pays for the EXT0 (e.g., is it the employee, the employer, taxpayers, or some combination of all three), and 2) *how* (i.e., by what mechanism) are these EXT0 funds collected from these various possible sources.

Once the question of *who* pays for EXT0 is answered, the question of *how* EXT0 funds should be collected must be addressed. There are various mechanisms that can be used to collect such funds – even from the same source.

The chart below highlights some existing collection mechanisms from different groups.¹³⁰

Employee Pays	Employer Pays	Taxpayer Pays	Joint Funding
Payroll tax	Payroll Tax experience rating a flat tax	Income tax as a percentage of income into a general or specific fund.	Equal contributions
Pre-tax funding to an individual account	General employer funds	Other taxes (e.g., sales tax, property tax, cigarette tax, etc.) into a general or specific fund.	Employee tax with Employer match Employee and/or Employer tax with Government match
Deferred compensation plans/tax savings accounts			If the employee contribution is pre-tax and the employer is allowed a deduction or credit, the government "funds" EXTO by giving up revenue

A. General Conceptual Approaches

Existing EXTO programs vary based on *who* pays for the time off: employees, employers, the government, or all three.

Employees may fund EXTO benefits under at least three models – the specific employee pays (e.g., under individual employer policies), a subgroup of employees pays (e.g., leave banks) or all employees pay (e.g., social insurance programs like California's paid family leave law).

Employers may fund EXTO under at least two models – the specific employer pays (e.g., short term disability, vacation, time off for maternity purposes) or all employers pay (e.g., unemployment compensation for care of a newborn child).

The *government* (i.e., all of us as taxpayers) may fund the benefit using public funds (e.g., "At-Home Infant Care" (AHIC) programs) or by providing tax incentives (e.g., tax credits to companies who provide paid EXTO).

Lastly, EXTO may be funded *jointly*, by some combination of employees, employers, and the government all paying some portion of the cost (e.g., some state TDI programs, some EXTO programs in foreign countries).

We describe below some existing and proposed models for paid EXTO – organized along the lines of who pays for them.

B. Models for Paid EXTO

1. EMPLOYEE PAYS

A. Specific Employee Pays

The least common approach to paying for EXTO is for the individual employee to pay in advance for the EXTO out of his or her own salary and benefits while continuing to be employed.¹³¹ Nonetheless, some companies do provide mechanisms for individual employees to self-fund their EXTO needs.

For example, one large consulting firm has started an EXT0 program for employees (use of which is currently limited to a maximum of three times in a career). Under the program, employees essentially self-fund their own sabbaticals.

The employee first decides that he or she needs time away from work at a predetermined point in the future, for any reason (e.g., birth or adoption, personal rejuvenation, caring for aging parents), and then consults with his or her manager to plan for this time off. The employee continues working full time during the period before the time off, but during this time receives only a percentage of his or her ordinary pay and directs the employer to deposit the remaining percentage (of the employee's after-tax pay) into a separate account in the employee's name. The employee elects either to self-direct the account's investment or to have the employer direct the investment.

Because the account is in the employee's name, the employee has full access to the account at any time. When the employee's time off begins (the employee's time off is currently limited to a maximum of three months), the full amount in the account is distributed to the employee in a lump sum payment. In other words, instead of going to a bank to set up a "Christmas Club Account," employees essentially go to their employer to set up an "EXT0 Account."

During the employee's time off, the employee remains eligible to participate in the company's health care plan, with the employer paying the employee's portion of the premiums during this time. In addition, during the time off, the employee's career counselor remains in contact with the employee to assist with any issues that may arise during the time off and to help the employee transition back to the company upon return.¹³²

Similar programs have been proposed in New York and Nebraska. Bills in both states would allow workers to set aside part of their compensation, exempt from state income tax, to be used when taking time off under the FMLA.¹³³

B. Subgroup of Employees Pay

Many employers (particularly in the public sector) sponsor leave banks. We categorize this approach as a form of "subgroup of employees pay."¹³⁴

A leave bank permits employees to donate their paid time off to other employees who have exhausted their paid time off. Under this mechanism, a subgroup of employees subsidizes another employee's EXT0, in exchange for the safety net of having a pool of paid time off available to them should they need it.

Leave banks generally allow donated leave to be used only for time off relating to health related conditions. In traditional *leave bank* programs, employees donate paid time off days to a general pool out of which any co-worker in need may draw. In *transfer* programs, employees with accrued paid time off may donate days to a particular co-worker in need.

The Internal Revenue Service has ruled that when an employee donates leave to a leave bank program, or surrenders leave to the employer to be transferred to another employee, the leave donor does not realize any taxable income or incur any deductible expense or loss upon such a donation or transfer.¹³⁵ The recipient of the donated leave, however, is required to include the donated leave as compensation, taxable as income.¹³⁶ As a practical matter, this simply means that the recipient has the same income and payroll taxes taken out of his or her gross pay (provided during the time off) as is ordinarily taken out of his or her pay during regular employment.

Under a federal law enacted in 1988, the Office of Personnel Management (OPM) has the responsibility of establishing voluntary leave bank and leave transfer programs for federal employees.¹³⁷ Beginning in 1989, OPM issued regulations requiring that each agency establish and administer its own leave bank and leave transfer programs.¹³⁸

The requirements with respect to both the leave bank and leave transfer programs are similar. For example, the federal law prohibits an employee from donating, in any leave year, more than one-half of the amount of annual time off he or she would accrue during a leave year.¹³⁹ The law places no limit on the amount of donated annual time off a leave recipient may receive from the donor(s), other than to stipulate that any unused donated time off must be returned to the donor(s) when the medical emergency ends.¹⁴⁰ OPM, however, has required that agencies set a limit on how much donated annual time off any particular employee may receive.¹⁴¹

A number of states also operate leave bank programs for their state employees. For example, in California, state employees are permitted to transfer their annual, vacation, and holiday time off (but not their sick days) to another employee in the event that the employee has exhausted all time off due to a catastrophic illness or injury.¹⁴² A catastrophic illness or injury may include the incapacitation of a member of the employee's family, if this requires the employee to take extended time off from work to care for the family member and the employee has exhausted all paid time off.¹⁴³

C. All Employees Pay

Five states — California, Hawaii, New Jersey, New York and Rhode Island — and Puerto Rico have established state temporary disability insurance (TDI) programs that provide partial or full income replacement to employees who need to take time off from work because of their own non-work-related illness. Two states, California and New Jersey, have supplemented their disability insurance program with a family leave insurance program that provides partial income replacement to employees who take time off from work to care for a new child or for an ill family member.

Some state-administered disability programs are funded *jointly* by employers and employees. Those programs are therefore discussed in the section below. The disability and family leave programs in California, the family leave program in New Jersey, and the disability program in Rhode Island are funded solely by employees through an *employee payroll tax*. Hence, we discuss these three programs here.

California's comprehensive State Disability Insurance (SDI) program, enacted in 1946, and its paid family leave (PFL) program, enacted in 2002 and effective in 2004, are funded by an employee payroll tax.¹⁴⁴

California's SDI program provides wage replacement to workers who need to take time off from work due to their own disability. The PFL program expands the existing SDI program to cover individuals who take time off to care for a seriously ill family member or to bond with a new child.

A worker is considered "disabled" and potentially eligible for SDI benefits if he or she is "unable to perform his or her regular or customary work" due to a "physical or mental condition."¹⁴⁵ If disabled, a worker is generally eligible for SDI if he or she has earned a de minimis amount of wages (\$300) during a defined period of time before becoming disabled (the "disability base period").¹⁴⁶ A worker also must file a valid claim, satisfy a seven consecutive day waiting period, and provide required medical documentation of the disability to receive benefits.¹⁴⁷

Once found eligible, a worker generally may receive up to 52 weeks of SDI wage replacement during any "disability benefit period."¹⁴⁸ The worker receives a "weekly benefit amount" of approximately 55% of his or her average weekly salary during the highest earning quarter of his or her "disability base period."¹⁴⁹ An individual's total SDI benefits are capped by the total amount of wages that individual earned during his or her "disability base period."¹⁵⁰ **A recipient is also limited to a maximum cap on the weekly benefit amount, \$917 in 2008.**¹⁵¹ For individual income tax purposes, SDI benefits are not considered taxable income for either federal or state purposes.¹⁵²

California's PFL program was added to the SDI program in 2002 and thus shares many of the SDI program's characteristics. Like the SDI program, the PFL program is solely a wage replacement program and not a job protection guarantee, but it too operates in conjunction with other state and federal laws that provide job protection.¹⁵³

The PFL program provides income replacement to individuals who are temporarily unable to work due to the need to take time off for bonding with a new child or for caring for a child, parent, spouse or domestic partner with a "serious health condition."¹⁵⁴

As with the SDI program, the PFL program is funded by employees through a payroll tax.¹⁵⁵ In 2004 and 2005, employees contributed at a rate of 0.08% of the taxable wage limit (\$68,829 in 2004 and \$79,418 in 2005) for PFL benefits, in addition to contributing for SDI benefits.¹⁵⁶ From 2006 and beyond, the employee's contribution for PFL is incorporated into the base SDI contribution rate of 0.8%; in 2008, up to the first \$86,698 in wages earned by each worker were subject to this tax.¹⁵⁷

There is a non-consecutive seven-day waiting period during which an employee must be absent from work under qualifying circumstances, and which is not payable.¹⁵⁸ All employers, including small employers, must provide the benefits payable under the PFL program and self-employed individuals may elect to obtain coverage by paying into the state's SDI system.

The SDI program is funded through a payroll tax on employees that is tax-deductible for federal, but not state, income tax purposes.¹⁵⁹ As of January 1, 2007, the current payroll tax rate for benefits available under the PFL program was .6%.¹⁶⁰ For 2007, benefits, which are based on earnings during a 5 to 17-month base period, ranged from \$50 to \$882. **In the month of June 2007, the average weekly benefit amount for the PFL program was \$454.**

To be eligible for PFL benefits, an individual generally must meet SDI eligibility requirements (e.g., have earned \$300 in previous quarters, file a valid claim, submit appropriate medical certification), with some changes and additions.¹⁶¹ First, the individual must have a requisite family need (e.g., a new child or ill family member), and must have medical certification "that the serious health condition warrants the participation of the employee to provide care."¹⁶² The statute defines "warrants the participation of the employee" broadly to include offering psychological comfort, arranging third party care or directly providing or participating in care.¹⁶³ It also explicitly provides that an individual is not eligible for PFL benefits if another family member is ready, willing, able and available to provide care for the same period of time in a day that the individual is providing the required care.¹⁶⁴ This provision was the result of a legislative compromise to place some limits on the scope of PFL benefits by ensuring that a worker is ineligible for PFL benefits if another family member can provide the care.¹⁶⁵

Unlike SDI, the waiting period for PFL may be served on non-consecutive days,¹⁶⁶ and the employer may require an employee to take two weeks of paid vacation (assuming an employer offers such a benefit) prior to the

employee receiving PFL benefits. Since the PFL program requires a seven-day waiting period in any event, an employee may use the first week of required vacation time to satisfy the PFL waiting period.¹⁶⁷

With respect to the benefit structure, PFL is similar to the SDI benefit, except that it provides only **six weeks of partial wage replacement** in any 12-month period.¹⁶⁸ In addition, for individual income tax purposes, PFL benefits are taxable income (in the nature of unemployment compensation) at the federal level, though like SDI, they are not taxable income at the state level.¹⁶⁹

The PFL program includes the same limitations and caps on aggregate benefits as the SDI program.¹⁷⁰ In other words, an individual may receive 1/7th of his/her "weekly benefit amount" for each full day of work missed in order to care for a family member or to bond with a new child.¹⁷¹ The individual's maximum benefit is equal to the lower of six times the "weekly benefit amount" or the total wages the individual earned during the individual's "disability base period."¹⁷²

The most recent state to have enacted a paid family leave law is New Jersey which did so by expanding its temporary disability insurance program. On May 2, 2008 Governor Corzine signed the Family Leave Insurance Program (FLIP) into law.¹⁷³ The legislation extends the state's existing TDI program to provide workers with up to **six weeks of TDI benefits** to care for a sick family member or care for newborn or newly adopted children.¹⁷⁴

Under the law, employees are entitled under the law to receive up to two-thirds of their weekly pay, **up to a maximum weekly benefit of \$546 for claims beginning in July 1, 2009.**¹⁷⁵ The law does not provide any job protection beyond existing state and federal law.¹⁷⁶ The FLIP is 100% funded by employees through an additional .09% payroll deduction in 2009 and .12% deduction in subsequent years above the existing .5% that employees are required to contribute to the State disability benefits fund.¹⁷⁷

Rhode Island's SDI law also provides for a state-administered SDI program. The program grants up to **thirty weeks of time off per year** funded solely by employees at a rate of 1.5% of the employee's first \$46,800 in annual earnings.¹⁷⁸ Thus, in Rhode Island, an employee who makes \$35,000/year will pay \$525 for SDI coverage; an employee who makes \$46,800 will pay \$702, as will an employee who makes \$146,800. In terms of benefits, an individual who becomes eligible for SDI benefits receives 4.62% of the highest wages earned in a base period quarter, **up to a maximum of 85% of the employee's average weekly wage for the preceding calendar year.**¹⁷⁹

The SDI programs are purely income replacement programs. They do not guarantee the employee any health benefits protection while on EXT0, nor do they provide the employee with a guarantee of being able to return to his or her job. Obviously, however, the SDI law operates in conjunction with other state and federal laws that do provide both job protection and health benefits protections.¹⁸⁰

Massachusetts legislators have also proposed a paid family leave program. Under one legislative proposal in 2007, the state would establish 12 weeks of paid family and medical leave (up to \$750 per week in 2008 and 2009, to be adjusted for inflation thereafter). This benefit is subject to a five-day waiting period. To be eligible for paid family leave, employees must have been (1) employed for at least three months by the employer from whom leave is requested (2) performed 216 hours of service with that employer during the previous three month period; and (3) and earned at least \$3000.¹⁸¹ Leave would be funded through employee premiums collected in connection with income tax payments.¹⁸²

2. Employer Pays

A. SPECIFIC EMPLOYER PAYS

Many employers offer EXT0 to their employees under company benefit plans and employment policies, with the employer paying for the time off. For example, many employers offer paid time off for maternity or paternity purposes. Under these policies, employees who give birth to/adopt/offer foster care to a child may take from a few weeks to a few months off from work to care for and bond with the child while receiving partial or full compensation and, in some cases, continued benefits coverage.

Some employers offer paid sabbaticals, in which the employer may pay partially or fully for the time off, depending on the terms of the plan.

Many employers offer short and long term disability coverage to their employees. Employers usually pay for Short-term disability (STD) and Long-term disability (LTD) programs either through insurance or by self-funding the benefit (i.e., paying from the employer's own assets). STD programs are usually for an illness or injury that is incurred while an employee is actively employed and is not expected to last longer than six months, with payments generally beginning after a seven day waiting period. LTD programs are usually for disabilities that are ongoing, with benefits generally payable after a six month waiting period.¹⁸³

Finally, workers often use their accumulated paid sick days, vacation time, or generic "paid time off" (PTO) days – all forms of compensation paid for by the employer – to address their EXT0 needs. Under some company policies, employees may use sick days not only when they themselves are ill, but also when a family member is ill and needs care.

Other than in the 5 states that have TDI programs, all of the above benefits are discretionary on the part of employers. In other words, while many employers do provide at least *some* EXT0 benefits, they are not required to do so by any law.

Some states, however, require that any public and/or private employer that has chosen to offer paid sick time off to employees must permit such employees to use the time off to care for certain sick family members, and not only for their own medical needs.¹⁸⁴ For example, state employees in every state except for Louisiana and Virginia may use some accrued sick time off to care for certain sick family members.¹⁸⁵ Likewise, at least seven states (California, Connecticut, Hawaii, Maine, Minnesota, Washington, and Wisconsin) have laws requiring private-sector employers that have chosen to offer paid sick leave to allow employees to use such leave to care for certain sick family members.¹⁸⁶

B. ALL EMPLOYERS PAY

Another EXT0 model is one in which all employers pay, generally through some sort of payroll tax, thus sharing the burden of paying for employees' time off among all employers.

The most widely discussed version of this model to date has been use of state unemployment insurance (UI), funded solely through employer payroll taxes.

In June 2000, the Department of Labor under the Clinton Administration issued the Birth and Adoption Unemployment Compensation (BAA-UC) regulations, colloquially referred to as "Baby UI."¹⁸⁷ The regulations

were issued in response to a directive from President Clinton.¹⁸⁸

The Baby UI regulations stated that employees who are eligible to receive UI— that is, individuals who are not working but are “able to work and available for work” (known as the A&A requirements) included parents of newborns and newly-adopted children who had left the workforce but were not actively seeking work.¹⁸⁹ Thus, this regulation permitted states to create experimental programs in which they could use UI funds to provide partial wage replacement for parents who took time off from work during the first year following the birth or adoption of a child.

The proposed and final BAA-UC regulations drew strong opposition from business groups.¹⁹⁰ These groups argued that the regulations would threaten the solvency of the UI system, thus threatening the UI safety net for the “truly unemployed,” as well as threatening the imposition of higher taxes on employers in order to keep state funds solvent.¹⁹¹ In addition, some business groups argued that charging employers for BAA-UC would result in unfair increases to their experience-rated UI payroll taxes because the employer would have little or no control over an employee’s taking of leave.¹⁹² Finally, at least some business groups expressed concern that the BAA-UC regulations represented the first step towards opening up the UI system to fund other social programs.¹⁹³

The new Baby-UI regulation was short-lived. Early on in the administration of President George W. Bush, the DOL rescinded the regulation.¹⁹⁴ The agency stated that the Baby-UI experiment was “poor policy” because it would pay individuals for voluntarily taking time off from work, using funds that were intended to provide temporary wage insurance to individuals who were unemployed due to lack of suitable work.¹⁹⁵ It also found that the agency’s interpretation of the A&A requirement to allow UI to be provided to individuals who voluntarily left the workforce was legally unsound and contrary to the legislative intent of the underlying federal laws.¹⁹⁶

During the comment period on the original BAA-UC regulations, some commentators had argued that a DOL regulation permitting states to use UI funds was not even legally necessary, since states were permitted to offer broader eligibility for UI funds if they wished to do so.¹⁹⁷ This argument was based on the fact that the federal UI statute itself contained no explicit requirement that a recipient must be “able to work and be available for work” (the A&A requirement), nor was there any explicit DOL regulation to that effect. Rather, this particular restriction on receiving UI had been generated through informal agency interpretation of separate provisions in the Social Security Act and the Federal Unemployment Tax Act.¹⁹⁸

Two years after the DOL rescinded the Baby UI regulations, therefore, the agency also issued a proposed rule that individuals be “able and available” for work in order to receive unemployment compensation.¹⁹⁹ The agency noted that “because the A&A requirement is not explicitly stated in federal law or the CFR, there appears to be some confusion regarding the validity of the A&A requirement as well as its scope and application.”²⁰⁰ In particular, the DOL cited as impetus for the proposed new regulations the confusion about the A&A requirement evidenced in the debate over the promulgation and subsequent repeal of the BAA-UC regulations.²⁰¹

The DOL issued a final rule setting forth the A&A eligibility requirements on January 16, 2007.²⁰² This rule specifies that “a State may pay [UI] only to an individual who is able to work and available for work for the week for which [UI] is claimed.”²⁰³

The new regulations also permit a state to consider an individual to be “able to work” if the individual is “able to work for all or a portion of the week claimed, provided any limitation on his or her ability to work does not constitute withdrawal from the labor market.”²⁰⁴ In its comments explaining the language permitting states to

provide unemployment to individuals who are available for a "portion of the week," the Department of Labor stated that this provision was intended to permit states to provide unemployment insurance to individuals who are only seeking part-time work, as long as that limitation is not tantamount to withdrawal from the labor market (presumably because of the lack of part-time work in a particular profession or geographic area).²⁰⁵ This provision means that a state could generally permit an individual who only works part-time so that she can provide care to her children to collect unemployment insurance if she could not find part-time work.

A person who has previously demonstrated availability and ability to work but is ill may still be considered "able" to work so long as he or she does not refuse suitable work during illness because of the illness or injury.²⁰⁶ Presumably, then, if a person who is pregnant or has given birth has medical restrictions resulting from the pregnancy or from the birth, which were not present at the time that the individual applied for unemployment insurance benefits (and the person was A&A at the time of the application), a state could permit the individual to continue to receive unemployment as long as she does not turn down work due to her medical condition.

Aside from the limited circumstances discussed in the two preceding paragraphs, the regulations preclude payment for caretaking leave purposes, such as parental leave, because individuals on parental leave are not "available" and "able" to work. Indeed, in its comments on the final rule the Department of Labor underscored the constraints imposed on states by the rule requiring ability and availability for at least some of the week for which benefits are claimed, noting: "Although the Department agrees that States should retain wide latitude in crafting their UC laws, it also believes that State laws must assure that an individual's unemployment for any week is involuntary due to the unavailability of suitable work."²⁰⁷

In addition to the "Baby UI" model, UI funds have also been used to provide wage replacement to individuals who lose their jobs because of an emergency. For example, the Stafford Act, a federal disaster response law, provides for, but does not require, federally-ordered unemployment compensation benefits if a national disaster is declared.²⁰⁸

An example of a state-level proposal for employer-funded EXT0 is a bill introduced in 2007 in the Commonwealth of Massachusetts. That bill would establish 12 weeks of paid "family and temporary disability benefits," up to 66% of an individual's weekly wage per 12-month period. The benefits would be funded by employer contributions in an as yet undefined amount.²⁰⁹

3. Taxpayer (i.e., Government) Pays

EXT0 also can be paid for through taxpayer-funded government programs or through tax incentives designed to encourage the development and use of EXT0 programs.

One model of a taxpayer-funded program is "At-Home Infant Care" (AHIC), a program that provides subsidies to eligible low-income parents with recent work histories to stay at home and care for their own small children in lieu of financial assistance for outside childcare.²¹⁰ Generally, AHIC programs use federal Child Care Development Block Grants (CCDBG) and/or state funds to allow parents to take a certain period of time off over a lifetime (which generally may be broken up and used for more than one child) to stay at home and provide full-time care for their young children.²¹¹

In 2007, Senator Clinton introduced a bill allocating additional federal funding to states through the Child Care and Development Block Grant Act to start at-home infant care demonstration projects.²¹² A similar bill, the Choices in Childcare Act of 2007, was introduced by Congresswoman Rosa De Lauro.²¹³ These bills provide funds to award grants to five to seven states to provide subsidies directly to low-income parents with a recent work history to care for their children who are under one or two years old.²¹⁴ While several federal AHIC bills have been introduced in the past, such efforts have thus far been unsuccessful.²¹⁵

Three states, Montana, Minnesota, and New Mexico, have implemented laws or pilot initiatives establishing AHIC programs.²¹⁶

For example, Minnesota offers an AHIC program to care for children up to one year old for families who participate in or are eligible for the state's sliding fee child care program and who meet defined income standards (e.g., earn less than 175% of the federal poverty level).²¹⁷

To be eligible for enrollment under the program, a caretaking parent must have been engaged in an eligible activity (e.g., working, training, education) during the 9-month period prior to application to the program (although the parent need not return to work after receiving the benefit).²¹⁸ The caretaking parent may not work or pursue an education and the family cannot receive other childcare or cash assistance while receiving the benefit (e.g., the parent must provide full-time care for the infant and also care for other children in the family who would otherwise be eligible for child care assistance from the state).²¹⁹ The maximum benefit provided is equal to 90% of the state's maximum rate paid to a licensed child care provider for full time infant care in the parent's county of residence, and the benefit is available for a maximum of 12 months over a lifetime (which may be broken up to care for more than one child).²²⁰ The program is paid for through funds that come through the CCDBG.²²¹

In addition to Montana, New Mexico and Minnesota, three other states – Vermont, Missouri and Iowa – have considered, but not passed AHIC legislation.²²²

Washington State offers an example of a family leave insurance program that was initially funded out of general taxpayer revenues, but whose ultimate fate is currently in question.

On May 8, 2007, the state of Washington became the second state to enact a paid family leave law, the Family Leave Insurance Program ("FLIP"), which was scheduled to become effective in October 1, 2009.²²³ Although the bill initially provided for a two percent employee payroll tax to fund the program, lawmakers were ultimately unable to agree on a funding mechanism. As interim measures, therefore, the bill appropriated \$18 million from general revenues for the administration of the program and created a taskforce to consider long-term funding mechanisms and make recommendations to the legislature regarding implementation of the law.²²⁴

On January 23, 2008, the Task Force sent its report to the legislature, recommending that the family leave program be funded for the first two years of its existence through general state revenues contained in Washington's General Fund-State.²²⁵ The Task Force also recommended that the Washington State Employment Security Department administer and implement the program, except for the labor standards, which the Task Force recommended be implemented by the Department of Labor and Industries.²²⁶

On October 7, 2008, however, as part of a series of cost-cutting budget measures, Governor Christine Gregoire suspended spending for the Family Leave Program. The savings anticipated for FY2009 was \$4.2 million (derived from eliminating spending for a computer program to have been used for providing benefits starting in October

2009) and \$72 million in savings in FY 09-11, by not using funds from the General Fund-State for the program.²²⁷

Some states have also explored tax credits or other tax incentives to encourage the development and use of EXTO programs. For example, a bill introduced in Pennsylvania offers graduated tax credits (subject to a cap) to small employers (500 employees or fewer) who provide 12 weeks of paid time off in addition to or under the FMLA.²²⁸

As a general matter, there has not been extensive focus on the federal level on legislation that would use general taxpayer revenue to support paid EXTO. One exception has been the Balancing Act of 2007, which would provide federal grants to states to reimburse the costs of providing six weeks or more per year of full or partial compensation to public or private employees who take time off to provide care for family members and themselves, under certain circumstances.²²⁹ States that accept the federal grant would be required to provide funds to eligible employees who take time off to care for a new child, and could, at the states' option, also provide time off to care for a family member with a serious health condition or because of their own serious health condition.²³⁰ The bill provides wide latitude to states to decide how to administer these funds – providing that the funds may be administered directly, through a public or private insurance program, or through any other mechanism.²³¹

The idea of using federal funds to support state efforts to expand paid EXTO in this manner was also picked up during the Presidential campaign by the Democratic contenders for the nomination. Senator Hillary Clinton articulated a goal of having all states institute some form of paid parental leave for employees by the year 2016. Her proposed role for the federal government was the creation of a State Family Leave Innovation Fund to provide \$1 billion/year annually (with increases) to match state expenditures in such leave programs.²³² Similarly, President-Elect Barack Obama recommended a federal strategy that encouraged states to adopt paid-leave systems of their choice. During the campaign, he proposed a \$1.5 billion federal fund to help states with the start-up costs of such plans.²³³

One other area where proposals for paid EXTO have been funded solely by the federal government is when the federal government is itself acting as the employer. For example, legislation introduced during the 110th Congress would provide paid parental leave to federal employees, paid for by their employer – the federal government.²³⁴ On June 19, 2008, the House passed the Federal Employees Paid Parental Leave Act of 2008, which provides four weeks of paid time off in connection with the birth or placement of a new child with an employee.²³⁵ A similar bill was pending in the Senate before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, but has not been enacted.²³⁶

Outside of the United States, EXTO paid for by general tax revenues is more common. For example, under the United Kingdom's Work and Family Act, which went into effect in 2006, employees who satisfy certain job tenure and earnings requirements receive up to 39 weeks of Statutory Maternity Pay (SMP).²³⁷ Employees receiving SMP are paid up to 90 percent of their wages for the first six weeks, and up to £112.75 for the remaining 33 weeks.²³⁸ Although the employees receive these payments from their employers, the employers subsequently recover most of the cost by deductions from various payments otherwise due to the government (including National Insurance, PAYE tax and certain other payments).²³⁹

Some women who do not qualify for SMP, but who otherwise meet certain past employment history and earnings requirements, are also entitled under the law to 39 weeks maternity (MA) allowance. This allowance is

paid by Jobcentre Plus, a government agency that is a division of the Department of Work and Pensions.²⁴⁰

Finally, fathers who meet certain job tenure and earnings requirements are entitled to one or two consecutive weeks of paternity leave with Statutory Paternity Pay following the birth of a child.²⁴¹ The government's intention is to extend the number of weeks of paternity leave to which a father is entitled to 26, and to provide that some of this time off be paid, if the mother returns to work.²⁴² The government plans to introduce this extension alongside an extension of maternity pay to twelve months.²⁴³

It is well-documented that even when parental leave is available to both mothers and fathers, men's take-up rates tend to be low.²⁴⁴ To encourage men to take parental leave, some countries have made that leave available only on a "use-it-or-lose-it" basis, and non-transferable between parents.²⁴⁵

4. Joint Systems

Among the various paid EXTO models, perhaps the most common is where EXTO is funded jointly, through some combination of contributions by employees, employers and/or the government.

Joint funding is used, for example, by certain state TDI programs in the United States (employee-employer funded) and is also prevalent in Europe (employee-employer-government funded).

While California and Rhode Island fund their TDI programs solely through employee contributions, Hawaii and Puerto Rico allow for joint contributions by employers and employees,²⁴⁶ New York requires joint contributions from employers and employees, and New Jersey requires joint contributions for its disability (but not family leave) provisions of the TDI program.²⁴⁷ The majority of these TDI laws were enacted in the 1940s, with Hawaii and Puerto Rico adding their laws in the late 1960s.²⁴⁸

State TDI programs provide wage replacement to employees who are temporarily disabled for non-work-related medical reasons (e.g., sickness, accident), including employees who become temporarily disabled due to pregnancy.²⁴⁹ These programs generally define a disability as an employee's total inability to perform the duties of employment as the result of these non-work-related medical reasons.²⁵⁰

In general, under state TDI programs, workers can take anywhere from 26 to 52 weeks off, and usually receive from 55%–65% of their average weekly wage, subject to a cap.²⁵¹ Employees generally must pay a payroll tax of a small percentage of their earnings (no more than 1.5%, and often limited by a cap on either the contribution amount or the wages subject to the tax).²⁵² Employers must either pay a similar tax based on a percentage of employee earnings, or must pay the balance of the plan's cost.²⁵³

New York's TDI law is one example of employer–employee joint funding of EXTO. Employees fund the TDI benefit at the rate of 0.5% of the first \$120 of weekly wages up to a maximum of \$0.60 per week, with employers paying the balance of the plan costs not covered by employees.²⁵⁴ The program defines "disability" as "the inability of an employee, as a result of injury or sickness not arising out of and in the course of an employment, to perform the regular duties of his employment or the duties of any other employment which his employer may offer him at his regular wages and which his injury or sickness does not prevent him from performing" and specifically includes disability caused by or in connection with a pregnancy.²⁵⁵

Benefits under NY's TDI program are 50% of an employee's average weekly wage (based on the last 8 weeks of employment), but no more than the maximum benefit, which is \$170 a week for any disability (subject to

Social Security and withholding taxes).²⁵⁶ Benefits may be paid up to a limit of 26 weeks during a period of 52 consecutive calendar weeks or during any one period of disability, and are generally subject to a 7-day waiting period.²⁵⁷

Several pieces of legislation have been introduced in the New York Legislature to expand New York's TDI law to provide paid family leave. One proposal, offered in 2007, would provide up to 12 weeks of "family care leave" and would be administered through the state's TDI program. The benefit level would be \$170 per week, and workers could use the leave to care for newborn or newly adopted children, or seriously ill family members.²⁵⁸

An alternative family leave bill was introduced in NY on June 18, 2007, amending the workers' compensation and insurance law to provide twelve weeks of disability benefits to employees to care for a family member or to bond with newborn or newly adopted children.²⁵⁹ To be eligible, workers must have been employed for four weeks prior to seeking paid leave and to wait seven days before receiving benefits.²⁶⁰ Similar to the TDI bill introduced, the additional benefits would be funded by increasing the employee payroll deduction by 45 cents per week (in 2008).²⁶¹

Other state legislative proposals would also fund EXTO through payroll taxes imposed jointly on employers and employees.²⁶² For example, an Illinois bill introduced in 2007 would create a family leave insurance program (FLIP) paid out of a designated account administered by the State Treasurer and funded jointly by employers and employees (employers would match a \$0.75 weekly contribution per employee, prorated for part-time employees). This bill would provide up to four weeks time off for an employee to care for a new child, a family member with a serious health condition, or an employee's own serious health condition. The employee would be required to have earned at least \$1,600 and to have worked at least six months during the qualifying year for the employee to be eligible. Benefits would be paid at 67% of the employee's weekly wages, up to a maximum benefit of \$380 per week (recalculated annually).

In the Commonwealth of Pennsylvania, the "Family Temporary Care Act" would provide up to 12 weeks of wage replacement benefits per year while an employee cares for a newly born or adopted child, or a sick family member. The bill would be funded by uniform employer and employee contributions at a rate established annually by the state. The benefit amount would parallel the state's Unemployment Compensation Law.²⁶³

During the last few years, several states have explored joint funding by employers and taxpayers through the use of tax credits or other tax incentives to encourage the development and use of EXTO programs. For example, a bill introduced in Pennsylvania in 2005 offers graduated tax credits (subject to a cap) to small employers (500 employees or fewer) who provide 12 weeks of paid time off in addition to or under the FMLA.²⁶⁴ A similar Oklahoma bill introduced in 2005 offered a tax credit benefiting employers who provide paid time off under the FMLA for the birth or adoption of a child.²⁶⁵ Neither of these bills have been enacted at this time.²⁶⁶

On the federal level, the Family Leave Insurance Act of 2007 (FLI) would provide a source of jointly-funded paid EXTO for employees to care for a new child, to care for a family member with a serious health condition or because of the employee's own serious health condition.²⁶⁷

The FLI bill provides eligible employees who are absent from work for an FMLA-qualifying reason for 5 consecutive days up to eight weeks of paid leave during a 12-month period.²⁶⁸ To be eligible, employees with qualifying reasons for leave must have worked for a covered employer for 12 of the previous 18 months.²⁶⁹

The bill provides a tiered income replacement structure, providing the greatest percentage of income replace-

ment to the lowest paid employees, and the least percentage to the highest paid employees.²⁷⁰ The bill provides for 100% of the daily wages for employees with an annual income of \$20,000, and 75% of the daily wages for employees with an annual income of \$30,000.²⁷¹ The maximum benefit an individual can receive is 40% of the daily wages of employee with an annual income of \$97,000.²⁷²

Employers with more than 50 employees are required to participate in the plan and must pay a tax of .2% of each employee's weekly wages.²⁷³ Employees of such employers must pay payroll taxes of .2% of their weekly wages.²⁷⁴

Employers with fewer than 50 employees may elect to participate in the plan, and if participating, must pay a tax in the amount of .1% of each employee's weekly wages.²⁷⁵ Employees of such employers must also pay payroll taxes of .1% of their weekly wages.²⁷⁶

Self-employed individuals may elect to participate in the plan, provided they have income from self-employment for 12 of the 18 months prior to claiming benefits and have paid premiums on that income.²⁷⁷

Another possible joint-funding federal proposal for EXTO might be the Unemployment Insurance Modernization Act (UIMA).²⁷⁸ This bipartisan bill, introduced by Senators Kennedy, Snowe, Rockefeller, Warner, and Cantwell, makes \$7 billion available in new incentive payments to states to encourage them to expand eligibility for benefits.²⁷⁹ One of those expansions would be to make 26 weeks of unemployment insurance available to employees who voluntarily separate from employment for caregiving or domestic violence reasons.²⁸⁰ The funds provided by the UIMA would be paid for both by the UI trust fund and through an extension of the existing federal unemployment surtax.²⁸¹

Joint funding of EXTO, often involving employee, employer and/or government contributions, is particularly common in countries outside of the United States. For example, in Canada, as well as in Belgium, the Czech Republic, Denmark, France, Germany, and the United Kingdom, employees, employers and the government all contribute to the cost of funding time off for maternity purposes, usually through social security, sickness, invalidity or health care insurance funds.²⁸²

The time off varies in length from 14 to 28 weeks, depending on the country. In certain countries (e.g., Denmark, France, Germany), the employee receives 100% of wages while taking time off for maternity purposes, while in other countries the employee receives a percentage of wages (ranging from 55% - 90%) that may be subject to a daily or weekly cap.²⁸³

In certain Asian countries the amount of time off provided is less generous than in Europe (from 90 days in China, to up to 12 weeks in India and Singapore, to 14 weeks in Japan); however, the time off is often paid at 100% of the employee's wages.²⁸⁴ In Asia, time off for maternity purposes is usually funded by employers and/or the government.²⁸⁵ Several of these nations also offer time off for paternity purposes, usually for shorter time-frames (5 days to two weeks), but often paid, sometimes at full wages, and again generally funded by joint contributions from employees, employers and the government.²⁸⁶

Time off for parental purposes is also common, again usually jointly funded by employees, employers and the government. For example, several European countries (e.g., the Czech Republic, France and Germany) provide unlimited time off for both parents until a child's third birthday paid at a flat rate monthly benefit.²⁸⁷ In Japan, parents can request time off until a child's first birthday and receive pay at 25% of their monthly wages, and in Singapore, mothers may take four weeks off up until their child is six months old, paid at a flat rate.²⁸⁸

Finally, European and Asian countries, and Australia also offer disability benefits, jointly funded by the government, employers and employees, that in some cases last for years and provide wage replacement (from 50%-100%) to workers with health-related needs.²⁸⁹ Comparison charts of EXTO policies related to time off for maternity and paternity purposes, parental time off, disability, and vacation in select foreign countries are available on WF2010's website.²⁹⁰

IV. President-Elect Obama's Stated Positions on EXTO

President-elect Barack Obama has expressed his support for expanding the FMLA to include businesses with 25 or more employees and to allow workers to take leave to address domestic violence.²⁹¹ He also supports expanding the FMLA to permit workers to take leave for elder care needs, and parents to take up to 24 hours of leave each year to participate in their children's academic activities.²⁹² In addition, President-elect Obama has indicated that he would encourage states to adopt paid leave programs, and would provide \$1.5 billion in funding to assist states in this effort.²⁹³

V. Conclusion

This overview memo provides some background on the legal and policy issues surrounding EXTO. We hope that it will be helpful to participants in the conversation about how EXTO needs in the workplace can best be addressed.

Endnotes

- 1 J.A. JACOBS & K. GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 43 (Harvard University Press 2004). For example, nearly 2 million working age women, 15-44, had a child in the last year while employed.
- 2 D. CANTOR, WALDFOGEL, J., KERWIN, J., MCKINLEY-WRIGHT, M., LEVIN, K., RAUCH, J., HAGERTY, T., & STAPLETON-KUDELA, M., *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE 2-5* (Westat 2001) (hereinafter Cantor et. al, Westat 2001).
- 3 CIVITAS INITIATIVE, ZERO TO THREE & THE BRIO CORPORATION, *WHAT GROWN-UPS UNDERSTAND ABOUT CHILD DEVELOPMENT: A NATIONAL BENCHMARK SURVEY* 168 (2006), *available at* <http://www.zerotothree.org/fullreport.pdf>.
- 4 CANTOR et. al, Westat 2001, *supra* note 2, at 2-5.
- 5 *Id.* at 2-3.
- 6 M. Toosi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, 127 MONTHLY LAB. REV. 38 (2004).
- 7 U.S. CENSUS, *AMERICANS WITH DISABILITIES* 3 (Washington, DC 2002), *available at* <http://www.census.gov/prod/2006pubs/p70-107.pdf>.
- 8 JACOBS & GERSON, *supra* note 1, at 83.
- 9 CANTOR et. al, Westat 2001, *supra* note 2, at 2-5.
- 10 See NATIONAL ALLIANCE FOR CAREGIVERS AND AARP, DEPT. OF HEALTH AND HUMAN SERVICES, RESOURCES AND SERVICES ADMIN., MATERNAL AND CHILD HEALTH BUREAU, THE NATIONAL SURVEY OF CHILDREN WITH SPECIAL HEALTH CARE NEEDS (CSHCN) (2004), *available at* <http://mchb.hrsa.gov/chscn/>.
- 11 *Id.*
- 12 *Id.*
- 13 CANTOR et. al, Westat 2001, *supra* note 2, at 2-3.
- 14 *Id.* at 3-4.
- 15 J.T. BOND ET AL., 2005 NATIONAL STUDY OF EMPLOYERS 10 (Families and Work Institute 2005), *available at* <http://familiesandwork.org/eproducts/2005nse.pdf>.
- 16 See CAL. UNEMP. INS. CODE §§ 135 - 2708 (2005); HAW. REV. STAT. §§ 392-1 ñ 392-101 (2005); N.J. STAT. ANN. § 43:21-25 ñ 43:21-71 (2005); N.Y. WORKERS' COMP. LAW §§ 200 - 242 (2005); 11 LAWS P.R. ANN. §§ 201 - 212 (2005); R.I. GEN. LAWS §§ 28-39-1 ñ 28-41-33 (2005).
- 17 *Id.*
- 18 CAL. UNEMP. INS. CODE § 3301(a)(1).
- 19 N.J. Stat. Ann. § 43-21-25 et seq.. Both the California and New Jersey laws are described in greater detail below.
- 20 Wash. Rev. Code § 49.86.
- 21 See *infra*, pp. 33-34, for description of activities in Washington State.
- 22 Wash. Rev. Code § 49.86.
- 23 SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 2006 BENEFITS SURVEY REPORT 47-48 (Society for Human Resource Management 2006).
- 24 U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY (NCS): EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES 24 (2006) *available at* <http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf>.
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*
- 29 Cantor et. al, Westat 2001, *supra* note 2, at 4-5, 4-6.
- 30 *Id.* at 2-16.
- 31 *Id.* at 2-17. Nearly 90% of those who needed leave said they would have taken it if they had received some or additional pay.
- 32 *Id.* at 4-9.
- 33 See Society for Human Resource Management, 2008 *Employee Benefits*, at 47-48.
- 34 See 29 U.S.C. §§ 2601 ñ 2654.
- 35 For extensive legal memos on the FMLA, see memos available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>. What follows is a brief summary of the legal requirements of the FMLA.
- 36 An individual who works 50% of a 40-hour week will provide 1040 hours of service over the course of a year and will, therefore, not be eligible under the FMLA.
- 37 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110(a)-(c).
- 38 29 U.S.C. § 2612 (a)(1)(A)-(B).
- 39 29 U.S.C. § 2611(11).
- 40 29 C.F.R. § 825.114(a)(1). ñIncapacityñ under this definition is defined as the inability to work, attend school or perform regular daily activities because of the condition, treatment or recovery. *Id.*

41 29 C.F.R. § 825.114(a)(2)(i). The regulations also include being incapacitated for longer than three days but seeing a doctor for the condition only once if the visit is followed by a regimen of continuing treatment (e.g., a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen)).

42 See The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 7966 (Feb. 11, 2008).

43 29 C.F.R. § 825.114(a)(2)(ii).

44 29 C.F.R. § 825.114(a)(2)(iii).

45 See The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 7966 (Feb. 11, 2008).

46 29 C.F.R. § 825.114(a)(2)(iv).

47 29 C.F.R. § 825.114(a)(2)(v).

48 29 U.S.C. § 2612; 29 C.F.R. § 825.116.

49 29 U.S.C. § 2612(d)(2); 29 C.F.R. § 825.207.

50 29 C.F.R. § 825.207(e).

51 *Id.* at 29 U.S.C. § 2612(d)(2)(B); 29 C.F.R. § 825.207(b),(c). For example, if an employee takes time off to care for a sick family member, but the employer's sick days policy only permits time off to be taken for reasons related to the employee's own health condition, that employee may not currently substitute paid sick days for FMLA leave. However, if that same employee had paid vacation or personal time off that may be taken to care for a family member, such time may be substituted for the unpaid FMLA leave.

52 See The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 7972-73 (Feb. 11, 2008).

53 29 U.S.C. § 2614(c)(1); 29 C.F.R. §§ 825.209, 825.210.

55 29 C.F.R. § 825.209(h).

55 29 U.S.C. § 2614(a)(1)(B); 29 C.F.R. §§ 825.214 & 825.215.

56 See, e.g. *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 545-548 (4th Cir. 2006) (employer's reorganization was a legitimate reason for eliminating employee's job and was not retaliation in violation of the FMLA)

57 29 C.F.R. § 825.215(c). Employees are also entitled to be restored to positions with shift differentials or consistent amounts of overtime pay if they were in such positions before their FMLA leave. *Id.*

58 *Id.*

59 *Id.*

60 29 U.S.C. § 2614(b); 29 C.F.R. § 825.217.

61 29 U.S.C. § 2614(b). Highly compensated employees are not covered by the FMLA's job-protection provisions if two conditions are met. First, an employer may refuse to restore a highly compensated employee to his or her job if doing so would cause substantial and grievous economic injury to the operations of the employer. *Id.* Second, an employer must give the employee timely written notice of the fact that an employee qualifies as a key employee and the employer's good faith determination that reinstating that employee in his or her job will cause substantial and grievous economic injury such that the employer plans to deny such reinstatement. 29 U.S.C. § 2614(b); 29 C.F.R. § 825.219(a)-(b).

62 The Department of Labor issued a Request for Information on the Family and Medical Leave Act on December 1, 2006. See Dept of Labor Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69504-02 (Dec. 1, 2006).

63 The *Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information* (the Report). The Report is available at www.dol.gov/esa/whd/FMLA2007/FederalRegisterNotice/07-3102.pdf.

64 See <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>. Of the 15,000 comments, many were postcards or letters generated by employer or employee advocacy groups that reiterated the same points. The 575 comments reviewed by WF2010 covered all or most of the non-duplicative comments.

65 See *Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information*, 72 Fed. Reg. 35550, 35551 (June 28, 2007) (commenters consistently stated that the FMLA is generally working well at least with respect to leave related to the birth or adoption of a child or for indisputably serious health conditions). See also *Workplace Flexibility 2010, Different Types of FMLA Leave: DOL Topic F*, www.law.georgetown.edu/workplaceflexibility2010/law/documents/TopicF-DifferentTypesofLeave.pdf (summarizing employers' response that they generally do not have problems administering previously scheduled leave and that managing long-term absences is generally easier than managing short-term absences).

- 66 See Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35550, 35551 (employers voiced concern about their ability to manage business operations and attendance control issues, particularly when unscheduled, intermittent leave is needed for chronic health conditions. See also *Workplace Flexibility 2010, Different Types of FMLA Leave: DOL Topic F* (summarizing employers' response that tracking intermittent leave is time-consuming and that employees misused intermittent leave to cover for tardiness).
- 67 See Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35550, 35551.
- 68 The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 7876 (Feb. 11, 2008).
- 69 National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585 (2008).
- 70 29 U.S.C. § 2612(a)(1)(E) (2008).
- 71 *Id.* § 2612(a)(3)-(4).
- 72 See, e.g., The Family and Medical Leave Expansion Act, H.R. 7233, 110th Cong., introduced by Congresswoman Maloney (D-NY), cosponsored by Representatives Al Green, Alcee Hastings, Sheila Jackson-Lee, Jim McDermott, and George Miller (extending coverage to employers with 25 or more employees); The Balancing Act of 2007, H.R. 2392, 110th Cong, introduced by Rep. Lynne Woolsey, cosponsored by 71 Democrats (extending coverage to employers with 15 or more employees and reducing tenure requirements to 1050 hours/year).
- 73 The Family and Medical Leave Inclusion Act, H.R. 2792, 110th Cong. (introduced by Rep. Carolyn Maloney on June 20, 2007) (allow employees to take time off to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling or grandparent with a serious health condition). The Crime Victims Employment Leave Act, H.R. 5845, 110th Cong. (introduced by Rep. Rahm Emanuel on April 17, 2008) and The Security and Financial Empowerment Act, H.R. 2395, 110th Cong. (2007), would permit employees who are victims of domestic violence to take up to 30 days of unpaid leave a year. A similar bill, The Survivors Empowerment and Economic Security Act, S. 1136, 110th Cong. (2007) was introduced in the Senate. Another bill, The Job Protection for Survivors Act, H.R. 4015, 110th Cong. (2007), would permit employees who are victims of domestic violence to take up to 15 days of unpaid leave a year.
- 74 H.R. 2744, 110th Cong. (introduced by Rep. Timothy Bishop on June 15, 2007).
- 75 38 U.S.C. § 4312-15. USERRA generally prohibits discrimination in employment on the basis of service in the uniformed services and prohibits retaliation on the basis of engaging in activity authorized or protected by USERRA. 38 U.S.C. § 4311. Special rules apply to state and federal employers and certain federal intelligence agencies. See 38 U.S.C. §§ 4314-15, 4323-25.
- 76 38 U.S.C. § 4312(a)(1) & (3). Exceptions to the notice requirement are given at § 4312(b) and requirements for timely return are given at § 4312(e).
- 77 38 U.S.C. § 4312(a)(2). Thus, USERRA encompasses more time away from work (up to five years) than our definition of EXTO (up to one year). There are eight categories of service that do not count toward the five-year limit. See 38 U.S.C. § 4312(c).
- 78 38 U.S.C. § 4312(d)(1)(A); 20 C.F.R. § 1002.139(a).
- 79 38 U.S.C. § 4312(d)(1)(B).
- 80 38 U.S.C. § 4312(d)(1)(C).
- 81 38 U.S.C. § 4312(d)(2).
- 82 38 U.S.C. § 4312(d)(1)(B).
- 83 38 U.S.C. § 4313(a)(3).
- 84 38 U.S.C. § 4313(a)(4).
- 85 Employer Statutory Defenses, 20 C.F.R. § 1002.139(b) (emphasis added).
- 86 20 C.F.R. § 1002.198. This regulation provides that i[t]he employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. For an employee to be qualified, the employee must have the ability to perform the essential tasks of the position. 20 C.F.R. § 1002.198(a)(1). iReasonable efforts are defined as iactions required of an employer that do not place an undue hardship on the employer. 20 C.F.R. § 1002.5(i).
- 87 See 38 U.S.C. § 4313(a)(2)(A). If the absence is for fewer than 91 days, the employee is entitled to the *exact* position the employee would have held but for the absence. 38 U.S.C. § 4313(a)(1)(A).
- 88 See 20 C.F.R. § 1002.191 (describing the iescalator principle).
- 89 38 U.S.C. § 4313(a)(2)(B).

- 90 38 U.S.C. § 4313(a)(2)(B). If the employee still cannot become qualified for that position after reasonable efforts by the employer (for any reason other than disability), the employee is entitled to the nearest approximate job the employee is qualified to perform, with full seniority. 38 U.S.C. § 4313(a)(4). An employee who is unqualified for a position due to a disability incurred in or aggravated by their service is entitled to separate, somewhat more generous reemployment protection under § 4313(a)(3).
- 91 38 U.S.C. § 4316(a).
- 92 38 U.S.C. § 4316(b)(1).
- 93 38 U.S.C. § 4316(b)(4).
- 94 Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), if an individual loses health care coverage as a result of a COBRA qualifying event (e.g., termination of employment, divorce from a covered employee), the individual may continue health care coverage (by paying his/her own premiums) for 18, 29 or 36 months, depending on the type of qualifying event. The cost for this coverage is 102% of the applicable premium (which generally is the cost to the plan for coverage for similarly situated individuals for whom a COBRA qualifying event has not occurred.) *See generally* ERISA §§ 601,602, 604; I.R.C. § 4980B(f)(2),(4).
- 95 38 U.S.C. § 4317(a). If the employee's absence for uniformed service is for 31 days or fewer, the employee cannot be required to pay more than the employee share. *Id.*
- 96 38 U.S.C. § 4317(b)(1)-(2). This determination is made by the Department of Veterans Affairs, not the health plan. *Id.*
- 97 38 U.S.C. § 4318(a)(2)(A).
- 98 38 U.S.C. § 4318(b)(2).
- 99 *Id.*
- 100 38 U.S.C. § 4316(c). That period is a year if the employee's service prior to reemployment was greater than 180 days, or 180 days if the employee's service was between 30 and 180 days. *Id.*
- 101 *See, e.g., Amy Joyce, Baghdad and Bust: Small-Business Owners Defending America are Losing Their Shirts, WASH. POST, June 5, 2005, at F1.*
- 102 *See, e.g., Stephen Barr, Private Sector Surpasses Agencies on Pay to Deployed, WASH. POST, Oct. 30, 2005, at C2. See also Matthew B. Stannard, Jobs Don't Always Wait for Guards, Reservists: Citizen Soldiers Find Duty in Iraq Can Dent Families' Finances, SAN FRAN. CHRON., Feb. 20, 2005, at A1; Matt Viser, Communities Conflicted About Pay for Reservists: Desire to Be Generous Blunted by Fiscal Reality, BOS. GLOBE, Oct. 31, 2004, at 1.*
- 103 Hope at Home Act of 2007, S. 384, 110th Cong., 1st Sess. § 2 (introduced by Senator Mary Landrieu on January 24, 2007).
- 104 *Id.* at § 2.
- 105 *Id.* at § 4.
- 106 ALASKA STAT. §§ 39.20.500-550, 39.20.305. *See also* FLA. STAT. §§ 110.123, 110.221 (provides time off for serious family illnesses or parental purposes to career service state government employees); IDAHO ADMIN. CODE R. 15.04.01.242 (time off for state government employees under the same terms as the federal FMLA not including the exceptions for highly compensated employees and for worksites with fewer than 50 employees in a 75 mile radius).
- 107 D.C. CODE §§ 32-501 to 32-503. Oregon and Vermont also offer comprehensive EXTO benefits to employees of employers with fewer than 50 employees and several states offer narrower time off benefits to employees of employers with fewer than 50 employees. *See, e.g.,* OR. REV. STAT. §§ 659A.150-659A.174, VT. STAT. ANN. TIT. 21, §§ 471 to 472; IOWA CODE § 216.6; MONT. CODE ANN. § 49-2-310.
- 108 MASS. GEN. LAWS CH. 149 § 105D.
- 109 *See, e.g.,* FLA. STAT. §§ 110.221, 110.123; HAW. REV. STAT. § 398-1-398-10.
- 110 *See, e.g.,* D.C. CODE §§ 32-501 to 32-503.; HAW. REV. STAT. §§ 398-1 to 398-10; 2006 R.I. PUB. LAWS 316.
- 111 2006 ARIZ. SESS. LAWS 11 (amending ARIZ. REV. STAT. § 41-783).
- 112 D.C. CODE § 32-501; HAW. REV. STAT. § 398-3; 2006 R.I. PUB. LAWS § 316 (amending R.I. GEN. LAWS § 28-48-1).
- 113 *See, e.g.,* CAL. GOV'T CODE § 12945.2.
- 114 *See, e.g.,* Conn. Gen. Stat. §§ 31-51kk to 31-51nn.
- 115 GA. COMP. R. & REGS. R. 478-1.18; 11 IOWA ADMIN. CODE 63.4 (8A).
- 116 *See, e.g.,* FLA. STAT. §§ 110.123, 110.221; ILL. ADM. CODE TIT. 2, § 600.686.

- 117 See ARIZ. ADMIN CODE § R2-5-411, CONN. GEN. STAT. § 5-248a; FLA. ADMIN. CODE ANN. R. 60L-34.0051; ME. REV. STAT. ANN. TIT. 26, § 843.
- 118 See Conn. Gen. Stat. § 5-248(d) (90 days); 29 Del. Code § 5113 (reasonable amount of paid leave); Fla. Stat. § 110.118 (30 days); La. R.S. 42:432 (90 days); Mass. Gen. Laws 30 § 9G (60 days); Minn. Stat. § 15.62 (90 days); N.J. Stat. § 11A:6-11 (90 days); NY Civ. Serv. Law § 151 (90 days); N.C. Gen. Stat. § 126-8.1 (30 days); Ohio Rev. Code § 9.46 (reasonable amount of paid leave); Or. Rev. Stat. § 243.330 (90 days); Va. Code § 2.2-124 (90 days).
- 119 Associated Press, iState Civil Rights Commission Votes to Expand Maternity Leave, available at <http://www.cantonrep.com/index.php?ID=383155>
- 120 The relevant text of the proposed rule is as follows: iWhere an adverse employment action taken against an employee who is temporarily limited, in part or in whole, in her ability to work due to pregnancy, childbirth or a related medical condition is based upon an employment policy or practice under which less than twelve weeks of paid or unpaid pregnancy, childbirth or maternity leave is available when medically recommended, such policy shall be presumed to have a disparate impact on women and constitutes unlawful sex discrimination unless justified by business necessity. Ohio Revised Code, Chapter 4112-5-05, available at <http://crc.ohio.gov/pregnancy/CleanVersion.pdf>.
- 121 *Id.*
- 122 **Vincent J. Tersigni** iNo New Delivery Date for Ohio's Proposed Maternity Leave Rules, Cranes Cleveland Business, available at <http://crainscleveland.com/article/20080211/FREE/518340924/1076/TOC>.
- 123 DEPARTMENT OF TRADE AND INDUSTRY, INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 59-229 (2006), available at <http://www.dti.gov.uk/files/file31948.pdf>. Casual employees are also eligible for the time off if they have been engaged on a regular systematic basis for at least one year.
- 124 See Maternity and Parental Leave Regulations of 1999, S.I. 1999, No. 3212.
- 125 *Id.*
- 126 See Parental Leave: A Guide For Employers and Employees, available at http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18479.html#2_4.
- 127 *Id.*
- 128 See Work and Families Act 2006, available at http://www.opsi.gov.uk/ACTS/acts2006/pdf/ukpga_20060018_en.pdf; Maternity entitlements and responsibilities: a guide to babies due on or after April 1, 2007 Part 2, <http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page34244.html>.
- 129 *Id.* at 217. Time off must be taken in increments of one week.
- 130 Each of these collection mechanisms has different tax implications. The tax implication of any collection mechanism must be factored into any decision about what collection mechanism to adopt.
- 131 Of course, the specific employee paying out of his or her savings is also the most common way to pay for EXT0. But we're calling that unpaid EXT0 for simplicity's sake.
- 132 Flex Options Teleconference on Career Flexibility, Department of Labor, Women's Bureau, Statement of Sharon Klun, Accenture (June 22, 2006). According to this company, the program is viewed as both a business tool to help employees balance work and personal responsibilities and to retain more women in its workforce, and as a promoter of the bottom-line, allowing the company to meet fluctuating business needs without high implementation costs.
- 133 A. 2824, New York State Assem., 2008 Legis. Sess., available at <http://assembly.state.ny.us/leg/?bn=A02824>; LB 413, Nebraska Leg., 99th Legis. Sess., available at <http://uniweb.legislature.ne.gov/FloorDocs/99/PDF/Intro/LB413.pdf>.
- 134 This could also be considered as a subset of employer pay's since the employees are contributing paid leave days that are guaranteed to them from their employer as a benefit of their employment. However, since employees may often cash out any such remaining days at the termination of employment, we designate this as a subgroup of employees pay.
- 135 See REV. RUL. 90-29, 1990-1 C.B. 11.
- 136 *Id.*
- 137 See 5 U.S.C. §§ 6332, 6362.
- 138 5 C.F.R. §§ 630.903, 630.1003. See also 54 FED. REG. 4749 (1989), 54 FED. REG. 4750 (1989), 54 FED. REG. 18268 (1989), 54 FED. REG. 18269 (1989), 54 FED. REG. 53309 (1989), 59 FED. REG. 4242 (1994), 59 FED. REG. 4243 (1994), 59 FED. REG. 67122 (1994), 59 FED. REG. 67123 (1994).

- 139 5 U.S.C. §§ 6334, 6365. For employees with use or lose annual leave, the employee may donate the lesser of one-half of the annual leave he or she would accrue in a leave year or the number of hours remaining in the leave year for which the employee is scheduled to work and receive pay. 5 C.F.R. §§ 630.908, 630.1005.
- 140 5 U.S.C. §§ 6336, 6369.
- 141 5 C.F.R. §§ 630.907, 630.1008.
- 142 See CAL. GOV'T CODE § 19991.13.; see also Ala. Admin. Code r. 670-X-14-.04; D.C. Code § 1-612.05 to .11.
- 143 CAL. GOV'T CODE § 19991.13.
- 144 See CAL. UNEMP. INS. CODE § 135 ñ 3306.
- 145 See CAL. UNEMP. INS. CODE § 2626(a). A disability also includes any illness or injury resulting from pregnancy, childbirth, or related medical condition, as well as an inability to work because of a written order from a state or local health officer to an individual infected with, or suspected of being infected with, a communicable disease. *Id.* at 2626(b)(1)-(2).
- 146 CAL. UNEMP. INS. CODE § 2652. A disability base period is a lagging quarter measurement, designed to ensure that the individual has been paid some wages (and therefore contributed to the disability fund through the payroll tax) in the 6-18 months prior to making a claim for benefits. If, for example, an individual makes a claim for benefits in the months of January, February or March, his/her disability base period is the 12-month period ending on the previous September 30th. See CAL. UNEMP. INS. CODE § 2610.
- 147 See CAL. UNEMP. INS. CODE §§ 2708, 2627(b).
- 148 CAL. UNEMP. INS. CODE § 2653.
- 149 CAL. UNEMP. INS. CODE § 2655. In other words, for any day in which an individual is disabled and unemployed, he or she receives 1/7th of his or her weekly benefit amount. CAL. UNEMP. INS. CODE § 2627..
- 150 CAL. UNEMP. INS. CODE § 2653.
- 151 See California Employment Development Dept., *State Disability Insurance (SDI) and Paid Family Leave (PFL) Weekly Benefit Amounts*, available at http://www.edd.ca.gov/pdf_pub_ctr/de2588.pdf (last visited Oct. 3, 2008). This amount is indexed to worker's compensation amounts, and so will increase automatically. See CAL. UNEMP. INS. CODE § 2655(d).
- 152 See I.R.C. § 104(a)(3); CAL. REV. & TAX. CODE § 17131. For federal tax purposes, in states where the employer also contributes to the fund, any SDI benefits attributable to employer contributions would be includable as income.
- 153 For example, time off while receiving PFL benefits must be served concurrently with FMLA and/or CFRA leave, if applicable. CAL. UNEMP. INS. CODE § 3303.1(b). Employers are not relieved from any collective bargaining obligations. CAL. UNEMP. INS. CODE § 3303.1(c).
- 154 CAL. UNEMP. INS. CODE § 3301(a)(1). "Serious health condition" is defined under the statute as an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment or continuing supervision by a health care provider. CAL. UNEMP. INS. CODE § 3302(h).
- 155 S.B. 1661, 2001-02 Leg., Reg. Sess. (Ca. 2002) (as amended Aug. 23, 2002). According to the legislative history, the bill passed the California Senate with joint contributions from both employers and employees, but the employer contribution was eliminated when the bill moved to the Assembly, after employers voiced concerns about the cost. *Disability Compensation: Family Members: Hearing on S.B. 1661 Before the Assemb. Comm. on Ins.*, 2001-02 Leg., Reg. Sess. 12 (Ca. Jun 25, 2002).
- 156 See California Employment Development Dept., SDI Contribution Rates available at http://www.edd.ca.gov/Disability/SDI_Contribution_Rates.htm (last visited October 3, 2008).
- 157 See California Employment Development Dept., Paid Family Leave Insurance, Frequently Asked Questions available at <http://www.edd.ca.gov/direp/pflfaq1.asp> (last visited October 28, 2006).
- 158 More information about the administration of California's Family Leave Insurance Program is available at <http://www.edd.ca.gov/direp/pflfaq1.asp>.
- 159 SDI contributions are deductible for federal income tax purposes as state income taxes for the individual. Rev. RUL. 81-194, 1981-2 C.B. 54. However, contributions to a voluntary plan are not deductible. *Id.* Generally speaking, higher income individuals benefit more from tax deductions than lower and middle income individuals. Burman, Leonard, *The Impact of Tax Reform on Low- and Middle-Income Households*, p. 5 (June 8, 2005) available at http://www.taxpolicycenter.org/UploadedPDF/900818_Burman_060805.pdf (last visited October 28, 2006). SDI contributions are not deductible for California income tax purposes. CAL. REV. & TAX. CODE § 17222.
- 160 Income earned above \$83,389 is not taxable.

- 161 See CAL. UNEMP. INS. CODE §§ 2652, 2708(b), 3301(e), 3302(j), 3303(c). The statute's "Definitions" provision defines a "valid claim" as any claim for PFL benefits that complies with the statute and its implementing regulations, if the individual has been employed, has been paid the threshold wages to qualify for PFL benefits, and is caring for a seriously ill family member or bonding with a minor child during the first year after birth or placement in connection with adoption or foster care. CAL. UNEMP. INS. CODE § 3302(j). The claim must be filed within 41 days after the first day that the individual's need for time off arises (e.g., a baby is born, a parent falls ill), unless good cause is found. CAL. UNEMP. INS. CODE § 3301(e). The medical certification must be completed by a health practitioner who has actual knowledge of the family member's "serious health condition" and must include, among other things, the date on which the condition began, the probable duration of the condition, an estimate of the amount of time the practitioner believes the employee is needed to provide care and a statement that the condition warrants care by the employee. CAL. UNEMP. INS. CODE § 2708(b).
- 162 CAL. UNEMP. INS. CODE § 2708(b)(1)-(5).
- 163 CAL. UNEMP. INS. CODE § 2708(b)(5)(B).
- 164 CAL. UNEMP. INS. CODE § 3303.1(a)(4). The requirement that no other family member be available to provide care was found at § 3303(e) in the original 2002 legislation, but was moved to § 3303.1(a)(4) in a 2003 amendment to the PFL law. See S.B. 727, 2003-04 Leg. Reg. Sess. (Ca. 2003).
- 165 Conversation with Rona Sherriff, Cal. Senate Office of Research (March 18, 2005); see also S.B. 1661, 2001-02 Leg., Reg. Sess. (Cal. 2002) (as amended Aug. 23, 2002).
- 166 CAL. UNEMP. INS. CODE § 3303(b).
- 167 CAL. UNEMP. INS. CODE § 3303.1(c). An individual is not eligible for PFL benefits if the individual has or is entitled to receive certain other benefits (e.g., unemployment compensation, disability insurance benefits) from California or from other states. CAL. UNEMP. INS. CODE § 3303.1(a).
- 168 CAL. UNEMP. INS. CODE § 3301(d). This 12-month "disability benefit period" is measured as the 365 consecutive days that begin with the first day the individual first establishes a valid claim for PFL benefits. CAL. UNEMP. INS. CODE §§ 3302(k), 3302.1(a). Any time off taken for the same reason within a 12-month period is considered one "disability benefit period." CAL. UNEMP. INS. CODE § 3302.1(b). Thus, unlike SDI, PFL defines the period by the reason for the time off, rather than ending the disability benefit period automatically when the employee returns to work. Likewise, when work is missed due to pregnancy disability and then to bond with that child within a 12-month period after birth, all of the time off is considered the same "disability benefit period." CAL. UNEMP. INS. CODE § 3302.1(c).
- 169 See I.R.C. § 85; CAL. REV. & TAX. CODE § 17083.
- 170 CAL. UNEMP. INS. CODE §§ 3301(c), 3302(j), and 3303.1(c).
- 171 CAL. UNEMP. INS. CODE § 3301(b). Benefits may be prorated for part-time employees. Telephone conversation with Janet Botill, California Employment Development Dept. (June 7, 2005).
- 172 CAL. UNEMP. INS. CODE § 3301(c).
- 173 N.J. Stat. Ann. § 43-21-25 et seq.
- 174 See generally 5/2/08 statement from Office of the Governor, available at <http://www.state.nj.us/governor/news/news/2008/>
- 175 See New Jersey Department of Labor and Workforce Development, *Family Leave Insurance Fact Sheet*, available at http://lwd.dol.state.nj.us/labor/fli/content/fli_fact_sheet.html.
- 176 The law specifically states that "the Legislature does not intend that the policy established by P.L. 2008 . . . be construed as granting any worker an entitlement to be restored by the employer to employment held by the worker prior to taking family temporary disability leave . . . and the Legislature does not intend that the policy of providing benefits during family temporary disability leave be construed as increasing, reducing or otherwise modifying any entitlement of a worker to return to employment or right of the worker to take action under the provisions of the "Family leave Act," P.L. 199, c. 261 (C34:11B et seq.), or the federal "Family and Medical Leave Act of 1993," Pub. L. 103-3(29 U.S.C. s.2601 et seq.)." N.J. Stat. Ann. § 43-21-26
- 177 See New Jersey Department of Labor and Workforce Development, *Family Leave Insurance Frequently Asked Questions*, available at <http://lwd.dol.state.nj.us/labor/lwdhome/FamilyLeaveFAQ.html#4>.
- 178 See R.I. GEN. LAWS §§ 28-39-1 to 28-41-33.

- 179 R.I. GEN. LAWS. § 28-41-5. Workers may also receive additional payments of the greater of 7% of their weekly benefit or \$10 per child, if they have children under age 18. *Id.* A base period generally means the first four of the most recently completed five quarters immediately preceding the first day of a worker's benefit year. R.I. GEN. LAWS. § 28-39-2. A benefit year begins when a worker files a valid claim. *Id.* This benefit is generally comparable to that of other state TDI benefits because the 4.62% is taken as a percentage of the employee's quarterly earnings. Most other state TDI laws use a higher percentage (generally 55%-65%) of average weekly earnings as a benefits formula.
- 180 See, e.g., The Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 ñ 2654; the California Family Rights Act (CFRA), CAL. GOV'T CODE § 12945.2(a).
- 181 See S.B. 114, 185th Gen. Court, 2007 Reg. Sess. (Mass. 2007).
- 182 The bill was referred to the Senate Committee on Ways and Means on November 5, 2007. See <http://www.mass.gov/legis/185history/s00114.htm>
- 183 See generally METLIFE, DISABILITY INSURANCE (2006), available at <https://www.metlife.com/Applications/Corporate/WPS/CDA/PageGenerator/0,4132,P1794,00.html>. For purposes of STD, a disabled individual is defined as an individual who is unable to work at his/her own job at the particular employer. For LTD, a 2-tier definition generally applies: during the first 24 months, the individual must be disabled from his own occupation, and after the first 24 months, the individual must be disabled from any and all occupations for which he/she is reasonably qualified (the so-called any and all occupation test). *Id.* While all STD payments are considered taxable income for the employee, LTD payments may or may not be taxable, depending on the payment source and methods of premium payments: if the employer or employee pays the premiums on a pre-tax basis, the LTD benefits are taxable for the employee, but if the employee pays the premiums on an after-tax basis, the LTD benefits are not taxable.
- 184 Sick time off is generally defined as paid time off that accrues over time and is provided by the employer as a benefit of employment for the employee to use when he/she is too sick to work or needs to go to the doctor for diagnosis or treatment of a medical condition. See, e.g., CAL. LAB. CODE § 233(b)(4) (2005); HAW. REV. STAT. §§ 398-4.
- 185 See <http://www.nationalpartnership.org/portals/p3/Library/PaidLeave/SickDays/GetWellSoon.pdf>, at 7 (last visited October 25, 2006).
- 186 CAL. LAB. CODE § 233; CONN. GEN. STAT. §§ 31-511I; HAW. REV. STAT. § 398-4; ME. REV. STAT. ANN. tit. 26, § 636; MINN. STAT. § 181.9413; WASH. REV. CODE § 49.12.270; WIS. STAT. § 103.10.
- 187 Birth and Adoption Unemployment Compensation, 65 FED. REG. 37,210 (June 13, 2000).
- 188 See Memorandum from President William J. Clinton to the Heads of Executive Departments and Agencies, available at <http://www.opm.gov/oca/compmemo/1999/ATTACH1.HTM> (May 24, 1999) (last visited October 28, 2006). As DOL noted in its Final Rule: Based on findings from a 1996 study conducted by the Commission on Family and Medical Leave, which indicated that parents were not able to take needed leave because they could not afford it, and in response to the legislative efforts by some States to provide UC to parents, the President directed the Secretary of Labor on May 23, 1999, to propose regulations allowing unemployment fund monies to be used to provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child. The President elaborated on this Birth and Adoption UC (BAA-UC) proposal in a May 24, 1999, memorandum to the heads of executive departments stating that the Department of Labor is to evaluate the effectiveness of using the system for these or related purposes. 65 FED. REG. 37,210.
- 189 20 CFR § 604; 65 FED. REG. at 37223-37225 .
- 190 See, e.g., Letter from Jeffrey C. McGuinness, President, LPA, Inc., to President William J. Clinton (July 22, 1999), available at http://www.hrpolicy.org/memoranda/1999/99-130_Letter_to_President_Clinton_Re-FMLA-UI.pdf (registering strong opposition to the use of unemployment insurance funds as income replacement for employees on family leave); Letter from Tim Hammonds, President and CEO, Food Mktg. Inst., to Grace A. Kilbane, Dir., Unemployment Ins. Serv., Employment and Training Admin., U.S. Dept of Labor. (Feb. 2, 2000), available at <http://www.fmi.org/gr/comments/more/202-00.html> (strongly opposing the proposed extension of unemployment compensation to those who choose to leave the workforce voluntarily).
- 191 See, e.g., Letter from Dan Danner, NFIB, to John Morall, OMB, Comments on OIRA's Draft Report to Congress and Recommendations for Regulatory Review (May 28, 2002) available at <http://www.whitehouse.gov/omb/infocreg/comments/comment30.pdf> (last visited October 23, 2006).

- 192 States allocate the costs of UI among employers based on each employer's experience of unemployment such that employers whose workers took time off with Baby-UI would likely see their experience rating increase. The purpose of experience ratings is to encourage employers to stabilize their workforce, but employers would have no means to discourage employees from claiming Baby-UI benefits. Thus, experience rating systems would become ineffective and employers would have to bear a cost over which they had no control. See Federal-State Unemployment Compensation Program; Unemployment Insurance Program Letters Interpreting Federal Unemployment Insurance Law, 56 FED. REG. 54,891 (Oct. 23, 1991).
- 193 See, e.g., Letter from Randel K. Johson, US Chamber of Commerce, to Cheryl Atkinson, US Department of Labor iComments Supporting the Labor Department's Proposed Unemployment Compensation Trust Fund Integrity Rulei (February 3, 2003) available at <http://www.uschamber.com> (last visited October 23, 2006).
- 194 Unemployment Compensation ñ Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 FED. REG. 58,540 (Oct. 9, 2003) (to remove 20 C.F.R. § 604). Several business groups had also filed a lawsuit challenging the validity of the BAA-UC regulations. Complaint for Declaratory, Injunctive and Other Relief, *LPA Inc. v. Chao*, 211 F. Supp. 2d 160 (D.D.C. 2002) (Civ. A. No. 00-1505(PLF)). The lawsuit was dismissed for lack of standing. *LPA, Inc. v. Chao*, 211 F. Supp. 2d at 166 (i[P]laintiffs cannot show injury in fact because the *injury* they fear is based on the speculation that a state will pass such a law . . . that will harm plaintiffs.i) (emphasis in original). Nevertheless, the lawsuit was used by the DOL as a reason to reopen consideration of the new regulation. See Unemployment Compensation ñ Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 67 FED. REG. 72,122 (proposed Dec. 4, 2002) (to remove 20 C.F.R. § 604) (iAlthough the case was dismissed on procedural grounds, it did cause the Department to scrutinize the underlying statutory authority for Baby-UI.i)
- 195 *Id.* at 58,540, 58,542 (iCongress intended the UC system to be subordinate to the main task of getting people back to work, which is . . . implemented through the A&A requirements. Baby-UI is not consistent with this goal because it encourages parents to refuse available work.i).
- 196 *Id.*
- 197 See 65 Fed. Reg. 37212 (summarizing comments on the proposed rule.) Although states choose how to administer their unemployment compensation programs, for each state's employers to qualify for the 5.4% federal tax credit, that state must adhere to certain minimum requirements set out in the Federal Unemployment Tax Act. See 26 U.S.C. § 3304. Likewise, to qualify for federal grants to cover the costs of administration of states' unemployment insurance programs each state's program must meet the minimum requirements set forth in the Social Security Act that are necessary to be certified by the Secretary of Labor. See 42 U.S.C. § 503.
- 198 See 65 Fed. Reg. 37210, at 37212. The Federal Unemployment Tax Act (FUTA) § 3304(a)(4) and the Social Security Act (SSA) § 303(a)(5) generally limit withdrawals from state UI funds to the payment of compensation (defined as cash benefits payable to individuals with respect to their unemployment). FUTA § 3304(a)(1) and SSA 303(a)(2) require that compensation be paid through public employment offices. The Department of Labor believes i[t]he requirement that [UI] be paid through the public employment system (the purpose of which is to find people jobs) ties the payment of UC to the individual's ability to work and availability for work. These A&A requirements serve, in effect, to i cap i UC eligibility. 65 Fed. Reg. 37213. The DOL acknowledged in its commentary to the final BAA-UC regulations that i[a]lthough no explicit A&A requirements are stated in Federal law, the Department and its predecessors . . . have interpreted Federal UC law as requiring participating States to have A&A requirements. 65 Fed. Reg. 37210.
- 199 Unemployment CompensationóEligibility, Notice of Proposed Rulemaking, 70 Fed. Reg. 42474 (July 22, 2005).
- 200 *Id.*
- 201 *Id.*
- 202 Unemployment CompensationóEligibility, Final Rule, 20 C.F.R. § 604, 72 Fed. Reg. 1890 (January 16, 2007).
- 203 *Id.* at § 604.3(a).
- 204 *Id.* at § 604.4(a); see also § 604.5(a)(1)-(3).
- 205 72 Fed. Reg. 1890.
- 206 *Id.* at § 604.4(b).
- 207 See Discussion of Comments on the Proposed Rule, 72 Fed. Reg. 1890.
- 208 42 U.S.C. § 5177.

- 209 See S. 1071, 185th Gen. Court, 2007 Reg. Sess. (Mass. 2007). This bill is different from S. 114, discussed above, which would be funded through employee premiums.
- 210 See Nat'l Partnership for Women & Families, *At-Home Infant Care (AHIC): A Side-by-Side Comparison of Federal and State Initiatives* (Oct. 2005), available at http://www.nationalpartnership.org/site/PageServer?pagename=library_pl_PaidLeave (last visited December 10, 2007).
- 211 *Id.* Parents must meet state income and other CCDBG requirements, and must have worked or attended education or training for a minimum number of hours prior to the time off. Families are not allowed to access other childcare benefits while participating in an AHIC program. *Id.* A provision was included in the TANF reauthorization legislation of 2004 and 2005 providing that states may choose to initiate such programs to provide payment to at-home caretakers of children under two years old, using the CCDBG funding stream.
- 212 S. 820, 110th Cong. § 1 (Introduced by Sen. Hillary Clinton on March 8, 2007).
- 213 H.R. 1438, 110th Cong. (Introduced by Rep. Rosa De Lauro on March 9, 2007).
- 214 *Id.*
- 215 See, e.g., H.R. 5992, 109th Cong. (2006); S. 3797, 109th Cong. (2006), H.R. 3595, 107th Cong. (2004).
- 216 See *infra* note 222.
- 217 MINN. STAT. § 119B.035; MINN. R. 3400.0235.
- 218 See Nat'l Partnership for Women & Families, *At-Home Infant Care (AHIC): A Side-by-Side Comparison of Federal and State Initiatives* (Oct. 2005), available at <http://www.nationalpartnership.org/portals/p3/library/PaidLeave/AHICchartOct05.pdf> (last visited October 23, 2006).
- 219 MINN. STAT. § 119B.035.
- 220 *Id.*
- 221 See MINN. STAT. § 119B.03.
- 222 See National Partnership for Women and Families, 2007 *Where Families Matter: State Progress Toward Valuing Women and Their Families*.
- 223 Family Leave Insurance, Wash. Rev. Code § 49.86 (2007), Senate Bill 5659, Chapter 357, 60th Legislative Session (passed by the Senate with a vote of 26 to 21, passed by the House with a vote of 57 to 41).
- 224 *Id.* at § 49.86.005. When the Washington FLIP program is fully funded, it will provide up to 5 weeks of paid leave in a given year, for parents taking leave to care for newborn or newly adopted children, for which an employee may apply following a seven-day waiting period, during which the employee is not eligible for leave. *Id.* at § 49.86.050. Benefits available through a state insurance fund will start at \$250 per week, prorated for part-time workers. *Id.* at § 49.86.060. Everyone who has worked at least 680 hours during the previous four of the last five calendar quarters completed or the last four calendar quarters immediately preceding the employee's application year will be eligible, regardless of firm size. *Id.* at § 49.86.030. Workers in companies with more than 25 employees who have been with an employer a full year, and have worked 1250 hours during that year, will also have job protection. *Id.* at § 49.86.090. Washington's bill, as originally introduced, also provided leave for the serious health condition of the worker or a close family member, but as a result of political compromise, the final bill provided leave only to care for a newborn or newly adopted child.
- 225 JOINT TASK FORCE ON FAMILY LEAVE INSURANCE, FINAL REPORT (2008), available at <http://www.leg.wa.gov/documents/joint/fli/FinalReport.pdf>.
- 226 *Id.*
- 227 See 10/7/08 statement from Office of the Governor Chris Gregoire, available at <http://www.governor.wa.gov/news/news-view.asp?pressRelease=1037&newsType=1> See http://www.ofm.wa.gov/news/release/2008/081007_budget_actions.pdf for breakdown of budget cuts.
- 228 H.B. 453, 190th Gen. Assemb., 2007-08 Sess. (Pa. 2007). The Pennsylvania bill was referred to the House Committee on Labor Relations on March 29, 2007, but never enacted.
- 229 H.R. 2392, Section 104, 110th Cong. § 1 (Introduced by Rep. Lynn Woolsey on May 17, 2007).
- 230 *Id.* at Section 104(d).
- 231 *Id.* at Section 104(c).
- 232 Hillary Clinton for President Campaign Website. 2007. iPress Release October 16, 2007: Hillary Clinton's Agenda for Working Families: Helping Parents Balance Work & Family. <http://www.hillaryclinton.com/news/release/view/?id=3743>. (Accessed: 12/27/2007).

- 233 Obama for America Campaign Website. 2007. Fact Sheet: iBarack Obama's Work-Family Balance Agenda.î <http://my.barackobama.com/page/iowa%20blog/Fact%20Sheets/Fact%20Sheet%20Iowa%20Work%20Family%20Balance%20FINAL.pdf>. (Accessed: 12/27/2007)
- 234 See H.R. 3158/ H.R. 3799/ H.R. 5718/ H.R. 5781, 110th Cong. (Introduced by Rep. Carolyn Maloney) (provides for paid leave in connection with the birth or placement of a child) . See also S.80, 110th Cong. § 1 (Introduced by Sen. Ted Stevens on January 4, 2007) (provides 7 weeks of paid leave to employees who give birth, and 1 week of paid leave to other employees who have a new child).
- 235 H.R. 5781.
- 236 S. 3140, 110th Cong. (2008) (Introduced by Senator Webb on June 16, 2008).
- 237 See Explanatory Notes to Work and Families Act, 2006 Chapter 18, available at <http://www.opsi.gov.uk/acts/en2006/2006en18.htm>. This is an extension from the previous 26 weeks of paid time off to which pregnant employees had been entitled. *Id*; see also Statutory Maternity Pay and Allowance: Key Facts, available at <http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page34244.html#Statutory>.
- 238 Pregnancy and Work: What You Need To Know As An Employee, Babies Due On Or After April 1, 2007, available at <http://www.berr.gov.uk/files/file34285.pdf>.
- 239 See Explanatory Notes to Work and Families Act, 2006 Chapter 18, available at <http://www.opsi.gov.uk/acts/en2006/2006en18.htm>.
- 240 See Maternity entitlements and responsibilities: a guide ñ babies due on or after April 1, 2007 ñ Part 1, available at <http://www.berr.gov.uk./employment/employment-guidance/page34236.html>.
- 241 See The Paternity and Adoption Leave Regulations 2002, Statutory Instrument 2002, No. 2788; Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002, Statutory Instrument 2002, No. 2822; Working Fathers: Rights to Leave and Pay: Guide for Employers and Employees, available at <http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18481.html>
- 242 See Additional Paternity Leave and Pay, available at <http://www.dti.gov.uk/employment/workandfamilies/add-paternity-leave/index.html>.
- 243 *Id*.
- 244 See Mother's Day: More than Candy and Flowers, Working Parents Need Paid Time Off, Issue Brief, Spring 2002, Columbia University Clearinghouse on International Developments in Child, Youth and Family Policies, available at <http://www.childpolicyintl.org/issuebrief/issuebrief5.htm>.
- 245 *Id*. (describing iuse-it-or-lose-itî government leave policies in Denmark, Italy, Norway and Sweden).
- 246 Hawaiian law requires the employer to pay at least one-half of the TDI plan costs, and permits employers to deduct and withhold contributions from employees of one half the cost of the plan (but not more than 0.5% of the employee's weekly wages). HAW. REV. STAT. § 392-43.
- 247 New Jersey requires joint contributions for its TDI program, but funds its new family leave program solely through an employee tax. See New Jersey Department of Labor and Workforce Development, *Family Leave Insurance Frequently Asked Questions*, available at <http://lwd.dol.state.nj.us/labor/lwdhome/FamilyLeaveFAQ.html#4>.
- 248 Rhode Island (1942), California (1946), New Jersey (1948), New York (1949), Puerto Rico (1968) and Hawaii (1969).
- 249 For example, Hawaii's TDI law provides that i[a]ny individual in current employment who suffers disability resulting from accident, sickness, pregnancy, or termination of pregnancy, except accident or disease connected with or resulting from employmentÖshall be entitled to receive temporary disability benefits in the amount and manner provided in this chapter.î HAW. REV. STAT. § 392-21.
- 250 For example, New Jersey's TDI law defines a icompensable disabilityî as follows: iDisability shall be compensable subject to the limitation of this act, where a covered individual suffers any accident or sickness not arising out and in the course of the individual's employment or if so arising not compensable under the worker's compensation lawÖand resulting in the individual's total inability to perform the duties of employment.î N.J. STAT. ANN. § 43:21-29. Hawaii defines iDisabilityî to mean the itotal inability of an employee to perform the duties of the employee's employment caused by sickness, pregnancy, termination of pregnancy, or accident other than a work injury. . . .î HAW. REV. STAT. § 392-3.
- 251 See, e.g., N.J. STAT. ANN. §§ 43:21-38, 43:21-40 (up to the lesser of 26 weeks or 1/3 of total base year wages at 66.67% of average weekly wage up to a cap); HAW. REV. STAT. §§ 392-22, 392-23 (up to 26 weeks of time off per benefit year at 58% of average weekly wage up to a cap).

- 252 See, e.g., N.J. STAT. ANN. § 43:21-7(d)(1)(G); HAW. REV. STAT. § 392-43.
- 253 See, e.g., N.J. STAT. ANN. § 43:21-7(e); HAW. REV. STAT. § 392-43.
- 254 N.Y. WORKERS' COMP. LAW §§ 209-210.
- 255 N.Y. WORKERS' COMP. LAW § 201(9). In addition, it provides, "[d]isability during unemployment means the inability of an employee, as a result of injury or sickness not arising out of and in the course of an employment, to perform the duties of any employment for which he is reasonably qualified by training and experience." *Id.* The law applies to employers who have one or more employees for thirty days in a calendar year (covered employers) and employees who have worked for a covered employer for four or more consecutive weeks. N.Y. WORKERS' COMP. LAW §§ 202-203.
- 256 N.Y. WORKERS' COMP. LAW §§ 204 & 205.
- 257 The period of disability benefits begins on the eighth consecutive day of the employee's disability and during the continuance of disability, up to a maximum of twenty-six weeks. N.Y. WORKERS' COMP. LAW §§ 204 & 205.
- 258 A. 7130, New York State Assem., 2007 Legis. Sess., available at <http://assembly.state.ny.us/leg/?bn=A07130&tsh=t>
- 259 A. 9245, New York State Assem., 2007 Legis. Sess., available at <http://assembly.state.ny.us/leg/?bn=A09245&tsh=t>
- 260 *Id.*
- 261 *Id.*
- 262 H.B. 1683, 95th Gen. Assem. (2007) available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=51&GA=95&DocTypeId=HB&DocNum=1683&GAID=9&LegID=30506&SpecSess=&Session=> (last visited June 21, 2007). Reps. Julie Hamos and Barbara Flynn Currie introduced the bill on January 22, 2007. *Id.*
- 263 H.B. 1386, 190th Gen. Assem., 2007-2008 Sess. (Pa. 2007), available at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2007&sessInd=0&billBody=H&billTyp=B&billNbr=1386&pn=1733> (last visited June 22, 2007), 43 P.A. CONS. STAT. § 804. Section 804 sets the weekly benefit at 50% of weekly wages, or an amount determined by a table found at subsection (e)(1), whichever is greater.
- 264 H.B. 685, 189th Gen. Assem., 2005-06 Sess. (Pa. 2005).
- 265 H.B. 1803, 50th Leg. Sess., 1st Sess. (Okla. 2005) (credit would not exceed 20% of salaries and wages paid for not more than six weeks in a 12 month period, subject to a cap of \$500 per week).
- 266 The Pennsylvania bill was referred to the House Committee on Finance on March 1, 2005, but never enacted. The Oklahoma bill was passed by the House on March 8, 2005, but the last action in the Senate was the bill leaving the Senate Committee on Finance on April 7, 2005.
- 267 S. 1681, Section 103(a), 110th Cong. § 1 (2007) (Introduced by Senators Christopher Dodd on June 21, 2007) (cosponsored by Senators Ted Stevens and Patty Murray). The Family Leave Insurance Act of 2008, H.R. 5873, 110th Cong. (2008) was introduced by Representative Pete Stark on April 22, 2008. It differs from the Senate bill in that it: (1) provides for 12 (instead of 8) weeks of paid leave; (2) defines small employer as having less than 20 (instead of 50) employees; (3) defines eligible employee as someone who has worked for a covered employer for at least 6 months and has been employed by the employer from whom leave is requested for at least 625 hours and; (4) includes caring for a domestic partner with a serious medical condition as a qualifying reason.
- 268 *Id.* at Section 103 (a).
- 269 *Id.* at Section 101(1)(A).
- 270 *Id.* at Section 103 (c).
- 271 *Id.*
- 272 *Id.* at Section 103 (c)(1)(E).
- 273 *Id.*
- 274 *Id.*
- 275 *Id.* at Section 306(b).
- 276 *Id.* at Section 306(a).
- 277 *Id.* at Section 101(1)(C).
- 278 S. 1871, 110th Cong. § 2 (introduced by Sen. Kennedy on July 25, 2007); H.R. 2233, Section 2(a), 110th Cong. § 1 (introduced by Rep. Jim McDermott on May 9, 2007). See also H.R. 2395/S. 1136, 110th Cong. (2007) (permitting individuals to qualify for unemployment insurance who are separated from employment due to circumstances resulting from the individual's experience of domestic violence).
- 279 S. 1871, 110th Cong. § 2

- 280 The bill expands the reasons that an employee can qualify for unemployment insurance to include voluntary separation from employment when the employee separates because of (1) the illness or disability of a member of the individual's immediate family or (2) domestic violence that causes the individual to believe that her safety and the safety of her family members is threatened by continued employment. *Id.*
- 281 *Id.* See also Press release on S. 1871, http://kennedy.senate.gov/newsroom/press_release.cfm?id=df1ff028-1aa0-4c73-a168-722048efb665.
- 282 DEPARTMENT OF TRADE AND INDUSTRY, INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 59-229 (2006), *available at* <http://www.dti.gov.uk/files/file31948.pdf>. With respect to foreign laws, time off for maternity purposes generally means time off granted to mothers for a limited period around the time of childbirth; time off for paternity purposes generally means time off granted to fathers for a limited period around the time of childbirth; and time off for parental purposes generally means time off granted to mothers and fathers for longer periods of time, typically following periods of maternity and paternity leave. See JANET C. GORNICK AND MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT (Russel Sage Foundation 2003).
- 283 DEPARTMENT OF TRADE AND INDUSTRY, INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 59-229 (2006), *available at* <http://www.dti.gov.uk/files/file31948.pdf>. For example, in Denmark, female employees receive 100% of wages up to a flat-rate ceiling of approximately US \$539 per week for up to eighteen weeks of time off for maternity purposes. *Id.* at 95. In the United Kingdom, female employees receive 90% of average earnings for six weeks plus a flat rate payment of approximately US \$ 201.81 for the following 20 weeks. *Id.* at 217.
- 284 UNITED STATES SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: ASIAN AND THE PACIFIC, 2002 (2003), *available at* <http://www.ssa.gov/policy/docs/progdsc/ssptw/2002-2003/asia/> (Particular reference to fact sheets on China, India, Japan and Singapore). Employees receive 100% of wages in China, India and Singapore (subject to a cap in Singapore applicable to weeks 8 -12 of the time off), and in Japan employees receive 60% of wages.
- 285 *Id.*
- 286 DEPARTMENT OF TRADE AND INDUSTRY, INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 59-229 (2006), *available at* <http://www.dti.gov.uk/files/file31948.pdf>. For example, the United Kingdom offers two weeks of time off for paternity purposes paid at a flat rate, France offers two weeks off paid at 100% of wages up to a flat rate ceiling and India offer 15 days off paid at 100% of wages. Canada provides 8 days of unpaid time off.
- 287 *Id.*
- 288 UNITED STATES SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: ASIAN AND THE PACIFIC, 2002 (2003), *available at* <http://www.ssa.gov/policy/docs/progdsc/ssptw/2002-2003/asia/> (Particular reference to fact sheets on China, India, Japan and Singapore).
- 289 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRANSFORMING DISABILITY INTO ABILITY: POLICIES TO PROMOTE WORK AND INCOME SECURITY FOR DISABLED PEOPLE (2003), *available at* http://www.oecd.org/document/14/0,2340,en_2649_3528841_35290126_1_1_1_1,00.html. We note that most of these nations also have statutorily-required paid vacation days for workers, ranging from 10 days to 8 weeks off, but these are paid for solely by employers.
- 290 See Select Foreign EXTO Laws: By Country, *available at* <http://www.law.georgetown.edu/workplaceflexibility2010/definition/documents/EXTOInternationalByCountry.pdf>; Summary Comparison of Select Foreign EXTO laws, *available at* <http://www.law.georgetown.edu/workplaceflexibility2010/definition/documents/EXTOInternationalSummaryChart.pdf>; Select Foreign EXTO Law By Topic, *available at* <http://www.law.georgetown.edu/workplaceflexibility2010/definition/documents/EXTOInternationalByTopic.pdf>.
- 291 BARACK OBAMA, THE BLUEPRINT FOR CHANGE: BARACK OBAMA'S PLAN FOR AMERICA at 15, *available at* <http://www.barackobama.com/pdf/ObamaBluprintForChange.pdf>
- 292 *Id.*
- 293 *Id.*