FMLA Scope, Coverage, and Eligibility

Note: We have developed our understanding of the assertions and concerns of various family and business groups from our reading of FMLA cases, from materials developed by the groups, and through individual conversations with group representatives. Where comments have appeared in writing, we have included at least one source for each concern or assertion, even if we have heard similar information from additional sources. For purposes of this chart, the term "family and labor groups" includes: AFL-CIO, D.C. Employment Justice Center, Labor Project for Working Families, National Partnership for Women and Families, and the National Women's Law Center. For purposes of this chart, the term "business groups" includes: HR Policy Association (formerly LPA), National Association of Manufacturers, Society for Human Resource Management, and the U.S. Chamber of Commerce.

Issue	Family and labor groups' assertions and concerns (as we understand them)	Business groups' assertions and concerns (as we understand them)	WF 2010 Comments
Coverage limited to employers who employ 50 or more employees ("covered employer") 29 U.S.C. §2611(4)(A)(i) 29 C.F.R. §825.104	FMLA fails to cover a significant number of workers. Approximately 40% of the private sector workforce works for establishments not currently covered by the FMLA. (National Partnership) Approximately 77% of respondents to the DOL **employee** survey said that they work for covered employers. (2000 DOL study) Only approximately 11% of respondents to the DOL **employer** survey said that they were covered under the FMLA. (2000 DOL study)	FMLA's burdens are already onerous for large companies. It would be impossible for small companies to comply with the FMLA.	Note difference from Title VII and ADA, which both cover employers with 15 or more employees. 42 U.S.C. § 12111(5)(A) 42 U.S.C. § 2000e(b) During the FMLA's development, coverage changed from all employers with 5 or more employees, to employers with 15 or more employees, to employers with 50 or more employees during the first 3 years of enactment, and 35 employees thereafter, to employers with 50 or more employees. Note: some state FMLA leave laws have lower employee thresholds.

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Employee eligibility limited to those who have worked for their employers for at least 12 months, and who have worked at least 1250 hours in the preceding year. 29 U.S.C. §2611(2)(A) 29 C.F.R. §825.110	Doesn't cover the majority of part time workers or those who work over 1250 hours per year, but for more than one employer. Many workers are subject to statutory restrictions on certain work hours that prevent them from meeting the FMLA's 1250 hours of service requirement unless DOL considers all of those employees' compensable hours in determining whether they meet the threshold for coverage. (AFL-CIO)		Note difference from Title VII and ADA, both of which do not have hours of service or time served requirements. 42 U.S.C. §12111(4) and (5) 42 U.S.C. §2000e(b) and (f)
FMLA leave is unpaid 29 U.S.C. §2612(c), (d) 29 C.F.R. §825.207	Over 3.5 million people working for covered employers have needed leave but have not taken it. (2000 DOL study) 78% of those who said they needed leave but did not take it said they did not take leave because they could not afford to do so. (2000 DOL study) 88% of leave-needers said they would have taken leave if they had received some or additional pay. (2000 DOL study)	Mandating paid family and medical leave would be an incredibly poor policy choice for Congress to make. In today's global competitive economy, American employers need fewer mandates, not more mandates.	

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	37% of workers taking FMLA leave and receiving less than full pay during leave reported having to cut their leave short due to lost pay. (2000 DOL study)		
FMLA leave is limited to leave for caregiving and personal health care needs. 29 U.S.C. §2612(a)(1) 29 C.F.R. §825.112	No job-protected leave for "life issues" – e.g., domestic violence, court appearances, school visits, etc.	The FMLA is already incredibly difficult for employers to handle. Employers cannot handle yet additional reasons for FMLA leave.	
Caregiving provisions limited to caring for a child, spouse, or parent. 29 U.S.C. §2612(a)(1)(C) 29 C.F.R. §§825.112(a)(3) and 825.113	Does not cover domestic partners, parents-in-law, stepparents, grandparents, or other relatives.	Same as above. Expanding the scope of FMLA coverage would increase compliance costs. Given the current problems with the FMLA, expanding coverage is inappropriate.	The original FMLA bill (H.R. 2020, 99th Congress) provided unpaid parental leave for the birth, adoption, or serious illness of a child, and unpaid medical leave for employees' own serious health conditions. The "family leave" provisions– i.e., leave to care for parents or a spouse with a serious health condition – were added in subsequent years.
Medical leave is provided for a "serious health	Broad definition of "serious health condition" is essential. It addresses the complexity of how	Regulatory interpretation of "serious health condition" is overly broad. Congress did not	Note that the rationale offered by Congress for limiting coverage to "serious health conditions" (rather than to any health condition that might require an absence from work) was simply

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condition" that makes an employee unable to perform the functions of the employee's job. Family leave is provided to care for a family member with a "serious health condition." 29 U.S.C. §2612(a)(1)(C)&(D) 29 C.F.R. §§825.112(a)(3)&(4), 825.115	different individuals are affected by illnesses. (National Partnership) Many employees – including those who have paid sick leave for themselves – do not have access to leave provisions that enable them to care for a family member with a less than serious medical issue (e.g., taking a child to a routine medical or dental visit, staying home with a sick child who has a fever or a stomach virus, taking a frail elderly parent to the physician's office.) (IWPR – More than 59 million workers do not have access to paid sick leave for themselves. Nearly 86 million workers do not have access to paid sick leave to care for sick children**.)** There have been a number of overly restrictive court interpretations of what it means "to care for" a family member. *See, e.g., Fioto v. Manhattan Woods Golf Enters*., 270 F. Supp. 2d 401 (S.D.N.Y. 2003).	intend to cover "minor illnesses" under the FMLA; they are now coming through the back door. (NAM) There is no bright line test or listing of conditions that enables the employer to determine whether the employee has a "serious health condition" that renders him/her "unable to perform the functions of the job." Very confusing and difficult to administer. (LPA) Three days of incapacity/two visits to the doctor test encourages employees to stay out of work and overuse the medical system. (LPA) Regulatory definition of "unable to perform the functions" of his or her job is overly broad. It allows an employee to demand FMLA leave whenever the employee cannot perform ***any one*** of the essential functions of the job. An employer's ability to reduce costly absences is thus	wrong; i.e., that time off for non-serious health conditions would be available to all employees under even "the most modest employer sick leave policies." Note that under the ADA, an individual is a "qualified individual with a disability" if the individual can perform the essential functions of the job with or without reasonable accommodations. The employer, however, need not provide such accommodations if doing so would impose an undue hardship on the employer. Once such an accommodation is available, however, the employee *must* accept the restructured job if that's the only way for the individual to remain "qualified" for the job. See also Intermittent Leave Chart.

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		limited because the employer cannot require the employee to return to work, e.g., in a light duty position that will accommodate the employee's medical restrictions. (Chamber)	
Family leave is provided for the care of a newborn, adopted, or foster child. 29 U.S.C. §2612(a)(1)(A)-(C) 29 C.F.R. §825.112(a)(1)-(3)			

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Unclear whether states are immune from suit under the medical leave provisions. Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003).	In most federal judicial circuits, State employees cannot recover money damages for violations of the medical leave provisions. *See, e.g., Brockman v. Wyoming Dept. of Family Servs*., 342 F.3d 1159 (10th Cir. 2003); *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001); *Chittister v. Dept. of Cmty. and Econ. Dev.,* 226 F.3d 223 (3d Cir. 2000).		