

# The Family and Medical Leave Act

Policy Equity Assessment

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## LOGIC

The Family and Medical Leave Act of 1993 (FMLA) is federal legislation that offers unpaid, job protected leave from work for eligible employees.<sup>1</sup>

The FMLA was designed to address employee's need to balance their work duties with their own health needs or caretaking responsibilities for newborns and seriously ill family members. Racial/ethnic minority, low-wage, female, and immigrant workers are significantly less likely to have employer provided benefits such as health insurance, pensions and paid time off.<sup>2-7</sup> The FMLA promotes equity by allowing employees to address their and their family's health needs without losing their jobs, which is particularly important for workers without employer-provided leave. The FMLA also seeks to promote gender equity in the workplace and in the home by providing leave for all genders.

However, the FMLA's benefits are not universal and leave out many workers. Limited access to leave due to affordability and eligibility means that the FMLA exacerbates existing inequities. Specifically, because the FMLA provides only unpaid leave with strict eligibility criteria, the policy deepens existing inequities between lower-wage and higher-wage workers in access to employment protection and disproportionately excludes Hispanic and black workers. The case of the FMLA illustrates that for a given policy, explicit equity goals may be present for a particular subgroup (e.g., women) but not addressed for others (e.g., low-income workers).

In this Policy Equity Assessment, we assess the capacity of the FMLA to address racial/ethnic equity and whether the FMLA impacts economic and health outcomes and reduces disparities for U.S. workers. Significantly, some of the populations who are least likely to have access to FMLA leave are also more vulnerable to certain health conditions, which means that they may be the most in need of, but the least likely to access, worker benefits that can help address health issues.<sup>8</sup> We particularly emphasize the impact of the FMLA for working parents, given research showing that when a parent is present to provide care, children recover faster from illnesses and injuries, have shorter hospital stays and are more likely to receive preventive care.<sup>9</sup>

## History

The FMLA is a federal labor standard passed in 1993 that establishes and upholds eligible workers' rights to take unpaid, job-protected leave from work for select caregiving or medically-related reasons. Legislators envisioned that by encouraging all genders to take family leave, the FMLA would reduce the incentive for employers to discriminate against female employees, who typically bear more family caregiving responsibilities. They also hoped that the opportunity to take job-protected leave would encourage men to participate more equally in parenting and caregiving responsibilities.<sup>10-12</sup>

Prior to the FMLA guarantee, a patchwork of state leave laws and employer leave policies existed across the United States. Since its passage, the FMLA has been expanded to include more diverse families including children 18 years and older who are incapable of self-care due to a mental or physical disability (in 2013); next of kin of a current service member with a serious injury incurred during active duty (in 2008), and same sex spouses (in 2015).<sup>13-15</sup> See Appendix A FMLA Federal Legislative History Highlights.

## The FMLA's purpose: Increasing family wellbeing and employment stability

The primary goals of the FMLA are to promote workers' family and medical leave taking, employment stability and security, and work-family balance.<sup>16,17</sup> The Act recognizes that workers', and particularly

parents', ability to care for sick family members and new children is important for family cohesiveness, family wellbeing and child development. Furthermore, employment policies that support parents' caregiving roles are crucial given the increase in single parent households and two-parent households where both parents work.<sup>18</sup> Although not stated in the original legislative purpose of the FMLA, an additional consideration for improving access to family and medical leave is the aging of the U.S. population. The rising population of elderly people, for whom care is primarily provided by spouses and adult daughters, also requires flexible employment policies.<sup>19</sup> See Appendix B A Logic Model of the FMLA.

### Equity in the FMLA: Explicit and implicit goals

The FMLA legislation details several explicit equity goals. Other equity goals are implicit in the Act's logic. Legislators designed the Act to minimize gender discrimination and promote equitable employment opportunities for all genders. It acknowledges that because of societal norms, caretaking responsibilities fall disproportionately on women, and so affect their working lives more than those of men. Prior to the passage of the FMLA, much of the effort around family leave policies focused on women. However, in 1984 a federal district court ruling struck down a California maternity leave law as sex discrimination. In response, many stakeholders came together to design a federal law that would withstand legal scrutiny. Thus, the FMLA arose from a push to reduce employment discrimination against women, but is explicitly gender neutral.<sup>20</sup> The gender neutrality of the FMLA equally promotes access to leave for all genders.

A second explicit equity focus in the FMLA legislation involves health-vulnerable employees and families. The Act specifically acknowledges "inadequate" job security for employees with serious health issues.<sup>17</sup> Workers' employment stability is jeopardized if they are at risk of losing their jobs due to their own serious health condition or when they need time off to recover from childbirth or care for a seriously ill family member.<sup>21</sup> By guaranteeing job-protected family or medical leave for eligible employees, the Act is designed to promote more equitable employment security for health-vulnerable workers and their families. The FMLA also enables workers to spend time caring for newborns and bonding with newly adopted children, which can have future health benefits for children.<sup>22</sup> However, while the FMLA's job protection may promote job stability, its unpaid nature puts a financial strain on workers who need to take leave. Therefore, the Act is designed to address employment stability, but is not designed to ensure financial stability for health-vulnerable workers.

Improved employee and child health are not explicit goals of the FMLA. While it can be inferred that the FMLA goals of increased leave taking and work-family balance for families with health needs are aimed at improving health outcomes, the FMLA does not explicitly list health as a goal, nor are health outcomes measured in government-sponsored surveys of FMLA leave usage.

In contrast to the explicit equity focus on gender and employment security for workers who experience health challenges, the FMLA does not acknowledge inequities in access to and use of leave for workers of lower socioeconomic status and racial/ethnic minority groups. Although these groups are less likely to have access to employer provided paid leave policies, the FMLA is silent on the question of improving outcomes for these vulnerable populations.<sup>23-25</sup>

### A snapshot of FMLA provisions

The FMLA entitles eligible employees to take up to 12 weeks of job-protected, unpaid leave for a qualifying reason in any 12-month period. Job protection means that after employees take FMLA leave, they must be allowed to return to the same or an equivalent position with the same pay and benefits.

During leave, employers are required to maintain and contribute to employees' health insurance (if employees are enrolled in employer-provided health plans).

Eligible employees may take FMLA leave for the following qualifying family and medical reasons:<sup>26</sup>

- The birth of a child and to bond with a newborn within one year of birth
- The placement of an adopted child or foster-care child with the employee, and to bond with the newly placed child within one year of placement
- To care for a spouse, child, or parent with a serious health condition
- An employee's own serious health condition that renders him/her unable to perform the essential functions of his/her job
- Military family leave which includes qualifying exigency leave (an urgent need arising from the foreign deployment of the employee's spouse, son, daughter or parent with the Armed Forces) and military caregiver leave (to care for a service member with a serious injury or illness if employee is service member's spouse, son, daughter, parent or next of kin)<sup>27, 28</sup>

In the case of an employee's own serious illness or that of a family member, employees may take leave on an intermittent or reduced schedule basis, meaning that they may take time off in separate shortened blocks of time or in the form of a reduction in their regular work hours (see Appendix C Intermittent Leave Under the FMLA).<sup>17,29</sup>

Leave to care for oneself or a family member can only be used for serious health conditions, not for medical appointments such as check-ups and preventive care, which may be important for long-term health but are not considered serious. Unless inpatient care or health complications develop, medical conditions not covered under the FMLA include cosmetic treatments, the common cold, the flu, earaches, upset stomach and routine dental problems. Mental illness, allergies and substance abuse qualify as serious health conditions if they involve inpatient care or continuous treatment.<sup>30,31</sup>

## CAPACITY

The FMLA has the capacity to promote equity and it has undoubtedly increased access to family leave and had some impact on gender patterns in leave taking. A 2012 Department of Labor survey found that 16% of the FMLA-eligible workforce, or roughly 14 million workers, took leave for a qualifying FMLA reason between mid-2011 and mid-2012.<sup>32; 33</sup> Half of leaves taken were for an employee's own illness and workers with children were more likely to take leave, implying that FMLA leave helps parents meet health needs.<sup>34; 35</sup> In terms of gender equity, eligible women and men both take FMLA leave, though a slightly higher percentage of women take leave and have an unmet need for leave.<sup>34</sup> Between 1995 and 2012 leave taking increased significantly for men.<sup>34</sup>

Evidence suggests that the FMLA has increased the number of U.S. workers eligible for family and medical leave. For example, the percentage of full-time employees working in firms offering maternity and/or paternity leave (paid or unpaid) increased substantially by 20 to 40 percentage points after FMLA's passage.<sup>36</sup> In addition, there is evidence the FMLA improves eligibility for specific subgroups. For example, by covering all public sector agencies, the FMLA has resulted in wide eligibility for black workers, who are overrepresented in the public sector.<sup>37</sup>

However, the FMLA does not improve equity in access to leave for all vulnerable subgroups. Due to eligibility and affordability constraints, certain types of workers are excluded from accessing FMLA leave. According to the Department of Labor's 2012 survey, among FMLA-eligible employees, 6% reported that they needed leave but did not take it in the past 18 months, which almost tripled since 2000.<sup>34</sup> The survey found that FMLA-eligible employees who needed leave but did not take it were more likely to be female, Hispanic, non-white, low-income, not married, and parents, raising concerns about inequitable take up for certain vulnerable subgroups.<sup>34</sup> A recent national survey confirms racial/ethnic disparities in take up of leave and suggests that the lack of paid leave is a primary barrier to leave taking, particularly for Hispanic workers.<sup>38</sup> While the FMLA's job protection and guarantee of the right to take leave benefits many workers, the policy also has capacity constraints that present serious equity challenges.

### Eligibility: Restrictive requirements impact equity

According to the Department of Labor, 59% of all United States employees (which does not include the self-employed), or roughly 90 million employees, were eligible for the FMLA in 2011 according to federal eligibility criteria.<sup>33; 34; 39</sup> diversitydatakids.org estimates that 46% of workers (including the self-employed) are eligible for the FMLA and that ineligible workers are disproportionately Hispanic.

Inequity is embedded into the FMLA's capacity in two key dimensions: via the types of employers required to provide FMLA leave and its employee eligibility criteria.

The FMLA specifies which types of employers are legally obligated to provide FMLA leave:<sup>40</sup>

- All public sector agencies, including local, state or federal government agencies
- All public or private elementary and secondary schools
- Private employers with at least 50 employees in at least 20 workweeks in the current or preceding calendar year

FMLA eligibility is also determined at the employee level. In order to be eligible for FMLA leave, an employee must meet several employee-specific criteria, as follows:<sup>40</sup>

- Works for a FMLA-covered employer
- Works at a worksite where the employer has at least 50 employees within 75 miles

- Has worked for at least 12 months for the employer (does not have to be continuous)
- Has worked for the employer for at least 1,250 hours during the 12 months immediately before FMLA leave begins (this is, on average, 24 hours per week)

Employees who are not eligible for FMLA leave include small-business employees, new employees who have not yet worked for their employer for 12 months and seasonal employees. Employees employed in multiple part-time jobs may be ineligible for FMLA unless one of those jobs provided them with 1,250 work hours over the last 12 months. These eligibility requirements impact equity because low-income and racial/ethnic minority employees are more likely to be in specific employment situations which put them at risk of being ineligible for the FMLA such as contingent workers or workers who are involuntary part-time (want to work more hours but cannot find full-time work).<sup>41; 42</sup>

Another FMLA eligibility requirement that limits access to leave is that employees can only take leave to care for a qualifying family member, defined as a child, parent or spouse (including same-sex spouse).<sup>43</sup> The FMLA does not allow employees to take leave to care for other family members such as grandparents, grandchildren, in-laws or domestic partners. Survey data show that almost 10% of employees had an unmet need for leave due to an ineligible family member health.<sup>34</sup>

The qualifying family member requirement has implications for equity. Increasingly, family and caregiving responsibilities are expanding beyond the traditional nuclear family to include grandparents and unmarried domestic partners.<sup>44-47</sup> Employees who are racial/ethnic minorities or foreign-born are more likely to live in households containing members (grandparents, grandchildren or extended family members) whom they cannot care for under the FMLA.<sup>48</sup>

Although the original draft of the FMLA legislation had broader and more inclusive eligibility criteria, legislative compromises limited the scope of eligibility in order to ensure the bill's political viability. Raising the private employer eligibility threshold to a minimum of 50 employees and narrowing qualifying family members to spouses, children and parents were two such compromises.<sup>20</sup> While this may have contributed to the FMLA's successful passage into law, these concessions also denied potential benefits to many workers—including low-income and racial/ethnic minority workers—and created significant inequities in who benefits from family and medical leave.

#### Limited eligibility for Hispanic working adults and parents

About 46% of working adults are eligible for the FMLA. Behind these overall numbers, diversitydatakids.org calculations find that not all racial/ethnic groups have equal eligibility rates.<sup>49</sup> Disaggregating working adults by race/ethnicity reveals that Hispanic working adults have the lowest levels of eligibility among all race groups, with just 41% eligible for FMLA leave.

FMLA eligibility is also limited for working parents, 50% of whom do not meet the eligibility criteria. Moreover, there are racial/ethnic inequities in FMLA eligibility of working parents. For example, 43% of Hispanic working parents are eligible for the FMLA, compared to 51% of white working parents and 55% of black working parents. This inequity may have a disproportionate impact on child health in the U.S. given that Hispanics represent nearly 25% of the U.S. child population and are the only group in which the majority of households are families with children.<sup>50</sup> These statistics reveal important equity constraints in FMLA eligibility criteria that not only limit eligibility for all U.S. working parents, but also distribute eligibility inequitably by race/ethnicity, particularly for Hispanic parents.

### Eligibility: Public sector coverage improves equity

The fact that public sector and school-based employees are eligible for the FMLA likely increases equity for women and black employees because teachers are overwhelmingly female and public sector workers are disproportionately black.<sup>37; 51</sup> For example, black working adults have relatively high eligibility rates (53%) compared to white working adults (46%), reflecting the fact that a disproportionate share of black workers are employed in the public sector. All public agencies are covered by the FMLA regardless of size, unlike in the private sector.<sup>37; 52</sup> The increased eligibility for unpaid leave among black parents is noteworthy, as on average this population faces lower wages and job quality<sup>2</sup> and are at increased risk for certain health conditions covered by the FMLA, such as chronic asthma and premature birth.<sup>53-56</sup>

### Affordability: Unpaid leave limits access

Affordability is a significant FMLA equity challenge. Even among eligible employees, the fact that the FMLA is unpaid renders leave unaffordable for many families. A nationally representative survey found that 30% of adults with household income under \$30,000 were unable to take the leave they needed or wanted compared to 17% of adults with household income between \$30,000 and \$74,999 and 12% of those with household income greater than \$75,000.<sup>38</sup> The survey also found that 69% of leave takers who took less time off than they needed or wanted cited wage loss as the main reason.<sup>38</sup> Finally, the survey found that leave takers with lower incomes, less education, and who were Hispanic were less likely to receive any pay while on leave. Since black and Hispanic families have less wealth, fewer assets and less resourced social networks, without paid leave, these workers are less likely to be able to afford to take leave when faced with a health crisis.<sup>23; 57-63</sup>

### Affordability limitations for diverse working adults and parents

The unpaid nature of FMLA leave may deter many workers, especially lower-income workers, from taking needed leave. Among working adults, 46% are eligible for leave, but only 39% of working adults are eligible and could afford unpaid leave. There are racial/ethnic differences in the percent of workers who are both eligible and could afford unpaid leave: 29% of Hispanic and 39% of black workers are eligible for and could afford leave, compared to 41% of white workers.

Among working parents, an estimated 50% are eligible for FMLA leave, yet only 40% of working parents are eligible and can potentially afford to take this unpaid leave. This means that 60% of FMLA-eligible working parents may face substantial financial hardship when taking unpaid leave, or may choose not to take leave at all due to affordability constraints. Black and Hispanic working parents are estimated to be the least likely to be both eligible for and potentially able to afford FMLA leave, compared to white and Asian working parents. Therefore, Hispanic and black working parents are the least able to afford unpaid leave to attend to their own or their children's health needs.

Figure A. Share of working adults who are eligible for FMLA leave and those who are eligible and can also afford it, by race/ethnicity

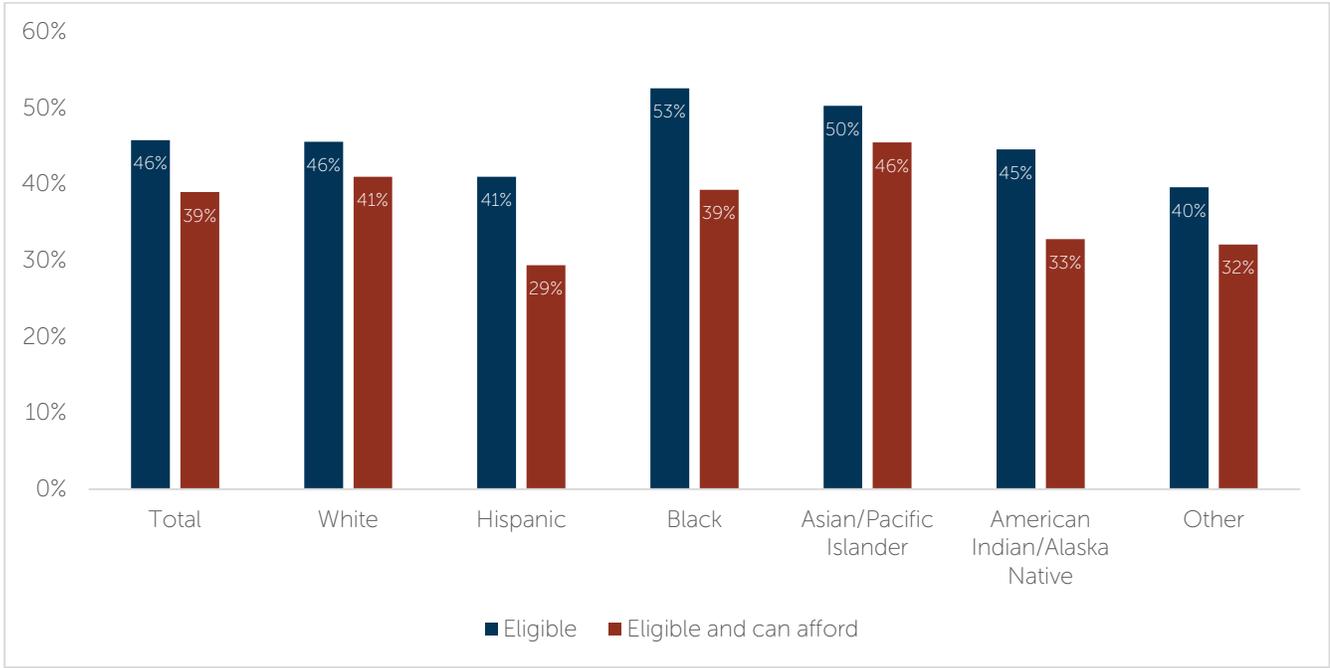
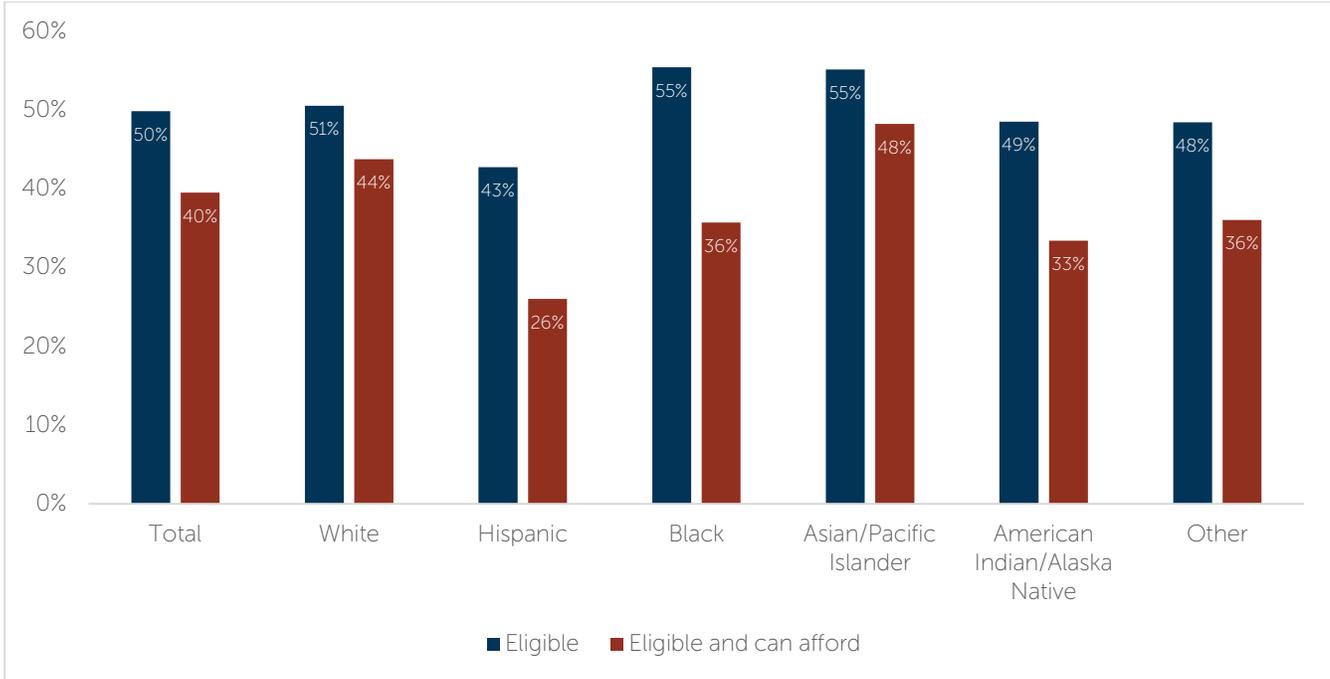


Figure B. Share of working parents who are eligible for FMLA leave and those who are eligible and can also afford it, by race/ethnicity



### Increasing equity in the FMLA: Federal action and states leading the way

Over time, policy changes have occurred at the federal and state levels to address inequities in access to FMLA leave. At the federal level, expansions in access include widening the definition of family and expanding eligibility for employees who need to care for veterans. Research shows that further eligibility expansions can significantly increase FMLA coverage. One study estimates that an additional 8.3 million private sector employees nationwide would gain eligibility, increasing private sector eligibility from 55.9% to 63.4%, if the FMLA were expanded to cover worksites with at least 30 employees within 75 miles (instead of the current 50 employees) and to allow eligibility for employees who have worked at least 750 hours in the past 12 months (instead of the current 1,250).<sup>64</sup>

Recognizing the limitations of the FMLA, several states have expanded unpaid family and medical leave and parental leave laws that address multiple root causes of inequities in access through specific policies. Doing so remediates some of the capacity issues related to the FMLA. For example, in Hawaii, qualifying family members include in-laws, grandparents and stepparents, in order to address the state's unique multigenerational care needs.<sup>65</sup> In Maine, a state with predominately rural geography and a small population, private employers with 15 or more employees are covered (compared to 50 employees required by the FMLA).<sup>66</sup> In the State of Washington, workers are eligible for FMLA if they have been employed for at least 680 hours in the qualifying year (compared to 1,250 hours required by the FMLA).<sup>66</sup>

States have also taken the lead in addressing the economic burden that unpaid leave can place on families and workers (see Appendix D State Variation in Family and Medical Leave Policies). Eight states (California, New Jersey, Rhode Island, New York, Washington, Massachusetts, Connecticut, and Oregon) and Washington, D.C. have enacted paid family leave programs that cover most private sector employers.<sup>66, 67</sup> These state paid leave programs address multiple root causes of unmet need by expanding eligibility and affordability.<sup>68</sup> States specifically address affordability by offering higher wage replacement rates and targeted wage replacement to lower earners. Accruing evidence from California's and New Jersey's paid leave programs demonstrate the promising influence of paid leave on workers' ability to take needed time off to care for themselves or their families.<sup>69</sup> Not only does paid leave reduce inequities in leave taking, but initial descriptive and quasi-experimental evidence suggests positive economic and health outcomes for families and their children.<sup>69-73</sup> Nevertheless, many low-income and minority working families in the vast majority of states still lack affordable family and medical leave options, and states continue to try to create paid leave policies that are accessible for low-income and vulnerable workers.<sup>74; 75</sup>

### FMLA implementation and enforcement: Equity challenges

The FMLA is a labor standard, rather than a program, and is overseen by the Wage and Hour Division of the U.S. Department of Labor. The FMLA's implementation, conducted by employers and workers, and enforcement, which is in the process of transforming from reactive to proactive, may lead to additional inequities.

#### Implementation: How does the FMLA work in practice?

The federal government provides little support for employers and employees who together must implement the policy. Access to the FMLA is affected by whether employees have knowledge of the law and are able to successfully apply for leave. Data on the FMLA and state paid leave policies indicate that racial/ethnic minority and low-income workers are less likely than other workers to know about the policy and are likely to find the process burdensome.<sup>74-78</sup>

In practice, FMLA implementation is carried out by employers' human resources departments, leave administrators or other management officials, with federal involvement restricted to establishing the administrative process (e.g., creating standardized forms) and dealing with compliance issues.<sup>79</sup> Employers and employees must communicate about the details of leave, such as whether the employee will be required to use accrued paid leave concurrently with unpaid FMLA leave and what documentation the employer requires.<sup>79; 80</sup> Covered employers are required to post notices of FMLA rights and responsibilities at their worksites, including information about how employees can file a complaint with the Wage and Hour Division.<sup>79; 81</sup>

We know very little about how employers implement FMLA, but given the limited resources they receive from the federal government, it is likely that employers use a variety of administrative practices. The FMLA does not include funding to support education for employees or employers and the primary dissemination requirement is the display of a poster with FMLA information. More robust outreach activities, such as targeted dissemination when an employee experiences a qualifying health condition, is up to the employer. Data from the Department of Labor employer survey conducted in 2012 show that FMLA covered employers were less likely to use active outreach such as direct memos and e-mail and more likely to use more passive strategies such as publishing rules in the employee handbook or posting bulletin board notices. Only 2% did not inform workers of their rights entirely.<sup>34</sup>

Employee knowledge of the FMLA and state paid leave laws varies, with gaps in awareness highest among more vulnerable workers. Employees were more aware of the FMLA compared to state programs. The Department of Labor employee survey indicated that in 2011, two thirds of all employees and 71% of employees at FMLA covered worksites had heard of the FMLA. This leaves almost 30% of employees at covered worksites who may be eligible for FMLA unaware of their right to take job-protected leave. A 2011 poll in California found that roughly 43% of workers had knowledge of the state's paid FML program and that knowledge varied by race/ethnicity: 48% of Asians were aware of the program, compared to 45% of whites, 39% of blacks and 36% of Latinos.<sup>76</sup> A 2015 poll in California found that awareness was lower among employees who were low-wage, low-income, without employer-provided sick leave or vacation, and Latinos.<sup>77</sup> Given the gaps in awareness for these more vulnerable subgroups in California, more focused and robust dissemination of the FMLA and paid FML programs are warranted to ensure the law is effective in achieving the goal of increasing leave taking when it is needed.

The bureaucratic and administrative processes of requesting FMLA leave are burdensome for all workers and are likely to present a more significant barrier to access to workers who are not native speakers of English, have low levels of education, or whose employment status is precarious, making them reluctant to make demands on an employer for fear of losing their job. Recent qualitative research focused on paid FML programs in New Jersey, Rhode Island and California confirm that low-income mothers experienced challenges in navigating the state administrative system, working with employers to better understand the program and submitting paperwork.<sup>74-76; 78</sup>

#### FMLA compliance: A work in progress

A 2012 Department of Labor (DOL) survey indicates that both employers and employees self-report compliance with key aspects of the FMLA:<sup>34</sup>

- Only 2.5% of FMLA-covered worksites reported suspicion of FMLA misuse by eligible employees, and only 1.6% reported confirmed misuse.
- Less than 1% of FMLA-eligible employees reported being assigned to a worse position upon returning to work after leave.

However, there is also evidence that some employers do not fully comply with FMLA rules. The DOL survey found that among FMLA-covered worksites:<sup>34</sup>

- Eighty percent of employers (representing 73% of employees) report that they cover work during leaves of one week or longer by asking the employee on leave to perform some work during designated leave time. Although it is unknown whether employees on leave volunteer to work, the FMLA does not allow employers to interfere with employees while on leave, and so further examination of this finding is merited.<sup>33</sup>
- Ninety-nine percent of employers (representing 99% of employees) allow leave for one or more of the qualifying reasons under the FMLA. However, only 80% allow leave for all the FMLA-qualifying reasons (representing 68% of employees).
- Ninety-two percent of employers (representing 89% of employees) report that they allow leave for FMLA-qualifying reasons related to the deployment of a military service member. Thus, 8% of FMLA-covered worksites may not be in compliance with FMLA requirements regarding military leave.

The full picture of FMLA compliance is unclear. The DOL survey, which is the largest study of the implementation of the FMLA, provides some insight into potential noncompliance, but does not provide extensive detail into how noncompliance may vary across different types of employers. Additional information on employees and employers is necessary to understanding the equity implications.

#### FMLA enforcement: Shifting to a strategic approach to increase effectiveness and equity

The FMLA expressly forbids employers from impeding or denying an eligible employee's right to take FMLA leave, retaliating against employees who took or attempted to take FMLA leave or discharging or discriminating against employees who have complained about unlawful actions under the FMLA.<sup>82</sup>

The Department of Labor Wage and Hour Division's (WHD) investigations of employer FMLA violations can be initiated due to employee complaints or to directed investigations, in which the WHD elects to initiate investigations against certain types of business and industries.<sup>83</sup> The first enforcement approach is reactive and represents a high burden on workers, who must be aware of their rights, detect a violation of these rights and take the initiative to file a complaint with the WHD or take legal action. The second approach is proactive and shifts the onus to employers who have to respond to investigations.

Limited funding and staffing leads to significant WHD capacity constraints and a historical focus on investigating individual worker complaints.<sup>84</sup> This worker-based enforcement approach can disadvantage workers with less human capital, time, or resources, and particularly disadvantages workers who do not know about the FMLA. In contrast, the targeted industry-based enforcement approach can enhance equity by increasing long-term FMLA compliance in targeted low-wage industries, such as the textile or home health care sectors, that employ a disproportionate share of women and Asian, black and Hispanic workers.<sup>85; 86</sup> Research shows that an enforcement strategy that focuses on the highest number of complaints is not necessarily the most effective since it can miss the employers with the highest probability of violations.<sup>87</sup>

More recently, the WHD shifted to a proactive approach by hiring more investigators (increased from 700 to 1,000 from 2014 to 2017 with an emphasis on hiring more multilingual investigators) and pursuing strategic enforcement, including a data-driven strategy to investigate employers in low-wage industries with the highest probability of violations.<sup>84</sup> Reflecting this strategic enforcement approach, the proportion of proactive WHD-initiated investigations increased from 25% in 2007 to 50% in 2017.<sup>84</sup>

Another way the agency engages in strategic enforcement is to pursue legal settlements geared toward changing large employers' FMLA practices. For example, the WHD filed a lawsuit on behalf of an employee of Staples, a national corporation with stores across the U.S. The employee was not informed of his rights under the FMLA and fired for missing work intermittently to care for his wife with breast cancer (a health condition covered under the FMLA). The DOL and Staples settled the case and the individual employee was awarded back pay and damages. The agreement also required that Staples better implement the FMLA by training all human resources and managerial personnel on eligibility and notice requirements. Strategic enforcement can help to shift employer practices so that there are fewer violations in the first place.<sup>88</sup>

Since 2015, the WHD has been appropriated level funding. In fiscal year 2020, the agency requested a budget increase of approximately \$3.5 million to modernize compliance assistance through employer outreach tools and to upgrade outdated IT systems.<sup>89</sup> Recently the WHD changed leadership, so it remains to be seen if enforcement strategies, particularly strategic data-driven strategies to investigate targeted low-wage industries, will shift. The current funding request could indicate that a focus on strategic enforcement will continue.

## RESEARCH EVIDENCE

Synthesizing the research evidence on FMLA's effectiveness involves analyzing the available evidence on the policy's achievement of its explicit and implicit goals and assessing its equity impact.

The key equity-related questions for the FMLA are:

- Does the FMLA help to close any identified socioeconomic or racial/ethnic gaps in taking of parental and medical leave?
- Does the FMLA help to close any identified socioeconomic or racial/ethnic gaps in economic or health outcomes associated with leave taking?

### Research evidence on the FMLA's effectiveness

A review of FMLA research evidence highlights the lack of attention to racial/ethnic equity goals and an absence of program components designed to achieve equity goals. This omission, to some degree, helps explain the absence of strong evidence on racial/ethnic subgroup impacts. This gap results in a dearth of information about how FMLA impacts the leave taking, employment and health outcomes of racial/ethnic minorities. As a result, any disparities in FMLA impacts that might exist by race/ethnicity are not part of the public discussion, and policymakers may not be aware of possible inequities. There is some research that analyzes the FMLA in terms of other subgroups including gender, marital status, firm size, education level and income.

Rigorous quasi-experimental studies on family and medical leave (FML) in recent years have focused on state paid FML programs.<sup>90</sup> California established the first paid FML program in 2002, followed by New Jersey in 2008. Although five other states passed paid FML legislation since 2008, these newer programs have not yet been evaluated using rigorous quasi-experimental studies. Thus, in this section we review studies of the impacts of California and New Jersey state paid FML programs on labor market outcomes, maternal and child health outcomes and nursing home usage. All quantitative studies reviewed use a quasi-experimental difference-in-difference approach.

The research summarized here is based on a full assessment of the published quasi-experimental U.S. studies. See Appendix E – I which provide detailed information about 10 selected studies of the FMLA and state paid leave policies, which were chosen to highlight rigorous studies of key FMLA and state paid leave policy outcomes.<sup>91; 92-94</sup> We review evidence related to the FMLA's primary goals, leave taking and employment outcomes, as well as maternal and child health outcomes, due to the FMLA's focus on taking temporary leave from work to address family health. We also include a survey of employees' and employers' experiences with the FMLA to help interpret the evidence of the policy's effectiveness.

### Impact of FMLA

The FMLA is associated with overall positive effects on parental leave taking.<sup>95</sup> Research evidence from rigorous studies shows that the FMLA is associated with increased leave taking among all genders – one of the policy's primary goals— as well as improved infant health outcomes.<sup>22; 36; 96</sup> All studies of the FMLA focus on parents or infants.

Key FMLA findings include:

- Leave taking: Living in a state with parental leave laws (including the FMLA as well as state laws) is associated with increased leave taking among working mothers. These findings also apply to working fathers, although to a lesser extent.<sup>96</sup> Examination of the FMLA alone finds that it is associated with increased leave taking for working mothers, especially mothers with infants,

- employed in large and medium-sized firms.<sup>36</sup>
- Employment and wages: The FMLA is not associated with any changes in employment outcomes for either mothers or fathers.<sup>96</sup> Studies do not find any consistent impacts on wages.
- Infant health: The FMLA is modestly associated with increased birth weight, reduced likelihood of premature birth and reduced infant mortality rates.<sup>22</sup>

### Impact of state paid leave

In contrast to the FMLA, research on paid FML has found positive economic impacts for parents.<sup>97</sup> Studies found that California's paid FML policy had positive impacts on leave taking for employed mothers<sup>22</sup> and employed fathers.<sup>98</sup> Several studies, using different national datasets, found a positive effect of paid FML on mothers' labor force participation (which includes employment and unemployment) around the time they give birth, mothers' return to work after childbirth and younger women's labor force participation overall.<sup>70; 92; 99</sup> In the longer term, for mothers with children who are one, two, or three years old, California paid FML was associated with an increase in employment and work hours.<sup>69</sup> On the other hand, one study found that paid FML was associated with a small increase in unemployment among young women relative to men and older women, indicating that paid FML may have an unintended negative impact due to potential hiring discrimination against women by employers who perceive that they will need leave in the future.<sup>99; 100</sup>

Several studies found that California's paid FML program positively impacted health by increasing breastfeeding rates, improving infants and young children's health outcomes and decreasing nursing home utilization.<sup>72; 73; 101</sup>

Key state paid family and medical leave findings include:

- Leave taking, work hours, wages and employment: California's paid FML program is associated with increased maternity leave taking, labor force participation, retention, employment rates in the longer-term and work hours for employed mothers. It is not significantly associated with any changes in mothers' wages or short-term employment rates.<sup>69; 92</sup>
- Unemployment: The state level unemployment rate for young women was slightly higher after the implementation of California's paid FML program relative to young men and older women.<sup>99</sup>
- Child health: Children in elementary school born after the implementation of California paid FML had a lower rate of being overweight, having frequent ear infections, and being diagnosed with ADHD, hearing and communication problems.<sup>101</sup>
- Infant health: California paid FML decreased pre-term and low birth weight and reduced infant hospital admissions (upper respiratory and gastrointestinal).<sup>93; 102</sup>
- Breastfeeding: Paid FML implementation in California and New Jersey increased the share of children breastfed exclusively at six months.<sup>73</sup>
- Nursing home admissions: The implementation of California paid FML is associated with decreased nursing home utilization.<sup>72</sup>

### Variation in the impact of FMLA

Estimating average impacts across a study population is one method to assess policy effectiveness, but relying on this analysis alone may miss important nuances for vulnerable groups.<sup>103</sup> Policies serving diverse populations, such as the FMLA and paid family and medical leave programs may affect diverse types of participants in different ways. For this reason, it is useful to examine data by subgroups to uncover additional positive impacts or unintended negative impacts that may not be captured in the overall 'average' effect.

In general, average effects show that the FMLA is associated with increased leave taking and improved child and infant health outcomes. However, unpaid FMLA benefits do not accrue equally to all. The positive effects on leave taking and child health are mostly confined to working parents who are socioeconomically advantaged.<sup>22; 36; 96</sup> Married and college-educated mothers and college-educated fathers, who are more likely to be of higher socioeconomic status, benefit most. Therefore, the FMLA may actually contribute to widening inequities in leave taking for lower-socioeconomic status families, which has implications for health equity.

Key FMLA subgroup findings include:

- Leave taking: The association between living in a state with parental leave laws (including the FMLA as well as state laws) and increased parental leave taking was only statistically significant for college-educated mothers and fathers. In addition, living in a state with parental leave laws was significantly associated with increased leave taking among married mothers, but not single mothers.<sup>96</sup>
- Child health: The FMLA's associations with positive childbirth outcomes were larger for college-educated and married mothers than for less-educated and unmarried mothers. In addition, the FMLA is not associated with any reduction in infant mortality rates for less-educated and unmarried mothers; this association is only significant for college-educated and married mothers.<sup>22</sup>

One important limitation across all rigorous studies of the FMLA is the lack of subgroup analyses by race/ethnicity. In part, this omission may reflect the fact that the FMLA legislation does not discuss or target racial/ethnic minorities, thus racial/ethnic subgroup impacts have not been a focus of the research literature. However, this gap results in a dearth of information about the impacts of leave taking, employment and health outcomes for racial/ethnic minorities. Although socioeconomic status is correlated with race/ethnicity, no rigorous analytic studies of FMLA impacts have conducted subgroup analyses specifically by race/ethnicity, partially due to data limitations (e.g., small sample sizes).

#### Variation in the impact of state paid leave

There are studies of state paid FML programs that examined outcomes by race/ethnicity and provide insights into how these programs may exacerbate or alleviate racial/ethnic economic and health disparities.<sup>104</sup> Evidence suggests paid family leave may improve equity in leave taking for vulnerable families. In contrast to the FMLA research, evidence from California paid FML programs highlighted a reduction in leave taking disparities for vulnerable mothers (including unmarried mothers, mothers with less than bachelor's degrees and black and Hispanic mothers) though black and Hispanic mothers take less leave compared to white mothers.

The positive health impacts of paid FML varied by socioeconomic status, race/ethnicity and language. One study found that after implementation of California's paid FML, school-age children with low socioeconomic status and those with mothers having less than a high school diploma drove decreases in risk of obesity and diagnosis of ADHD. On the other hand, school-age children for whom English was their second language had mixed benefits from paid FML on health outcomes compared to children for whom English was their first language. One study of the California paid FML program's impact on breastfeeding found several outcomes consistently improved among married, white, high-income and older mothers.

Key paid family and medical leave subgroup findings include:

- Leave taking, work hours, wages and employment: California's paid FML program is associated with

large reductions in racial/ethnic disparities in maternity leave taking, though the black-white gap remains. Specifically, maternity leave taking time increased from 1-2 weeks to 6 weeks on average for black mothers and 5 weeks on average for Hispanic mothers. For non-Hispanic white mothers, their average time of leave increased from 3-5 weeks to 6-7 weeks.<sup>69</sup> A study found that the effect of California's paid FML policy was greater for fathers of first-borns than for fathers of higher order children, and that there is no difference for mothers.<sup>98</sup>

- Child health: After California paid FML's implementation, children with low socioeconomic status and those with mothers having less than a high school diploma drove decreases in risk of obesity and diagnosis of ADHD. However, there were mixed effects for children depending on whether English was their first language. Diagnosis-dependent conditions (such as ADHD and ear infections) decreased the most among children for whom English was their first language and health outcomes not related to a diagnosis such as obesity and overall health ratings improved more for children for whom English is not their first language.<sup>101</sup>
- Breastfeeding: There were mixed results in the effect of paid FML implementation in New Jersey and California. Relative to white mothers, black mothers had reduced breastfeeding at 12 months. Hispanic mothers had improved breastfeeding at six months. Compared to low-income mothers, middle- and high-income mothers increased instances of ever breastfeeding, exclusive breastfeeding at three months and breastfeeding duration.<sup>73</sup>

While the subgroup findings for the FMLA are disheartening, there is evidence that providing paid leave increases equity in leave taking for lower socioeconomic status and racial/ethnic minority families. However, there are limitations in paid FML reducing racial/ethnic and income-based health disparities.

### Interpreting FMLA research evidence

The results of FMLA research should be considered within the context of the history of family leave in the U.S. Traditionally, much of the effort around family leave policies has focused on women, who are more likely to take time off from work for caregiving. The FMLA reflects this emphasis, with explicit goals focused on eliminating gender employment discrimination and promoting equal employment opportunities across genders. Additional explicit goals include promoting economic security, preserving family integrity, and promoting work-family balance. However, due to limited data, research has not established that unpaid leave from work under the FMLA achieves these goals. Defining and measuring "work-family balance" and "family integrity" is challenging, and in general these outcomes, alongside gender discrimination, have not been extensively studied in relation to the FMLA. Other outcomes, such as economic security, have been measured by examining the impacts of the FMLA on women's wages and employment stability, as demonstrated by several of the rigorous quasi-experimental studies included in this section.<sup>36, 96</sup> Nevertheless, while the growing research base demonstrates positive employment and health impacts, data and measurement challenges mean that there are several unanswered questions about the FMLA's effectiveness in meeting its goals to improve work and family outcomes.

A second noteworthy finding is that while the FMLA legislation includes gender equality and addresses discrimination in its findings and goals section, it does not address socioeconomic or racial/ethnic equality. The Act does not acknowledge the financial barriers to unpaid leave faced by many single working parents or lower-income and lower-educated workers, a disproportionate number of whom are nonwhite. Omitting equity considerations for vulnerable workers in the FMLA's logic is mirrored by limitations in its capacity. As noted in the capacity section, FMLA eligibility requirements exclude many workers and the unpaid nature of FMLA leave makes it unaffordable for many low-income workers, especially black and Hispanic working parents. These capacity constraints can translate into inequitable

outcomes, as demonstrated by research evidence showing that positive FMLA impacts on leave taking and child health outcomes are highly concentrated among women of higher socioeconomic status.

Research focused on the FMLA and race/ethnic equity is lacking. The FMLA implementation survey does report some results by race/ethnicity, but only compares Hispanics to non-Hispanics and non-white employees to white employees (likely due to small sample sizes). The dearth of studies of FMLA impacts on racial/ethnic equity is an important finding in itself since it impedes understanding how the FMLA may affect racial/ethnic minorities differently. Considering that Hispanic and black working parents are less likely to be able to afford FMLA unpaid leave, analyses of leave taking and health outcomes by race/ethnicity are warranted. Lack of research means that there is little information about any differential impacts of leave taking, employment, and health outcomes for racial/ethnic minorities. As a result, disparities in FMLA impacts that might exist by race/ethnicity are not consistently part of the public discussion and policymakers may not be aware of possible inequities. In contrast to studies of the FMLA, some studies of paid FML programs do examine impacts by race/ethnicity, income, language and education level.<sup>69, 73</sup>

### Limitations of FMLA data and research evidence

The research evidence base has some limitations, beyond the lack of research on racial/ethnic disparities.

First, no study estimates the causal impact of FML on selected outcomes due to data limitations and the lack of studies with experimental research designs. No randomized controlled trial of the FMLA has been conducted because the law was implemented all at once at the national level, leaving no straightforward way to conduct random assignment of workers. Paid FML studies face similar issues: the implementation of state paid FML policies is not randomly assigned.<sup>105</sup> Similar to the FMLA, paid FML has only been studied quasi-experimentally, rather than experimentally.

Additionally, due to the lack of state-level data that links program participation and labor market and health outcomes, most FMLA and paid FML studies rely on data from nationally representative household surveys that were not originally designed to assess the impacts of these policies. Thus, researchers do not have the exact variables needed to estimate FMLA and paid FML eligibility, need for leave or usage. For example, the Current Population Survey (CPS) has a question about maternity leave last week, but does not include information on leave duration nor what entity provided the leave (e.g., state, employer). The CPS also does not include all the criteria to determine whether a worker is eligible for either FMLA leave or state paid leave. Researchers employ advanced statistical techniques to improve estimates and reduce selection bias. Also, to address data limitations, several studies restrict their sample to full-time working mothers (e.g., Waldfogel 1999) or employed mothers (e.g., Rossin-Slater et. al. 2013) who are likely eligible for leave and may need leave.

Specific data issues related to studies of FMLA and paid FML impacts include:

- Most employment-focused datasets (such as the CPS) do not have extensive adult and child health outcomes and vice versa for health-focused datasets.<sup>22; 36; 96</sup>
- For all relevant studies, the available data allow only an approximation of likely/potential FMLA or paid FML eligibility, not actual eligibility or actual usage.<sup>22; 36; 96</sup>
- For all relevant studies, the data did not contain an explicit measure of maternity or paternity leave. Instead, the authors used proxy categories such as all parents or parents that are “employed but absent from work.”<sup>22; 96</sup>

- Data sources do not generally measure medical leave and studies have not focused on adult health outcomes.

Finally, there have been several studies that address FMLA and paid FML implementation issues,<sup>34; 106</sup> but there are limited data available for researchers to study FMLA compliance, impact on employers and specific implementation questions, such as those related to employer awareness and practices. The FMLA survey is currently ongoing, with the newest survey adding a focus on unmet FMLA needs and an examination of employers' leave policies and their perceptions of FMLA.<sup>107</sup> New research is being conducted on paid FML awareness, specifically what types of awareness activities are most effective at increasing policy awareness among those who may need the policy most.<sup>76</sup> Additional study is needed to better understand paid FML implementation.<sup>108</sup>

In detailing the limitations, our hope is that researchers and policy analysts will use existing data to fill in gaps or commission new work on issues of FML access, adult and child outcomes and disparities in outcomes for vulnerable workers, especially for racial/ethnic minorities and working parents. Below are a select set of family and medical leave equity-related questions that have not yet been evaluated:

- How do FMLA impacts on leave taking, employment and child health outcomes vary by race/ethnicity?
- How does the FMLA influence work-family balance?
- What is the impact of the FMLA on maternal or employee health outcomes, especially for vulnerable subgroups?
- What is the impact of the FMLA on gender discrimination?
- Is job protection or wage replacement more important for increasing leave taking and improving family economic and health outcomes, especially for vulnerable subgroups? Based on current studies to date, it is not possible to disaggregate the effects of these two factors.

## CONCLUSION AND RECOMMENDATIONS

The FMLA is landmark legislation enacted in 1993 and remains one of few federal laws recognizing that workers occasionally need temporary leave from working to address serious health needs. This law asserts that all workers (especially working women) should not suffer discrimination for taking leave. However, the fact that the FMLA guarantees unpaid leave, has strict employer and employee eligibility criteria and is difficult to enforce means that many vulnerable workers are unable to access its benefits. These gaps mean that workers who would most likely benefit from job-protected leave—health vulnerable, single parents and workers with low education levels and English proficiency—have the least access to it. These workers are also disproportionately low-income, black, and Hispanic. Taken together, these limitations mean that the FMLA, which was originally designed to increase equity in the workplace, has failed to increase equity for several historically disadvantaged groups.

Since 1993, recognizing the need for more policies to facilitate combining work and family and improving health, state policymakers and employers filled the family and medical leave gap with more affordable options available to more workers. With public support growing for a national approach, there are several general recommendations from the field that can address equity concerns (to varying degrees):

- Establish a social insurance system that makes family and medical leave paid<sup>100</sup>
- Expand employer and employee eligibility criteria<sup>64</sup>
- Ensure access for the least advantaged workers<sup>100</sup>
- Increase public education efforts around the FMLA and state paid family and medical leave implementation to ensure that all workers understand their rights under the Act<sup>76, 109</sup>
- Consider increasing proactive and strategic FMLA enforcement<sup>110</sup>

This equity analysis also implies the following recommendations:

- Given the health equity goals of HealthyPeople 2020, add health as an explicit goal of the FMLA
- Measure adult and child health outcomes in government-sponsored surveys of FMLA leave usage and other economic surveys
- Include more detailed employment and FML questions in health surveys (e.g., the Centers for Disease Control's *Pregnancy Risk Assessment Monitoring System*)
- Fund studies of family and medical leave approaches that use experimental designs (for example, that take advantage of differences in employer sponsored-programs)
- Conduct research with large enough sample sizes of racially/ethnically diverse workers to increase the precision of estimates and require reporting of results by race/ethnicity (similar to the reporting of educational achievement gaps)

Based on these findings, new research on FMLA impacts should have an increased focus on race/ethnicity. Future implementation survey studies should also capture linkages between employers and employees, so as to better understand how the experiences of each influence one another. Most important for equity, full or partial wage replacement should be incorporated into family and medical leave policy, given that California's paid leave program has demonstrated evidence of closing inequities in leave taking for lower-socioeconomic status and nonwhite mothers. Paid leave and expanded coverage are essential to making time off from work to care for children and ill family members both accessible and affordable for all workers, including the most vulnerable.

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