Family and Medical Leave: Examining Recovery and Bonding Time to Promote Healthy Families Who Utilize Surrogacy
I. Introduction

The Family and Medical Leave Act (FMLA) of 1993 was enacted to balance the demands of employment with the personal, economic, and medical needs of families. Thus, Congress provided twelve weeks of unpaid leave within any twelve-month period upon the birth or placement of a child to eligible employees “in order to care for” such child without the threat of losing an employment opportunity. A child—a “son or daughter”—is defined as “a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis” under the age of eighteen or dependent on the employee due to a disability. Congress recognized the importance of the parent-child relationship and thus stressed the need for bonding during the early stages of a child’s life.

---

1 See The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2012) (listing findings and purposes of FMLA). Congress found that children benefit substantially from the presence of both mothers and fathers during early development. See § 2601(a)(2). Thus, Congress attempted to “balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity” by providing federal statutory guidelines for family leave policies. See § 2601(b). The FMLA seeks to prevent men and women from being forced “to choose between job security and parenting.” See § 2601(a)(3); see also Jeffrey D. Enquist, Note, Thinking Inside-the-Box, Krill v. Cubist Pharmaceuticals: Does FMLA Need to be Amended to Address Gestational Surrogacy and How Should Companies Address Paid “Maternity” Leave?, 14 J. L. & FAM. STUD. 137, 142-44 (2012) (summarizing FMLA’s applicability to parents).

2 See § 2612(a)(1)(A)-(D) (explaining entitlement to family or medical leave); § 2611(2)(A) (defining “eligible employee” as one working 1250 hours for same employer in previous twelve months); § 2611(4)(A)(i) (defining eligible “employer” as one who employs fifty or more employees on every work day for twenty or more weeks of the current or previous year); § 2614(a)(1) (requiring restoration to position held when leave commenced). The birth or placement of a child is often a “foreseeable” reason for leave and the employee seeking leave must thus provide not less than thirty days notice to the employer of the employee’s intention to take leave. See § 2612(e)(1) (explaining requirement of notice).

3 § 2611(12) (providing definition of child entitling parent-employee to family and medical leave). One standing in loco parentis is someone “of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.” In Loco Parentis, BLACK’S LAW DICTIONARY (9th ed. 2009). In loco parentis may be interpreted broadly, either as “the assumption of parental status and discharging the parental duties” or “the intention of the person . . . to assume the status of a parent toward the child.” See Enquist, supra note 1, at 146; Nancy J. Leppink, DEP’T OF LABOR, WAGE AND HOUR DIV., Administrator’s Interpretation No. 2010-3 (2010), http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm[http://perma.cc/X4W6-7552] (providing interpretation from Wage and Hour Division of U.S. Department of Labor).

4 See Enquist, supra note 1, at 144-45 (illustrating Congress’s consideration of parent child bond when passing FMLA); see also § 2601(a)(2) (recognizing importance of parental participation in childrearing).
The FMLA provides unpaid leave to an employee who suffers from a “serious health condition” that prevents the employee from fulfilling his or her employment position duties and functions.\(^5\) A “serious health condition” requires inpatient care or continuous medical treatment.\(^6\) Because most births require some level of inpatient care or medical treatment, childbirth is a “serious health condition” entitling a qualified employee to medical leave.\(^7\)

The FMLA, however progressive, helpful, and necessary for today’s families, fails to recognize the specific challenges facing modern families formed with assisted reproductive technology.\(^8\) Though Congress intended to “ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child,” the Senate is silent regarding a birth mother with no child for whom to care.\(^9\) In order to best, and equally, support American families, maternity leave must be extended to include all women recovering from pregnancy and birth.

II. History of Parental Leave

A. Parental Leave in the United States

\(^5\) See § 2612(a)(1)(D) (providing medical leave for employees). As with anticipated parental leave, foreseeable medical leave requires not less than thirty days notice to the employer of the employee’s intention to take such leave. See § 2612(e)(2)(B) (detailing requirement of notice). However, when such medical leave is due to a surrogate’s delivery of a child, compliance with scheduling to reduce undue disruptions to the workplace is challenging. See § 2612(e)(2)(A) (requiring “reasonable effort” to avoid disrupting employer operations).


\(^8\) See Enquist, supra note 1, at 144 (mentioning absence of reference to families constructed without traditional birth or adoption).

\(^9\) S. REP. No. 103-3, at 22 (1993) reprinted in 1993 U.S.C.C.A.N. 3, 24 (explaining United States Senate’s intent to include all parents and children in FMLA coverage); see also Enquist, supra note 1, at 147 (believing FMLA’s broad construction includes all forms of families).
Discrimination on the basis of sex is prohibited in the United States.\(^{10}\) Congress’s enactment of the Pregnancy Discrimination Act (PDA) of 1978 overruled the Supreme Court’s ruling in *General Electric Co. v. Gilbert*,\(^{11}\) emphasizing Congress’s intention to protect women from all forms of discrimination, including prejudice surrounding pregnancy and childbirth.\(^{12}\) The PDA was the first attempt to help women balance work and family life while ensuring equal participation in both professional and personal opportunities.\(^{13}\)

The PDA, however, did not provide maternity leave in order to care for children.\(^{14}\) Leave was granted because a pregnant woman was considered “disabled” and incapable of fulfilling her job requirements.\(^{15}\) With the lack of mandated disability leave, many employees, parents or not, struggled to balance work responsibilities with other life necessities.\(^{16}\) Congress responded to the nation-wide challenge by proposing the Parental and Medical Leave Act of 1987, which suggested providing unpaid leave to parents due to the birth or adoption of a child or a serious health condition of an immediate family member.\(^{17}\) The substantive purpose of the Parental and Medical Leave Act of 1987 was later enacted through the Family and Medical Leave Act of 1993.\(^{18}\)

---


\(^{11}\) *See* 429 U.S. 125, 136 (1976) (ruling discrimination based on pregnancy was not sex-based discrimination).


\(^{15}\) *See id.* (equating maternity—or pregnancy disability—leave with other disability leaves).

\(^{16}\) *See id.* (demonstrating challenge to balance family and work life without job security).

\(^{17}\) *See* 133 CONG. REC. S493 (1987) (statement of Mr. Dodd) (promoting economic security by providing family leave).

\(^{18}\) *Compare id.* (stating purposes, findings, and requirements of proposed Parental and Medical Leave Act), *with* 29 U.S.C. § 2601 (2012) (stating nearly identical purposes, findings, and requirements of enacted Family and Medical Leave Act).
Prior to the enactment of the PDA and the FMLA, scholars proposed two types of leave for mothers: childbirth leave and childrearing leave.¹⁹ Childbirth leave would provide women time to recover from complications from pregnancy and childbirth.²⁰ Childrearing leave, on the other hand, revolves around the care of children, which is accomplished by both men and women.²¹ These distinctions reflect the current view regarding maternity and paternity leave; however, today’s model of maternity leave does not distinguish between time for maternal recovery and familial bonding.²²

Though the federal government only provides employment security during family and medical leave, some states have extended wage replacement to employees utilizing family and medical leave, often as a form of temporary disability insurance.²³ States have enacted leave insurance programs that enable employees to pay into family and medical insurance, like disability insurance income deductions, to provide employees with a portion of their weekly earnings during their leave period.²⁴ Even with state paid leave provisions, only twelve percent

---

²⁰ See id. (discussing childbirth leave as form of disability leave when women are unable to work).
²¹ See id. at 501 (explaining benefit of mothers and fathers participating in child care).
²² Compare id. at 481 (proposing distinct leave for childbirth recovery and for child rearing), with § 2612(a)(1)(A) (grouping leave due to “birth of” and “care for” child into one twelve-week period).
²³ See, e.g., CAL. UNEMP. INS. CODE § 3300 (West 2016) (presenting findings and declarations leading to extension of family temporary disability insurance); N.J. ADMIN. CODE § 12:21-1.2 (2016) (defining temporary disability benefits law’s extension to family leave benefits); 28 R.I. GEN. LAWS ANN. § 28-41-34 (2016) (providing temporary caregiver insurance program, entitling employees utilizing family leave to wage replacement benefits); WASH. REV. CODE § 49.86.020 (West 2016) (establishing family leave insurance benefits). These policies mirror the proposed, not yet adopted, federal regulation providing compensated leave. See Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,222-23 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604) (providing partial wage replacement for employment leave following birth or placement for adoption of a child).
of United States employees had access to paid family leave in 2012, according to either state regulations or independent employer policies. Though these state initiatives improve family leave, the limited compensation provided to employees utilizing family leave perpetuates the struggle between work and family life.

B. Parental Leave in Other Jurisdictions

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly in 1979. Among the numerous articles aimed at eliminating discrimination toward women in all facets of life, provisions ensuring employment security and maternity leave modeled an important international interest in balancing motherhood and female financial independence. Ninety-nine countries have signed CEDAW, expressing an intention to incorporate at least some of the Convention’s provisions into its own law and practice.

family leave in 2014. See id. at 5 (explaining New Jersey’s Family Leave Insurance program). Rhode Island workers are entitled to compensation between $72 and $752 per week during their four weeks of paid leave. See id. (explaining Rhode Island’s Temporary Caregiver Insurance Program payments). Washington’s plan would provide full-time employees with a maximum of $250 per week for a maximum of five weeks. See id. (discussing Washington’s proposed Family Leave Insurance Law).


See Gault et al, supra note 24, at 4-5 (describing access to partial wage replacement for only four to six weeks of family leave); see also Rona Kaufman Kitchen, Missing the Mark: How FMLA’s Bonding Leave Fails Mothers, 31 HOFSTRA LAB. & EMP. L. J. 303, 309-10 (2014) (discussing inability to afford taking FMLA leave).


See Convention on the Elimination of All Forms of Discrimination against Women, art. 11, Dec. 18, 1979, 1249 U.N.T.S. 13 (stressing importance of female access to “maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”).

Sweden, a signatory that has ratified CEDAW, provides the most generous model of parental leave in the world. In Sweden, parents are granted 480 days of leave that may be utilized any time during the first eight years of the child’s life; sixty of these days are specifically allotted to the father. Parents are compensated for 390 days of leave at approximate 80% of their wages. Iceland, another CEDAW ratified-signatory, also promotes generous parental leave policies: Iceland provides each parent “the non-transferable right to three months each of paid leave, plus an additional three months that may be shared between the couple at their discretion; a single parent gets the full entitlement.” These generous parental leave policies serve as strong models for countries where access to paid family leave is lacking. However, neither Sweden nor Iceland have legislation legalizing or regulating surrogacy; thus, their ideal parental leave policies lack specific guidance on extending parental leave to parents utilizing surrogacy.

The Australian Department of Human Services provides eighteen weeks of paid parental leave and Newborn Upfront Payment and Newborn Supplement plans for qualifying new

---

30 See Hegewisch & Hara, supra note 25, at 11 (analyzing Sweden’s parental leave policy).
31 Id.
32 See id. (noting parental leave payment cap).
33 Id. (discussing Iceland equal distribution model of paid parental leave).
parents. In Canada, only mothers who have given birth are entitled to maternity leave.\textsuperscript{37} However, parental leave is available to biological, adoptive, or “legally recognized parents,” arguably providing leave to intended parents.\textsuperscript{38} Surrogate mothers in Canada cannot be “compensated,” but are “reimbursed” for pregnancy expenses; these payments include coverage of postpartum expenses.\textsuperscript{39} In the United Kingdom, eligible employees receive up to thirty-nine weeks of paid maternity leave.\textsuperscript{40} Like Canada, in the United Kingdom only women who endure successful pregnancy and childbirth are entitled to maternity leave.\textsuperscript{41} However, litigation contemplating an intended mother’s right to maternity leave continues.\textsuperscript{42}

III. Parental Leave in the Context of Surrogacy


\textsuperscript{38} See Pregnancy and Parental Leave, ONTARIO MINISTRY OF LABOR (Nov. 2015), http://www.labour.gov.on.ca/english/es/pubs/guide/pregnancy.php (providing parental leave in addition to maternity leave). Maternity benefits may be paid to birth mothers for up to fifteen weeks; parental benefits are provided for up to thirty-five weeks. \textit{Id}.


Surrogacy is distinct from adoption and should be treated as such.\textsuperscript{43} Thus, the availability of maternity leave for surrogate mothers, birth mothers, intended parents, and adoptive parents are distinct. However, for the purpose of this paper, trends between birth mothers and surrogate mothers—who have given birth but do not have the newborn at home for whom to care—and between intended parents and adoptive parents—who have not experienced the physical process of pregnancy and childbirth but have an infant for whom to provide care—will be compared for simple analogy.\textsuperscript{44}

Surrogacy is the process of conceiving a child, biologically or otherwise, by using the womb of a surrogate to carry a pregnancy for the intended parents.\textsuperscript{45} In traditional surrogacy, the surrogate provides the egg, which is fertilized either by donor sperm or the sperm of the intended father; thus, the surrogate is the biological mother of the resulting child.\textsuperscript{46} In gestational surrogacy—significantly more popular than traditional surrogacy today—the intended parents select the gametes, either the biological gametes of one or both intended parents or donor sperm

\textsuperscript{43} See Clara Spivack, The Law of Surrogate Motherhood in the United States, 58 AM. J. COMP. L. 97, 105 (2010) (distinguishing between procreation, adoption, and surrogacy as methods to parenthood); see also Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133, 1137 (Mass. 2001) (differentiating between adoption and surrogacy agreements). Surrogacy is a method of medical reproduction for the infertile; adoption is the transfer of legal parental rights of an existing child from the biological parent or parents, or the state, to the adoptive parent or parents. See Bruce Hale, Regulation of International Surrogacy Arrangements: Do We Regulate the Market, or Fix the Real Problems?, 36 SUFFOLK TRANSNAT’L L. REV. 501, 504 (2013) (demonstrating important distinction between surrogacy reproduction and adoption parenthood). Gestational surrogacy is especially different from adoption because the gestational surrogate is not “vulnerable to financial inducements to part with her own offspring.” See Enquist, supra note 1, at 142 (emphasizing policy and rationale differences between adoption and surrogacy).

\textsuperscript{44} See Enquist, supra note 1, at 142 (comparing adoption and gestational surrogacy statutes in context of FMLA). “Adoption is similar to gestational surrogacy under FMLA, as the mother in each case has not given birth to the child, yet is still the mother of the child.” Id.

\textsuperscript{45} See Jennifer L. Watson, Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 529-30 (2007) (discussing surrogacy process). A surrogate is “an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.” UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(4) (UNIF. LAW COMM’N 1989). Intended parents “enter into an agreement under this [Act] providing that they will be the parents of the child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.” Id. §1(3).

\textsuperscript{46} See Watson, supra note 45, at 529 (explaining genetic link between traditional surrogate and resulting child); Enquist, supra note 1, at 141 (stating traditional surrogate is gestational and genetic mother).
and/or egg, which form the embryo that is implanted in the surrogate to create a pregnancy.\textsuperscript{47} Thus, a gestational surrogate does not have a biological connection to the resulting child.\textsuperscript{48}

Adoption is the legal surrender of a child to non-genetic parents by his or her biological mother and father when the biological parents are unable or unwilling to care for the child.\textsuperscript{49} Adoption results in the termination of the biological parents’ parental rights and the essential transfer of parental rights to the adoptive parents.\textsuperscript{50} Because traditional surrogacy arrangements result in the biological surrogate mother’s severance of parental rights, some scholars compare surrogacy to independent adoption, thus applying adoption laws to traditional surrogacy agreements.\textsuperscript{51}

A. Maternity Leave for the Surrogate

While maternity leave has been recognized and granted to intended mothers using surrogates, the current language of the FMLA presents challenges in applying maternity leave to the surrogate herself.\textsuperscript{52} Regardless of Congress’s intent to extend FMLA benefits to a wide range of families, the language of the FMLA emphasizes that parental leave is necessary to

\textsuperscript{47} See Watson, supra note 45, at 529-30 (contrasting and explaining traditional and gestational surrogacy processes).
\textsuperscript{48} See id. at 529 (recognizing absence of biological link between gestational surrogate and resulting child); Raftopol v. Ramey, 12 A.3d 783, 791 (Conn. 2011) (ruling gestational surrogate, with no biological connection to resulting child, has no parental rights to terminate).
\textsuperscript{50} See id. at 11-15 (describing adoption procedure).
\textsuperscript{51} See id. at 15-16 (equating surrogacy and independent adoption).
\textsuperscript{52} See Enquist, supra note 1, at 147 (observing intended mother’s access to FMLA leave). Enquist recognized the complications in reconciling the plain language of the FMLA and the U.S. Department of Labor’s interpretation when determining parental leave eligibility. See id. Enquist questions whether the FMLA will grant “maternity leave to the ‘mother’ who carried and gave birth to a child;” his emphasis around the term “mother” places a surrogate mother in a distinctly separate—arguably less deserving—category than intended, biological, or adoptive mothers. See id.
promote familial bonding and provide care to children. These childcare-specific intentions are mute to the rights of birth mothers without a child for whom to care.

Though a woman is no longer pregnant following the birth of a child, some scholars argue that there are not three, but four trimesters of pregnancy. During this “fourth trimester,” birth mothers experience numerous “physical, social, and psychological aspects of pregnancy” that follow childbirth. The physical recovery following birth—the perperium—begins when labor and delivery ends and finishes when the “woman’s reproductive system returns to a ‘normal nonpregnant state.’” Birth mothers experience intense fatigue and pain during recovery from pregnancy and childbirth; regardless of the presence of the infant birthed, women undergo hormonal and physical changes. Though the postpartum medical check-up six weeks post-birth marks the end of many medical maternity or pregnancy leaves for employment and insurance purposes, medical professionals assert another six weeks of recovery is often necessary. Though “[a] surrogate mother who surrenders the infant she carried because she has signed a contract will experience yet a different set of emotional and financial challenges,” recognizing her physical status as a birth mother solidifies a surrogate mother’s medical need for maternity leave.

53 See 29 U.S.C. § 2612(a)(1)(A) (2012) (stating leave is granted for parent to “care for” child); § 2601(a)(2) (discussing intention to encourage mother and father participation in “childrearing” and “care of family”); S. REP. NO. 103-3, at 22 (1993) (ensuring leave for parents who have “day-to-day responsibility for caring for a child”).
55 See id. at 127 (enumerating maternal needs beyond pregnancy and childbirth).
56 See id. at 128 (defining perperium recovery during first six to eight weeks postpartum).
57 See id. at 128-30 (discussing physical and hormonal changes postpartum). Internal organs reposition after shifting to make room for an expanded uterus; the birth canal or abdominal incision heal from delivery trauma; breasts enlarge for lactation. Id. (detailing recovery process for birth mothers).
58 See Matambanadzo, supra note 54, at 129-30 (discussing postpartum timeline). Some women may require nine months to fully recovery from pregnancy. See id. at 130.
59 See id. at 169 (providing examples and reasons for recognizing fourth trimester when determining maternity leave requirements).
Doctors have stressed the importance of women receiving sufficient time to recover from pregnancy and childbirth, regardless of the presence of the child birthed. Mothers who have experienced the trauma of stillbirth require adequate time to recover, both physically and emotionally; some jurisdictions have specified that stillbirth mothers are entitled to maternity leave. Physicians acknowledge that mothers should be allotted time to recover from the physiological and psychological experience of pregnancy and childbirth. The length of required recovery time depends on numerous factors surrounding the birth. Some experts have estimated that full recovery from childbirth may take six months or more, rather than mere weeks that many employers offer. A surrogate’s recovery time may be shorter or longer than the “average”; regardless, she should be allotted reasonable maternity leave and should not be penalized or discriminated against because she is recovering without the presence of a child.

---

61 See Caroline Cologna, Mom’s Powerful Stillbirth Post Issues Important Plea to Parents, HUFFINGTON POST, (Sept. 30, 2015) http://www.huffingtonpost.com/entry/moms-powerful-stillbirth-post-issues-important-plea-to-parents_560967e3e4b0dd8503084ae8 (detailing physical pain, loss, and recovery during stillbirth postpartum); Stillbirth: Surviving Emotionally, American Pregnancy, (Aug. 2015) http://americanpregnancy.org/pregnancy-loss/stillborn-surviving-emotionally/, (describing physical recovery of stillborn birth); see also Pregnancy and Parental Leave, supra note 38 (allotting at least six weeks maternity leave to mothers following stillbirth or miscarriage in Canada); Statutory Maternity Pay and Leave, supra note 40 (extending maternity leave to birth mothers without infants in United Kingdom).
62 See Matambanadzo, supra note 54, 160 (discussing “physiological, emotional, social, and relational” challenges women face postpartum).
64 See Matambanadzo, supra note 54, at 130 (recognizing women may require nine months recovery); see also Galtry & Callister, supra note 63, at 225 (discussing effect of spousal and community support and overall health of mother contributing to actual recovery time).
Because a surrogate mother has endured the physical, medical process of pregnancy and childbirth, the surrogate mother is entitled to some amount of medical leave. Thus, the surrogate mother’s employer must provide her employment security for a reasonable amount of time in anticipation of and/or following the delivery. Without requiring time to bond and care for the newborn child, it may be reasonable to grant a surrogate mother six to eight weeks of medical leave for recovery from birth. The question remains, however: who pays for the surrogate’s lost wages during this recovery time without provided or mandated maternity leave compensation?

Scholars who oppose surrogacy, or specifically compensated surrogacy, believe that surrogacy exploits women. Paying women to carry and bear children for infertile families in the upper echelon of the community may encourage poor women to enter surrogacy contracts, focusing on the payout upon delivery while ignoring the physical and emotional process of pregnancy and childbirth. If surrogate mothers are members of an already disadvantaged financial class, they may not have access to adequate health care or leave coverage; strict adherence to the statutory employer and employee definitions within the FMLA may continue to

Caregivers, 20 DUKE J. GENDER L. & POL’Y 1, 8 (2012) (discussing Supreme Court’s conclusion that more than six weeks of maternity leave is for “parenting and not disability”).
66 See supra note 7 and accompanying text (classifying pregnancy and childbirth as “serious medical condition” entitling birth mother to medical leave).
68 See supra notes 56-58 and accompanying text (discussing postpartum recovery); supra note 65 (establishing four to eight week range for average postpartum recovery).
69 See Watson, supra note 45, at 544-47 (presenting arguments equating surrogacy with baby selling, exploitation, and prostitution).
70 See id. at 544 (demonstrating economic discrepancies between surrogates and intended parents as motivation for surrogacy). But see Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993) (finding no difference between “lower-paid or otherwise undesirable” employment positions and surrogacy contracts in relation to economic necessity).
objectify women who wish to serve as surrogates.\textsuperscript{71} While it may be true that many women who choose to serve as surrogates live among the lower income bracket, scholars lack evidence that financial benefits are the sole, or primary, motivation to become surrogates or that surrogates actually feel exploited.\textsuperscript{72} To remedy any potential for exploitation, employing a universal surrogate compensation policy—including prenatal and postpartum medical expenses and lost wage replacement—will level the playing field by providing all surrogate mothers, regardless of economic class, reasonable compensation for her pregnancy and childbirth services.\textsuperscript{73}

In the United States, a birth mother cannot be compensated for consenting to the adoption of her child; thus, some scholars argue that surrogate mothers cannot be compensated for consenting to the placement of the child born via surrogacy.\textsuperscript{74} However, these critics fail to recognize the vital difference between adoption and surrogacy agreements: adoptive birth mothers are pregnant with their own biological child before deciding to place the child with another family; surrogate mothers become pregnant after consenting to carry and bear a child for another family.\textsuperscript{75}

\textsuperscript{71} See § 2611(2)(A) (2012) (defining “eligible employee” as one working 1250 hours for same employer in previous twelve months); § 2611(4)(A)(i) (defining eligible “employer” as one who employs fifty or more employees on every work day for twenty or more weeks of the current or previous year); Matambanadzo, supra note 54, at 174 (discussing women’s access to maternity leave, paid and unpaid, based on employment status). Requiring that an employee satisfy specific time-based work requirements for an eligible employer before guaranteeing access to unpaid family and medical leave marginalizes the lower-end of the working class, including mothers and women who work part-time. See Kaufman Kitchen, supra note 26, 309-10 (providing statistics on FMLA eligible employment).


\textsuperscript{73} See Hale, supra note 43, at 520-21 (discussing benefits of surrogate compensation); Havin, supra note 72, 692 (explaining rationale for compensating surrogate for “substantial services”).

\textsuperscript{74} See Watson, supra note 45, at 547 (explaining policy violation of paying birth mothers).

\textsuperscript{75} See id. (describing fundamental distinction between adoption and surrogacy arrangements).
States permit adoptive parents to financially provide for the birth mother for medical expenses related to the birth of the child adopted. Surrogacy, unlike adoption, however, has not been legalized in some manner in every American state. Some states permit surrogacy contracts if the surrogate is not compensated, though reimbursement of reasonable and necessary expenses is allowed. Very few states promote compensated surrogacy. However, men and women are compensated for gamete donation; it follows that a surrogate woman who donates her uterus to bear a child should be compensated for her services. In many surrogacy agreements, the surrogate is “reimbursed” for her services, including medical and legal fees associated with the surrogacy agreement and birth. Some agreements specifically provide for reimbursement

76 See, e.g., N.Y. DOM. REL. LAWS §115(8) (McKinney 2016) (allowing payment to birth mother sixty days prior and thirty days following adoptive child’s birth); N.J. STAT. ANN. § 9:3-55(a) (West 2015) (granting payment of reasonable pre- and post-natal expenses to birth mother during adoption proceeding); OHIO REV. CODE ANN. § 3107.055(C) (West 2015) (permitting payment of medical expenses incurred by birth mother for adoptive child’s birth); see also Watson, supra note 45, at 538-39 (discussing permissible payment of medical, psychological, and legal fees).


79 See 750 ILL. COMP. STAT. ANN. 47/25(b)(4) (West 2015) (permitting surrogate compensation if placed in escrow); In re Baby, 447 S.W.3d 807, 826-27 (Tenn. 2014) (allowing compensation that is not contingent upon surrender of child).

80 See Hale, supra note 43, at 520-21 (suggesting flexible surrogate compensation method); Havin, supra note 72, 690-91 (proposing Uniform Gestational Surrogacy Contract Act, with provision for reasonable compensation); Watson, supra note 45, at 545-46 (rationalizing compensation for surrogate birth mothers).

81 See, e.g., Baby, 447 S.W.3d at 840 (permitting surrogate compensation for injuries related to pregnancy and birth); Magdalin v. Commissioner of Internal Revenue, 96 T.C.M (CCH) 491, *1-2 (2008) (listing intended father’s financial contributions to surrogates for conception and birth of children); Culliton v. Beth Israel Deaconess Med. Cir., 756 N.E.2d 1133, 1135 (Mass. 2001) (reimbursing surrogate mother for “medically necessitated lost wages” and other related expenses); Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (ruling payment for gestation, labor, and birth of child permitted according to public policy); Surrogate Parenting Associates, Inc., 704 S.W.2d at 210 (allowing fee payment to surrogate for medical, hospital, and necessary expenses of pregnancy); see also UNIF. PARENTAGE ACT § 801(e) (UNIF. LAW COMM’N 2002) (providing for
of lost wages due to the pregnancy and birth; intended parents often agree to cover the surrogate’s maternity leave.\textsuperscript{82}

Since surrogacy is established via a contractual agreement with many provisions and clauses, reimbursement for lost wages accruing during the surrogate’s maternity leave should be included in every surrogacy agreement.\textsuperscript{83} The individual agreement crafted between the intended parents, surrogate mother, and their respective attorneys may provide for a set lump sum of lost wages payment or may provide a specific amount per week that the surrogate requires leave.\textsuperscript{84} Compensation, or reimbursement, is often provided to the surrogate in installments; reimbursement for lost wages due to necessary maternity leave should be included in the final installment to the surrogate.\textsuperscript{85} Many intended parents carry health insurance that provides coverage for prenatal and childbirth care; some plans even require postpartum care.\textsuperscript{86} If the insurance of the intended parents, used for the birth of the child via surrogate, includes postpartum care, such coverage should extend to the surrogate mother’s recovery.

B. Maternity Leave for the Intended Mother

In the context of surrogacy, the FMLA provides maternity leave most explicitly for the intended mother.\textsuperscript{87} In gestational surrogacy arrangements, the intended mother is likely the biological mother of the child; thus, the intended mother is entitled to maternity leave just as

\begin{itemize}
  \item \textsuperscript{82} See Matter of Adoption of Baby Boy, 552 N.Y.S.2d 1005, 1007 (1990) (finding lost wages due to pregnancy—maternity leave—reimbursable to surrogate from intended parents).
  \item \textsuperscript{83} See \textit{id.} (allowing clause for lost wages payment in surrogacy contract).
  \item \textsuperscript{84} See \textit{supra} note 81 (discussing surrogate recovery compensation options); see also \textit{supra} note 24 (providing overview of parental leave insurance payment options).
  \item \textsuperscript{85} See \textit{Johnson}, 851 P.2d at 778 (discussing payment to surrogate in installments throughout pregnancy and postpartum).
  \item \textsuperscript{86} See \textit{MASS. GEN. LAWS} ch. 176G, § 4(c) (2014) (providing for prenatal, childbirth, and postpartum care).
  \item \textsuperscript{87} See 29 U.S.C. § 2612(a)(1)(A)-(B) (2012) (providing leave for the birth, or placement, and care of son or daughter); § 2611(12) (permitting leave for “biological, adopted, or foster child . . . or a legal ward); see also Enquist, \textit{supra} note 1, at 145-47 (explaining FMLA application to intended mother).
\end{itemize}
much as a mother who gives birth to her own biological child. In traditional surrogacy arrangements, the intended mother has no genetic connection to the child; the relationship between the intended mother and the child delivered via traditional surrogacy mirrors the relationship established through adoption. The question remains whether the intended mother, regardless of her genetic connection to the child, should receive the same maternity leave as a birth mother or the leave of an adoptive mother.

The purpose of the FMLA is to provide parents time to bond with their newborn babies. Regardless of the nature of the relationship between the parent and the child, this opportunity to bond should not be jeopardized by employment obligations. A child learns important self-regulation by bonding with his or her parent; when caregivers are in physical contact with their newborns, babies learn to adapt to life outside of the womb.

88 See § 2611(12) (granting maternity leave for birth and care of biological child); Enquist, supra note 1, at 148 (extending FMLA leave to parents using gestational surrogate).
89 See § 2611(12) (providing maternity leave for birth and care of adopted child); Atwell, supra note 49, at 15-16 (comparing traditional surrogacy with adoption).
92 See Burns, supra note 91, at 4 (discussing importance of bonding period between parents and children).
93 See Matambanadzo, supra note 54, at 130-31 (discussing importance of parent-child contact during first six to eight weeks of newborn’s life).
personality of their child and adapt to life revolving around another family member during these early bonding moments.94

An intended mother’s use of maternity leave is for the sole purpose of childcare and bonding with a newborn because she does not require recovery from childbirth. Thus, her amount of leave required differs from that of a birth mother. The intended mother’s leave also differs from that of adoptive mothers: an intended mother bonds and cares for a newborn, the child she intended to create; an adoptive mother may bond and care with an older child depending on the specific circumstances surrounding the particular adoption.95 Though leave may be cut short because the intended mother does not require recovery time like a birth mother, the time required for childcare is likely the same as other birth mothers with newborns: alternative child care options, such as daycare, are often unavailable to children under the age of six weeks.96 A new mother cannot be expected to forego essential, early bonding time with a newborn in order to return to the workforce; daycare is not an acceptable supplement for personal, parental care.97

The simple solution is to remember that “she who intended to bring about the birth of the child that she intended to raise as her own” is the child’s “natural mother.”98 Thus, an intended

---

94 See id. (emphasizing parental lessons, adjustments, and benefits during fourth trimester with newborn).
98 Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (remedying conflict when genetics and giving birth both establish motherhood of one child in different women). A natural mother is often considered a birth or biological mother. See Mother, BLACK’S LAW DICTIONARY (9th ed. 2009). Thus, if a birth mother is fully
mother should be treated as any other “natural mother,” whether her child was born via a
traditional or gestational surrogate.99 By providing the “natural” intended mother—who seeks
maternity leave due to the birth of and in order to care for her child—with full maternal benefits,
intended mothers enjoy the parental rights they so deserve.

C. Paternity Leave for the Intended Father

The language and requirements of the FMLA favor working fathers over mothers.100
Regardless of male access to some form of paternity leave, women—mothers—spend
significantly more time caring for children than men, even when both parents work outside of the
home.101 Employers, however, are more likely to offer maternity leave than paternity leave;
paternity leave, unlike maternity leave, is short and unpaid when offered to a father.102 Sixty-
three percent of large employers consider it unreasonable for a man to take any parental leave;
twenty-three percent considerable two weeks or less a reasonable length of paternity leave.103
For some employers, fathers, in order to receive paternity leave, must prove to be the “primary

99 See supra note 98 (extending maternity leave rights to “natural” intended mother).
100 See Kaufman Kitchen, supra note 26, at 309-10 (demonstrating eligibility requirements’ tendency to
include more men than women).
101 See Malin, supra note 7, at 1050 (explaining parenting roles of mothers and fathers). The perception of the
“maternal instinct” and mother’s superior knowledge and ability to care for the children is deeply rooted in
history and has been perpetuated into today’s society. See id. at 1055-1057 (discussing history of female
dominated child care). While fathers participate greatly in family life, mothers are more likely to plan,
schedule, and instruct family tasks that require the father’s participation. See id. at 1051. Even when typical
gender roles are reversed and the mother works outside of the home while the father is the primary caregiver,
the mother often maintains responsibility for child care decisions. See id.; see also Garcia, supra note 65, at
34-35 (detailing gender roles surrounding parenthood).
102 See Garcia, supra note 65, at 4 (explaining substantial differences between maternity and paternity leave);
see also Malin, supra note 7, at 1073-75 (providing common rationale for absence of financed paternity leave).
Fathers seeking paternity leave face discrimination and stereotypes; fathers are often considered on “vacation”
while they are on paternity leave to care for their children. See Garcia, supra note 65, at 4.
103 See Malin, supra note 7, at 1078.
caregiver” of the child.\textsuperscript{104} Regardless of a father’s ability to take parental leave, paid or unpaid, it is estimated that less than ten percent of working American fathers utilize paternity leave.\textsuperscript{105} However, many fathers seize vacation and personal days to spend time with their newborns.\textsuperscript{106}

It has become abundantly clear that bonding between fathers and newborns is just as important as child-bonding with mothers.\textsuperscript{107} In heterosexual, two-parent households, while a mother obtains maternity leave for the purposes of recovery and infant care, fathers should be granted paternity leave to enhance paternal bonding.\textsuperscript{108} In order to eradicate gender norms—in the workplace and in the home—family leave provisions must provide leave equally to men and women; if paid maternity leave is available to women for eight weeks, then paid paternity leave should be available to men for eight weeks.\textsuperscript{109} By encouraging equal parental participation in the early weeks of parenthood, gender roles and expectations will decrease and equality between family rights and responsibilities will emerge.\textsuperscript{110}

\textsuperscript{104} See Garcia, supra note 65, at 14 (finding paternity leave requires great burden of proof); see also Knussman v. Maryland, 272 F.3d 625, 628-29 (4th Cir. 2001) (denying father paternity leave because he was not primary caregiver, could not breastfeed child).

\textsuperscript{105} See Malin, supra note 7, at 1050.

\textsuperscript{106} See id. at 1071-1072 (explaining fathers’ leave immediately following birth).

\textsuperscript{107} See e.g., 29 U.S.C. § 2601(a)(2) (2012) (stressing importance of paternal and maternal bonding with children); Duncan Koontz, supra note 19, at 501 (including father’s role in childrearing); Galtry & Callister, supra note 63, at 230 (stating benefits of parental leave include father-child bonding).

\textsuperscript{108} See Galtry & Callister, supra note 63, at 238 (proposing equal length in maternity and paternity leave). In furtherance of true equality—at home and work—fathers should be granted an equal share of paternity leave to avoid stereotypical gender roles and responsibilities. See id. Thus, if mothers are awarded additional leave, beyond the required time for childbirth recovery, in order to bond and care for a newborn, paternity leave should provide the same. See id. (encouraging longer, and consecutive, leave for mothers and fathers to share in early child bonding). However, if a mother and father choose to utilize their parental leave subsequently, the opportunity for the child to bond with his or her parents is extended, though more so with one parent at a time. See id. at 239 (discussing alternating parental leave time to shorten non-employment time).

\textsuperscript{109} See Garcia, supra note 65, at 34-35 (outlining effect of gender stereotypes in home and work life for fathers). By favoring and praising motherhood while fathers are expected to work to financially provide for their families, parents of the same children are viewed and valued differently. See id. at 34-37. These parenthood and role classifications beg the question: “if mothers should not miss their children’s first step, is it really fair to ask fathers to miss out on the joys of caregiving?” See id. at 36 (arguing for destruction of gender roles in home and workforce).

\textsuperscript{110} See id. at 37 (demonstrating effect of egalitarian family roles).
If fathers are granted family leave equal to that of mothers, fatherhood will increasingly mirror stereotypical motherhood. Thus, a father’s role during the early stages of a newborn’s life are consistent with the role of mothers, whether biological, adoptive, or intended; new fathers care for, interact and play with their newborns, and experience pride, joy, and love toward their children. Considering the consistent role of both parents in infant care, all parents, including fathers—adoptive, biological, or intended—should be granted the same amount of parental leave.

D. Parental Leave for Same-Sex Parents

The use of assisted reproductive technology, and surrogacy in particular, among same-sex couples has become increasing popular. Unlike heterosexual parents utilizing surrogacy, same-sex parents often have different genetic relationships to the child: one same-sex partner likely has a genetic link to the resulting child, while the other lacks such a biological connection. Some scholars recommend that the non-genetic same-sex parent secure parental rights by adopting the child; however, some states prohibit second parent adoption by same-sex couples. Regardless of whether adoption occurs, it is clear that the parent with the biological link to the child has a stronger, simpler claim to parental leave.

111 See id. at 36-37 (discussing role of fathers when considered “authentic caregivers”).
112 See Malin, supra note 7, at 1066 (describing paternal experience surrounding newborn interaction).
114 See id. (recognizing only one same-sex partner will be genetic parent); Judith F. Daar, Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms, 23 BERKLEY J. GENDER L. & JUST. 18, 33 (2008) (explaining same-sex couples’ using egg or sperm of one partner and donor gametes to conceive).
115 See Daar, supra note 114, at 50-51 (demonstrating barriers preventing same-sex couples from conceiving); Kindregan, supra note 113, at 621-22 (discussing dual maternity through adoption).
116 See 29 U.S.C. § 2611(12) (2012) (classifying a “biological” son or daughter as one entitling a parent to family leave).
parent could also claim leave according to the FMLA, so long as his or her employer recognized the non-biological parent-child relationship.117

Unlike heterosexual parents, both same-sex parents would be entitled to the same form of parental leave—maternity leave for mothers or paternity leave for fathers.118 History seems to suggest that two parents in the same household are unlikely to receive, or afford, identical leave.119 Because same-sex parents are either both mothers or both fathers, typical gender roles and parental responsibilities are absent from same-sex households.120 Through the enactment of the FMLA, Congress sought to alleviate gender-norms and stereotypes regarding parenting.121 However, as discussed in regards to a father’s access to paternity leave, many employers provide family leave more readily to the “primary caretaker.”122 Currently, same-sex parents struggle to answer the question of who is the primary caretaker.123 Even if couples were to determine which

---

117 See id. (including “adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis” qualifying parent to leave access); see also Darren Rosenblum, Unsex Mothering: Toward a New Culture of Parenting, 35 HARV. J. L. & GENDER 57, 105 (2012) (applying FMLA to same-sex parents).
118 See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L. J. 459, 481, 572 (1990) (recognizing dual fatherhood and motherhood).
119 See Garcia, supra note 65, at 7 (recognizing inability for majority of families to enjoy unpaid FMLA leave); Kaufman Kitchen, supra note 26, at 312-13 (explaining unaffordability to take unpaid leave); Matambanadzo, supra note 54, at 150-51 (observing family reliance on income, inability to utilize FMLA unpaid leave).
120 See Kindregan, supra note 113, at 621-22 (discussing dual maternity or paternity in same-sex parent families); Rosenblum, supra note 117, 81, 88-89 (explaining more even divide of family responsibilities in same-sex households).
122 See supra note 104 and accompanying text (demonstrating high burden on fathers to receive adequate parental leave).
123 See Jennifer Sroka, Note, A Mother Yesterday, But Not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships, 47 VAL. U. L. REV. 537, 568 n. 189 (2013) (discussing same-sex non-biological parent struggle to achieve parental rights according to de facto parent doctrine and primary caregiver model). In order to qualify as a de facto parent, the parent must demonstrate that he or she was the primary caretaker for at least two years. Id. Sometimes, a parent has been required to demonstrate he or she was the “primary caregiver rather than simply parenting alongside another parent.” Id. at 552 n. 90.
same-sex parent acts as the primary caregiver, the same-sex parents would likely receive different parental leave benefits.\(^{124}\)

Same-sex couples already suffer from discrimination in becoming parents, despite research findings that “same-sex parents are not worse parents than heterosexual parents.”\(^{125}\) Seeking equal leave for same-sex mothers and fathers may be an even heavier burden than establishing equal access to parenthood.\(^{126}\) However, Canada’s parental leave policy grants parents thirty-five weeks of partially paid leave and already extends these benefits to same-sex parents.\(^{127}\) By emulating Canada’s family leave policy, same-sex parents will effectively eliminate parenting stereotypes between mothers and fathers and provide men and women with equal access to adequate family leave.

**IV. Recommendations for Reform**

Above all else, the United States should amend the FMLA to extend to all individuals in the workforce, regardless of employer size or employee status.\(^{128}\) Currently, the FMLA disadvantages individuals who are already receiving the least access to benefits: non-qualified employees or employees for non-qualified employers.\(^{129}\) The strict and specific FMLA employee and employer requirements further strip an individual’s access to employment,

\(^{124}\) See *supra* notes 102-104 and accompanying text (analyzing leave discrepancies afforded to primary and secondary caregivers).

\(^{125}\) Rosenblum, *supra* note 117, at 87-88 (discussing same-sex parenting).

\(^{126}\) See *id.* at 88 n. 132 (examining same-sex adoption access).


\(^{128}\) See 29 U.S.C. § 2611(2)(A) (2012) (defining “eligible employee” as one working 1250 hours for same employer in previous twelve months); § 2611(4)(A)(i) (defining eligible “employer” as one who employs fifty or more employees on every work day for twenty or more weeks of the current or previous year).

\(^{129}\) See *supra* note 71 and accompanying text (analyzing disadvantages of FMLA leave requirements and employee access to adequate benefits); *supra* note 119 (demonstrating economic inability to enjoy unpaid leave).
financial stability, and health.\textsuperscript{130} Adequate leave is essential for individual and family health, job retention and stability, and overall satisfaction.\textsuperscript{131} By providing job security and reasonable medical and family leave to everyone in the workforce, the workforce will become stronger with happier, more satisfied, and committed employees and employers alike.\textsuperscript{132} This modification will specifically guarantee a surrogate mother’s employment position while she utilizes necessary maternity leave.\textsuperscript{133}

Though guaranteed parental leave, without the risk of losing employment, calms the minds of parents, the guarantee of \textit{paid} leave would provide additional ease to mothers and fathers, allowing them to further enjoy their family time.\textsuperscript{134} The United Nations has specified an obligation to provide paid maternity leave, without specifying the required number of weeks, in CEDAW.\textsuperscript{135} By furthering the objective of CEDAW and providing paid parental leave, the

\textsuperscript{130} See Kaufman Kitchen \textit{supra} note 26, at 312-13 (explaining damaging economic effect of financial inequalities in FMLA coverage).

\textsuperscript{131} See Gault et al., \textit{supra} note 24, at 7 (discussing economic benefits of paid family leave). Paid leave “increases the likelihood that workers will return to work after childbirth, improves employees morale, has no or positive effects on workplace productivity, reduces costs to employers through improved employee retention, and improves family incomes.” \textit{Id}. Paid leave also decreases family dependency on government public assistance. \textit{Id}.


\textsuperscript{133} See \textit{supra} notes 70-73 and accompanying text (discussing and remedying potential for surrogate mother exploitation by providing job security and reasonable compensation).

\textsuperscript{134} See The Family and Medical Insurance Leave Act, H.R. 1439, 114th Cong. § 5 (2015); S. 786, 114th Cong. § 5 (2015) (proposing insurance income deduction, like disability deduction, to cover family and medical leave); The Family and Medical Insurance Leave Act, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES (Mar. 2015) http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf [http://perma.cc/XCS7-7C62] (proposing Family and Medical Insurance Leave Act for paid family leave). However helpful the FMLA was intended to be, it fails to provide sufficient support to the majority of Americans seeking leave:

The FMLA is only a viable fourth trimester alternative for mothers and fathers who are full-time workers with a significant degree of attachment to the labor market, who work for larger companies, and who can also afford to take twelve weeks of unpaid leave.

Matambanadzo, \textit{supra} note 54, at 152-53 (detailing shortcomings of FMLA); \textit{see also} Garcia, \textit{supra} note 65, at 7 (explaining flaws of FMLA).

\textsuperscript{135} See Convention on the Elimination of All Forms of Discrimination against Women, art. 11, Dec. 18, 1979, 1249 U.N.T.S. 13 (stressing importance of female access to “maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”).
United States will join forces with other progressive countries in truly valuing family stability and economic freedom.\textsuperscript{136}

In order to ensure adequate leave for birth mothers, especially in surrogacy and adoption arrangements, the FMLA should separate entitlement to leave due to childbirth from leave in order to care for a child.\textsuperscript{137} Alternatively, the FMLA could specify that childbirth and pregnancy are especially included in the definition of “serious health condition,” entitling birth mothers to medical leave.\textsuperscript{138} This distinction clarifies that birth mothers may utilize family or medical leave for childbirth even when the child does not return to the birth mother’s care, without the risk of losing an employment position. To ensure that surrogate birth mothers receive adequate maternity leave, surrogacy contracts should specifically provide for wage replacement, reimbursement for postpartum medical expenses, and necessary counseling.\textsuperscript{139}

Though the FMLA seeks to provide equal access to family leave to men and women, individual employer practices favor the use of leave by mothers over fathers by providing paid maternity leave, yet uncompensated and/or short paternity leave.\textsuperscript{140} Some employers also provide family leave based on the method of family formation, determining leave eligibility by distinguishing between biological reproduction and adoption.\textsuperscript{141} These inequalities are evident in many of the “ideal” or “model” family leave policies implemented internationally.\textsuperscript{142} The United States should seek to enact legislation clarifying equal access to family leave for mothers and

\textsuperscript{136} See supra Part II.B. (analyzing international family leave policies).


\textsuperscript{138} See supra note 7 and accompanying text (classifying pregnancy and childbirth as “serious health condition” requiring medical leave access).

\textsuperscript{139} See supra note 83 and accompanying text (arguing for provision for lost wages to surrogate due to maternity leave in surrogacy contract with intended parents).

\textsuperscript{140} See supra notes 102-106 and accompanying text (exploring discrepancies between employer-provided maternity and paternity leave and use of leave by mothers and fathers).

\textsuperscript{141} See supra note 90 (discussing employer classification between adoption leave and childbirth leave).

\textsuperscript{142} See supra note 38 (demonstrating inequality in length of maternity and paternity leave); see also Kroggel, supra note 127, at 457-48 (explaining inequality within British family leave system as violation of Equal Protection Clause of Fourteenth Amendment).
fathers, even if fathers voluntarily choose to cultivate shorter leave. This clarification will ensure that all parents—whether single, heterosexual, or homosexual, birth, biological, adoptive, or intended—have equal access to parental leave, a necessary provision when considering leave entitlements in surrogacy agreements. Additionally, the United States should impose a mandatory minimum allotment of parental leave, promoting maternal health and parental bonding for all parents and children. This specification will prevent serious leave discrepancies between employees of varying statuses and will encourage all parents to participate in early childrearing.

V. Conclusion

The Family and Medical Leave Act provides a necessary first-step to achieving an appropriate family-work life balance. However, the FMLA ignores many unconventional family dynamics. By incorporating specific language entitling surrogate mothers to maternity leave without the child so birthed in her care, the FMLA will ensure that all birth mothers have adequate leave to recover from pregnancy and childbirth. Additionally, by providing uniform leave to all parents—abolishing classifications between “primary” and “secondary” caregivers—intended mothers and fathers—regardless of sexual orientation, gender roles, or parental responsibilities—will be given the opportunity to care for and bond with their children. These changes are necessary to promote true family equality and work-life stability.

143 See Kroggel, supra note 127, at 468-69 (proposing implementation of parental leave policy providing equal leave access to men and women); see also Gault, et al., supra note 24, at 4 (discussing California’s Paid Family Leave policy’s application to men and women).
144 See supra note 65 (analyzing ideal or average length of parental leave).
145 See Matambanadzo, supra note 54, at 152-54 (detailing discrepancies between maternity and paternity leave access, compensation, and duration, especially between public and private sector employers).