RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports federal and state legislation establishing minimum requirements for reasonable, unpaid, job-protected family and medical leave for employees, consisting of:

(a) temporary medical leave, to allow employees to take job-protected leave for medically necessary time for childbirth and pregnancy-related health conditions and for other temporary health conditions;

(b) family leave, to allow employees to take leave on a full or part-time basis to provide care for family members other than their children (e.g., the employees' own parents or spouse) who have serious health conditions; and

(c) continuation of health benefits during such periods of temporary medical and family leave.

BE IT FURTHER RESOLVED, that such legislation should only apply to organizations which have more than a reasonable threshold number of employees; and

BE IT FURTHER RESOLVED, that the Association supports federal legislation mandating a study of means for providing salary replacement during all or part of such temporary medical and family leave, and also supports the establishment of federal minimum requirements for job-protected, unpaid temporary medical and family leave pending the outcome of this study.
In August 1987 The House of Delegates passed a resolution\(^1\) endorsing a public policy of parental leave for a reasonable time following the birth or adoption of a child or to care for a seriously ill child and the continuation of health benefits during the period of such leave. This resolution builds upon these provisions but goes beyond them to endorse a broader public policy which would provide job protection for leave related to workers' own disabilities, for leave to care for other seriously ill family members, and which would set up a process for exploring alternative public policy approaches to providing salary replacement during periods of family or medical leave.

This was but the most recent in a long series of related Association policies. The Association has long recognized the importance of equal rights for women and the need to protect women against employment discrimination because of their childbearing role. The Association also has a longstanding interest in the well-being of children and in the quality of life afforded to our elderly citizens.

In February 1972 the House of Delegates passed a resolution supporting constitutional equality for women and urging the extension of legal rights, privileges and responsibilities to all persons regardless of sex. The ABA has urged law schools and law firms to refrain from discriminating against women and has favored enactment of legislation to insure that employers are prohibited from discriminating against applicants or employees on the basis of sex. The ABA has supported federal and state legislation assuring that prohibitions against sex discrimination in employment would also prohibit discrimination because of pregnancy.

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1 The resolution reads as follows:

BE IT RESOLVED, That the American Bar Association supports the establishment of a reasonable Federal minimum requirement for job-protected parental leave to allow parents to take unpaid leave on a full or part-time basis to provide child care for newborn infants, newly-adopted children, and seriously ill children.

BE IT FURTHER RESOLVED, That such requirement only apply to organizations which have more than a reasonable threshold number of employees.

BE IT FURTHER RESOLVED, That such federal requirement include the continuation of existing health benefits during such periods of leave.
In 1978 the ABA established its National Legal Resource Center for Child Advocacy and Protection to work on legal and policy issues affecting children. The ABA has passed numerous resolutions regarding the well-being of children including a 1983 resolution supporting the increased availability of child care resources to families at all income levels as well as resolutions on foster care, corporal punishment in the schools, child abductions, child support and a number of other issues. In 1978 the ABA established the Commission on the Legal Problems of the Elderly and in 1981 passed a resolution endorsing re-authorization of the Older Americans Act of 1965, as amended, which is concerned with the quality of life of our older citizens.

The current resolution is necessary to clarify the position of the Association and to provide the full protection needed to cover all medical conditions related to pregnancy and childbirth. In particular, a public policy of providing parental leave, as previously endorsed by the Association, would not provide job protection when a woman must take leave because of prenatal health problems requiring her to be bedridden before her baby is born or when a woman must take leave because of temporary disability caused by miscarriage, stillbirth, or complications of abortion. This resolution addresses the question of how to do so in a manner which would not offend the principle of treating pregnancy related medical conditions like all other serious health conditions.

The current resolution suggests that our nation should begin the process of developing a policy of accommodating families and work and of doing so in a way that furthers the goals of equality between the sexes and nondiscrimination in the workplace on the basis of sex.

In the past the greater part of childrearing and care of the ill and the elderly was performed by family members, usually women, who typically did not work outside of the home. Today, however, while many families prefer to have both parents work because of the satisfaction they experience from their jobs, most families find it necessary to have both parents work in order to assure a satisfactory standard of living for the family. It is no longer feasible for most mothers to stay home with their children. Today 61.3% of all married women with children are in the labor force. Most mothers of young children also are in the work force: 67% of married women with children under the age

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of three and 50% of all mothers with children under the age of one were in the labor force in 1985. In the 8.7 million families headed by women the income of the mother is essential; 67.6% of these single-parent mothers are in the labor force.

While most of these families use some form of child care to care for their children while parents work, it is extremely important to the well-being of the child and to the bonding of parents and children that parents themselves be physically present to care for children during certain essential periods in a child's life such as following the child's birth or adoption or placement in foster care and during a child's serious illness. Dr. Berry Brazelton recommends four months as a minimum time for newborns and new parents to adjust to one another. The Yale Bush Center recommends six months as the minimum. There are similar time periods required for the adjustment of a newly adopted child and his or her new family to each other. Similarly, according to the American Academy of Pediatrics, children have increased dependency needs when they are ill and require the unique warmth and security only their parents can offer. According to the Academy, it is sound pediatric practice to encourage the parents to care for and comfort the seriously ill child.

Families also remain a primary resource for the care of the elderly in their own homes or the homes of family members. According to a Department of Health and Human Services estimate, 2.2 million people, predominantly women, cared for 1.2 million frail elderly people in 1982; approximately one million of these caretakers were employed for some time during the care-giving

3 Staff of Representative Patricia Schroeder, Parental and Medical Leave, H.R. 4300, Briefing Paper, 99th Cong., 2d Sess. 3 (July 17, 1986).
5 Brazelton, Testimony at the Hearing on Parental Leave, H.R. 2020, before the Subcommittees on Labor Management Relations and Civil Service 1, 8 (October 17, 1985).
6 Recommendations of the Yale Bush Center Advisory Committee on Infant Care Leave 3 (November 26, 1985).
8 Statement of the American Academy of Pediatrics (February 3, 1987).
Experience. Reliance on healthier family members is often the most cost-efficient and desirable way to care for the elderly. But if no accommodation to this need is made on the job, the result will almost surely be an increasing shift of care to high-cost, professional institutions, much of it at the taxpayers' expense.

Clearly, one of the worst economic hardships that can befall a family is for a breadwinner, whether mother or father, to lose a job because of absence due to temporary disability. Workers are unlikely to need to use temporary medical leave for extended periods of time: the current average is 5.0 days per year. But when the situation arises it is devastating to family income for a parent to lose a job on top of the difficulties inherent in having a serious medical condition.

While outright workplace discrimination because of pregnancy was outlawed by Congress by enactment of the Pregnancy Discrimination Act of 1978, some employers in the United States are still reluctant to accommodate their workplaces to the reality that their employees have family responsibilities as well as employment responsibilities. Title VII of the Civil Rights Act of 1964, amended by the Pregnancy Discrimination Act, requires employers to treat pregnancy and childbirth like any other medically disabling condition: insofar as leave, paid or unpaid, is provided for other temporary disabilities, they must be provided for pregnancy and childbirth related medical conditions, also. Similarly, Title VII's prohibition of discrimination on the basis of sex requires that if leave is provided to mothers to allow them to care for their newborn infants beyond the mother's own period of disability, then child care leave for a similar period must be provided for fathers. However, there is at present no federal minimum standard providing that any leave must be provided for any temporary disability, whether related to pregnancy and childbirth or not. And there is no federal minimum standard providing that any leave must be provided for caring for a newborn, newly adopted or seriously ill child or for other seriously ill family members.

Today, only the United States and South Africa among the world's industrial countries do not have any nationally mandated maternity benefits. Several European countries, including France,
Italy, and Britain, instituted some form of national maternity insurance for working women prior to World War I; they and many other countries have maintained and expanded these policies through the economic vicissitudes of this century. Today over 75 countries have enacted laws providing for maternity benefits—including paid leave before and after childbirth and free health and medical care for pregnancy and childbirth; some provide for paid paternity leave as well. Many have explicit family policies that go far beyond maternity leave and encompass child care provision, housing, and health services to support families. Sweden provides new mothers with 38 weeks of 90% paid leave—with up to 12 more unpaid weeks; fathers are also entitled to parental leave. Italy provides 20 weeks of maternity leave at 80% of earnings. Japan provides 16 weeks at 60% of earnings. The Philippines provides 45 days at 100%. Surely the United States can afford an appropriate minimum level of unpaid leave and begin work on determining how paid leave could be provided.

From the standpoint of employers, providing job protected leave in these circumstances would not be a substantial burden. A careful review of current employer practices casts doubt on many of the concerns about burden that some employers have expressed. A 1984 study of a sample of the nation's largest 1500 companies conducted by Catalyst, an independent research firm, showed that 95% of the companies surveyed grant short-term disability leave (38.9% fully paid, 57.3% partially paid, and 3.8% unpaid); 90.2% of them continue full benefits during the period; 80.6% of them guarantee the same or a comparable job. Unpaid parental leave was provided by 51.8% of the companies; of these, 24.3% offer such leave of three months duration, while 28.2% offer such unpaid parental leave of four to six months duration. While smaller firms often permit temporary disability or parental leave, their decisions tend to be more ad hoc and tend not to be based on clearly established personnel guidelines employees can rely on.

Similarly, most employers' health insurance policies already continue health insurance coverage during employees' leaves. In fact, according to a comprehensive study published in 1984 by the

Employee Benefit Research Institute, 98.6% of health insurance plan participants in establishments of 100 or more employees have coverage that continues for some period when they become disabled.\textsuperscript{14} A Columbia University study found that 55% of employers continue health insurance coverage during "maternity leave" (apparently referring to some combination of temporary medical and parental leave).\textsuperscript{15} It thus appears that many employers will not have to alter their health insurance policies significantly, if at all, to insure continuation of health insurance coverage during periods of leave.

It is important that national policies providing for the accommodation of work and families be developed in a way that discourages discrimination against women in the workplace and that encourages the full participation of men in caring for their young children and for elderly and ill family members. Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.

Current employment practices, because of sex discrimination against men, may in some cases, make it even more difficult for men than for women to accommodate family responsibilities without suffering adverse employment consequences. In the Catalyst study cited above, 51.8% of companies surveyed reported that they give parental leave to mothers, but only 37.0% reported that they provide such leave to fathers\textsuperscript{16}—even though such a sex-based differential clearly violates existing law. And while it is a grave hardship on most families to risk the mother's losing her job because of child bearing, it is usually literally impossible for them to risk loss of the father's job in order for him to care for a new or seriously ill child.

In \textit{California Federal Savings and Loan Association v. Guerra} \textsuperscript{U.S.} (1987) the Supreme Court upheld, for the first time, state legislation which provided job protection following


\textsuperscript{15} S. Kammerman et al., \textit{Maternity Policies and Working women} 61 (1983).

maternity disability leave only and did not provide job protection following leaves for other kinds of temporary disabilities. This decision marks the first time in recent history that employers (in states with laws like California's) can argue that there is a "special burden" attached to hiring women - that they must provide something for women affected by pregnancy that they are not required to provide for other employees. While Title VII as amended by the Pregnancy Discrimination Act, continues to forbid discrimination against women in hiring, firing or other terms and conditions of employment because of pregnancy and childbearing, this additional "burden" could bring subtle pressure to bear on employers not to hire women of childbearing age or to limit their advancement. Proving discrimination in the best of circumstances is difficult for the plaintiff, who must bear not only the legal burden of proof but also the enormous practical barriers to hiring a lawyer and bringing suit. And even if she succeeds in overcoming these barriers and wins, her relief will necessarily be delayed substantially.

It is far preferable that the same job protection be provided for all workers who are temporarily disabled in order to remove any incentive to discriminate against women. And perhaps the only practical way of insuring that both men and women are able to be present to parent their newborn and newly adopted children or seriously ill children or other family members is to provide job protection for family leave for all workers.17

Additionally, it is clear that no policy of family and temporary medical leave is complete without provision for salary replacement. Without salary replacement, most workers will not be able to take advantage of the leave available except for limited time periods. While it is possible to provide job protection now for workers taking temporary medical or family leave, it is also desirable to begin at once to formulate a national scheme for full or partial salary replacement during these periods of leave as most industrial countries now provide.

Currently, over sixteen states have some form of fair employment practice laws or regulations that require employers to provide unpaid pregnancy disability leave or parental leave. Legislation also has been introduced in a number of other states in the wake of the decision in California Federal Savings and Loan v. Guerra, supra. This pending legislation takes a variety of forms.

17 In Sweden, where parental leave has been available to both parents since 1974, the percentage of men taking such leave rose from 3% to 22% in seven years. Bureau of National Affairs, Work and Family: A Changing Dynamic 174 (1986).
ranging from maternity disability leave through "maternity" leave through "parental" leave and "medical" leave and includes various combinations of these forms of leave.

Prior to the decision in California Federal Savings and Loan v. Guerra, supra, legislation had already been introduced in the 99th Congress to provide for job-protected, unpaid temporary disability and parental leave. Passage was not secured by the end of the 99th Congress. A Family and Medical Leave Act has again been introduced in both House and Senate in the 100th Congress (H.R. 925, S. 249). Hearings have been held in both the House and Senate. The Senate bill, S.249, covers employers of 15 or more employees and provides for unpaid, job protected leave of up to 26 workweeks during any 12-month period for temporary medical leave for an employee's own serious health condition (including pregnancy and childbirth). It also provides for unpaid, job protected leave of up to 18 workweeks during any 24-month period because of the birth of the employee's child, because of the placement of a foster or adoptive child with the employee, or in order for the employee to care for the employee's child who has a serious health condition. The 18 weeks of family leave may be taken on a part-time basis, rather than a full-time basis, over a period not exceeding 36 consecutive weeks. Leave may be taken intermittently, as necessary, within these time limits to care for a parent or child with a serious health condition or for treatment of the employee. When the leave is foreseeable, the employee must provide the employer with reasonable advance notice and must make a reasonable effort to schedule treatments so as to not unduly disrupt the employer's operations subject to approval of the health care provider. Other kinds of leave accruing to the employee may be substituted for any part of the time periods specified. Employers may limit the combined number of workweeks of family leave and temporary medical leave to 36 during any 12 month period. Employers must maintain coverage for employees taking these forms of leave under their group health plans, if any. On return, employees are to be placed in their former or an equivalent position.

The Act would also establish a Commission on Paid Family and Medical Leave to study methods of providing workers taking family or temporary medical leave with full or partial salary replacement and to make recommendations to Congress concerning a system of salary replacement for these kinds of leave. Enforcement responsibility would be lodged in the United States Department of Labor, with an additional private right of action in the federal courts for aggrieved employees.

A bipartisan compromise reached in the House Education and Labor Committee would amend H.R.925, which originally was almost identical to S.249, to provide coverage only for employees of employers with 50 or more employees during the first three years after enactment and those with thirty-five or more employees after
Family leave would be available to care for a parent with a serious health condition as well as for children; family leave would be guaranteed for only ten weeks in a two year period. Medical leave guarantees would be limited to fifteen weeks. Employees in the top ten percent of the workforce can be excepted from coverage if the employer shows business necessity. Other provisions are similar to those in the Senate bill.

To date, the primary objections to the legislation have been financial as well as objections, on principle, to further federal regulation of employment. The Chamber of Commerce originally charged that this legislation would cost employers $23.8 billion annually, but has reduced its estimate several times.

The General Accounting Office has concluded a study of the likely costs of this legislation. The GAO's estimate of the costs for H.R.925, as currently amended, is $188 million per year primarily for continuation of health care benefits. The GAO study concluded that there would be no additional cost for replacing workers during leave, finding that replacement costs would not exceed savings from not paying salaries and benefits to absent workers.

In short, the claimed expenses appear to be greatly exaggerated. In addition, they fail to count the cost to society from increased claims for unemployment compensation and AFDC and Medicaid benefits because of job loss due to employees' serious health conditions or urgent family responsibilities. Nor do they count the economic suffering families experience because of job loss for these reasons. But, very importantly, they fail to count the cost to society of the emotional suffering or poor adjustment of children who never had an adequate opportunity for early bonding with their parents or who are not able to have their parents with them when they are seriously ill or injured.

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18 The GAO's precise cost estimates for the different elements of the legislation are:

- Birth or adoption $90 million
- Seriously ill child $10 million
- Seriously ill parent $35 million
- Temporary medical leave $53 million

It is expected that the Commission on Paid Family and Medical Leave will focus on social insurance schemes for payment for family and medical leave rather than on direct payment by individual employers. Most Western European countries provide payment for family and medical leave through a social insurance program of some sort.

The policies proposed by this resolution will begin the important task of establishing a national policy of accommodating work and family responsibilities in this era when the work of both men and women is essential to ensure adequate economic support for their families.

Respectfully submitted,

William L. Robinson, Chairman
Section of Individual Rights and Responsibilities

February 1988
1. Summary of Recommendations.

Recommends that the American Bar Association support federal and state legislation establishing minimum requirements for reasonable, unpaid, job-protected family and medical leave for employees, consisting of: (a) temporary medical leave, to allow employees to take job-protected leave for medically necessary time for childbirth and pregnancy-related health conditions and for other temporary health conditions; (b) family leave, to allow employees to take leave on a full or part-time basis to provide care for family members other than their children (e.g., the employees' own parents or spouse) who have serious health conditions; and (c) continuation of health benefits during such periods of temporary medical and family leave.

Further recommends that such legislation should only apply to organizations which have more than a reasonable threshold number of employees.

Further recommends federal legislation mandating a study of means for providing salary replacement during all or part of such temporary medical and family leave, and also supports the establishment of federal minimum requirements for job-protected, unpaid temporary medical and family leave pending the outcome of this study.

2. Approval By Submitting Entity.

This recommendation was approved for submission to the House of Delegates by the Council of the Section of Individual Rights and Responsibilities at its meetings in Annapolis, Maryland on May 1, 1987 and in Los Angeles, California on November 14, 1987.

3. Background.

A recommendation similar to this one was submitted by the I.R.& R. Section to the House of Delegates at the August, 1987 meeting but was withdrawn prior to its consideration.

The proposed resolution is consistent with, and is a natural extension of existing ABA policy on parental leave and women's rights. In August 1987, the House of Delegates adopted a recommendation sponsored by the Young Lawyers' Division supporting the establishment of a reasonable Federal minimum requirement for job-protected parental leave to allow parents to take unpaid leave on a full or part-time basis to provide child care for newborn infants, newly-adopted children, and seriously
ill children. That recommendation also stated that such a requirement would only apply to organizations which have more than a reasonable threshold number of employees and that it would include the continuation of existing health benefits during such periods of leave.

In February 1972 the House of Delegates passed a resolution supporting constitutional equality for women and urging the extension of legal rights, privileges and responsibilities to all persons regardless of sex. The ABA has urged law schools and law firms to refrain from discriminating against women and has favored enactment of legislation to insure that employers are prohibited from discriminating against applicants or employees on the basis of sex. The ABA has supported federal and state legislation assuring that prohibitions against sex discrimination in employment would also prohibit discrimination because of pregnancy.

4. Need for Action at This Meeting.

The U.S. House of Representatives is expected to vote on the Family and Medical Leave Act of 1987 during the first few months of 1988. It is hoped that the Senate will act shortly thereafter. However, current ABA policy on parental leave is not sufficiently comprehensive to enable the Association to go on record in favor of the legislation which has been approved in committee in the U.S. House of Representatives. The support of the Association will be very influential in helping to encourage passage of the legislation in 1988.

5. Status of Legislation. (If applicable)

Federal legislation substantially encompassing the general principles set forth in this recommendation, the Family and Medical Leave Act of 1987 (H.R. 925) is currently pending before the United States House of Representatives. A similar bill (S. 249) is pending in the United States Senate. Hearings have been held in both the House and Senate.

The House of Representatives is expected to vote on the Family and Medical Leave Act of 1987 in the first few months of 1988. H.R. 925 was marked up in the full House Education and Labor Committee on November 17, 1987, at which time a substitute bill sponsored by Congressmen Clay, Roukema and Jeffords was adopted. As of December 8, 1987, the bill had been ordered reported to the full House, but the Committee report had not yet been filed. Markup was also pending before the House Committee on Post Office and Civil Service.

The similar Senate bill, S. 249, has 12 co-sponsors including Republican Senators Specter and Weicker. The Senate Labor and Human Resources Committee, Subcommittee on Children, Youth and Families held seven hearings between February and October, 1987. No further action had been scheduled in the Senate as of December 8, 1987.
6. **Financial Information.** (Estimate of funds required, if any.)

Adoption of this Recommendation will not require any expenditures by the Association.

7. **Statement of Interest** (If applicable)

The report was written by G. Diane Dodson, Special Counsel for Family Law and Policy at the Women's Legal Defense Fund in Washington, D.C., in consultation with Estelle Rogers, National Director of the Federation of Women Lawyers' Judicial Screening Panel and co-chair of the IRR Section's Rights of Women Committee.

8. **Referrals.**

A copy of this Recommendation with accompanying report has been sent to the chairpersons and staff liaisons of each of the ABA's sections and divisions. A copy has also been sent to the directors of the ABA Division of Communications, Governmental Affairs Group, Public Services Group, and Professional Services Group.

9. **Contact Person.** (Prior to meeting)

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10. **Contact Person.** (Who will present the report to the House)

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