RECENT DEVELOPMENTS

THE IMPACT OF THE FAMILY AND MEDICAL LEAVE ACT OF 1993 ON THE LEGAL PROFESSION

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I. INTRODUCTION

On February 5, 1993, President Clinton signed the Family and Medical Leave Act of 1993 into law.[1] The Act represented Clinton's first legislative action as President, and was greeted with great fanfare.[2] It was seen, at least by Democrats, as the beginning of change with the new administration.[3] The Act, which had been vetoed twice by President Bush,[4] entitles eligible employees to as much as three months unpaid leave to care for family members.[5]

This Essay examines how the Family and Medical Leave Act affects the legal profession. The position of many lawyers is unique, in that most private attorneys work in partnerships and professional corporations, which present different employment dynamics than

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1. 29 U.S.C.A. §§ 2601–2654 (1993 West Supp.) (hereinafter "the Act").

2. *See* Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law*, L.A. TIMES, Feb. 6, 1993, at A22.

3. *See* Carl P. Leubsdorf, *Clinton Signs Bill for Family Leave in Jubilant Ceremony*, DALLAS MORNING NEWS, Feb. 6, 1993, at A3.

4. *See Deadlock Breaker: Family Leave is Finally Law Under Clinton and a Democratic Congress*, TIME, Feb. 15, 1993, at 15.

5. 29 U.S.C.A. § 2612(a)(1).

the standard employer-employee relationship. The quantitative analysis contained herein is somewhat limited, because of the scarcity of demographic data on the work environment of attorneys.

II. THE FAMILY AND MEDICAL LEAVE ACT

A. *Purpose and Objectives of the Family and Medical Leave Act*

The Family and Medical Leave Act is, in part, a response to the growing number of women working outside the home.[6] A generation ago, when women pursued primarily domestic responsibilities within the home and men worked primarily outside the home as the breadwinners,[7] the Act was not as necessary as it is today.[8] When a child was born, or a family member needed constant attention, there was someone within the home to bear these attendant responsibilities.[9] As more women entered the paid workforce, however, the care of children (or elderly parents) became increasingly difficult because there was no longer someone at home all the time.

As women's roles continue to expand, so too do their professional and domestic responsibilities. "A woman's place today is in the home, in the workplace, in the military and in the White House. The family leave law recognized these new realities, and legislates a little compassion for working moms and dads."[10] The Act responds to these increased demands by allowing employees the necessary latitude to be both earners and caretakers.

The Family and Medical Leave Act strives to prevent women[11] from having to choose between the needs of their family and the

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6. 29 U.S.C.A. § 2601(a)(1) (finding that "the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly.").

7. As an example of this trend, in 1960, 28.8% of married women between 25 and 34 years of age worked outside the home. By 1991, this figure had increased to 70.1%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 387 (112th ed. 1992).

8. There has always been a need for family leave legislation, as there have always been women who work outside the home. Unfortunately, their hardships have only received attention in recent years, as the number of women in the paid work force increased dramatically. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 8 (1992) (explaining the generational differences in gender and the workforce).

The Family and Medical Leave Act also provides leave when, because of prolonged illness, an employee cannot perform her own duties. This, too, has always been necessary, but is only now being addressed.

9. *See Signing Off on a Revolution*, L.A. TIMES, Feb. 6, 1993, at B7.

10. *Id.*

11. The Family and Medical Leave Act is important for all employees, regardless of gender; it provides the same benefits to anyone who qualifies, man or woman. Wo-

demands of their career.[12] Traditionally, if an employee took leave in response to family demands, the employee risked losing her job. The decision whether or not to take that risk is difficult, not only because family and employment are both important, but because family and employment are interdependent. When a mother leaves work temporarily to care for a child and is forced to give up her job, she is less able to care for her child because she has no income to support herself and her child. Likewise, if a mother stays on the job in order to keep it, she may jeopardize her child's health or be unable to concentrate on her duties at work. Sick children, new babies, and other family members requiring intensive care need both time and money. The Family and Medical Leave Act attempts to provide for both.

The Act acknowledges the importance of work within the family, recognizing that those who care for family members perform a crucial function in our society, and their work is worthy of respect.[13] Child care is important in its contribution to our nation's future: it is to our benefit to raise healthy, well-adjusted children who will grow to become productive citizens.[14] In addition, promoting the economic stability of families promotes the stability of the national economy as a whole.[15] The Family and Medical Leave Act addresses these issues.

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men, however, have traditionally been the family caretakers, and so the Act is likely to have more impact on them. *See infra* notes 17–20 and accompanying text.

12. 29 U.S.C.A. § 2601(a)(3). Mitchell Locin, *Family Leave Signed, Hailed as Gridlock End*, CHI. TRIB., Feb. 6, 1993, at 3 (" 'In times of family crisis, people should not have to choose between their loved ones, and the jobs they need.' ") (quoting Vicki Yandle, present at the Family and Medical Leave Act signing ceremony, who lost her job when she needed to care for her cancer-stricken daughter).

13. 29 U.S.C.A. § 2601(a)(2) ("[I]t is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions.").

14. During the signing ceremony, President Clinton offered another reason why the Act is economically sound: " 'Men and women are more productive when they are sure they won't lose their jobs because they are trying to be good parents.' " *Signing Off on a Revolution*, *supra* note 9, at B7. In an effort to appeal to a wide range of citizens and interest groups, Clinton was likely trying to appease the business interests that opposed the Act. *See* Locin, *supra* note 12, at 3 (noting business groups' negative reaction to the Act). Former President George Bush vetoed the same bill twice on the ground that it would adversely impact businesses. *See supra* note 4 and accompanying text.

15. *See* 29 U.S.C.A. § 2601(b)(1) (Act seeks to "promote national interests in preserving family integrity").

Apart from considering the contribution of the family to our society and our economy, there is intrinsic value simply in recognizing and honoring the work that cares for people, and respecting the value of nurture. Unfortunately, work within the family has largely been ignored up to this point.

The Family and Medical Leave Act entitles all eligible employees, regardless of gender, to take leave to care for their immediate families.[16] The Act, however, is of much greater importance to women. Women tend to bear the burden of family and child care.[17] This usually does not change when they go to work.[18] The workplace has always been set up to accommodate traditional workers: men who have wives at home to care for the house and children. The workplace structure assumes that workers have no other obligations and can devote all their energies to work.[19] When women enter the workplace with multiple roles and responsibilities, however, the workplace has traditionally not responded with any greater flexibility. Many women are caught between the needs of a family and the demands of a career. The Family and Medical Leave Act strives to address these concerns, and so is likely to be of greater benefit to women.[20]

B. *Mechanics of the Family and Medical Leave Act*

Under the Family and Medical Leave Act, an eligible employee is entitled to twelve weeks of unpaid leave per year.[21] An employee may take the leave in four circumstances: birth of a child;[22] placement of a child with the employee for adoption or foster care;[23] care

16. 29 U.S.C.A. § 2612(a)(1).

17. 29 U.S.C.A. § 2601(a)(5); *see* Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415, 1451–52 (1991); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 985 (1993); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822–23 (1989).

18. *See* Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 56–57 (1979); Review Essay, *Putting Asunder the 1990s*, 80 CAL. L. REV. 1091, 1108–09 (1992) (explaining how continuing child care responsibilities often hinder women's career opportunities).

19. Frug, *supra* note 18, at 56 ("The labor force is organized as if workers do not have family responsibilities.").

20. It could be argued that the Act will be of growing importance to men, because as women enter the workforce in increasing numbers, married men will feel more financially comfortable taking time off to care for their dependents. *See* Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 569 (1990). The Family and Medical Leave Act would facilitate this behavior, giving men the job security necessary to take family leave. However, financial ability or disability by itself cannot explain the reasons women are more likely to care for their families than men. Women have been assigned care-giving responsibilities for centuries. These socialized roles are so entrenched that the Family and Medical Leave Act is unlikely to change them. *Cf. infra* note 56.

21. 29 U.S.C.A. § 2612(a)(1), (c).

22. 29 U.S.C.A. § 2612(a)(1)(A).

23. 29 U.S.C.A. § 2612(a)(1)(B).

of a child, a parent, or a spouse;[24] or a "serious health condition"[25] which renders the employee unable to perform his or her job.[26] Employees retain their health benefits for the duration of their leave[27] and are generally entitled to return to the job they held when the leave commenced or to return to an equivalent position.[28]

There are two limitations within the Family and Medical Leave Act which significantly reduce the number of individuals who will be eligible to take leave. The first is that the Act does not apply to worksites with fewer than fifty employees.[29] The Act also excludes part-time employees[30] from coverage, and does not include part-time employees in calculating the fifty-employee threshold.[31]

III. IMPACT ON LAWYERS

A. *Demographics of the Profession*

Figure 1 shows the distribution of lawyers[32] by employment category and gender.[33] As the Figure shows, while the vast majority of all lawyers are employed in private practice,[34] a greater proportion of male lawyers are employed in private practice than are

24. 29 U.S.C.A. § 2612(a)(1)(C). A child is defined as a "biological, adopted, or foster child, a stepchild, a legal ward or a child of a person standing in loco parentis" who is under 18 years old or is "incapable of self-care because of a mental or physical disability." 29 U.S.C.A. § 2611(12).

25. A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition" involving inpatient care or "continuing treatment by a health care provider." 29 U.S.C.A. § 2611(11).

26. 29 U.S.C.A. § 2612(a)(1)(D).

27. 29 U.S.C.A. § 2614(c)(1).

28. 29 U.S.C.A. § 2614(a)(1). However, if the individual is among the highest paid 10% of employees, she may be denied her previous position upon three conditions: (1) "such denial is necessary to prevent substantial and grievous economic injury" to the employer, (2) the employer gives notice to the employee, and (3) the employee does not immediately return from leave. 29 U.S.C.A. § 2614(b).

29. 29 U.S.C.A. §§ 2611(2)(B)(ii), 2611(4)(A)(i).

30. An employee must work more than 1250 hours a year, approximately 25 hours a week, to qualify for leave. 29 U.S.C.A. § 2611(2)(A)(ii).

31. 29 U.S.C.A. § 2611(2).

32. For the purpose of this Essay, a lawyer is any individual who is licensed to practice law in the United States and whose place of employment or residence is in the United States. Individuals who report themselves as "retired" or "inactive" are not included. BARBARA CURRAN & CLARA N. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988 235–36 (1991).

33. *Id.* at 20. See Appendix A, *infra*, for a discussion of data sources.

34. "A lawyer employed in a law firm, in whatever capacity, is considered in private practice as are lawyers in solo practice. Lawyers employed in retail legal service organizations such as Hyatt Legal Services are treated as private practitioners." CURRAN & CARSON, *supra* note 32, at 235.

female lawyers. Employment in private industry[35] makes up the second largest employment group. A similar proportion of male and female lawyers are employed in private industry. In contrast, in the three remaining job classifications (Federal Government, State Government, and Other Employers[36]), there is a higher proportional representation of female lawyers.

B. *Private Practice Lawyers*

One of the primary shortcomings of the Family and Medical Leave Act is that it treats lawyers in substantially identical working circumstances differently. This shortcoming is partially a function of the way the Act defines employee and partially a function of the different types of business organizations used to conduct private legal practice.

The Act adopts the definition of employee used in the Fair Labor Standards Act of 1938 (FLSA).[37] The FLSA defines an employee as "any individual employed by an employer."[38] Judicial interpretations of statutes using this definition of employee suggest that members of partnerships will not be considered employees for the purposes of the Family and Medical Leave Act. Courts have universally held that bona fide partners are not employees for the purposes of Title VII and the Age Discrimination in Employment Act.[39] Courts have applied this standard even when the partner in question had a very small partnership interest and had very little

35. "Private industry includes any organization engaged in providing goods or services for profit. This classification excludes law firms." *Id.*

36. The "Other Employers" category includes lawyers not employed in private industry or government.

37. 29 U.S.C. § 203.

38. 29 U.S.C. § 203(e) (1). This is the definition used by most civil rights statutes. Court decisions interpreting the definition of employee in these other statutes are therefore pertinent to interpretation of the Family and Medical Leave Act.

39. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring) ("The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates.") (footnote omitted); Auld v. Law Offices of Cooper, Beckman & Tuerk, 1992 U.S. App. LEXIS 32939, at *2 (4th Cir. 1992) ("[T]raditional partners are not 'employees' of the firm as an independent entity for the purposes of Title VII."); Hyland v. New Haven Radiology Assoc., 794 F.2d 793, 797 (2nd Cir. 1986) ("It is generally accepted that the benefits of [the Fair Labor Standards Acts of 1938, Title VII, and the Age Discrimination in Employment Act (ADEA)] do not extend to those who properly are classified as partners."); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) ("[W]e do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business.") (footnote omitted).

practicable ability to participate in the management of the partnership.[40]

The exclusion of partners as employees for purposes of the Family and Medical Leave Act has two significant impacts on lawyers in private practice. The most obvious impact is that partners will not be protected if they need to take leave. This may have less functional impact on women, however, because women represent a disproportionately small percentage of partners at larger firms.[41] The second impact of excluding partners from the definition of employee is that the group of fifty employees necessary to bring a law firm under the Act must be composed entirely of associates and support staff. This means that some mid-sized firms with over fifty employees and attorneys may not qualify under the Act.

Many private practice law firms are also organized as professional corporations. It is not clear if shareholders of professional corporations will be treated as employees for the purposes of the Family and Medical Leave Act. Courts that have addressed this issue in the context of other anti-discrimination statutes have reached inconsistent results.

The Seventh and Eleventh Circuits have held that shareholders of professional corporations are not employees for the purposes of anti-discrimination legislation.[42] In reaching this conclusion, these courts have looked at the "economic realities" of a professional corporation and concluded that "[t]he role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation . . . ."[43] The Second Circuit has taken the opposite approach and

40. In Wheeler v. Main Hurdman, 825 F.2d 257 (7th Cir. 1987), the plaintiff brought a Title VII and ADEA suit alleging that she was expelled from the Main Hurdman partnership on the basis of her age or sex. Wheeler was one of 502 partners, *id.* at 260, and had a .000058 share of the firm's capital account. *Id.* at 262. The court found Wheeler to be a partner and thus not protected by Title VII or the ADEA. *Id.* at 276–77.

41. Only 8% of women lawyers in private practice are partners, compared to 20% of men. These figures are only for those firms where there are both partners and associates (*i.e.*, this does not apply to sole practitioners or very small firms with no associates). CURRAN & CARSON, *supra* note 32, at 22.

42. *See* Fountain v. Metcalf, Zima & Co., 925 F.2d 1398 (11th Cir. 1991) (stockholder in professional corporation was not an employee for the purposes of the ADEA); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984) (three stockholders in professional corporation were not considered employees for the purposes of calculating the total number of employees in a Title VII action).

43. *Dowd & Dowd*, 736 F.2d at 1178; *see also Metcalf, Zima & Co.*, 925 F.2d at 1400–01 (when evaluating the classification of an individual as an employee or partner, the court must focus on "the actual role played by [the individual] in the operations of

treats shareholders of professional corporations as employees.[44] While acknowledging that shareholders of professional corporations have "many of the attributes of a partner," the court rejected the application of an economic realities test and held that the similarity between the two forms of organization was "no reason for ignoring a form of business organization freely chosen and established."[45] This split will likely result in inconsistent application of the Family and Medical Leave Act to shareholders of professional corporations.

Though it was difficult to quantify the impact of the Family and Medical Leave Act on private practitioners, we have developed a simple model which generally estimates how many lawyers might be eligible for benefits under the Act. Because our data sources are imprecise, these figures represent estimates accurate only within an order of magnitude. If all private practice firms were treated as partnerships, we estimate that only 10% of all private practitioners would be eligible for leave benefits. See Table A-1. This group is comprised primarily of associates working for firms with twenty-eight or more attorneys. This is in contrast to an intuitive response, in which all partners are considered employees. Under this scenario, 22% of all private practitioners would be eligible under the Act. See Table A-2. This group consists of all partners and associates in law firms with twenty-one or more attorneys.

The differential treatment of shareholders in professional corporations makes predicting the impact of the Act more difficult. We were unable to locate data indicating the proportion of partnerships to professional corporations. For purposes of comparison, we ran the model assuming that 50% of all private practice firms were organized as professional corporations. We then assumed, given the split between the circuits, that in only 50% of the cases would shareholders at these firms be considered employees. Under this scenario, 13% of private practitioners would be eligible for leave. See Table A-3. This group consists of one quarter of the partners in firms of twenty-one or more attorneys, one quarter of the associates in firms with between twenty-one and twenty-seven attorneys, and all associates in firms with twenty-eight or more attorneys.

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the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership").

44. Hyland v. New Haven Radiology Assoc., 794 F.2d 793 (2d Cir. 1986).

45. *Id.* at 798.

C. *Federal Employees*

The Family and Medical Leave Act provides for federal employees by amending their existing annual and sick leave benefits.[46] The Act entitles most federal employees to the same leave benefits enjoyed by eligible private sector employees.[47] As a consequence, most lawyers who work for the federal government will be eligible to take leave under the Act. Eligible federal employees who take leave are entitled to return to their previous job, or an equivalent position,[48] and may continue to participate in any applicable health benefit plans.[49]

D. *State Employees*

Employees of state and local government who are subject to civil service laws are eligible for leave under the same conditions as employees in the private sector.[50] Thus, while most state employees will be eligible for leave, employees of local government will be precluded from eligibility if their employing jurisdiction has fewer than fifty employees.[51]

E. *Other Lawyers*

Lawyers who work outside private practice and government will be treated under the Family and Medical Leave Act as any other employee. Their eligibility will be predicated largely on the size of the employer. These lawyers include those in private industry, law professors, lawyers working for private associations,[52] and legal aid attorneys. Some private industry and private association

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46. 5 U.S.C.A. §§ 6381–6387 (1993 West Supp.). Current provisions for federal employee annual and sick leave are codified in 5 U.S.C. § 6300.

47. The Family and Medical Leave Act generally adopts the definition of employee used in 5 U.S.C. § 6301. 5 U.S.C.A. § 6381(1)(A) (1993 West Supp.). The Act expands 5 U.S.C. § 6301 by including physicians, dentists, and nurses employed by the Veterans Health Administration and individuals who hold teaching positions as defined by 20 U.S.C. § 901. *Id.* Federal employees who are not covered by the Act include many part-time and temporary employees, employees of either house of Congress, and a number of officers appointed by the President. 5 U.S.C. § 6301.

48. 5 U.S.C.A. § 6384(a).

49. 5 U.S.C.A. § 6386.

50. *See* 29 U.S.C.A. § 2611(4)(A)(iii).

51. *See* Dumas v. Mount Vernon, 612 F.2d 974, 979–80 (5th Cir. 1980) (holding that a municipality employing fewer than 15 people was not an employer for the purposes of Title VII).

52. "Examples of private associations are trade associations, unions, special interest groups, charitable and religious organizations." CURRAN & CARSON, *supra* note 32, at 235.

attorneys, most likely general counsel, may fall under the Act's exemption for those that earn compensation within the top 10% of all employees.[53] While this does not completely exclude them from the benefits of the Act, it gives the employer, in certain circumstances, the ability to deny the employee her previous position.[54]

IV. CONCLUSION

The impact of the Family and Medical Leave Act on lawyers will be limited due to the structure and organization of the legal profession. The Act will be most meaningful to lawyers working outside private practice because the majority of these individuals work for employers with fifty or more employees. This is also due to the structure and dynamics of private practice.[55] Because most private firms are small, and because partners and some shareholders of professional corporations are not considered employees, most private practitioners will not be covered. The largest group of private practitioners that are eligible for leave under the Family and Medical Leave Act, therefore, are associates at large firms. Unfortunately, these are the women who may feel least at liberty to take it. Associates at large firms are often professionally handicapped if they take maternity leave, and many women attorneys feel they must choose between the "mommy track" and the partnership track.[56] Women can take the time to have children and spend time with them, or they can advance in their firms, but many have found that they cannot do both.[57] So while family leave may be available, and the attorney can return to her position as she left it, she may find subsequent advancement is slower or non-existent.

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53. Our law professors have assured us they will not have to worry about this provision.

54. *See supra* note 28 and accompanying text.

55. It is likely that women lawyers outside private practice may enjoy more flexible work environments, and would not be constrained to the same degree as their counterparts in large law firms. *See, e.g.*, Nancy Kramer, *Women in Law Can Be Mommies and Partners; Other Kinds of Practice*, N.Y. TIMES, Aug. 26, 1988, at A18.

56. *See, e.g.*, Jennifer A. Kingson, *Women in the Law Say Path Is Limited by "Mommy Track,"* N.Y. TIMES, Aug. 8, 1988, at A1; Tamar Lewin, *Women Say They Still Face Obstacles as Lawyers*, N.Y. TIMES, Dec. 4, 1989, at A21.

57. It is possible that the pressure on male associates not to take family leave is even greater. One lawyer told the *New York Times* that " '[I]n the legal world, to take parental leave is wimp-like . . . . The kind of toughness that is needed to be perceived as a go-getter lawyer is more harmed if a man takes parental leave than if a woman does.' " Geneva Overholser, *So Where's the Daddy Track*, N.Y. TIMES, Aug. 25, 1988, at A20. Because women are more likely to assume family responsibilities, though, men are less likely to feel torn between their jobs and their families. *See supra* notes 17–20 and accompanying text.

The fact that partners are not considered employees under the Family and Medical Leave Act, and thus not included in the fifty employee calculation, may have a detrimental effect on the subjective expectations of associates and support staff at medium-sized law firms. Not knowing that partners are not considered employees under the law, these women may expect that because there are fifty people working at their firm, they are therefore eligible for leave under the Act. The reality of their circumstances is not likely to become apparent until too late, when they urgently need leave to care for a sick family member. Support staff may be more vulnerable to this perception, because they may be less familiar with the law which would make them ineligible.

In addition, the Family and Medical Leave Act may thwart advancement among women in large firms. Accepting a partnership is already a difficult choice for some, since it carries with it the potential for significant financial loss associated with personal liability for firm obligations.[58] The unavailability of family leave may act as a further incentive for women to choose not to become partners. Unfortunately, the aggregate consequences of this decision is that women will continue to be kept out of the leadership of law firms, which may well slow the advancement of all women.

58. *See, e.g.*, Alison L. Cowan, *The New Letdown: Making Partner*, N.Y. TIMES, Apr. 1, 1992, at D1.

APPENDIX A

Our primary data source for this article is the *Supplement to the Lawyer Statistical Report: The U.S. Legal Profession in 1988*, published by the American Bar Foundation.[59] This report presents the most detailed information about the United States legal profession we could find. We specifically chose not to use United States Census data because they were not sufficiently detailed. In particular, the Census Bureau collects data about business enterprises providing "Legal Services." This is defined as including "attorneys, counselors at law, law offices, lawyers, legal aid services, legal services, patent solicitors offices and referees in bankruptcy."[60] In addition, Census data do not provide information about partner-to-associate ratios and participation in particular job categories by gender.

To determine an estimate of the impact of the Family and Medical Leave Act (FMLA) on private practitioners, we developed a very simple model using the American Bar Foundation data. Because eligibility for leave is predicated largely on the employer's size, the first step in developing our model was ascertaining a ratio of attorney-to-support staff within private practice firms. The only study we were able to find on the subject indicated an average attorney-to-support staff ratio of 1 to 1.36.[61] Using this attorney-to-support staff ratio and American Bar Foundation associate-to-partner ratios,[62] we were able to project the number of individuals and the number of FMLA "employees" who worked at firms using the number of attorneys in the firm. As Figure A-1 shows, we estimate that a firm with twenty-one attorneys will have fifty individuals working at the firm. Figure A-1 also shows our estimate that firms with twenty-eight attorneys will have more than fifty employees as defined by the Act (*i.e.* non-partner employees).

Tables A-1, A-2, and A-3 estimate the impact of the Family and Medical Leave Act on attorneys, both in terms of individual firms and private practice in general. The following calculations were used:

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59. CURRAN & CARSON, *supra* note 31.

60. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT & BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 390 (1987).

61. Gerry S. Malone & Joseph B. Altonji, *Administrative Staff, in The Back Office*, AM. LAW., Dec. 1991, at supp. 22. The survey was based on firms with over 100 lawyers and thus may not be applicable to smaller firms. *Id.* at 10. The authors observed, however, no economies of scale as offices got larger. *Id.* at 20. While better data would yield a more precise estimate, such data do not appear to be available.

62. CURRAN & CARSON, *supra* note 32, at 13.

Firm Size: We have used the same firm size groupings used in the *Lawyer Statistical Report*.[63] When a grouping includes more than one firm size, we calculated the impact on individual firms using the largest firm size in that grouping. We used 150 lawyers to calculate the impact on individual firms with over 100 lawyers.

Associate/Partner Ratio: This is the associate-to-partner ratio of firms with one or more associate.[64] Because not all firms have associates, applying this ratio to all firms would overstate the total number of associates and understate the total number of partners.

Partners: Firm Size divided by the Associate/Partner Ratio.

People in Firm: Firm Size plus support staff using a 1.36 attorney-to-support staff ratio.[65]

FMLA Employees: People in Firm less those individuals who are not considered employees for the purpose of the Family and Medical Leave Act.

Total Lawyers: This information is taken directly from the *Lawyer Statistical Report*.[66]

Total Partners & Total Associates: Division of Total Lawyers using Associate/Partner Ratios by Firm Size.

Eligible FMLA Lawyers: Lawyers who would be eligible for leave under the Family and Medical Leave Act.

Table A-1 estimates the number of lawyers who will be eligible for leave if all private practice firms are treated as partnerships. Table A-2 shows the number of lawyers who would be eligible for leave if the distinction between partners and associates was ignored by the courts. Table A-3 is an attempt to estimate the number of lawyers who will be eligible for leave by assuming that 50% of the private practice attorneys are employed by professional corporations and that in only 50% of those cases would shareholders at these firms be considered employees.

63. *Id.* at 21.

64. *Id.* at 13.

65. The limitations of the attorney-to-support staff ratio are discussed in Malone & Altonji, *supra* note 61.

66. CURRAN & CARSON, *supra* note 32, at 21.

TABLE A-1
IMPACT OF THE FAMILY AND MEDICAL LEAVE ACT IF ALL
PRIVATE PRACTICE FIRMS ARE TREATED AS PARTNERSHIPS

	IMPACT ON INDIVIDUAL FIRMS				IMPACT ON PROFESSION			
Firm Size	Associate/ Partner Ratio	Partners	People In Firm	FMLA Employees	Total Lawyers	Total Partners	Total Associates	Eligible FMLA Lawyers
1 Lawyers	n.a.	1	2	1	240,100	240,100	n.a.	0
2 Lawyers	1 / 1	1	5	4	34,700	17,400	17,400	0
3 Lawyers	1 / 2	2	7	5	23,900	15,900	8,000	0
4 Lawyers	1 / 3	3	9	6	17,700	13,300	4,400	0
5 Lawyers	2 / 3	3	12	9	13,600	8,200	5,400	0
6-10 Lawyers	1 / 2	7	24	17	40,600	27,100	13,500	0
11-20 Lawyers	3 / 4	11	47	36	36,900	21,100	15,800	0
21-50 Lawyers	4 / 5	28	118	90	36,600	20,300	16,300	12,000
51-100 Lawyers	4 / 5	56	236	180	26,300	14,600	11,700	11,700
150 Lawyers	1.1 / 1	71	354	283	49,600	23,600	26,000	26,000
TOTAL					520,000	401,600	118,500	49,700
PERCENT OF TOTAL						77%	23%	10%

TABLE A-2

IMPACT OF THE FAMILY AND MEDICAL LEAVE ACT IF ALL PARTNERS IN PRIVATE PRACTICE FIRMS WERE TO BE TREATED AS EMPLOYEES

	IMPACT ON INDIVIDUAL FIRMS				IMPACT ON PROFESSION			
Firm Size	Associate/ Partner Ratio	Partners	People In Firm	FMLA Employees	Total Lawyers	Total Partners	Total Associates	Eligible FMLA Lawyers
1 Lawyers	n.a.	1	2	2	240,100	240,100	n.a.	0
2 Lawyers	1 / 1	1	5	5	34,700	17,400	17,400	0
3 Lawyers	1 / 2	2	7	7	23,900	15,900	8,000	0
4 Lawyers	1 / 3	3	9	9	17,700	13,300	4,400	0
5 Lawyers	2 / 3	3	12	12	13,600	8,200	5,400	0
6-10 Lawyers	1 / 2	7	24	24	40,600	27,100	13,500	0
11-20 Lawyers	3 / 4	11	47	47	36,900	21,100	15,800	0
21-50 Lawyers	4 / 5	28	118	118	36,600	20,300	16,300	36,600
51-100 Lawyers	4 / 5	56	236	236	26,300	14,600	11,700	26,300
150 Lawyers	1.1 / 1	71	354	354	49,600	23,600	26,000	49,600
TOTAL					520,000	401,600	118,500	112,500
PERCENT OF TOTAL						77%	23%	22%

TABLE A-3

IMPACT OF THE FAMILY AND MEDICAL LEAVE ACT IF 25% OF STOCKHOLDERS IN PROFESSIONAL CORPORATIONS ARE TREATED AS EMPLOYEES

	IMPACT ON INDIVIDUAL FIRMS				IMPACT ON PROFESSION			
Firm Size	Associate/ Partner Ratio	Partners	People In Firm	FMLA Employees	Total Lawyers	Total Partners	Total Associates	Eligible FMLA Lawyers
1 Lawyers	n.a.				240,100	240,100	n.a.	0
2 Lawyers	1 / 1				34,700	17,400	17,400	0
3 Lawyers	1 / 2				23,900	15,900	8,000	0
4 Lawyers	1 / 3				17,700	13,300	4,400	0
5 Lawyers	2 / 3	(The impact on an individual firm			13,600	8,200	5,400	0
6-10 Lawyers	1 / 2	will differ depending on the form			40,600	27,100	13,500	0
11-20 Lawyers	3 / 4	of business association used).			36,900	21,100	15,800	0
21-50 Lawyers	4 / 5				36,600	20,300	16,300	18,115
51-100 Lawyers	4 / 5				26,300	14,600	11,700	15,350
150 Lawyers	1.1 / 1				49,600	23,600	26,000	31,900
TOTAL					520,000	401,600	118,500	65,365
PERCENT OF TOTAL						77%	23%	13%

FIGURE 1

Employment of Active Lawyers by Job Category

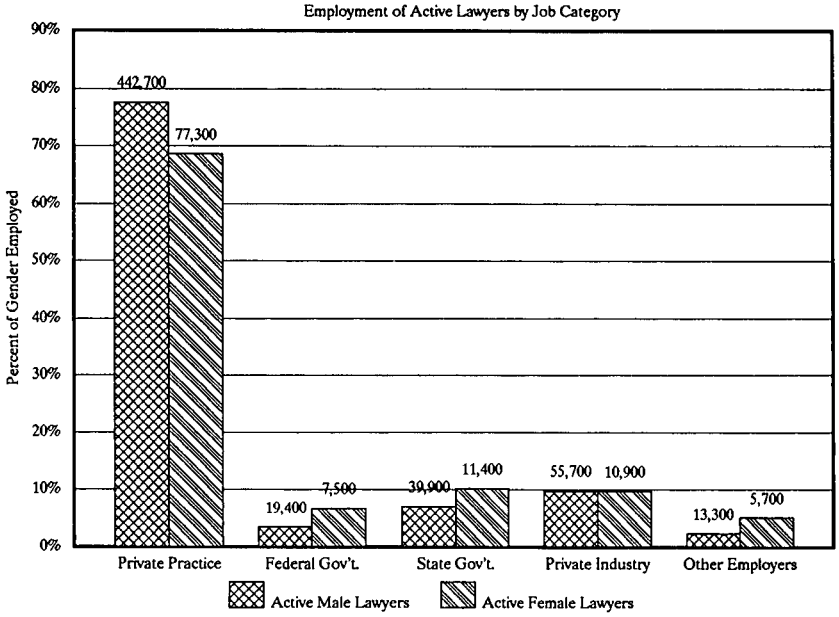

FIGURE A–1

Family and Medical Leave Act "Employees" by Lawyers in Firm