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DOES PAID FAMILY LEAVE REALLY PAY FOR SMALL BUSINESSES IN CALIFORNIA?

Guissu Raafat*

I. INTRODUCTION

Bill,¹ a small business owner in Silicon Valley (Valley), has ten employees working for his start-up company. He owns and manages a small enterprise application company that is attempting to compete with large companies in the Valley for software contracts. Initially, Bill was reluctant to establish his company in Northern California due to high overhead costs. Eventually, the Valley's reputation for attracting the most innovative minds in the technology industry persuaded Bill to establish his new business in San Jose.

Last week, Bill's top sales account executive (SAE), Jim, informed Bill that he needs to take a leave of absence to care for his sick mother in San Diego. Bill is aware that under California's Paid Family Leave Program (PFL),² Jim is entitled to six weeks of paid benefits to care for a sick family member.³

Bill now finds himself in a difficult situation. He is losing his top SAE for a month and a half and has little time to find a replacement. Jim's position as a SAE includes responsibilities that a temporary hire cannot perform. If Bill were to find and train a replacement, he would prefer to hire

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1. The names in the following hypothetical situation, "Bill" and "Jim," are fictional and meant to represent individuals involved in common situations that may arise under California's Paid Family Leave Act.

2. CAL. UNEMP. INS. CODE §§ 3300-3306 (Deering 2007).

3. *Id.* § 3301(d).

that individual full time. This will pose a problem when Jim returns, however, because Bill cannot afford to employ them both. On the one hand, Bill knows that because he does not employ fifty or more employees, he may not be obligated to reinstate Jim after his paid leave.⁴ On the other hand, Bill fears that Jim may sue him if he does not offer Jim his job back.⁵

Over the past few decades, the demand for leave to address family needs has become increasingly urgent.⁶ Three key factors have contributed to the emergent need for family leave: the growing number of female labor force participation, the growing demand for elder care, and the increasing number of men who participate in family care giving.⁷

In 1993, Congress passed the Federal Family and Medical Leave Act (FMLA)⁸ that allows unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition.⁹ In response, California amended its existing family leave statute, the California Family Rights Act (CFRA),¹⁰ to reconcile the state law with the employee-favorable aspects of the FMLA.¹¹ As a result, California employers are subject to federal and state laws and regulations that dictate the terms of family and medical leave for their employees.

FMLA and CFRA are similar in their coverage of unpaid family and medical leave and limited job protection for

4. See discussion *infra* Parts II.A-B.

5. See discussion *infra* Part III.

6. Eileen Appelbaum & Ruth Milkman, *Paid Family Leave in California: New Research Findings*, in UNIV. CAL. INST. FOR LABOR & EMP., THE STATE OF CALIFORNIA LABOR, 2004, at 45, 46 (2004), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1038&context=ile>.

7. *Id.*

8. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2000); see also *infra* Part II.A.1.

9. 29 C.F.R. § 825.101(a) (2006).

10. Moore-Brown-Roberti Family Rights Act of 1993 [CFRA], CAL. GOV'T CODE § 12945.1 (Deering 2006).

11. 29 C.F.R. § 825.100; see also A.B. 1460, 1993 Leg., Reg. Sess. (Cal. 1993) ("This bill would change the term 'family care leave' to 'family care and medical leave,' and would, in addition to other types of leave authorized under existing law, entitle an eligible employee to take leave because of a serious health condition of the employee that makes the employee unable to perform the functions of his or her position, other than leave taken for disability on account of pregnancy, childbirth, or related medical conditions.").

eligible employees.¹² An employer is obligated to comply with these statutes if it employs at least fifty employees within a seventy-five mile radius of its worksite.¹³

Despite FMLA and CFRA family and medical leave benefits, employees often cannot afford to take advantage of the leave because it is unpaid.¹⁴ This has led some states to consider paid family leave programs.¹⁵ In 2002, California pioneered paid family leave legislation by passing the Paid Family Leave Act (PFL).¹⁶ Unlike FMLA and CFRA, PFL is applicable to all California employers regardless of the number of employees.¹⁷ Also, unlike FMLA and CFRA, PFL provides pay to employees during their leave, but it does not offer job protection.¹⁸ Additionally, unlike the unpaid family leave programs, PFL is entirely funded through employee contributions taken from payroll deductions.¹⁹

This comment addresses the inconsistencies between federal and state unpaid leave programs and California's paid family leave program. Although these programs have not resulted in litigation, the goal is to obviate potential unnecessary and costly legal challenges against small businesses. Both small business employers and their employees will benefit from clarification of these provisions so they can avoid needless lawsuits.

Part II of this comment will provide a background of federal and state unpaid family leave statutes and California's Paid Family Leave Act.²⁰ Part III will explain how the gaps in coverage between the paid and unpaid leave

12. See discussion *infra* Part II.A.

13. 29 U.S.C. §§ 2611(2)(B), (4)(A)(i); CAL. GOV'T CODE § 12945.2(b).

14. See Appelbaum & Milkman, *supra* note 6, at 47-48.

15. See NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE LEGISLATIVE ROUND-UP: STATE PAID LEAVE INITIATIVES IN 2004 AND PRIOR STATE LEGISLATURES: MAKING FAMILY LEAVE MORE AFFORDABLE 3-4, <http://npwf.convio.net/site/DocServer/StateRoundUp2004.pdf?docID=1054> (last visited Mar. 12, 2007) (listing developments in paid leave campaigns in various state legislatures around the country in 2004).

16. CAL. UNEMP. INS. CODE §§ 3300-3306 (Deering 2007).

17. See *id.*

18. See *id.* § 3301; Employment Dev. Dep't, Paid Family Leave Insurance: Frequently Asked Questions, <http://www.edd.ca.gov/direp/pflfaq2tx.htm> (last visited Mar. 12, 2007).

19. CAL. UNEMP. INS. CODE § 3300(g); Editorial, *Time for Families*, S.F. CHRON., Sept. 9, 2002, at A24 ("Employees, rather than employers, will fund the state program. Most California workers will pay an additional \$27 each year.").

20. See discussion *infra* Part II.

programs present potential legal problems for small businesses.²¹ Part IV will analyze California's statutory scheme with respect to unpaid and paid family leave programs.²² Part IV will also discuss how the statutory scheme could lead to grounds for wrongful termination actions based on violations of public policy if an employee is terminated for taking paid family leave.²³ Finally, Part V will propose three amendments to California's Paid Family Leave Act to remedy the inconsistencies between the PFL and the preexisting state and federal unpaid leave statutes.²⁴

II. BACKGROUND

A. *Unpaid Family Leave Programs*

Prior to the enactment of FMLA in 1993, the United States did not have national family and medical leave legislation.²⁵ Before 1993, state legislation, collective bargaining agreements, and individual employer plans governed family leave laws.²⁶

1. *Federal Family and Medical Leave Act*

During the Clinton administration, congressional findings revealed a need to adjust employee leave-rights due to the societal shift in the composition of the workforce and a significant increase in the number of single-parent households or two-parent households where both parents worked.²⁷ The lack of employment policies that accommodated working parents to take leave often forced individuals to choose between job security and parenting.²⁸ This had an adverse effect on the working lives of women, especially because they are generally the primary family caregivers.²⁹ As a result of these findings, Congress

21. See discussion *infra* Part III.

22. See discussion *infra* Parts IV.A-B.

23. See discussion *infra* Parts IV.C-D.

24. See discussion *infra* Part V.

25. Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, 124 MONTHLY LAB. REV. 17 (2001), available at <http://www.bls.gov/opub/mlr/2001/09/art2full.pdf>.

26. See *id.*

27. See 29 U.S.C. § 2601(a)(1) (2000).

28. See *id.* § 2601(a)(3).

29. See *id.* § 2601(a)(5).

predicated the enactment of the FMLA on two fundamental concerns: "the needs of the American workforce, and the development of high-performance organizations."³⁰ Finding a direct correlation between stability in the family and productivity in the workplace, Congress intended and expected FMLA to benefit both employers and employees.³¹ To that effect, the FMLA provides eligible employees with reasonable *unpaid* leave for certain specified reasons.³² On February 5, 1993, President Clinton signed FMLA into law.³³

In order to benefit from FMLA, employers and employees must satisfy certain qualifications. The FMLA eligibility for an employee requires at least one year of employment with the current employer and at least 1250 hours with such employer during the previous year.³⁴ An employer is covered by FMLA if it employs fifty or more employees within a seventy-five mile radius of the worksite.³⁵

The FMLA entitles eligible employees of a covered employer "to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it."³⁶ Eligible employees are entitled to a total of twelve work weeks of leave in any twelve month period for one or more of the following reasons:

30. 29 C.F.R. § 825.101(b) (2006).

31. *Id.* § 825.101(c).

32. *See* 29 U.S.C. § 2601(b)(2) (2006). The intent of FMLA is "to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 C.F.R. § 825.101(a).

33. Senator Hillary Rodham Clinton, Children & Families, <http://clinton.senate.gov/issues/children/> (last visited Apr. 2, 2007). It is notable that this legislation had been vetoed twice by President George H.W. Bush because of potential burden on employers. *See* Charles L. Baum, *The Family and Medical Leave Act of 1993: Ten Years of Experience, Has Family Leave Legislation Increased Leave-Taking?*, 15 WASH. U. J.L. & POL'Y 93, 94 (2004).

In his veto message, Mr. Bush said, "I want to strongly reiterate that I have always supported employer policies to give time off for a child's birth or adoption or for family illness and believe it is important that employers offer these benefits. I object however, to the Federal Government mandating leave policies for American's employers and work force."

Michael Wines, *Bush Vetoes Bill Making Employers Give Family Leave*, N.Y. TIMES, Sept. 23, 1992, at A1.

34. 29 U.S.C. §§ 2611(2)(A)(i)-(ii).

35. *See id.* § 2611(2)(B)(ii).

36. 29 U.S.C. §§ 2612(c)-(b); 29 C.F.R. § 825.100(a).

1. birth of a son or daughter of the employee and in order to care for such son or daughter;
2. placement of a son or daughter with the employee for adoption or foster care;
3. to care for the spouse,³⁷ son, daughter, or parent of the employee if such spouse, son, daughter, or parent has a serious health condition;³⁸ or
4. serious health conditions that make the employee unable to perform the functions of the position of such employee.³⁹

Additionally, if both parents work for the same employer, the employer is only required to grant a total of twelve weeks of leave under FMLA between the two parents for the birth, adoption, or placement of a child.⁴⁰

Furthermore, where an employee's need for leave is foreseeable, the employee must provide the employer with at least thirty days notice.⁴¹ If thirty days notice is not practicable because, for example, the employee lacks knowledge of when leave will be required, or a change in circumstances occurs, or medical emergency arises, then notice must be given as soon as possible.⁴² When planning medical treatment, an employee must consult with the employer and make reasonable efforts to schedule the leave so as not to unduly disrupt the employer's operations.⁴³ Moreover, an employee cannot take an intermittent leave or a reduced leave schedule⁴⁴ unless the employee and the

37. 29 C.F.R. § 825.113(a) (defining "spouse" as "a husband or wife as defined or recognized under State law for the purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized").

38. 29 U.S.C. §§ 2611(11)(A)-(B) (defining "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care in a hospital, hospice or residential medical care facility . . . [or] continuing treatment by health care provider").

39. *Id.* §§ 2612(a)(1)(A)-(D).

40. *Id.* § 2612(f).

41. *Id.* § 2612(e).

42. *Id.*; 29 C.F.R. § 825.302(b) ("As soon as practicable" means as soon as possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, 'as soon as practicable' ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.").

43. 29 C.F.R. § 825.302(e).

44. 29 U.S.C. § 2611(9) (defining "reduced leave schedule" as "a leave

employer otherwise agree or when it is medically necessary.⁴⁵

Also, for the duration of the leave, employees are entitled to maintenance of their employment health benefits including coverage of any group health plan provided by the employer.⁴⁶ In certain circumstances, however, "an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from [the] employee if the employee fails to return to work after the . . . FMLA leave . . . has been exhausted or expires."⁴⁷ An employer is not entitled to reimbursement of the premium if the reason the employee does not return to work is due to the continuation of the serious health condition or other circumstances beyond the employee's control.⁴⁸

An eligible employee who takes leave under FMLA is entitled to reinstatement of the position held before the leave commenced or to an equivalent position with equivalent employment benefits, pay and other terms and conditions.⁴⁹ An employee's right to reinstatement exists even if the employee is replaced or his or her position is restructured to accommodate his or her absence.⁵⁰ This general rule, however, is subject to two exceptions. First, an employer may deny reinstatement to FMLA eligible "key employees"⁵¹ if such denial is "necessary to prevent substantial grievous economic injury to the operations of the employer."⁵² Under this exception, an employer must notify the employee of its intent to refuse reinstatement at the time the employer determines that refusal is necessary.⁵³ Prior to denying reinstatement, however, the employer must also give the employee a reasonable opportunity to return to work.⁵⁴

Second, employees are not entitled to reinstatement if

schedule that reduces the usual number of hours per week, or hours per workday, of an employee").

45. *Id.* § 2612(b)(1).

46. *Id.* § 2614(c)(1).

47. 29 C.F.R. § 825.213(a).

48. *Id.* §§ 825.213(a)(1)-(2).

49. 29 U.S.C. §§ 2614(a)(1)(A)-(B).

50. 29 C.F.R. § 825.214(a).

51. *Id.* § 825.217(a) (defining a "key employee" as "a salaried FMLA-eligible employee who is among the highest paid ten percent of all the employees employed by the employer within 75 miles of the employee's worksite").

52. *Id.* § 825.216(c).

53. *Id.* §§ 825.219(a)-(b).

54. *Id.* § 825.219(b).

their job is eliminated through downsizing or reorganization.⁵⁵ In this circumstance, the employer has the burden of proving that an employee would have been laid off during the FMLA leave period despite his or her leave.⁵⁶

2. California Family Rights Act

The California Family Rights Act (CFRA) is the California counterpart to FMLA. Although CFRA is similar to FMLA in scope and coverage, there are some differences.⁵⁷ One notable difference is the standard covering reinstatement.⁵⁸ Under FMLA, an employee who takes leave under the act is entitled to the position held at the time of the leave or an "equivalent" position.⁵⁹ By contrast, under CFRA, an employee is entitled to the same position held before leave or a "comparable position."⁶⁰ While seemingly insignificant, critics of CFRA's reinstatement standard argue it undermines the purpose of family leave laws.⁶¹

B. Paid Family Leave Act

On September 23, 2002, California Governor Gray Davis

55. See 29 U.S.C. § 2614(a)(3).

56. C.F.R. § 825.216(a)(1).

57. See e.g., Amy Olsen, Comment, *Family Leave Legislation: Ensuring Both Job Security and Family Values*, 35 SANTA CLARA L. REV. 983, 996 (1995) (noting the difference in reinstatement provisions between FMLA and CFRA). For a more complete discussion of the differences between CFRA and FMLA, see Pauline T. Kim, *The Family and Medical Leave Act of 1993: Ten Years of Experience*, 15 WASH. U. J.L. & POL'Y (2004).

58. Olsen, *supra* note 57, at 994.

59. 29 U.S.C. §§ 2614(a)(1)(A)-(B).

60. CAL. GOV'T CODE § 12945.2(a).

61. Olsen, *supra* note 57, at 1011 ("Mandatory reinstatement provides the linchpin of family leave laws because it promotes family well-being without jeopardizing job security. Without a guarantee of reinstatement to the same position an employee had when she took leave, objectives of family leave laws cannot be achieved."). Although PFL is funded through employee contributions, critics of the legislation express concern that the cost of maintaining the SDI fund may eventually shift to business owners. For a more detailed discussion of this issue, see Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Act Legislation*, 12 U. MIAMI BUS. L. REV. 77, 94 (2004) ("As the law is currently written, the SDI fund is maintained solely through employee contribution, and requires no additional money from employers. Despite this clear language, however, businesses have expressed concern over the possibility of the costs eventually being shifted to them if the amounts generated by the employees prove not to be enough to maintain the SDI.").

signed Senate Bill 1661,⁶² also known as the Paid Family Leave Act (PFL), into law.⁶³ This made California the first state in the nation to create a comprehensive paid family leave program.⁶⁴ The Act became operative on January 1, 2004 and eligible employees could collect benefits under the program beginning July 1, 2004.⁶⁵

PFL is a component of the State Disability Insurance Program (SDI) and is fully funded through employee contributions.⁶⁶ The preexisting SDI program limited payment of disability compensation to individuals whose unemployment and lost wages resulted from their own sickness or injury.⁶⁷ PFL expands coverage of the SDI fund to include disability compensation for workers who suffer wage loss due to the need to provide care for a seriously ill family member or to bond with a new child.⁶⁸

The Employment Development Department (EDD) administers the state's disability fund that pays for initial and ongoing administrative costs associated with PFL.⁶⁹ In order to cover the costs of the added benefits under the PFL, the law required an increase of 0.08% in employee contributions to the SDI for the 2004 and 2005 calendar year beginning January 1, 2004.⁷⁰ In 2005, the SDI contribution rate was 1.08%⁷¹ and the SDI taxable wage limit was

62. S.B. 1661, 2002 Leg., Reg. Sess. (Cal. 2002).

63. CAL. UNEMP. INS. CODE §§ 3300-3306 (Deering 2007). PFL provides families with temporary disability insurance for an employee who "takes time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption." *Id.* § 3301(a)(1).

64. Cal. Paid Family Leave, 10 Facts About the Law, <http://www.paidfamilyleave.org/law.html> (last visited Mar. 12, 2007).

65. CAL. UNEMP. INS. CODE § 3300 note (original version at S.B. 901, 2001 Leg., Reg. Sess. § 7).

66. CAL. UNEMP. INS. CODE §§ 3300(g), 3301(a)(1).

67. *Id.* § 3300(e).

68. *Id.* § 3301(a)(1).

69. *Id.* § 3300(g).

70. *Id.* § 984(a)(2)(B). *But see id.* § 984(a)(3) ("The rate of worker contributions shall not exceed 1.5 percent or be less than 0.1 percent.").

71. CAL. CPA, FAST TAX FACTS 2005, at 20 (2005), available at <http://www.calcpa.org/NR/rdonlyres/1CD39803-8CF9-4519-903D-612A409A0414/0/05FTF.pdf> (stating that the contribution rate refers to the percentage of employee wages deducted as a contribution to the SDI fund); see also Cal. Employment Dev. Dep't, Paid Family Leave Insurance, Frequently Asked Questions, <http://www.edd.ca.gov/direp/pflfaq1.asp> (last visited May 22, 2007)).

\$79,418.⁷²

As of 2005, PFL covered nearly thirteen million workers in California.⁷³ Within the first year of PFL benefits becoming available, the EDD received 176,085 leave claims and paid 137,772 claims.⁷⁴ Of the claims received, approximately eighty-eight percent were bonding claims, of which eighty-three percent were filed by women.⁷⁵ The remainder of the filed claims were care claims; seventy percent of which were filed by women primarily providing care to a spouse, child, parent, or registered domestic partner.⁷⁶

The purpose of the PFL legislation is to provide temporary disability insurance benefits to employees so that they can care for their family members.⁷⁷ The California legislature intended to supplement FMLA and CFRA unpaid leave with the limited coverage of state disability insurance to provide employees the opportunity to take family care leave and receive some form of wage replacement.⁷⁸

The PFL program differs significantly from FMLA and CFRA. For example, under PFL:⁷⁹

1. within any twelve month period, no more than six weeks of family temporary disability insurance benefits shall be paid;⁸⁰

72. See Cal. Employment Dev. Dep't, Paid Family Leave Insurance, Paid Family Leave Year in Review July 1, 2004 - June 30, 2005, www.edd.ca.gov/direp/pflanniv.asp (last visited May 22, 2007). Wages above this amount are not taxed for SDI. See Cal. Employment Dev. Dep't, *supra* note 71.

73. *Id.*

74. *Id.* In 2005, average weekly benefits were \$409 per week, with leaves averaging almost five weeks. *Id.*

75. See *id.* (reporting that, of the 176,085 total claims received between July 1, 2004 and June 30, 2005, 155,483 were bonding claims; eighty-three percent were filed by females and seventeen percent were filed by males).

76. See *id.* (reporting that, of the 176,085 claims received between July 1, 2004 and June 30, 2005, 20,602 were care claims; seventy percent were filed by females and thirty percent were filed by males; 36.3% for the care of a spouse, 22.1% for the care of a child, 21.6% for the care of a parent, 1.3% for the care of a domestic partner, and 18.7% for the care of others).

77. See CAL. UNEMP. INS. CODE § 3301(a)(1) (Deering 2007).

78. See *id.* §§ 3300(d)-(g).

79. This is not an exhaustive list of the differences between PFL, FMLA, and CFRA. It is merely meant to point out the key differences in coverage between the three leave programs.

80. CAL. UNEMP. INS. CODE § 3301(d). Eligible employees may receive up to six weeks of partially paid leave during any twelve month period. CAL. UNEMP.

2. all private sector employers are covered regardless of the size of the organization⁸¹ and there is no set number of hours required to be worked by employees;⁸²
3. there is no job reinstatement provision;⁸³
4. eligible employees are subject to a one week waiting period during which no benefits are paid;⁸⁴ and
5. domestic partners are explicitly covered by PFL.⁸⁵

PFL covers eligible employees who contribute to the SDI fund who have earned at least \$300 within a twelve month period.⁸⁶

C. California's Wrongful Termination Laws for Violations of Public Policy

As a general rule, almost all employment relationships in California are "at will," meaning an employer may discharge an employee at any time, for any reason or no reason at all.⁸⁷

INS. CODE § 3301(d); Appelbaum & Milkman, *supra* note 6, at 48-49. They are entitled up to fifty-five percent of their last wages with a minimum of \$50 to a maximum of \$882 per week. Cal. Employment Dev. Dep't, Family Paid Leave Insurance, Frequently Asked Questions: Benefits, <http://www.edd.ca.gov/direp/pflfaq1.asp#BENEFITS> (last visited May 22, 2007).

81. Appelbaum & Milkman, *supra* note 6, at 48. In contrast, FMLA and CFRA apply to employers with fifty or more employees. 29 U.S.C. § 2611 (2000); CAL. GOV'T CODE § 12945.2(b) (Deering 2006).

82. Employment Bulletin from Cal. Dep't of Fair Employment & Hous. on "California Employment Development (EDD) Family Temporary Disability Insurance Program (Paid Family Leave Insurance Program)" (Dec. 31, 2003), at <http://www.dfeh.ca.gov/news/bulletin-paid%20family%20leave%2012-31-03%20web.htm> [hereinafter Employment Bulletin].

83. *Id.* (although an employer is not required to hold a job for an employee under PFL, an employee taking CFRA leave concurrent with PFL leave has reinstatement rights under CFRA and FMLA); *see also infra* Part III.

84. CAL. UNEMP. INS. CODE § 3303(b).

85. *Id.* § 3301(a)(1) (providing that family temporary disability insurance shall provide wage replacement for workers taking time off to care for a seriously ill domestic partner); *see also id.* § 3302 (defining "family care leave" as leave for the birth of a child of the employee or the employee's domestic partner, the adoption or foster care placement of a child with an employee or domestic partner, or the serious health condition of a child of the employee, spouse or domestic partner).

86. Appelbaum & Milkman, *supra* note 6, at 48 & n.5.

87. CAL. LAB. CODE § 2922 (Deering 2006); *see also* Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 391-93 (2006) (noting the presumption of at-will employment codified in section 2922 of the California Labor Code).

California recognizes a public policy limitation to the presumption that employment is at will.⁸⁸ A termination violates public policy when an employer's actions are "injurious to the public or against the public good."⁸⁹

In order for an employee to establish a *prima facie* claim of wrongful termination in violation of public policy, he or she must show that:

1. an employer-employee relationship existed;
2. a sufficient violation of public policy occurred;
3. the termination was the legal cause of the employee's damage; and
4. the nature and extent of the employee's damages.⁹⁰

Additionally, an employee must exhaust any internal grievance procedures extended by the employer.⁹¹

The public policy violated by the termination must inure to the public at large, rather than merely serving the personal or proprietary interests of the employee or employer.⁹² This rationale primarily focuses on the relevant laws designed to protect the public at large⁹³ as opposed to a private dispute between the employer and employee.⁹⁴ In wrongful termination cases, courts look to whether the company's actions affect the general public.⁹⁵ The California Supreme

88. *Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167 (1980); *Petermann v. Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188 (Ct. App. 1959).

89. *Petermann*, 174 Cal. App. 2d at 188 (quoting *Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n*, 41 Cal. 2d 567, 575 (1953)).

90. *See, e.g.*, *Holmes v. Gen. Dynamics Corp.*, 17 Cal. App. 4th 1318, 1426 n.8 (Ct. App. 1993).

91. *Palmer v. Regents of the Univ. of Cal.*, 107 Cal. App. 4th 899, 903-06 (Ct. App. 2003) (holding that an employee must exhaust internal grievance procedures prior to filing a tort action for discharge in violation of public policy in order to allow the employer an opportunity to remedy situation).

92. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 669-70 (1988).

93. *See Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1095 (1992) (noting that employers are not impeded by the public policy exception when they operate within the bounds of fundamental policies as expressed in constitutions and statutes), *overruled on other grounds by Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66 (1998).

94. *See, e.g.*, *Hunter v. Up-Right Inc.*, 6 Cal. 4th 1174, 1186 (1993) (noting that a claim of fraud does not fall within the public policy exception because it is essentially a private dispute which only affects the individual interests of the employer and employee, rather than an action to vindicate a broader public interest).

95. *See, e.g.*, *Collier v. Super. Ct.*, 228 Cal. App. 3d 1117, 1126 (Ct. App. 1991) ("The wrongdoing alleged in this case, which Collier believed violated

Court has found a violation of public policy to exist when the wrongful termination has been a result of sex discrimination,⁹⁶ disability discrimination,⁹⁷ discharge for refusal to participate in unlawful conduct,⁹⁸ and reporting alleged illegal activities to higher management.⁹⁹

Wrongful termination cases for violations of public policy must have a basis in either the state constitution or statutory provisions.¹⁰⁰ The cause of action thus need not be “tethered to” specific statutory or constitutional *language*, but instead need only “find[] support in an important public policy based on a statutory or constitutional provision.”¹⁰¹ Ultimately, courts should give great deference to the legislative branch in determining whether a violation is sufficiently grounded in public policy.¹⁰²

III. IDENTIFICATION OF THE LEGAL PROBLEM

The Labor Market Information Division of the California Employment Development Department¹⁰³ reported that in 2005, approximately ninety-six percent of California businesses employed less than fifty employees.¹⁰⁴ As a result, these businesses are not subject to FMLA and CFRA laws and regulations.¹⁰⁵ Nevertheless, these businesses are still subject to the requirements of PFL. This difference creates a

federal antitrust laws and California laws prohibiting bribery and kickbacks, affected members of the public including recording artists, record retailers, and tax authorities, as well as the employer.”)

96. *Rojo v. Kliger*, 52 Cal. 3d 65 (1990).

97. *City of Moorpark v. Super. Ct.*, 18 Cal. 4th 1143, 1160 (1998).

98. *Tamery v. Atl. Richfield Co.*, 27 Cal. 3d 167 (1980); *see also* *Petermann v. Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188-89 (Ct. App. 1959).

99. *See Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66, 76-77 (1998); *see also Collier*, 228 Cal. App. 3d at 1123.

100. *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1090 (1992), *overruled on other grounds by Green*, 19 Cal. 4th at 66.

101. *Green*, 19 Cal. 4th at 79, 90 (citing *Stevenson v. Super. Ct.*, 16 Cal. 4th 880, 888-90 (1997)) (holding specific administrative regulations as a sufficient source of public policy).

102. *Gantt*, 1 Cal. 4th at 1095.

103. *See* Employment Dev. Dep't, LaborMarketInfo Homepage, <http://www.labormarketinfo.edd.ca.gov/> (last visited Mar. 12, 2007).

104. *See* CAL. EMPLOYMENT DEV. DEP'T, LABOR MKT. INFO. DIV., DISTRIBUTION OF CALIFORNIA BUSINESSES BY NUMBER OF WORKERS IN BUSINESS (2005), available at <http://www.calmis.ca.gov/file/indsize/Chart-SOB2005.pdf>.

105. *See supra* note 13 and accompanying text.

pressing legal problem and potentially exposes small businesses to litigation. Since small business employers are exempt from FMLA and CFRA, they are not obliged to provide reinstatement for employees who take unpaid leave. These employers are, however, obliged to provide paid leave under PFL which does not have a reinstatement provision. The unresolved issue is whether an employee who takes paid family leave and is denied reinstatement upon return from the leave, can sue the small business employer by asserting wrongful termination on public policy grounds.

While provisions of PFL do not obligate small businesses to reinstate employees, the question remains whether the courts will favor PFL covered employees who bring a wrongful termination suit¹⁰⁶ by asserting that their termination while on paid leave was in violation of public policy.¹⁰⁷ If courts do not find that employees of smaller businesses (employing fewer than fifty employees) are entitled to reinstatement, then these employees risk losing their job by taking the paid leave and therefore do not benefit from the job security available to employees of larger companies under FMLA and CFRA. In other words, California employees of companies covered under FMLA and CFRA (i.e. companies employing fifty or more employees) benefit from the reinstatement provisions of these statutes and also, under PFL, benefit by receiving pay for up to six weeks of paid leave. By contrast, California employees of small businesses, only covered by PFL, do not have the protection of an explicit reinstatement provision and yet pay into the SDI program which funds PFL. If an employee of a small business is terminated after taking leave under PFL, a wrongful termination suit for violation of public policy is his or her only recourse to challenge the termination. The employee at a larger company, on the other hand, can assert his or her reinstatement rights under FMLA and CFRA.¹⁰⁸

An absence of a reinstatement provision in PFL also

106. Kathleen Pender, *Family Leave to Change*, S.F. CHRON., Dec. 7, 2003, at 11.

107. See *supra* Part II.C.

108. 29 U.S.C. § 2614 (2000); CAL. GOV'T CODE §§ 12945.2(a), (g) (Deering 1997). But see CAL. GOV'T CODE § 12945.2(r)(1) (providing exceptions when an employer may refuse to reinstate an employee under CFRA); *supra* Part II.A.1 (discussing exceptions to the general rule of reinstatement under FMLA).

raises the question of whether the program is truly serving the intent of the California legislature. The current state of the law creates additional liability due to potential wrongful termination suits for small businesses, and unfairly burdens small business employees with unequal access to benefits despite equal contribution to the SDI fund when compared to their big-company counterparts.

IV. ANALYSIS

A comprehensive understanding of the legal and social policy issues surrounding California's Paid Family Leave Program requires a discussion of the shortcomings of unpaid leave and why, as a result, the California legislature felt paid leave was necessary to cure the deficiencies in the unpaid leave legislation.¹⁰⁹ The paid leave legislation created a heated public policy debate with compelling arguments on both sides. While California ultimately enacted PFL to help working families, a comparison of PFL to FMLA and CFRA will reveal that PFL's PFL program does not fulfill all of its objectives. The legislation may, however, subject the state's small businesses to potential wrongful termination suits.

A. *Why Unpaid Leave Failed to Protect Working Families*

While FMLA and CFRA do provide some protections for working families by allowing employees to care for family members without losing job security, the provisions are limited. For example, FMLA and CFRA do not apply to employers with less than fifty employees.¹¹⁰ As noted earlier, in California, companies with less than fifty employees make-up nearly ninety-six percent of businesses in the state.¹¹¹ These businesses are not mandated to provide unpaid leave for employees. Moreover, even if an employee is employed by a company that is covered by FMLA and CFRA, a relatively low number of eligible employees can withstand the financial reality of twelve weeks of leave without a paycheck.¹¹² "Among employees who need but do not take leave, . . .

109. Lynda Gledhill, *Davis OKs Paid Leave to Care for Family: Workers to Get About Half of Salary for 6 Weeks*, S.F. CHRON., Sept. 24, 2002, at A1.

110. See *supra* note 13 and accompanying text.

111. See *supra* text accompanying note 104.

112. Eric Daniel, *Family and Medical Leave Act Reform: Is Paid Leave the Answer?*, 51 CLEV. ST. L. REV. 65, 70 (2004) (internal citation omitted).

63.9[%] cannot afford the accompanying loss of wages.”¹¹³ The absence of wage replacement under FMLA and CFRA render the benefit of unpaid family and medical leave illusory. Therefore, the general purpose of family and medical leave legislation to “balance the demands of the workplace with the needs of families”¹¹⁴ was not and is still not being achieved.¹¹⁵ These concerns have led to the growing support of paid family leave programs.

B. Pros and Cons of Paid Family Leave

In response to the perceived failures of FMLA and corresponding state statutes, such as CFRA, paid family leave legislation has “become the new central focus of the family rights movement.”¹¹⁶ The concept of paid family leave is already widespread in foreign countries.¹¹⁷ In fact, the United States is one of only two industrialized nations that do not offer national paid family and medical leave benefits.¹¹⁸ California was the first state in the nation to have enacted paid family leave legislation.¹¹⁹ Other states are considering similar programs.¹²⁰

California’s PFL has received overwhelming support from a broad range of advocacy groups, who have formed a coalition in support of the legislation.¹²¹ The legislation has also been subject to criticism, however, especially by members of the business community.¹²²

113. U.S. Dep’t of Labor, Families and Employers in a Changing Economy, <http://www.dol.gov/esa/regs/compliance/whd/fmla/summary.htm> (last visited Mar. 12, 2007).

114. 29 U.S.C. § 2601(b)(1) (2000).

115. Daniel, *supra* note 112.

116. See Anne Wells, *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers*, 77 S. CAL. L. REV. 1067, 1067 (2004).

117. Daniel, *supra* note 112, at 71-73.

118. Justin Marks, *Paying for Family Leave*, STATE LEGISLATURES, Feb. 2003, (Magazine), available at <http://www.ncsl.org/programs/pubs/slmag/2003/203leave.htm#leave> (stating that the United States and Australia are the only two industrialized nations that do not offer paid family and medical leave benefits).

119. *Id.*

120. See Wells, *supra* note 116 (noting that, as of 2004, paid family leave legislation had been proposed in nearly thirty states).

121. See Cal. Paid Family Leave, California Paid Family Leave Partners and Supporters, <http://www.paidfamilyleave.org/partners.html> (last visited Mar. 12, 2007).

122. Lori Dorfman & Elena O. Lingas, *Making the Case for Paid Family*

1. Arguments in Favor of PFL

When Governor Gray Davis signed SB 1661¹²³ into law, California became the first state in the nation to enact a paid family leave program.¹²⁴ A coalition of non-profit organizations and advocacy groups favoring family rights, women's rights and workers rights, united in support of PFL.¹²⁵

Leave: How California's Landmark Law Was Framed in the News, ISSUE 14 (Berkeley Media Stud. Group), Nov. 2003, at 3, available at <http://www.bmsg.org/pdfs/Issue14.pdf>.

123. S.B. 1661, 2002 Leg., Reg. Sess. (Cal. 2004).

124. Erin Gielow, Note, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1550 (2002) (internal citation omitted).

125. See Cal. Paid Family Leave, *supra* note 121 (listing the advocacy groups supporting the Paid Family Leave Collaborative: AFSCME, Alliance For Retired Americans, Region 9, American Association of University Women, American Civil Liberties Union, American College of Obstetricians and Gynecologists, American Federation of State, County and Municipal Employees, Asian Law Caucus, Association of California Caregiver Resource Centers, Banana's, Breast Cancer Fund, California Advocates for Social Change, California Alliance for Pride and Equality, California Association for the Education of Young Children, California Catholic Conference, California Child Care Resource & Referral Network, California Children and Families Commission, California Coalition for Youth, California Commission on the Status of Women, California Conference Board of the Amalgamated Transit Union, California Conference of Machinists, California Faculty Association, California Federation of Teachers, California HIV Advocacy Coalition, California Independent Employees Legislative Council, California Labor Federation (sponsor), California Medical Association, California Nurses Association, California National Organization for Women, California Professional Firefighters, California School Employees Association, California State Employees Association, California State Parent Teacher Association, California Women's Law Center, Center for Community Change, Center for the Child Care Workforce, Center on Policy Initiatives, Childcare Health Program, Childcare Law Center, Children NOW, Coalition of Labor Union Women, Capitol Chapter, Coalition of Labor Union Women, East Bay Chapter, Communication Workers of America, District 9, Communication Workers of America, Local 9400, Congress of California Seniors, Compassion in Dying Federation, East Bay Community Law Center, Engineers and Scientists of California, Equal Rights Advocates, Family Caregiver Alliance, Fresno-Madera-Tulare-Kings Central Labor Council, Gray Panthers, Hotel Employees, Restaurant Employees International Union, Jericho, Labor Project for Working Families, Lambda Letters Project, Latino Coalition for a Health Family, Legal Aid Society, Employment Law Center, National Multiple Sclerosis Society, Older Women's League, Orfalea Family Foundation, Planned Parenthood Affiliates of California, Planning for Elders in the Central City, Sacramento Central Labor Council, San Francisco State University - Psychology Department, San Mateo County Central Labor Council, Southern California Commission on the Status of Women, Transport Workers Union of California, Teamsters, Union of American Hebrew Congregations, United Farm Workers, United Food & Commercial Workers Region 8 States Council, United Food &

A recent report published by the University of California, Los Angeles, found that the absence of paid family and medical leave forces working families to choose between having economic security and providing vital medical care for ill children and elderly parents.¹²⁶ California State senator Sheila Kuehl, who authored SB 1661, stated that because of the PFL act, "Californians will no longer have to choose between caring for their families and holding down a job."¹²⁷ She went on to say that "[p]aid family leave strengthens communities by strengthening family life," and that "[t]his benefit will meet the real needs of California's real families, thus improving the quality of life for neighborhoods in which families are the basic social unit."¹²⁸ Paid family leave also benefits women by allowing them to develop careers and earn higher wages.¹²⁹

The paid family leave program assists individuals of all classes and ages, from lower-income to upper-middle class, and from newborn to the elderly.¹³⁰ "Nationally, two-thirds of low-income mothers and more than one-third of moderate- and upper-income mothers lose pay when they miss work because a child is sick."¹³¹ Reports also show that when parents are present, ill children recover more quickly.¹³² Furthermore, parental time at home, especially during a child's infancy, is beneficial to the child's overall health and development.¹³³

Supporters of the PFL program not only praised the

Commercial Workers Local 870, United Nurses Association/Union of Health Care Professionals, UTLA, Women's Employment Rights Clinic, Golden Gate School of Law, and Women's Cancer Resource Center); see also LABOR PROJECT FOR WORKING FAMILIES, PUTTING FAMILIES FIRST: HOW CALIFORNIA WON THE FIGHT FOR PAID FAMILY LEAVE (2003), <http://www.paidfamilyleave.org/pdf/paidleavewon.pdf> [hereinafter FAMILIES FIRST].

126. Appelbaum & Milkman, *supra* note 6, at 48.

127. Statement from Sheila Kuehl, California Senator, Twenty-Third Senatorial District, <http://www.paidfamilyleave.org/updates/kuehl.pdf> (last visited Apr. 4, 2007).

128. *Id.*

129. Arindrajit "Ari" Dube & Ethan Kaplan, Paid Family Leave in California: An Analysis of Costs and Benefits 16 (June 19, 2002), available at <http://www.iies.su.se/~ekaplan/paidfamilyleave.pdf>.

130. FAMILIES FIRST, *supra* note 127, at 10.

131. Appelbaum & Milkman, *supra* note 6, at 48.

132. *Id.*

133. *Id.* (internal citation omitted).

social benefits to California families, but also viewed the legislation as beneficial to California businesses.¹³⁴ In his remarks at the signing ceremony, Governor Gray Davis said, “[paid family leave] sends a message around the world [that] California is pro-worker, pro-employer and pro-family.”¹³⁵ This kind of argument embraces a competitive advantage claim that paid family leave makes California an attractive place for skilled workers and benefits the state as a whole.¹³⁶ State Senator Kuehl stated: “Paid family leave is good for business. It allows businesses to retain skilled workers without having to pay for their time off. Long-standing workplace relationships will be maintained, and workers’ performance will reflect their secure knowledge that urgent matters at home have been taken care of.”¹³⁷ Empirical data supports this assertion by showing more than a ten percent increase in return probabilities for those who take paid leave over unpaid leave.¹³⁸ Labor leaders indicate that paid family leave allows “small businesses [to] offer a benefit that they otherwise could not afford, and therefore level[s] the playing field with larger businesses.”¹³⁹

2. *Opposition to PFL*

Although there was overwhelming support for PFL, small business owners sharply criticized the legislation. For example, the California Chamber of Commerce opposed SB 1661, arguing that PFL imposed excessive burdens on employers, especially small businesses, that would drive them out of the state.¹⁴⁰ Tony Malandra, a spokesman for the California branch of the National Federation of Independent Business,¹⁴¹ characterized the legislation as “good politics, but

134. See *FAMILIES FIRST*, *supra* note 125, at 9.

135. Kimberly Edds, *Calif. Adopts Family Leave; Law Mandates Paid Time Off*, WASH. POST, Sept. 24, 2002, at A03.

136. See Dorfman & Lingas, *supra* note 122, at 8.

137. Statement from Senator Sheila Kuehl, *supra* note 127.

138. See Dube & Kaplan, *supra* note 129, at 41 tbl.8.

139. Dorfman & Lingas, *supra* note 122, at 7.

140. Appelbaum & Milkman, *supra* note 6, at 51; see also Dorfman & Lingas, *supra* note 122, at 9.

141. The National Federation of Independent Business is a nonprofit, nonpartisan advocacy organization that represents small and independent businesses. Nat’l Fed’n of Indep. Bus., About NFIB, <http://www.nfib.com/page/aboutHome> (last visited Mar. 12, 2007).

bad public policy.”¹⁴²

Even though the program is funded through employee contributions, business owners feared that they would be burdened with additional costs associated with the implementation of the legislation.¹⁴³ For example, some employers expressed concern about the additional costs from loss of productivity, hiring temporary workers, and training.¹⁴⁴ Other employers feared that too many employees would take advantage of the benefits leading to a need for businesses to contribute to the fund.¹⁴⁵ Opponents of the legislation also argued that by implementing a paid family leave program, California was creating a competitive disadvantage for employers because of the increased cost of doing business, and as a result, it would be difficult for the state to attract investors and new business.¹⁴⁶ Some politicians opposed the legislation as a burdensome tax on employees.¹⁴⁷ A Republican California Legislator was quoted as saying “a tax on workers coming out of their paychecks so they cannot spend that money for things they choose.”¹⁴⁸

C. How the Absence of a Reinstatement Provision Denies Employees Benefits

While proponents and opponents may disagree about the costs and benefits of the legislation, it seems both sides agree on one thing: paid family leave does not provide job protection.¹⁴⁹ While employers with fifty or more employees are still subject to FMLA and CFRA reinstatement provisions, PFL does not create additional job protection.¹⁵⁰ Notwithstanding PFL enactment, smaller businesses are not obligated to reinstate employees who take paid family

142. Frank Green, *Gov. Davis Signs Bill for Paid Family Leave: Insurance Program Providing 6 weeks to Care for Relative, Child is First in Nation*, S.D. UNION TRIB., Sept. 24, 2002, at A1; see also Dorfman & Lingas, *supra* note 124, at 11.

143. See Wells, *supra* note 116, at 1068.

144. Robert Caldwell, *Davis' California is Hard on Business*, S.D. UNION TRIB., Oct. 6, 2002, at G-1.

145. Pender, *supra* note 108; also see Thompson, *supra* note 61.

146. *Just Say No: Bad Bill Merits Governor's Veto*, S.D. UNION TRIB., Sept. 19, 2002, at B14; see also Dorfman & Lingas, *supra* note 124, at 9.

147. Dorfman & Lingas, *supra* note 122, at 10.

148. *Id.* (internal citation omitted).

149. Pender, *supra* note 106.

150. See *supra* Part III.

leave.¹⁵¹

Both FMLA and CFRA have reinstatement provisions¹⁵² that apply to employers with fifty or more employees. Employers with less than fifty employees are not subject to FMLA and CFRA and thus are not required to reinstate employees that take unpaid leave.¹⁵³ Any employee in California, however, paying into the SDI fund for PFL is entitled to paid leave.¹⁵⁴ Therefore, an employee of a business with less than fifty employees may be eligible for paid family leave if he or she pays into the SDI fund through payroll deductions. Such an employee, however, is not entitled to the same or equivalent job position upon his or her return from the leave. In fact, the PFL does not give the employee a right of return at all.¹⁵⁵ Therefore, according to the California legislature, although all employees pay into a general fund established to create flexibility and promote family and workplace values,¹⁵⁶ only employees at larger companies may actually reap the rewards of such contributions and take a paid leave knowing that they will have a job to return to after their leave.

Suppose, for example, that Joe¹⁵⁷ works for a venture capital firm with sixty employees in San Jose, California. Joe's employer is obligated under FMLA and CFRA to provide Joe with twelve weeks of unpaid family leave, assuming he is otherwise eligible.¹⁵⁸ Also, since January 1, 2004, deductions from Joe's paycheck have contributed to the SDI for PFL.¹⁵⁹ The combination of the reinstatement provisions offered by FMLA and CFRA, and the paid benefits offered by PFL allow Joe to take six weeks of paid leave, six additional weeks of unpaid leave, and return to the same or comparable position

151. Employment Bulletin, *supra* note 82.

152. 29 U.S.C. §§ 2614(a)(1)(A)-(B) (2000); CAL. GOV'T CODE §§ 12945.2(a), (g) (Deering 2006).

153. 29 U.S.C. § 2611(B)(ii); CAL. GOV'T CODE § 12945.2(b). *But see supra* note 55 and accompanying text.

154. *See* CAL. UNEMP. INS. CODE §§ 3300-3303 (Deering 2006); *see also* Employment Bulletin, *supra* note 82.

155. *See supra* Part III.

156. *See* CAL. UNEMP. INS. CODE § 3300; *see also supra* Part IV.B.1.

157. The name "Joe" is fictional and is meant to represent an individual involved in a common scenario that may arise under California's Paid Family Leave Act.

158. *See supra* Part II.A.

159. *See supra* Part II.B.

upon his return.¹⁶⁰

In contrast, suppose Mary¹⁶¹ works for a small software start-up in California's Silicon Valley with ten employees. Unlike Joe, her employer is not obligated to provide unpaid benefits under FMLA or CFRA.¹⁶² But like Joe, Mary has also been contributing to the SDI for PFL and her contributions to the program entitle her to paid family leave benefits, if she is otherwise eligible.¹⁶³ If Mary should take six weeks of paid family leave, however, nothing obligates her employer to reinstate her previous position or any other position upon her return. Thus, given the risk of losing her job, it is unlikely that Mary will take advantage of her paid family leave benefits despite the fact that she, like Joe, has been paying into the SDI program.

Therefore, the absence of a reinstatement provision in the PFL statute forces employees of small businesses to pay into a fund that will ultimately still force them to choose between the risk of losing their job and the need to spend time with or care for their family.

D. Cost to Employers and Potential Wrongful Termination Suits

While employers have expressed concerns regarding the costs associated with paid family leave,¹⁶⁴ these claims contradict most studies, which have found minimal costs to employers.¹⁶⁵ These studies on the costs of FMLA, however, do not account for costs to employers based on losing six weeks of a specialized worker's position or facing the cost of litigation from a wrongful termination suit. Because PFL does not have a reinstatement provision similar to those

160. This given that no other exceptions apply and all eligibility requirements under the statutes are fulfilled.

161. The name "Mary" is fictional and is meant to represent an individual involved in a potential scenario that may arise under California's Paid Family Leave Act.

162. See *supra* note 13 and accompanying text.

163. See *supra* Part II.B.

164. See Wells, *supra* note 116, at 1078-79; Marks, *supra* note 120.

165. See Wells, *supra* note 116, at 1079 n.78 (discussing minimal costs of FMLA to employers). The costs of PFL are not separate from the costs of FMLA; rather, any additional costs created by the legislation are largely dependent on whether the frequency and duration of leaves increase. *Id.* at 1079-1089.

found in the FMLA¹⁶⁶ and CFRA,¹⁶⁷ employers may be subject to liability due to a wrongful termination cause of action in violation of public policy.¹⁶⁸

An employee whose job terminates during or shortly after taking paid leave may be able to win reinstatement of his or her job by proving unlawful discharge in violation of public policy. In deciding whether the termination is in violation of public policy, courts look at whether the public policy is supported by a statutory or constitutional provision or administrative regulation.¹⁶⁹ The combination of California's unpaid and paid family leave legislation creates a statutory scheme in favor of job security and family leave benefits for California employees. Both federal and state legislatures have expressed intent to promote economic security and family integrity.¹⁷⁰ Therefore, employees claiming wrongful discharge in violation of public policy can couch their argument in multiple statutory provisions.

The lack of a reinstatement provision in the PFL subjects small business employers to a heightened risk of wrongful termination litigation. Given the extensive legislative findings and clear legislative intent for enacting PFL,¹⁷¹ a terminated employee may now have a persuasive claim.

V. PROPOSAL

California's Paid Family Leave Act is good public policy, but as written, it is not sound law. An amendment to PFL can resolve the deficiencies of the statute without substantial

166. 29 U.S.C. §§ 2614(a)(1)(A)-(B) (2000).

167. CAL. GOV'T CODE §§ 12945.2(a), (g) (Deering 2006).

168. Wrongful termination suits have been noted as the leading area of exposure for all California employers. Steven Hayward, *Golden Lawsuits in the Golden State*, REG. (Cato Inst.), Summer 1998, available at <http://www.cato.org/pubs/regulation/regv17n3/reg17n3-hayward.html>. Also, a recent study of costs associated with wrongful termination concluded that "the direct cost of liability is only about \$12 per employee, but the indirect costs are much more substantial." *Id.* (citing a study of the Rand Corporation's Institute for Civil Justice).

169. *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1091-95 (1992), *overruled on other grounds by Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66 (1998); *see also supra* Part II.C (discussing the standard applied to claims for wrongful termination in violation of public policy).

170. *See, e.g.*, 29 U.S.C. § 2601(b)(1); CAL. UNEMP. INS. CODE § 3300 (Deering 2007).

171. *See supra* Part II.B.

cost to employers and can prevent the potential management and legal dilemmas created by the current legislation.¹⁷² The key is to reconcile PFL with existing federal and state unpaid leave legislation, filling the gap into which small businesses fall. This section will provide suggestions on how the California legislature can amend PFL so that it is consistent with the preexisting statutory scheme, thus helping California's small businesses avoid liability from litigation and enabling their employees to benefit from the paid leave legislation.

A. Amend PFL to Include Reinstatement Provision

PFL should be amended to include a reinstatement provision similar to FMLA and CFRA.¹⁷³ Providing employees with a right of return to the same or equivalent position will offer job security while allowing employees to take time off to care for their families, just as PFL intended.¹⁷⁴

In order to be fair to employers, however, the reinstatement provision should not be without exceptions. Where an employer employs a highly specialized employee, the employer should not be obligated to guarantee reinstatement. When electing not to reinstate an employee, an employer should be required to show that the business will suffer an undue burden by granting the highly specialized employee reinstatement. Such a burden could result from costs associated with keeping the employee's position open, replacement of the employee, or training a substitute. In such a situation, an employer should be obligated to express the business's inability to reinstate the employee prior to him or her taking leave. This provision would be similar to the "key employee" exception under FMLA.¹⁷⁵ This proposal will provide employers with the necessary flexibility they need in conducting a highly specialized business.

172. See *supra* Part III.

173. 29 U.S.C. §§ 2614(a)(1)(A)-(B); CAL. GOV'T CODE §§ 12945.2(a), (g) (Deering 2006).

174. See *supra* Part II.B.

175. 29 C.F.R. § 825.217(a) (2006).

B. Notice Requirement

Currently, PFL does not require employees to give their employers notice in advance of their leave.¹⁷⁶ By adopting a provision into the PFL that requires employees to give advance notice of leave, an employer will have time to reallocate tasks, hire a temporary employee, or train a substitute.

It would be optimal, from an employer's perspective, to require employees to give thirty days notice before taking leave. This is not an unreasonable requirement considering that this is the standard under FMLA.¹⁷⁷ In the alternative, employees could be required to give reasonable advance notice. This alternative is more "employee friendly" as it takes into consideration that leave may not always be planned, for example when an employee must tend to an emergency or serious health condition of a family member. This reasonable notice provision is similar to the notice requirement articulated under CFRA.¹⁷⁸

C. Opt-Out Provision

Another proposal, though less desirable, is to provide employees not covered by FMLA and CFRA an option to opt out of the PFL program.¹⁷⁹ This would alleviate the problem of employees paying into a fund from which they are ultimately unable to benefit. This proposal, however, may not be as attractive to small businesses as creating a reinstatement provision¹⁸⁰ because it may lead to insufficient funds for the program and ultimately trigger the need for employer contributions.

VI. CONCLUSION

California's PFL program is sound policy to the extent it aims to help employees balance job security with their family care needs. As noted above, PFL offers significant benefits to working families.¹⁸¹ The statute as written is not sound law

176. See Employment Bulletin *supra* note 82.

177. 29 U.S.C. § 2612(e)(2)(B).

178. CAL. GOV'T CODE § 12945.2(h).

179. See *supra* Part IV.B.2.

180. See *supra* Part V.A.

181. See *supra* Part IV.B.1.

and does not fulfill the legislature's express intent of helping California employees balance work and family life.¹⁸² This is especially the case for employees of small businesses.¹⁸³ Eliminating the discrepancies in coverage between the federal and state family leave laws not only benefits employees, but also employers who face the risk of potential wrongful termination suits.¹⁸⁴ It is to the benefit of Californians and the family rights movement for the California legislature to amend the statute before litigation ensues. As the trend towards paid family leave gains popularity,¹⁸⁵ enacting effective legislation will be vital for state legislatures that hope to garner support from the business community.¹⁸⁶ Adopting the proposals suggested in this comment and amending PFL to be more consistent with FMLA and CFRA will result in both effective public policy and sound law.

182. *See supra* Part V.

183. *See supra* Part III.

184. *See supra* Part IV.D.

185. Wells, *supra* note 116, at 1067.

186. *See supra* Part IV.B.