

CRITERION ECONOMICS

**ASSESSING THE COSTS OF THE
FAMILY AND MEDICAL LEAVE ACT**

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INTRODUCTION

The Family and Medical Leave Act of 1993 (“FMLA”) allows eligible workers employed by covered establishments to take up to 12 weeks of unpaid leave per year. Employees may become eligible for FMLA leave when either the employee or a family member suffers from a serious health condition. Additional qualifying events include family-related responsibilities, such as the birth or adoption of a child. The FMLA established a bipartisan Commission on Family and Medical Leave (“Commission”) to examine the effect of family and medical leave policies on employees and employers. In 1995, the Commission issued a report containing the results of surveys of employees and employers. In 1999, the Department of Labor (“Department”) contracted with Westat, a privately owned research corporation, for the purpose of updating the 1995 surveys. The result was a report entitled *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update* (“Westat Survey” or “Survey”).¹ The Westat Survey includes both a “Survey of Establishments” and a “Survey of Employees.” These surveys were designed to help the Department assess both the scope (i.e., number of eligible firms and employees) and the economic impact (e.g., effects on productivity) of the FMLA.

Other information on the effects of FMLA has emerged from private sector surveys, Congressional testimony, and in comments and submissions from various affected groups to the Office of Management and Budget in the context of its annual reviews of the Benefits and Costs of Federal Regulation.² Much of this information suggests that the economic costs of the FMLA

¹ Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*, available at <http://www.dol.gov/esa/whd/fmla/fmla/main2000.htm> [hereinafter *Westat Survey*].

² See especially Office of Management and Budget, *Progress in Regulatory Reform: 2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (December 2004) (available at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html).

(as implemented in the Department's regulations),³ especially with respect to intermittent FMLA leave, are significant.

In December 2006, the Department issued a Request for Information on issues relating to the FMLA (the "RFI").⁴ I have been asked by the National Coalition to Protect Family Leave to address certain of the issues raised in the RFI, including specifically questions relating to the Westat Survey's estimates of the incidence and economic impact of intermittent FMLA leave⁵ and, more broadly, the methodology used to estimate the impact of FMLA leave on employees and employers.⁶

My primary findings are as follows:

First, neither the Westat Survey nor the RFI itself provide an appropriate economic framework for assessing the costs of the FMLA. Both the Survey and the RFI focus on the effects of FMLA on the "profitability" and "productivity" of firms. Even if the Survey had yielded accurate measures of these effects (and it clearly did not), they still would not provide an adequate basis for assessing the economic impact of FMLA. In fact, the costs of FMLA are likely borne to a significant extent by workers, in the form of reduced wages, higher unemployment, or both; and by consumers, in the form of higher prices. Even in theory, neither effect is fully captured by data on productivity or profitability. Moreover, neither the Survey nor the RFI address the potential impact of FMLA on the ability of firms and employees to achieve mutually beneficial, and economically efficient, labor supply contracts. By ignoring these and

³ See 60 FR 2180 (January 6, 1995). The regulations were amended on February 3, 1995 (60 FR 6658) and on March 30, 1995 (60 FR 16382).

⁴ See *Request for Information on the Family and Medical Leave Act of 1993*, 71 FR 69504 (December 1, 2006) (available at <http://www.dol.gov/esa/whd/06-9489.pdf>). (Hereafter "RFI.")

⁵ See RFI, Sections 3(E)-3(H).

other potential costs, the Department's approach understates FMLA's costs to the economy. In Section I below, I provide a very brief description of some important economic concepts the Department should take into account in assessing the economic impact of FMLA.

Second, flaws in the design of the Westat Survey, including the failure of the Employee Survey to collect and report adequate information on firm size and the industry in which the employee worked, and the failure of the Establishment Survey adequately to segment surveyed firms by size and industry, also tend to bias downward the Survey's estimates of the economic costs of FMLA. In Section II below, I describe some of the Survey's shortcomings in this regard, and demonstrate that if the Establishment Survey's estimates are properly weighted, the resulting estimates of the impact of FMLA on productivity and profitability increase significantly.

Third, flaws in the implementation of the Westat Survey (including, for example, the fact that it relies on information provided by respondents even after they indicated they had no quantitative basis for responding) also tend to bias the Survey's estimates of FMLA's costs downward. In Section III below, I discuss some of the implementation flaws in the Survey and explain why they are also likely to bias the results downward.

As a result of these flaws, and others discussed below, the Westat Survey fails to present either complete or accurate data on the costs of FMLA. As a result, the actual economic costs of FMLA are likely much higher than the Westat Survey suggests.

⁶ See RFI, Section 3(I).

I. THE DEPARTMENT SHOULD ASSESS THE COSTS OF FMLA USING AN APPROPRIATE ECONOMIC FRAMEWORK

To accurately assess the economic effects of FMLA, the Department needs to begin by developing an appropriate economic framework. No such framework is stated, or even implied, in either the Westat Survey or the RFI. While it is well beyond the scope of this analysis to develop a complete economic framework for analyzing FMLA, it is important to point out that the issues raised and the data presented in the Westat Survey and the RFI do not fully capture the likely costs of the regulations.⁷

A. The Effect of FMLA on Economic Welfare Is Not Fully Captured by Its Effects on Profitability and Productivity

The Westat Survey presents, and the RFI focuses on, two primary metrics relating to the aggregate economic impact of FMLA: profitability and productivity.⁸ The Westat data was obtained through a telephone survey of human resource managers, who were asked whether they believed “complying with the Federal Family and Medical Leave Act” had a positive, negative or “not-noticeable” effect on profitability, “firm productivity,” or “employee productivity” at their location.⁹ The same respondents were asked whether “leave taken on an intermittent basis” had affected productivity or profitability at their locations, whether the impact was positive or negative, and whether the impact was “small,” “moderate” or “large.”

⁷ In general, the Department should apply the guidelines provided by the Office of Management and Budget for benefit-cost analyses. See OMB, Circular A-4, *Regulatory Analysis* (September 17, 2003) (available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>)

⁸ See RFI, Sections 3(F) and 3(H). The survey also collected information the impact of FMLA on firm growth, on some specific cost items, such as administrative costs, and some specific qualitative impacts, such employee morale. The survey design does not permit this data to be translated into anything approaching aggregate economic effects.

⁹ See Westat Survey, Appendix E, at 15. While one can imagine economic analogues to these terms, respondents were apparently not given any guidance on their meaning, e.g., on how they should interpret the terms “firm productivity” and “employee productivity” differently in providing their responses.

A proper assessment of the economic impact of FMLA would measure its effect on overall economic welfare, i.e., on the sum of consumer and producer surplus.¹⁰ Setting aside (for now) questions about the qualitative nature and accuracy of the Westat Survey's data (I address these issues in Section III below), data on profitability and productivity – even if it were quantitative and even if it were accurate – would not be sufficient to assess the impact of FMLA on economic welfare.

First, information on profitability is (at most) probative of FMLA's impact on producer surplus, and says nothing about consumer surplus. For example, OMB Circular A-4 notes that “A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers. The net reduction in the total surplus (consumer plus producer) is a real cost to society, but *the transfer from buyers to sellers resulting from a higher price is not a real cost* since the net reduction automatically accounts for the transfer from buyers to sellers.”¹¹ There are many scenarios (the most obvious being competitive industries with production functions that exhibit constant returns to scale) in which raising the cost of an input (such as labor) will have no impact on profitability whatsoever: the resulting cost increases will simply be passed through to consumers in the form of higher prices, thereby reducing consumer surplus, but leaving producer surplus (profits) unaffected.

Data on firm-level profitability is even less helpful. For example, if two firms in an industry use different production functions, one of which is more labor intensive than the other, then (under reasonable assumptions) the impact of a regulation that raises the cost of labor will be to increase the profitability of the less labor-intensive firm while reducing the profitability of

¹⁰ See Circular A-4 at n. 13.

the more labor intensive one, even though (again, under reasonable assumptions) one would expect the combined profitability of the two firms to fall. To the extent the Westat Survey discovered such an effect, it would report that one firm saw profits increase while another saw them fall – incorrectly implying a “wash”, when the real effect was to reduce producer surplus (and thus economic welfare).¹²

Data on the productivity impact of FMLA, while potentially probative, cannot by itself be used to estimate welfare effects accurately. While it is broadly true that reductions in productivity reduce economic welfare, the magnitude of the reduction depends on how the effect is distributed across inputs and industries. A regulation that reduces labor productivity, for example, will have a larger impact on economic welfare in industries where production requires “fixed proportions” of capital and labor (e.g., air transport, which requires at least one pilot and one co-pilot per airplane) than in industries where capital can easily be substituted for labor. Similarly, a reduction in total factor productivity in an industry producing products for which there are few economic substitutes will have a larger effect on economic welfare than one affecting an industry producing a product with many substitutes. In the latter case, consumers will simply shift their purchases away from the products of the less productive industry, suffering little or no loss in consumer surplus. For these and other reasons, economists do not

¹¹ See Circular A-4 at 38.

¹² Information about location-level profitability, which is what the Westat Survey collected, is still further divorced from any economically relevant metric. For example, if the primary impact of FMLA is to reduce the profitability of manufacturing facilities, but the survey data is collected from (and applies to) corporate headquarters, the survey data will understate the effect of the regulations on the firm.

generally attempt to measure the impact of policies on economic welfare effects by tracking their effects on productivity.¹³

B. FMLA's Effects on the Labor Market Are Not Captured by the Westat Survey Nor Adequately Addressed in the RFI

If FMLA results in significant welfare losses, it must do so, in the first instance, by distorting (i.e., producing inefficient outcomes in) the market for labor. Yet neither the Westat Survey nor the RFI provides a framework for, or relevant data to assess, the likely effects of FMLA on labor market outcomes.

FMLA can be thought of as a mechanism that changes the “rules of the game” with respect to labor supply contracting, by imposing specific limitations on the ability of firms and workers to contract for labor services. An employer is required to offer family leave in the amount and under the precise terms mandated by FMLA, as long as the employee provides the requisite documentation. Furthermore, FMLA proscribes employers’ rights and abilities to monitor and police employees’ use of family leave. Of course, no legal barrier prevented employees and firms from voluntarily agreeing to similar (or identical) leave policies before FMLA was enacted. Hence, FMLA unambiguously constrains contracting. It does not allow for any new contracts that were not previously feasible, and simultaneously prohibits a set of contracts that were previously permitted under the law.¹⁴

¹³ For example, the word “productivity” does not appear in OMB Circular A-4.

¹⁴ It should be noted that the Department’s National Compensation Survey shows that 90 percent of all workers have family leave benefits (including 8 percent with paid family leave), which suggests that approximately 30 percent of employees are covered by family leave benefits that are not mandated under FMLA. While the benefits available to workers not covered by FMLA may be different from FMLA benefits, this data demonstrates that employers do voluntarily enter into labor contracts that include family leave benefits. See U.S. Department of Labor, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2006* (Summary 06-05, August 2006) at Table 19.

FMLA's prohibitions on voluntary contracts may introduce inefficiencies in the labor market in at least two ways. First, they may prevent firms and employees from efficiently sorting themselves based on heterogeneity of employee and firm characteristics. Second, they may constrain the parties from agreeing to mutually advantageous contract provisions for monitoring and enforcing contract compliance (i.e., policing what economists refer to as "shirking").

First, FMLA may inhibit the market's ability to allocate labor efficiently among firms (and jobs among workers). Both firms and workers display heterogeneity with respect to values they place on absenteeism. In some industries, employee absenteeism will have a relatively small effect on firms' overall ability to operate, and therefore entail a relatively modest financial impact. In other sectors, absenteeism hinders production substantially by, for example, diminishing the productivity of other workers and equipment. If the effect of worker absence on a company's productivity is relatively modest, economists classify that firm as operating a so-called *linear production technology*. Firms whose productivity is more sensitive to absenteeism are said to employ *assembly line technologies*.¹⁵ Companies relying on assembly line production techniques depend to a much greater extent on coordinated efforts of labor and machinery. Therefore, the absence of a single employee has a ripple effect throughout the organization.¹⁶

Although absenteeism may be costly to firms, worker absences are, as a matter of economic theory, not necessarily inefficient. From an economist's point of view, the employee who misses a day at work to care for a sick child (or for any other use of time that the worker

¹⁵ This term should not be taken literally. There are many industries that do not actually operate assembly lines, but nonetheless have production structures that are highly sensitive to absenteeism.

considers valuable) engages in a tradeoff between workplace production and home production. Moreover, just as different companies are affected differently by absenteeism, different workers are likely to attach different values to flexible attendance policies. If both employers and employees are heterogeneous in this sense, a competitive labor market would entail sorting of firms and workers.

In particular, economic theory emphasizes that industries operating assembly line technologies would require a low level of absenteeism and offer relatively high wages to compensate workers for reliable attendance. Workers who have a comparative advantage in attending work reliably – for example, employees without the need to take unscheduled intermittent leave to deal with recurrent health problems – would sort themselves by choosing to work for assembly line firms, and enjoy the resulting wage premium. On the other hand, those workers placing a higher value on flexibility in work attendance would tend to be employed by companies employing linear technology. While they would earn a lower average wage, such employees would be compensated by relatively lenient work attendance policies.¹⁷

FMLA interferes with this sorting of workers and employees. The sorting process described above depends on the ability of assembly line companies to offer compensation that is relatively “rich” in wages and relatively “sparse” in leave benefits. By requiring that all employers offer relatively high levels of leave, FMLA prevents employers and employees from entering into such contracts. FMLA can be expected to have a relatively modest effect in industries characterized by linear technology. Companies in these sectors can be expected

¹⁶ See Andrew Weiss, *Absenteeism & Wages*, 19 *ECONOMICS LETTERS* 277 (1989); M.G. Coles & J.G. Treble, *The Price of Worker Reliability*, 41 *ECONOMICS LETTERS* 149 (1993).

¹⁷ M.G. Coles & J.G. Treble, *Calculating the Cost of Absenteeism*, 3 *LABOUR ECONOMICS* 169 (1996).

already to offer flexible absence policies, and FMLA therefore does not represent a significant constraint on their behavior. Instead, the sectors hit hardest by FMLA would be those engaged in assembly line production. For these sectors, FMLA represents a binding constraint preventing workers and companies from arriving at mutually beneficial agreements that would have existed in the absence of the legislation.¹⁸

A second labor market distortion associated with FMLA is its impact on the ability of firms effectively to monitor and police employees' adherence to leave policies. For example, FMLA limits the ability of firms to obtain information about employees' health conditions,¹⁹ introduces uncertainty into the definition of what conditions are covered (e.g., common colds and flu),²⁰ and subjects employers to significant risk of litigation when they do attempt to enforce the rules.²¹

These and related effects of FMLA exacerbate a challenge that exists, to some extent, in all employment contracts: The need for employers (buyers of labor services) to be able to monitor the compliance of workers (suppliers) with the terms of the employment contract. The challenge of monitoring compliance arises out of two characteristics of employment contracts.

¹⁸ The RFI refers to this issue, but appears to be concerned only with its effect on employers rather than overall economic welfare. *See* RFI Section 3(H) (“[I]ntermittent FMLA leave may be a significant problem for some employers. The unexpected absence of certain employees may create problems in the workplace. For example, an unannounced absence can cause other workers or equipment to be idled. An unannounced absence can result in lost business or performance penalties to be imposed upon the employer. It is noteworthy that the two industries with the highest FMLA costs in the 2004 Employment Policy Foundation (“EPF”) survey were transportation (an industry which has performance penalties) and telecommunications (an industry where quality of service agreements are common). Anecdotal reports also indicate that some employers schedule extra workers for some positions to avoid the negative impacts of unforeseen, intermittent leave.”) In fact, both workers and consumers also suffer. Workers who would prefer a job with less generous leave but higher wages are made worse off by being forced into a suboptimal compensation package; and, consumers are made worse off by the higher costs (and ultimately higher prices) that result from the inability of firms to hire a labor force that is well matched to their particular production functions.

¹⁹ *See* RFI Section 2(J) (discussing medical certification procedures).

²⁰ *See* RFI Section 2(B).

First, labor contracts are incomplete (or “relational”);²² second, they often exist in environments in which there is asymmetric information.

Labor contracts are necessarily incomplete. Whenever a worker is hired, a contract is formed (whether implicitly or explicitly) in which the employer agrees to pay a given wage in exchange for a given amount of work to be supplied by the employee. However, the precise nature of the work to be supplied depends on a variety of changing and unpredictable circumstances. Indeed, Nobel Prize winning economist Ronald Coase defined firms as institutions which use such relational contracts to organize economic activity.²³

Another Nobel Prize winner, Joseph Stiglitz, expanded on Coase’s model of the firm by examining what happens when there is an asymmetry of information between workers and employers about the employees’ level of effort – as, for example, when the worker knows whether he or she is at home with a migraine headache or, alternatively, at the ballpark watching a baseball game, but the employer does not have this information, absent the expenditure of resources to monitor employee behavior.

²¹ See RFI Section 1(C).

²² See Charles J. Goetz and Robert E. Scott, *Principles of Relational Contracts*, 67 VIRGINIA LAW REVIEW 1089 (1981).

²³ See Ronald H. Coase, *The Nature of the Firm*, in Oliver E. Williamson and Sydney G. Winter, eds., *THE NATURE OF THE FIRM: ORIGINS, EVOLUTION AND DEVELOPMENT* (Oxford University Press, 1991), 18-33; 21. (“[T]he service which is being provided is expressed in general terms, the exact details being left until a later date. All that is stated in the contract is the limits to what the person supplying the commodity or service is expected to do. The details of what the supplier is expected to do is not stated in the contract but is stated later by the purchaser. When the direction of resources (within the limits of the contract) becomes dependent on the buyer in this way, that relationship which I term a “firm” may be obtained.”)

In a seminal 1984 article,²⁴ Stiglitz, along with Carl Shapiro, noted that in general it is costly for an employer to determine with certainty how much effort a worker is exerting on the job. Using this seemingly self-evident assumption as starting point, they demonstrate that one result of this simple informational asymmetry is a labor market equilibrium in which the level of employment is inefficiently low. Moreover, and importantly from the perspective of analyzing the effects of FMLA, Shapiro and Stiglitz also demonstrate that the magnitude of the inefficiency depends critically on the magnitude costs of monitoring.²⁵ In particular, if monitoring is effective, then firms and workers will be able to arrive at and enforce nearly complete contracts, and the resulting level of employment will approximate the efficient level. The more costly it is to monitor performance, the wider the gulf between the actual level of employment and the efficient level, and the greater the impact on economic welfare.²⁶

The RFI is correct to recognize that FMLA may have disparate effects on different types of firms, and to solicit additional information on the administrative burdens associated with FMLA (especially those associated with intermittent leave). However, the resulting analysis will not be complete or accurate unless it uses this additional information to assess the overall economic effects of FMLA, including its effects on the labor market (employment and wages) and its effects on overall economic welfare (i.e., on consumer surplus as well as producer surplus).

²⁴ See Carl Shapiro & Joseph E. Stiglitz, *Equilibrium Unemployment as a Worker Discipline Device*, 74 AMERICAN ECONOMIC REVIEW 433 (1984). See also Benjamin Klein, *Transaction Cost Determinants of “Unfair” Contractual Arrangements*, 70 AMERICAN ECONOMIC REVIEW 356 (1980), for a discussion of implicit versus explicit contractual responses to the problem of opportunistic behavior. Klein defines implicit contracts as those that can be enforced by “termination of the business relationship.” To the extent FMLA deters firms from terminating “shirking” employees (e.g., by raising the risk of litigation), it may inhibit efforts to reduce such behavior.

²⁵ Shapiro & Stiglitz, *Id.*; See also Tim Barnby, John Sessions, & John Treble, *Absenteeism, Efficiency Wages and Shirking*, 96 SCANDINAVIAN JOURNAL OF ECONOMICS 561 (1994).

II. THE WESTAT SURVEY DID NOT COLLECT, OR DOES NOT REPORT, SUFFICIENT DATA TO FULLY ASSESS THE COSTS OF FMLA

This section shows that certain flaws in the design of the Westat Survey create a bias in the direction of understating the costs of FMLA compliance. In particular, because large firms are more likely than small firms to experience negative effects as a result of FMLA, and because the majority of workers are employed at large firms, Westat understates the negative effects of FMLA and intermittent FMLA leave. Furthermore, because certain industries are more likely than others to experience large negative effects due to FMLA, the Westat Survey understates the negative impact of FMLA on certain industries.

A. The Westat Survey Understates the Economic Impact of FMLA by Failing to Weight Its Results Appropriately

The Survey of Establishments included questions regarding the effect of FMLA compliance and intermittent FMLA leave on business operations. Specifically, Table A2-6.12 shows that of all establishments covered by FMLA, 16.3 percent of respondents stated that FMLA has a negative effect on business productivity.²⁷ However, 26.1 percent of establishments with more than 250 employees stated that FMLA negatively affects business productivity, whereas only 15.7 percent of small establishments (between 50 and 250 employees) stated that FMLA negatively affects business productivity.²⁸

Similarly, data in Table A2-6.13 indicates that 81.2 percent of surveyed businesses report that intermittent FMLA leave has no effect on productivity, and 93.7 percent of firms surveyed

²⁶ See Barmby, Sessions & John Treble at 565.

²⁷ *Westat Survey*, *supra* note 1, at Table A2-6.12.

²⁸ *Id.*

reported that intermittent leave had no effect on profitability.²⁹ Again, however, large firms were more likely than small firms to report negative effects. In particular, 65.7 percent of firms with more than 250 employees reported no negative effects of productivity from intermittent leave, and 81.7 percent of firms with more than 250 employees reported no negative effects on profitability.³⁰ Thus, the Westat Survey supports the proposition that large firms are more likely than small firms to experience negative effects from FMLA.

In reporting its results, the Westat Survey weights the results by the number of establishments, a weighting scheme that biases the overall results in favor of responses provided by small establishments, as there are far more small firms than large firms in the United States. The appropriate metric for gauging the economic impact of FMLA is not the firm-weighted average, but rather the employment-weighted average.³¹

To account for the importance of firm size, one would, ideally, know the distribution of firm size for establishments included in the Westat Survey.³² Because that distribution is not reported,³³ the next best option is to assume that the firm size distribution in the Westat Survey

²⁹ *Westat Survey*, *supra* note 1, at Table A2-6.13.

³⁰ *Id.*

³¹ A simple example clarifies this point. Suppose there are only 5 firms in the economy. Four of those firms have only 100 workers each. The fifth firm, however, has one million workers. The first four firms claim that FMLA has no effect on their business, but the large firm reports that FMLA has a large negative effect. Were the Westat weighting scheme used, it would be reported that 80 percent ($4/5 = .8$) of firms found no negative effect from FMLA. This drastically understates the negative effect of FMLA, because weighting by employees reveals that 99.9 percent of employees ($1 \text{ million} / 1,000,400 = .999$) work at a firm that is affected by FMLA in a large, negative way. Note that the employee-weighted approach is accurate based on the assumption that there is no difference in employee productivity between small and large firms.

³² As I explain below, this adjustment is likely inadequate to fully correct for the effect of firm size. Therefore, these results serve as only a minimum reasonable bound to the average effect of FMLA on productivity as reported in the Westat Survey.

³³ To be complete, the Westat survey reports the number of respondents in each category for all tables in the report. For questions broken out by firm size, this includes the number of respondents for firms with fewer than 250 employees and firms with more than 250 employees. *Westat Survey*, *supra* note 1, at Appendix B. However, because

reasonably approximates that of the U.S. population, in which case the use of U.S. Census data is appropriate. Based on U.S. Census, I estimate that between that 17 and 39 percent of employees in the United States in 2001 worked at firms with between 50 and 250 employees.³⁴ Using these estimates, I weighted the Westat survey results by employment. The results are presented in Table 1.

**TABLE 1:
CORRECTED ESTIMATES OF THE IMPACT OF FMLA
ON PRODUCTIVITY AND PROFITS**

	Reported Effect (by Firm Size)		Implied Overall Economic Impact		
	1-250 Employees	251+ Employees	Firm- Weighted (Westat)	Employment Weighted (17%)	Employment Weighted (39%)
Productivity Effect					
Positive (%)	6.7	14.3	7.1	13.0	11.3
Negative (%)	15.7	26.1	16.3	24.3	22.1
No Effect (%)	77.6	59.6	76.5	62.6	66.6
Profit Effect					
Positive (%)	2.5	4.6	2.6	4.3	3.8
Negative (%)	9.0	23.5	9.8	21.1	17.9
No Effect (%)	88.6	71.9	87.6	74.7	78.4

Table 1 shows that weighting the Westat survey results by employment has a large effect on the reported impact. For example, the Westat Survey reports (accurately) that only 16.3 percent of *firms* respond that FMLA negatively affected productivity. However, as shown in

Westat does not report either the probability weights associated with each firm in the sample or the size of each firm in the sample, the distribution of firms by size cannot be ascertained from the reported data.

³⁴ These data are available at <http://www.census.gov/csd/susb/susb01.htm>. Because Census does not provide data that perfectly correspond to the between 50 and 250 category, an assumption must be made. The 17 percent figure is attained by including three eighths $((50-20)/100 = 3/8)$ of employees in Census' 20 to 99 category and three eighths $((250-100)/400 = 3/8)$ of employees in the 100 to 499 category in the between 50 and 250 category. The 39 percent figure is arrived at by using firms with size between 20 and 499 to approximate the number of firms with

Table 1, these firms account for at least³⁵ 22.1 percent of *employees*.³⁶ Assuming labor productivity is equal at large and small firms, FMLA negatively affects firms that represent between 22.1 and 24.3 percent of gross domestic product. Similarly, the Westat Survey reports that only 9.8 percent of firms report negative effects of FMLA on profitability. However, as shown in Table 1, these firms account for at least 17.9 percent of employees (and economic output). Therefore, the overall effect of FMLA on the employee-weighted population of firms in the economy is larger than what is reported in the Westat Survey.

I applied the same adjustments to the Westat Survey's results regarding intermittent FMLA leave.

between 50 and 250 employees. Therefore, the 39 percent figure overstates the percent of employees working at firms with between 50 and 250 workers.

³⁵ As I show below, the distribution of employees in the United States is strongly weighted toward firms with very large numbers of employees. If these firms were more likely than even average sized firms to report negative effects from FMLA, then these percentages understate the negative effects of FMLA on employee productivity.

³⁶ Note that weighting the results by employment also increases the implied overall positive effects of FMLA.

**TABLE 2:
CORRECTED ESTIMATES OF THE IMPACT OF INTERMITTENT FMLA LEAVE
ON PRODUCTIVITY AND PROFITS**

	Reported Effect (by Firm Size)		Implied Overall Economic Impact		
	1-250 Employees	251+ Employees	Firm- Weighted (Westat)	Employment Weighted (17%)	Employment Weighted (39%)
Productivity Effect					
Large Negative (%)	0	3.2	0.5	2.7	2.0
Negative (%)	12	14.6	12.2	14.2	13.6
Small Negative (%)	4.8	14.5	5.4	12.9	10.7
No Effect (%)	82.3	65.7	81.2	68.5	72.2
Profit Effect					
Large Negative (%)	0	1.2	0.1	1.0	0.7
Negative (%)	1.5	5.5	1.7	4.8	3.9
Small Negative (%)	3.8	10.7	4.2	9.5	8.0
No Effect (%)	94.5	81.7	93.7	83.9	86.7

As shown in Table 2, the impact of intermittent leave on the economy is much larger than the firm-weighted Westat results suggest. The Westat Survey found that 81.2 percent of firms experienced no effect on productivity from intermittent FMLA leave. However, these firms employ (at most) 72.2 percent of workers – meaning that firms employing 27.8 percent of workers did experience a negative effect. Similarly, the Westat Survey found that 93.7 percent of firms experienced no effect on profits from intermittent FMLA leave. However, these firms employ (at most) 86.7 percent of workers – meaning that firms employing 13.3 percent of workers did experience a negative effect.

B. The Westat Survey Fails to Provide Adequate Data on Results by Firm Size

Although the above data provide a minimum level of correction to the results reported in the Westat Survey, the negative effects experienced by companies as a result of FMLA are almost certainly higher still. In particular, the data from the Westat survey indicates that larger

firms are more likely to experience negative effects from FMLA. However, the Westat survey lumped all large firms into a single category – 250 employees or more. Given the Westat data, it is reasonable to expect that a hypothetical firm with (for example) 5,000 or more employees would be more likely to be harmed by FMLA than another hypothetical firm with (for example) 300 employees (in other words, that the impact of FMLA is positively correlated with firm size across the distribution of firms).

The distribution of employees in the U.S. is heavily weighted toward the largest firms. Data from the U.S. Census Bureau show that 27.2 percent of workers in the United States work at firms with more than 10,000 employees.³⁷ Considering only firms with 100 or more employees, 42.3 percent of the population works at firms with more than 10,000 employees.³⁸ If FMLA affects the largest companies in the U.S. economy more than it does the average firm with more than 250 employees, then the Westat survey understates impact of FMLA to an even greater extent than suggested by the employment-weighted estimates provided in Section II.A. above. To accurately estimate the employee-weighted effects of FMLA on all firms in the economy, data on the size distribution of firms included in the Westat survey would have to be reported on a more disaggregated basis.

C. The Westat Survey Fails to Report Adequate Information on Results by Industry

Another shortcoming of the Westat Survey involves its failure to provide sufficient industry-specific information regarding the financial impact of FMLA. As discussed in Section I.B., economic theory and empirical research indicate that the costs of absenteeism vary depend on the characteristics of firm production functions. Hence, the economic impact of FMLA is

likely to vary by sector. Critical aggregate statistics in the Westat Survey are constructed by averaging across all industries.³⁹ Reliance on simple averages disguises the fact that certain sectors incur disproportionately high costs as a result of FMLA compliance, and hence leads to estimates that are biased downward.

As the RFI notes, independent survey data support the notion that FMLA imposes higher costs on sectors that rely more heavily on assembly line technologies. In particular, the 2004 Employment Policy Foundation survey found that the sector incurring the highest costs associated with FMLA was transportation, where FMLA compliance costs accounted for 3.2 percent of total compensation.⁴⁰ Because of the high degree of coordination of labor and equipment that is required in this industry – an obvious example being the unexpected absence of an airline pilot – absenteeism in the transportation sector involves heavy costs.

The Westat Survey fails to provide industry-specific statistics regarding FMLA's financial impact.⁴¹ Instead, the Westat Survey's aggregate statistics calculate averages across all industries surveyed. Sectors operating linear production technologies are, for reporting purposes, lumped together with those that have assembly line characteristics. Hence, the substantial FMLA compliance costs incurred by industries such as transportation are, in the aggregate, obscured by

³⁷ These data were downloaded from the U.S. Census Bureau at <http://www.census.gov/csd/susb/susb01.htm>.

³⁸ *Id.*

³⁹ The Westat Survey's statistics regarding FMLA's effects on business and employee performance are disaggregated (to a very limited extent) by firm size, but not by sector. *See Westat Survey, supra* note 1, at Table A2-6.12. Some industry-specific information is presented in the Westat Survey. For example, statistics pertaining to FMLA-related administrative activities are broken down by industry. However, the division by sector is very rough (Manufacturing, Retail, Service, All other Industries). *See Westat Survey, supra* note 1, at Table A2-6.11. In addition, the Westat Survey contains no industry-specific statistics regarding FMLA's effect on productivity, profitability, or any of the Westat Survey's other measures of business and employee performance.

⁴⁰ Janemarie Mulvey, *The Costs and Characteristics of Family and Medical Leave*, EMPLOYMENT POLICY FOUNDATION ISSUE BACKGROUNDER (April 2005).

the effects of averaging. By masking what may be large effects of FMLA in particular industries, the Westat Survey fails to capture what may well be substantial economic costs incurred in particular industries.

III. THE DATA COLLECTED BY THE WESTAT ESTABLISHMENT SURVEY IS UNRELIABLE AND LIKELY UNDERSTATES THE IMPACT OF FMLA

The economic impact data collected by the Westat Establishment Survey is unreliable and likely understates the impact of FMLA. While a complete critique of the survey is beyond the scope of this analysis, I do note three issues of particular concern. First, survey respondents often lacked the information required to provide informed responses to questions regarding the financial impact of FMLA. Second, the survey did not allow sufficient time for complete responses, allotting roughly 20 minutes of interview time for respondents to answer 45 questions. Third, the way the survey was conducted suggests that the results likely exhibit what survey researchers refer to as “social desirability” bias.

A. Many Respondents Had No Quantitative Basis for Their Responses

The Survey of Establishments was administered as a telephone survey to the human resources director or individual responsible for the benefits plan at each responding company.⁴² In many cases, respondents specifically indicated that their companies did not maintain records of information relevant to the survey questions.

While the Establishment Survey specifically asked respondents whether their companies maintained records on employee use of FMLA leave, the responses to that question do not

⁴¹ Even the limited industry-specific information that is reported uses industry definitions that are too coarse to be of practical use. *See* note 39, *infra*.

⁴² *Westat Survey*, *supra* note 1, Chapter 1, at 4 (“The human resources director or the person responsible for the company’s benefits plan was selected to be the respondent for each establishment.”).

appear in the report.⁴³ However, the report does indicate that that approximately 45 percent of establishments surveyed were unable to retrieve any information on the number of FMLA leaves from their record-keeping systems.⁴⁴ While these firms' responses were excluded from the Establishment Survey's estimates of the amount of FMLA leave taken, they were included in the Survey's estimates of FMLA's financial impact. The impact of including such responses cannot be known with certainty, as the Survey does not report disaggregated results for firms that report maintaining records versus those that do not.⁴⁵ One would expect, however, that respondents who lacked records of FMLA usage would be less likely to report an economic impact than those who had such records.

The Survey's failure to distinguish between responses based on quantitative data and those based on subjective opinion or "guesses" is exacerbated by the fact that the Survey relies on qualitative, vaguely phrased questions to begin with. A typical survey question requested that the respondent indicate whether the effect of FMLA compliance on business productivity had been positive, negative, or simply not noticeable. (The interviewer did not define for the respondent what was meant by terms such as "productivity" and "profitability.")⁴⁶ By relying

⁴³ *Westat Survey*, *supra* note 1, Appendix E, at 14, Question 20.

⁴⁴ *Westat Survey*, *supra* note 1, Appendix C, at 23 ("To estimate the number of leaves taken under the FMLA, the respondent was asked to provide data for the period between January 1, 1999 and the interview. The establishment's estimated number of leaves taken could include multiple leaves for the same person...a number of establishments had difficulties retrieving this information from their records. Approximately 45 percent of covered establishments did not provide these data at all."). *See also Westat Survey* at Sec. 3.5.1. This evidence is consistent with independent survey data indicating that approximately 43 percent of organizations track FMLA absences by qualifying reason. *See WorldatWork, FMLA Perspectives and Practices*, April 2005, at 4,

⁴⁵ The Westat Survey's aggregate statistics regarding FMLA's effects on business and employee performance do not distinguish between respondents reporting that their organization did maintain records of employee use of FMLA leave and those that did not. *See, e.g., Westat Survey*, at Table A2-6.12.

⁴⁶ In addition to "Positive Effect," "Negative Effect," and "No Noticeable Effect," interviewers could also record that the respondent refused to answer the question, or did not know the answer. *See Westat Survey*, *supra* note 1, Appendix E, at 15, Question 24.

on *vague concepts* and *vague quantifiers*, the Survey of Establishments fails to abide by basic guidelines of survey methodology.⁴⁷

B. The Westat Survey Allotted Insufficient Time to Interviews

The Survey of Establishments also allowed insufficient time for interviewers to elicit information regarding the financial effect of FMLA compliance, likely resulting in still more downward bias in estimated economic impact. Interviews contained a total of 45 questions, with a target interview length of 20 minutes.⁴⁸ Respondents were therefore given, on average, fewer than 30 seconds to answer each question. Thus, even in cases where respondents may have had access to the data needed to answer a particular question, they typically would not have had time to access the data.

C. The Westat Survey Likely Suffers from Social Desirability Bias

Social desirability bias in surveys “refers to the tendency to present oneself in a favorable light.”⁴⁹ In the case of the Westat survey, which was preceded by a letter from a Secretary of Labor who was known to be strongly supportive of FMLA (and dismissive of its potential costs to employers),⁵⁰ the potential for social desirability bias is exceptionally high – that is, respondents were likely to perceive that the socially desirable responses would be those

⁴⁷ Survey methodology texts note that a lack of concreteness (referred to as the use of *vague concepts* or *vague quantifiers*) is one of the primary comprehension problems that occurs in survey questionnaires. *See, e.g.,* Robert Groves, Floyd Fowler, Mick Couper, James Lepkowski, Eleanor Singer, & Roger Tourangeau, *SURVEY METHODOLOGY 210* (John Wiley & Sons 2004) (“[I]t helps if survey questions are as concrete as possible. For example, a question about children should specify the age range of interest...Some survey items employ vague relative terms (“Disagree somewhat,” “Very often”) in response scales. Unfortunately, different respondents use the scale in different ways.”). *See also* Circular A-4 at 23 (“[T]he survey instrument should be designed to probe beyond general attitudes (e.g., a “warm glow” effect for a particular use or non-use value) and focus on the magnitude of the respondent's economic valuation”).

⁴⁸ *Westat Survey, supra* note 1, Appendix E, Advance Letter.

⁴⁹ Groves *et al* at 155.

⁵⁰ *See, e.g.,* Bill Leonard, *Relieving FMLA Headaches*, HRMAGAZINE (July 1999) (available at <http://www.allbusiness.com/public-administration/administration-human/287524-1.html>)

emphasizing the benefits of FMLA while minimizing its economic and other costs. Moreover, social desirability bias is known to be especially problematic in telephone surveys (as opposed to self-administered surveys, such as those conducted by mail or online).⁵¹

CONCLUSION

The Westat Survey does not provide an adequate basis for assessing the economic impact of FMLA. Its results are subjective, qualitative, incomplete and biased in the direction of understating the costs of FMLA to consumers, workers, employers and overall economic welfare. The Department has taken the first step towards a more complete and accurate assessment by soliciting additional information through the RFI, and it can be hoped that the questions raised in the RFI will elicit more quantitative data that could form the basis for a more complete analysis. Such an analysis should be conducted in accordance with basic principles of benefit-cost analysis, focusing on the overall effect of FMLA on economic welfare.

⁵¹ See Groves *et al* at 157-8. See also Circular A-4 at 23 (indicating that survey instruments should be pre-tested and that “the mode of administration of surveys (in-person, phone, mail, computer, internet or multiple modes) should be appropriate in light of the nature of the questions being posed to respondents and the length and complexity of the instrument.”)