

**Benefits and Costs of the
Family and Medical Leave Act of 1993:
A Consumer Welfare Perspective**

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Economic Welfare Consequences of FMLA

EXECUTIVE SUMMARY

This paper addresses the intentions and impacts of the Family and Medical Leave Act of 1993. It is based on a review of data and analysis available after a decade of experience under the Act. It uses a standard economic welfare framework for assessing the size, nature and distribution among individuals of the Act's costs and benefits, while also attempting to reconcile and interpret imperfect, incomplete and inconsistent estimates of the Act's implications. After summarizing and interpreting the "best" estimates of the Act's effects, the paper adopts and spells out an individual economic welfare impact perspective in which individual interests are a composite of their economic roles as consumers, workers and stakeholders in the US economy. The paper concludes that much of the cost of implementation of the Act is effectively a "dead weight" economic loss that reflects economic waste and confers very limited benefit on all but a few stakeholders. These deadweight losses are estimated to be in excess of \$30 billion annually, all of which is borne ultimately by individuals as consumers, workers and economic stakeholders. Using Office of Management and Budget guidelines for estimating the costs of federal programs and applying a discounted present value analysis to the best available data, we estimate the present value of the cost total of FMLA driven price increases to consumers in the 2004-2009 time period to be \$666 per household.

I. INTRODUCTION

This paper addresses selected economic impacts and issues arising from implementation by the Department of Labor of the Family and Medical Leave Act of 1993 (FMLA). The main provisions of the FMLA permit eligible employees to take as much as 12 weeks unpaid leave each year to attend to family matters related to maternity, adoption or newborn care; to care for an elderly parent, sick child or spouse; or for reasons related to the employees' own "serious" medical condition(s). The Act directs employers to restore workers to previous job status on returning from covered leave.¹

The FMLA took effect in April 1995. Over a decade of experience with its implementation through rules established by the Department of Labor and extensive judicial review has created a record that permits assessment of

¹ Text of the FMLA is found in 29 CFR chapter 825, part 110.

the costs and benefits to individuals impacted by it. A substantial amount of information has been amassed. Research and analysis to date address several dimensions of the Act, including a) the extent to which its implementation and impact reflect Congressional intent; b) its impact on employees and families; c) the costs incurred by firms obliged to decipher its intent and meaning, while putting in place systems to interpret and comply with its provisions; and d) the overall “success” or “failure” of the Act as reckoned by advocates from different perspectives using different metrics.

We have reviewed the principal studies, analyses, articles and data collection efforts whose common theme is to record and understand the impact of the Act. Our purpose here is not to add to that volume of data, but rather to draw from it and present relevant and reliable portions of it in a framework that has at its center the impact of the Act on employees as family members and consumers, individually and collectively.

There is no denying the importance of fundamental benefits conferred by the Act on individuals. The value of job security in the face of unanticipated family or personal issues requiring “time off” cannot be ignored, but neither has it been reliably estimated, since benefits are highly circumstantial.

That said, we note the obvious, but sometimes neglected, fact that well-intended policies, processes, and events create both benefits and costs. Statutory provisions for family leave and their administration are no exception. Provisions and applications of law regarding family leave create benefits for some members of some families. The expectation and implicit valuation of such benefits provided the basis for the law in the first instance. Benefits are not free and each comes at some cost -- frequently at substantial costs which were not for the most part anticipated. Nor have they subsequently been fully identified and adequately quantified.

Benefits of FMLA tend to be concentrated among a few, while the associated costs associated are often scattered and diffused. All are borne ultimately by individuals as members of families and households. The nature of associated benefits and costs varies as to size, dimension or type, distribution or incidence among different individuals. Thus, a key element of any cost-benefit analysis should be to determine how large they are; in what way are they realized; and, by whom is their burden sustained. Ultimately some net value must be assessed.²

As important as measuring the aggregate cost of both intended and unintended employee behaviors under the Act is a better understanding of whom in fact has to pay those costs. Just as there is no such thing as a “free lunch,” neither is there free family and medical leave. The impacts are manifest in a variety of forms which vary from company to company: higher labor costs, lower productivity, undesirable impacts on fellow workers, less effective organization, administration and personnel practices of effected firms, higher prices, and lower quality of service to patrons of the impacted companies.

The goals of this paper are to:

- Review selectively the record of individual benefits and costs of the Act and set out a framework for analyzing and evaluating them;
- Consider the “unanticipated” or “undesired” impacts of the Act;

² The standard criterion for deciding whether a government program can be justified on economic principles is *net present value* -- the discounted monetized value of expected net benefits (i.e., benefits minus costs). Net present value is computed by assigning monetary values to benefits and costs, discounting future benefits and costs using an appropriate discount rate, and subtracting the sum total of discounted costs from the sum total of discounted benefits. Discounting benefits and costs transforms gains and losses occurring in different time periods to a common unit of measurement. “Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs”, Memorandum for Heads of All Executive Departments and Establishments, Office of Management and Budget Circular No. A-94, Revised (Transmittal Memo No. 64), October 29, 1992. Following a review of different cost estimates of FMLA implementation, we will show in Section IV a) how these are passed forward in part to consumers and b) a first order estimate of the consumer welfare losses due to the FMLA cost pass through.

- Consider the magnitude of associated benefits and costs; their incidence, trends, and economic consequences;
- Derive an estimate of the extent of FMLA cost pass through and its impact on consumer welfare; and
- Suggest changes to improve the ratio of benefits to costs.

II. FAMILY AND MEDICAL LEAVE ACT OF 1993

Issues at the intersection of family life and work have been on the Nation's public policy agenda continuously for the past sixty years.³ Numerous pieces of legislation have been introduced in Congress over that period. The debate in Congress has been wide ranging, but has focused for the most part on conditions and provisions for leave for family related matters and, secondarily, on more specific concerns related to individual health care related leave.⁴

The focus of draft legislation and debate during the past twenty five years has been on gender-related, workplace issues and in particular "equal opportunity" legislation designed to prohibit differential treatment of women in the workplace, while also supporting women working in the home and enabling them better to accommodate conflicts between work and family.⁵ The debate has been dominated by issues related to unpaid leave for family related reasons and, while women were the original focus, sentiment has morphed toward family and health-oriented leave for all family members.

The purposes and focus of the language of the Family and Medical Leave Act of 1993 (FMLA) reflected the history of the debate. It mirrored the emphasis on gender along with recognition of the need to reconcile the needs

³ See, Michael Selmi, "The Family and Medical Leave Act of 1993: Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA", 15 Washington University Journal of Law and Policy, v. 65, 2004, footnote 10.

⁴ See, Ronald Elving, "Conflict and Compromise How Congress Makes the Laws", Simon & Schuster, 1995.

⁵ Paul Burstein, R. Marie Bricher and Rachael L. Einwohner, "Policy Alternatives and Political Change: Work, Family and Gender on the Congressional Agenda, 1945-1990", 60 American Sociological Review, February 1995, 67-83, cited by Selmi.

of family relationships and requirements of the workplace environment. No less an authority than Chief Justice Rehnquist of the United States Supreme Court observed that the intent of the legislation was "...to protect the right to be free from gender-based discrimination in the workplace..."⁶ Chief Justice Rehnquist elaborated on that theme: "Congress sought to adjust family leave policies in order to eliminate their reliance on and perpetuation of invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace."⁷ In short, it is a fair representation of Congressional intent to say that the purpose of the FMLA was to reflect in family leave policies and rules to address (in part) and help to eliminate gender-based barriers to working women.

It takes nothing away from the actual goals of the Act to emphasize here what they were not: that is, issues that were not addressed by the intent or language of the FMLA. Debate in Congress and public media discussions focused on leave provisions related to child birth and adoptions rather than leave provisions addressing other, serious illnesses. One scholar concluded a review of the legislative record: "While the formal legislative history did refer to the serious illness provisions, it generally treated those as the least significant portions of the legislation, [while] giving them the shortest treatment."⁸

The legislative history suggests that there were three expectations:

- The FMLA would bring into balance work and family (not health) issues;
- It would be the first step toward implementation of a comprehensive family leave policy that would include paid leave; and
- By extending the (birth- and adoption-focused) leave provisions to men, it would break down stereotypes regarding childcare.⁹

⁶ Nevada Department of Human Resources v. Hibbs, 123 S. Ct. at 1978 (2003).

⁷ Selmi, footnote 10.

⁸ Selmi at p. 3.

⁹ We note that birth- and adoption-focused leave provisions were the focus of recent Supreme Court Opinion written by Chief Justice Rehnquist's. Selmi, at p. 1.

Main Provisions of the Act. The main provisions of the FMLA reflect the context of decades of debate and its principal purposes.¹⁰ The Family and Medical Leave Act was the first bill signed into law by President Clinton. Its main provisions addressed the need to balance the often competing demands of family life and work. The Law covers employers with 50 or more employees within 75 miles of their work site. Workers who have logged at least 12 months for the employer--and 1,250 hours within the past year--are eligible. It allows up to 12 weeks of unpaid leave annually for a limited array of events sustained by employees or their family members, while also guaranteeing continuation of certain worker rights when they return from covered leave. Coverage of the law was to be limited to "serious" health conditions include cancer, heart disease and other severe illnesses as well as injuries and chronic physical or mental conditions. The law provides for unpaid leave, although many employees do receive some salary during FMLA leave.

The law specifically requires covered employers to:

- Provide up to 12 weeks of leave annually to female or male workers upon the birth or adoption of a child;
- Provide up to 12 weeks of leave during any 12-month period for a "serious" health condition of an employee or the employee's spouse, child or parent;
- Allow leave to be taken intermittently or via reduced work schedules;
- Continue employee health insurance coverage during the leave period;
- Keep certain records during leave periods, including payroll information and the dates, hours and--in some cases--minutes that FMLA leave was in effect for the employee; and
- Except for some key, highly compensated individuals, return employees to the same positions they had before the leave (or equivalent jobs).

¹⁰ Selmi observed: "Although every version of the legislation included provisions to grant individuals leave to care for the serious illness of a child or themselves, these provisions were never highlighted in the same way that the maternity or paternity leave provisions were. Virtually all of the news stories emphasized the birth and adoption provisions and how the legislation might (or in some cases might not) enable new parents to spend more time with their children." Selmi, at p. 4.

III. BENEFITS OF FMLA

There is in the record a substantial amount of data, analysis and conjecture on which to base a description of various attributes of benefits and costs arising from over a decade of experience under FMLA. That is the good news. The not so good news is that the data are scattered, spotty, frequently inconsistent, and largely anecdotal and episodic. They reflect the results and interpretation of a substantial amount of questionnaire research. While the research is useful and especially helpful in conveying impressions of the implications of the Act and the relative frequency of differing impressions, it nonetheless suffers many of the infirmities and limitations of survey data more generally.¹¹

General Benefits. Supporters of FMLA properly regard it as a landmark in their efforts to create a more “family-friendly” workplace in which employers are obliged to recognize episodic family events as sufficiently to warrant requiring changes in work rules and conditions. In the wake of the Act, practitioners and experts cite beneficial changes in perspectives on the workplace by both employers and employees.¹² The law appears to have achieved an important goal of providing a legal framework and structure in which employees are freed from the fear and risk of losing employment as a result of short term events requiring them to “take time off” from their jobs.¹³

¹¹ We neither pretend nor aspire to competence in survey research methods, but can certainly attest to the problems traceable to our efforts to analyze and to make supportable inferences from survey data results in the record. For an excellent review of challenges and best practices in the field we commend the very comprehensive treatment of questionnaire and sampling design, sources of error and bias, inferential limits and generally of inference in Robert M. Groves, Mick P. Couper, James M. Lepkowski, Eleanor Singer, Roger Tourangeau, Floyd J. Fowler, Jr. *Survey Methodology*, John Wiley & Sons, Inc., April 2004. Perusing the table of contents will by itself convey a healthy sense of the need for care in use of survey data.

¹² "It has engendered an attitude change, both from the employer's and employee's perspective, that these are important life issues and concerns," according to Mr. Peter Burki, a work/life benefits consultant. According to counsel at the National Partnership for Women & Families, "It was a turning point in how workers looked at the workplace," Michael Prince, FMLA hasn't been big burden for employees, *Business Insurance*, September 29, 2003, 18-20.

¹³ See Prince, "Employees feel confident they can take the leave they need and not worry about their job," according to a VP of risk management and benefits at a major restaurant chain.

Employers cite leave-afforded relief to employee anxiety and preoccupation with disruptive family events and subsequent job performance quality.¹⁴ The law appears to have been especially helpful to expectant mothers who can plan in advance their absence and return dates, thereby enabling employers to adapt production plans through planned changes in schedules, assignments and personnel. Leave for foreseeable, but disruptive, family events rewards employers and employees by permitting them to cooperate in scheduling around the event and continue what is by and large a jointly beneficial employment arrangement.¹⁵

Benefits from Specific Types of Leave. Different types of leave provide different benefit profiles. Discussions and critiques of the Act categorize leave according to whether it is paid or unpaid (FMLA leave is unpaid); whether the leave is birth related (self or family) or health related (self or family); whether the leave is intermittent or regular; and, whether or not the employer is given sufficient or any prior notice of the leave.¹⁶

Similar sentiments were expressed by the employee benefits manager at a major national law firm who asserted: “Before the law's adoption, people would be reluctant to take time off out of concern for losing their job or having the leave held against them.”

¹⁴ See Prince, "When they do come back they are a better employee and can concentrate on their work," according to one manager. "You have a better workforce."

¹⁵ See Prince, “The law also especially helped new mothers,” according to a senior manager of corporate health benefits of a major company. “Expectant mothers can plan in advance their leave period and their return date, which allows their employer time to develop a plan to fill in for the absent worker”, she said. “Also, by holding the person's job open, as required under the law, it's more likely the worker will return... We, as the employer, don't lose that experience.”

¹⁶ While beneficial to employees who take it, the unannounced intermittent leave is the most problematic for employers and other employees. The following matrix would be a useful classification of leave for purposes of evaluating both benefits and costs. Unfortunately, available data will not permit estimation of relative frequencies of each individual type, nor changes in them over time.

Classification of Leave Taking Occasions

	Intermittent		Regular	
	Scheduled	Unscheduled	Scheduled	Unscheduled
Birth Related (self)				
Birth Related (family member)				
Sickness related (Self)				
Sickness related (Family member)				

The main categories indicate whether the leave is sickness or birth related; whether the occasion is intermittent or regular; if birth related whether it is taken by the mother or the father; and, finally and critically, whether the leave is planned (scheduled) by the employee

The Department of Labor 2000 survey yields some insights into the benefits and beneficiaries by type of leave.¹⁷ The Department reported the following data points, from which we can deduce a very general benefit profile: Of 144 million employees covered, 23.8 million took leave (17%); and about 6.6 million or 5 % of total employees took intermittent leave in the 18 months prior to the survey. That is 4.4 million or 3.3% annually.

Intermittent leave takers also took scheduled leave, but of those who took both almost half (46%) took predominantly intermittent leave.¹⁸ Intermittent leave was on average the longest for one of out five leave takers who took both intermittent and scheduled leave.¹⁹ A small fraction of the longest, intermittent leave was taken on a regular, routine basis (13.4%), but most was taken “as-needed” and taken without employer notice by employees.²⁰ Over a third (35.1%) of those taking the longest, intermittent leave did so for reasons related to their own health.²¹

Between the 1995 to 2000 surveys, the number of leave takers increased in absolute terms from 20.4 million to 23.8 million. That reflects a modest increase (from 16.0% to 16.5%) in relative terms.

The employees own health (52.5%) was the predominant reason for leave (in contrast to the apparent focus of the Act), while child related was second (38%) and care for family member(s) was third in frequency (19.4%).

and employer or not. These occasions have different cost and benefit profiles, as well as creating differing amounts of costs. These are discussed more fully in the cost section below.

¹⁷ *FMLA Survey*, December 7, 2006, Department of Labor, accessed January 16, 2007 at <http://www.dol.gov/esa/whd/fmla/fmla/foreword.htm>.

¹⁸ *FMLA Survey*, Table 2.9.

¹⁹ *FMLA Survey*, Table 2.10.

²⁰ *FMLA Survey*, Table 2.1.

²¹ *FMLA Survey*, Table 2.12.

The impact on other employees of all leave, without regard to reason, took several forms. Some employees worked more hours (32.1%); some worked a shift other than their regular shift (22.9%); and almost half (46.2%) took on additional duties.²²

A major intent of the FMLA was to afford the beneficiaries a better work life balance in times of need and thus increase their quality of life. Substantial benefit can be traced to that intention and to efforts to implement it.

Differences between Actual and Intended Benefits. The types of benefits realized and beneficiaries of the Act are not entirely congruent with the intentions and expectations of Congress at the time the statute was passed.²³ The major difference is reflected in differences between a) the law's primary impetus and emphasis on family oriented leave related to child bearing and parenting more generally and b) principal use of the Act's provisions by employees taking leave for personal medical reasons.²⁴

In practice, the benefits of leave are realized in several ways and depend on the circumstances of the leave and leave taker. As discussed above, FMLA permits leave for a variety of reasons and as an accommodation for varied events or occasions in an employee's personal circumstances.

Unintended benefits and Beneficiaries: Employee Abuse. There is much discussion in the record of employee abuse of the opportunities availed them by the Act.²⁵ Employer complaints are not uniform across all classes of

²² FMLA Survey, Table 4.22.

²³ See Selmi for exposition of stark contrasts between the intent and effects of the law. "While the formal legislative history did refer to the serious illness provisions [of individual employees], it generally treated those as the least significant portions of the legislation, [while] giving them the shortest treatment.

²⁴ "The FMLA was not designed to be the national sick leave Act". Gelak quoted in Bill Leonard, "Relieving FMLA Headaches", HR Magazine, 44 no. 7, July 1999, pp. 40 – 44.

²⁵ Numerous anecdotes have been offered in Congressional Testimony. See, for example, Statement of George G. Daniels in hearings before the House Subcommittee on Oversight and Investigations or the House Committee on Education and the Workforce, June 10, 1997.

leave, but center on contentions about unscheduled, intermittent leave by employees for reasons related to personal illness – alleged “chronic physical ailments or conditions” in particular.²⁶ Employer suspicions and charges of abuse or fraudulent employee behavior fall short of course of establishing either its frequency or severity. To be sure, many, and perhaps most, of the requests/claims for leave under the Act are valid, but just as certainly, an intolerable number are not. Only the employee really knows for certain if his/her health-related claims are valid.²⁷ Current regulations will not permit employers to require employees to “prove” or adequately verify that the leave was indeed the result of a “chronic” condition leading to a “serious” malady. In addition, the record suggests that whatever medical documentation is allowed or required is often incomplete, vague, or otherwise indeterminate with regard to the employees’ true physical state.²⁸

²⁶ “The biggest problem with the FMLA by far is employee abuse of intermittent leave.” See U.S. Chamber of Commerce Real Experiences Administering the FMLA: Why the Regulation Need Reform at page 1.

²⁷ Economists have observed this unequal distribution of important, transaction- relevant market information in several contexts. Such “information asymmetries” are present if one party to a transaction has more or better information than the other party. Such asymmetries are credited as sources of market failure that may and often should be addressed by remedial policy measures. For example, only the seller knows the true condition of a used car, while only the buyer of health insurance knows fully his/her true medical history and condition. “Information asymmetries” may lead to what economists call “adverse selection” whereby the ignorant party lacks information while negotiating or implementing an agreement or transaction. Adverse selection occurs when high health risk individuals are more likely to buy insurance than healthy individuals. Such asymmetries may also lead to so-called “moral hazard” which describes circumstances in which the ignorant party lacks information about performance of the agreed-upon transaction or lacks the ability to retaliate for a breach of the agreement or governing regulation. Moral hazard occurs if/when individuals are more likely to behave recklessly if insured, either because the insurer cannot observe this behavior or cannot effectively retaliate against it, for example by failing to renew the insurance. The typical policy remedy is to take steps to encourage or enable the information deficient party “reasonably” to acquire the necessary information and thereby reduce if not eliminate the asymmetry. A good overview of information asymmetries and alternative market and government solutions when they lead to unacceptable costs may be found in Stephen Shmanske, “Information Asymmetries in Health Services”, The Independent Review, Volume 1, Number 2, Fall 1996, pp. 191-200. The interested reader could explore the issue further through references there.

²⁸ SBC Communications Inc., Statement in Support of the FMLA Reform, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 2002.

Unintended Benefits and Beneficiaries: Employer Uncertainty.

Ignorance of the law has long and properly been held as no excuse for violations. Fair enough. That said, the other side of the coin is the cost of knowing what the law is. Employer uncertainty about the law – borne of vague/ambiguous language in the statute and Department of Labor rules as well as in inconsistent results from judicial review in different appellate jurisdictions. These infirmities create risks of noncompliance, and associated costs, for employers, but also a variety of opportunities for employees to reap benefits from the uncertainties. In short, vagueness, ambiguity and contradiction in the law's implementation and enforcement create unintended opportunities and benefits for some employees, but also lead to higher costs and litigation risks for employers and burdens on other employees.²⁹

*Summary and Conclusions.*³⁰ Benefits from the Act are significant.

However, they are diffuse, realized in different ways by different employees depending on purposes and type of leave, different from expectations at time of passage, cannot be fully identified and certainly not quantified with any sense of confidence. Most of the benefits are realized in ways that are not valued by markets and hence have no reasonably accessible or estimable dollar value.

²⁹ The difficulties of compliance have been cited and explicated on numerous occasions in Congressional testimony on experience under the FMLA. The US Chamber of Commerce cites 7 Congressional Hearings on the matter between June 1997 and November 2004. (See U.S. Chamber of Commerce).

³⁰ What is the Bush Administration's Record in Regulatory Reform? Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the House Government Reform Comm., 108th Cong., 2nd Sess. (Nov. 17, 2004); Paperwork Inflation: The Growing Burden on America Before the House Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the House Government Reform Comm., 107th Cong., 2nd Sess. (Apr. 11, 2002); Unemployment Compensation and the Family and Medical Leave Act Before the Subcomm. on Human Resources of the House Ways and Means Comm., 106th Cong., 2nd Sess. (March 9, 2000); Is the Department of Labor Regulating the Public Through the Backdoor? Before the Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Government Reform Comm., 106th Cong., 2nd Sess. (Feb. 15, 2000); The Family and Medical Leave Act: Present Impact and Possible Next Steps Before the Subcomm. on Children and Families of the Senate Health, Education, Labor and Pensions Comm., 106th Cong., 1st Sess., (July 14, 1999); Hearing on the Family and Medical Leave Act [FMLA] of 1993 Before the Subcomm. on Oversight and Investigations of the House Education and the Workforce Comm., 105th Cong., 1st Sess., (June 10, 1997); The Implementation of the Family and Medical Leave Act Before the Subcomm. on Children and Families of the Labor and Human Resources Comm., 104th Cong., 2nd Sess., (May 9, 1996).

IV. Costs of FMLA

Policies, processes, production and events create both benefits and costs. Family leave is no exception. The previous section focused on benefits and beneficiaries. We turn now to a discussion of costs.

Cost Overview. Provisions and applications of law regarding family leave create benefits for some members of some families. Expectations of such benefits provided the basis for the law in the first instance. But, these benefits are not free. The costs of the law were not fully anticipated, either in kind or in magnitude. Nor have they subsequently been fully identified and quantified. They have however come to the fore and a substantial amount of effort at doing so is evident.

Costs are always difficult to identify and to quantify. Differences in cost definitions and measurement are the basis for disagreement and litigation in most industries and with respect to a variety of laws, economic activities and events. That said, we have found it particularly difficult to get a firm sense of specific measures of the costs of FMLA, despite our intention and efforts to do so. The difficulty traces to the way the Act is worded; the imprecision of its implementation by Department of Labor; and to the fundamental complexity (and imprecision) in defining the occasions and conditions governed by the Act.

Costs are realized in a variety of ways, recognizable in different forms, and distributed differently among different stakeholders. Some are readily quantifiable; most are not. Costs are sometimes realized in terms of dollar outlays that can be captured by conventional accounting methods, but frequently and more seriously the costs are realized in the form of lost opportunities, implicit harms and hidden costs that are not quantifiable. Many of the costs of leave, especially intermittent leave, are experienced in ways that defy measurement – lost opportunities by employers as well impacts on other

employees in the workplace, including stress, inconvenience, loss of morale and workplace effectiveness. Despite the complexity and identification problems, the measurable impacts of FMLA are significant. Other costs are likely to be substantial, if intangible – employee and consumer safety and overall quality of service for example -- and cannot readily be estimated from the available data. That said, a complex array and variety of costs have been identified and quantified with methods of varying rigor and reliability.

Whatever their total and without regard to their cause, it is an unavoidable fact that all costs associated with FMLA are ultimately borne by individuals as members of families and households.

The nature of economic costs imposed by provisions of FMLA varies as to a) size, b) dimension or type, and c) distribution or incidence among different individuals. Thus, a key element of any cost benefit analysis should be to determine how large they are; in what way are they realized; and, by whom is their burden sustained. Thus, the goals of this section are to identify and quantify these costs. But, we begin with a discussion of some useful background and context provided by consideration of legislative expectations regarding costs at the time FMLA was passed and a brief discussion of the “drivers” or sources of causation for these costs.

Expectations about Costs. The cost of FMLA implementation in practice has substantially exceeded expectations of the even the most skeptical of critics who commented on its passage. That is true in part because of differences in the Act’s focus on family and child related events (birth, adoption, illness) and actual leave taking under the Act which, as discussed with respect to benefits, has been concentrated in leave taking for illness generally and employees’ own illness in particular. But, unanticipated costs are substantially the result of a natural tendency to focus more intently on the benefits of “fixing” perceived problems than on costs from such efforts.

Our review of costs uncovers a variety of costs that sum to substantial impositions on stakeholders, which were neither anticipated nor necessarily desired by supporters of the Act.³¹

Categories of Costs. It is critical to understanding the impacts of the Act to inquire about how costs realized and from what kinds of cost “drivers.” Several studies of costs are in the record and it is beyond the scope of this paper to attempt to review and summarize them all. That said, it is useful to report some of them as a means of indicating the ways in which costs are realized by employers and as a means of suggesting how one might categorize and analyze them. Some examples follow:³²

- Worker resentment of coworkers taking unfair ("legal") leave;
- Loss of productivity;
- Increased absenteeism;
- Increased administrative and personnel costs;
- Scheduling difficulties;
- Unnecessary record keeping;
- Unworkable notice requirements;
- Conflicts with existing paid sick leave policies; and
- Worker resentment of employers' "invading privacy" asking sensitive questions to determine if FMLA applies

Our review of commentary from employers and others suggests a variety of other “drivers” of leave-related costs. For example, and by no means exhaustive:

- Information gathering related to the meaning of the rules, verification of leave claims, and others;
- Record keeping for accounting and legal purposes, including tracking intermittent leave;

³¹ Much has been written about so-called law of “unintended consequences” and there are a variety of explorations of why they occur and with what impact. An important finding of most of the research conforms to the commonsense notion that some implications are simply not knowable inasmuch as we are not prescient. It is also commonsense to note that the “ex ante” hedge against unintended consequences is extensive research and analysis, while the “ex post” remedy is learning from experience then adapting rules to the new information.

³² The list is compiled by the National Coalition to Protect Family Leave. See http://www.workingforthefuture.org/fact_sheet.cfm, accessed 1/28/2007 at 2:00 PM.

- Production planning and revision due to episodic leave-taking;
- Legal research, litigation related activities;
- Assorted managerial and administrative costs;
- Costs of “filling” in for employees on leave;
- Training potential substitutes for employees on leave;
- Outsourcing assorted administrative chores;
- Costs imposed on customers, other employees;
- Overtime pay; and
- Decreases in quality and safety.³³

The purpose of this list is to indicate the range and diversity of cost drivers and implicitly to establish the difficulty of constructing a coherent set of categories that might be reasonably coherent. This list is by no means exhaustive, nor is its elements mutually exclusive. Nonetheless, they do suggest the full range and complexity of FMLA costs.

Special Problems of Intermittent leave. The biggest problem with the FMLA by far is employee (ab)use of intermittent leave. A popular conception of FMLA is as a law that provides for blocks of leave after the birth of a child or to recuperate from a major illness or surgery. The FMLA does provide for this type of leave, but it also allows an employee to take leave in small increments or at unpredictable times. The most problematic is leave for ‘chronic conditions.’ Under the current regulatory scheme, an employee may obtain a physician’s certification stating that the employee has a chronic, recurring condition—such as migraines or asthma—that may episodically flare up, and that the employee will need intermittent leave as a result. With that certification, the employer must provide the employee with intermittent leave

³³ These and other types of costs are mentioned in a variety of testimonies and reviews of experience under the law. A good cross sample would include: Bill Leonard, “Relieving FMLA Headaches,” HR Magazine 44 no7 40-4 July 1999; Margaret Littman, “Taking leave,” Crain’s Chicago Business 24 no23 E37 June 4 2001 supp.; Rebecca Auerbach, “FMLA Admin Woes: Disability Insurers, TPAs Are Coming To The Rescue,” National Underwriter (Life & Health/Financial Services Edition) 105 no10 30 March 5 2001; Steve Bates, “Whirlwind of Change,” HR Magazine 46 no8 62-6 August 2001; Paula J. Dehan, “Has the FMLA Been Stretched Beyond Its Intended Scope?” Northern Kentucky Law Review 29 no3 629-40 2002; Milton Zall, “The Family and Medical Leave Act: An Employer’s Perspective,” Strategic Finance Magazine 81 no8 46-50, Fall 2000.

whenever the condition flares up. Employers cannot require an employee to verify that the absences were indeed caused by chronic conditions.

Opportunities and incentives for Gaming the Rules. The literature on the economics of administrative regulation of firms and markets contains a variety of references to the potential for exploitation or abuse of well intended rules and regulations.³⁴ The essence of “gaming” regulatory processes is taking advantage of ambiguities and loopholes in the rules, lack of information required for adequate enforcement (asymmetric information), and/or lack of inexpensive or effective enforcement mechanisms available to government or other private sector stakeholders. Such behavior is a common source of unintended, negative consequences of well meaning, but inadequately drafted legislation.

Much of the post FMLA analysis by critics has highlighted anecdotes of employee exploitation of opportunities and for purposes not entirely consistent with the Act. No doubt that some employees take advantage. But, it is not always possible, because of asymmetric and imperfect information, for employers either to prove that the action constitutes abuse or to quantify its impact where it does in fact exist. Critics are left to report anecdotes of which there are many.³⁵

³⁴ For an early analysis on which substantial subsequent literature draws, see Bruce M. Owen and Ronald Braeutigam, *Regulation Games: Strategic Use of the Administrative Process*, Ballinger Publishing Co., (August 1978).

³⁵ These include instances of moonlighting while on leave, collecting overtime pay for eight hours of work while on FMLA leave, misleading or fraudulent letters from personal physicians, (sometimes without the benefit of an examination), routine absences before/after weekends or holidays, etc. Countless similar examples are to be found in the congressional record of hearings. (See footnote 30, supra.) Our purpose is not to catalog these or fully to summarize the extensive record of employee experience with “questionable” employee behavior, but rather to convey the sense from our review that they are cumulatively a serious and substantial problem traceable largely to vagueness in the rules and the inability of employers to verify employee claims.

One particularly egregious example of gaming the rules for personal advantage was reported by Southwest Airlines. In the case reported, the rules had the unintended consequence of requiring payment of overtime for employees on FMLA who worked an 8 hour shift. Workers would come in 4 hours late and then work 4 hours at regular pay and 4 more hours at the overtime rate. Some employees may have had legitimate reasons for such late arrivals. It is

Opportunities and incentives for employees to game the rules are magnified by the lack of clarity in its interpretation and implementation. Thus, the lack of clear definition for what constitutes a “serious health condition” encourages some employees to explore the limits of possible definitions, while requiring employers – as a means of minimizing their exposure to the costs of noncompliance – to adopt policies and processes that in some instances exceed a reasonable definition and very likely that which Congress had in mind when it passed FMLA.

It is well established, by experience and literature on the matter, but also common sense, that regulatory uncertainty or ambiguity provides occasions for behavior that may add substantial, but unnecessary costs. One irony here is the most conscientious and law abiding firms – those who study and attempt to learn the rules and follow them to the letter -- are the ones who may suffer most from the uncertainty. Firms that are more “casual” in their approach to implementation may well be unaware of the ambiguities.

Some Indicators of Overall FMLA-Related Costs. Notwithstanding the very substantial amount of research and controversy surrounding the costs of implementation of FMLA, it is disappointing, to find that the total costs are difficult accurately to pin down. There have been several estimates of the costs of FMLA. Unfortunately for our purposes, they use different estimating methods, which are not always spelled out clearly. They also measure

also clear that unprincipled workers recognize an opportunity and have the incentive to game the system. In the limiting case, a potential abuser can garner substantial financial gains. For example, an eight hour shift of which half is overtime pay will increase their gross pay if done twice a week by 10 percent. In some industries employees are paid double time for overtime especially on weekends. Thus an employee can take a day off during the week under FMLA and work on the weekend thus increasing gross pay by 20 %. Given that FMLA is for 12 weeks or 60 workdays and employee could thus do this every week and in essence get a 10 to 20 % raise for the same amount of work. This raise would be even higher if the employee has some paid sick days and uses them under FMLA. Again, the potential combinations are many, but the incentives are clear cut for unprincipled workers. Costs of course are borne in part by other employees, as discussed elsewhere in the text.

different types and different subsets of the total. Major problems, faced by all analysts of FMLA costs, derive from a) the complexity of leave-taking events and purposes which cause the costs b) the sheer magnitude of the number of leave taking occasions that must be monitored and measured and, most importantly, c) the lack of a coherent set of definitions usable to categorize the full range of leave-taking occasions.

The most important cost metric for evaluating FMLA is of course their total amount, direct and indirect, summed over all additional activities and impacts directly or indirectly attributable to the Act. Various estimates of varying quality – all subject to some criticism – have been offered.³⁶ One of the best reports of FMLA costs -- in terms of comprehension, cohesiveness, consistency, timeliness and coverage – is a report of 2005 survey results published by the Employment Policy Foundation (EPF). Though not without shortcomings, and critics, we will use it as a baseline for our analysis.

Direct Cost Estimates. The Employment Policy Foundation study indicates that total direct cost of FMLA leave in 2004 was \$21 billion.³⁷ The EPF study disaggregated the costs and assigned them to three subcategories: \$4.8 billion for the cost of lost productivity; \$5.9 billion for the cost of healthcare and \$10.3 billion for replacement of the services of absentees by additional hired labor. The cost of lost productivity reflects the value of output lost as a direct result of the leave-taking events.³⁸ The cost of healthcare reflects the cost of paid healthcare benefits provided to employees absent from

³⁶ We have reviewed a news release from the WorkAbility Division of CORE, Inc. which contains a variety of estimates of costs of interest here. However, since we were unable to access their data and analysis or otherwise review the basis for their results, we have not relied on them for our analysis. Nevertheless, we recommend that the news release be made a part of the record of this proceeding. See <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=www/story/03-22-2>, accessed January 12, 2007.

³⁷ “In terms of dollar value, EPF estimates that lost productivity due to FMLA leave cost firms \$4.8 billion in profit in 2004 equivalent to 0.6 percent of before-tax profits. In total, the overall direct cost of FMLA leave in 2004 was \$21 billion...The telecommunications, manufacturing, and transportation industries paid the majority of those costs.” EPF at p 1.

³⁸ “EPF estimates that lost productivity due to FMLA leave cost firms \$4.8 billion in profits in 2004 [which is] equivalent to 0.6 percent of before-tax profits.” EPF at p. 1.

the work place for the time spent while on FMLA leave.³⁹ Finally, the third component reflects the cost outlays for replacement labor required to compensate for the lost labor input due to the leave taker's absence.⁴⁰

These costs do not exhaust the total cost outlays attributable to FMLA leave. They do not include indirect costs, which would include, for example, the costs of litigation, record keeping, human resources management and administration, employment policy determinations, establishment of labor standards and contracts, and other indirect "compliance" costs related to resource use within the firm or outsourced to others.⁴¹

Indirect Cost Estimates. Some costs are indirect. Our best estimate of the order of magnitude of these costs is taken from a study done by the National Association of Manufacturers which estimated these indirect costs of compliance.⁴² These are in addition to the direct costs estimated by EPF and discussed above. The NAM surveyed 100 US manufacturers in 2001 on compliance costs of varied statutes and executive orders encompassing and requested information regarding "...all significant workplace regulations promulgated by the federal government." While the survey covered programs other than those related to FMLA, the responses are broken down into categories of sufficient detail and coherence to allow the results to be decomposed in a way to allow inference of a rough estimate of the compliance costs associated with the FMLA.⁴³

³⁹ "Employers incur an additional cost because FMLA requires employers to continue to provide group health care benefits while an employee is on an FMLA leave." EPF at p. 1.

⁴⁰ The third cost associated with FMLA leave is the net replacement cost of labor. This includes additional wages paid to other employees who work additional shifts and overtime to replace those on leave. EPF at p. 1.

⁴¹ According to EPF, "...it does not include the added administrative burden employers face in tracking and complying with FMLA leave...[and] represents only the direct cost of FMLA leave to employers." EPF at p. 2.

⁴² W. Mark Crain and Joseph M. Johnson, "Compliance Costs of Federal Workplace Regulations: Survey Results for U.S. Manufacturers, National Association of Manufacturers, 2001, p. 7.

⁴³ "The survey instrument requested information about four different types of firm compliance activity. Broadly, these were "Internal Costs" (functions performed by company employees), "External Costs" (functions performed by law firms or outside vendors, legal judgments and

The format of the results of the NAM survey does not comport specifically with our needs for estimating from them the costs of FMLA-related activities by firms. Some inferences and assumptions are required to make use of the data for our purposes. The following is a roadmap of our use, linkages and adjustments to the NAM data.

The National Association of Manufacturers estimates that more than \$1700 is spent annually per employee by manufacturing firms to comply with federal employee related workplace regulations.⁴⁴ The cost for large firms covered in the sample was \$1530 per employee.

The NAM survey also found that employee benefits (FMLA, COBRA, ERISA and Unemployment Compensation) account for 27% of the compliance costs.⁴⁵ Of these four employee benefits FMLA is rated the highest by all employers and by large employers (more than 500 employees). FMLA compliance is rated number 2 by medium employers (100-499 employees). It is not important to small employers since FMLA applies only to firms with 50 or more employees. Thus, it can be safely concluded that that FMLA is a major share of total compliance costs for large and medium sized firms and for most covered employers.

The NAM questionnaire indicates that FMLA is the “most important” source of cost causation for employee benefits, but does not indicate specifically what share it commands. Were all four sources equal in relative impact, each would account for 25% of the total. In order to be conservative, and for insufficient reason in support of any other estimate, we use that as our relative share in calculations that follow.

settlements), “Capital Expenditures,” and “Other Costs”. “Internal Costs” were further divided among three major corporate functions: Human Resources (the traditionally defined functions such as employment decisions, employee benefits, and labor standards), Engineering and Legal (activities to ensure compliance).

⁴⁴ NAM, p. 1.

⁴⁵ NAM, Figure 7, p. 14.

Multiplying the share of total employee benefits “caused by FMLA” (25%) times the share of employee benefits of all costs of complying with federal workplace regulations (27%) yields 6.75% of the total cost per employee that can reasonably be treated as FMLA compliance costs.

This means FMLA compliance cost amount to 6.75% times \$1,500.00 or \$1,012.50. Multiplying that times 110 million employees in 2000 yields a rough estimate of the indirect cost to firms of FMLA compliance of approximately \$11 billion.

To generalize the result, we assume that the FMLA experience in the manufacturing sector is roughly representative of the rest of the economy. We have no good reason to suggest otherwise and have found no data in the record to identify and measure whatever differences might exist.⁴⁶

Estimated Total Cost of FMLA. Summing direct costs derived from the EPF data (\$21 billion) and indirect costs from the NAM data (\$11 billion) suggests a total cost on the order of \$32 billion FMLA-related costs for 2004.

Cost Estimation – Some Caveats. We are well aware of the limitations of this estimate. Having gone through the available data and tried to piece it together in several different ways as a means of developing a reasoned estimate of the total costs of FMLA, we know well and better than most the long list of assumptions and inferences we have been obliged to make in order to compile an estimate. We have made a good faith effort to use available information fairly and under conservative assumptions to obtain a sense of the total cost of FMLA. Elsewhere in our report we are critical of the methods and

⁴⁶ It is also worth noting that the result does not account for inflation for the past five years, nor for the increase in the number of employees. To that extent it is a conservative estimate.

analyses on which we rely for this estimate.⁴⁷ But, the number should be taken for what it is – a signal that FMLA occasions substantial amounts of cost and, to the extent it is flawed, a reflection of the inadequacies of the underlying data for the purposes to which we have put it.

Cost Incidence; Who Bears the Cost? The burdens of FMLA costs are unequally distributed throughout the economy. We collectively as individuals bear the entire cost of the (ab)uses of FMLA, but some of us pay more than others. While survey data indicate that on average 14.5% of employees took FMLA leave in 2004, there was considerable variation from sector to sector about the mean. Leading sectors in the percentage of employees who took leave in 2004 were Telecommunications (22%), Manufacturing ((17%), Health Care (16%), and Utilities (14%). The Education (5%) and Financial Services (7%) sectors showed the lowest incidence, while the Retail/Wholesale Trade and Transportation sectors were in the neighborhood of 10% of their employees who took some type of FMLA attributable leave in 2004.⁴⁸

Impact on Manufacturing Sector. Much has been written about the seriousness of loss of US competitiveness in the manufacturing sector. Growing adverse trade balances and increasing number of lost manufacturing jobs have been highlights of trade data for the past several years. Estimates of the overall impact of workplace regulations (of which FMLA is only a subset) on the US manufacturing sector are sobering and according to one estimate sum to the equivalent of a 1.6% across the board excise tax on products manufactured in the U.S.⁴⁹ Employee benefits are more than a quarter of that,

⁴⁷ For a more detailed and complete critique, Jeffrey A. Eisenach, “Assessing the Costs of the Family and Medical Leave Act”, February 2007.

⁴⁸ “The Cost and Characteristics of Family and Medical Leave”, Issue Background, Employment Policy Foundation, April 19, 2005, p. 1. The numbers in the text above were estimated visually from a bar chart in Figure 1.

⁴⁹ W. Mark Crain and Joseph M. Johnson, “Compliance Costs of Federal Workplace Regulations: Survey Results for U.S. Manufacturers”, Regulatory Studies Program, Mercatus Center, George Mason University (Survey assisted by the Human Resources Steering Committee of the National Association of Manufacturers, December 2001.)

ranking slightly below occupational health and safety in relative importance.⁵⁰ Of all employee benefit programs -- including FMLA, COBRA, ERISA unemployment compensation -- FMLA was rated most costly by respondents to the Mercatus Center 2001 Survey.⁵¹

A recent survey (of manufacturers) and report with instructive data for our purposes was conducted last year by Mercer/Marsh Health Benefits LLC. According to the Mercer/Marsh 2006 Survey results, total cost of time off (scheduled and unscheduled leave) for disabilities programs of all kinds was 14.1% of payroll of which 10% was for scheduled leave. The direct cost of unscheduled absences (incidental, disability and workers' compensation medical and lost time) was 4.1% of payroll in 2004.⁵² Mercer/Marsh estimates that adding indirect costs may raise that by a factor of 1.5 to 3. They derive an estimate of total direct plus indirect costs for unscheduled absences in the range of 6-12% of payroll.⁵³

In response to a inquiry about management's top priorities for absence management programs, four factors -- "improving FMLA administration", "tracking systems for incidental absence/sick days", "controlling direct costs", and "reducing impacts of absences on business operations"-- were each cited by a third or more of respondents.⁵⁴ The average cost as a percent of payroll for "incidental absence/sick days" was in the range of 1.1% to 2.1% of payroll.⁵⁵ Indirect costs of absenteeism are more of an issue with unscheduled time off than with scheduled time off".⁵⁶ Scheduled absences can be timed to offset work flow disruptions, meet production plans, satisfy quality requirements and otherwise minimize related costs. Unscheduled and/or intermittent absences are more costly and more difficult to accommodate in

⁵⁰ Ibid at 13.

⁵¹ Ibid at 20.

⁵² Mercer/Marsh, p. 8.

⁵³ Mercer/Marsh, p. 8.

⁵⁴ Mercer/Marsh, p. 11.

⁵⁵ Mercer/Marsh, p.14.

⁵⁶ Mercer/Marsh, p. 16.

production processes. According to Mercer/Marsh, “With unscheduled absences, work tends to be postponed; performed less effectively; or covered by more costly labor, such as overtime.”⁵⁷ Seventy-three percent of U.S. manufacturing establishments who responded to the Mercer/Marsh survey have created a tracking system used to administer FMLA benefits and almost half those created the tracking system for FMLA related purposes alone.⁵⁸

Impact on Health Care Sector. Mercer/Marsh verify that unscheduled absences “significantly” affect operations. 86% of respondents declared that there is a significant impact of “unscheduled absences on business operations”.⁵⁹ The health care sector was especially impacted. These indirect impacts and the proportion of respondents who reported them include:

- Disruption of work flow – all respondents 61%
Health care respondents – 75%
- Added staffing expense – all respondents 63%
Health care respondents – 91 %
- Added demands on management time -- all respondents 57%
Health care respondents – 79%
- Reduced production and output -- all respondents 54%
Health care respondents – 63%
- Reduced level of customer service/sales -- all respondents 39%
Health care respondents – 62%

Health care sector and government lead all others in the percent of respondents who have “centralized tracking system specifically for FML events/benefits”.⁶⁰

Costs per Household. Dividing the total direct and indirect cost derived above (\$32 billion FMLA-related costs for 2004) by the number of

⁵⁷ Mercer/Marsh, p. 16.

⁵⁸ Mercer/Marsh, p. 61, (unnumbered table entitled Family Medical Leave Benefits).

⁵⁹ Mercer/Marsh, p. 50.

⁶⁰ Mercer/Marsh, p. 61, (unnumbered table entitled “FML Administration”).

households (approximately 107 million) in 2004 yields an estimate of more than \$310 FMLA-related costs per household for 2004.⁶¹

Burden: How Individuals Bear These Costs. Individuals may realize the costs in different ways, since they play different economic roles in the market. Three in particular stand out. First, and foremost, they are buyers of goods and services in the marketplace. The bulk of the “out-of-pocket” costs of FMLA are borne in the first instance by employing firms directly. These costs are in part passed forward to consumers of the goods and services produced by the firm. A portion of the costs is borne by the firm and reflected in reduced value to the firm’s owners, many of whom are employees and families. Thus, a second way employees suffer from abuse of FMLA is reduction in the value of their holdings in the equities of their own or in other companies.

Costs Imposed on Other Employees. An important cost dimension is reflected in the burdens imposed on fellow employees. These are not trivial, but have not been quantified in any except the most impressionistic and subjective way. Anecdotes abound.

The record indicates that fellow employees who “fill in” for unscheduled leave takers are often obliged to miss professional appointments and family engagements. Employees also cite added workplace stress, resentment and uncertainty. There are considerable costs to employees that must work overtime or more intensely to cover for another employee “out” on FMLA leave. This is especially true of unscheduled intermittent leave. Most employees will gladly fill in for a fellow employee who actually has a valid problem requiring leave. However employees are very unhappy when they

⁶¹ The Bureau of the Census reported the number of households under three definitions. The average was 107 million for the year 2004. Current Population Reports, Projections of the number of US Households and Families in the United States: 1995 -2010, (P25-1129), U.S. Department of Commerce, Economic and Statistics Administration, Bureau of the Census, Table C, page 5 (April 1996).

believe that a fellow employee is gaming the system and forcing them to work extra when the person is abusing the FMLA laws. This was expressed by a Hallmark survey concerning employee morale. Following is a sample of employees' comments:

- "FMLA is being abused by certain individuals in the company."
- "The FMLA is an incentive for people to miss work due to various things. It is appropriate in some cases, but highly abused. [It] causes resentment."
- "Too many people are taking advantage of their illness."
- "It affects the people who are here everyday that have to do their work as well their own....they get the same treatment as someone who is here every day. It is not fair."⁶²

Fellow workers cite other abuses. For example while some workers are "filling in" for an FMLA leave-taker, there are reports of leave takers moonlighting at another job. Further, many companies give rewards for perfect attendance. However, under the law those on FMLA leave are eligible for perfect attendance rewards. Tyler cites an instance in which two best friends have not spoken in over a year over the issue of perfect attendance and another case in which a FMLA leave-taker rewarded for perfect attendance promptly returned the check believing he did not deserve it.⁶³

FMLA also gives rise to substantial safety risks. The record is replete with reports of those and the following incidents gathered by the California Nurses Association are suggestive of the stakes in play.

- A nurse on the evening shift was ordered to work the night shift in spite of her protests that she had been up since 8:00 a.m. with her children and was too tired to think straight. Around 5:00 a.m., after about 14 hours on the job, she accidentally gave a patient an IV cardiac stimulant at twice the prescribed dose. The error was caught

⁶² The Experience of Hallmark Cards Under the FMLA, excerpts from the House Education and Workforce Subcommittee on Oversight and Investigation, June 10, 1997.

⁶³ See, Kathryn Tyler, "All Present and Accounted For?" HR Magazine 46 no. 10 101-9 October 2001.

as the patient's heart rate shot up into the 150s and his systolic blood pressure to 160.

- During a second mandatory double shift in one week, a nurse who had had only four and a half hours of sleep the night before inadvertently hung an insulin drip at a rate of 125 cc an hour instead of the standard dextrose solution that had been prescribed. The patient complained of nausea and weakness, and subsequently fainted. By the time the staff recognized the error and intervened, the patient's serum glucose levels had fallen to 27, far below the normal range of 80 to 100.

These are serious incidents, obviously. Unfortunately, there is no way to identify and capture them all, or to quantify their real human impacts.

FMLA Costs to Consumers. The “burden” imposed by FMLA on behalf of some employees is borne in the first instance by employers who are obliged to carry out its terms. However, as suggested above, that burden – measured by the direct and indirect costs of implementation -- may be multiplied and shifted in part to other economic stakeholders, including consumers of the goods and services provided by the employer. Determining how and how much of that cost burden is borne by different economic entities is critical to understanding the costs of legislation. The analysis parallels that of the analysis of the incidence or burden of a tax – a subject to which we now turn in order to lay the foundation of our estimates of the consumer burden of the costs of FMLA.

When legislatures pass a tax, the accompanying debate, before and after, often addresses who pays it, directly or indirectly, and in what measure. It is a fact that tax burdens are usually shared among different stakeholders and may be shifted from one to another – as among, say, employing firms, employees and customers. So it is as well with the costs associated with non-tax legislation which requires private sector economic entities, firms in particular, to provide certain services, opportunities or any thing of value to other firms, its employees, its stockholders and creditors, or its customers (consumers or other firms) to whom it sells goods and services. Economic

analysts and public finance specialists use the terms “tax burden” or “tax incidence” to describe who actually bears the weight of taxation and how they do so.⁶⁴

A tax may be imposed on one group but actually borne in some small or substantial part by one or more other groups. So it is as well with the costs imposed on firms by the economic obligations imposed on employers by the FMLA.

General Principles of Cost Shifting. While the economics of tax incidence and the burdens of costs added by statutory or regulatory requirements are well known, they are complicated by the need to take into considerations important characteristics of markets that have an impact on how the burdens are shared. Critical in this respect are: a) the extent to which market supply is marked by monopoly power – quasi-monopoly providers through oligopoly to markets that are organized very competitively; b) the extent to which customers have other options that may be substituted; and c) the extent to which the firm’s customers are consumers (end users) or other firms (intermediaries in the production chain).⁶⁵ Costs to firms from taxes and government mandates, like those under FMLA, set off ripple effects that radiate from firm to firm, market to market, sector to sector, short term to long term and ultimately throughout the entire economy. This radiation of costs outward to other entities and markets makes it impossible, as a practical matter, to capture fully all the effects.

Given the economy-wide scope of FMLA, it is beyond the reach of this study to estimate sector by sector the amount of FMLA costs that are passed

⁶⁴ An excellent discussion of tax burden for different kinds of taxes, tax shifting, and associated economic on impacts can be found in Joseph E. Stiglitz, Economics of the Public Sector, W.W. Norton, 1988, second edition, especially Chapter 17, “Who Really pays the Tax: Tax Incidence” and Chapter 18, “Taxation and Economic Efficiency: Consumption”. The analysis here is consistent with the principles explicated and references cited there.

⁶⁵ There is an excellent and straightforward discussion of these and other more specific determinants in Stiglitz, Economics of the Public Sector, Chapter 17.

through to consumers and the amount that is absorbed by firms in the first instance, then passed through to suppliers of labor inputs (employees) and capital inputs (investors, including employees) to their production processes.

Accordingly, we will focus, as do most other analyses and analysts on the principal, first-order effects as indicators of the orders of magnitude of the impacts likely to be involved. That is the best that can be done with the data available here, but should nonetheless be adequate for indicating the order of magnitude of consumer costs occasioned by FMLA implementation.

The analysis of the impact of FMLA on consumers is to be done in three steps. Step one estimates the increase in consumer prices from the cost pass through. Step two estimates the loss in current consumer welfare from the price increase. Step three estimates the present value of current plus anticipated future welfare losses from the price increases.

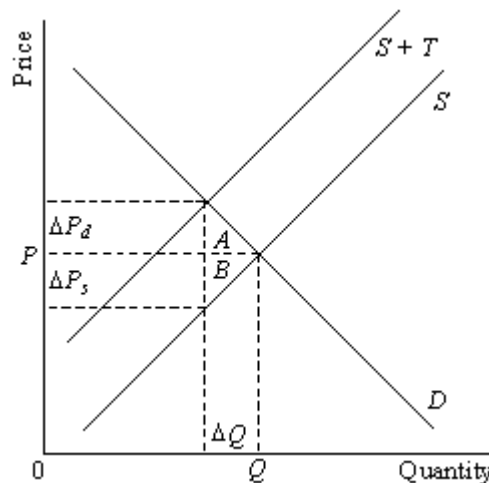
Step One. The first order analysis begins with an increase in costs that effectively increases the price at which employers who provide goods and services are willing to offer different quantities to consumers.

The diagram below provides a visual illustration of the conventional analysis of the way in which the burden of a cost increase is apportioned between employers/producers (suppliers) and consumers (demanders). The diagram depicts a stylized market with an normal, upward sloping supply curve (labeled S) and a normal, downward sloping demand curve (labeled D).

Together they illustrate the inclinations of buyers to buy greater (lesser) quantities (Q) at lower (higher) prices (P), while suppliers are willing to provide greater (lesser) quantities at higher (lower) prices. Introspection suggests that price increases decrease quantity demanded and increase quantity supplied and confirms the visual shape of the supply curve (S) and the demand curve (D) in the diagram. The market clears where supply equals demand. At

price P and quantity Q both suppliers and demanders are content with the market clearing quantity (the market is at equilibrium under current conditions) and there is in principle no reason for either to change their respective market behaviors.

Illustration of the Market Allocation to Producer and Consumers of an Increase in Government Mandated Cost



Now suppose suppliers are newly subjected either to a government mandate to implement cost-increasing programs like those required under FMLA. This has the practical effect of shifting the supply curve upward (leftward) to reflect the fact that employers must now recover both the original costs and added costs in order to induce them to make available the same quantities. The new, cost enhanced supply curve reflecting the added cost of fulfilling the government mandate is now given by $S+T$ which is everywhere above S by an amount reflecting the added costs of complying with the mandate. The new market equilibrium price and quantity is determined at the intersection of the new supply curve which reflects the added cost of fulfilling the government mandate ($S+T$) and the original demand curve (D).

The new price paid by buyers is given by the original price (P) plus the change in price (ΔP_d). But suppliers do not enjoy benefit from the full price

increase, since they sell less by the amount ΔQ . They receive only P minus ΔP_s which is less than the price paid by consumers by the amount of the tax. This is indicated visually by the difference between the old supply curve (S) and the new one ($S+T$). The price paid by consumers after the government mandate increases and the proceeds to producers declines.

The relative sizes of the increase in price paid by consumers (ΔP_d) and the amount received by suppliers (ΔP_s) indicates the market's allocation of the burden of the mandated cost increase between consumers and suppliers. Consumers pay more and suppliers net less than before the cost increase. The stylized diagram reflects a roughly even distribution of the burden of the increased costs.

But, inspection of the graph and a bit of imaginative visualization suggests that this even distribution of costs between demanders and suppliers is ordained by the slopes of the original supply and demand curves. These slopes reflect the willingness and desire of suppliers and demanders to adjust their desired quantities to changes in price. In economic jargon these preferences are reflected by the “elasticities” (or responsiveness to price changes) of supply and demand. A “flatter” demand curve would indicate a reluctance of consumers to pay higher prices (and perhaps the availability of good substitutes for the good or service in question here) and to sustain the burden of cost recovery. In the case of a flatter demand curve and more elastic response of users to price changes, more of the burden would be borne by suppliers. Alternatively, a “flatter”, more elastic supply curve would indicate the ability of firms to adapt to cost changes by changing output and would (all other things unchanged) force more of the cost increase to be borne by consumers.⁶⁶

⁶⁶ A widely known textbook analysis of the incidence of a tax [or mandated cost] on producers concludes: “The steeper the demand curve or the flatter the supply curve, the more the tax [or mandated cost] will be borne by consumers; the flatter the demand curve or the steeper the supply curve, the more the tax [or mandated cost] will be borne by producers. We measure the steepness of a demand curve by the elasticity of demand [which is] the percentage change

Using our earlier estimate of total 2004 FMLA costs of \$32 billion, then dividing it 50-50 between consumers of products and services availed by employers, we estimate \$16.0 billion in FMLA related costs passed on to consumers in the form of FMLA cost induced higher prices. Dividing by the number of households as before yields FMLA cost driven price increases summing to about \$155 per US household in 2004.

Much more and detailed analysis would be required of course to break this down by sector and, as discussed above, utilize sector specific supply and demand parameters. However, given the law of diminishing returns and the fact of near, current full employment of the U.S. economy, we are comfortable with the upward sloping supply curve. Given, as well, the fact that firms will always price their output in the range of the demand curve where elasticity is greater than unity⁶⁷ and that there is some market power in most markets subject to FMLA, we are comfortable that the estimated 1 to 1 distribution of the FMLA cost burden as between producers and suppliers probably does not exaggerate the amount shifted forward to the firms' customers.

Step Two. The price increase borne by consumers (measured graphically by ΔP_d) as a result of FMLA cost pass forward makes consumers worse off and for two reasons. First, they are paying a higher price by the amount ΔP_d . Secondly, they are consuming less of the good/service than they did before the government mandate and price increase (measured graphically by ΔQ). The combination of the price increase and the quantity decrease

in quantity of a good consumed due to the percentage change in its price...Similarly, we measure the steepness of the supply curve by the elasticity of supply [which is the percentage change in the quantity of the good supplied due to a percentage change in its price...The more elastic the demand curve and the less elastic the supply curve, the more the tax [or mandated cost] is borne by producers; the less elastic the demand curve and the more elastic the supply curve, the more of the tax [or mandated cost] will be borne by consumers. See Stiglitz, pp. 418-9. (Parentheticals marked by [] are added by the authors.)

⁶⁷ For the underlying economic logic, see the discussion of pricing and demand elasticity under imperfect competition in Hal Varian, MicroEconomic Analysis, W.W. Norton & Company, New York and London, 3rd edition, 1992, pp. 234-36.

defines the loss of consumer welfare and is given by the triangle labeled A in the diagram. That triangle measures a loss of “consumer surplus”, which is the term used by economists in estimating changes in consumer welfare under different market and demand conditions.⁶⁸

Unfortunately, we have no way to estimate how consumers in the aggregate and in all US markets covered by FMLA will react to the price increases. But, it is nevertheless true that the total welfare impact of the price increase and the quantity reduction will be greater than the price increase alone. That fact of course implies that our estimate of welfare loss from price only (\$15.5 billion in 2004) will be a very conservative estimate of the loss of consumer welfare.

Step 3. These losses in consumer welfare are not one time events. They are recurring each year and apparently growing from year to year. Thus, to capture fully their impact, it would be necessary to sum the annual cost over a number of years historically and/or prospectively. Adding the time element complicates the analysis since both the costs and benefits are changing over time in largely unknown ways (both as to size and composition). Secondly, the addition of time as an element in the analysis requires adjusting monetary impacts in each year for the time value of money – that is discounting at an appropriate discount rate to derive a “present value” of impacts realized in other time periods.⁶⁹ The cost-benefit literature is mixed on the appropriate

⁶⁸ We refer again to Stiglitz, “...consumer surplus calculations are widely employed to evaluate government programs...” Op. cit.

⁶⁹ That is precisely what is called for if the OMB Guidelines are followed. As noted in footnote 2 above, according to OMB: “The standard criterion for deciding whether a government program can be justified on economic principles is *net present value* -- the discounted monetized value of expected net benefits (i.e., benefits minus costs). Net present value is computed by assigning monetary values to benefits and costs, discounting future benefits and costs using an appropriate discount rate, and subtracting the sum total of discounted costs from the sum total of discounted benefits. Discounting benefits and costs transforms gains and losses occurring in different time periods to a common unit of measurement. “Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs”, Memorandum for Heads of All Executive Departments and Establishments, Office of Management and Budget Circular No. A-94, Revised (Transmittal Memo No. 64), October 29, 1992.

discount rate to use to adjust for future benefits and costs. Accordingly, we will use -- without apology and absent compelling reasons to do otherwise -- a rate of .08 or eight percent.⁷⁰

It is possible to calculate various present values of the losses of consumer welfare from price increases driven by FMLA costs. Doing so requires making assumptions about the growth of costs over time, the correct discount rate, the length of the correct time period for estimating -- historically and/or prospectively -- and others. As a crude indicator, we have calculated the present value of the \$16 billion FMLA cost-driven price increases estimated above for a five year period 2004-2009, assuming no growth and using an eight percent discount rate. The result is a (2004) present value of discounted FMLA driven price increases to consumers over the 2004-2009 period of \$69 billion in the aggregate. Dividing the total as before by 107 million US households in 2004 yields about \$666 per household as the estimate of the present value, to the average US household, of five year forward looking, FMLA cost-driven price increases.

We are of course acutely aware of the limitations on this estimate and a variety of potential criticisms. We hasten to note again the limitations, which we have described above and which are widely known, of the data on which we have based this estimate. We have also made clear the principal assumptions made to shape the data into forms usable for present purposes. We have been straightforward about these limitations and discussed them fully above.

All that said, the estimate of lost consumer welfare from FMLA inspired market cost and price effects is based on a) reasonable and necessary

⁷⁰ Eight percent is a reasonable estimate of consumers' average time preference, inasmuch as it is in the neighborhood of currently effective home mortgage rates and is between what consumers get on their investments and what they pay for consumer or other unsecured credit lines. It is otherwise consistent with the mean of other measures of household or consumer time preference.

assumptions about the data and b) generally accepted methods of economic welfare analysis. We have not attempted to estimate the present value of the benefits of FMLA, which we believe to be considerable, but which have not been documented, so far as we can tell, in ways that would permit the kind of analysis we have done on costs. Thus, future work can usefully be devoted to quantifying benefits and to improving the data in ways that will allow refinement of our cost estimates.

V. SUMMARY AND CONCLUSIONS

The foregoing reports an extensive review of much of the commentary and analysis of the impact of over a decade of implementation of the FMLA of 1993. There is a substantial amount of data describing and attempting to identify the costs of implementing FMLA. There is less of analytical value in the record to permit quantifying the associated benefits.

Many of the consequences – both costs and benefits – appear to be unanticipated and, at least with respect to costs, undesirable impacts of the Act. That is the result in large part of divergence between the main focus of the Act (child related family leave) and its principal use (individual health related leave).

We conclude from our review that the cost is excessive and attributable to some employees gaming the system; to unnecessary administrative and legal expenses traceable to uncertainties and ambiguities in the implementation of the law; expansion of coverage beyond the express and clear intent of the original statute; and others. While the associated costs cannot be entirely eliminated, there is no doubt plenty of opportunities available to reduce them and thereby increasing substantially the current benefit to cost ratio.

There appears to have been substantial “regulatory creep” as reflected in gradual expansion of the reach of the law and in particular into areas

(intermittent employee illnesses) that were not clearly the original focus of the Act (maternity and other family related leave). Regulatory creep has been stymied in part by numerous court decisions overturning DOL implementation, but the litigation leaves no doubt about the existence of several other interpretations that have not been challenged and litigated. Just as critical is the dappled nature of the rules resulting from dissimilar application in different federal appellate jurisdictions. Some portions of the law implementation have been struck down in federal appellate court decisions applying in some parts of the country, but those same rules remain in force in other parts of the country and thereby confront nationwide employers with a patchwork of obligations.

Efficient firms adapt by looking for ways to meet requirements imposed by government obligations in the least cost manner. When the rules are clear and consistent and stable, efficient firms can focus on least cost solutions. When, in contrast, the rules are uncertain, changing, different in different locations and ambiguous, firms must spend enormous amounts of cash, which could otherwise be committed to creating consumer value, to overcoming these infirmities.

Many of the costs cited by firms and discussed above are a dead weight loss to society. They create no public value beyond offsetting unnecessary costs attributable to lack of sufficient care and diligence in government rule making and implementation. Firms adapt by implementing expensive paperwork schemes to record equally expensive monitoring and implementation processes; they study regulations looking for clues to meaning and expend resources on legal and administrative personnel specializing in arcane legal distinctions; they attempt to get accurate information about employee traits, many of which are difficult or impossible to obtain; and, they document everything. Uncertainties in the law and rules require employers to deal frequently with Hobson Choice between two undesirable options – cede to unreasonable employee leave-taking or incur the costs of investigation, verification and, perhaps, eventually, litigation.

We have attempted to quantify the costs of FMLA and their financial impacts. The infirmities of our overall cost estimates and the lack of any quantitative estimate of benefits are traceable in substantial measure to infirmities in the underlying data which are quite useful for conveying a general sense of the problems of implementing the Act, but less so for the overriding purposes of this paper -- actually quantifying them, identifying who bears them and in what specific measure.

Our estimates of various measures of FMLA-driven cost per household are based on fair use of existing data and widely used economic methodologies. No doubt critics of the Act will find ways to increase our estimates, while supporters will find reasons why the estimates might be aggressive. We think the probability of each of those types of errors are about the same, but are in any event happy to join critics of our cost estimates in calling on the Department of Labor to clarify the rules and in particular the uncertainties about the meaning of key terms. Concurrently, it would be quite valuable to future efforts at estimating the impacts of the Act if the Department would also undertake more intensive and careful programs for accumulating data on the impacts of its implementation of the Act.