

## “AN ARBITRARY FRACTION”<sup>1</sup>: HOW THE FAMILY AND MEDICAL LEAVE ACT FAILS RURAL WORKERS

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*The Family and Medical Leave Act (FMLA) provides workers twelve weeks of unpaid, job-protected leave to care for their own or a close family member's serious illness or injury. However, the FMLA has stringent eligibility guidelines that make this leave inaccessible to many of America's rural workers. The ability to take leave from one's job without economic or professional consequences is central to a worker's socioeconomic stability, and the burden of the lack of guaranteed leave often falls squarely on the shoulders of those rural workers caring for their own medical needs or those of their loved ones.*

*Rural workers are particularly disadvantaged when it comes to accessing protections under the FMLA due to the requirement that one's employer must have fifty or more employees in a seventy-five-mile radius to qualify for FMLA leave. The geographic spread and paucity of population centers in rural areas make this requirement extremely difficult to meet. Those working in the small businesses that predominate rural communities are excluded from the FMLA's protections. Rural workers may be forced to work while sick or injured or to leave their loved ones without care. If a worker does take leave, they may not get their job back when they return.*

*The first Part of this Essay outlines the legislative history of the FMLA and discusses how extensive political compromise led to restrictive eligibility requirements that leave out many rural workers. The next Part discusses the Department of Labor's regulations for the FMLA and an example of one case that worked to further hinder rural access to the FMLA. The third Part provides a profile of rural workers and explains how they are uniquely situated to benefit from access to FMLA leave, as well as how they, in turn, suffer from their lack of access. The final Part explores the impact that reducing the FMLA's eligibility requirements will have on the rural workforce, as well as compares state and federal family- and medical-leave eligibility requirements and what we can learn from these policies when considering family and medical leave on a national scale.*

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<sup>1</sup> 139 CONG. REC. 1843 (1993) (statement of Sen. Howard Metzenbaum).

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I. CAPITULATION IN THE NAME OF COMPROMISE:  
THE LEGISLATIVE HISTORY OF THE  
FMLA'S EMPLOYER ELIGIBILITY REQUIREMENTS

*A. On Political Compromise*

The long legislative journey toward the passage of the Family and Medical Leave Act of 1993<sup>2</sup> (FMLA) was rife with compromise between political parties and their affiliated interest groups.<sup>3</sup> Political compromise is an essential aspect of governance. As Professors Amy Gutmann and Dennis Thompson write: “Governing a democracy without compromise is impossible. To restrict political agreements to common ground or common goods, especially in a polarized partisan environment, is to privilege the status quo, even when all parties agree that reform is needed.”<sup>4</sup> Gutmann and Thompson do, however, recognize that sacrifices are often made in the name of political compromise in that there is “inevitable tension between seeing the need to compromise to make political progress and appreciating the loss of something valuable in agreeing to a compromise.”<sup>5</sup> Professor Mariken A.C.G. van der Velden further explains:

Political compromises can have a diluting effect: when a party compromises on its principles, it downplays its ideational commitments, which can confuse its electorate. This paradox of compromise presents a conundrum for political parties during coalition negotiations, as they must navigate the tension between policy representation and responsibility.<sup>6</sup>

Something is inevitably lost when politicians capitulate on their policy objectives in the name of bipartisan compromise. This is particularly the case for the legislative process that led to the passage of the FMLA. What first started as legislation meant to benefit *all* American workers<sup>7</sup> became an exceedingly exclusionary policy built upon arbitrary foundations. The interests of some of the workers who would most benefit from the protections the FMLA provides — rural

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<sup>2</sup> Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601–2654).

<sup>3</sup> This Part relies heavily on Professor Lynn Ridgeway Zehrt’s prior work. See Lynn Ridgeway Zehrt, *Why Fifty: An Analysis of the Small Business Exemption Codified in the Family and Medical Leave Act of 1993*, 84 ALB. L. REV. 275 (2021). I sincerely thank her for her extensive research on this topic as it laid the groundwork for my further research on the impact of the FMLA’s employee thresholds on rural communities.

<sup>4</sup> Amy Gutmann & Dennis Thompson, *Compromise & the Common Good*, DAEDALUS, Spring 2013, at 185, 188.

<sup>5</sup> *Id.* at 190.

<sup>6</sup> Mariken A.C.G. van der Velden, *Finding Common Ground: The Delicate Balance of Political Compromise in Democracy*, OPEN ACCESS GOV’T (July 10, 2023), <https://www.openaccessgovernment.org/article/common-ground-delicate-balance-political-compromise-in-democracy> [https://perma.cc/XC66-ZGEH].

<sup>7</sup> See Zehrt, *supra* note 3, at 284; see also Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. § 101(2) (1985).

workers — were cast aside in the name of political compromise with those lawmakers instead supporting the interests of the business lobby.

*B. The Long Journey to Family and Medical Leave Legislation*

*i. Defining “Rural.”* — First, a threshold question: What constitutes a “rural” area? There are two predominant classification systems to define rural or nonmetropolitan (nonmetro) areas. Economic Research Service researchers appear to treat the Office of Management and Budget’s (OMB) definition of nonmetro areas (which are demarcated along county or county-equivalent lines, such as a borough or parish) as synonymous with “rural.”<sup>8</sup> Previously, “OMB defined metropolitan (metro) areas as broad labor-market areas that include”<sup>9</sup>:

1. Central counties with one or more urbanized areas; urbanized areas . . . are densely-settled urban entities with 50,000 or more people.
2. Outlying counties that are economically tied to the core counties as measured by labor-force commuting. Outlying counties are included if 25 percent of workers living in the county commute to the central counties, or if 25 percent of the employment in the county consists of workers coming out from the central counties . . . .<sup>10</sup>

Nonmetro counties include two types:

1. Micropolitan (micro) areas, which are nonmetro labor-market areas centered on urban clusters of 10,000–49,999 persons and defined with the same criteria used to define metro areas.
2. All remaining counties, often labeled “noncore” counties because they are not part of “core-based” metro or micro areas.<sup>11</sup>

When compared to the OMB’s definition of “nonmetro,” the U.S. Census Bureau’s definition of “rural” is much more precise, as it is based on “population size and density.”<sup>12</sup> All areas not considered urban areas are rural areas.<sup>13</sup> The Census Bureau has two categories of “urban areas”: urbanized areas, which contain at least 50,000 people, and urban clusters, which have at least 2,500 people but fewer than 50,000 residents.<sup>14</sup> Based on the Census Bureau’s definitions, therefore, “rural areas consist of open countryside with population densities less than 500 people per square mile and places with fewer than 2,500 people.”<sup>15</sup>

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<sup>8</sup> See *What Is Rural?*, ECON. RSCH. SERV., U.S. DEP’T OF AGRIC. (Oct. 23, 2019), <https://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/what-is-rural> [https://perma.cc/Y3A6-9NXU].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *Urban and Rural*, U.S. CENSUS BUREAU (Sept. 26, 2023), <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html> [https://perma.cc/6VLF-HB4Z].

<sup>14</sup> *What Is Rural?*, *supra* note 8.

<sup>15</sup> *Id.*

Policymakers and researchers often use varying definitions to identify areas as rural.<sup>16</sup> This Essay follows the Center on Rural Innovation's preference for the OMB's definition of "nonmetro" as the definition of "rural": "When forced to choose these [sic] two definitions, we believe that the nonmetro definition best describes places that share common characteristics, better represents the diversity of rural America, and reflects the critical social and economic dynamics of smaller economies that link open land areas and small towns."<sup>17</sup>

Any use of the word "rural" in this essay should generally be interpreted under OMB's definition (of "nonmetro"), unless specifically stated otherwise. However, some sources use the Census Bureau's definition or a mix of both definitions.

### C. *Early Efforts in the Quest for Family and Medical Leave Legislation*

A first draft of the soon-to-be-called FMLA was written in 1984.<sup>18</sup> Female participation in the workforce had grown exponentially over the prior decades, and the number of single-parent households had greatly increased.<sup>19</sup> In the wake of Title VII of the Civil Rights Act of 1964<sup>20</sup> and the Pregnancy Discrimination Act of 1978,<sup>21</sup> female and pregnant workers were protected against workplace discrimination, but pregnant workers were entitled to benefits like medical leave only if their employer provided similar benefits to other employees as well.<sup>22</sup> The anti-discrimination statutes did not go so far as to "impose . . . affirmative obligation[s] on employers to" provide leave benefits.<sup>23</sup> Following the passage of these laws, there were efforts throughout the country to

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<sup>16</sup> *See id.*

<sup>17</sup> *Defining Rural America: The Consequences of How We Count*, CTR. ON RURAL INNOVATION (July 20, 2022), <https://ruralinnovation.us/blog/defining-rural-america> [<https://perma.cc/3KRS-F6A7>].

<sup>18</sup> *History of the FMLA*, NAT'L P'SHIP FOR WOMEN & FAMS., <https://nationalpartnership.org/economic-justice/family-medical-leave-act/history-of-the-fmla> [<https://perma.cc/XT3A-KB27>].

<sup>19</sup> *See, e.g.*, 139 CONG. REC. 1704 (1993) (statement of Sen. Tom Harkin) ("[The FMLA] is also good family policy and responds to our changing workplace. The American work force has changed dramatically since the end of World War II — more women are working[ and] more families are headed by single parents . . . . The number of women in the workplace has increased by over 200 percent since 1950. Nearly two-thirds of mothers with children under the age of 3 work outside the home. The Census Bureau reports that the number of single-parent families has doubled since 1970 and now account for 27 percent of all families.")

<sup>20</sup> Pub. L. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-17).

<sup>21</sup> Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

<sup>22</sup> Zehrt, *supra* note 3, at 280; *see also id.* at 280-81.

<sup>23</sup> *Id.*

introduce or improve policies designed to protect and accommodate women in the workplace.<sup>24</sup>

These efforts were dealt a particularly harsh blow in 1984, however, “when a federal district court struck down California’s maternity-leave law as sex discrimination against men” in violation of Title VII of the Civil Rights Act of 1964.<sup>25</sup> The opinion stated that the maternity leave law “require[d] preferential treatment of females disabled by pregnancy, childbirth or related medical conditions.”<sup>26</sup> The California law required employers “to provide a reasonable disability leave of up to four months to employees disabled by pregnancy, childbirth or related medical conditions.”<sup>27</sup> The law further mandated that employers reinstate workers returning from pregnancy or other medical leave to their same or a similar position.<sup>28</sup> The court found that Title VII preempted the California law since employers were not required to provide this type of leave and right to reinstatement to male employees.<sup>29</sup>

In response to this setback, a coalition was formed “to advocate for the establishment of comprehensive, gender-neutral family and medical leave on a national basis”; the group included representatives from California (one from the federal level and another from the state level), the National Woman’s Law Center, Georgetown University Law Center, and the Women’s Legal Defense Fund.<sup>30</sup> This coalition helped produce the first draft of the FMLA, then entitled the Parental and Disability Leave Act of 1985<sup>31</sup> (PDLA), which was introduced in the House of Representatives on April 4, 1985.<sup>32</sup> This nascent version of the FMLA was intended to apply to employers regardless of size, broadly defining “employer” as “any person engaged in commerce or in any industry or activity affecting commerce who acts directly or indirectly in the interest of an employer to one or more employees, and any agent or successor in interest of such a person.”<sup>33</sup>

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<sup>24</sup> One example of such activism was the push for state-level “family and medical leave laws.” See DONNA R. LENHOFF & LISSA BELL, NAT’L P’SHP FOR WOMEN & FAMS., GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES: FAMILY AND MEDICAL LEAVE AS A CASE STUDY 8 (2023), <https://nationalpartnership.org/wp-content/uploads/2023/02/fmla-case-study-lenhoff-bell.pdf> [<https://perma.cc/6VM6-DS28>].

<sup>25</sup> *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, No. 83-4927, 1984 WL 943, at \*1 (C.D. Cal. Mar. 21, 1984), *rev’d*, 758 F.2d 390 (9th Cir. 1985).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* The Ninth Circuit eventually overturned this ruling, stating “that the district court’s conclusion that section 12945(b)(2) discriminates against men on the basis of pregnancy defies common sense, misinterprets case law, and flouts Title VII and the [Pregnancy Discrimination Amendment].” *Guerra*, 758 F.2d at 393. The Supreme Court later affirmed the Ninth Circuit’s ruling in *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272, 295 (1987).

<sup>30</sup> LENHOFF & BELL, *supra* note 24, at 4.

<sup>31</sup> H.R. 2020, 99th Cong. (1985).

<sup>32</sup> LENHOFF & BELL, *supra* note 24, at 4, 15.

<sup>33</sup> H.R. 2020 § 101(3).

While the House subcommittees on Labor-Management Relations and Labor Standards of the Committee on Education and Labor and the subcommittees on Civil Service and Compensation and Employee Benefits of the Committee on Post Office and Civil Service held a hearing on the Parental and Disability Leave Act of 1985, the Act failed to gain sufficient support. And some “Republicans raised concerns about the impact the PDLA would have on small businesses. . . . Congressman Harris W. Fawell, a Republican from Illinois, questioned the cost such legislation would have on small businesses and asked about the practical application of the PDLA to these [companies]” during the initial hearing.<sup>34</sup>

#### D. Capturing the Attention of the Business Lobby

Another version of a family- and medical-leave bill was introduced in the House in March 1986: the Parental and Medical Leave Act of 1986<sup>35</sup> (1986 PMLA bill), meant to apply to employers with “five or more employees and engaged in commerce or in any industry or activity affecting commerce.”<sup>36</sup> This bill gained more traction than the previous year’s version and caught the attention of the business lobby.<sup>37</sup> Business leaders protested that a federal family- and medical-leave policy would “place unbearable economic burdens on American businesses.”<sup>38</sup> Lobbyists noted that “[t]he costs associated with continuing the leave taker’s health benefits . . . and the lower productivity that would result from replacing the leave taker would be ‘especially damaging’ to this Nation’s 14 million small companies.”<sup>39</sup> At a hearing hosted by the House Committee on Education and Labor’s subcommittees on Labor-Management Relations and Labor Standards, Frank S. Swain, Chief Counsel for Advocacy for the U.S. Small Business Administration, claimed the employee number threshold in the 1986 PMLA bill was “ridiculously low.”<sup>40</sup>

“Senator Christopher Dodd, a Democrat from Connecticut,” along with Senators Arlen Specter, Gary Hart and Daniel Patrick Moynihan,<sup>41</sup>

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<sup>34</sup> Zehrt, *supra* note 3, at 286 (citing *Parental and Disability Leave: Joint Hearing Before the Subcomm. on Civ. Serv. & the Subcomm. on Comp. & Emp. Benefits of the H. Comm. on Post Off. & Civ. Serv. & the Subcomm. on Lab.-Mgmt. Rels. & the Subcomm. on Lab. Standards of the Comm. on Educ. & Lab.*, 99th Cong. 14 (1985) (statement of Rep. Harris Fawell)).

<sup>35</sup> H.R. 4300, 99th Cong. (1986).

<sup>36</sup> *Id.* § 102(3)(A).

<sup>37</sup> See Zehrt, *supra* note 3, at 287.

<sup>38</sup> James Carr, Comment, *Bringing Up Baby: The Case for a Federal Parental Leave Act*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 857, 859 (1987).

<sup>39</sup> *Id.* at 878–79 (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Civ. Serv. & the Subcomm. on Comp. & Emp. Benefits of the H. Comm. on Post Off. & Civ. Serv. & the Subcomm. on Lab.-Mgmt. Rels. & the Subcomm. on Lab. Standards of the Comm. on Educ. & Lab.*, 99th Cong. 70 (1986) [hereinafter *Joint Hearing of 1986*]).

<sup>40</sup> *Id.* at 881 (quoting *Joint Hearing of 1986, supra* note 39, at 71).

<sup>41</sup> Parental and Medical Leave Act of 1986, S. 2278, 99th Cong. (1986).

“filed a [Senate] companion bill [to] the PMLA . . . one month after the introduction of the House bill, [with] several [key] differences.”<sup>42</sup> Most notably:

[T]he definition of employer contained in the Senate bill increased the small business exception from five to fifteen. Supporters hoped that this employer definition would be more acceptable to a Republican-controlled Senate . . . [This change] also made the Senate’s version of the PMLA identical to Title VII’s definition of employer.<sup>43</sup>

This compromise, however, “exclude[d] more than one-fifth of the private sector workforce.”<sup>44</sup>

Despite these concessions, the business lobby, as well as the lawmakers who supported their interests, continued to oppose the low employee threshold. During a joint hearing on the House and Senate bills in April 1986, a representative from the Chamber of Commerce stated that “unpaid leave represents a serious and substantial threat to businesses’ ability to grow, compete, and create jobs — particularly small businesses.”<sup>45</sup> Representative Margaret Roukema, a Republican from New Jersey,<sup>46</sup> was particularly critical of the impact the 1986 PMLA bill would have on small businesses. Representative Roukema argued that the 1986 PMLA bill was “too far reaching both for the ultimate good of the workforce as well as the ultimate good of the business community.”<sup>47</sup> Regardless of these criticisms, the bill was eventually approved for consideration on the House floor, but Congress ultimately adjourned before the bill could be considered.<sup>48</sup>

#### *E. Moving Toward a More Stringent Employer Exception*

Following the failure to pass the 1986 PMLA bill, Representative Roukema herself introduced a parental- and medical-leave bill, the Family and Medical Leave Job Security Act of 1987<sup>49</sup> (FMLJSA).<sup>50</sup> The FMLJSA was meant to cover employers with fifty or more employees at “any geographically separate facility” or a nongeographically separate facility that is “functionally separate and distinct from any other facility

<sup>42</sup> Zehrt, *supra* note 3, at 287–88 (citing S. 2278 § 102(4)(A)).

<sup>43</sup> *Id.* at 288 (footnotes omitted).

<sup>44</sup> *Id.* at 294 (alteration in original) (quoting H.R. REP. NO. 99-699, pt. 2, at 26 (1986)).

<sup>45</sup> *Id.* at 292 (quoting *Joint Hearing of 1986*, *supra* note 39, at 66 (prepared statement of Susan Hager, President of Hager, Sharp and Abramson, Inc.)).

<sup>46</sup> See *Margaret Roukema*, N.J. WOMEN’S HIST., [https://perma.cc/H4CW-7UV4](https://njwomenshistory.org/biographies/margaret-roukema).

<sup>47</sup> Zehrt, *supra* note 3, at 289 (quoting *Joint Hearing of 1986*, *supra* note 39, at 2 (statement of Rep. Margaret Roukema)).

<sup>48</sup> LENHOFF & BELL, *supra* note 24, at 16.

<sup>49</sup> H.R. 284, 100th Cong. (1987).

<sup>50</sup> *Id.*

of the employer which is located within the same geographic area,”<sup>51</sup> in an effort to “balance the legitimate concerns of small businesses.”<sup>52</sup>

While the FMLJSA did not pass, it marked an important step toward what would be the final version of the employee-threshold requirement in the FMLA. This bill was the first time that the fifty-employee threshold was named as a limiting factor for eligibility for family and medical leave.<sup>53</sup> The FMLJSA also classified employers not only by their number of employees but also by the geographic spread of their operations.<sup>54</sup> As the eligibility requirements for family and medical leave evolved through the legislative process, the FMLJSA’s proposed geographic restrictions evolved as well; the final version of the FMLA limited coverage to employers with fifty or more employees within a given *seventy-five-mile radius*.<sup>55</sup>

Although the purpose of the mileage restriction is not readily apparent in congressional records contemporaneous with the introduction of the FMLJSA, a House report from 1991 states that the mileage provision “recognizes the difficulties an employer may have in reassigning workers to geographically separate facilities,”<sup>56</sup> potentially benefiting larger employers with widespread satellite operations in rural areas as well as rural small businesses. Later congressional sources also point to concerns about how family and medical leave would affect small businesses in rural areas. Representative Bill Barrett of Nebraska remarked in a 1991 hearing on family- and medical-leave legislation:

As the owner of a [sic] insurance and real estate company in a small rural town in Nebraska, I know that the effects of requiring even larger companies to mandate unpaid family leave would have a damaging, rippling affect [sic] to businesses like mine.

Time after time I’ve seen government policies hinder the growth and development of businesses — and in small rural communities that also means the growth of the community as well. . . .

I am concerned that in small communities in my state, like those that dot the landscape in my district, the temporary absence of even a single wage earner could have a serious affect [sic]. Employers can’t be forced to hold that job open if it would mean the possible bankruptcy of the company.<sup>57</sup>

In a 1993 hearing, Democratic Representative Dan Glickman of Kansas shared his rural constituents’ concerns about family- and medical-leave policies:

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<sup>51</sup> *Id.* § 102(1)–(2).

<sup>52</sup> Zehrt, *supra* note 3, at 296.

<sup>53</sup> See H.R. 284 § 102(1)–(2).

<sup>54</sup> See *id.* § 101(6).

<sup>55</sup> See 29 U.S.C. § 2611(2)(B)(ii).

<sup>56</sup> H.R. REP. NO. 102-135, pt. 1, at 37 (1991).

<sup>57</sup> *The Family and Medical Leave Act of 1993: Hearing on H.R. 2 Before the Subcomm. on Lab.-Mgmt. Rel. of the H. Comm. on Educ. & Lab.*, 102d Cong. 11 (1991) (statement of Rep. Bill Barrett).



I want to share with my colleagues, the thoughts of average Americans. I have spent the last few weeks holding a series of town hall meetings in my district, particularly in the outlying and rural areas. What I keep hearing, over and over again, is that small businesses, covered under this legislation, can't withstand any more government intrusion. There is only so much the Federal Government can mandate before a businessowner [sic] realizes a profitable operation can no longer be operated. In our fragile economy, Government's role should be to encourage small business owners to prosper and expand so they can hire more workers, not encumber them with more Government mandates.<sup>58</sup>

Although Representative Roukema's bill failed, she and her supporters continued to hold fast to the fifty-employee threshold<sup>59</sup> and the consideration of a business's geographic spread<sup>60</sup> when structuring a small business exception in family- and medical-leave legislation. Both small and large businesses operating in rural areas were considered when creating these geographic exceptions,<sup>61</sup> and these exceptions became increasingly significant as the FMLA edged closer to passage.

#### F. *The Beginnings of Compromise*

In early 1987, the Parental and Medical Leave Act of 1987<sup>62</sup> (1987 PMLA bill) and the Family and Medical Leave Act of 1987<sup>63</sup> (1987 FMLA bill)<sup>64</sup> were introduced in the Senate and the House, respectively. The bills both applied only to employers with fifteen or more employees;<sup>65</sup> however, the House bill also included the requirement that these employees must work within two hundred miles of the employer's facility<sup>66</sup> (this was later amended to seventy-five miles<sup>67</sup>).

Congress held several hearings on the 1987 PMLA bill and 1987 FMLA bill, to include some 1987 PMLA bill hearings in cities across the United States.<sup>68</sup> The small business exception was frequently discussed during these hearings.<sup>69</sup> Representative Roukema was steadfast in her commitment to the exemption of businesses with fifty or fewer employees and was continually asked her reason for endorsing this number of

<sup>58</sup> 139 CONG. REC. 2013 (1993) (statement of Rep. Dan Glickman).

<sup>59</sup> See Zehrt, *supra* note 3, at 326.

<sup>60</sup> H.R. REP. NO. 102-135, pt. 1, at 37 (1991).

<sup>61</sup> *Id.*

<sup>62</sup> S. 249, 100th Cong. (1987).

<sup>63</sup> H.R. 925, 100th Cong. (1987).

<sup>64</sup> This change in name marks the distinction between “parental” leave and “family” leave. Family leave now “include[d] employees who were caring for other immediate family members with serious health conditions including elderly parents.” Zehrt, *supra* note 3, at 293 (citing *Parental Leave: Hearing Before the H. Comm. on Small Bus.*, 100th Cong. 22 (1987)).

<sup>65</sup> S. 249 § 102(4)(A); H.R. 925 § 101(4)(A).

<sup>66</sup> H.R. 925 § 102.

<sup>67</sup> See *Summary: H.R. 925 — 100th Congress (1987–1988)*, CONGRESS.GOV, <https://www.congress.gov/bill/100th-congress/house-bill/925/summary> [<https://perma.cc/G6YF-8A85>].

<sup>68</sup> See LENHOFF & BELL, *supra* note 24, at 16–17.

<sup>69</sup> Zehrt, *supra* note 3, at 296.

employees.<sup>70</sup> Representative Roukema acknowledged that “50 is somewhat of an arbitrary number” and that “[f]ifty employees or less would exempt approximately 44[%] of the work force.”<sup>71</sup> However, Representative Roukema argued that the fifty-employee threshold was a better threshold than the lower employee exceptions in the 1987 FMLA bill and 1987 FMLA bill “because [a] business[] with fifty employees ‘can absorb and still effectively continue its operations with a family and medical leave policy in place.’”<sup>72</sup> Representative Roukema did not rely upon any empirical data when making this suggestion; she remarked: “[I]n my own random survey of business in my district, 50 employees or more seem[s] to be a workable and feasible number with which my small business community seem to be able to work.”<sup>73</sup> Representative Roukema’s concessions make clear that the fifty-employee threshold was indeed arbitrary, lacking a factual basis beyond her own independent “survey.”<sup>74</sup>

Moreover, it is unclear from the contemporary record why lawmakers in the House chose two hundred miles initially,<sup>75</sup> which was then modified to seventy-five miles,<sup>76</sup> as the radius for the mileage exception. Since there is no mention of empirical studies or other evidence used to determine this number, it is possible that the mileage threshold is also an arbitrary figure, like the employee threshold.

In spite of the weak basis upon which the fifty-employee threshold, and possibly the mileage threshold, were established, Representative Roukema’s recommendations continued to gain support among her fellow Republicans.<sup>77</sup> “Representative Roukema proposed an amendment in the nature of a substitute to [the FMLA of 1987]” in November of 1987.<sup>78</sup> This proposed legislation included a phase-in period: for the first three years, businesses with fifty or more employees would be covered; following that, businesses with thirty-five or more employees would be covered.<sup>79</sup> The House Committee on Education and Labor adopted the amendment, and several months later it was “reported out of [the] House Committee on Post Office and Civil Service,” yet it was

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 297 (alterations in original) (quoting *Parental Leave: Hearing Before the H. Comm. on Small Bus.*, *supra* note 64, at 11, 19 (statement of Rep. Margaret Roukema)).

<sup>72</sup> *Id.* (quoting *Parental Leave: Hearing Before the H. Comm. on Small Bus.*, *supra* note 64, at 11 (statement of Rep. Margaret Roukema)).

<sup>73</sup> *Id.* at 298 (quoting *Parental Leave: Hearing Before the H. Comm. on Small Bus.*, *supra* note 64, at 11 (statement of Rep. Margaret Roukema)).

<sup>74</sup> *Id.* at 297–98.

<sup>75</sup> See Family and Medical Leave Act of 1987, H.R. 925, 100th Cong. § 102 (as introduced in the House, Feb. 3, 1987).

<sup>76</sup> See Summary: *H.R. 925 — 100th Congress (1987–1988)*, CONGRESS.GOV, <https://www.congress.gov/bill/100th-congress/house-bill/925/summary> [<https://perma.cc/G6YF-8A85>].

<sup>77</sup> See Zehrt, *supra* note 3, at 304.

<sup>78</sup> *Id.* at 299 (citing H.R. REP. NO. 100-511, pt. 2, at 14–15 (1988)).

<sup>79</sup> *Id.* (citing Family and Medical Leave Act of 1988, H.R. 925, 100th Cong. § 101(5)(A) (as reported by H. Comm. on Post Off. & Civ. Serv., Mar. 9, 1988)).

never debated on the House floor.<sup>80</sup> The Senate companion bill also never made it to the floor, mired in lawmakers’ concerns around the cost of family and medical leave on small businesses.<sup>81</sup>

In June 1988, Senator Dodd introduced what he described as a compromise bill in an effort to finally pass family and medical leave legislation.<sup>82</sup> The Parental and Medical Leave Act of 1988<sup>83</sup> was meant to apply to employers with “20 or more employees . . . for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”<sup>84</sup> Lawmakers’ insistence on the fifty-employee threshold and continued concerns surrounding costs on small businesses, as well as a general resistance to government mandates, led to the bill’s defeat, though not before the bill was debated on the Senate floor in November 1988.<sup>85</sup> Democrats were unable to defeat Republicans’ filibuster on the legislation, which was centered “on whether the private sector rather than Congress is best equipped to decide and manage benefit policy,” and Democrats vowed to reintroduce the bill after the 1988 elections.<sup>86</sup>

### G. Another Republican President, Stronger Small Business Exceptions

The 1988 elections yielded a new Republican President, resulting in increased incentives for Democratic lawmakers to compromise with Republicans in order to pass family- and medical-leave legislation.<sup>87</sup> While the Senate version of the Family and Medical Leave Act of 1989<sup>88</sup> still only affected employers with twenty or more employees,<sup>89</sup> the House bill, notably with Representative Roukema on board as a cosponsor, was meant to apply to employers with fifty or more employees within seventy-five miles for the first three years following the law’s enactment, then to employers with thirty-five employees within seventy-five miles after the three-year period.<sup>90</sup> “[T]he supporters of these bills strove to rally as much bipartisan support for their family leave bills as

<sup>80</sup> LENHOFF & BELL, *supra* note 24, at 17.

<sup>81</sup> See Zehrt, *supra* note 3, at 300, 303.

<sup>82</sup> *Id.* at 302.

<sup>83</sup> S. 2488, 100th Cong. (1988).

<sup>84</sup> *Id.* § 102(4)(A).

<sup>85</sup> Zehrt, *supra* note 3, at 303.

<sup>86</sup> *Family Bill Fails in Senate as GOP Stall Carries the Day: Democrats Vow Action Next Year*, L.A. TIMES (Oct. 7, 1988, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1988-10-07-mn-3716-story.html> [<https://perma.cc/GM3X-XWSM>].

<sup>87</sup> See Zehrt, *supra* note 3, at 304.

<sup>88</sup> Family and Medical Leave Act of 1989, S. 345, 101st Cong. (1989).

<sup>89</sup> *Id.* § 102(4)(A).

<sup>90</sup> Zehrt, *supra* note 3, at 304–05 (citing Family and Medical Leave Act of 1989, H.R. 770, 101st Cong. § 101(5)(A)(i)–(ii) (1989)); H.R. 770 § 102(1)–(2).

possible.”<sup>91</sup> A bipartisan amendment to raise the threshold to fifty employees without the phase-in approach was adopted in May 1990, cementing the FMLA employee threshold as it is in the final version of the FMLA.<sup>92</sup> In spite of bipartisan support for the Family and Medical Leave Act of 1989, President Bush vetoed the legislation in protest against government mandates, remarking that “rigid, federally imposed requirements” on business would damage the U.S. economy; Congress was unable to override the veto.<sup>93</sup>

Notwithstanding the veto, lawmakers were still dedicated to the passage of family- and-medical leave legislation. Virtually identical bills to the previous year’s were introduced in the House and Senate,<sup>94</sup> and each passed and was sent to President Bush’s desk.<sup>95</sup> Once again, however, President Bush vetoed the legislation, claiming that the “financial burden it would impose on business would further dampen the growth of the economy and new jobs.”<sup>96</sup> Congress again failed to override the veto.<sup>97</sup>

#### H. *New Administration, Renewed Hope of Passage*

The elections of 1992 led to renewed promise that family- and medical-leave legislation would finally pass with a Democrat in the Oval Office.<sup>98</sup> President Clinton was a strong supporter of the FMLA on the campaign trail, bolstering lawmakers’ hopes for successful passage.<sup>99</sup> The FMLA was introduced in the House on January 5, 1993, and a Senate companion bill was introduced on January 21.<sup>100</sup> The small business exception in these bills read as follows:

The term “eligible employee” does not include . . . any employee of an employer who is employed at a worksite at which such employer employs less

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<sup>91</sup> See Zehrt, *supra* note 3, at 305 (citing RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 161–64 (1995)).

<sup>92</sup> See *id.* at 305–07.

<sup>93</sup> Ann Devroy, *President Vetoes Bill on Unpaid Family Leave*, WASH. POST (June 30, 1990, 1:00 AM), <https://www.washingtonpost.com/archive/politics/1990/06/30/president-vetoes-bill-on-unpaid-family-leave/3fc6b2d8-bde3-4186-acb6-895df2of8bb9> [<https://perma.cc/H6Z9-R9ZT>]; see Zehrt, *supra* note 3, at 309.

<sup>94</sup> Family and Medical Leave Act of 1991, H.R. 2, 102d Cong. (1991); Family and Medical Leave Act of 1991, S. 5, 102d Cong. (1991).

<sup>95</sup> See LENHOFF & BELL, *supra* note 24, at 18.

<sup>96</sup> Michael Wines, *Bush Vetoes Bill Making Employers Give Family Leave*, N.Y. TIMES (Sept. 23, 1992), <https://www.nytimes.com/1992/09/23/us/bush-vetoes-bill-making-employers-give-family-leave.html> [<https://perma.cc/PVB5-ZNFT>].

<sup>97</sup> LENHOFF & BELL, *supra* note 24, at 19.

<sup>98</sup> See Zehrt, *supra* note 3, at 310.

<sup>99</sup> *Id.*

<sup>100</sup> Family and Medical Leave Act of 1993, S. 5, 103d Cong. (1993); *Actions Overview: S. 5 — 103rd Congress (1993–1994)*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/senate-bill/5/actions> [<https://perma.cc/B4GA-47XQ>].

than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.<sup>101</sup>

The House and Senate passed the FMLA several weeks later, and President Clinton signed the Act into law on February 5, 1993.<sup>102</sup> Upon signing the FMLA, President Clinton remarked that “U.S. workers ‘will no longer need to choose between the job they need and the family they love.’”<sup>103</sup>

After nearly eight years of coalition-building and bipartisan compromise, (some) American workers were finally granted the hard-fought right to twelve weeks of job-protected leave to care for their own health or the health of a loved one, without risking their jobs and economic security.

### I. Reflections on Compromise

The journey to the passage of the FMLA was long and arduous, and stands as an example of the importance of legislative compromise in benefiting the greater good. Many lawmakers, however, were left frustrated and dissatisfied with the sacrifices made along the way in the name of compromise. During the debates on the 1991 version of the FMLA later vetoed by President Bush, Representative Patricia Schroeder of Colorado, who was an original sponsor of the first family- and medical-leave bill in 1985, stated that she had “trouble supporting this compromise because [the bill] ha[d] been watered down so much.”<sup>104</sup> At the same hearing, Representative Bill Owens of New York stated:

It would be hard to weaken and water down this bill any more than it has been in the 5 years it has taken it to get to the floor . . . . Most businesses are not even covered by this bill anymore. Small businesses with fewer than 50 employees are now completely exempted. This bill will have no effect at all on 95 percent of the businesses and 44 percent of the employees in this country.<sup>105</sup>

Lawmakers continued to express their frustration with these compromises made during discussions about the final version of the FMLA in 1993.<sup>106</sup> Representative Donald M. Payne, Jr., stated, “I am truly disappointed, though, in this watered down version. It was watered down so that the previous administration would not veto it, and I wish we did not start with that same premise, I am personally

<sup>101</sup> S. 5 § 101(2)(B), (B)(ii); H.R. 1 § 101(2)(B), (B)(ii).

<sup>102</sup> See LENHOFF & BELL, *supra* note 24, at 19–20.

<sup>103</sup> Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law: Legislation: President Marks First Victory, Promises Mayors Funds for Head Start, Transportation Projects*, L.A. TIMES (Feb. 6, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-02-06-mn-1088-story.html> [<https://perma.cc/CAY4-QZ9W>].

<sup>104</sup> Zehrt, *supra* note 3, at 306–07 (first alteration in original) (quoting 136 CONG. REC. 9871 (1990) (statement of Rep. Patricia Schroeder)).

<sup>105</sup> 136 CONG. REC. 9952 (1990) (statement of Rep. Bill Owens); see Zehrt, *supra* note 3, at 307.

<sup>106</sup> See Zehrt, *supra* note 3, at 307.

disappointed.”<sup>107</sup> Representative Patsy Mink expressed: “My only disappointment is that it is not as strong as I would have wished it to be, and it comes as a product of the work of the Bush administration in trying to water down our efforts over a number of years.”<sup>108</sup> Several years later, when Senator Howard Metzenbaum introduced the FMLA of 1993 on the Senate floor, he remarked:

[T]he bill’s small business exemption . . . exempt[s] 95 percent of the businesses in this country. As a result, 60 percent of our work force will not be protected by this bill.

Let me make this clear: This bill ought to protect all workers, not just an arbitrary fraction. A worker’s right to take family or medical leave should not depend on whether he or she works for a big company or a small one. But I recognize that compromise is part of the legislative process . . . .<sup>109</sup>

Some later attempts were made to reduce the FMLA’s small business exception; President Clinton even urged Congress to reduce the employee threshold to twenty-five during his 1999 State of the Union address.<sup>110</sup> Any attempts made at the federal level to change the small business exception have failed, however.<sup>111</sup> While many cities and states have enacted their own versions of medical and family leave with lower employee thresholds, the FMLA employer exception has remained unchanged for over thirty years.<sup>112</sup>

The FMLA was originally intended to benefit *all* workers, regardless of the size of their employers.<sup>113</sup> Yet capitulation to the business lobby left the law woefully underinclusive, excluding around 95% of the nation’s employers from coverage at the time of its passage. This singular focus on the interests of business disregarded those whom the law was ultimately supposed to benefit: workers, especially low-income workers who may not have had access to medical leave benefits otherwise. Furthermore, the stringent eligibility requirements (which protect small businesses) of the FMLA are based upon “admittedly arbitrary” figures.<sup>114</sup> Despite calls to reduce the employer exception, later regulations have instead furthered the interests of rural businesses to the detriment of their employees, as explored in the next Part.

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<sup>107</sup> *Id.* at 311 n.248 (quoting *The Family and Medical Leave Act: Legislative Hearing on H.R. 1 Before the Subcomm. on Lab.-Mgmt. Rels. of the H. Comm. on Educ. & Lab.*, 103d Cong. 38 (1993) [hereinafter *The FMLA Hearing of 1993*] (statement of Rep. Donald M. Payne, Jr.)).

<sup>108</sup> *Id.* (quoting *The FMLA Hearing of 1993*, *supra* note 107, at 41 (statement of Rep. Patsy Mink)).

<sup>109</sup> 139 CONG. REC. 1843 (1993) (statement of Sen. Howard Metzenbaum).

<sup>110</sup> *See* Zehrt, *supra* note 3, at 311–12.

<sup>111</sup> *See, e.g.*, Family and Medical Leave Fairness Act of 1999, S. 201, 106th Cong. (1999).

<sup>112</sup> Zehrt, *supra* note 3, at 317–18, 317 n.283.

<sup>113</sup> *See id.* at 284; *see also* Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. § 101(3) (1985).

<sup>114</sup> *See* Zehrt, *supra* note 3, at 326.

## II. “AS THE CROW FLIES” OR “AS THE ROAD WINDS”?: HOW FMLA REGULATIONS CONTINUE TO INHIBIT RURAL WORKERS’ ACCESS TO LEAVE

### A. *Measuring the Seventy-Five-Mile Exception*

Recent regulations and associated case law have worked to further benefit employers operating in rural areas to workers’ detriment. The FMLA permits the Secretary of Labor to promulgate “regulations as are necessary to carry out” the objectives of the law.<sup>115</sup> One regulation in particular benefits businesses operating in rural areas, while making it more difficult for rural workers to become eligible for FMLA leave benefits; in 1995, the Department of Labor promulgated a regulation on how to calculate whether a business falls under the seventy-five-mile exception:

The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).<sup>116</sup>

Measuring distance in surface miles in this context inevitably results in a number of miles larger than if the distance were measured in linear miles, or “as the crow flies,” since surface transportation is generally not plotted out in a perfectly straight line like that used when measuring linear miles. This leads to the possibility that, even where two worksites are less than seventy-five linear miles apart, if the road between the two deviates even slightly from a perfectly straight line, employees at those worksites could be ineligible for leave benefits under the FMLA. Such was the issue in the case discussed in the following section.

### B. *Hackworth and the Arbitrary Nature of FMLA Eligibility Requirements*

In *Hackworth v. Progressive Casualty Insurance Co.*,<sup>117</sup> an employee challenged the validity of the surface-mile-measurement regulation, stating that Congress intended the seventy-five-mile threshold to be measured in linear miles “as the crow flies,” not in surface miles.<sup>118</sup> The United States District Court for the Western District of Oklahoma upheld the validity of the regulation, finding that the Department of Labor

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<sup>115</sup> 29 U.S.C. § 2654.

<sup>116</sup> 29 C.F.R. § 825.111(b).

<sup>117</sup> 468 F.3d 722 (10th Cir. 2006).

<sup>118</sup> *Id.* at 725.

“was owed judicial deference.”<sup>119</sup> An appeal to the Tenth Circuit followed.<sup>120</sup>

Kelly Hackworth worked in Progressive Casualty Insurance Company (Progressive)’s Norman, Oklahoma, office, which, when combined with Progressive’s Oklahoma City worksite, employed a total of forty-seven workers.<sup>121</sup> The next closest office was 75.6 surface miles away in Lawton, Oklahoma, according to Hackworth.<sup>122</sup> In spite of Hackworth’s ostensible ineligibility for the FMLA, Progressive granted her FMLA leave to provide support for her mother.<sup>123</sup> When she attempted to return from leave, however, she found that her position had been eliminated and she was not offered an equivalent position or salary, as the FMLA’s job-protection provision requires.<sup>124</sup> As a result, Hackworth filed a suit against Progressive for violating the FMLA’s reinstatement clause.<sup>125</sup> “Progressive . . . moved for summary judgment [claiming] that Ms. Hackworth was not an ‘eligible employee’ under the FMLA [since] Progressive did not employ at least 50 people within 75 surface miles of Hackworth’s Norman, Oklahoma worksite.”<sup>126</sup> Hackworth argued that the distance between Norman and Lawton should be measured in linear miles, in which case the Lawton worksite would be only sixty-seven linear miles away, thus making Hackworth an eligible employee under the FMLA.<sup>127</sup>

In her appeal to the Tenth Circuit, Hackworth made several arguments against the validity of the surface-mile-measure regulation.<sup>128</sup> She contended that Congress intended the distance between two worksites to be measured as a “radius test” using linear miles because Congress had used the word “radius” several times when discussing the mileage exemption in hearings and reports found in the legislative history of the FMLA.<sup>129</sup> Hackworth contended that the regulation was arbitrary “because ‘leave under [the] FMLA literally depends on how straight a road is.’”<sup>130</sup> Hackworth explained that an employee may be ineligible for FMLA leave if the road to their worksite “zigs and zags,”

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 724–25.

<sup>122</sup> *Id.* at 725.

<sup>123</sup> *Id.* at 724.

<sup>124</sup> *Id.*; 29 U.S.C. § 2614(a)(1) (“[A]ny eligible employee who takes leave . . . shall be entitled, on return . . . (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.”).

<sup>125</sup> *Hackworth*, 468 F.3d at 724.

<sup>126</sup> *Id.* at 725.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 725, 727.

<sup>130</sup> *Id.* at 729 (alteration in original) (quoting Appellant’s Opening Brief at 12, *Hackworth*, 468 F.3d at 722 (No. 05-6198)).



thereby increasing the number of surface miles for that route.<sup>131</sup> Hackworth also pointed out that “an employee may suddenly lose eligibility for FMLA leave when a detour is created because a route between two worksites comes under construction, thereby rendering the driving distance between the two points greater than 75 surface miles.”<sup>132</sup>

To analyze Hackworth’s claim that the Department of Labor regulation was arbitrary and capricious, the Tenth Circuit utilized the judicial deference standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>133</sup> “First, [the court] look[ed] to whether Congress directly spoke to the precise question at issue”;<sup>134</sup> it found that Congress had not directly spoken to how to measure the distance between worksites, and that Congress used the term “radius” in the legislative history but also omitted it on multiple occasions.<sup>135</sup> The court further stated that “there is nothing in the legislative history to indicate that Congress, in the few instances in which it used the term ‘radius,’ was using that term in a technical, rather than a colloquial, sense.”<sup>136</sup> Furthermore, the court took into consideration the FMLA’s ultimate purpose: “[T]he FMLA was enacted, in part, ‘to balance the demands of the workplace with the needs of families . . . [and] to entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers.’”<sup>137</sup> The court also noted the purpose of the mileage exception: “to accommodate employer concerns about ‘the difficulties an employer may have in reassigning workers to geographically separate facilities.’”<sup>138</sup> With this purpose in mind, the court concluded that it was “more persuasive that Congress did not define a method of measuring the geographic proximity of two worksites and therefore left an implicit statutory gap that 29 U.S.C. § 2654 authorizes the Secretary of Labor to fill.”<sup>139</sup>

The Tenth Circuit then moved to the second part of the *Chevron* test, asking “whether the [regulation] is based on a permissible construction of the statute.”<sup>140</sup> It noted that the Department of Labor regulation was “a plausible and reasonable reading of the term ‘within 75 miles’ contained in 29 U.S.C. § 2611(2)(B)(ii),” further stating that “use of surface miles is a fair, reasonably accurate and commonly-understood method of determining whether an employer has a significant pool of substitute

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<sup>131</sup> See *id.* at 729–30.

<sup>132</sup> *Id.* at 730.

<sup>133</sup> 467 U.S. 837 (1984); see *Hackworth*, 468 F.3d at 727.

<sup>134</sup> See *Hackworth*, 468 F.3d at 727 (citing *Chevron*, 467 U.S. at 842).

<sup>135</sup> See *id.* at 727–29.

<sup>136</sup> *Id.* at 729.

<sup>137</sup> *Id.* at 727–28 (alteration and omissions in original) (quoting 29 U.S.C. § 2601(b)(1)–(3)).

<sup>138</sup> *Id.* at 728 (quoting H.R. REP. NO. 102-135, pt. 1, at 37 (1991)).

<sup>139</sup> *Id.* at 729.

<sup>140</sup> *Id.* (alteration in original) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

workers nearby.”<sup>141</sup> The Tenth Circuit did address Hackworth’s concerns about the arbitrary nature of road construction, but ultimately dismissed them:

Although Ms. Hackworth is correct that an employee’s eligibility for FMLA leave could conceivably vary depending on how straight a particular road is, whether a particular road is under construction, or how many public roadways are located in a particular region, that does not render § 825.111(b) arbitrary and capricious. Rather, we see no reason why such considerations should not be factored into the eligibility calculus given the balance the FMLA strikes between the needs of an employee and the employer. Because the 50/75 provision was intended to protect employers who do not have a sufficient source of substitute employees nearby to cover for an absent employee, it is only logical that conditions which negatively affect the viability of moving an employee from one worksite to another may well come into play. This is true even if conditions such as the straightness of an interstate or the presence of road construction may be occasionally determinative of an employee’s eligibility status.<sup>142</sup>

The Tenth Circuit found that the Department of Labor regulation was not arbitrary or capricious and thus valid.<sup>143</sup> The court further noted that, “in order to survive summary judgment, [Hackworth] was required to produce evidence tending to show that Progressive employed at least 50 employees within 75 surface miles of its Norman worksite.”<sup>144</sup> Since Hackworth was unable to do so, she was not considered an “eligible employee” under the FMLA and could not claim that she was entitled to reinstatement upon returning from leave.<sup>145</sup> The Tenth Circuit thus “affirm[ed] the district court’s grant of summary judgment to Progressive.”<sup>146</sup>

The Tenth Circuit’s decision further emphasizes the high degree of deference the FMLA shows to businesses while disregarding the interests of workers, as well as the inherently arbitrary nature of the FMLA’s employee threshold. In a practical sense, the regulation does indeed fulfill the purpose of the FMLA’s mileage requirement: workers reassigned to geographically separate facilities have to use the roads to get to these facilities and cannot sprout wings and fly in a straight line. The application of the mileage requirement in this case, however, clearly demonstrates the arbitrary nature of the FMLA’s employee threshold. A little more than half a mile separated Ms. Hackworth from the job protection she needed in order to care for her loved one without sacrificing her economic security.<sup>147</sup> The court stated that the surface regulation is still valid even if it “may be occasionally determinative of an

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 730.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 730–31.

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 725.

employee’s eligibility status.”<sup>148</sup> Yet that eligibility status could mean the difference between keeping one’s job and caring for one’s sick child, between paying one’s electric bill and staying home from work when one is sick with the flu. These occasional consequences are anything but; huge swaths of American workers are forced to reckon with the consequences of these arbitrary eligibility limitations, particularly those who are deeply mired in poverty.<sup>149</sup> The next Part introduces some of the people who suffer most from these restrictive eligibility requirements: rural workers.

### III. RURAL WORKERS: HOW THEY ARE UNIQUELY SITUATED TO BENEFIT FROM FMLA ELIGIBILITY

According to one estimate, only around 47.9% of rural workers are eligible for job-protected leave under the FMLA,<sup>150</sup> and small businesses with fewer than fifty workers account for 42% of all rural jobs in the United States.<sup>151</sup> Access to FMLA leave would significantly benefit these workers, especially those living in poverty.

#### A. Poverty, Race, and Employment in Rural Communities

Popular conceptions of rural communities paint rural residents as predominantly white, and while this may be true, recent statistics indicate that other demographics are impacted as well:

As of 2018, 79 percent of rural residents were white, 8 percent were Black, 8 percent were Hispanic or Latine, and [even] smaller shares were Asian and Native American . . . .

. . . .

Rural counties are poorer than suburban and urban areas. In 2019, the rural poverty rate was 15.4 percent, compared to 11.9 percent in metro areas — and the gap is largest in the southern United States (19.7 percent in non-metro counties versus 13.8 percent in metro counties).<sup>152</sup>

Rural community members of color are disproportionately represented in “persistently poor” communities.<sup>153</sup> According to a separate source, which issued a report on “persistent poverty,” such communities

<sup>148</sup> *Id.* at 730.

<sup>149</sup> See Juan C. Flores, Comment, *12 Months, 12 Weeks, 1250 Hours, 75 Miles, and 50 Employees: Why the Numbers of the FMLA Don’t Add Up for New Parents of Color and Low-Wage Workers*, 54 U.S.F. L. REV. 313, 324 (2020).

<sup>150</sup> KELLY JONES & FARAH TASNEEM, FMLA ELIGIBILITY OF UNDERSERVED COMMUNITIES 13 tbl.1 (2022), [https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/American%20University\\_Final\\_20220105\\_508.pdf](https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/American%20University_Final_20220105_508.pdf) [<https://perma.cc/Z9MY-3DHK>].

<sup>151</sup> *Rural Small Businesses Play Key Factor in American Economic Growth but Experience Roadblocks to Success*, PR NEWSWIRE (June 2, 2022, 11:03 AM), <https://www.prnewswire.com/news-releases/rural-small-businesses-play-key-factor-in-american-economic-growth-but-experience-roadblocks-to-success-301560238.html> [<https://perma.cc/5D4E-3HZX>].

<sup>152</sup> VICKI SHABO & HANNAH FRIEDMAN, NEW AM., HEALTH, WORK, AND CARE IN RURAL AMERICA 16 (2022).

<sup>153</sup> See *id.* at 17.

are defined as areas that “had a poverty rate of 20.0% or higher during the three-decade period from 1989 to 2015–2019.”<sup>154</sup> “[Persistently impoverished] communities are generally rural, isolated geographically, lack resources and economic opportunities, and suffer from decades of disinvestment.”<sup>155</sup> In areas of persistent poverty, white individuals constitute only 53% of the population, while Black individuals constitute 25% of the population.<sup>156</sup> “Non-metro counties in the Mississippi Delta (which tend to be disproportionately . . . Black), . . . on Native American lands, as well as in the Southwest” make up some of “the highest concentrations of poverty in the country.”<sup>157</sup>

Furthermore, to those rural community members living in impoverished areas, gaining and maintaining employment is important.<sup>158</sup> A 2018 survey showed that 42% of rural residents, “including 53[%] of non-white rural residents, identified the availability of jobs as an area of major concern for them.”<sup>159</sup> Those jobs that *are* available often are low-wage and lack benefits.<sup>160</sup> Becoming unemployed can have deleterious effects on an already unsteady financial situation, making the need for job-protected leave all the more pressing for rural community members.

### B. Increased Health Concerns for Rural Community Members

Rural residents face higher rates of health issues than do those in metropolitan areas, in turn heightening the need for family and medical leave to manage these conditions. “Prior to the COVID-19 pandemic, 81 percent of persistently poor counties were in the bottom quartile of U.S. counties in terms of health outcomes . . . .”<sup>161</sup> According to the CDC, “[r]ural Americans are more likely to die from heart disease, cancer, unintentional injury, chronic lower respiratory disease, and stroke than their urban counterparts.”<sup>162</sup> Rural residents are also generally older; “rural counties have a higher share of residents aged 65 and older relative to urban and suburban areas (18 percent compared to 13 percent

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<sup>154</sup> Craig Benson, Alemayehu Bishaw & Brian Glassman, *Persistent Poverty: Identifying Areas with Long-Term High Poverty*, U.S. CENSUS BUREAU (May 22, 2023), <https://www.census.gov/library/stories/2023/05/persistent-poverty-areas-with-long-term-high-poverty.html> [https://perma.cc/CU4Q-XP3U].

<sup>155</sup> LANCE GEORGE & KEITH WILEY, HOUS. ASSISTANCE COUNCIL, RURAL RESEARCH BRIEF: THE PERSISTENCE OF POVERTY IN RURAL AMERICA (2022).

<sup>156</sup> SHABO & FRIEDMAN, *supra* note 152, at 17.

<sup>157</sup> *Id.* at 16.

<sup>158</sup> *See id.* at 25.

<sup>159</sup> *Id.* (citing KIM PARKER ET AL., PEW RSCH. CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN, AND RURAL COMMUNITIES 46 (2018)).

<sup>160</sup> *See id.*

<sup>161</sup> *Id.* at 26.

<sup>162</sup> *About Rural Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 28, 2023), <https://www.cdc.gov/ruralhealth/about.html> [https://perma.cc/B6KW-TJSZ].

and 15 percent, respectively).<sup>163</sup> Additionally, while Black maternal mortality rates nationwide are at crisis levels, with Black individuals being 2.6 times more likely to die while pregnant than white individuals,<sup>164</sup> “in rural communities, maternal mortality is almost double urban rates.”<sup>165</sup>

Research has pointed to several causes for these disparities in health outcomes. Rural residents have higher rates of smoking<sup>166</sup> and often live in food deserts, lacking access to grocery stores and fresh produce.<sup>167</sup> Additionally, the “lack of walkability” makes it difficult for rural residents to engage in aerobic activities.<sup>168</sup> Another major factor contributing to poor rural health outcomes is the lack of easy access to vital health care services,<sup>169</sup> as discussed in the next section.

### C. Exorbitant Travel Times to Health Services

Rural residents must travel considerable distances to access most health care services, thereby increasing the time a rural worker must take away from work to manage their or their loved one’s health conditions. Rural residents “must typically travel three to four times further” to access health care than do their urban counterparts.<sup>170</sup> Those residing in persistent poverty areas generally live even farther away from adequate health services.<sup>171</sup> The lack of access to public transportation in rural areas leads to lower access to health care, since rural community members may not have access to a car or even have enough money for gas to get them to their health care provider.<sup>172</sup> Even if a rural resident does have a car, the “poor road quality,” the prevalence of “windy roads”<sup>173</sup> in some rural areas, and the “significant safety and mobility challenges, such as high motor vehicle fatalities rates and poor

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<sup>163</sup> SHABO & FRIEDMAN, *supra* note 152, at 14.

<sup>164</sup> William Brangham & Shoshana Dubnow, *American Black Women Face Disproportionately High Rates of Maternal Mortality*, PBS NEWSHOUR (June 28, 2023, 6:30 PM), <https://www.pbs.org/newshour/show/american-black-women-face-disproportionately-high-rates-of-maternal-mortality#transcript> [<https://perma.cc/UH72-9BG2>].

<sup>165</sup> Stephanie Sy & Maea Lenei Buhre, *The Health Care Challenges Pregnant Women of Color Face in Rural Areas*, PBS NEWSHOUR (Mar. 29, 2023, 6:40 PM), <https://www.pbs.org/newshour/show/the-health-care-challenges-pregnant-women-of-color-face-in-rural-areas> [<https://perma.cc/3BYS-C4RJ>].

<sup>166</sup> See SHABO & FRIEDMAN, *supra* note 152, at 26.

<sup>167</sup> *Rural Hunger and Access to Healthy Food*, RURAL HEALTH INFO. HUB, <https://www.ruralhealthinfo.org/topics/food-and-hunger> [<https://perma.cc/Y5DD-MTPN>].

<sup>168</sup> See SHABO & FRIEDMAN, *supra* note 152, at 26.

<sup>169</sup> See *id.* at 27.

<sup>170</sup> *Id.* at 6.

<sup>171</sup> *Id.* at 9.

<sup>172</sup> See Ben Abrams, *Inflation Is Crushing Rural America and May Even Drive People to the Cities*, NPR (July 25, 2022, 5:00 AM), <https://www.npr.org/2022/07/25/1112915507/inflation-rural-america-gas-prices-economy> [<https://perma.cc/E9W2-VNVB>].

<sup>173</sup> SHABO & FRIEDMAN, *supra* note 152, at 44. Recall Hackworth’s arguments about road construction. See *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 730 (10th Cir. 2006).

transportation infrastructure condition and maintenance”<sup>174</sup> further increase the time it takes to access medical care.

Rural residents have particularly low levels of access to obstetric and gynecological care, leading to less access to contraceptives and putting the lives of Black mothers at even greater risk.<sup>175</sup> This makes every onerous second spent traveling to the hospital “a matter of life and death.”<sup>176</sup> Additionally, access to abortion in rural areas has been drastically reduced by the overturning of *Roe v. Wade*.<sup>177</sup> Rural residents may try to self-induce abortion, leading to possible further health complications.<sup>178</sup>

The lack of access to medical care in rural communities has a twofold effect: First, it may discourage rural residents from seeking medical care, especially screenings and other preventive services, in the first place, leading to lower health outcomes generally and increasing the amount of time a worker has to take off because of illness (that could have possibly been prevented with regular care). Second, it may increase the length of time a rural worker may have to take off from work when they finally do seek out medical services. These consequences leave rural workers at high risk of losing their jobs without the benefit of job-protected leave.

#### D. Rural Caregivers’ Need for Family Leave

Due to increased health risks among rural residents and a lack of access to health care services, as well as an aging rural population, family caregivers are extremely vital members of rural communities.<sup>179</sup> In 2021, almost 23% of rural residents “report[ed] having provided care to a family, friend, or loved one within the past 30 days.”<sup>180</sup> By one metric compiled in 2016, nearly six in ten caregivers nationwide were also employed full-time,<sup>181</sup> making job-protected family leave vital for caregivers to continue supporting their families while fulfilling their caregiving obligations. Almost 70% of employed caregivers reported some type of

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<sup>174</sup> *The Critical Role of Rural Communities in the U.S. Transportation System*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/rural/grant-toolkit/critical-role-rural-communities> [https://perma.cc/QA5M-E78X].

<sup>175</sup> See Glory Okwori et al., *Geographic Differences in Contraception Provision and Utilization Among Federally Funded Family Planning Clinics in South Carolina and Alabama*, 38 J. RURAL HEALTH 639, 640 (2022).

<sup>176</sup> SHABO & FRIEDMAN, *supra* note 152, at 46; see also Sy & Buhre, *supra* note 165.

<sup>177</sup> 410 U.S. 113 (1973); see, e.g., Sarah McCammon, *With Roe v. Wade Overturned, Doctors Expect to See More Self-Induced Abortions*, NPR (July 5, 2022, 5:05 AM), <https://www.npr.org/2022/07/05/1109779581/with-roe-v-wade-overturned-doctors-expect-to-see-more-self-induced-abortions> [https://perma.cc/G48U-QBF5].

<sup>178</sup> McCammon, *supra* note 177.

<sup>179</sup> SHABO & FRIEDMAN, *supra* note 152, at 30.

<sup>180</sup> *Id.*

<sup>181</sup> See *Caregiver Statistics: Work and Caregiving*, FAM. CAREGIVER ALL. (2016), <https://www.caregiver.org/resource/caregiver-statistics-work-and-caregiving/> [https://perma.cc/8HFL-U6JU].

work-related difficulty because of their caregiving responsibilities, such as having to leave work early or to arrive late and taking time away from work to care for their loved ones.<sup>182</sup> “[Thirty-nine percent] of caregivers le[ft] their job to have more time to care for a loved one.”<sup>183</sup> Rural caregivers would greatly benefit from job-protected family leave, which would allow them to keep their jobs while fulfilling their caregiving obligations.

*I. Rural Working Parents.* — Working parents living in rural communities face particular caregiving challenges that necessitate access to job-protected family leave. In one survey, more than one-third of working rural mothers reported that caregiving has made it hard to remain in the workforce.<sup>184</sup> Twenty-five percent of rural mothers reported quitting a job because of caregiving in the preceding two years — more than all working mothers nationwide (twenty percent).<sup>185</sup> Additionally, according to the same survey, only 51% of working rural mothers reported “hav[ing] access to affordable, quality childcare” to supplement their caregiving responsibilities.<sup>186</sup> Job-protected family and medical leave would allow working parents to stay home with their sick children or take their kids to the health care services they need but lack easy access to, without workers having to sacrifice financial stability.

*E. Rural Workers and Job-Protected Leave, In Sum*

Rural workers would derive tremendous benefit from the job-protected family and medical leave the FMLA provides. Persistent poverty and geographic isolation lead to increased health risks among rural communities, forcing residents to take time away from work to care for their own health or the health of their loved ones. Without job-protected family and medical leave, rural workers risk losing the means to support their families by missing one day of work, leading to the further persistence of poverty in rural areas, particularly those areas with large swaths of residents of color. Job-protected leave would prevent rural workers from having to sacrifice their economic security in the name of their or their loved ones’ health needs.

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<sup>182</sup> *See id.*

<sup>183</sup> *Id.*

<sup>184</sup> MORNING CONSULT & BIPARTISAN POL’Y CTR., UNDERSTANDING MOMS IN THE WORKFORCE 18 (2022), [https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/05/BPC-Working-Moms\\_ANALYSIS\\_updated.pdf](https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/05/BPC-Working-Moms_ANALYSIS_updated.pdf) [https://perma.cc/7KGY-J35A].

<sup>185</sup> *Id.* at 23.

<sup>186</sup> *Id.* at 12.

#### IV. POSSIBILITIES FOR FUTURE REFORM OF THE FMLA ELIGIBILITY REQUIREMENTS

##### A. *The Effect of Lowering the Employee Threshold on Rural Access to FMLA Leave*

Lowering the employee threshold would significantly improve access to job-protected medical and family leave for rural workers. A study solicited by the Department of Labor simulated the effect on worker eligibility of lowering the FMLA employee threshold.<sup>187</sup> The study found that, if the threshold was lowered to ten or more employees, FMLA eligibility among rural workers would increase from 47.9% to 58.5%.<sup>188</sup> The study also found that “[w]ithin a race/ethnicity/citizenship group, the largest gains [in eligibility] are seen for workers with low wages or [who live] below the poverty line,” and that expanding the definition of eligibility could increase access for those living below the poverty line by as much as 59%.<sup>189</sup> The FMLA’s employee threshold stands as a significant barrier to rural, impoverished workers’ access to medical services, and increasing the threshold would result in remarkable gains to eligibility for job-protected family and medical leave.

##### B. *What Can Be Learned from State Family and Medical Leave Policies*

Several states have enacted their own family and medical leave laws, either with lower employee thresholds than that of the FMLA or with no employee threshold at all. Vermont’s law regarding parental leave<sup>190</sup> and the Healthy Delaware Families Act<sup>191</sup> both apply to employers with ten or more employees.<sup>192</sup> The Minnesota Parental Leave Act<sup>193</sup> previously applied only to those employing twenty-one or more employees; beginning July 1, 2023, however, the Act applies to all employers (that is, those with “one or more employees”), regardless of size,<sup>194</sup> perhaps indicating a growing sentiment in favor of more expansive family and

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<sup>187</sup> See JONES & TASNEEM, *supra* note 150, at 2.

<sup>188</sup> *Id.* at 15 tbl.3.

<sup>189</sup> *Id.* at 9–10.

<sup>190</sup> VT. STAT. ANN. tit. 21, § 471(4) (2023) (defining “Parental leave”); see also *Parental Leave, Family Leave, and Short-term Family Leave*, VT. DEP’T OF LAB. (2019), [https://labor.vermont.gov/sites/labor/files/doc\\_library/WH-14%20-2019-%20FAMILY%20LEAVE%20%281%29.pdf](https://labor.vermont.gov/sites/labor/files/doc_library/WH-14%20-2019-%20FAMILY%20LEAVE%20%281%29.pdf) [<https://perma.cc/W457-JGBN>].

<sup>191</sup> DEL. CODE ANN. tit. 19, §§ 3701–3724 (2023).

<sup>192</sup> VT. STAT. ANN. tit. 21, § 471(4) (2023); tit. 19, § 3701(7); see NAT’L P’SHP FOR WOMEN & FAMS., *THE HEALTHY DELAWARE FAMILIES ACT: WHAT YOU SHOULD KNOW 1* (2022).

<sup>193</sup> MINN. STAT. §§ 181.940–.944.

<sup>194</sup> *Id.* § 181.940; see also Grant T. Collins, *Effective July 1, 2023, Minnesota Significantly Expands Parenting Leave, Pregnancy Accommodations, and Nursing Mothers Protections*, FELHABER LARSON (June 26, 2023), <https://www.felhaber.com/effective-july-1-2023-minnesota-significantly-expands-parenting-leave-pregnancy-accommodations-and-nursing-mothers-protections> [<https://perma.cc/RLR8-9BWV>].



medical leave laws. Some states, including Colorado, Connecticut, Oregon, and Washington, as well as the District of Columbia, have family and medical laws that apply to all employers (that is, those with at least one employee).<sup>195</sup> Notably, none of the above laws include any sort of mileage exception like that found in the FMLA.<sup>196</sup> Even Vermont, the most rural state in the country with 64.9% of its residents living in rural areas,<sup>197</sup> does not have a mileage exception in its family leave law.<sup>198</sup>

The existence of these state laws speaks to the possibility of a federal family and medical leave policy applicable to all or nearly all employers. These state laws fulfill the true intent of the original proponents of family and medical leave: that such leave would be accessible to all workers who could benefit from it.

### C. A Note on Paid Leave

Over the past several years, there has been growing popular sentiment in favor of a national *paid* family and medical leave policy. In 2020, “78 percent of rural voters said they supported a national paid sick days law and 80 percent expressed support for a permanent paid family and medical leave program for people with illness or child or family care.”<sup>199</sup> Researchers at New America describe “paid family and medical leave” as a “rural health and economic imperative.”<sup>200</sup> Rural workers would tremendously benefit from paid family and medical leave, which would help mitigate the economic risks associated with taking time off from work.

Despite the remarkable benefits paid family and medical leave would bring for American workers, if the eligibility guidelines for a paid policy were to mirror those for the FMLA, a large portion of the population would be left behind. Many rural workers would still have to make the choice between economic security and the health of themselves and their loved ones. A future paid leave policy that does not cover small rural employers or employers with satellite operations in rural areas would work to further entrench rural communities in poverty, particularly in those rural communities with large populations of color. A national paid

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<sup>195</sup> *State Family and Medical Leave Laws*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 9, 2022), <https://www.ncsl.org/labor-and-employment/state-family-and-medical-leave-laws> [https://perma.cc/P9SS-KZ2V].

<sup>196</sup> *See id.*

<sup>197</sup> Press Release, U.S. Census Bureau, Nation’s Urban and Rural Populations Shift Following 2020 Census (Dec. 29, 2022), <https://www.census.gov/newsroom/press-releases/2022/urban-rural-populations.html> [https://perma.cc/GGJ2-K2YY].

<sup>198</sup> *State Family and Medical Leave Laws*, *supra* note 195.

<sup>199</sup> SHABO & FRIEDMAN, *supra* note 152, at 68–69.

<sup>200</sup> *Id.* at 68. Indeed, this author’s own fellowship host organization, A Better Balance, was specifically founded in part to advocate for paid family and medical leave. *See Our History*, A BETTER BALANCE, <https://www.abetterbalance.org/who-we-are/our-history/> [https://perma.cc/GY3K-DXC6].

leave policy should benefit *all* American workers, not merely an arbitrary portion of the workforce.

#### CONCLUSION

The Family and Medical Leave Act of 1993 provides invaluable protections to American workers, allowing them to balance their and their loved ones' health needs without risking their financial security. Yet only a fraction of workers are entitled to these benefits. The FMLA was originally intended to apply to *all* employers, ensuring every worker, no matter where they worked, would have access to job-protected leave. As the legislative process progressed, however, the percentage of employers covered under the FMLA went from 100% in the initial versions of the law, to 5% at the time of the law's passage in 1993. This shift was due to capitulation to the business lobby and reliance on threshold figures that lacked any particular basis other than lawmakers' own opinions. The arbitrary nature of the employee threshold is especially laid bare when applied to real-world situations, like that of Kelly Hackworth, who lost her job over 0.6 miles.

The FMLA's employer restrictions prevent many rural workers from accessing the job-protected family and medical leave from which they would derive significant benefit. Rural community members face increased health risks and lack sufficient access to essential health care services, increasing the likelihood that they take time off work to care for themselves or their loved ones. Without access to job-protected leave, however, rural workers may be forced to choose between their or their loved ones' health and their economic security. Simulations have shown that lowering the employee thresholds would significantly increase access to FMLA leave for rural workers, and current state-level family and medical leave policies demonstrate the possibility of future nationwide policies with reduced or eliminated employee thresholds.

Rural workers stand to significantly benefit from access to job-protected family and medical leave policies, yet so many are deprived of that access. The FMLA's eligibility requirements can and should be lowered to benefit beyond just "an arbitrary fraction"<sup>201</sup> of American workers.

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<sup>201</sup> 139 CONG. REC. 1843 (1993) (statement of Sen. Howard Metzenbaum).