
Kathryn L. Morris*

I. INTRODUCTION

On February 5, 1993, U.S. President William Jefferson Clinton enacted into law the Family and Medical Leave Act of 1993 (FMLA).1 When signing the Act into law, President Clinton cited the FMLA as "a response to a compelling need-the need of the American family for flexibility in the workplace."2 The compelling need referred to by President Clinton in signing the bill is evidenced by statistics that show, by 1990, one-half of mothers with children less than one year old and two-thirds of mothers with children younger than three years old worked outside the home.3 The creation of unpaid leave for family members was not a novel concept; former President George Bush vetoed a similar act in 1991.4 The FMLA's roots trace even further back than the early 1990's; U.S. Representative Patricia Schroeder(D-Colo.) initially set forth a parental leave bill in 1985.5

The FMLA responds to a society in which a working father and a stay-at-home mother is the exception rather than the rule.6 Prior to the enactment of the FMLA, women were forced to choose between dead-end "jobs" and high-pressure, child-unfriendly "careers" open to advancement. Not surprisingly, moving up the corporate ladder was difficult for most mothers. The FMLA has several goals: "to balance the demands of the workplace with the needs of

* J.D., University of Georgia, 2002; B.S., Banking & Finance, University of Alabama, 1999.
2 Statement by President William J. Clinton Upon Signing H.R. 1, 29 WEEKLY COMP. PRES. DOC. 144 (Feb. 8, 1993).
4 See id.
5 See id.
families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." The FMLA gives employees the right to take unpaid leave time for family and medical leave.

The issue of balancing the needs of family life with the desire to have a productive workforce was also addressed by the European Council in 1996 when it adopted the European Union Directive on Parental Leave. The European Directive binds the Member States in some respects as does a traditional law or administrative order. Member States, as a condition to their continued good standing in the European Community, are essentially coerced into compliance. However, the amount of leave given, as well as the methods used to implement and administer the Directive, are left up to the individual Member State. Nonetheless, some degree of compliance is required; the source of this requirement is Article 119 of the Treaty of Rome.

Article 119 assures employees working in the European Community that both sexes will receive equal pay for comparable work. While there is no express language within Article 119 that demands compliance, both the EC Commission and Parliament have emphasized the importance of uniformity by making and publishing binding decisions. In contrast, however, the United States follows no comparable supranational command in its implementation of the FMLA; instead, states are bound by the federal law due to the Constitution and notions of federalism.

While these two separate acts have experienced both success and failure in their respective implementations, considering the acts together on the
international scene poses a whole new dilemma. From these two seemingly similar acts arise large problems for U.S. multinational corporations locating in Europe: what should these corporations do to follow the relevant European law and how might this affect productivity? Though the two acts seem on their faces to be similar in nature, the European Directive provides generally for a greater length of family leave than the FMLA and thus presents a challenge to U.S. employers locating in Europe for the first time.17

Initially, it appears that this problem does not cut both ways, as a European company locating in the United States would have no problem with compliance with U.S. laws, since the European laws are more generous to the employee. After all, the European-based employer could just continue its standard practices in the United States and face no penalties. However, this may not always be the case, as a European company may bring contract workers from the home country who may still be subject to the Directive’s protections. The question then becomes which laws apply and what penalties may result as a consequence of noncompliance. While the exact dimensions of the problem posed by the disparity in the Acts differ, both U.S. and European multinationals face some consequence or risk by failing to monitor carefully their compliance with host country and home laws.

This Note seeks to identify the problems that do exist for such employers and whether solutions exist on an international level. Part II explains more thoroughly the provisions of the FMLA and the European Directive, focusing upon leave designed for the birth or adoption of a child and highlights problems each has faced in its respective region. Part III describes in detail the conflict that these differing standards present to employers; in other words, this section compares the provisions of the respective acts and identifies problems currently faced by multinational companies. Part IV explores the relative merits of adopting an international standard regarding family leave and demonstrates that such a standard would likely be ineffective, impractical, and basically unenforceable. The findings enumerated in this Note are summarized in the Conclusion.

II. BACKGROUND—THE ACTS

Before identifying the conflict of laws the FMLA and the European Directive create, it is useful to learn more about the relevant provisions of each act in order to provide a more meaningful comparison.

17 See generally Rasnic, supra note 13, at 111-35.
A. The FMLA: Its Purpose, Provisions, and Problems

i. Statutory Provisions

The FMLA seeks to fill a gap in U.S. law, namely that of a need for uniform parental leave and leave for other reasons, such as taking care of an aging parent or ill relative.\(^{18}\) The FMLA applies to businesses having greater than fifty employees each working day for twenty or more weeks within the previous year or current year.\(^{19}\) In essence, the FMLA ensures up to twelve weeks of leave to employees per year if they are to (1) care for a newborn child or for a child newly placed for adoption or foster care; (2) care for an employee's child, parent, or spouse with a serious health condition; and/or (3) care for their (employees') own serious health condition.\(^{20}\)

With respect to the first purpose of FMLA, to provide leave for employees who are to care for newborns or foster/adopted children, the Act does not designate whether such leave should be coined "maternity" or "paternity" leave.\(^{21}\) Notably, the FMLA provides for "parental leave" rather than designating such leave for mothers exclusively.\(^{22}\) Indeed, the statement of purpose for the FMLA recognizes that, while women are primary caregivers to newborns and children,\(^{23}\) it is also paramount that employees be free to raise their children in order for the children to properly develop, regardless of whether that employee-parent is male or female.\(^{24}\) In fact, the FMLA embraces the definition of family somewhat broadly, as it encompasses spouses married under traditional state law as well as common law marriage.\(^{25}\)

This type of gender equality reflected in the statute indeed existed prior to Congress' enactment of the FMLA, though not specifically in the parental leave sector; in Satty v. Nashville Gas Co., a U.S. District Court held that the company's health insurance policy for pregnancy coverage applied equally to

\(^{18}\) See McCaffrey & Graff, supra note 7, at 230.


\(^{20}\) See id. at § 2612(a)(1)(A)-(D).

\(^{21}\) See 29 C.F.R. § 825.112(c) (1993); see also Rasnic, supra note 13, at 108.

\(^{22}\) See Grill, supra note 3 (citing 29 C.F.R. § 825.113(a),(c); the FMLA gives the Secretary of Labor power to issue regulations necessary to carry out the Act). See also The District of Columbia's Family Leave Act, D.C. Code Ann. 36-1301 to 1317 (Supp. 1991) (extending the definition of family to life partners and extended family members in its version of the Act).


\(^{24}\) See id. at § 2(a)(2).

\(^{25}\) See generally Grill, supra note 3, at 376.
males and females, with no sex discrimination; wives of participating male employees were covered by the policy’s benefits.\textsuperscript{26}

In its general provisions, the FMLA allows for twelve weeks of unpaid leave for one of the above-specified reasons at any time or segment of time. However, as to the birth-adoption leave, the primary focus of this Note, the FMLA specifies that such leave must be taken within twelve months of the birth or placement of a child.\textsuperscript{27} While European countries often offer employees family leave from birth up until five years after the child’s birth, U.S. employers only have to offer the mandated twelve-week leave within the twelve month period; the FMLA does not provide for a specific number of weeks of leave to be taken before and after the birth or adoption of the child.\textsuperscript{28}

2. \textit{The Provisions in Practice}

Though the basic provisions of the FMLA sound relatively simple, employers have discovered that the Act is fairly difficult to implement.\textsuperscript{29} For example, U.S. employers, as well as courts, have struggled to define “serious health condition” as denoted in the FMLA.\textsuperscript{30} In addition, some commentators have even suggested that an employer could violate the FMLA and strategically escape liability therefrom: “For example, an employer could grant leave and subsequently threaten termination if the employee refused to return to work. That way, the employer avoids family or medical leave and need not fear receiving a penalty for its actions in violation of the Act.”\textsuperscript{31}

\textsuperscript{27} See FMLA, § 102(a)(2).
\textsuperscript{28} See id.
\textsuperscript{29} See Rasnic, supra note 13, at 147.
B. The European Union\textsuperscript{32} Directive on Parental Leave

1. Purposes and General Information

The European Union Directive on Parental Leave seeks to set minimum statutory requirements for family leave in a uniform fashion throughout the European Community.\textsuperscript{33} Like the FMLA, the Directive\textsuperscript{34} seeks to reconcile a productive work force with a balanced family life in which the mother and father equally share responsibility for childcare.\textsuperscript{35} The Directive's aim targets equalization of the workforce for women, who, until the point of passage of the Directive in 1996, had enjoyed equal rights but not equal treatment.\textsuperscript{36} To a degree, the Directive promotes more equalization in the respective national labor markets than the FMLA did in its creation. The average European government, however, has long been considered a "social state".\textsuperscript{37} That is, many European governments have sought to establish employment legislation more broad and sweeping than that of the United States. The European Union had "further to go" in improving its rights for pregnant women and parents in general because blatant discrimination against these classes has been allowed in the past, unlike in the United States.\textsuperscript{38} European employment statistics support such an assertion. For example, in 1998, across the European Union,
the employment rate of women of working age was only around fifty-one percent, compared to a rate of sixty-seven percent in the United States. In addition, Greece, one of the member states subscribing to and bound by the Directive, had one of the worst male-female employment ratios in Europe; this gender gap was a problem also encountered by the Dutch. The United Kingdom perhaps had the most problems facing it in the employment arena as there were wide disparities between the male and female employment rates and long-term unemployment among single parents. These differences explain why the employee seems to be favored so heavily in the Directive's regulations and applications to the individual member states. Whether such gender disparities were caused by formerly existing national employment laws or rather by local custom is questionable; nonetheless, the Directive sought to reform this problem via a more protective law.

Specifically, the Directive calls for a minimum of three months' parental leave. While this sounds strikingly similar to the FMLA, Article 2.2 allows member states to decide whether parental leave is granted in multiple phases or in a single block of time, how long an employee must work at a given company to earn that leave, and how much notice the employee must give the company to access such leave. Workers are given the right to return to the same jobs they held before taking leave after the completion of the provided statutory period. Member states are given the latitude to introduce more favorable provisions within their individual nations than are available in the Directive alone. Member states had two years from the 1996 adoption of the Directive to implement the laws and regulations necessary to place into effect such parental leave in their individual nations.

Because the Directive gives member states considerable freedom in how far the States may carry the minimum requirements, the Directive's provisions have been subject to interpretation by the European Court of Justice. For example, the court interpreted a Christmas bonus as not being "a right acquired
or in the process of being acquired by the worker on the date on which parental leave started since it is paid voluntarily at the start of that leave." That is, the court found that an employer was not required to pay a female employee a Christmas bonus when the employee took not only the statutorily granted parental leave but also the company's optional additional leave. The court determined that the employer's actions did not constitute direct discrimination.  


Since the European Union Directive allows member states to make their own laws in conjunction with the Directive's provisions, it is helpful to observe how States have sought to enforce compliance on a more individual basis. Also, the effects on U.S. multinational corporations operating in such countries will differ greatly, depending upon the amount of leave provided for and how strictly the leave policies are enforced. The range of leave provided for in each nation varies widely, with some parental leave being statutorily mandated and some leave being determined by employer-employee agreement.

Typically, member states provide for fourteen to sixteen weeks of maternity leave, with six to eight weeks of leave taken before the birth of the child and six to eight weeks taken after the child is born. Notably, most of this leave is paid time, and the vast majority of member nations make this leave mandatory, rather than optional, for the employer. Though Great Britain did not originally subscribe to the Directive, it provides the longest leave in Europe—a total of forty weeks is available to the employee, eleven of which are to be used before birth and twenty-nine afterward.

Austria follows a statutory approach, giving employees a maximum leave period of two years. This two-year leave may be granted either to the child's

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49 Id.
50 See id.
51 See McCaffrey & Graff, supra note 7, at 244.
52 See Rasnic, supra note 13, at 133.
53 See id.
55 See McCaffrey & Graff, supra note 7, at 244-45.
56 See RUDOLPH STRASSER, AUSTRIA, 2 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 109 (Roger Blapain ed., 1986 & Supps.).
mother or father. Leave given also reflects the needs of lower-income employees by compensating such employees accordingly. (Note that no data is available as to how requiring accommodations for lower-income employees discourages hiring of certain classes of workers.) Employers in Austria also give workers the option of working on a part-time basis while taking their allotted leave time. Even more generously, some employers provide additional personal leave for events such as the death of a close family member or the illness of an aging parent.

Like Austria, Denmark provides employees with a statutory right to parental leave. The employee may take leave of ten weeks at the fully paid rate, and an additional year’s worth of leave may be taken at the employee’s choosing at a reduced rate.

Belgium’s leave provisions appear much less lenient than those of other European nations. Leave is not mandated by statute. Leave may be taken for up to one year, but only if the employers involved have signed a paid leave agreement. In fact, an employer can emphatically deny an employee’s request for parental leave if the company cannot find a replacement for the employee. A company must merely make “reasonable efforts” to locate a replacement employee.

In contrast, Germany’s right to leave is statutory. To qualify for federally regulated parental leave, the employee need only be working for the employer-company for a minimum period of four weeks. Germany also has very favorable laws as to leave for the adoption of children; for example, adoptive parent-employees have three years from the child’s adoption date, and the employer may voluntarily extend the leave period.

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57 See id.
58 Id.
59 See id.
60 See id.
62 See id.
64 See id.
65 See id.
68 See Mutterschutzgesetz; see Parental Leave in Europe, supra note 67, at 19.
Sweden’s parental leave laws are thought to be some of the most lenient in the entire world.\(^{69}\) Swedish employees, unlike many of their counterparts in other countries, have been entitled to some sort of family leave since 1937.\(^{70}\) The Swedish Act on Child Care Support, effective July 1, 1994, granted parents one year of familial leave, actually reducing the fifteen months of leave that was previously available.\(^{71}\) Both parents are entitled to separate periods of leave, and spouses can transfer their leave to one another.\(^{72}\) Unlike parental leave practices in several European Union countries and in the United States, all employers in Sweden are required to furnish their employees with parental leave.\(^{73}\)

Most notably, Sweden gives its workers a “parental allowance” while they are on leave, so long as it is taken within eighteen months of the child’s birth or adoption.\(^{74}\) During the first sixty days of leave, employees receive compensation equaling ninety percent of their previous salary; after such time, they collect eighty percent of the prior salary.\(^{75}\) This paid leave is funded through payroll taxes as well as general governmental revenues.\(^{76}\) In addition to the compensation given by employers themselves, employees with children are given a monthly allowance of 2000 Swedish crowns.\(^{77}\)

Though it is not necessary to examine each and every member states’ adaptation of the Directive, several other nations’ policies stand out. Employees in Luxembourg, for instance, have no right to take parental leave if they work in the private sector.\(^{78}\) However, in the public sector, employees have a statutory-based right to parental leave without pay for a period of up to two years.\(^{79}\) Spain’s national leave policy limits a parent to three years of parental leave, but, if both parents work, only one of the parents will qualify

\(^{69}\) See Grill, supra note 3, at 374.

\(^{70}\) See id.

\(^{71}\) See id. at 375; see also The Act on Child-Care Support, No. 553 (1994) (Swed.).

\(^{72}\) See id.

\(^{73}\) See id.


\(^{75}\) See Grill, supra note 3, at 379.

\(^{76}\) Id. at 380.

\(^{77}\) See The Public Insurance Act, supra note 74.

\(^{78}\) See McCaffrey & Graff, supra note 7, at 249; see also ROMAIN SCHINTGEN, LUXEMBOURG, 9 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 85 (Roger Blanpain ed., 1986 & Supps.).

\(^{79}\) See McCaffrey & Graff, supra note 7, at 249.
for this leave.\textsuperscript{80} Both parents may, however, work on a part-time basis at the same time if they choose to do so.\textsuperscript{81}

In conclusion, the individual nations of the European Union reflect what is already granted to them in the Directive. That is, the minimum standards have been enacted by law or by employer-employee agreement in each country since the deadline in June 1998.\textsuperscript{82} However, in putting into effect the mandatory changes, each nation has taken a unique approach in application, changing the amount of leave given, as well as when it must be taken, and the amount of control employers have over the process. Such variances make the task of locating in Europe initially even more perplexing for multinational corporations than ever. However, one should keep in mind that multinationals have already conquered compliance in a multitude of other areas, including compliance with varying international labor laws, environmental regulations, and the like.\textsuperscript{83} Thus, compliance with differing parental leave standards, while confusing at times, is not an insurmountable obstacle for multinational employers.


A. A Brief Comparison of the FMLA and the Directive

Multinational companies would not experience problems in complying with both the FMLA and the European Union Directive if the statutes provided for similar periods of leave and like practices in taking such leave. Unfortunately, however, consistency is not the case. Thus, one must consider how the two statutes differ in their general provisions and in their respective legislative backgrounds to understand the full impact such variances have on multinational companies locating in European Union nations.

Clearly, the greatest difference between the FMLA and the EU Directive is the amount of leave given to parents before and after the birth or adoption of a child. The FMLA mandates twelve weeks of unpaid leave to be taken

\textsuperscript{80} See id.
\textsuperscript{81} Id.
\textsuperscript{82} See The Directive, supra note 9.
within twelve months of the child's birth or adoption, while the typical length of leave granted to European employees is fourteen to sixteen weeks (though the Directive only requires twelve). As aforementioned, the FMLA does not mandate leniency on the part of employers (or to the states implementing these laws) as to how leave shall be granted; usually leave is granted in a single block of time. In contrast, the European Union Directive provides considerable leeway for individual nations in enforcement; employers may "divide up" the mandatory leave period into time before the child's birth and afterward. In addition, member states have discretion as to whether the leave will be mandated statutorily or by employer-employee agreement.

Another difference between the FMLA and the European Union Directive is the compensation given employees when they take their designated leave time. As previously mentioned, the FMLA gives employees unpaid leave. However, many member states of the European Union, including Sweden, give employees compensation during their leave time. This, in turn, creates a major disparity between U.S. and European family leave laws' practical effects. For example, the U.S. General Accounting Office discovered that the majority of U.S. employees are unable to afford uncompensated leave even when it is necessary for them to take it. The economic burden of unpaid leave is especially hard on male employees "because of the importance of the good-provider [breadwinner] role." As a result, then, European workers are more likely to take advantage of such leave than are their U.S. counterparts. Thus, U.S. companies operating elsewhere, particularly in countries like Sweden, must expect that their European employees will take leave more frequently than their U.S. employees will; such companies will have to account for these differences when examining productivity levels and hiring practices or personnel needs.

Differing social practices, as well as varying historical treatment of parents in the workplace, cause the FMLA and the Directive to diverge from one another in their respective provisions. First, many commentators often

84 See FMLA, supra note 1, § 2612(a)(2).
85 See The Directive, supra note 9, art. 2(2) (granting a right to three months' leave).
86 See FMLA, supra note 1, § 2612(b)(1).
87 See The Directive, supra note 3, art. 2(3)(a).
88 See id.
89 See Grill, supra note 3, at 379.
90 See generally id.; see also LINDA HAAS, EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN 19 (1992).
consider European employment laws more paternalistic in nature than their U.S. counterparts. This means the United States is less paternalistic in its laws concerning employees. Some explanation for the U.S. "laissez-faire" approach to employees' rights can be gleaned from already-existing statutes such as the Americans with Disabilities Act of 1990 and the Pregnancy Discrimination Act of 1978. Less paternalism exists because there is a smaller need for such laws when anti-discrimination statutes are already in place.

Meanwhile, the more "hands-on approach" of European nations can be traced back to the formation of the actual European Community by the Treaty of Rome of 1957. As early as 1957, Article 119 of the Treaty of Rome sought to protect against sexual discrimination in the workplace, and the Treaty also strove to assure equal pay among the sexes. The European Union's employee-friendly outlook did not come to a halt after the formation of the earliest European Community; instead, the protection of employees has enjoyed a steady progression throughout time, as the European Community Commission has passed several binding decisions and regulations concerning employee protection, including the 1992 Council Directive on pregnancy in the workplace.

In conclusion, the notably shorter and more stringent periods of leave provided for in the FMLA are in sharp contrast to the longer, variable standard the European Union has imposed upon its member states. The social policies advanced by the respective U.S. and European Union governments are the underlying source of differences in these two approaches. That is, the greater need for employee-protective legislation and the history of a more paternalistic view of employees' rights leads the European Union to impose more restrictions on employers in member states in order to extend and preserve employees' rights.

92 See Rasnic, supra note 13, at 137.
95 See generally Rasnic, supra note 13, at 144-46 (citing Treaty Modifications Concerning Community Institutions, Monetary Cooperation, Research & Technology, Environmental Protection, Social Policy, and Foreign Policy Coordination, Opened for Signature Feb. 17, 1986, 25 I.L.M. 503 (stating that the Treaty of Rome of 1957 was the predecessor to the European Community as it is known today)); see also Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8 1965, 4 I.L.M. 776.
96 See Treaty of Rome, supra note 13, art. 119.
B. Effect on Multinational Corporations—Both Legal and Practical

1. Definition of a Multinational Corporation (MNC)

Before proceeding with how differing labor and employment laws, especially those concerning parental leave, can adversely affect multinational corporations locating in Europe, it is helpful to define such a corporation and the scope of its functions in foreign nations. According to one source:

A multinational corporation is a parent company that:

1. engages in foreign production through its affiliates located in several countries,
2. exercises direct control over the policies of its affiliates,
3. implements business strategies in production, marketing, finance, and staffing that transcend national boundaries.  

However, this definition is not ironclad and is not universally agreed upon, as multinationality can also be defined by economic, political, legal, or financial perspectives. Examples of multinational corporations include Shell Oil, Nestle, Exxon, Coca-Cola, and General Motors. Today there exist some 35,000 MNCs, according to United Nations estimates. Even as early as 1991, before the peak of the “world economy” and the Internet, there were already some 20,000 affiliates of nearly 2000 U.S. companies operating in 121 different countries around the world.

2. Legal Implications for Multinational Corporations Operating in Europe

Compliance is the central problem that multinational corporations locating in Europe face. That is, the MNC, though incorporated elsewhere, such as

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99 Id.
100 Id.
103 See Mabry, supra note 101, at 569.
the United States, is bound to follow the law of the nation in which it does business. Thus, employers must change their workplace policies, regulations, and the standards by which the law regulates them when locating in Europe.

Scholars and experts have studied how other changes in European corporate law have affected the way in which international lawyers handle transactions with the European Union member states. Specifically, David Trubek explores the effect of changes in European mergers and acquisitions laws upon the international legal arena. Trubek ponders the manner in which "international forces" play a role in shaping international and transnational law. While Trubek's analysis does not deal directly with how European family leave law has changed the face of international legal dealings, the article's introductory comments properly frame the issue at hand in this Note, namely how multinational corporations can be impacted by a lack of uniformity in family leave laws. First, Trubek notes that nearly all areas of European law have changed drastically in the last twenty years. More importantly, Trubek notes:

New transnational and global economic processes and political trends create opportunities for law and lawyers and change the logic of legal practices. As the participants in various national legal fields react to new opportunities, they change the nature of the field. Actors with international linkages and expertise become more important, while those whose practices are tied exclusively to national law lose ground. National legal fields become more "internationalized," and transnational legal regimes become more important and begin to penetrate previously closed national fields. Lawyers participate in the construction of transnational and supranational regimes and these actions affect the power and legitimacy of national states and their legal fields.

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105 See id. at 408.
106 See id.
107 See id. at 412.
108 Id. at 407.
Trubek, then, expresses the very essence of the problem that MNCs face when presented with relatively new and different laws such as the European Union Directive on Parental Leave. To maintain a competitive edge in the international corporate field, multinational businesses must be able to not only successfully comply with varying standards but also integrate those standards into their everyday business practices.

Before delving into compliance issues MNCs face in dealing with the Directive, one should note that even member states have had a difficult time adjusting to the requirements of the Directive. For example, Great Britain did not subscribe to the Directive until December 15, 2000, because businessmen in Great Britain were worried about the Directive's consequences. In particular, Chris Humphries, British Chamber of Commerce director general, was concerned over the impact on small businesses; he believed that taking key employees away from the smaller firms for extended periods of time as mandated by the Directive will be crippling. Great Britain allows thirteen weeks of leave to be taken by an employee during the first five years of his or her child's life. Humphries criticized the decisions of trade and industry secretary Stephen Byers, stating, "[t]wo weeks was the maximum time that 52% of businesses said that they could cover for any key member of staff without a replacement . . . the way this directive is being implemented will create yet another burden for small firms, which they will find difficult to shoulder."

Thus, any firm, whether foreign or domestic, will naturally experience some trouble when initially implementing the provisions of the Directive. This burden is doubled on MNCs locating in Europe due to issues of forum non conveniens.

Namely, the law of the member state which has been violated by a multinational corporation committing an infraction of the Directive and its accompanying statutes will likely be asserted. Jurisdiction will be conferred

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109 See Oldfield, supra note 54, at 1.
110 See id.
111 See id. (affirming that the dismissal of an action by the personal representative of Scottish nationals killed in airline crash in Scotland on condition that American defendants submit to jurisdiction of the courts of Scotland); see also Vargas v. A.H. Bull Steamship Co., 44 N.J. Super. 536 (1957) (holding that even though service of process by residents of Puerto Rico against New Jersey corporations could be obtained on corporations only in New Jersey, forum non conveniens was applicable upon corporations' offers to appear in any actions brought against them in Puerto Rico); see also Lee Hiles Wertheim, A Funny Thing Happened on the Way to the Forum: Federalism, Jurisdiction, and Choice of Law, New Jersey Lawyer, The Magazine (1987).
upon that forum (the member state) since the MNCs will be deemed to be "doing business" in that member state, making the corporation subject to that particular state's laws and regulations, including their adaptations of the Directive.\footnote{This notion is in complete accord with American jurisdictional concepts of minimum contacts and due process; see International Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that a defendant must have purposeful minimum contacts in order to be subject to personal jurisdiction in a state court); see also World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (holding that a one-time occurrence in the forum, or indirect derivation of substantial revenue from that forum, cannot confer personal jurisdiction).}

Some experts blame the relative leniency of the Directive, in allowing member states to dominate parental leave while still adhering to the minimum standards, for the difficulties with compliance that member states and foreign-based companies are facing.\footnote{Tips for Companies Operating in the EU, Eurowatch, Employment, Vol. 8, No. 8, June 10, 1996.} That is, "EU is a federal concept and EU law of employment is just emerging."\footnote{Id.} Thus, the varying forms of compliance by member states make it difficult for multinational employers to establish a uniform policy across European Union member states, since each state's provisions are somewhat different. While the Directive is in and of itself a binding regulation for member states, it has the limitation of being just a framework under which member states may create their own regulatory structure, making uniformity nearly impossible.\footnote{See id.}

Though the disparities in U.S. and European Union law on family leave make compliance difficult on multinationals, neither the law of the European Union nor the United States has been hesitant to sanction violators of international law in the past.\footnote{See, e.g., Case C-281/97, Kruger v. KreiskrankenhausEbersburg, Official Journal C 352 (1999).} While MNCs face the threshold threat of disciplinary action by the Court of Justice of the European Communities, their worries cannot stop there. In addition, multinationals must deal with the worker participation law concept ever-present in European Union nations.\footnote{See generally Rasnic, supra note 13, at 140.} In a sense, such worker-participation laws function much like the U.S. concept of a labor union, in that employee groups are set up to discuss relevant issues such as working conditions and wages.\footnote{See id.} These participation groups go far beyond standing up for workers' rights, however; "...[t]he European worker groups are run in cooperation with management. In the United States, unions
are not really trying to manage the company . . . "

Thus, violation of the Directive by multinationals will mean loss of goodwill of the corporations' employees and of the surrounding community; in addition, such violations will also cause a loss of support by such worker participation groups, a key body in the European labor force itself. Therefore, the stakes of non-compliance for multinational corporations are high in the legal sense of the term.

As if these consequences are not enough, MNCs could be held liable under U.S. law if they violate U.S. laws while operating abroad. Therefore, it is not likely, but certainly possible, that a multinational operating in Europe could violate not only the relatively employee-favoring provisions of a member state operating under the Directive, but it could also be held liable for violation of the FMLA in the United States, if the requisite three months of unpaid leave is not given to the employee. Such was the case in Steele v. Bulova Watch Co., which can be analogized to the multinational corporation's dilemma in following the Directive. In Steele, an American resident assembled and sold watches in Mexico bearing a questionable trademark. Under U.S. law, the U.S. resident was guilty of trademark infringement and unfair competition.

The Court focused particularly upon the defendant's U.S. nationality, stating, "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States." The Court's reasoning identified a slight effect on U.S. commerce as a factor in its decision as well. Similarly, MNCs, specifically those originally incorporated in the United States, operating in Europe who violate the Directive and the FMLA will suffer the consequences in a U.S. tribunal. Such issues have caused some commentators to ask, "What is an American company anymore?" Indeed, others are suggesting an extension of the territorialism of U.S. laws to reach its companies who violate acceptable labor standards on the international level. Such solutions will be considered in the contemplation of an international standard at a later point in this Note.

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120 See Case C-281/97.
123 Id. at 281-82.
125 Id. at 282-83.
126 See id.
127 See Mabry, supra note 101, at 566.
128 See Drummonds, supra note 102, at 292.
Even more confusing still for U.S. companies seeking to locate in other countries with varying labor and employment laws, including those involving family leave, is the status of U.S. disability law abroad. Generally U.S. labor and employment laws do not apply abroad; the laws of the host country are given deference. However, the 1991 Civil Rights Act made Title VII and the Americans with Disabilities Act (ADA) applicable to U.S. citizens working abroad. More specifically, these laws apply to companies incorporated in the United States but operating elsewhere as well as those companies actually incorporated outside the United States if a U.S. company or affiliate has substantial control over that non-domestically incorporated company. Such laws do not apply, however, when the host country laws would be violated by the observance of American discrimination laws.

Though no provision of the FMLA seeks to make it an extraterritorially effective law, the provisions of Title VII and the ADA making them binding on U.S.-based or affiliated multinationals makes compliance with varying standards more difficult. Moreover, though most multinationals have vast legal departments ready to handle differences in domestic and host country law, it is likely difficult to follow U.S. law with respect to discrimination and disability issues and, at the same time, follow European law when family leave issues arise! In effect, the legal departments of multinationals without separate national branches are forced to become experts in at least two vastly different bodies of law.

3. Actual Multinational Compliance Practices

While these problems seem monumental and confusing to a company beginning their multinational or transnational business, steps can be taken to avoid such sanctions and maintain the goodwill of their European customers. For example, Coca-Cola Corporation handles its multinational status by having separate divisions. That is, the corporation is divided into local branches by nation. Thus, there is a Coca-Cola of the United States, headquartered in Atlanta, Georgia, and other local branches exist in nations such as France and Italy. These local branches fall under the blanket provisions of the

129 See id. at 293; see also Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (1994); see also Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(c) (1994).
130 See Drummonds, supra note 102, at 293; see also 42 U.S.C. § 2000e-1(c).
131 See Drummonds, supra note 102, at 294.
132 Telephone Interview with Frederick, Coca-Cola Representative, ID # A15795 (Nov. 7, 2000).
133 See id.
Directive; at the same time, Coca-Cola is able to comply with the requirements of the FMLA by having its own separate branch in the United States.

Parent companies located in one country that have foreign-based subsidiaries are also able to handle the disparity in parental leave standards relatively well. Consider, for example, Daimler Chrysler AG.Located in Germany, Daimler Chrysler's subsidiary company, Mercedes Benz USA LLC, is incorporated in Delaware; in addition, Mercedes has a manufacturing plant housed in Vance, Alabama. Of course, Daimler Chrysler itself need not worry about its own employees housed in Germany; such workers are subject to Germany's version of the European Union Directive. Naturally, since Mercedes, though a subsidiary of Daimler Chrysler, is incorporated in the United States, it is subject to the provisions of the FMLA and must follow U.S. statutory guidelines. Another way then for companies to easily comply with both standards is to re-incorporate as a subsidiary in a foreign country. Interestingly enough, Mercedes’ Vance, Alabama plant hosts a number of German contract workers. As such, there is a legal question of which standard these workers fall under, since they are not truly “employees” of Mercedes Benz but are instead working for Daimler Chrysler.

IV. THE HYPOTHETICAL INTERNATIONAL STANDARD: ITS FEASIBILITY AND ITS EFFECT

While U.S. multinational corporations have found ways to comply with varying standards of family leave, consideration of implementing an international standard is helpful. In pondering such a hypothetical standard, one must consider numerous questions and issues. What would be the substantive content of such a standard? Which labor body or organization would draw up the provisions? Which nations would participate? How would the provisions of the standard be enforced?

135 Id.
136 Note also that the Mercedes Benz example is the “flip side” of the Coca-Cola example. That is, Coca-Cola is an American-based company locating in Europe. In contrast, Mercedes' parent company, Daimler Chrysler, is a German-based company that has located within the United States fairly recently; Mercedes' manufacturing plant in Alabama opened in 1998. See id.
137 See id.
138 See id.
A. *The Substantive Content of an International Standard: Difficult to Predict*

It is difficult to imagine what exactly the substantive content of an internationally-followed family leave law would be. Since the FMLA and the European Union Directive on Parental Leave are relatively similar at first glance, the amount of leave given would not likely be a major point of contention. More than likely, the way in which leave was divided up and administered would be the central focus of a proposed international standard. Also, an international standard may try to address issues such as part-time leave for low-income employees.

B. *Is There a Suitable Organization to Create Such a Standard?*

The creation of such a standard would have to be generated by a major international organization. Since family leave is likely not considered a fundamental human right for an employee, the United Nations would probably not be the best spearhead for the effort. Instead, a group more like the International Labor Organization (ILO) or Organization for Economic Cooperation and Development (OECD) would be more suitable to the task.

Should an international standard be promulgated, another possible candidate for its creation and/or enforcement might be the World Trade Organization (WTO). The WTO effectively rewrote the original General Agreement on Tariffs and Trade (GATT) in 1994. Likely, though, the WTO may be an organization more suited to enforcing the provisions of an international standard than determining its substantive content. That is, the WTO focuses on issues such as rates of trade between its member nations and equalizing trade between more developed and less developed nations, rather than actual working conditions or terms of employment.

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139 Officially formed by the Uruguay roundtable on January 1, 1995, the WTO is located in Geneva, Switzerland. The WTO is composed of approximately 142 nations. See Final Act Embodying the Results of the Uruguay Round Table Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments-Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994).


141 See The World Trade Organization Agreement, *supra* note 139.
C. Likelihood of Success: In Compliance and in Enforcement

Consider the relative likelihood of U.S. compliance with the internationally imposed standard. Perhaps the best (and only) indicator of such compliance, or possibly lack thereof, is a brief examination of how the United States has reacted to proposed International Labor Organization (ILO) standards in the past. For example, the 1998 ILO Workers' Rights Declaration (hereinafter the Declaration) provides an increased level of scrutiny to domestic labor practices. Designed to answer the plea for a means of improving workers' rights in addition to working conditions, the Declaration was essentially a trade-off for U.S. employers and labor unions. As a part of the creation of the Declaration, the ILO initiated a fact-finding mission. The inquiry delved into U.S. compliance with the "freedom of association" clause of the ILO Constitution. The results of this examination are useful for purposes of this Note, since it demonstrates which union sectors of the United States would be willing to comply with an internationally-imposed standard for family leave.

For many years, U.S. labor unions did not actively voice a desire for the U.S. government to comply with any international codes of labor. Due to rapidly declining union membership, as well as an increasingly global economy and workforce, unions in the United States have changed their tune. Since the globalization of the economy has occurred, unions' impact on companies has weakened dramatically. Consequently, the American Federation of Labor and Congress of Industrial Organizations (otherwise known as the AFL-CIO), has pushed for the United States to adopt the 1998 Declaration. That way, weakening unions could still indirectly have some impact upon preserving workers' rights and working conditions on the international front.

The U.S. government complied with the Declaration, as it was a binding part of membership in the ILO. However, the United States failed to adopt

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143 See Coxson, supra note 142, at 471.
144 See id.
145 See The Declaration on Fundamental Principles, supra note 142.
146 Id.
147 See Coxson, supra note 142, at 471.
clause 105, which calls for the absolute elimination of compulsory labor.\(^{148}\) What sounds like an affront to human rights on the part of the United States was actually a crafty move. That is, having not ratified all clauses, the U.S. government, and consequently U.S. employers, are not subject to ILO supervision of labor and employment practices.\(^{149}\) (Interestingly enough, though, U.S. corporations housed or situated in ratifying countries are subject to being monitored by the ILO.) Due to the United States' failure to adopt clause 105, the Declaration has little actual bite in the United States, since no internationally neutral agency can monitor U.S. labor practices or sanction violators.

Relating these findings to the current issue, it seems that an international standard of family leave would gain popularity with waning U.S. unions, based on their active support of the ILO's 1998 Declaration. However, it also appears that, even if such a standard were adopted by the United States, actual enforcement may be rejected by the U.S. government, as it has been in regard to the mandates of the Declaration. In addition, it is likely that even supportive labor unions, not to mention the U.S. Department of Labor and quasi-legislative bodies like the Equal Employment Opportunity Commission (EEOC), would not welcome to scrutiny by an international labor organization. Thus, the likelihood of U.S. compliance and willingness to be held accountable by an international body is fairly low, thereby making an international standard for family leave nearly unforeseeable.

An international standard for family leave to serve MNCs is also unlikely to be created because of enforcement issues. While the ILO's 1998 Declaration extends to nearly 200 countries worldwide, the ILO lacks serious enforcement authority. (Created in 1919, the ILO was designed to improve working conditions and strengthen human rights. One of the ILO's main concerns is child labor.)\(^{150}\) The ILO is unable to compel legal or equitable remedies against employers or even subscribing governments for violations of the ILO's fundamental principles or Conventions. This evidence suggests that, not only will the United States be reluctant to comply with an international family leave standard, but even European countries willing to be member states of the European Union will not likely be forced to meet some international standard. Since the ILO is more of an advocating organization rather than a regulatory agency, it is likely not suited to the task of monitoring an

\(^{148}\) See id. at 470.

\(^{149}\) See id.

international family leave standard. That leaves us with two difficult questions: Who would? Who could?

Again, one must consider the possibility of utilizing the WTO. In its administrative duties as the “police force” behind GATT’s provisions, the WTO seeks to regulate trade concerns like protectionism, human rights, and equal bargaining power for less developed nations. In some respects, the WTO seems to be the ideal candidate for enforcement of such a standard, since one of its goals is to equalize trade for all its member nations; likewise, the hypothetical standard would also seek to equalize working conditions and terms of employment for many nations. However, as aforementioned, the WTO does not regulate terms of employment and would likely consider this issue out of its realm of power.

Despite the high probability that national governments would not comply with such a standard, or that such compliance could not be enforced, MNCs can see international regulation on the horizon and could be ready to deal with such a standard. While no definite plans are in the works to craft an international family leave standard, multinationals have already seen regulation via the OECD. The first such regulation of multinationals occurred in the 1970’s when, “[b]ack in the 1970’s, the main concern of many parties was to ensure that multinational companies respected the sovereignty of host nations.” Then, in mid-January of 2000, the OECD released the new Guidelines for Multinational Enterprises. The guidelines present strict standards for the behavior of multinational corporations in areas such as corporate governance, labor relations, and environmental regulations. The guidelines are non-binding recommendations for corporations' behavior. Specifically, the “Employment and Industrial Relations” chapter calls for greater dialogue between employees and management and for adequate steps to be taken in a business’s first year to ensure that occupational safety and

152 This is due to multinationals being regulated by the OECD on economically related issues, as well as by the ILO on child labor issues and by the European Union on data privacy issues; see Angela S. Broughton et al., International Employment, 33 INT’L LAW. 291 (1999).
154 Id. (quoting Robert Ley (Jan. 28, 2000)).
155 See Speer, supra note 153.
health standards are met. Also, the new guidelines call for an absolute end to child labor.

The OECD hopes to strengthen its authority and penalty powers. According to President Levy, "For anyone to take this review seriously, there needs to be some movement on implementation."\(^{157}\) The OECD anticipated that the text of the new guidelines would be passed by its twenty-nine members in June 2001.\(^{158}\)

Though the OECD has met with relative success in its ventures, likely it is not a body to generate or govern an international standard for family leave. However, multinational regulation, as exemplified by the OECD, is nothing new; thus, an international standard for family leave, while not likely, is still possible.

**D. How Would Multinationals React?**

Though no formal opinion has been expressed by multinationals in previous literature or those contacted for purposes of research for this Note, it seems probable that multinationals would likely not welcome an international parental leave standard with open arms. Granted, an international standard would ease any potential confusion as to how much leave time would have to be given (as well as an applicable rate of compensation). However, as a result, multinationals would be forced to re-format their current policies in favor of the international standard. In addition, since multinationals have already handled the discrepancies between the FMLA and the Directive to some degree (as in the aforementioned examples of Coca-Cola and Mercedes Benz), many might view an international standard as unnecessary since measures have already been put into place to compensate for the statutes' differences.

**V. CONCLUSION**

Family leave is an important issue in the United States and in Europe, as exemplified by the passage of the FMLA and the Directive. While the United States and the European Community share the same purpose in promoting these laws, namely to grant parents adequate leave time to spend with children, their guidelines and flexibility are very different. The FMLA governs all U.S. states and allows for twelve weeks of unpaid leave, to be taken with twelve

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\(^{156}\) See id. \\
^{157}\) See id. \\
^{158}\) See id.
months of the birth or adoption of a child. In contrast, the Directive gives employees the same three-month period of leave but allows member states to alter or extend the period so long as they meet the minimum requirement. This disparity results in a major international difference when it comes to family leave. Even across the European Union there are major differences; some leave is granted by statute, other is by employer contract. These differences result in a severe lack of uniformity across Europe and across the world when determining how much family leave an employee may take and what the conditions of that leave are.

Many nations have had difficulties implementing their family leave laws. Questions have arisen as to extent of coverage and the like. Also, small businesses seem to have suffered as a result of more generous family leave laws, as exemplified by small companies in Great Britain.

Multinationals are affected by the apparent disparity among nations' family leave provisions, since, by definition, they carry on substantial operations in multiple countries. Such corporations must deal with the issue of *forum non conveniens*. In addition, companies must learn and adapt to the host country's laws accordingly. If not, the company could face sanctions in that country, and, if their actions or noncompliance violate a U.S. law, the company may be penalized even more at home.

To combat such problems, MNCs such as Coca-Cola operate completely separate branches in their various countries of operation. These separate branches carry with them different employee policies and handbooks. Thus, compliance is easily met because a particular division need only be concerned with the laws of the host country.

Because the varying standards call for relatively drastic measures to be taken by MNCs, one must consider if an international standard would be appropriate. Determining the substantive content is a problem, since the FMLA and the Directive differ not in the amount of leave but in the ways in which leave is taken. The identity of the creating body, too, is questionable, as this is a task not suited for the United Nations. Perhaps even more disturbing about an international standard is the fact that the likelihood of U.S. compliance and enforcement is relatively low. No international labor body seems to have the requisite authority to enforce such a provision.

Therefore, an international standard will not likely be promulgated to regulate the disparities between the FMLA and the EU Directive. Instead, multinationals will continue to find ways to comply with both sets of laws.