



1-1-2016

Chapter 5 & SB 406: Who Wants Expanded Family Leave in California? Your Mom

Jessica Stein Gosney

Follow this and additional works at: <https://scholarlycommons.pacific.edu/uoplawreview>

 Part of the [Legislation Commons](#)

Recommended Citation

Jessica S. Gosney, *Chapter 5 & SB 406: Who Wants Expanded Family Leave in California? Your Mom*, 47 U. PAC. L. REV. 513 (2017).
Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol47/iss3/10>

This Legislative Review is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in The University of the Pacific Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

**Chapter 5 & SB 406: Who Wants Expanded Family Leave
in California? Your Mom**

Jessica Stein Gosney

Code Sections Affected

Government Code § 12945.2 (amended); Unemployment and Insurance Code §§ 985, 2655, 3301, 3303 (amended).

AB 908 (Gomez & Burke); 2016 STAT. Ch. 5.

SB 406 (Jackson); vetoed.

TABLE OF CONTENTS

I. INTRODUCTION	514
II. LEGAL BACKGROUND.....	515
A. <i>California Family Rights Act</i>	516
B. <i>Federal Family Medical Leave Act</i>	517
C. <i>California Disability Insurance Program</i>	518
D. <i>Other Paid Family Leave Programs in the United States</i>	519
E. <i>International Paid Family Leave</i>	520
III. SB 406 & CHAPTER 5.....	520
A. <i>California Family Rights Act Amendments</i>	520
B. <i>California Paid Family Leave Act Amendments</i>	521
IV. ANALYSIS.....	521
A. <i>Would SB 406 Have Achieved Its Goal of Expanding Leave for California Workers?</i>	522
B. <i>Would AB 908 Achieve Its Goal of Increasing Wage Reimbursement for Disabled or Family Leave Recipients?</i>	523
C. <i>California Public Workers Cannot Bring Self-Care FMLA Claims After the One-Year CFRA Statute of Limitations Expires.</i>	524
1. <i>Supreme Court Rulings on the FMLA and the Fourteenth Amendment</i>	525
2. <i>How Could Future CRFA Amendments Ensure Public Sector Workers the Same Opportunity to Bring Self-Care Claims?</i>	527
D. <i>Could Employees Excluded From the CFRA Take Leave Under the CPFL Act and Bring a Wrongful Termination Claim If Terminated?</i> ..	528
1. <i>CFRA Wrongful Termination Based On Public Policy Claims.</i>	528

2. *Could Wrongful Termination Based On Public Policy Be Used for Paid Family Leave Claims?* 529

E. *Struggles in Passing SB 406*..... 531

F. *Struggles in Passing Chapter 5*..... 531

V. CONCLUSION..... 532

I. INTRODUCTION

Mary Ignatius’s second son suffered from clubfeet, a birth defect curable only if treatment starts early.¹ He needed significant care in the first months of his life, receiving weekly casts starting at two weeks old.² Mary’s access to paid family leave through both the California Paid Family Leave Act (CPFL) and the California Family Rights Act (CFRA) allowed her time with her son and the availability to take him to doctor appointments during that stressful and critical period.³ The Acts reimbursed part of her income and guaranteed her job when she returned to work.⁴ Today, six years later, her son only needs leg braces.⁵

On the other hand, Trish Hughes Kreis, a Sacramento resident, had a hard time accessing family leave.⁶ Trish cares for her brother who suffers from severe epilepsy.⁷ Despite numerous drugs, surgeries, and research studies, his seizures persist almost daily.⁸ When Trish takes time off to care for her brother she is partially reimbursed through the CPFL Act, but her job is not guaranteed upon her return because the CFRA does not cover siblings.⁹

California passed the first family leave act in the United States but struggles to continue to lead the nation in passing critical, new leave policies.¹⁰ Chapter 5

1. Mary Ignatius, *Meet Mary Ignatius*, PAID FAMILY LEAVE CAL., <http://paidfamilyleave.org/news-room/california-stories/meet-mary-ignatius> (last visited Aug. 23, 2015) (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Infra* Part II (explaining the CFRA and the CPFL Act).

5. Ignatius, *supra* note 1.

6. Trish Hughes Kreis, *Meet Trish Hughes Kreis*, PAID FAMILY LEAVE CAL., <http://paidfamilyleave.org/news-room/california-stories/meet-trish-hughes-kreis> (last visited Aug. 23, 2015) (on file with *The University of the Pacific Law Review*).

7. *Id.*

8. *Id.*

9. *Id.* The California legislature expanded the CPFL Act in 2013 to include caring for seriously ill siblings, grandparents, grandchildren, and parents-in-law, but did not expand the CFRA. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 406, at 5 (Apr. 22, 2015) [hereinafter SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, Apr. 22].

10. CAL. GOV’T CODE § 12945.2 (enacted by 1991 Cal. Stat. Ch. 462, § 4). The legislature attempted five times to expand the definition of “family” under the CFRA to mirror the CPFL Act, but none were successful. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, Apr. 22, *supra* note 9, at 5.

and SB 406 aimed to help more families, like Mary and Trish's, access and take leave when they need it and provide them with resources to make it successful.¹¹

SB 406 attempted to provide more leave opportunities for employees at businesses with more than fifty employees, but did not attempt to increase the number of individuals with access to job-protected leave.¹² Public sector employees also have limited opportunities to bring self-care claims under the Family and Medical Leave Act (FMLA) if they miss the one-year statute of limitation for CFRA claims.¹³ The legislature could eliminate this inequity by amending the statute of limitations for the CFRA from one-year to two-years in order to match the FMLA.¹⁴

Chapter 5 will increase both California's disability insurance and paid family leave program reimbursement rates, providing sixty to seventy percent of income reimbursement,¹⁵ remove the seven-day waiting period,¹⁶ and require a report by the Employment Development Department on projected costs and benefits.¹⁷ Employees can possibly bring a wrongful termination based on a public policy claim under the CPFL Act, which could be prevented in future amendments.¹⁸

II. LEGAL BACKGROUND

Both California and Federal family leave policies provide employees with twelve weeks of protected leave¹⁹ and California enacted the first paid family leave, replacing fifty-five percent of employees' wages for the first six weeks.²⁰ Both the United States and California lag behind the international community in providing comprehensive family leave.²¹ National momentum for paid family

11. *Infra* Part III (explaining the changes in SB 406 and AB 908).

12. *Infra* Part IV.A (analyzing whether SB 406 would have achieved its goal of providing expanded leave to California workers).

13. *Infra* Part IV.C (explaining the limitation on public sector workers' ability to bring self-care claims under FMLA).

14. *Infra* Part IV.C (analyzing how the California Legislature could amend SB 406, or a similar future bill, to match the statute of limitations to the FMLA's statute of limitations).

15. AB 908 § 4, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (awaiting Assembly concurrence in Senate amendments on Sept. 11, 2015).

16. *Id.* at § 8.

17. *Id.* at § 9.

18. *Infra* Part IV.D (analyzing whether a wrongful termination based on public policy claim could be brought under the CPFL Act).

19. 29 C.F.R. § 825.100(a) (West 2013); CAL. GOV'T CODE § 12945.2(a) (West 2012).

20. CAL. UNEMP. INS. CODE § 2655(a) (West 2007).

21. Gretchen Livingston, *Among 28 Nations, U.S. Is the Outlier When It Comes to Paid Parental Leave*, PEW RES. CTR. (Dec. 12, 2013), <http://www.pewresearch.org/fact-tank/2013/12/12/among-38-nations-u-s-is-the-holdout-when-it-comes-to-offering-paid-parental-leave/> (on file with *The University of the Pacific Law Review*). Comprehensive family leave includes job security, wage replacement, optional part-time schedules, subsidized childcare, and anti-discrimination laws. Claire Cain Miller & Liz Alderman, *Why U.S. Women are Leaving Jobs Behind*, N.Y. TIMES (Dec. 12, 2014), <http://www.nytimes.com/2014/12/14/upshot/us->

leave is growing as evidenced by new state and private industry leave policies and President Obama's 2015 goals.²²

A. *California Family Rights Act*

In 1991, California enacted the first family leave program in the United States: the California Family Rights Act (CFRA).²³ The Act provides job security for employees taking time off to care for new children and elderly family members.²⁴ The California Family Rights Act permits employees to take up to twelve weeks of unpaid leave per year for family or personal medical necessity.²⁵ To be eligible for leave, employees must work for the employer for at least twelve months with a minimum of 1,250 hours of service.²⁶ Employees have to file CFRA claims within forty-one days of starting their leave.²⁷ Employers with "less than 50 employees within 75 miles of the worksite" are exempt from the CFRA.²⁸

Employees can take leave for a new birth, adoption, or foster care of a child under the age of eighteen.²⁹ They can also take the leave to care for an adult dependent who cannot care for him or herself,³⁰ a sick partner or spouse,³¹ or their own serious health condition.³² The CFRA defines a serious health condition as "illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment or supervision by a healthcare provider."³³

Employees must provide reasonable notice to the employer when the leave is foreseeable.³⁴ The employer may require a relevant medical note stating the date, duration, estimated recovery time, and verification that the illness necessitates the

employment-women-not-working.html?abt=0002&abg=1 (on file with *The University of the Pacific Law Review*).

22. Claire Cain Miller, *New Momentum on Paid Leave*, in *Business and Politics*, N.Y. TIMES (June 22, 2015), http://www.nytimes.com/2015/06/22/upshot/a-federal-policy-on-paid-leave-suddenly-seems-plausible.html?_r=0&abt=0002&abg=1 (on file with *The University of the Pacific Law Review*).

23. 1991 Cal. Stat. ch. 462, § 4 (enacting CAL. GOV'T CODE § 12945.2).

24. *Id.*

25. CAL. GOV'T CODE § 12945.2(a) (West 2015).

26. *Id.*

27. UNEMP. INS. § 3301(e).

28. GOV'T § 12945.2(b).

29. *Id.* at §§ 12945.2(c)(1), (c)(3)(A).

30. *Id.*

31. *Id.* at § 12945.2(c)(3)(B). In 2013, the California legislature expanded the CPFL Act to include caring for seriously ill siblings, grandparents, grandchildren, and parents-in-law, but did not expand the CFRA. The legislature attempted five times to expand the definition of family under the CFRA to mirror the CPFL Act, but none were successful. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, Apr. 22, *supra* note 9, at 5.

32. GOV'T § 12945.2(c)(3)(C).

33. *Id.* at § 12945.2(c)(8).

34. *Id.* at § 12945.2(h)-(i).

leave.³⁵ The employer may also require employees to use any vacation or personal time as part of the leave.³⁶ If the same employer employs both parents, the employer is only required to grant one leave that either one parent can take or both parents can split.³⁷

Employees maintain their right to continue participating in all work-related benefit programs, including health care and retirement, but the employer is only required to contribute to employees' group health care plan.³⁸ An employer's failure to guarantee the employee the "same or a comparable position" upon return from the leave violates the Act.³⁹ Upon the employee's return, the employer must provide the employee the same or similar duties, pay, and geographic work location.⁴⁰

B. Federal Family Medical Leave Act

Two years after California enacted the CFRA, President Clinton signed the federal FMLA into law on August 5, 1993.⁴¹ The FMLA provides employees with twelve weeks of unpaid, job-protected leave for family or medical reasons.⁴² Leave under the FMLA runs concurrent with the CFRA, meaning California workers get twelve total weeks of job-protected leave, not twelve under the FMLA and another twelve under the CFRA.⁴³ The FMLA qualifications are the same as the CFRA's: employees must work at least 1,250 hours in the twelve months prior to the leave.⁴⁴ Employers with fewer than fifty employees within seventy-five miles of the worksite are exempt.⁴⁵

Employees can take leave under the FMLA for the birth, adoption, or foster care of a child, to "care for the employee's spouse, child, or parent with a serious health condition," an employee's own serious health condition, or for qualifying exigencies when a spouse, son, daughter, or parent of a member of the military is called to covered active duty.⁴⁶ The employee's child must be under the age of

35. *Id.* at § 12945.2(j)(1).

36. *Id.* at § 12945.2(e).

37. *Id.* at § 12945.2(q).

38. *Id.* at § 12945.2(f)(1)(B)(2).

39. *Id.* at § 12945.2(a).

40. *Id.* at § 12945.2(a).

41. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (West 2015).

42. 29 C.F.R. § 825.100(a) (West 2015).

43. Gov'T § 12945.2(s).

44. C.F.R. § 825.100(a).

45. *Id.*

46. *Id.* "Covered active duty" is when a member of the Armed Forces or Reserves is deployed to a foreign country. The spouse, son, daughter, or parent can take FMLA leave for a "qualifying exigency" to help military families balance family affairs when family members are called to active duty. Categories of qualifying exigencies include preparing for deployment, military events and related activities, childcare and school

eighteen or an adult dependent incapable of self-care.⁴⁷ The term spouse referred to all marriages, including same-sex, months before the Supreme Court ruled that states cannot ban same-sex marriages.⁴⁸

Employees are entitled continued group health insurance benefits, but are not entitled to their wages while on leave.⁴⁹ Upon conclusion of the leave, employees are guaranteed an equivalent position with equivalent pay.⁵⁰

C. California Disability Insurance Program

California's disability insurance compensates disabled individuals unable to work due to his or her own or a family member's sickness or injury, or the "birth, adoption, or foster care placement of a new child."⁵¹ Individuals qualify for disability insurance payments if they contributed to the State Disability Insurance (SDI) fund.⁵² The weekly benefit amount is based on the individual's wages in the highest quarter of employment.⁵³

The California legislature expanded California's disability insurance to include California's Temporary Family Disability Insurance Program, commonly known as the California Paid Family Leave (CPFL) Act, in 2002.⁵⁴ The CPFL Act is the first law of its kind in the United States, granting six weeks of fifty-five percent wage replacement to employees who take time off to care for an ill "child, spouse, parent, domestic partner, sibling, grandparent, grandchildren, and parent-in-law or to bond with a minor child in connection with foster care or adoption."⁵⁵ To qualify, an employee must receive a note from his or her doctor and must have contributed to the SDI fund from his or her paycheck.⁵⁶

activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities. Office of Personnel Management, *Fact Sheet: Family and Medical Leave Qualifying Exigency Leave*, PAY & LEAVE ADMIN. (July 26, 2015), <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/family-and-medical-leave-qualifying-exigency-leave/> (on file with *The University of the Pacific Law Review*).

47. C.F.R. § 825.102.

48. *Id.* The Department of Labor issued a regulation on February 25, 2015 changing the definition of spouse to reference the law in the place where the celebration occurred, not the individual's state of residence. *Id.* This allowed legally married individuals to take the leave even if they lived in a state that did not recognize their marriage. *Id.* Two months later, on April 28, 2015, the Supreme Court held that states could not ban same-sex marriages. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

49. C.F.R. at § 825.100(b).

50. *Id.* at § 825.100(c).

51. CAL. UNEMP. INS. CODE §§ 2601, 2655(a) (West 2014).

52. *Id.* at § 984.

53. *Id.* at § 2655(a).

54. *Id.* at § 3301.

55. *Id.* at §§ 2655(b)–(c), 3301(a)–(b). SB 770 in 2013 expanded Paid Family Leave to include in-laws, siblings, and grandparents. ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF AB 908, at 3 (Mar. 18, 2015).

56. UNEMP. INS. § 3301(e).

D. Other Paid Family Leave Programs in the United States

Today, eighty-five percent of American workers do not get paid family leave.⁵⁷ While polls show eighty percent of the population supports paid family leave, the “United States is the only industrialized country that doesn’t provide workers with any sort of paid leave.”⁵⁸ To address the disparity, President Obama announced an executive action in his 2015 State of the Union Address granting federal workers six weeks paid parental leave.⁵⁹ The Labor Department announced in June 2015 that it would offer \$1.25 million in research grants for development and implementation of state and local paid leave programs.⁶⁰

Only three other states offer paid family leave programs: New Jersey, Rhode Island, and Washington.⁶¹ New Jersey and Rhode Island’s programs, like California’s, are worker funded through state disability pools.⁶² Washington passed a state-funded family leave policy, but budgetary issues have delayed implementation since the bill’s enactment in 2007.⁶³

Recently, several private companies announced family leave policies, including Facebook, Johnson & Johnson, Apple, Google, Virgin America, Twitter, Instagram, Reddit, Change.org, and Yahoo.⁶⁴ Most private company leave policies range from eight to twenty-two weeks, many with partial wage replacement benefits.⁶⁵

E. International Paid Family Leave

Compared to the thirty-eight industrialized countries with family leave programs, California grants workers the shortest leave and provides the least

57. BUREAU OF LABOR STAT., EMPLOYEE BENEFITS SURVEY, LEAVE BENEFITS: ACCESS (Mar. 2013), <http://www.bls.gov/ncs/ebs/benefits/2013/ownership/private/table21a.htm> (on file with *The University of the Pacific Law Review*).

58. Cain Miller, *supra* note 22.

59. *Id.*

60. *Id.*

61. COUNCIL OF ECON. ADVISERS, THE ECONOMICS OF PAID AND UNPAID LEAVE 3, 20 (2014), available at https://www.whitehouse.gov/sites/default/files/docs/leave_report_final.pdf (on file with *The University of the Pacific Law Review*).

62. *Id.* at 19–20.

63. *Id.* at 20.

64. Cain Miller, *supra* note 22; Rebecca Grant, *Silicon Valley’s Best and Worst Jobs for New Moms (and Dads)*, ATL. (Mar. 2, 2015) <http://www.theatlantic.com/technology/archive/2015/03/the-best-and-worst-companies-for-new-moms-and-dads-in-silicon-valley/386384/> (on file with *The University of the Pacific Law Review*).

65. Grant, *supra* note 64.

compensation while on leave.⁶⁶ Globally, the average paid maternity leave is seventeen weeks at a seventy-five percent wage reimbursement rate.⁶⁷

Most European countries have extensive family leave policies with protected leave, wage replacement, optional part-time schedules, subsidized childcare, and anti-discrimination laws.⁶⁸ Sweden, for example, grants sixteen months of joint parental leave, with two months earmarked for each parent.⁶⁹ The Swedish government pays for thirteen months of leave at eighty percent wage replacement and three more months at a flat rate set by the government.⁷⁰ Individuals with no income still receive the flat rate for all sixteen months.⁷¹ Parents can use the leave any time before the child's eighth birthday.⁷² Almost all mothers and ninety percent of fathers take advantage of Sweden's parental leave.⁷³ The leave is both worker- and state-funded.⁷⁴

III. SB 406 & CHAPTER 5

SB 406 and Chapter 5 aimed to expand access to family leave through California's Family Rights Act and Paid Family Leave Act.⁷⁵

A. California Family Rights Act Amendments

SB 406 would have permitted leave to also include caring for a "child, parent, grandparent, grandchild, sibling, spouse, or domestic partner who has a serious health condition."⁷⁶ The term child included any age "son or daughter, a stepchild, a legal ward, a son or daughter of a domestic partner, or a person to whom the employee stands in loco parentis."⁷⁷ Each parent requesting leave

66. Livingston, *supra* note 21.

67. OECD SOC. POL'Y DIV., DIR. OF EMP., LAB. AND SOC. AFFAIRS, FAMILY DATABASE 4 (May 12, 2015), available at http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf (on file with *The University of the Pacific Law Review*). Twelve of the thirty-eight countries did not provide paid father-inclusive parental and home care leave. Of those that did, the average length was 36.6 paid weeks of leave. *Id.* at 5.

68. Cain Miller & Alderman, *supra* note 21.

69. NICLAS JARVKLO, PARENTAL LEAVE POLICY IN SWEDEN: EVOLUTION, LESSONS LEARNED 5 (United Nations Commission on the Status of Women 2013), available at <http://www.un.org/womenwatch/daw/csw/csw57/panels/panel4-niclas-jarvklo.pdf> (on file with *The University of the Pacific Law Review*).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Dan Walters, *Family Leave Expansion Bills Spark Clashes*, SACRAMENTO BEE (June 24, 2015), <http://www.sacbee.com/news/politics-government/capitol-alert/article25444240.html> (on file with *The University of the Pacific Law Review*).

76. SB 406 § 1, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (vetoed on Oct. 11, 2015).

77. *Id.*

would have been entitled to twelve weeks of job-protected leave, even if both parents work for the same employer.⁷⁸

B. California Paid Family Leave Act Amendments

Chapter 5 increases both California's disability insurance and paid family leave program reimbursement rates, providing sixty to seventy percent income reimbursement.⁷⁹ The weekly wage reimbursement rate will be seventy percent for those who make up to thirty-three percent of the California average weekly wage and sixty percent for those who make more than 33 percent of the California average weekly wage.⁸⁰ Chapter 5 also sets a minimum reimbursement of \$50 per week for individuals who made under \$929 wage rate during the previous quarter.⁸¹

Chapter 5 also removes the seven-day waiting period, allowing reimbursement on the first day disability insurance or paid family leave is needed.⁸² Additionally, Chapter 5 requires the Employment Development Department to "report to the Assembly Committee on Insurance and the Senate Committee on Labor and Industrial Relations the projected costs and potential benefits associated with options to reduce, eliminate, or otherwise modify the waiting period for disability insurance benefits."⁸³

IV. ANALYSIS

Section A explores whether SB 406 would have achieved its goal of expanding leave for California workers, while Section B asks the same question for Chapter 5.⁸⁴ Section C analyzes a public sector worker's ability to bring a FMLA claim after the CFRA statute of limitations expires.⁸⁵ Section D discusses whether an employee could bring a wrongful termination claim under the CPFL Act.⁸⁶ Finally, Sections E and F highlight the struggles in the legislators' attempts to pass both SB 406 and Chapter 5.⁸⁷

78. *Id.*

79. UNEMP. INS. § 2655(e) (amended by Chapter 5).

80. *Id.*

81. *Id.* at § 2655(e)(1) (amended by Chapter 5).

82. *Id.* at § 3303 (amended by Chapter 5).

83. *Id.* at § 2655.1 (added by Chapter 5)

84. *Infra* Part IV.A–B. (discussing whether SB 406 and AB 908 would have met their goals).

85. *Infra* Part IV.C (discussing a public sector worker's ability to bring a FMLA claim after the CFRA statute of limitations expires).

86. *Infra* Part IV.D (analyzing whether an employee could bring a wrongful termination claim under the CPFL Act).

87. *Infra* Part IV.E–F (highlighting the struggles in passing SB 406 and AB 908).

A. *Would SB 406 Have Achieved Its Goal of Expanding Leave for California Workers?*

SB 406 attempted to include caring for extended family members in protected leave and removed the age requirement for children cared for.⁸⁸ It also allowed two parents working for the same employer to each take full leave.⁸⁹ Employees at companies previously required to provide the CFRA would have more opportunities to utilize it.⁹⁰

SB 406 did not increase who is eligible for leave: only individuals employed at organizations with fifty or more employees would have been eligible to take leave under the CFRA.⁹¹ Over forty percent of California workers are not eligible for the CFRA.⁹² Employees at small businesses excluded from the CFRA can still take paid family leave under the CPFL Act, but there is no job guarantee when they return.⁹³ In 2010, twenty-three percent of women ineligible for CFRA benefits “lost their job or were told they would lose their job” for taking paid family leave.⁹⁴ Another thirty-seven percent of women who were eligible for paid family leave but ineligible for the CFRA did not take leave out of fear they would lose their jobs.⁹⁵

While larger businesses with more than 100 employees more frequently reported negative impacts from the CPFL Act than small businesses did, cumulatively, the CPFL Act would have minimally impacted employers.⁹⁶ In a recent survey, more than eighty-eight percent of employers reported positive or neutral effects on productivity, ninety-one percent reported positive or neutral effects on profitability, more than ninety-two percent reported positive or neutral effects on employee turnover, and more than ninety-eight percent reported a

88. *Supra* Part III.A.

89. SB 406 § 1, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (Vetoed on Oct. 11, 2015).

90. *Id.*

91. *Id.* Compare SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, Apr. 22, *supra* note 9 (initially introducing SB 406 also reduce the small business exemption from fifty employees to five employees), with OFFICE OF SENATE FLOOR ANALYSIS, SENATE RULES COMMITTEE, at 1 (Sept. 4, 2015) [hereinafter OFFICE OF SENATE FLOOR ANALYSIS] (removing the recommendation to lower the small business exemption).

92. STATE OF CAL. ECON. DEV. DEP’T, NUMBER OF BUSINESSES AND NUMBER OF EMPLOYEES BY SIZE OF BUSINESS (2014), available at http://www.calmis.ca.gov/file/indsize/chart_sob2014_3.pdf (on file with *The University of the Pacific Law Review*).

93. See generally CAL. UNEMP. INS. CODE §§ 2601, 2655(a), 3301 (West 2015) (not mentioning job protection as a benefit of paid family leave).

94. Cassandra D. Engeman, *Ten Years of the California Paid Family Leave Program: Strengthening Commitment to Work, Affirming Commitment to Family*, UNIVERSITY OF CALIFORNIA, SANTA BARBARA 4 (Sept. 2012).

95. *Id.* at 6.

96. *Id.* at 5.

positive or neutral effect on employee morale.⁹⁷ Studies also show that paid family leave decreases workforce turnover, with eighty-three percent of women who take paid family leave returning to their same employer compared to seventy-three percent of those who do not take paid family leave.⁹⁸

It is also unclear whether employees would have been able to take leave under the CFRA to care for a sick family member not covered under the FMLA, and then subsequently taken leave again, in the same 12-month period, for a family member covered by both the FMLA and the CFRA.⁹⁹ For example, an employee could request leave under CFRA to care for her grandparent, which is not covered under the FMLA, and then request leave again, in the same 12-month period, to care for her child.¹⁰⁰ The CFRA, though, explicitly states that the “aggregate amount of leave” taken under the CFRA, the FMLA, or both “shall not exceed 12 workweeks in a 12-month period.”¹⁰¹

While SB 406 would have increased the opportunities for individuals at companies with more than fifty employees to take family or self-care leave under the CFRA, employees at small businesses still had no access to job-protected family or self-care leave.¹⁰²

B. Will Chapter 5 Achieve Its Goal of Increasing Wage Reimbursement for Disabled or Family Leave Recipients?

Chapter 5 directly increases disability insurance and paid family leave replacement rates.¹⁰³ Individuals who do not pay into the SDI fund, such as those who are self-employed and some public sector workers, still do not have access to the benefits provided by the CPFL Act.¹⁰⁴

When the CPFL Act initially passed in 2004, the average family leave length utilized increased from three weeks to six weeks.¹⁰⁵ But that increase disproportionately reflected advantaged individuals at “high-quality” jobs,

97. EILEEN APPELBAUM & RUTH MILKMAN, EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 7–8 (Ctr. for Econ. and Pol’y Res.).

98. Engeman, *supra* note 94.

99. Compare CAL. GOV’T CODE § 12945.2(c)(3)(A)–(C) (allowing employees to take CFRA leave for a “child, parent, grandparent, grandchild, sibling, spouse, or domestic partner who has a serious health condition”), with C.F.R. § 825.100(a) (allowing employees to take FMLA leave for the birth, adoption, or foster care of a child or to “care for the employee’s spouse, child, or parent with a serious health condition”).

100. *Id.*

101. GOV’T § 12945.2(s).

102. *Supra* Part IV.A.

103. AB 908 § 6, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (awaiting Assembly concurrence in Senate amendments on Sept. 11, 2015).

104. UNEMP. INS. § 2655(e) (amended by Chapter 5).

105. Maya Rossin-Slater et. al., *The Effects of California’s Paid Family Leave Program on Mothers’ Leave-Taking and Subsequent Labor Market Outcomes*, 32(2) J. POLICY ANALYSIS AND MGMT. 224, 234–35 (2013) (on file with *The University of the Pacific Law Review*).

defined as jobs that pay more than \$20 per hour with health insurance.¹⁰⁶ Individuals in high-quality jobs who used the CPFL Act took longer leaves than those in high-quality jobs who did not or could not use the CPFL Act.¹⁰⁷ Comparatively, individuals at low-quality jobs took the same length of leave whether or not they used the CPFL Act.¹⁰⁸ While ninety-one percent of low-quality job workers felt paid family leave increased their child-caring abilities, one-third of individuals eligible for leave under the Act failed to take advantage of paid family leave “because wage replacement was too low.”¹⁰⁹ Chapter 5 proponents claim higher reimbursement rates allow low-quality job workers to use their SDI contributions.¹¹⁰ Chapter 5’s author believes the increase from fifty-five percent wage replacement to sixty to seventy percent wage replacement will enable more individuals in low-quality jobs to take longer family leaves.¹¹¹

C. California Public Workers Cannot Bring Self-Care FMLA Claims After the One-Year CFRA Statute of Limitations Expires

When bringing a claim under the CFRA, an employee can choose to only plead CFRA violations or to also plead FMLA violations.¹¹² Generally, most employees bringing a family leave claim will bring a CFRA claim in state court.¹¹³ One reason for bringing a FMLA claim instead of, or in addition to, a CFRA claim, is FMLA’s longer statute of limitations.¹¹⁴ Under the CFRA, an employee has one year to file a claim with the California Department of Fair Employment and Housing (DFEH), and after obtaining a right-to-sue letter, an employee has one year to file suit.¹¹⁵ However, the FMLA has a two-year statute of limitations claim, or three years if the violation was willful.¹¹⁶ An employee who does not file a CFRA claim with the DFEH within one year would be unable

106. APPELBAUM & MILKMAN, *supra* note 98, at 3–4.

107. *Id.* at 22.

108. *Id.*

109. Engeman, *supra* note 94, at 3; SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 908, at 3 (June 24, 2015) [hereinafter SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, June 24].

110. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, June 24, *supra* note 109.

111. *Id.*

112. *See, e.g.*, Xin Liu v. Amway Corp., 347 F.3d 1125, 1125–26 (9th Cir. 2003) (holding that summary judgment improper when the Plaintiff brought both a FMLA and CFRA claim).

113. *See, e.g.*, Nelson v. United Technologies, 74 Cal. App. 4th 597 (1999) (bringing a wrongful termination claim under the CFRA in California State Court).

114. 29 U.S.C. § 2617(c)(1)–(2) (2015).

115. CAL. GOV’T CODE § 12965(b) (West 2015).

116. 29 U.S.C. § 2617(c)(1)–(2) (2015).

to seek relief under the CFRA, but he or she could still bring a suit under the FMLA.¹¹⁷

If an employee pleads a FMLA violation, instead of CFRA, the case could be removed to a federal court under federal question jurisdiction.¹¹⁸ For public sector state employees, this presents a problem for self-care claims, where the Eleventh Amendment upholds state immunity and the Fourteenth Amendment does not protect the self-care provision from that immunity.¹¹⁹ California could protect more public workers by extending the DFEH claim statute of limitations from one year to two, or three if willful, to match FMLA's.¹²⁰

Section 1 provides an overview of how the Fourteenth Amendment limits the Eleventh Amendment.¹²¹ Section 2 discusses how future CFRA amendments could ensure public sector workers the same opportunity to bring self-care claims as private-sector employees.¹²²

1. Supreme Court Rulings on the FMLA and the Fourteenth Amendment

The Eleventh Amendment holds that a state's sovereignty includes immunity from civil suits against it, stating: "[j]udicial power of the United States shall not be construed against one of the United States by Citizens of another State or by citizens or Subjects of any Foreign State."¹²³ The Supreme Court recognized that the Eleventh Amendment is not absolute, but limited by the equal protection guarantee of the Fourteenth Amendment.¹²⁴ Consequently, when the Fourteenth Amendment protects a statute, the Eleventh Amendment's sovereign immunity is trumped and the state can be found liable.¹²⁵

The United States Supreme Court twice addressed the FMLA's relevance to the Fourteenth Amendment.¹²⁶ The Court found parental leave aimed to stop

117. *Supra* Part IV.C.

118. 28 U.S.C. § 1331 (2015). Because the FMLA is federal law, it presents a federal issue and can be removed from state court to federal court. *Id.*

119. *Infra* Part IV.C.1 (discussing recent United States Supreme Court cases holding that the self-care provision of the FMLA is not protected by the Fourteenth Amendment); *see* GOV'T § 12945.2(c)(2) (permitting California public sector employees to bring CFRA claims against the California State Government).

120. *Infra* Part IV.C.2 (discussing how California could prevent the FMLA and CFRA statute of limitations inconsistency).

121. *Infra* Part IV.C.1 (discussing recent United States Supreme Court cases holding the self-care provision of the FMLA is not protected by the Fourteenth Amendment).

122. *Infra* Part IV.C.2 (discussing how California could prevent the FMLA and CFRA statute of limitations inconsistency).

123. U.S. CONST. amend. XI.

124. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

125. *Id.*

126. *See Nevada Dep't of Hum. Resources v. Hibbs*, 538 U.S. 721, 726 (2003) (holding the parental leave provision of the FMLA was constitutionally protected under the Fourteenth Amendment); *Coleman v. Court of*

gender discrimination, but the self-care provision did not and, therefore, could not pierce sovereign immunity through Fourteenth Amendment equal protection arguments.¹²⁷

The Fourteenth Amendment forbids states from denying individuals equal protection under the law.¹²⁸ Section Five of the Fourteenth Amendment gives Congress the power to “enforce, by appropriate legislation” the equal protection and due process provided by the amendment.¹²⁹ Through a series of cases, the Court created the “congruence and proportionality test” for validity under the Fourteenth Amendment.¹³⁰ In analyzing Section Five of the Fourteenth Amendment, the Court considered: (1) the equal protection problem Congress was attempting to solve; (2) whether there was a history and pattern of discrimination by state governments; and (3) whether, using legislative history, the remedy was congruent and proportional to the States’ violation of equal protection rights.¹³¹

In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court held that parental leave was protected under the Fourteenth Amendment because it intended to address gender inequality.¹³² The Court reviewed the FMLA under heightened scrutiny, requiring the gender-based classification to “serve important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives.”¹³³ The Court reflected on the low percentage of men who took paternal leave compared to women and the low number of states and private businesses offering paternal leave as indicators gender discrimination.¹³⁴ The Court held the Constitution protected parental leave provided by the FMLA,¹³⁵ reasoning Congress enacted the FMLA to “protect the right to be free from gender-based discrimination in the workplace” by removing “the pervasive sex-role stereotype that caring for family members is women’s work.”¹³⁶

Appeals of Maryland, 132 S. Ct. 1327 (2012) (holding the self-care provision of the FMLA was not constitutionally protected under the Fourteenth Amendment).

127. *Nevada Dep’t of Hum. Resources*, 538 U.S. at 728; *Coleman*, 132 S. Ct. at 1327.

128. U.S. CONST. amend. XIV § 1.

129. *Id.*

130. *See generally* Board of Trustees of the University of Alabama v. Garrett, 121 S. Ct. 955, 963–65 (2001) (discussing the legal analysis precedent for whether a law is protected from state immunity because it invokes section five of the Fourteenth Amendment).

131. *Id.*

132. 538 U.S. at 724.

133. *Id.* at 728 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

134. *Id.* at 728, 731.

135. *Id.* at 728.

136. *Id.*

However, in *Coleman v. Court of Appeals of Maryland*, the Court narrowed Congress' power under Section Five of the Fourteenth Amendment.¹³⁷ Justice Kennedy distinguished the parental leave in *Hibbs* from the self-care requested in *Coleman*, finding that, unlike parental leave, the FMLA self-care was not a congruent and proportional response to gender discrimination.¹³⁸ The Court found "evidence did not suggest States had facially discriminatory self-care leave policies or that they administered neutral self-care leave policies in a discriminatory way."¹³⁹ And there [was] scant evidence in the legislative history of a purported stereotype harbored by employers that women take self-care leave more often than men."¹⁴⁰ Kennedy concluded, "without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it [was] apparent that the Congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs."¹⁴¹

Justice Ginsburg and three others dissented, arguing the self-care provision "is a key part of Congress' endeavor to make it feasible for women to work and have families" and that it "validly enforces the right to be free from gender discrimination in the workplace."¹⁴² The dissent further noted "it would make scant sense to provide job-protected leave for a woman to care for a newborn but not for her recovery from delivery, a miscarriage, or the birth of a stillborn baby."¹⁴³

Consequently, today, California state employees could bring suit against state employers for denying FMLA family leave, but because the FMLA self-care provisions fail to protect from sovereign immunity, there is no enforcement available to employees denied self-care leave under the FMLA.¹⁴⁴

2. How Could Future CRFA Amendments Ensure Public Sector Workers the Same Opportunity to Bring Self-Care Claims?

In order to ensure California public sector employees receive equal leave claims as private-sector employees, the California legislature could extend the statute of limitations for the CFRA to match the FMLA.¹⁴⁵ Because the CFRA only allows employees one year to file a DFEH claim, employees seeking a remedy after a year must file their complaint under FMLA, which allows a two-

137. 132 S. Ct. 1327, 1333, 1338 (2012).

138. *Id.* at 1335.

139. *Id.* at 1334.

140. *Id.*

141. *Id.* at 1335.

142. *Id.* at 1339, 1349.

143. *Id.* at 1345.

144. *Supra* Part IV.C.1.

145. *Id.*

year statute of limitations, or three years if the violation is willful.¹⁴⁶ However, public sector employees who bring a FMLA-only claim against their employer, the state, are limited to only parental leave claims.¹⁴⁷ Self-care provision claims are subject to the Eleventh Amendment.¹⁴⁸ Increasing the statute of limitations to match FMLA will ensure that all employees in California eligible for the CFRA will get at least two years to bring self-care-provision claims.¹⁴⁹

D. Could Employees Excluded From the CFRA Take Leave Under the CPFL Act and Bring a Wrongful Termination Claim If Terminated?

Several legal scholars question whether an individual who is ineligible for the CFRA, takes paid family leave, and loses her job as a result could bring a wrongful termination claim against the employer based on public policy.¹⁵⁰ Section 1 will review wrongful termination based on public policy claims under the CFRA while Section 2 will analyze whether a wrongful termination based on public policy claim could be applied to the CPFL Act.¹⁵¹

1. CFRA Wrongful Termination Based On Public Policy Claims

The California Supreme Court recognizes an exception to at will employment, holding that California's public policy against discrimination could permit an employee to bring a tort claim for wrongful termination.¹⁵² A plaintiff must prove that the public policy is "(1) articulated within a statute (the FEHA); (2) benefits society at large, (3) . . . established at the time of the employee's discharge; and (4) . . . substantial and fundamental."¹⁵³

While the California Supreme Court has not confirmed it yet, several California Courts of Appeal found the public policy underlying the CFRA would support a tort claim for wrongful termination.¹⁵⁴ *Nelson v. United Technologies*

146. *Supra* Part IV.C.

147. *Supra* Part IV.C.1.

148. *Id.*

149. *Supra* Part IV.C.

150. Guissu Raafat, *Does Paid Family Leave Really Pay for Small Businesses in California?*, 47 SANTA CLARA L. REV. 573, 585–86 (2007).

151. *Infra* Part IV.D.1–2 (discussing wrongful termination based on public policy as applied to the CFRA and potentially the CPFL Act).

152. *Nelson v. United Technologies*, 74 Cal. App. 4th 597, 608 (1999).

153. *Id.* at 609.

154. *E.g., id.* (holding that an employee could bring a wrongful termination claim under the CFRA's public policy because the goals of the CFRA, promoting the stability and economic security of families, are fundamental and substantial public policy). *But see* *Boecken v. Gallo Glass Company*, WL 245503 (2011) (holding an employer did not wrongfully terminate under public policy because the employee's termination for not returning to work after his FMLA leave was not motivation that violated public policy).

held that an employee could bring a claim for wrongful termination under the public policy set forth in the CFRA.¹⁵⁵ The Sixth District Court of Appeal reasoned that the legislature set forth policy for enacting the CFRA in the statute, the policy clearly benefitted the public at large, the policy was well-established before the employee was terminated, and the policy behind the CFRA was fundamental and substantial.¹⁵⁶ The Court found the policy behind the CFRA aimed to prevent employment discrimination and benefit the public at large by “strengthen[ing] the FEHA’s general goal of preventing the deleterious effects of employment discrimination, and also furthers the CFRA’s specific goal of promoting stability and economic security in California families.”¹⁵⁷

The Court then reasoned the CFRA was fundamental and substantial, finding that the “fact that the Act [was] included within the FEHA support[ed] the argument that the Act reflect[ed] a fundamental and substantial policy.”¹⁵⁸ And, “[p]romoting the stability and economic security of families, which [was] one of the goals of the CFRA, likewise reflect[ed] a fundamental and substantial public policy.”¹⁵⁹

2. Could Wrongful Termination Based On Public Policy Be Used for Paid Family Leave Claims?

No court ruling on California law has addressed whether an employee who did not qualify for CFRA but took paid family leave under the CPFL Act and was then terminated could bring a claim for wrongful termination on the basis that the termination violated public policy.¹⁶⁰

The courts could analyze the CPFL Act under the same analysis used in *Nelson*.¹⁶¹ The CPFL Act itself satisfies two of the elements required to bring a tort action based on public policy.¹⁶² The only elements a plaintiff may have trouble establishing are whether the policy benefits society at large and if the policy is substantial and fundamental.¹⁶³ As to whether the policy benefits society at large, the CPFL Act’s current purpose is to increase the positive impacts on infant and maternal health associated with women returning to jobs after taking

155. *Nelson*, 74 Cal. App 4th at 607.

156. *Id.* at 609–610.

157. *Id.* at 610.

158. *Id.*

159. *Id.* at 610.

160. *C.f. id.* at 609 (holding wrongful termination based on public policy could be brought under a CFRA claim, but not discussing the CPFL Act).

161. *Id.* at 609–10.

162. CAL. UNEMP. INS. CODE § 3301 (West 2015).

163. *Infra* Part IV.D.2 (comparing the CFRA public policy with the CPFL Act and AB 908 public policy).

leave.¹⁶⁴ Chapter 5 stated an even more specific purpose: increase access for paid family leave for working families who cannot afford the current wage replacement rate.¹⁶⁵ Further, the CPFL Act is located in the California Unemployment Insurance Code, which purpose clause declares that it aims to “mitigate the evils and burdens that fall on the unemployed worker and his or her family.”¹⁶⁶ Similar to the CFRA, both the CPFL Act and Chapter 5 aim to promote the stability and economic security of low-income families.¹⁶⁷ The *Nelson* Court considered this substantial and fundamental under the CFRA, and thus could also be considered substantial and fundamental for the CPFL Act.¹⁶⁸

However, even if a court found that a wrongful termination claim for public policy could be brought under the CPFL Act, a court could find statutory interpretation reasons for denying the claim.¹⁶⁹ While neither the CPFL Act nor Chapter 5 expressly denies job protection, both explicitly state: “nothing in this chapter shall be construed to abridge the rights and responsibilities conveyed under the CFRA or pregnancy disability leave.”¹⁷⁰ By allowing individuals a wrongful termination claim under the CPFL Act, a court would essentially read a job protection element into paid family leave.¹⁷¹ The question then becomes whether reading job protection into the CPFL Act “abridges” the CFRA’s job protection.¹⁷² If “abridge” is taken textually to mean reducing the scope of the CFRA, then permitting a wrongful termination claim—essentially job protection—does not reduce the scope of the CFRA, but expands it.¹⁷³

The California legislature specifically restricted the CFRA to employers with more than fifty employees.¹⁷⁴ Expanding the CPFL Act to wrongful termination claims may render that explicit decision, and possibly the entire CFRA, pointless under a legislative intent analysis.¹⁷⁵

164. ASSEMBLY COMMITTEE ON INSURANCE, *supra* note 55, at 2 (Apr. 8, 2015).

165. *Id.*

166. UNEMP. INS. § 2601.

167. *Id.*; ASSEMBLY COMMITTEE ON INSURANCE, *supra* note 55, at 2 (Apr. 8, 2015).

168. *Supra* Part IV.D.1.

169. *Infra* Part IV.D.2 (discussing various statutory interpretation problems with permitting a job protection claim under the CPFL Act).

170. UNEMP. INS. § 3301(a)(2).

171. *See generally* *Nelson v. United Technologies*, 74 Cal. App. 4th 597 (1999) (finding that a wrongful termination claim based on public policy could be brought to defend an individual’s job protection).

172. UNEMP. INS. § 3301(a)(2).

173. “Abridge,” MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/abridge> (last visited Sept. 19, 2015) (on file with *The University of the Pacific Law Review*).

174. CAL. GOV’T CODE § 12945.2(c)(2)(A).

175. *Compare* SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 406, at 1 (Feb. 25, 2015) (initially introducing SB 406 also reduce the small business exemption from fifty employees to five employees), *with* OFFICE OF SENATE FLOOR ANALYSIS, *supra* note 91, at 1 (removing the recommendation to lower the small business exemption). Legislative intent analysis would also frown upon

Even though small businesses with fewer than fifty employees remain exempt from the CFRA, they could potentially remain liable under the wrongful termination public policy limitation if an employee takes paid family leave.¹⁷⁶ To avoid this, the legislature could explicitly define abridge or could expressly state that the purpose of the CPFL Act is not to provide job protection.¹⁷⁷

E. Struggles in Passing SB 406

Governor Jerry Brown vetoed SB 406 after it passed out of both the California Senate and Assembly.¹⁷⁸ While he supports expanding family leave to allow employees to care for their sick family members, Governor Brown vetoed SB 406 because of concern that the CFRA and FMLA disparity in who leave can be taken for would allow employees to take “[twenty-four] weeks of family leave in a [twelve]-month period.”¹⁷⁹ However, the CFRA explicitly requires the “aggregate amount of leave” taken under the CFRA, the FMLA, or both to “not exceed [twelve] workweeks in a [twelve]-month period.”¹⁸⁰

F. Struggles in Passing Chapter 5

California passed the first paid family leave act requiring wage replacement for family leave in the United States.¹⁸¹ The CPFL Act’s passage hinged on several critical components occurring together: the passage of State Disability Insurance, which funds the CPFL Act; a report released by the State Economic Development Department finding that paid family leave could be provided through SDI at a modest cost; and a statewide coalition of labor, advocacy, and community groups.¹⁸²

Unlike the CPFL Act’s original passage, the labor coalition did not initially support AB 908, citing the inequity between the bill’s proposed ten weeks of paid family leave to six weeks of disability reimbursement, and increased SDI

interpreting one statute to render another pointless. *See Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904) (holding that intention of the legislature should govern statutory interpretation).

176. *Supra* Part IV.D.2. California recognizes a public policy limitation to “at will” employment relationships, which are typical in California. Raafat, *supra* note 150, at 583–84. However, the State of California would be immune from a public policy wrongful termination claim because wrongful termination is a common law torts claim and thus not covered by the California Torts Claim Act. *Palmer v. Regents of Univ. of Cal.*, 107 Cal. App. 4th 899, 909 (Second Dist. 2003).

177. *Supra* Part IV.D.2.

178. Veto Message of SB 406, Edmund G. Brown, Jr., Office of the Governor (Oct. 11, 2015).

179. *Id.*

180. GOV’T § 12945.2(s); *supra* Part IV.A.

181. Caroline Cohen, *California’s Campaign for Paid Family Leave: A Model For Passing Federal Paid Leave*, 41 GOLDEN GATE U. L. REV. 213, 244 (2011).

182. *Id.* at 243.

payments from all workers, even though utilization is higher for high-quality jobs.¹⁸³ At its current utilization rate, the Employment Development Department (EDD) estimated that by increasing paid leave to ten weeks, AB 908 would have increased SDI payments by \$651 million dollars.¹⁸⁴ Because paid family leave would continue to be worker-funded through the SDI program, the EDD would have likely increased the worker contribution rate from 0.9 percent to 1.1 percent to maintain funds.¹⁸⁵ If the proposed ten weeks of paid family leave was enacted and utilization of the CPFL Act also increased, worker contributions to the SDI fund could have increased to a maximum of 1.5 percent, as currently permitted under statute.¹⁸⁶

Chapter 5's authors amended the bill in the Senate, significantly expanding the bill from a paid family leave focus to an increase in all disability reimbursements.¹⁸⁷ Chapter 5 passed with family leave reimbursement for six weeks, instead of ten weeks; the EDD now estimates SDI payments will increase by \$587 million based on current utilization rates, and will increase worker SDI contributions from 0.9 percent to 1.0 percent.¹⁸⁸

V. CONCLUSION

SB 406 and Chapter 5 attempt, but fall short, in continuing California's reputation as a national leader in family leave policies.¹⁸⁹ SB 406 would have expanded what qualified as family leave while Chapter 5 increases the wage-replacement rate available.¹⁹⁰ SB 406 did not increase the number of individuals with access to leave because it does not reduce the small business exception and public sector workers may be limited in their ability to bring FMLA self-care claims if the statute of limitations expires on their CFRA claim.¹⁹¹ There is also potential for employees terminated after taking paid family leave to bring

183. Walters, *supra* note 75.

184. SENATE RULES COMMITTEE, SENATE FLOOR ANALYSIS OF AB 908, at 7 (Sept. 4, 2015).

185. *Id.* The 2015 contribution rate is 0.9 percent, but the EDD expects it to increase to 1.0 percent for 2016. EMPLOYMENT DEVELOPMENT DEP'T, MAY 2015 DISABILITY INSURANCE (DI) FUND FORECAST, 3, available at http://www.edd.ca.gov/about_edd/pdf/eddforecastmay15.pdf (on file with *The University of the Pacific Law Review*).

186. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 908, at 2 (June 18, 2015). The EDD director can increase contribution funds up to 1.5 percent to meet needs based on a statutory formula. EMPLOYMENT DEVELOPMENT DEPARTMENT, *supra* note 185, at 3. If the director feels a contribution rate higher than 1.5 percent is needed, the California Legislature must make the change. *Id.*

187. CAL. UNEMP. INS. § 2655(e) (amended by Chapter 5).

188. CONCURRENCE IN SENATE AMENDMENTS, COMMITTEE ANALYSIS OF AB 908, at 2 (Feb. 24, 2015).

189. *Supra* Part II–III.

190. *Supra* Part III.

191. *Supra* Part IV.C.2.

wrongful termination claims, which future CPFL Act bills could address.¹⁹² Continued focus by the California legislature on family leave policies will make it even easier for individuals like Mary and Trish to access family leave.¹⁹³

192. *Supra* Part IV.D.2.

193. *See generally* Ignatius, *supra* note 1 (discussing their struggles and successes with the CFRA and the CPFL Act); Hughes Kreis, *supra* note 6.