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BRIDGING THE CONTINENTAL DIVIDE IN MATERNITY PROTECTION

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Introduction

Former Presidential Candidate, John Kerry, once remarked that “Values are not just words, values are what we live by. They’re about the causes that we champion and the people we fight for.”1 The United States of America has evolved from a country that once tolerated and promoted the repugnant values of inequality to one that now strives to treat women with the same respect and dignity accorded others in this country. The 19th Amendment to the US constitution giving women the right to vote was one of the first significant steps towards championing the American cause of equality.2 Congress has made attempts to rectify the problems of gender discrimination that continued to be pervasive even after Title VII of the Civil Rights Act was enacted. However, the attempt to rectify pregnancy discrimination, an amendment to Title VII in the form of the Pregnancy Discrimination Act, has proven insufficient. The Pregnancy Discrimination Act has not been interpreted to extend favorable or preferential treatment to pregnant women as will be explored in this paper. Laws, such as the PDA, that offer stringent protection to pregnant women reflect a lack of understanding of the condition of pregnancy as well as ignorance about the multiplicity of unforeseeable symptoms that are inherent to the condition. The profound capriciousness of pregnancy makes it difficult to have a set standard that caters to every pregnancy.

In addition to the PDA, pregnant employees can sometimes depend on the Family and Medical Leave Act. But this act also has severe limitations. Qualifying for FMLA leave is not always a guarantee as I will discuss in this paper.

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2 U.S. CONST. amend. XIX.
This paper argues that the inconsistency in application of the PDA coupled with the limitations of the FMLA reflect that the United States has insufficient protection for pregnant employees. The limited legal mandates protecting pregnant women in the United States are easily contrasted with the generous comprehensive protections afforded to pregnant employees in Ireland. However, without being oblivious to the striking demographical, geographical, cultural, social, political, and religious differences between the United States and Ireland, this paper compares the provisions of the two countries with regard to pregnancy and suggests that Ireland’s provisions are attainable goals in the United States despite the differences between the two countries. Though these two countries are different, both value pregnant employees in the workforce. Ireland has vigorously made legislative updates to its statutory instruments – constantly increasing the magnitude of its protections. The United States has updated its existing legislation and enacted new legislation, but without achieving the desired results needed.

Part one of this paper discusses the pre-birth accommodations and the maternity leave issues that occur in the United States by analyzing the applicable statutes and the case law interpreting them. Part two of this paper explores Irish statutes and cases and delves into Ireland’s degree of protection. Part three of this paper recommends ways in which the United States can increase its protection for pregnant employees. One of these recommendations is based on the idea of adopting some of Ireland’s provisions. The recommendation to adopt Ireland’s provisions is based solely on its generous maternity provisions. Ireland does not have comparable paternity provisions and so it would not be a good source from which to adopt laws regarding paternity provisions. See, e.g., Telecom Eireann v. O’Grady, 3 IR 432 (1998).
similar scheme in the United States. Finally, this paper concludes that by borrowing some facets of Ireland’s pregnancy provisions, the United States can more strongly reflect its value for pregnant employees in the workforce.

THE UNITED STATES

I. PRE-BIRTH ACCOMMODATIONS FOR PREGNANT EMPLOYEES

A. The Pregnancy Discrimination Act of 1978

The United States’ Congress amended Title VII of the Civil Rights Act by adding a definitional provision that is known as the Pregnancy Discrimination Act (PDA).5 The PDA states that “the terms ‘because of sex’ and ‘on the basis of sex’ include . . . because of or on the basis of pregnancy, childbirth or related medical conditions.”6 The PDA states further that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”7 It appears that the PDA offers protection to pregnant women who are hindered in their abilities because of their pregnancy, but, as will be discussed below, the protection is limited to that which an employer offers to employees who are disabled in their capabilities to the same extent even though the latter group is not pregnant. Essentially, pregnancy is only protected insofar as non-pregnancy is protected. The Act does not require that an employer affirmatively offer any preferential treatment or any special accommodations to pregnant employees unless the employer already offers those same types of accommodations to other employees who are not pregnant. Therefore, the PDA does not protect pregnancy. It simply makes it unlawful to discriminate against pregnant employees because of their pregnant

5 42 U.S.C. Section 2000e(k).
6 Id. (Emphasis added).
7 Id. (Emphasis added).
condition. This is a stingy legislative provision that offers minimal protection to the pregnant employee. In the sections that follow, it becomes evident through the discussion of various cases that this protection is useful only when there are comparator groups within the workplace for whom there are employment incentives that are not otherwise offered to pregnant employees.

i. The Adverse Consequences of the Absent Accommodations Provision in the Pregnancy Discrimination Act

In *Troupe v. May Dept. Stores Co.*, a pregnant employee who suffered severe morning sickness was terminated for excessive tardiness and absenteeism.\(^8\) Even though the employer’s seemingly legitimate non-discriminatory reasons for terminating her (tardiness and absenteeism) were direct results of her pregnant condition, the employer was not required to treat her any better than it would have treated another employer who was tardy and absent to the same degree.\(^9\) Her termination was not deemed discriminatory despite the fact that she was fired the day before she was due to begin her maternity leave.

The conditions that lead to Troupe’s termination, her morning sickness and her excessive absenteeism, were firmly grounded in her pregnancy; the positive causative relationship between her pregnancy and her morning sickness and absenteeism was undisputed.\(^10\) It was not a situation where she chose to be late to work everyday because she didn’t leave home early enough to escape traffic, or she didn’t take her job seriously, or she was too lazy to wake early. She was ill because her pregnancy was a stressful one. But, according to this court, the coverage of the PDA could not protect this employee because Troupe did not show that the employer was treating other employees who were tardy and excessively absent any differently than it was

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\(^8\) 20 F 3d. 734 (7th Cir. 1994)  
\(^9\) *Id.* at 739.  
\(^10\) *Id.* at 735.
treatment her.\textsuperscript{11} \textit{Troupe} stands for the proposition that consequences resulting from pregnancy are not protected, and therefore, are not actionable as pregnancy discrimination.\textsuperscript{12}

In \textit{Horton v. American Railcar Industries, Inc.}, the court held in favor of the employer where a pregnant employee requested light duty accommodations but she was unable to prove that non-pregnant employees were treated more favorably.\textsuperscript{13} The employer’s policy allowed light duty work only where the employee had sustained an occupational injury or illness.\textsuperscript{14} Since the employee could not show that similarly situated (those who were unable, at the time, to perform the same tasks that she could not do because of her pregnancy) non pregnant employees were not given any different accommodations, her termination was not unlawful.\textsuperscript{15} As in \textit{Troupe}, the court emphasized that the PDA does not require that employers offer any preferential treatment to pregnant employees.\textsuperscript{16} A note from a medical professional recommending light duty for the plaintiff was given no credence in this case.\textsuperscript{17} This type of judicial interpretation of the PDA and its focus on the non-requisites contained therein accentuate the uncompassionate application of the statute.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{11} {\textit{Id.} at 736}
\item \textsuperscript{12} {\textit{Id.; See also, Dormeyer v. Comerica Bank, 1998 U.S. Dist. LEXIS 16585 (Ill. Dist. Ct. 1998)(explaining that even though employee suffered severe morning sickness as a direct consequence of her pregnancy - morning sickness which employee testified was so tremendous that it caused her to vomit anywhere from every fifteen minutes to every hour and fifteen minutes-, employee did not demonstrate that similarly situated non-pregnant employees who had the same degree and type of absences were treated more favorably, and therefore, she did not meet her prima facie burden); Doss v. Jamco, Inc., 1998 U.S. Dist. LEXIS 6141 (Va. Dist. Ct. 1998)(granting summary judgment to employer where employee was told that she was being terminated because her maternity leave would cause her to be absent during the company’s busy season. Though leave was necessary precisely because of the pregnancy, the employee lost because she failed to show that other employees who were similarly unable to work were treated differently).}
\item \textsuperscript{13} 214 F. Supp.2d 921 (Ark. Dist. Ct. 2002).
\item \textsuperscript{14} {\textit{Id.} at 923.}
\item \textsuperscript{15} {\textit{Id.} at 932.}
\item \textsuperscript{16} {\textit{Id.} at 931.}
\item \textsuperscript{17} {\textit{Id.} at 923.}
\item \textsuperscript{18} {\textit{See also, Delcourt v. Bl Development Corp. 1998 U.S. Dist. LEXIS 18226 (Miss. Dist. Ct. 1998) (holding that employee did not proffer adequate evidence that similarly situated but non pregnant employees – that is, employees who were limited in their ability to walk - were accommodated by being granted variances in their schedules or work assignments).}
\end{itemize}
In Spivey v. Beverly Enterprises Inc., a certified nurse’s assistant requested that she be placed on light duty because she feared that lifting and moving heavy patients would put her pregnancy at risk. The plaintiff was subsequently terminated. Despite the employee’s proof that her obstetrician recommended that she not lift anything heavier than 25 pounds, the court’s analysis of the issue was based on the company’s policy which only granted light duty jobs to employees with occupational injuries. Judicial interpretation once again ignored the best interest of the employee’s pregnancy and delved into the “similarly situated but non-pregnant” treatment inquiry – an inquiry that has a tendency to lead to favorable outcomes for employers.

In Rhett v. Carnegie Center Associates, a pregnant employee was terminated while she was on maternity leave and the termination was held to be lawful.19 The court noted that the PDA is “a shield against discrimination, not a sword in the hands of a pregnant employee.”20 The court further pointed out that the pregnant employee was not entitled to reinstatement under the PDA since she had not made a showing that the employer treated her differently than it would have treated a non-pregnant employee absent on disability leave.21 Even though the court took note of the fact that this type of showing was impossible since the company never had an employee on disability leave for a protracted period for a reason other than pregnancy, the court still ruled in favor of the employer.22

In all of these cases, the courts disregard the fact that pregnancy is, by its very nature, unlike any other single condition. While employees who are disabled may be similarly situated in their ability or inability to work, their disability, if qualifying under the American with

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19 129 F.3d 290, 296 (1997)
20 Id. at 297.
21 Id.
22 Id.
Disabilities Act, entitles them to a “reasonable accommodation.” However, pregnant
employees, because they are typically only temporarily hampered in their capabilities, are not
entitled to any such reasonable accommodation under the American with Disabilities Act
because “pregnancy per se is not a disability.” Further, the PDA does not have any
accommodation provision. This is a flaw; it shows that pregnant women are not treated the same
as those similarly situated in their ability or inability to work. They are not accommodated in the
same way because there are regarded as being afflicted with a different, wholly unrelated
condition, to that of a permanently disabled employee. Therefore, the concept of accommodating
an employee who will temporarily be subjected to physical and chemical changes in her body is
outside the scope of both the Pregnancy Discrimination Act as well as the most generous
accommodation act in the United States, the American with Disabilities Act.

B. The Family and Medical Leave Act of 1993

The Family and Medical Leave Act offers employment security to an employee that she
will be reinstated to her job even after she has been on a prolonged period of leave. The FMLA
provides eligible employees with a maximum of twelve weeks of unpaid leave in a given twelve
month period. However, to be eligible, an employee must have worked 1250 hours in the
previous consecutive 12 month period and the employer must have 50 or more employees. Therefore, FMLA protection is not readily available to everyone. The part-time worker may not
be eligible for FMLA. The only guarantee of the FMLA is the employee’s unqualified right to

summary judgment as to employee’s claim of disability via pregnancy).
26 Id.
27 Id.
reinstatement to his former job or another position with equivalent pay, benefits and conditions of employment upon return from the leave.\textsuperscript{28} However, this leave is unpaid and the employee is not subsidized economically when she is on FMLA leave. Despite this automatic and sometimes crippling economic loss, pregnant employees are sometimes forced to resort to FMLA protection where the employer does not have any more favorable policies for pregnant employees.

The FMLA offers this leave for a broad range of situations, one of which is when the employee is suffering from a serious health condition, but courts have been inconsistent in their determination of whether pregnancy qualifies as a serious health condition under the FMLA.\textsuperscript{29} The inconsistency in FMLA application leaves the pregnant employee in a precarious situation where she is uncertain about whether she qualifies for this leave. Nevertheless, pregnant employees sometimes have no other recourse than to seek legal shelter under the FMLA when their pregnancy causes pre-birth complications and issues. The cases discussed below illustrate the limitations of the FMLA.

i. The Limits of FMLA Protection

The specific qualifying criteria for entitlement to FMLA leave were a hindrance for the plaintiff in \textit{Dormeyer v. Comerica Bank-Ill}.\textsuperscript{30} The pregnant employee in \textit{Dormeyer} was terminated for excessive absenteeism after being warned twice by her employer.\textsuperscript{31} Subsequent to the second warning, the employee claimed that her absences were due to her severe morning sickness which was a direct consequence of her pregnancy.\textsuperscript{32} After the employer issued a final

\begin{itemize}
\item \textit{Id.} at 5.
\item \textit{Id.}
\end{itemize}
Selma Shelton

warning, the plaintiff was terminated for excessive absenteeism.\textsuperscript{33} She brought suit under the FMLA claiming that she was denied leave.\textsuperscript{34} The court dismissed this claim because there was no consecutive twelve-month period preceding the date of her termination in which the plaintiff had worked 1250 hours.\textsuperscript{35} She failed to meet the qualifying criteria and so was not entitled to FMLA leave.\textsuperscript{36} Despite the fact that the morning sickness was the reason for her excessive absences, and therefore, it was one of the contributing factors to her not qualifying for FMLA(since she was unable to be at work for a consecutive 12 month period), she was still unable to get FMLA leave. Clearly, the leave, though reflective of a value for family and parenting responsibilities (that may lead one to take the leave in the first place) is not always available to pregnant employees – and partially because of their disqualification that was caused by direct effects of the pregnancy itself.

When an employee qualifies for FMLA leave, however, it can prove a powerful and useful tool. In \textit{Pendarvis v. Xerox Corp.}, a pregnant employee was terminated and she subsequently brought suit under the FMLA.\textsuperscript{37} The defendant employer argued that the employee had not proven that she had a serious health condition and so she was not entitled to FMLA leave.\textsuperscript{38} The court disagreed with this reasoning and pointed out that federal regulations specifically provide that in the case of severe morning sickness, there is no need for a health care provider to prove that there was a serious health condition that entitled the plaintiff to FMLA leave.\textsuperscript{39} The court further noted that “any period of incapacity due to pregnancy, or prenatal care

\begin{flushright}
\textsuperscript{33} \textit{Id}.
\textsuperscript{34} \textit{Id}.
\textsuperscript{35} \textit{Id}.
\textsuperscript{36} \textit{Id}.
\textsuperscript{38} \textit{Id} at 55.
\textsuperscript{39} \textit{Id}.
\end{flushright}
constitutes a serious health condition” entitling an employee to FMLA leave. However, as previously discussed, courts are not consistent about the view that pregnancy is a serious health condition. If courts embrace the perspective of the Pendarvis court, the FMLA is not draconian as the PDA has been interpreted to be.

In Walker v. Fred Nesbit Distributing Co., the pregnant employee was able to utilize her FMLA leave to accommodate her pre-birth restrictions. Plaintiff employee was a truck driver and her job duties involved heavy lifting. Plaintiff allegedly requested to be reassigned to light duty work or to be accommodated in some other respect. Employer claimed that it had a policy change that did not allow accommodations when the injury did not occur on the job. The employee was able to take her FMLA leave prior to the birth of her baby. Here, FMLA was useful to the pregnant employee because it enabled her to cope with pre-birth restrictions. However, after the birth of the baby, the employee found herself in a leave-less situation because she had already used her FMLA leave pre-birth. She was subsequently terminated for failing to return to work.

In Whitaker v. Bosch Braking Systems, a pregnant employee requested her FMLA leave so that she can be relieved of overtime duties. In addition to her severe morning sickness, her doctor was concerned that working overtime (which meant standing on her feet for more than eight hours per day) could lead to hypertension and premature delivery. According to the court, the defendant’s argument that the plaintiff could not establish a serious health condition because

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40 Id.
41 331 F. Supp at 783.
42 Id.
43 Id.
44 Id.
45 Id. at 784.
46 Id. at 789.
47 Id.
she had a normal pregnancy and was physically able to perform her job, essentially meant that a pregnant woman exposed to a job-related risk to her pregnancy does not have a serious health condition under the FMLA unless the injury occurs to the mother or the unborn child.\textsuperscript{49} The court staunchly rejected this argument saying that it does not believe Congress intended such a result.\textsuperscript{50} Additionally, the court noted that the legislative history of the FMLA contains language that “ongoing pregnancy” is a serious health condition.\textsuperscript{51}

II. **Maternity Leave**

A. **The Pregnancy Discrimination Act**

As discussed earlier, the protection under the PDA is limited by the employer’s policies regarding non-pregnant employees who are similarly situated in their ability or inability to work. Almost all of the cases that are brought under the PDA turn on the employer’s policies that are already in place with respect to another group of employees.

In *Communication Workers of America v. Ill. Bell Tel. Co.*, pregnant employees brought suit under Title VII claiming that the company’s practice of paying basic medical insurance (BMI) for employees on disability leave but discontinuing such payments for employees on maternity leave was discriminatory.\textsuperscript{52} The employees also claimed that the company’s policy of permitting employees on disability leave to accrue seniority during their entire period of leave while allowing employees on maternity leave to accrue only thirty days of seniority irrespective of the length of the duration of their leave is discriminatory.\textsuperscript{53} In a mind-boggling judicial

\textsuperscript{49} Id. at 931.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 927 (referring to H.R. Rep. No. 103-8 (1993)).

\textsuperscript{52} 509 F. Supp. 6 (1980)
\textsuperscript{53} Id. at 10.
decision, the court held that the former policy (discontinuation of BMI payments), while constituting a denial of a benefit to employees, was permissible because it did not burden the employees’ future employment opportunities at the company.\textsuperscript{54} The Pregnancy Discrimination Act states very clearly that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes.”\textsuperscript{55} On its face, this company was treating employees differently but because the court determined that this will not affect future employment conditions, it was a permissible policy. Therefore, in this court’s reasoning, the PDA allows employers to treat non-pregnant employees as favorably as they wish as long the benefit does not adversely affect employment related issues. The court did not consider the issue that employees who are on disability leave and whose premiums are being paid will be resented by those who are on maternity leave and whose premiums are discontinued. This can extinguish good morale in the workplace and so it could become employment related. The court incorrectly employed pre-PDA analysis in this case even though the PDA was already in effect.

On the issue of less accrued seniority, the court ruled that the policy was in fact discriminatory.\textsuperscript{56} Here was a situation where pensions, vacation time, automatic pay increases etc, were all linked to seniority.\textsuperscript{57} This was the correct holding because pregnant employees should be entitled to the same treatment as similar situated employees. Where the pregnant employees were deemed to be similarly situated to the disabled employees at this company, the ruling should have been that the company’s policies were discriminatory on both issues.

\textsuperscript{54} Id. at 7. 
\textsuperscript{56} 509 F. Supp. At 12. 
\textsuperscript{57} Id.
In *Doss v. Jamco*, a pregnant employee was terminated because the company anticipated her maternity leave would be during its busy season.\(^{58}\) The court held that this was permissible because the employee’s discharge was based on her inability to work rather than the reason for that inability.\(^{59}\) This is a rather fine distinction considering that maternity leave is a natural product of pregnancy. Further, this reasoning fails to take into consideration that the pregnant employee could miscarry which would mean she would not necessarily need to take that leave. Regardless of this possibility, it is inequitable to terminate an employee because one anticipates her pregnancy will lead to leave. If an employee qualified for leave because he/she needed surgery a week before the company’s busy season, that individual would have an unqualified right to reinstatement following the leave – irrespective of the leave’s duration. Yet, it is legally permissible for an employer to terminate an employee because it expects she will be absent in the future due to her pregnancy. Because of the harsh state of the law, it is unfortunate that pregnancy manifests itself physically thereby allowing an employer to anticipate one’s foreseeable absence, and therefore, one’s foreseeable inability to work. This gives employers the opportunity to blatantly discriminate and not to be held accountable for that discrimination.

In *Rhett v. Carnegie Center Associates*, a pregnant employee was asked by her supervisors if she planned to get married and was told that “it was the right thing to do.”\(^{60}\) The employer did not have a formal leave policy but claimed that it generally tried to hold positions open.\(^{61}\) While the pregnant employee was on leave, the company eliminated her position.\(^{62}\) The court held that this was not discriminatory because the PDA only protected plaintiff from being

\(^{58}\) 1998 U.S. Dist. LEXIS 6141
\(^{60}\) 129 F.3d 290, 293 (1997)
\(^{61}\) Id. at 293.
\(^{62}\) Id.
treated differently from non-pregnant employees.\textsuperscript{63} It offered no right to return to the job at the end of maternity leave.\textsuperscript{64}

When an employee is on leave due to pregnancy and would not have been treated in the specific adverse way if she were not on that leave, the adverse action is directly attributable to her pregnancy. This is discrimination that courts could ostensibly interpret to be unlawful under the second clause of the PDA since there were other secretaries who were not on leave and who were not considered for termination due to their mere presence. Therefore, there were non-pregnant employees who could be reasonably construed as having received more favorable treatment than the pregnant employee whose absence was a direct consequence of her pregnancy.

In \textit{Rafeh v. University Research}, a pregnant employee who received excellent evaluations prior to her pregnancy was given a promotion to a managerial position.\textsuperscript{65} While in that position, plaintiff became pregnant and requested to work from home.\textsuperscript{66} The company denied the request and subsequently stripped her of her managerial title.\textsuperscript{67} The court held that this was not discriminatory because it was objectively reasonable for an employer to require someone in a leadership position to work in the office.\textsuperscript{68} The fact that plaintiff was given a non-managerial position was attributed to the company's dissatisfaction with her performance.\textsuperscript{69} What is especially perplexing about this case is the fact that prior to her pregnancy, this employee received excellent evaluations and as soon as her pregnancy was announced to her employer, she was asked whether she will have the energy to do her work while she was pregnant.\textsuperscript{70}}
Here, it appears that the pregnant employee’s supervisors had preconceptions about what pregnancy entails before it saw firsthand what this particular employee’s pregnancy would be like. Under the ADA, an individual is protected if he has a disability but is also protected if he is regarded as having a disability. Viewing the instant case through the lens of the ADA sets up a “regarded as” scenario that does not make plaintiff’s claim that her employers (after forming the impression that she was unable to do her job because of her pregnancy), embarked on a program to undermine her authority and destroy her effectiveness, an implausible one. But the PDA does not consider such possible motivating animus towards pregnancy. There is no prong of the act that protects those who are regarded as incompetent simply because they are pregnant. The pregnant employee has the heavy prima facie burden of proving that she was discriminated against and the employer only has to produce a legitimate nondiscriminatory reason for its actions.

The bottom line for pregnant employees is that the employer has the upper hand. The employer can dismiss a pregnant employee who it anticipates will be taking maternity leave by simply offering the legitimate non-discriminatory reason that the absence will affect its business. The employer can sometimes escape liability (depending on the court’s analysis) when it denies benefits to the employee on maternity leave because that particular benefit would not affect an employment condition. The employer can do almost anything it wants under the guise of a reason that occurs later in the pregnancy chain. Employers cannot perform these adverse actions because of one’s pregnancy but they can permissibly perform the same adverse actions as long as they attribute them to any reason other than pregnancy – even if their proffered reason is a direct consequence of the employee’s pregnant condition.

71 Id.
72 See McDonnell Douglas v. Green, 411 US 792, 802 (1973) (establishing the proof scheme for Title VII cases where plaintiff has only circumstantial evidence).
Therefore, it is clear that the Pregnancy Discrimination Act does not provide affirmative protection for pregnant employees. Rather, it simply deters discrimination based on pregnancy.

A. **The Family and Medical Leave Act**

In the United States, there is no federal mandate that pregnant employees are entitled to a prescribed amount of pregnancy leave. Instead, there is the Family and Medical Leave Act which only came into existence in 1993. The FMLA provides, “an eligible employee shall be entitled to a total of twelve workweeks of leave during any twelve-month period for the birth of a son or daughter of the employee.” However, in order to be an eligible employee, an individual must “have been employed for at least twelve months by the employer to whom leave is requested and for at least 1250 hours of service with such employer during the previous twelve month period.” Furthermore, if an employee meets all of these requirements, the employer is not subject to FMLA regulations unless it employs fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding year. Some employers choose to be more employee-friendly and to have more favorable maternity leave provisions. When employers offer certain provisions for non-pregnant employees and deny those same employment related benefits to pregnant employees, the pregnant employees can file suit under the PDA.

FMLA suits brought by pregnant employees usually address the issue of reinstatement to the employee’s former position or one equivalent in benefits and terms and conditions of

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76 Id.
employment – an FMLA guarantee.\textsuperscript{77} For example, in \textit{Atchley v. Nordam Group}, a pregnant employee started her FMLA leave one month prior to giving birth and was given assurances that her position will be available to her upon completion of her leave.\textsuperscript{78} When she returned from maternity leave, her employer informed her that it did not have a place for her.\textsuperscript{79} Because FMLA gives an unqualified right to reinstatement, the employee won her claim.\textsuperscript{80}

FMLA offers a firm sense of security to those employees who qualify for it. However, as noted earlier, it is not always easy to meet the eligibility requirements. As such, FMLA, by itself, is an inadequate provision that does not guarantee protection to all pregnant women. Congress needs to enact appropriate legislation that will give pregnant employees an unqualified right to a certain amount of maternity leave that is subject to discretionary extensions in extenuating circumstances.

**IRELAND**

I. **PRE-BIRTH ACCOMMODATIONS FOR PREGNANT EMPLOYEES**

A. **The Maternity Protection Act of 1994**

Ireland expresses its cultural value for pregnant employees in the workforce by protecting employees from the inception of their pregnancy. In the spirit of educating expectant mothers, the Maternity Protection Bill of 2003 (an amendment to the Maternity Protection Act) allows expectant mothers to attend a complete set of ante-natal classes without loss of pay.\textsuperscript{81}

In terms of leave provisions, the Maternity Protection Act, by way of regulation, increased the amount of maternity leave to which employees are entitled from 18 weeks to 22

\textsuperscript{77} 29 U.S.C.A. § 2614(1993)
\textsuperscript{78} 180 F.3d 1143, 1145 (1999)
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 1152.
\textsuperscript{81} Maternity Protection (Amendment) Act, No. 28 (2004) (Ir.).
weeks paid maternity leave. Additionally, the new provisions allow for an additional 12 weeks of unpaid maternity leave. What is especially important about the increased leave is that it means that women are entitled to longer leave pre-birth as well if the need for it arises. Additionally, an amendment to the Maternity Protection Act that was made in 2004 revoked the once compulsory requirement for women to take four weeks of their maternity leave prior to the birth. Currently, pregnant employees in Ireland can work up to two weeks before giving birth and then the employee has to take her leave. It is up to the employee to choose to take either two or four weeks of leave prior to the birth of the child. Furthermore, pregnant employees are protected against dismissal and suspension while they are on maternity leave. A pregnant employee is also entitled to reinstatement to her same job, and if not possible, suitable alternative work which cannot be less favorable with respect to terms and conditions, responsibility or remuneration. Essentially, an employee on maternity leave is regarded as if she is at work and is therefore entitled to all the same benefits to which she otherwise would have been entitled. These include accrual of annual leave, and seniority status. However, if an employee is not being paid during maternity leave because she does not meet eligibility requirements of the act, then she is not regarded as contributing to Social Welfare Funds since the contribution to social welfare is usually deducted from an employee’s salary; therefore, the employee would not be

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83 Id.
84 Maternity Protection (Amendment) Act, No. 28 (2004) (Ir.).
85 Id.
86 Maternity Protection Act, No. 34 (1994) (Ir.).
87 Sections 25-28 of the Maternity Protection Act.
88 Section 22 of Maternity Protection Act.
89 Id.
regarded as being at work, and consequently, would not be entitled to these employment rights while on leave.  

The most important characteristic of unpaid leave is that it is not considered a break in service since it is still considered “protected leave.” The paid leave is possible because of the mandatory social insurance system in Ireland. Pay Related Social Insurance (PRSI) usually is compulsory for all workers over the age of 16 years. The social insurance contribution is paid to the Ministry of Social and Family Affairs and is usually deducted from an employee’s salary. PRSI contributions usually depend on the employee’s earnings as well as the nature of her work.

B. Health and Safety Regulations of the MPA

Ireland recognizes that pregnancy is a condition that deviates from the normal day to day life of the individual and conditions that were once completely safe to the employee may now be dangerous to her health and safety in light of her pregnancy. As such, the Health and Safety Regulations that accompany the Maternity Protection Act provide for appropriate accommodations in such dangerous circumstances.

Women who have health and safety concerns can bring them to the attention of the firm’s health and safety officer which every firm is required to have. After an assessment of the

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93 Id.
94 Id.
95 Id.
96 See Padraig Yeates, Maternity Law Increases Equality Queries by 70%, Irish Times, July 12, 1996.
situation, the health and safety officer determines if a risk exists.\textsuperscript{97} If he agrees that a risk is present, the risk must be eliminated.\textsuperscript{98} If the risk cannot be eliminated or the employee cannot be granted suitable alternative work (which is defined as being “appropriate to the employee in all circumstances”), the employee must be granted paid leave.\textsuperscript{99} If the firm’s safety officer evaluates the situation in the negative, the employee can appeal to the Health and Safety Authority for its opinion or even request that a representative come to inspect the premises and advise as appropriate.\textsuperscript{100} If the employee is not satisfied with the determination made by the Health and Safety Authority, further appeals can be made to a Rights Commissioner, the Employment Appeals Tribunal, and ultimately, the courts.\textsuperscript{101}

The Health and Safety at Work Regulations of 1994 enumerate agents, processes, and working conditions which are considered to be especially hazardous and may necessitate health and safety leave for pregnant women.\textsuperscript{102} These include: physical agents that might cause lesions likely to disrupt placental attachment, handling of loads entailing risk, noise, ionizing radiation, extremes of heat or cold, movements and postures, traveling (inside and outside the workplace), mental and physical fatigue, other burdens connected with the activity of the employee; biological agents that might endanger the pregnant woman and/or the unborn child; chemical agents and substances, carcinogens, mercury and mercury derivatives, antimitotic drugs, carbon monoxide, and chemical agents of known and dangerous percutaneous absorption; and processes that involve working underground and mining, working in a hyperbaric atmosphere, working

\textsuperscript{97} Section 18 of Maternity Protection Act.

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} YEATES, \textit{supra} note 38

Selma Shelton

with biological agents such as toxoplasmosis and rubella and working with organic lead and lead derivatives. The Health and Safety Leave is paid by the employer for the first twenty-one days of the employee’s leave. The pregnant employee is entitled to her usual wage during this period. If the Health and Safety Leave extends beyond this period, she may be entitled to Social Welfare Benefit based on her PRSI contributions. The employee qualifies for health and safety benefits in a situation where she was granted Health and Safety Leave by her employer, her employer has paid for the first twenty-one days, and she has paid at least thirteen weeks’ PRSI contributions in the twelve months immediately preceding her baby’s due date.

II. MATERNITY LEAVE IN IRELAND

A. Maternity Protection Act of 1994

The Maternity Protection Act in Ireland offers generous provisions. The act is comprehensive in its protection offering maternity leave, additional maternity leave, paid time off for ante and postnatal medical visits, the right to return to work, protection of certain employment rights while on leave under the Act, and protection against dismissal from the beginning of pregnancy to the end of maternity leave if the dismissal is for pregnancy related reasons.

103 Id.
104 Section 18 of Maternity Protection Act.
105 Id.
106 See supra note 44.
107 See, Health and Safety Leave, at http://www.siptu.ie/YourRights/TUFGuideToLabourLaw/OtherLeaveEntitlements/MaternityProtectionAct1994/, explaining that the third criterion is flexible and the employee may meet this requirement if she has paid 39 weeks’ PRSI contributions since she first started work and 39 weeks’ PRSI payment paid or credited in the relevant tax year OR she has paid 26 weeks’ PRSI contributions in the relevant tax year and 26 weeks PRSI in the tax year prior to the relevant tax year.
108 Although Ireland has leave provisions for adoptive parents via the Adoptive Leave Act of 1995, adoptive leave provisions are beyond the scope of this paper.
109 Maternity Protection Act, No. 34 (1994) (Ir.).
While there are eligibility requirements that focus on an employee’s Pay Related Social Insurance contributions, the system in Ireland allows responsible PRSI paying employees to entitlement to maternity leave under the act even if the employee is self-employed. The Act offers 22 weeks of paid maternity leave and if the employee feels the need for more leave, the employee can apply for an additional eight weeks which is usually unpaid. However, providing that there is no break in the leave, the entirety of it is protected.

There is a requirement of notifying an employer both as to the taking of leave and the intention to return. When an employee plans to return to work, she is required to give her employer written notice of her intentions four weeks before her leave is due to end and is expected to state her date of return in this notification. This is an essential requirement that was present in the 1981 Maternity Protection Act and has been reiterated in the 1994 amended version. This requirement can prove problematic if an employee does not comply with it. For example, in *Ivory v. Ski-Line Limited*, plaintiff employee, who had been a satisfactory worker during her employment with the company, became pregnant.\(^{110}\) Her expected date of confinement was estimated but her baby was born early and so her employer was less aware of when she was likely to return to work.\(^{111}\) During her maternity leave, she visited the office twice but did not offer any written notice to her employer of her anticipated date of return.\(^{112}\) The fact finder found that she did not even offer verbal notice and so there was no question of waiver of the written notice requirement by the employer.\(^{113}\) She received a termination letter from her employer informing her that her position was no longer available and that she had violated the

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\(^{110}\) 1989 ILRM 433 (1988)
\(^{111}\) Id.
\(^{112}\) Id.
\(^{113}\) Id.
Maternity Protection Act (of 1981) requirements.114 The court noted that it was unfortunate that there was “no statutory requirement on employers to inform an employee availing of maternity leave that she will be obliged to comply with section 22 of the Act.”115 Even though the court noted that the employee had not met her requirements and therefore was not entitled to reinstatement, the court also was sympathetic to the employee’s ignorance about what she was required to do.

B. Parental Leave Act of 1998

Similar to the United States’ Family and Medical Leave Act, Ireland has provisions that allow parents leave allowances when they have sick children for whom they need to care. The Parental Leave Act of 1998 entitles parents to a period of 14 working weeks of leave in order for them to care for a child who is less than five years old.116 However, similar to the FMLA, there are strict qualifying criteria before an employee can access this type of leave. For example, an employee needs to have been employed for one year of continuous employment before that employee can take the leave.117 Further, the employee needs to give at least six weeks of notice prior to the taking of the leave.118 Such notice must be in writing and must clearly specify the employee’s intentions.119

The act also caters for emergency situations and so the six week notice requirement does not serve as a hindrance in exigent circumstances. The Act provides that, “An employee shall be entitled to leave with pay from his or her employment, to be known and referred to in this Act as

114 *Id.*
115 *Id.*
116 Parental Leave Act, Section 6,(1998)(Ir.).
117 *Id.*
118 Section 8 of Parental Leave Act
119 *Id.*
‘force majeure leave,’ where, for urgent family reasons, owing to an injury to or the illness of a person specified in subsection (2), the immediate presence of the employee at the place where the person is, whether at his or her home or elsewhere, is indispensable.”\textsuperscript{120} The mere fact that this leave exists is reflective of how valuable parenting and family are in Ireland. This type of leave provision allows a mother who has given birth to care for the child if there are complications with the child’s health.

**ANALYSIS and RECOMMENDATIONS**

I. **Amending the PDA**

In 2005, a bill was introduced in the House of Representatives to amend the Pregnancy Discrimination Act so that it would protect breastfeeding by new mothers, provide for a performance standard for breast pumps and provide a tax incentive to encourage breastfeeding.\textsuperscript{121} One of the findings of the bill was that “Women with infants and toddlers are a rapidly growing segment of the labor force today.”\textsuperscript{122} It makes sense to infer that a significant portion of those women with infants were once pregnant. The United States Congress should amend the Pregnancy Discrimination Act so that it contains an accommodation provision that mandates employers to make reasonable accommodations for pregnant employees who are having difficult pregnancies.\textsuperscript{123}

The standard for judging whether the situation warrants an accommodation should be an objective standard whereby the need for accommodation is recommended by a medical professional who can attest that such an accommodation is necessary in his expert opinion.

\textsuperscript{120} Section 13 of Parental Leave Act.
\textsuperscript{121} See Pregnancy Discrimination Act Amendments of 2005, H.R. 2122, 109\textsuperscript{th} Congress. (2005)
\textsuperscript{122} Id.
\textsuperscript{123} Some may argue that Congress does not have the power to regulate the work environment to this extent. \textit{But See} Jamin Raskin, \textit{OVERRULING DEMOCRACY} 185 (Routledge 2004) (2003) (asserting that the Commerce Clause gives Congress the necessary power to enact Title VII).
This will eliminate concerns about employees taking advantage of the provision. Were this the case, pregnant women would not be compared to similarly situated non-pregnant employees, but rather, they will be assessed based on their individual conditions. This case by case inquiry that is based on the particular circumstances of that singular pregnancy will assist in protecting all pregnant employees in the workplace. Furthermore, this would be an affirmative duty to accommodate on the employer’s part and will reflect that the United States really values its pregnant employees in the workforce.

Additionally, if such an amendment were made to the Pregnancy Discrimination Act, the *Horton* employee would be protected even though her injury was not an occupational one. Further, the employee in *Spivey* would not have to put her pregnancy at risk because her proof that her obstetrician recommended that she not lift anything over a certain weight would be adequate.

One way to amend the PDA is to combine certain facets of the ADA with some aspects of Ireland’s law. Congress can borrow language from the ADA such as the provision that it is discrimination if the employer is “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.” The stricken words can be replaced with “who is pregnant.” To substantiate the protection, Congress can adopt some of Ireland’s health and safety regulations. The Health and Safety prong of the Maternity Protection Act states that:

> If an employer is required to move an employee . . . as a result of a risk assessment . . . , but:

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124 See Section 102 of the American with Disabilities Act.
it is not technically or objectively feasible for the employer to move the employee as required by the regulations; or
such a move cannot reasonably be required on duly substantiated grounds; or
the other work to which the employer proposes to move the employee is not suitable for her;

the employee shall be granted leave from her employment under this section.125

A provision such as this would protect both the employer and the employee. The employer would be protected from tort suits. The employee would be protected because she will either be accommodated at the workplace or she will be granted paid leave. The major question that is likely to arise is who will pay for the employee’s leave if that alternative is exercised. In Ireland, the employer pays as long as the employee has been paying her social insurance. In the US, we have no mandated paid leave provisions and so implementing a scheme like this would raise serious questions about who bears the economic costs for such a legislative provision. One possible option is to require employers to pay the employee’s salary while she is on Health and Safety Leave and let the company have tax incentives for paying out salaries in such situations.

It is a difficult inquiry to determine the precise word choices and syntactic arrangements that would amend the PDA in a way that achieves all the lofty goals that this paper recommends, but the obstacles are not insurmountable. Ireland has excellent provisions and so litigation on these issues is infrequent. Ireland may even have a less litigious society. It appears that in Ireland, all the parties involved know their roles and duties and so there is less debate over statutory language. The Irish statutory instruments regarding maternity leave protection are not interpreted in a myriad of ways and so the questions of ambiguity and unclear legislative intention are almost nonexistent. The United States can begin by informing employers and

125 Section 18 of the Maternity Protection Act of 1994.
employees of their responsibilities with respect to each other when it comes to pregnancy and related conditions.

II. Sculpting the Act to Award Comprehensive Protection

Borrowing from Ireland’s maternity leave principles, the right to reinstatement to one’s job or a job that is similar in benefits should be part of the new congressional legislation. Ireland’s notice requirement which asks an employee to give notice of intent to return four weeks before her leave is due to end\(^\text{126}\) is a fair way for employers to know what the employee’s plans are and so the employer can act accordingly in making workplace decisions.

The requirement in most US legislation that employers have a certain amount of employees before the act is applicable to them is highly problematic and I suggest that this new congressional act be made applicable to all businesses regardless of the amount of people in its employ.

Both the United States and Ireland require that employees have worked with the employer for a certain period before they are eligible for leave. In both cases, the person must have been employed by the company for 12 previous consecutive months. This does not seem to be a wholly unfair requirement, but I recommend that the requisite period of 12 consecutive months be shortened from one year to six months. This would enable an employee who becomes pregnant shortly after gaining employment with a company to qualify for her maternity leave during the working months of her pregnancy. As such, the employer is not being forced to pay for an employee who has not given it any service and the

\(^{126}\) See discussion supra p. 30.
employee has the opportunity to give that service and show that she is a useful and valuable employee that the employer wants to retain. The United States also has a requirement that an employee must have worked 1250 hours to be eligible for (FMLA) leave. This is also a problematic provision especially for part time expecting mothers. This requirement should not be adapted when sculpting maternity protections.

**Conclusion**

The United States offers limited protection to its pregnant employees. The two principal legislative instruments available to employees are the Pregnancy Discrimination Act and the Family and Medical Leave Act. Ireland protects its pregnant employees primarily with the Maternity Protection Act. The titles of the two pregnancy acts – the PDA and the MPA – reflect the concerns associated with the Acts. While the United States’ PDA is concerned with ensuring pregnant employees are not *discriminated* against, Ireland’s MPA is concerned with affirmatively *protecting* its pregnant employees. In order to show its value for pregnant employees in the workforce, the United States needs to go one step further and enact appropriate legislation that will serve not only discrimination deterrence goals, but also serve maternity protection ones.

While the principles discussed in this paper seem like a radical deviation from the US’ current principles regarding maternity leave, it is not an absurdity that a fully developed country that is considered one of the foremost powers in the world should have a system that takes care of its pregnant employees. Perhaps it is more paternalistic than the US government has been, but government is instituted such that citizens have power outside of their individual existences on which they can rely. In the United States, the states are organized as one nation and this gives
residents the comfort of knowing their values are shared in their community and will be
protected by the leaders they elect. If the United States wants to promote values that pregnant
employees are appreciated and are important to the fabric of the nation, it needs to take actions
and champion this significant cause.