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COMMENT

Pregnancy in Pieces:
The Potential Gap in State and Federal Pregnancy Leave

Sarah Stewart Holland†

Pregnancy, childbirth, and bonding with a newborn are part of a continuous experience and should be treated as such under the Family and Medical Leave Act and complementary state leave laws. By examining the New Jersey Supreme Court’s holding in Gerety v. Atlantic City Hilton Casino Resort, Sarah Stewart Holland demonstrates that current law leaves pregnant workers uniquely vulnerable to termination when they need time off from work because of the difficulty in making the various stages of pregnancy and childbirth fit into the rigid requirements of medical and parental leave laws. This vulnerability demonstrates that pregnant women confront a special burden, not faced by others claiming temporary disability or seeking family leave, when attempting to take advantage of state and federal leave laws. Next, Stewart Holland examines state approaches to leave for pregnancy-related illness and shows how most state laws leave potential gaps between the exhaustion of medical leave and the availability of parental leave. Finally, she notes the utility of comprehensive leave for pregnant employees and their employers and suggests reforms to state and federal leave laws to treat pregnancy as a single condition for the purposes of obtaining job-protected time off from work and alleviating the special burden placed on pregnant employees seeking leave.

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† J.D. 2007, American University, Washington College of Law. I would like to thank my editors for their help and guidance through this long, hard process. I would also like to thank my loving husband for his unfailing support and for always reading it “just one more time.” This piece is dedicated to every woman struggling to make room in her life for both work and family.
I. INTRODUCTION

Over the last fifty years, the percentage of women in the workforce has increased dramatically. As a result, there are more pregnant women in the workforce. Both the federal government and several state governments have attempted to meet the needs of pregnant employees by passing leave legislation that requires employers to offer job-protected leave for women during and after their pregnancies. Despite these efforts, significant gaps


2. See SHEILA B. KAMERMAN ET AL., MATERNITY POLICIES AND WORKING WOMEN 5 (1983) (estimating that eighty-five percent of working women are likely to become pregnant during their careers).

in the law remain that prevent pregnant employees from receiving the comprehensive leave they need. These gaps result from separating pregnancy-related leave into three distinct categories of absence rather than treating pregnancy as a single condition. The first category of leave covers illnesses directly related to gestation. The second category covers leave from work for the physical act of childbirth and recovery thereafter. Legislation usually refers to these categories of absence as forms of medical leave because they primarily relate to the physiological conditions related to pregnancy. The third category, referred to as parental leave, covers absence from work to care for and bond with the new child.

By dividing pregnancy into these separate categories rather than treating it comprehensively, leave legislation creates significant gaps in coverage for pregnant workers. For example, there can be gaps between the exhaustion of medical leave and the availability of parental leave, during which time a pregnant employee is vulnerable to job termination for missing work. The recent New Jersey Supreme Court case of Gerety v. Atlantic City Hilton Casino Resort illustrates this problem. In addition, Gerety demonstrates the failure of anti-discrimination statutes to fill such

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7. See MASS. GEN. LAWS ch. 149, § 105D (2005) (entitling qualified employee to eight weeks of leave upon the birth of a child); MayoClinic.com, Caesarean Birth and the Road to Recovery (Dec. 21, 2004), http://www.mayoclinic.com/health/c-section/PR00101 (reporting that recovery from caesarean births takes about four to six weeks).
8. See, e.g., What is a “serious health condition” entitling an employee to FMLA leave?, 29 C.F.R. § 825.114 (2005) (defining “serious health condition” under the medical leave provision as any period of incapacity due to pregnancy or childbirth).
10. See Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233, 1234-36 (N.J. 2005) (stating pregnant employees may be covered by both state medical and federal parental leave).
11. Id. at 1235 (reporting that the plaintiff, a pregnant employee, was fired during a thirteen day gap in leave coverage).
gaps and protect pregnant employees from termination as a result of their gender.\textsuperscript{12}

Part II of this Comment reviews Gerety in detail and describes current federal and state leave and pregnancy discrimination laws. In Part III, I explain that gaps in leave experienced by pregnant workers are most often the result of the interaction of federal and state leave laws. I then argue that these gaps violate the Pregnancy Discrimination Act by producing a disparate impact on pregnant employees. Part III shows that courts frequently fail to uphold disparate impact claims by pregnant employees because they ignore the unique nature of pregnancy and misinterpret disparate impact theory as requiring only equal access to leave even if pregnant women may be prevented technically from utilizing the maximum amount of leave. In conclusion, I advocate for the treatment of pregnancy as a single condition under leave laws. Such a holistic approach more closely mirrors women's real world experience with pregnancy and prevents discriminatory gaps.

II.
BACKGROUND

Lack of comprehensive leave laws can cause significant harm to pregnant employees.\textsuperscript{13} First, without leave and job protection, a pregnant employee is at risk of termination, jeopardizing her economic well-being during an already financially trying time.\textsuperscript{14} Second, inadequate leave places the physical and psychological well-being of the employee in a precarious position.\textsuperscript{15} In addition, in the absence of comprehensive leave laws pregnant employees face gaps in coverage that other non-pregnant

\textsuperscript{12} Id. at 1242 (holding that an employer's policy did not constitute gender discrimination under a disparate impact theory of discrimination because the policy provided equal medical leave to men and women). To prove a disparate impact claim, the plaintiff must show that a facially neutral policy "resulted in a significantly disproportionate or adverse impact on members of the affected class." Id. at 1237.

\textsuperscript{13} See Grant et al., supra note 4, at 6 (mentioning studies that indicate parental leave results in better prenatal and postnatal care, more intense parental bonding over a child's lifetime, and lower accident rates in the first year of life).

\textsuperscript{14} Mark Lino, Cent. for Nutrition and Pub. Policy, U.S. Dep't of Agric., Expenditures on Children by Families, 2004 at ii (2005) (reporting that the average child-rearing costs for a younger child for a two-child, married-couple family in the middle-income group was between $9,840 and $10,900).

\textsuperscript{15} See Sue Shellenbarger, The Dangers of the Trend Toward Shorter Maternity Leaves, WALL ST. J., May 20, 2004, at D1 (reporting on a National Bureau of Economic Research study that found mothers who take at least three months off after childbirth show fifteen percent fewer symptoms of depression after they return to work as compared to mothers who take six weeks or less).
employees do not face. Lastly, employers miss out on concrete benefits such as increased employee retention and productivity.

A. The Gap Created by Current Medical and Parental Leave Laws

In 1993, Congress passed the Family and Medical Leave Act (FMLA) in recognition of the importance of a work and life balance for all employees. The FMLA requires that all large employers provide twelve workweeks of leave during each twelve-month period. An employee can request leave for four reasons. The two applicable to pregnant employees are the birth of the employee’s child or the employee’s own “serious health condition.” In addition to providing for family and medical leave, the Act also prevents employers from discharging or otherwise discriminating against employees for taking advantage of the FMLA’s benefits and requires employers to return employees to their original positions upon return from leave.

Several states have their own versions of parental and medical leave legislation. Many of these laws provide leave additional to that provided by the FMLA. The FMLA clearly states that it is not meant to interfere with or supersede any “additional” leave provided by state laws. Some states, like New Jersey, permit employees to take this additional leave only for medical leave or only for parental leave. Under such laws, employees are not given flexibility to use the leave for both medical and parental leave as they are under the FMLA. This type of state leave does not run concurrent to the FMLA leave, as it would if both state and federal law covered the same

16. See 124 CONG REC. 36818 (1978) (statement of Sen. Javits) (arguing that the PDA, which legally requires pregnant employees be treated the same as other employees, “represents only basic fairness for women employees.”).


19. 29 U.S.C. § 2611 (defining eligible employers as those with fifty or more employees within a seventy-five mile radius).

20. Id. § 2612(a)(1) (stating that the other two reasons for leave are because the employee has adopted a child or received a foster child or to care for a family member with a serious health condition).

21. Id. § 2615.

22. Id. § 2651 (including in this provision any leave provided under parental and medical leave or anti-discrimination laws); Id. § 2653 (stating explicitly that employers should feel free to retain or adopt more generous leave policies).

23. See New Jersey Family Leave Act, N.J. STAT. ANN. § 34:11B-4 (West 2005) (providing leave to care for a family member with a serious health problem or after the birth or adoption of a child, but not providing leave for an individuals own health problems).
type of leave, but consecutively. As a result, a pregnant employee in these states may find herself eligible for twelve weeks of medical leave under federal law and an additional twelve weeks of parental leave under state law but she cannot use the state leave to augment the federally-mandated medical leave.

B. Gerety and the Gap

Gerety v. Atlantic City Hilton Casino Resort illustrates how the lack of comprehensive leave legislation creates gaps in coverage for pregnant employees. Christina Gerety had worked for the Atlantic City Hilton Casino Resort (Hilton) for almost ten years when she learned that she was pregnant with twins. Although intending to work during her pregnancy, Gerety took off two days from work one month into her first trimester due to illness related to her condition. Later, upon the advice of her physician, Gerety requested an extended period of leave.

Hilton’s leave policy provided for two types of leave: (1) leave under federal and state leave legislation, and (2) fourteen weeks of leave under its own policy. Gerety’s first twelve weeks of leave were classified as medical leave under the FMLA. While on leave, Gerety required hospitalization, during which her physician discovered that one of the twins had a serious health problem. The physician recommended that Gerety further extend her absence from work. In response, Hilton terminated Gerety because, by then, she had already exhausted all twelve weeks of FMLA medical leave and the additional fourteen weeks provided to her by Hilton’s leave policy. Hilton told Gerety that while it would consider rehiring her, she would lose all seniority benefits.

24. 29 U.S.C. § 2651 (stating that leave provided under the FMLA does not supersede additional state leave coverage).
25. See Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233, 1235 (reporting that Gerety would have been eligible for a total of thirty-eight weeks of leave between federal leave, state leave, and employer leave).
26. Id. at 1234 (reporting a gap in coverage between when plaintiff exhausted her medical leave and when she would have been eligible for parental leave).
27. Id. at 1244.
28. Id. (noting Hilton paid Gerety for these days off and charged them as leave under the FMLA).
29. Id. (noting that Gerety’s original leave of absence was to end on December 1, 1997 and was later extended through February 1, 1998).
30. Id. at 1238 (noting Hilton allowed leave under the federal Family and Medical Leave Act of 1993, the New Jersey Family Leave Act, as well as its own medical leave policy).
31. Id. at 1239. At this point, both Gerety and Hilton anticipated Gerety’s return to work without any “adverse repercussions.” Id.
32. Id. at 1235. It was undisputed that bona fide medical concerns required Gerety to extend her leave for the duration of her pregnancy. Id.
33. Id. At this time, Gerety’s anticipated due date was in May. Id.
34. Id.
This all took place before Gerety’s children were born. Had Gerety given birth to her twins she would have been eligible for twelve weeks of parental leave under the New Jersey Family Leave Act (NJFLA) despite exhausting all twenty-six weeks of available medical leave. The gap in time between the exhaustion of her medical leave and the birth of her children, which would have triggered her state parental leave, was only thirteen days. In other words, had Gerety begun her medical leave just thirteen days later than she did, she would have been covered through pregnancy by the FMLA and Hilton’s leave policy and she would have been covered after birth by the NJFLA. Thus, despite exceeding Hilton’s twenty-six week leave policy, the NJFLA would have prohibited Hilton from terminating Gerety. The law, however, left Gerety without enough leave and without legal protection because of the gap in coverage created by the distinction between medical leave and parental leave under the law.

C. Gerety and the Hesitation of Courts to Find Disparate Impact in Pregnancy Discrimination Cases

After her termination, Gerety filed a gender discrimination claim under New Jersey’s Law Against Discrimination (LAD), alleging that Hilton’s policy had a disparate impact on pregnant employees. The LAD is equivalent to Title VII of the Civil Rights Act of 1964, the federal anti-discrimination law that prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin.

In the first ten years after the enactment of Title VII, many state and federal courts interpreted the Act’s prohibition against sex discrimination to include pregnancy discrimination. Despite this precedent, the Supreme Court has been hesitant to find disparate impact in pregnancy discrimination cases.

35. Id.
36. Id. (reporting that Hilton fired Gerety on April 2nd and that she delivered twin daughters on April 14th).
37. Id. (showing that if she had begun her leave in mid-October the twenty-six weeks of leave would have reached until the birth of her children in mid-April).
38. New Jersey Family Leave Act, N.J. STAT. ANN. § 34:11B-7 (West 2005) (prohibiting the termination or denial of seniority benefits of employees upon return from taking parental leave).
40. N.J. STAT. ANN. § 10:5 (West 2006)
41. Id. Gerety also alleged wrongful termination, intentional infliction of emotional distress, and retaliatory action against her husband. Id.
42. 42 U.S.C. § 2000e-2 (a)(1) (2000). Title VII includes prohibition against discrimination with regards to “compensation, terms, conditions, or privileges of employment...” Id.
43. See, e.g., Hutchinson v. Lake Oswego Sch. Dist. No. 7, 519 F.2d 961, 968 (9th Cir. 1975) (finding employer policy that did not pay disability benefits for pregnancy or childbirth-related absences discriminatory under Title VII), vacated, 429 U.S. 1033 (1977); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1164 (W.D. Pa. 1974) (maintaining that the school board’s policy of firing employees if they did not return three months after birth was a violation of Title VII).
Court in *General Electric Co. v. Gilbert* stated that Title VII did not cover pregnancy discrimination.\(^{44}\)

Congress quickly responded to the Court's decision by passing the Pregnancy Discrimination Act (PDA). The PDA amended Title VII by adding the following terms:

'[B]ecause of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.\(^{45}\)

Not only did the amendment include pregnancy in the definition of sex discrimination, the PDA codified what state courts had been requiring from employers for several years—that employers must treat pregnancy, childbirth, and related medical conditions the same as any other temporary disability.\(^{46}\)

In examining Gerety's claim of discrimination under the NJFLA, the court stated that it would look to the "substantive and procedural standards established" under Title VII.\(^{47}\) Since Title VII, after the passage of the PDA, explicitly covers pregnancy as a form of sex-based discrimination, several courts have stated that plaintiffs like Gerety should have the same two legal theories available to them as any other Title VII plaintiff: disparate impact and disparate treatment.\(^{48}\) Following this interpretation, the New Jersey courts allow the use of both theories to show discrimination.

The court in *Gerety* focused particularly on Gerety's claim of disparate impact.\(^{49}\) Under this theory, an employee can prove a violation of the LAD

\(^{44}\) 429 U.S. 125, 137-39 (1976) (stating that there was no way to prove that the exclusion of pregnancy benefits were designed to discriminate and that the plaintiff failed to prove the neutral plan had a disparate impact on women), superseded by statute, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

\(^{45}\) Id.

\(^{46}\) See 37 Questions & Answers, 29 C.F.R. pt.1604, App. (1978) (appending to Title VII guidelines these Questions and Answers providing employers guidance on the interpretation of the new amendment).

\(^{47}\) Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1223, 1237 (N.J. 2005) (quoting Viscik v. Fowler Equip. Co., Inc., 173 N.J. 1, 13 (2002)). The court also noted that such standards had been applied with flexibility. Id. at 1244.

\(^{48}\) Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50, 867 F.2d 974, 979 (7th Cir. 1988) (holding explicitly for the first time that PDA claims may be brought under both disparate impact and disparate treatment theories). The seminal Supreme Court cases representing these two theories are McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (explaining the disparate treatment theory, which combats "artificial, arbitrary, and unnecessary barriers to employment" affecting a protected class and setting out a test to prove this type of discrimination) and Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (finding that an employer's requirement of a high school education or a general intelligence test had an adverse impact on black applicants).

\(^{49}\) Gerety, 877 A.2d at 1237 (focusing on the disparate impact theory of relief because the plaintiffs had presented no evidence of different treatment in the record).
based on the disparate impact of a facially neutral policy, like Hilton’s leave policy, on a protected group, here, pregnant women. In a disparate impact case, the employee is not required to prove that the employer had a discriminatory motive as with disparate treatment. The employer in a disparate impact case can defend itself by proving that the practice is a job-related business necessity. Even if the employer establishes business necessity, the employee can still prevail if she can prove that there was a less discriminatory policy that would “serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’”

Pregnant employees alleging discrimination, however, have a difficult time proving their cases for two main reasons. First, although several circuit courts have held that the disparate impact theory of discrimination was applicable to pregnancy discrimination claims, the Supreme Court has never explicitly declared its applicability. This lack of express authority has led many district and several circuit courts to hold that disparate impact claims are not available in pregnancy discrimination cases.

Second, many courts have stated that the PDA requires only equal treatment between pregnant employees and non-pregnant, but similarly disabled, employees. Under this formulation, courts are highly unlikely to find evidence of discrimination even though pregnant employees may suffer far more serious consequences as a result of gaps in coverage than any other employee who requests family or disability leave but who does not have to contend with the gap problem. Nonetheless, the Gerety majority’s conclusion, which reversed the trial court’s denial of summary judgment to

50. See Griggs, 401 U.S. at 436.
51. See Dothard, 433 U.S. at 335-36 (clarifying that the legislative intent of Title VII was to prevent discriminatory consequences not discriminatory motives).
52. See De Laurier v. San Diego Unified Sch. Dist., 588 F.2d 674 (1978) (finding a school district correctly asserted a business necessity defense where they prohibited pregnant teachers from working during the ninth month of pregnancy because of safety and efficiency concerns related to a teacher’s multifarious duties).
53. Dothard, 433 U.S. at 329 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)) (finding that a height and weight requirement for prison guards had a disparate impact on women and limiting the tasks available to women guards would have a less discriminatory impact).
55. See Laura Schlictmann, Accommodation of Pregnancy-Related Disabilities on the Job, 15 BERKELEY J. EMP. & LAB. L. 335, 373 (1994) (arguing that the closest the Court has come to addressing the issue was in California Federal Savings & Loan Assn. v. Guerra, where the Court looked at a California law that required enhanced leave for pregnant employees.) The Court skirted the issue of disparate impact by deciding the case on the basis of a preemption question.
56. See, e.g., EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 949 (10th Cir. 1992) (finding that pregnant employees only had access to disparate treatment analysis, as opposed to disparate impact analysis, because Title VII only required neutral application).
defendant based upon the policy’s neutral application and the absence of any exceptions to the policy, no matter the employee’s illness.\textsuperscript{57}

Despite an overall unwillingness to find disparate impact, other courts have held that the PDA can require leave for pregnant employees claiming disparate impact.\textsuperscript{58} In \textit{Abraham v. Graphic Arts International Union}, the court found the employer’s policy of allowing only a ten-day leave, while applied equally to both pregnant and non-pregnant employees, was nevertheless discriminatory towards pregnant employees.\textsuperscript{59} The court in \textit{Abraham} pointed to the drastic effect such a short leave policy on pregnant employees, which “clashes violently with the letter as well as the spirit of Title VII.”\textsuperscript{60} The dissent in \textit{Gerety} also took this position and argued that Hilton’s policy had a disparate impact on pregnant employees, that the LAD prohibited this form of discrimination, and that it was within the power of the courts to require reasonable accommodation for pregnant employees.\textsuperscript{61}

\section*{III.

\textbf{ANALYSIS}}

\textit{Gerety} is the paradigmatic case illustrating how the separation of pregnancy leave into distinct categories of absences under both state and federal leave legislation creates potential gaps in leave for pregnant women.\textsuperscript{62} These gaps in leave not only require pregnant women to separate their unitary condition into different segments to meet differing leave standards,\textsuperscript{63} but also expose pregnant employees to the risk of termination or loss of benefits not faced by non-pregnant employees.\textsuperscript{64} In other words,

\begin{itemize}
\item \textsuperscript{57} Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233, 1242 (N.J. 2005) (holding that the case was about preferential treatment for pregnant employees and not freedom from discrimination).
\item \textsuperscript{58} See, e.g., Zuniga v. Kleberg County Hosp., 692 F.2d 986, 994 (5th Cir. 1982) (finding that an employer’s policy of terminating pregnant employees because of concerns with fetal safety had a disparate impact and was discriminatory because the employer failed to use alternative, less discriminatory policy); Hayes v. Shelby Mem’l Hosp., 726 F.2d 1543, 1554 (11th Cir. 1984) (finding disparate impact where employer had failed to establish a business necessity for firing a female X-ray technician when she became pregnant).
\item \textsuperscript{59} 660 F.2d 811, 819 (D.C. Cir. 1981) (stating that “[b]eyond peradventure, the limitation of leave to ten days affected women employed in the PEP program much more severely than any male engaged therein . . . . “).
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Gerety, 877 A.2d at 1243 (Portiz, C.J. dissenting) (arguing that the case is not about preferential treatment or about pregnant women being treated differently than non-pregnant employees).
\item \textsuperscript{62} Id. at 1244 (noting the gap created between the first category of medical leave and the third category of parental leave).
\item \textsuperscript{63} See Family and Medical Leave Act, 29 U.S.C. §§ 2612-13 (2000) (setting a certification standard for pregnancy-related illness leave higher and harder to reach than the standard for childbirth or parental leave).
\item \textsuperscript{64} See \textit{Gerety}, 877 A.2d at 1234 (stating Gerety was fired upon expiration of leave and told she could be rehired but would lose all seniority benefits).
\end{itemize}
although non-pregnant employees can be terminated after exhausting available leave, they would never face the situation Gerety faced where, because of the employee’s specific condition, leave is available by statute but not technically accessible. This disparate impact is clearly prohibited by the PDA. As the Gerety decision shows, however, pregnant employees facing gaps in coverage have not always been successful when alleging disparate impact under anti-discrimination statutes.

A. How The FMLA Falls Short

The FMLA has fallen short of meeting the needs of pregnant employees in two main ways. First, the FMLA’s separation of pregnancy-related leave into three categories of absences forces pregnant employees to meet stricter eligibility requirements for leave related to illnesses during gestation than leave related to the act of childbirth and subsequent parental leave. This in turn raises the risk that pregnant employees will suffer a gap in coverage not faced by non-pregnant employees seeking leave under the FMLA, thereby disparately impacting pregnant employees. Second, by only covering twelve weeks of leave, the FMLA simply does not provide enough leave for pregnant employees and therefore makes gaps in leave coverage more likely, especially in the case of high-risk pregnancies.

While the FMLA has made inroads toward meeting the needs of pregnant employees, the separate treatment of pregnancy and childbirth within the law creates different eligibility requirements for coverage. This can have a discriminatory impact on pregnant employees. The FMLA automatically covers the birth of an employee’s child under either the first provision providing for parental leave or the fourth provision providing for medical leave. The FMLA does not automatically cover a pregnant employee, like Gerety, who wants to use medical leave for illness related to pregnancy.

65. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000) (stating that pregnant employees must be treated the same as “persons not so affected but similar in their ability or inability to work...”).

66. Gerety, 877 A.2d at 1240 (finding that Hilton’s leave policy did not have a disparate impact on pregnant women because it would also impact men facing gender-specific medical conditions such as testicular cancer).

67. See, e.g., CAL. UNEMP. INS. CODE § 3300-3306 (2005) (addressing the fact that most families in California cannot afford to take unpaid leave under the FMLA by providing up to six weeks of paid leave to employees for the care of newborn children).

68. 29 U.S.C. § 2612 (requiring employees taking medical leave for pregnancy-related illness to prove that their symptoms are a serious medical condition).

69. See Multiple Pregnancies: Maternal Complications, WOMEN’S HEALTH CHANNEL, http://www.womenshealthchannel.com/multiplepregnancies/risks_maternal.shtml (last visited Nov. 15, 2005) (stating that multiple births are twelve times more likely to be premature and therefore, often require long periods of bed rest for the mother).

70. 29 U.S.C. § 2612 (requiring pregnancy-related illness to meet the requirements for “serious medical condition,” while not requiring childbirth to meet any standards). As a result, only pregnant women would be required to differentiate symptoms within one medical condition. Id.

71. Id. (noting that the adoption of a child would also be automatically covered for parental leave).
gestation before childbirth. Instead, it requires the pregnant employee to prove that her illness qualified as a "serious medical condition" which would prevent her from performing the essential functions of her job.\textsuperscript{72}

The FMLA classifies serious medical condition as any condition that requires (a) inpatient care in a hospital, hospice, or residential medical care facility; or (b) continuing treatment by a health care provider.\textsuperscript{73} Pregnancy-related illness fits in the second category.\textsuperscript{74} Indeed, Congress envisioned this category as covering all illnesses related to gestation, including common symptoms.\textsuperscript{75} In fact, the legislature explicitly included "any period of incapacity due to pregnancy, or for prenatal care" within the continuing care test.\textsuperscript{76}

Despite this clear legislative intent, courts have incorrectly required that pregnancy-related absences be the result of severe symptoms.\textsuperscript{77} In \textit{Gudenkauf v. Stauffer Communications, Inc.} the court denied an employee's FMLA claim despite the presence of morning sickness, stress, nausea, back pain, swelling, and headaches.\textsuperscript{78} In direct conflict with the legislative intent of the FMLA, the court concluded that these were no more than the normal complications of pregnancy and did not prevent the employee from performing the essential functions of her job.\textsuperscript{79} Under the standard from \textit{Gudenkauf} and other similar cases, the FMLA would provide leave to a pregnant employee for a normal childbirth without complications but would not provide leave for a normal illness related to gestation. For a pregnant employee to qualify for leave related to illness during gestation, she would need to prove that her symptoms were severe.\textsuperscript{80} While some employees, like Gerety, may be able to meet this higher standard because of the high-risk nature of their pregnancies, a pregnant employee attempting to receive medical leave for normal pregnancy-related illness would face a


\textsuperscript{73} 29 U.S.C. § 2611(11).

\textsuperscript{74} Id.

\textsuperscript{75} See H.R. REP. No. 103-8, pt. 1, at 29 (1993) (listing among the conditions to be covered "ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth....").

\textsuperscript{76} 29 C.F.R. 825.114(a)(2).

\textsuperscript{77} See Kindlesparker v. Metropolitan Life Ins. Co., No. 94-C-7542, 1995 WL 275576, at *1 (N.D. Ill. May 8, 1995) (assessing a plaintiff's claim that she was discharged when her pregnancy required medical attention and denying relief because her pregnancy was not a serious medical condition because it did not involve severe symptoms).


\textsuperscript{79} Id. at 469, 475-76 (requiring the pregnant employee be incapacitated and unable to perform the essential functions of her position).

\textsuperscript{80} 29 U.S.C. § 2613 (2000) (allowing the employer to require the employee seek a second opinion if he doubts the results of the first certification of leave).
much stricter standard than a pregnant employee attempting to receive medical or parental leave for childbirth.\textsuperscript{81}

By differentiating between pregnancy-related illness and childbirth, the FMLA forces pregnant employees to look at continuous aspects of their pregnancies as separate conditions and to meet differing standards based on the stage of their condition, something a non-pregnant employee would not be required to do.\textsuperscript{82} As a result, an employer can treat a pregnant employee differently than a non-pregnant employee. This different treatment clearly violates the PDA and creates a disparate impact on pregnant employees by forcing pregnant employees to meet different leave requirements than those required of non-pregnant employees.\textsuperscript{83}

By providing an inadequate amount of leave time, the FMLA has also fallen short of its goals of meeting the needs of working mothers. While the Act has added greatly to the rights of pregnant employees by providing leave where before none was available, the FMLA increased the likelihood of gaps in coverage by not acknowledging that pregnancy sometimes requires enhanced leave. The twelve weeks provided for both pregnancy-related illness and childbirth under the FMLA falls far short of meeting the realistic needs of most pregnant women, in particular women like Gerety who experience complications from high-risk pregnancies that can require extensive leave.\textsuperscript{84} Since there is only one bank of twelve weeks from which a pregnant employee can draw, there is a high likelihood that she will exhaust her FMLA leave long before the birth of her child.\textsuperscript{85}

**B. State Leave Legislation and the PDA: The Disparate Impact of the Separation of Pregnancy into Distinct Categories of Absences**

The court in Gerety correctly called on state lawmakers to respond to the needs of pregnant women with enhanced leave legislation that would prevent gaps in coverage from occurring.\textsuperscript{86} Any future legislation will need

\begin{itemize}
  \item \textsuperscript{81} See id. § 2612 (2000) (covering work absences for the birth or care of a child, the adoption of a child, to care for an ill family member, or the employee's own illness that makes it impossible to perform the essential functions of her job).
  \item \textsuperscript{82} See id. (requiring pregnancy-related illness to be severe and incapacitating, while not requiring the presence of abnormal severity for childbirth).
  \item \textsuperscript{83} See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000) (requiring all pregnant employees be treated the same as similarly disabled employees for all "employee-related purposes").
  \item \textsuperscript{84} See Multiple Pregnancies, supra note 69 (stating that because of the multitude of risks involved in multiple births, longer leave is often required).
  \item \textsuperscript{85} See, e.g., Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233, 1234 (N.J. 2005) (stating that Gerety exhausted all twelve weeks of FMLA leave while still in the second trimester of her pregnancy).
  \item \textsuperscript{86} Id. at 1241 (arguing that it is the legislature's job to require enhanced leave and that the Court can not "legislate our personal preferences . . .").
\end{itemize}
to look closely at the examples from several states whose leave legislation prevents potential gaps from forming.\textsuperscript{87}

1. \textit{State Leave Laws and Gaps in Coverage for Pregnant Employees}

Several states have responded to the inadequacies of the FMLA. Eighteen states and the District of Columbia have enacted legislation that provides medical and/or parental leave above and beyond that offered under the FMLA.\textsuperscript{88} Notwithstanding some differences between states, most state legislatures have followed the scheme of the FMLA with leave that can be used for pregnancy, childbirth, or a related medical condition.\textsuperscript{89} Several states, like New Jersey, have restricted the leave to one category of absence. In so doing, leave legislation in these states creates a potential gap between medical and parental leave as illustrated in \textit{Gerety}.\textsuperscript{90} Under the legislative schemes of these states, pregnant employees face a gap in leave not faced by non-pregnant employees who take temporary disability leave, and this gap creates a disparate impact on pregnant employees in violation of the PDA.\textsuperscript{91}

State legislatures can provide additional, but restricted, leave for pregnant employees in four ways.\textsuperscript{92} First, states can provide additional leave available only for medical leave. Second, as in New Jersey, states can provide additional leave that is available for parental leave but not medical leave. Third, states can provide additional leave that is available for either medical or parental leave. Fourth, states can provide an additional amount of leave for both medical and parental leave.

The majority of states with enhanced leave legislation provide additional leave in the first two ways through a bank of time accessible for medical leave or a bank of time accessible parental leave.\textsuperscript{93} Some states, like Iowa, Louisiana, and New York, restrict the use of leave only to

\textsuperscript{87} See, \textit{e.g.}, \textit{CONN. GEN. STAT.} § 46a-60 (2005) (requiring that employers with three or more employees grant pregnant employees a reasonable leave of absence for pregnancy-related disability, thereby preventing gaps in coverage by not setting distinct time limits).

\textsuperscript{88} See \textit{GRANT ET AL.}, \textit{supra} note 4, at 17 (listing California, Connecticut, Hawaii, Idaho, Louisiana, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, and Washington as providing expanded leave).

\textsuperscript{89} See, \textit{e.g.}, \textit{IOWA CODE} § 216.6 (2004) (establishing entitlement to leave for "pregnancy, childbirth, or related medical conditions").

\textsuperscript{90} See, \textit{e.g.}, \textit{LA. REV. STAT. ANN.} § 23:341 (West 2005) (limiting leave only to medical conditions associated with pregnancy and childbirth and excluding parental leave).

\textsuperscript{91} 42 \textit{U.S.C.} § 2000e(k) (2000) (requiring all pregnant employees be treated the same as similarly disabled employees for all "employment-related purposes").

\textsuperscript{92} See \textit{GRANT ET AL.}, \textit{supra} note 4, at 6 (describing the ways in which legislators provide leave including: parental leave, medical leave, paid leave, sick leave flexibility, and disability benefits).

\textsuperscript{93} See id. (listing Iowa, Louisiana, Maine, Massachusetts, Minnesota, New Jersey, Tennessee, and Vermont as providing anywhere from six to twenty-six weeks additional medical leave for pregnant employees).
medical conditions related to pregnancy. Because it excludes parental leave, the FMLA considers this state leave additional to what the FMLA provides. Therefore, the FMLA would cover a pregnant employee for another twelve weeks of parental leave upon the birth of her child. For example, if a pregnant employee in such a state first exhausts her state medical leave during pregnancy, she would only be eligible for federal leave upon the birth of her children. Therefore, the exclusion of parental leave under state law creates another potential gap in leave not faced by non-pregnant employees. As with other gaps in coverage, a pregnant employee would be vulnerable to termination or loss of seniority.

A similar gap is created by the second way states, such as Massachusetts and Minnesota, provide leave with legislation like the NJFLA that limits leave for pregnant employees to parental leave and excludes medical leave for pregnancy-related illness. Again, because of the separation of absence into distinct categories and the exclusion of one category, the FMLA would consider leave provided for pregnancy-related medical condition to be in addition to any state provided parental leave. In these states, the exclusion of medical leave under their leave laws creates a gap between federally provided medical leave and state provided parental leave. As in Gerety, the gap will exist where the employee exhausts all of her FMLA medical leave on pregnancy-related illness before the birth of her children, at which point she would become eligible for state parental leave. This gap and the risk of termination that accompanies it also have a disparate impact on pregnant employees.

94. IOWA CODE § 216.6(2) (2004) (requiring employers with four or more employees to provide eight weeks of leave); LA. REV. STAT. ANN. § 23:342 (West 2005) (requiring employers with twenty-five or more employees to provide a reasonable amount of leave not to exceed four months); N.Y. WORK. COMP. LAW §§ 201(9)(B), 205 (Consol. 2005) (requiring employers with one or more employees to provide twenty-six weeks of leave).

95. Compare IOWA CODE § 216.6(2)(e) (granting eight weeks of leave for pregnancy, childbirth, or related medical conditions for employees at businesses with four or more employees), with 29 U.S.C. § 2612 (2000) (providing twelve weeks of leave for the birth of an employee's child at a business with fifty or more employees).

96. See 29 U.S.C. § 2612 (recognizing that childbirth triggers both medical and parental leave).

97. See, e.g., Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233, 1235 (N.J. 2005) (stating that the employer would have rehired Gerety but she would have lost almost ten years of seniority).


99. 29 U.S.C. § 2651 (prohibiting leave provided under the FMLA from superseding any additional leave provided under state law).


101. See Gerety, 877 A.2d at 1236 (2005) (reporting that plaintiff exhausted leave and was fired on April 2nd and gave birth on April 14th).

The third way states provide enhanced leave is by creating one bank of time that is available for both medical and parental leave. As previously mentioned, when state leave provides for both medical and parental leave, the FMLA will not consider the leave additional to the Act's coverage and the state leave will run concurrently with the federal leave. States avoid this problem through increasing the amount of leave provided or by decreasing the number of employees required for eligibility. When the amount of leave provided for employee requirements is changed, the state legislation no longer replicates the FMLA and is then considered additional leave. Therefore, it does not run concurrently. By still covering both medical and parental leave in one bank of time, however, they avoid gaps between the coverage of state-provided medical leave and federally provided parental leave or vice versa. For example, both Maine and Vermont circumvent the FMLA by reducing the number of employees needed for eligibility. Even if an employer had enough employees to qualify for FMLA, and therefore, by default, the lesser requirements under state leave laws, any pregnant employees would not be eligible for both state and federal leave. In these states, only one bank of twelve weeks is available to pregnant employees. As such, there are no discriminatory gaps, but this is still not enough leave for many pregnant employees. For example, Gerety would have exhausted her leave and would have not had any additional leave available.

The fourth way states provide enhanced leave is by providing additional banks of time for both medical and parental leave instead of providing one bank of time accessible for both. An example of the fourth approach is California. Many work and family groups recognize California as a leader in providing enhanced medical and parental leave to its citizens. California's Fair Employment and Housing Act (FEHA) requires all private employers with five or more employees to provide up to

103. 29 U.S.C. § 2651 (prohibiting federal parental and medical leave from superseding only state parental and medical leave laws that provide additional leave).
104. See, e.g., VT. STAT. ANN. tit. 21, §§ 471-2 (2005) (requiring employers with ten employees or more to provide leave, as opposed to the FMLA's eligibility requirement of fifty or more employees).
105. See ME. REV. STAT. ANN. tit. 26, § 844 (requiring an employer with fifteen or more employees to provide ten weeks of leave for the birth of a child or a serious health condition); VT. STAT. ANN. tit. 21, §§ 471-2 (requiring employers with ten employees or more to provide twelve weeks of leave for pregnancy-related medical conditions or to care for a newborn child).
106. See 29 U.S.C. § 2651 (allowing only additional state leave not equivalent state leave).
108. See e.g., GRANT ET AL., supra note 4, at 17-18, 23, 35, 42 (giving California an A- for providing additional leave time for both pregnancy-related medical leave and parental leave to care for a newborn, with Hawaii, the District of Columbia, and Oregon following closely behind with B+ scores because they do not provide paid leave as does California).
109. See GRANT ET AL., supra note 4, at 18-20 (awarding California the highest grade of any state for its parental leave policy combining paid and unpaid leave).
four months of unpaid job-protected leave for pregnancy-related medical conditions. Since the coverage focuses on the physiological aspect of pregnancy, it covers childbirth.

The leave provided under the FEHA is in addition to any leave the pregnant employee may take under California’s Family Rights Act (FRA). The FRA provides that an employee is eligible for a second bank of twelve weeks of leave upon the birth of a child. The FRA shares almost all of its provisions and much of its legislative history with the FMLA. With regard to pregnant employees, they differ in one important way—the provision of the FRA that allows leave for serious medical conditions excludes any leave for pregnancy, childbirth, or related medical conditions. Under the FRA, a pregnant employee is only eligible for coverage upon the birth of her child.

This fourth approach has the benefit of not creating a potential gap between federal and state leave. There is a potential gap between the state medical and parental leave, however, because states following this approach still set finite limits on medical leave. Despite the generous allotments of leave under both the FEHA and the FRA, an employee in Gerety’s position would still have faced a gap in coverage. Specifically, Gerety would have exhausted her pregnancy-related illness leave two months before the birth of her twins, and she would have faced a larger gap without coverage then she actually faced under Hilton’s leave policy and the FMLA. By extending a maximum of four months of medical leave, California does extend leave to employees whose employers’ policies are not as generous as

110. Fair Employment and Housing Act, CAL. GOV’T CODE §§ 12926(d), 12945(a) (West 2005). FEHA contains no requirement that women who take leave have worked for a certain number of hour or a certain amount of time. Id.
111. Id. at § 12945 (a).
112. Liu v. Amway Corp., 347 F.3d 1125, 1132 (9th Cir. 2003) (finding that under CFRA, which adopts the language of FMLA, a pregnant employee was entitled to unpaid leave after her FEHA pregnancy disability leave expired).
114. See GRANT ET AL., supra note 4, at 7 (noting the legislative findings of both laws explore the changing workforce and the challenges of such changes).
115. CAL. GOV’T CODE § 12945.2(a)-(b), (c)(3)(A)-(C) (allowing leave for the “birth of a child of the employee” but excluding pregnancy-related disabilities including childbirth).
116. Id. (requiring an employer to have fifty or more employees for an employee to be eligible for leave). Such a requirement greatly reducing the number of citizens with access to such leave.
118. Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233, 1234 (N.J. 2005) (reporting that Gerety was on leave for twenty-six weeks, which would have been beyond the twenty-four covered under California law).
Hilton's.119 Of course, pregnant workers with high-risk pregnancies like Gerety would still run out of leave.120 As a result of this gap and the accompanying risk of termination, any pregnant employee again faces a disparate impact not faced by non-pregnant employees.

2. Adopting a Reasonable Accommodation Standard to Prevent Discriminatory Gaps in Leave Coverage

One way to prevent the discriminatory gaps in coverage discussed above is to follow the approach advocated by the dissent in Gerety and use the ADA's reasonable accommodation analysis to determine whether a pregnant employee needs additional leave.121 Three states function under the standard of leave called for by the dissent in Gerety.122 Connecticut, Hawaii, and Montana require reasonable accommodation for women taking pregnancy-related disability leave.123 A reasonable accommodation approach sets a floor below which employers cannot sink by investing pregnant employees with an affirmative right to be treated according to their needs instead of the needs of employees in very different medical situations.124 By creating a flexible standard, pregnant employees would have access to enough leave to meet their needs and would no longer face finite amounts of medical leave that could run out before childbirth.125 This would especially benefit women like Gerety who have high-risk pregnancies requiring extensive leave. By eliminating gaps in coverage, state legislatures would prevent the disparate impact of existing leave legislation currently felt by pregnant employees.

119. Id. at 1243 (Portiz, C.J., dissenting) (acknowledging that Hilton's policy of providing an additional fourteen weeks of leave went above and beyond what was required by law, but that it still did not change the fact that the impact of the policy was discriminatory).
120. See Multiple Pregnancies, supra note 69 (noting that women pregnant with twins or other multiples are likely to need more leave prior to the birth of their children).
121. 42 U.S.C. § 12111 (2000); See also D'Andra Millsap, Comment, Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act, 32 HOUS. L. REV. 1412, 1430 (1996) (noting the ADA forces employers to accommodate a disabled person's needs either through making physical changes to the workplace or changing the work environment or structure).
122. Gerety, 877 A.2d 1233, 1243 (N.J. 2005) (Poritz, C.J., dissenting) (arguing that the court should require that employers institute a flexible leave policy to reasonably accommodate pregnant employees).
123. CONN. GEN. STAT. § 46a-60 (2005) (requiring employers with three or more employees to grant “a reasonable leave of absence” for pregnancy-related disabilities); HAW. ADMIN. RULES § 12-46-108 (2005) (requiring all employers to grant job-protection for a “reasonable period of time” for disability due to pregnancy, childbirth, or related medical condition).
124. See Millsap, supra note 121, at 1433-34 (arguing that reasonable accommodation avoids the pitfalls of a male-centered norm found in the equal treatment standard and the discrimination problems when special treatment is required).
125. See, e.g., Fair Employment and Housing Act, CAL. GOV'T CODE § 12945 (2005) (requiring employers to grant leave for pregnancy-related illness, but strictly limiting the amount to four months).
The equal treatment for pregnant employees mandated by the PDA has always been difficult to understand and enforce because there is no male equivalent to pregnancy.¹²⁶ Instead of trying to force pregnant employees to meet the standards of other non-similarly situated employees, a reasonable accommodation approach would require employers to change the workplace to meet the needs of pregnant employees.¹²⁷ Reasonable accommodation requires case-by-case analysis that would not only prevent unfair comparisons, but also prevent discriminatory gaps or disparate impacts by providing leave for clearly disabling pregnancy-related illness up until birth.¹²⁸

As a result of Gerety, the New Jersey Senate passed a bill in the 2004-2005 session that adds familial status to the state’s LAD and adopts the reasonable accommodation standard called for by the dissent in Gerety.¹²⁹ Senate Bill 2522 expressly provided for “reasonable accommodations for pregnancy or pregnancy-related conditions unless to do so would impose an undue hardship upon the employer.”¹³⁰ By requiring a reasonable accommodation standard, the New Jersey Senate attempted to prevent any leave gaps from forming and will put pregnant employees on equal footing with non-pregnant employees as required by the PDA. A similar bill has been introduced in the 2006-2007 session and is currently before the Senate Judiciary Committee.¹³¹

C. Applying the Disparate Impact Theory of Discrimination to Pregnant Employees Seeking Leave

In the absence of comprehensive leave legislation, most women are left to address this issue in the courts through disparate impact theory. The court in Gerety explored whether plaintiffs could use anti-discrimination statutes to force employers to fill the gaps in leave faced by many pregnant employees.¹³² In examining this issue, the court made several mistakes that

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¹²⁶ Millsap, supra note 121, at 1424, 1434 (criticizing the equal treatment standard because the inherent standard is a male-centered standard with women struggling to become more like men.).
¹²⁷ Id. at 1434 (arguing that since every employee has their own standard upon which to be judged there are no unnecessary comparisons).
¹²⁸ Id. at 1435.
¹²⁹ See 2004 N.J. Sess. Law Serv. (Senate 2522) (West) (including independent contractors within the definition of employee).
¹³⁰ Id. See also 2004 N.J. Sess. Law Serv. (Assembly 4157).
¹³¹ 2006 N.J. Sess. Law Serv. (Senate 1075) (West).
¹³² Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233, 1233 (2005) (concluding that a plaintiff is not asking for judicial remedy in facing discriminatory treatment, but rather is asking for preferential treatment).
reflect the uphill battle faced by pregnant plaintiffs using disparate impact theory.133

First, the Gerety court and others have incorrectly interpreted the PDA as only requiring that pregnant employees have equal access to their employers' temporary disability policy.134 For example, the Gerety court found that New Jersey's anti-discrimination statute only required neutral application and equated the satisfaction of that requirement with a finding of no disparate impact.135 Therefore, even when the courts allow disparate impact theory to be used, their analysis ends with proof of neutral application.136

If the PDA only required neutral application of the leave policy already in place, then it would fall far short of truly protecting pregnant employees from discrimination and a disparate impact charge would be completely ineffective. As the dissent in Gerety pointed out, the PDA has the "broad remedial purpose" of eliminating all discrimination and that mere neutral application of leave policies falls far short of achieving that goal.137 If the PDA only required neutral application then claims of disparate impact would be inapposite because the purpose of the disparate impact theory of discrimination is to provide a remedy even if there is neutral application of a workplace policy.138 Therefore, disparate impact claims require that plaintiffs prove discriminatory impact to counter any claims by the employer of business necessity.139 If a plaintiff could only succeed where there was no facially neutral policy, then the disparate impact cause of action would be completely unnecessary because all such claims would fall under a disparate treatment analysis.140

133. Id. at 1234-35 (describing the company's policy as allowing twelve weeks of leave under either the FMLA or New Jersey's Family Leave Act, in addition to fourteen weeks provided by the company).

134. See EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 949 (10th Cir. 1992) (concluding that the PDA only required neutral application between pregnant employees and non-pregnant, but similarly disabled, employees).

135. Id. at 1240 (stating that there is no disparate impact because there was gender-neutral application which is "what the LAD requires . . . ").

136. See Gerety, 877 A.2d at 1240-42. Gerety misinterprets the requirements of disparate impact and incorrectly rejects pregnant women as a protected class.

137. Id. at 1243-44 (Poritz, C.J., dissenting) (disagreeing that the judiciary usurps legislative function in requiring enhanced leave and stating that the LAD would be ineffective without judicial intervention).


140. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating that an employee can establish a prima facie case of disparate treatment by showing that she belongs to a protected class, that she applied and was qualified for a job, that despite her qualifications she was rejected, and that after this rejection, the position remained open).
By focusing only on application, the Gerety court never truly examined the impact of Hilton's policy on Gerety and other pregnant employees. The court only mentioned that additional leave would have been available to Gerety after childbirth but ignored completely the thirteen-day gap between when Hilton fired Gerety and when the state would have provided her with additional leave for childbirth. Mr. Gerety also had a baby but was not fired—a fact which the court never discussed. When courts focus only on neutral application, they ignore impacts such as these. While not every pregnant employee works with her spouse so that the court can clearly see a discriminatory impact, disparate impact can be proven by looking to the male employees with children who enjoy the birth of a child without job-related harm. For pregnant employees, it is not only that their partners will not lose their jobs as a result of becoming a parent, but also that the law would not force other temporarily disabled employees to fit their medical condition into separate and distinct categories of illness to meet the requirements of leave legislation.

Second, courts continually refuse to see pregnancy as a medical condition unique to women and, therefore, that any leave policy affecting only pregnant women should be seen as per se discrimination as stated in the PDA. The court in Gerety concluded that pregnancy is a medical condition unique to women, but that with regards to leave, pregnancy is no different than medical conditions affecting only men.

The court's logic was erroneous for a number of reasons. First, as the plaintiff argued, pregnancy is very different from a gender-specific cancer, such as testicular or ovarian cancer, primarily because cancer affects both genders. The court countered that Gerety was requesting preferential treatment, not protection from discrimination, which the court concluded was not required by federal or state law.

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141. Gerety, 877 A.2d at 1240 (examining no statistics with regards to the impact on pregnant women of the policy or even selective individual evidence beyond that presented by Gerety herself).
142. Id. at 1241 (mentioning additional leave when expounding on the "generosity" of Hilton's policy and how it far surpassed the requirements of the law but failing to mention the gap the policy created).
143. Id. at 1246 (Poritz, C.J., dissenting) (pointing out that Mr. Gerety was able to keep his job and that the fact that Mrs. Gerety was not, is precisely what the Court stated anti-discrimination laws were trying to prevent).
144. See 42 U.S.C. § 2000e(k) (2000) (stating that pregnancy is unique to women and therefore should be included in the definition of gender discrimination).
145. Gerety, 877 A.2d at 1240 (asserting that the plaintiff would require more leave for a pregnant woman than a woman suffering from ovarian cancer).
146. Id. at 1241 (responding to plaintiff's argument that both sexes can be affected by cancer by arguing that pregnant women should not be afforded more leave than women with ovarian cancer).
147. Id. at 1242 (proffering that it is the legislator's duty to decide if employers should be required to provide "enhanced leave to cover the panoply of medical needs that may arise during pregnancy").
the issue. The issue was not one of preferential treatment but of the inadequacy of leave provided for pregnancy-related illness under the employer policy and state and federal law and the disparate impact of that inadequacy upon pregnant employees. Pregnancy is a medical condition not only unique to women, but unique from other medical conditions because pregnancy has a definitive end. Policies such as Hilton's discriminate against pregnant employees using leave for pregnancy-related illness not only by limiting the leave available to medical conditions unrelated to pregnancy, but, more importantly, limiting the leave available after childbirth. Leave legislation would not limit a non-pregnant employee in such a way, especially if such limitations created a gap in coverage. Therefore both the LAD and the PDA prohibit this type of treatment.

Last, in rejecting disparate impact theory claims courts ignore precedent that requires employers to comprehensively meet the needs of pregnant employees. Several cases set a clear precedent regarding the use of disparate impact theory in pregnancy discrimination cases. Other courts have still found a disparate impact on pregnant employees even when the employers, as in Gerety, complied with the legislation in place at the time.

148. Id. at 1246 (Poritz, C.J., dissenting) (arguing the majority completely misinterpreted the LAD and the broad remedial powers granted the court under the legislation).
149. Id. (arguing that the leave policy would only be preferential if both men and women could become pregnant and women then asked to be treated differently).
150. Id. at 1243 (interpreting the LAD broadly as prohibiting all discrimination and granting the judiciary remedial power to end such discrimination without usurping the legislature).
151. See 42 U.S.C. § 2000e(k) (stating clearly that pregnant employees should be treated the same as "other persons not so affected but similar in their ability or inability to work" with regards to benefits and leave); see also Law Against Discrimination, N.J. STAT. ANN. § 10:5 (West 2006).
152. See Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job, 26 HARV. WOMEN'S L. J. 77, 131 (2003) (suggesting that plaintiffs desiring to prove a disparate impact anticipate the usual objections to the use of statistical evidence and perhaps use demographic data that shows the impact on women in general).
154. See Scherr, 867 F.2d at 978 (finding the school's policy of disallowing a combination of leave could be challenged under disparate impact, even though the policy was legal under federal and state leave legislation); see also Abraham, 660 F.2d at 813 (finding that the company's policy of allowing only ten days of leave had a disparate impact on pregnant employees, even though the policy did not violate federal and state leave legislation); Warshawsky, 768 F. Supp. at 654 (finding that the employer's policy of firing first-year employees who required long-term sick leave had a discriminatory impact, even though the policy did not violate federal and state leave legislation).
Of course, employers’ policies are diverse and the response to pregnancy based disparate impact claims differs from court to court. As the Gerety dissent argued, however, the presence of a leave gap reflects a bigger issue than just insufficient leave. For example, in Abraham v. Graphic Arts International Union, the court recognized that “[a]n employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have.” Unfortunately, many courts reflect the majority stance in Gerety that so long as employer policies comply with federal and state leave policies they are not discriminatory. While state legislation may be generous and employers may comply with the law, pregnant employees still are disparately impacted by the existence of gaps in coverage.

D. Implications and Recommendations

1. Developing Comprehensive Leave Laws to Benefit Workers, Employers, and Society

Women do not experience pregnancy in clearly definable categories. Pregnancy is a holistic experience that covers physical, psychological, economic, and emotional aspects of a person’s life and the law should treat it as such. Despite increasing evidence that expanded leave would be best for both employer and employee, the United States does not provide the comprehensive leave pregnant employees need to meet their own and their growing families’ needs.

Comprehensive leave for pregnant employees has several benefits. It can prevent the formation of other related medical conditions. Adequate leave can result in better prenatal and postnatal care, which is beneficial not

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155. See Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 365 (1984-5) (suggesting that the reason for the lack of precedent applying disparate impact theory to pregnancy discrimination cases is because in earlier years overt discrimination predominated, necessitating the application of disparate treatment theory and only later in the 1970's did it become apparent that neutral rules could also be discriminatory).

156. Gerety v. Atlantic City Hilton Casino Resort, 866 A.2d 1233, 1243 (N.J. 2005) (Poritz, C.J., dissenting) (arguing this lack of sufficient leave has a clear impact on pregnant employees).

157. Abraham, 660 F.2d at 819 (finding that despite the fact that pregnant employees had access to the same ten-day leave policy as male employees, it was “beyond peradventure” that the leave policy was too short for adequate pregnancy or childbirth leave).

158. Gerety, 877 A.2d at 1234 (emphasizing that the employer already provided an amount of leave “more than twice as much as required by law”); see also Davidson v. Franciscan Health Sys. of the Ohio Valley, Inc., 82 F.2d 768, 772 (2000) (finding that a hospital’s policy of fourteen weeks of leave in addition to the twelve weeks provided by FMLA did not violate the PDA).

159. GRANT ET AL., supra note 4, at 3 (noting that despite political rhetoric, the U.S. is ranked virtually last among industrialized nation with regards to parental leave).

160. E.g., Shellenbarger, supra note 15 (reporting that fifty to seventy percent of women experience post-partum anxiety, which can be exacerbated by the stress of returning to work too soon).
only for the mother and child, but for society in general. More importantly, adequate leave can result in a bevy of benefits for children including: improved brain development, social development, and overall well being. Adequate leave policies also produce positive results for society by increasing the likelihood that children will be immunized and, thereby, decreasing childhood mortality rates.

Comprehensive leave also benefits employers. Several studies have shown that access to leave is directly tied to employee retention and increased productivity. Despite not providing enough leave to meet fully the needs of working parents, the FMLA has already had a positive impact on profitability and growth of businesses.

2. Recommendations

The number of working women reporting instances of pregnancy discrimination continues to rise even as the birth rate declines. As a result, pregnant women are taking less time off and working until their last month of pregnancy. This is an important issue that states, the federal government, and the courts need to address.

The logical first step is to adopt reasonable accommodation standards for medical and parental leave. In doing so, states would treat pregnancy comprehensively instead of drawing confusing lines that can create gaps in coverage. The federal government should also include a reasonable accommodation standard within the PDA that applies to all pregnancy-

161. See GRANT ET AL., supra note 4, at 6 (arguing that parents are already attuned to the benefits of leave and want better legislation).
162. See id. (citing a survey that found four out of five parents with children believe that many new mothers are pressured to return to work too quickly).
163. See id. (arguing that better parental leave policies would help other societal problems, such as the lack of quality child care).
164. See id. at 11 (stating that an increase in the leave available to employees, be it paid or unpaid, is beneficial to employers).
165. Katherine Ross Phillips, Getting Time Off: Access to Leave Among Working Parents (The Urban Institute 2004) (showing that morale improves and employees show more loyalty toward the company where leave is provided).
166. Id. (stating that in 2000, ninety percent of covered establishments reported that the FMLA had either a positive or neutral effect on profitability and growth).
167. Rob Schumaucher, Pregnant Workers Report Growing Discrimination, USA TODAY, Feb. 16, 2005, at 1B, (reporting that pregnancy discrimination complaints to the EEOC jumped thirty-nine percent between 1999 and 2003, even though the birth rate dropped nine percent).
168. Sharon Jayson, New Moms Taking Less Time Off With Babies, USA TODAY, Nov. 13, 2005, at 5D (reporting that about fifty-seven percent of new moms worked full time while pregnant in 1996-2000 as opposed to about forty percent in 1961-65). In addition, over half of pregnant employees worked into the last month of pregnancy. Id.
169. Millsap, supra note 121, at 1450 (arguing that the federal government should also adopt a reasonable accommodations standard under the PDA).
related conditions, including childbirth. The physiological needs of pregnant women have a definitive end, and therefore, could be safely dealt with under the reasonable accommodation standard.

The federal government should also augment or amend the FMLA to provide a separate system of parental leave that begins several weeks after childbirth. This would ensure that employees would have leave both before and after the arrival of their child. Such post-delivery leave could have finite amounts of coverage to limit employer complaints but would still provide leave that is essential to American families.

IV. CONCLUSION

The separation of pregnancy-related leave into the three distinct periods of absence (absence due to illness related to gestation, the act of childbirth, and parental leave) creates potential gaps in coverage that can deprive pregnant employees of job protection. While legislators have gone a long way in responding to the needs of pregnant employees, their piecemeal efforts have resulted in gaps between medical and parental leave provided at both the state and federal levels. Only a reasonable accommodation standard that refuses to set strict leave limits on pregnant employees can solve this problem and adequately provide for pregnant employees' needs. Where such legislation is not available, employees who face a gap in coverage should still be able to demand a remedy under disparate impact theory of discrimination.

170 Id. (arguing that the adoption of a reasonable accommodation standard within the PDA would prevent inconsistent results among states and employers).
171 E.g., California Family Rights Act, CAL. GOV'T CODE § 12945.2(c)(3)(A) (2005) (providing twelve weeks of leave for the birth of a child or for a serious medical conditions, excluding pregnancy-related conditions).
172 E.g., Gerety v. Atlantic City Hilton Casino Resort, 877 A.2d 1233, 1236 (N.J. 2005) (stating that the plaintiff was fired during thirteen day gap in coverage between federally provided medical leave and state provided parental leave).
173 Id., 877 A.2d at 1243 (Poritz, C.J., dissenting) (arguing that plaintiff should be reasonably accommodated during her pregnancy and that this is not preferential treatment because of the unique reproductive position of women).