

**‘EMPLOYED BUT NOT EMPOWERED’: ANALYSING INDIA’S MATERNITY
BENEFIT SCHEME**

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“The health of a mother and a child is a more telling measure of a nation’s state than economic indicators” Harjit Gill (Chief Executive Officer, ASEAN and Pacific) ¹

ABSTRACT

The debates surrounding maternity leaves had been hanging by a thread in the working sector since decades. The Maternity Benefit scheme of India which had been following outdated provisions was not able to meet the demands of the working women of the country. Several legal loopholes and strict interpretation of the statute resulted in gross denial of the maternal health and rights of women, the expansion of which was the intended aim of the legislation. The Amendment to the Act proposed in 2017 surely took a step forward in the right direction but fell flat in rectifying the existing gaps in the previous legislation. The paper aims to highlight the legal obstacles as well as socio-cultural factors that hinder the financial autonomy of women during the process of pregnancy and childcare. The author aims to look at the issue from an interdisciplinary lens and aspires to propose solutions based on successful international models with the hope of achieving the desired goal of quality maternal health.

Keywords: Maternity Benefit, financial autonomy, maternal health, gender justice, inclusivity

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¹Harjit Gill, Improving healthcare for mothers and children in Asia, WORLD ECONOMIC FORUM (Apr.15, 2015, 8:00 PM), <https://www.weforum.org/agenda/2015/04/improving-healthcare-for-mothers-and-children-in-asia/>

INTRODUCTION

The quest for Gender Justice and Equality of Opportunity in India is a movement that has been going on for decades, growing rapidly through the contributions of various women and men trying to affect change in Indian society. This pervasive problem of gender inequality has long-lasting, deep roots in the patriarchal structure of Indian culture, which has put men on a higher pedestal since time immemorial, leaving women to suffer devastating economic and social consequences.

As we move towards the modern conversations of bringing about the much-needed gender balance in the economic and social structures, one of the most powerful weapons in this fight is the agency and financial autonomy of women. Economic independence for women has proven to have effective social benefits in totality that ultimately aids in their overall upliftment at the national level.

The basic concept underlying all the conversations for the upliftment of marginalised sections is that pure equality does not exist in the true sense. Notwithstanding the fact that it is expressed in our legal codes such as the Constitution and other statutes, every individual is born in different circumstances, religions, race, ethnicity, cultures, economic backgrounds, etc. Even men and women are not born equal and have several anatomic and biological differences.² *'Equals cannot be treated unequally and unequals cannot be treated equally'* is the basic underlying constitutional principle of Article 14 enshrined and reiterated in various judgements over the years.³

Biologically, the female has been empowered with the power to bear children. This process of childbirth and child-rearing has been regarded as a demanding period for a woman requiring proper care and nourishment for both the mother and the child. The States all across the world have recognised this natural distinction and attempted to make specific policy changes in their legal codes to assist women during the process of childbirth at the same time ensuring that they do not experience any disadvantage at the workplace and can continue their journey towards financial independence. Maternity benefits are that form of positive discrimination through which the unequal class of pregnant women (and other mothers) are given benefits for their upliftment in society for the purpose of securing equal opportunity.

²Joshua Rothman, The Equality Conundrum, THE NEW YORKER (Jan. 13, 2020, 8:35 PM), <https://www.newyorker.com/magazine/2020/01/13/the-equality-conundrum>

³Indira Sawhney vs Union of India, (1993) AIR 1993 SC 477.

In spite of the progress made across the globe to effectively help women transition into the workplace, women face numerous legal difficulties and conscious and unconscious biases at the workplace till date. It is important to look at the policy changes critically and analyse it in line with its aftermath on its target population, i.e., the working women of the country.

The author through this paper attempts to answer whether the Amendment to the Maternity Benefit Act offers an effective maternity relief scheme in application or not. Further, the research aims to explore potential changes and improvements that can be made to the existing legal framework and policy to realise the objectives of the statute better.

THE LEGAL FRAMEWORK

It was in 1919 that the International Labour Organisation became the pioneer by enacting the first international standard aimed at protecting women before and after childbirth through the Maternity Protection Convention. With the evolution of the legal structure and establishment of the United Nations which aimed to advance and accelerate social justice and welfare goals, the provision of maternity relief began to be recognised as part of several international documents. ⁴ The Universal Declaration of Human Rights ⁵ and the Convention on the Elimination of all forms of Discrimination against Women also identified as the International Bill of Rights for Women ⁶ have given due importance to the concept of Maternal care and relief in pursuance of meeting the global goals of gender justice in the world.

Constitutional and Legal History

The Maternity benefit scheme prevalent in India, has roots in Article 38 (e) and (f) of the Indian Constitution under Part IV that puts an obligation on the State to make special policies for the enhancement of health and strength of all workers including women. ⁷ The Constitution of India stipulates in Article 42 of the Directive Principles of State Policy that the State should provide maternity relief along with just and humane working conditions.⁸ It must be noted that the Directive Principles of State Policy unlike Fundamental Rights are unenforceable and are

⁴ Nidhi Buch, Maternity Benefit Act, 2017 - A Game Changer for Women's Economic Empowerment, 9 GNLU J.L. DEV. & POL. 138, 141-142 (2019).

⁵ Universal Declaration of Human Rights, (10th December 1948), Art 23, United Nations General Assembly

⁶ Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, available at <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

⁷ Const. Ind. of 1950, Art 38.

⁸ Const. Ind. of 1950, Art 42.

mere directive/suggestive in nature. Yet, this social security measure was adopted by India in its legal system just about a decade after the Independence from the British rule.

The existing colonial labour codes were replaced by the Maternity Benefit Act of 1961.⁹ However, the erstwhile Employee State Insurance Act continued to remain in force.¹⁰ This central Act also contained provisions issuing certain maternity benefits in addition to the new legislation. The main feature of the 1961 Act was that it made provision of a period of 12 weeks of paid leave for a woman during the process of childbirth. During this period, she would be paid an amount equivalent to her daily average wage.¹¹ On the contrary, the maternity benefits under the Employees' State Insurance Act are founded on the principle of insurance and provided in consonance with the contribution made to the insurance fund.¹² It is pertinent to highlight that the applicability of the two Acts was not uniform. These were a few of the several irregularities and clashes that existed between the two statutes that often led to confusion, conflict, difficulty in understanding, and thereby ineffective implementation. It is important to bring into light that India was following the same maternity benefit scheme of 1961 with outdated provisions for decades until just recently when an amendment was brought forth in the year 2017.¹³

The Amendment brought to the previous Maternity Benefit scheme of 1961 in the form of the Maternity Benefit (Amendment) Act, 2017 has attempted to address the major issues with the earlier legislation and substantially increased the maternity benefits to a mother with 26 weeks of paid leave during childbirth. The Amendment Act has also included commissioning and adoptive mothers within its purview. This was a step forward in recognising a wider population of women beyond biological natural mothers. Further, it mandates set up of creche facility for establishments with more than 50 employees. The legislation also places a burden on the employer or the organisation to make the woman aware of all the benefits and rights accruing from the given legislation.¹⁴ The Amendment to the Maternity Benefit Act of 1961 undoubtedly is a bold step towards the right direction covering a large section of women within its ambit. It also places India amongst the top countries providing the highest number of paid

⁹ The Maternity Benefit Act, (1961) (Act 53 of 1961).

¹⁰ The Employees' State Insurance Act, (1948) (Act 34 of 2002).

¹¹ The Maternity Benefit Act, S.5 (1961) (Act 53 of 1961).

¹² Nidhi Buch, *Supra* note 4

¹³ Sadanand Jha, Maternity Benefits: At Present and their future in India, 18 JILI, 332, 332-336 (1976).

¹⁴ The Maternity Benefit (Amendment) Act, (2017) (Act 6 of 2017).

leaves to women during maternity in the world, however the impact of the policy changes does not suggest a complete rosy picture and suffers from several roadblocks.¹⁵

THE LEGAL LACUNAE

Lack of proper implementation remains the primary reason for the failure of most of the social welfare statutes passed by the Indian legislature, and this reason holds true even for the Maternity Benefit (Amendment) Act, 2017. The new Act has increased the paid leaves from 12 weeks to 26 weeks which is more than double the number that was in force earlier.¹⁶ The change in the scheme has also increased the paid leave period under the Employees' State Insurance Act to 26 weeks of average daily wage in confinement.¹⁷ It is observed through various news reports and surveys conducted since the Amendment that most employers have failed to provide the 26 weeks of paid leave mandated by the law.¹⁸ Without the efficient administration of the provisions of the legislation, it becomes impossible for women to reap the benefits arising out of the Act.

As per Section 2 of the said legislation, the Act covers every mine, factory, plantation, shop, establishment, etc. where ten or more persons are employed making its extent quite wide. The provision also extends to women employed either directly or indirectly through a contractual or consultant basis.¹⁹ The application and extent of operation of the Act has been a frequent area of conflict at the ground level seen in several cases in the court of law. The case of *Municipal Corporation of Delhi v. Female Workers (Muster Roll) And Anr.* is a landmark maternity benefit case where the issue of applicability of maternity benefit scheme to the daily wage, temporary workers as opposed to regular female employees was questioned. It was contended that the female workers who were employed on a muster roll in the Municipal Corporation of Delhi were not entitled to maternity benefits as they were not regularised workers and did not fall under the definition of 'workmen'. Further, the Corporation did not fall within the definition of an 'industry'. The Apex Court rejected these arguments of the

¹⁵ Saumya Uma & Aditya Kamath, Gamechanger or a Trojan Horse: Some Reflections on the Maternity Benefit Act, 1961, 20 ECON.POLIT.W., 59, 61-63 (2019).

¹⁶ The Maternity Benefit (Amendment) Act, (2017) (Act 6 of 2017).

¹⁷ Employee State Insurance Corporation, Maternity Benefits – Benefits Section, EMPLOYEE STATE INSURANCE CORPORATION – MINISTRY OF LABOUR AND EMPLOYMENT (GOVT. OF INDIA) (Nov.7, 2021, 10:50 PM), <https://www.esic.nic.in/benefits>

¹⁸ Sonal Khetarpal, Maternity Benefits (Amendment) Act 2017: 3 years later, result far from satisfactory, BUSINESS TODAY (Nov. 3, 2020, 2:42 PM), <https://www.businesstoday.in/latest/economy-politics/story/maternity-benefits-amendment-act-2017-3-years-later-result-far-from-satisfactory-277590-2020-11-03>

¹⁹ The Maternity Benefit (Amendment) Act, S.2 (2017) (Act 6 of 2017).

Corporation by citing various precedents and considered it a narrow and stale view to look at the Act keeping the Statement of Objects and Reasons of the Statute in mind. The Supreme Court passed a praiseworthy judgement and emphasized on concepts of social justice and *sentia legis* of the Maternity Benefit Act. It cited provisions of the Directive Principles of State Policy and international documents such as UDHR and CEDAW to uphold the dignity of a woman in employment. The judgement turned out to be a bulwark in extension of the maternity benefits to the muster roll employees.²⁰

Unfortunately, even after about two decades since the landmark judgement in the year 2000, the denial of benefits on issues of applicability continues to be the trend in courts. In the recent case of *Dr. Mandeep Kaur v. Union of India*, the Petitioner, a contractual employee worked for an Ex-Servicemen Contributory Health Scheme (ECHS) clinic operated by the state. Her request for maternity leave under the Maternity Benefit Act, 1961 was denied in 2018, citing the reason that there were no maternity leave provisions in her contract of employment. The Court stepped in to elucidate the direct applicability of the Act to the ECHS clinic.²¹ The Court cited the above-mentioned case in which the Supreme Court explicitly mandated that women employees, regardless of their contractual status, would be eligible for maternity leave. The Hon'ble High Court directed the respondents to pay the increased maternity leave to the petitioner.²²

A recent case came into the limelight recently which dealt with various layers of socio-legal consequences of the maternity benefit scheme. The case dealt with the contractual employment of an ayurvedic doctor in the Uttarakhand State Medical and Health Services (SMHS). The main issue of the recent judgement was whether a woman employed on a contractual basis of one year be eligible for child-care leave after delivery. Her application for child-care leave was denied on the basis that such provision was only available to permanent employees.²³ The Court while deciding the case, examined the provisions of international documents like UDHR and CEDAW to arrive at a conclusion that the maternity benefit scheme merely does not have one beneficiary i.e the mother. It established that the ultimate beneficiary in the case was the new-born child and thus there must not be any discrimination or distinction on the eligibility

²⁰ *Municipal Corporation Of Delhi v. Female Workers (Muster Roll) And Anr*, (2000) AIR 2000 SC 1274

²¹ *Dr. Mandeep Kaur v. Union of India*, (2018) Civil Writ Petition No. 1400 of 2018

²² *Municipal Corporation Of Delhi v. Female Workers (Muster Roll) And Anr*, (2000) AIR 2000 SC 1274

²³ *Tanuja Tolia v. State of Uttarakhand*, (2020) SCC OnLine Utt 337

of child-care leave applied by a permanent employee or one who is employed temporarily as the ultimate beneficiary remains constant.²⁴

DISCONNECTION OF THE LAW WITH THE REALITY

The prime goal of the maternity benefit scheme in India is to increase the engagement and participation of women in the workplace by curating a favourable environment that enables their financial independence and growth. Maternity Benefit is a necessity in today's time to enable economic independence to women, provide job security and enable a healthy work-life balance. Shockingly, since the increased period of paid leaves for women during maternity, the consequence has been quite the opposite of the intended aim. It is noted that a large share of women suffered a net job opportunity loss, especially during the fiscal year 2019-2020. As per the surveys conducted across 337 employers, the top reasons for this loss in figures is attributed to increased attrition, increase in the cost for the employer and the increased burden for the other employees.²⁵

The upgraded Act is undoubtedly and considerably wide in its application compared to other nations. It has recognised and taken within its ambit adoptive and commissioning mothers, which were previously excluded. Most employers and establishments are covered within the purview of the Act but, the truth remains that India hosts a majority of women in the unorganised sector who are often unaware of their legal rights. Those large number of women working under contractors, agricultural industries, small factory units, etc. are vulnerable to be exploited by employers to work during pregnancy and after childbirth, thus denying them their statutory rights created by the Act. Beyond the unorganised sector as well, there is a lack of clarity and a hostile attitude towards maternity leaves in the organised sectors which is well established through the above-mentioned instances. The Amendment Act has inserted a new provision in form of Section 11A to the Act which mandates the duty of the establishment to intimate all benefits under the Act to the woman at the time of her appointment either in writing or electronically.²⁶ It is safe to assume that while some corporations and companies of the organised sector commence compliance procedures with such insertion, the situation of the

²⁴ Megha Chandra, Maternity Benefit cases that were heard in Indian Courts in past three months, UN GENDER (Aug 31, 2020, 7:15 PM) <https://www.ungender.in/maternity-benefit-cases-that-were-heard-in-indian-courts-in-past-three-months/>

²⁵ Saumya Uma et al, *Supra* note 15

²⁶ The Maternity Benefit (Amendment) Act, S.11A(2) (2017) (Act 6 of 2017).

unorganised sector where not even a written appointment letter is given, intimation of legal maternity benefits to a woman seems to be a far-fetched dream.

Though the legislation is considerably wide, the status of transgenders is an unexplored gap which the Act does not cover. There is a lacuna with respect to extension of these benefits to that section of population. The law doesn't answer whether they will come under the definition of an adoptive mother or their identity will not be recognized at all much like their existence in the social structure through marginalised treatment in the outside world. Several years after the official recognition of the third gender and upholding the dignity of transgenders, it is unfortunate that they have not been integrated into the mainstream society and still considered 'outcasts.'²⁷ There is a huge gap between the law and the reality with respect to this area that often leads to unequal treatment on the ground.

The provisions of the statute have to be construed flexibly to ensure maximum benefits to the class of working women of the country. In the case of *B. Shah v. Presiding Officer, Labour Court, Coimbatore*, the Court laid down emphasis on the approach that is to be adopted while interpretation of the Maternity Benefit Act. The Hon'ble Apex Court through its judgement highlighted the need to look at the objective and goals of enacting a welfare legislation while interpreting the provisions of the Acts. With regard to the statute in question, the Court stated that the act was enacted with the intent to achieve social justice for female employees who were bound to be given relief as per Article 42 of the Constitution. The aim of the legislation is not merely to let a woman subsist during pregnancy, but the greater goal is for her to be able to take care of her child, use her preserved energy for her recovery and maintain the level of efficiency and productivity as before.²⁸ It is through this benevolent and wide construction will the provisions of the enactment serve the object and purpose of the enactment.

THE SOCIO-CULTURAL FACTORS AT PLAY

A simple glance at the individual concerns from a woman's point of view can help in identifying the societal forces at play in this situation. The unavailability of day-care or creche facilities at the workplace (in spite of the existence of a legal provision in the Amendment Act) forces a new mother most of the time to leave her job and thereby to increase the attrition rate

²⁷ National Legal Services Authority of India (NALSA) v. Union of India, (2014) AIR 2014 SC 1863.

²⁸ B. Shah v. Presiding Officer, Labour Court, Coimbatore, (1978) AIR 1978 SC 12

after maternity.²⁹ Child rearing and caring is indeed a difficult process, but the inability of the families to share the workload of the new-born child and placing the entire responsibility of childcare on the mother is the root of the problem. These gender stereotypes and patriarchal notions that the mother is solely responsible for caring for children and handling the household work go against her human right of being viewed as an independent individual in the society. Mothers are often viewed as the 'obvious' and undeniable guardians whereas the status of the father when it comes to childcare is a matter of opinion and subjectivity. This stereotypical notion is reflected in the legal documents and decisions across the world to validate gender discrimination most often at the disadvantage of women.³⁰ With the increasing complexities of child rearing and caring in today's dynamic society, the lack of acknowledgement of her struggles and failure to take inclusive decisions in the boardroom often shun a woman out of the economic structure completely leaving her at the same level she started from. It is a fact that a woman is granted the noble power of giving birth to children but, a woman is equally capable of making a career and acquiring high posts in an organisation provided she gets all the support and cooperation from her family, peers and even employees at the workplace.

NEED FOR GENDER 'INCLUSIVE' MEASURES

Even in the organised sector, several biases and stereotypes plague the working environment thereby making it difficult for women to continue work during or after childbirth. Most big companies promote their policies and brands by advertising gender diversity and displaying big hoardings of women in top positions. But in fact, ensuring gender 'inclusion' and comfortable environment free from biases and sexually coloured remarks still remain to be an unheard domain in Indian workplaces. As opposed to the concept of diversity which is well known in India, 'inclusion' refers to an action. It refers to affirmative policies that attempt at building an environment that allows everyone to thrive equally. Promoting inclusive policies means cultivating a feeling of belongingness in the workplace.³¹ Often companies and organisations are more bothered about the number of women they hire to show off the figures which show a high diversity level but they seldom focus on enabling a holistically healthy environment for their so called diverse employees. The result of this lack of inclusivity is expressed in the unfavourable figures and the meagre number of women at the top financial

²⁹ Nidhi Buch, *Supra* note 4 at 144

³⁰ Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2223-2226 (2020).

³¹ 'Inclusion', Cambridge Dictionary (last visited Jul. 7, 2022)
<https://dictionary.cambridge.org/dictionary/english/inclusion>

layer despite the affirmative actions from the legislature's side.³² Even though women in most industrial economies contribute a large chunk to their State's GDP, they are often sidelined from workplace policies. It is widely proven that gender 'inclusive' policies nurture economic development and increase productivity of employees. Enhanced maternity benefits would enable job satisfaction and increase performance of women as opposed to a woman who is exhausted and physically and emotionally drained to efficiently contribute to the work. Big corporate giants today offer additional maternity leaves as part of their company policies to promote an inclusive and secure environment for women.³³ Promotion of inclusive policies in workplaces is the only way to understand and challenge the traditional concepts of gender. It is also the way forward to inculcate compassion and move towards an expansive understanding of the complex nature of gender. When it is hard to universally recognise the gender spectrum at a national level, it is through inclusive policies that we can move towards recognition and acceptance of the LGBTQI+ community as those govern the individual interactions of members of a particular organisation as opposed to relationship between individuals and the State.³⁴

CONCLUSION AND THE WAY FORWARD

In the recent conversations, it has been highlighted that several laws enacted specifically for the welfare of women have proven to be misused or created a breeding ground for further inequalities and discrimination at various levels. At this stage, India should revisit certain old laws and attempt to make them more gender neutral. The nation should also be taking inspiration from models of different countries such as Norway and Germany which provide for a gender-neutral parental leave as opposed to a maternity leave for only the mother.³⁵ Such a change will reaffirm the notion that a child is the responsibility of both the parents thus, both the parents must be actively involved in their care. It will also eliminate the negative judgements and biases in the minds of the employer while employing a woman as even a man would be entitled to the same paid benefits as his spouse. This attempt of shared responsibility

³² Ravi Chandran, Why gender inclusivity must be policy priority of modern-day workplaces, ECONOMIC TIMES (Sep. 19, 2021, 2:06 PM), <https://hr.economictimes.indiatimes.com/news/workplace-4-0/diversity-and-inclusion/why-gender-inclusivity-must-be-policy-priority-of-modern-day-workplaces/86331907>

³³ Corporate Wellness Magazine, Fostering Gender Equality and Diversity in the Workplace, CORPORATE WELLNESS MAGAZINE (Jul. 7, 2022, 9:15 PM) <https://www.corporatewellnessmagazine.com/article/fostering-gender-equality-diversity-workplace>

³⁴ Gender Spectrum, What is a "Gender Inclusive" World?, GENDER SPECTRUM (Jul. 7, 2022, 9:45 PM), <https://genderspectrum.org/articles/what-is-a-gender-inclusive-world>

³⁵ Nordic Co-operation, Parental Benefit in Norway, NORDIC CO-OPERATION (Nov. 8, 2021, 10:25 PM), <https://www.norden.org/en/info-norden/parental-benefit-norway>

between parents will hopefully bring an attitudinal shift in the society and aid women to concentrate on their intellectual and professional growth. Moreover, the laws enacted in this respect must be properly implemented by providing some incentives for employers that motivate them to promote a diverse and inclusive working environment in their respective organisations and institutions. Gender diversity and inclusivity is becoming a popular field in organizational management. However, this shift to the emphasis of these important issues is mostly limited to big global Multi-National Companies thereby excluding the other professions from focusing on the subject and making the necessary changes in their management.³⁶ Awareness campaigns and monetary incentives to the small industries as well as unorganised sector is the need of the hour in order to realize the advantages of the maternity benefit scheme. Further, construing the provisions of the existing maternity benefit scheme liberally with an emphasis on the objective of the legislation will go a long way in ensuring the target population gets its due through the welfare legislation.

At every International Woman's Day, we rejoice the progress that we have made so far yet fail to acknowledge the thousand more steps that we are yet to tread on. India celebrated its 75th year of Independence in August 2021, yet it is pertinent to look at its handful female population at the top level and ask whether we are really free? How many more years till we hide behind the veil of pure equality and make the equals more equal while the unequals remain famished of benefits?

It is time to view the social structure through an equitable intersectional lens by making our office doors encouraging and welcoming for women to walk into rather than being a breeding ground for gendered remarks, micro aggressions and constant discrimination.

Even though, there is a huge scope for improvement of the persisting law and working environment, it will be wrong to not appreciate and acknowledge the progress made by India so far. While on the other end of the world 'developed' and wealthy countries like United States does not provide 'paid' maternity leave to their women employees at the federal level, India has extended the paid benefits to adoptive and commissioning mothers as well through its amendment in 2017. While the United States parental leave programme covers only about 21% of the workers in the country, India has made sure to cover all the professions, institutions and

³⁶ Major Manjit Rajain, Creating Inclusive Workplaces for India, PEOPLE MATTERS (Nov. 8, 2021, 11:00 PM), <https://www.peoplesmattersglobal.com/article/diversity/creating-inclusive-workplaces-for-india-29576>

organisations within the application of the Act.³⁷ The provisions of the Indian legislation stand closer to the international labour standards and suit the needs of its diverse population. Considering that the new provisions of the amendment will take at least a decade to be reflected in the legal system to evaluate its impact, the act is capable of rectifying the minor loopholes and discrepancies faced by the system to realise the true goal of securing adequate maternal benefits across the country.

³⁷ Krystin Arneson, Why doesn't the US have mandated paid maternity leave?, EQUALITY MATTERS (Jun. 29, 2021, 2:00 PM), <https://www.bbc.com/worklife/article/20210624-why-doesnt-the-us-have-mandated-paid-maternity-leave>