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No Leave To Grieve: How Misfit Frameworks and America's "Grief Tsunami" Require Better Bereavement Policy

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NO LEAVE TO GRIEVE: HOW MISFIT FRAMEWORKS AND AMERICA'S "GRIEF TSUNAMI" REQUIRE BETTER BEREAVEMENT POLICY

By: Katherine S. Hanson*

ABSTRACT

The COVID-19 pandemic fueled America's recent death surge: 2021 has become the deadliest year on record in the United States. Scholars and commentators claim that the American workplace remains unprepared for the impending "grief tsunami" in the wake of such pervasive loss. Likewise, American law is ill-equipped for workplace grief. Bereavement, while medically "normal," lacks a substantial foothold in workplace benefits and in the law. Currently, organizations bear the burden of developing their own policies—and where available, these policies remain insufficient to accommodate the myriad logistical and emotional complexities associated with the loss of a loved one. In the event of an adverse action related to bereavement or grief-triggered behavior, workers and organizations lack a defined litigation framework. Without clear options, bereft employees who believe they have suffered adverse action may seek protections under the FMLA, Title VII, or the ADA; these efforts yield absurd, conflicting, or callous results. In some cases, these frameworks promote poor workplace policy, as they encourage organizations to minimize communication to avoid risk of estoppel in favor of the employee. Notably, current benefits or litigation options, however insufficient, apply near-exclusively to employees; there currently exist few provisions for the increasing number of independent workers within the American workforce.

However, there exist budding state legislative options which may serve to address the bereavement problem. Local legislators may pull from these examples to craft comprehensive bereavement frameworks, available to all types of workers, in a manner which

may reduce organizational burdens and serve to address America's swelling wave of grief.

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INTRODUCTION

Grief, like death, remains a natural and inevitable aspect of human existence.¹ Throughout history society has recognized bereavement—from Classical depictions of lamentation² to more modern representations of tangled emotion.³ Yet, grief remains largely ignored in American work culture and legislation despite its inevitability and ubiquity.⁴

Prior to the COVID-19 pandemic, the U.S. Census had estimated that the United States would experience a steady increase in annual number of deaths.⁵ This increased mortality rate would continue through the year 2055.⁶ But in 2020, the pandemic accelerated the mortality rate and thrust the certainty of death and dying to the

* J.D., Chicago-Kent College of Law, 2022; MLER, Rutgers University, expected 2024. Judicial Law Clerk; Editor-in-Chief, *The Chicago-Kent Law Review* Volume 97. A heartfelt thanks to Professor Michael Oswalt for entertaining my interdisciplinary interest for an independent study in my final semester, and to Professor Diane Soubly for granting an extra spark of inspiration in the eleventh hour. Finally, my thoughts are with those of us in society who have struggled to balance the demands of work against the heavy burden of grief. Our best hope is to continue to legislate to adapt to the needs of our evolving workforce.

¹ William Breitbart, *On the Inevitability of Death*, 15 PALLIATIVE SUPPORT CARE 276-78, (2017).

² See, e.g., Joel Christensen, *What the Greek Classics Tell Us about Grief and the Importance of Mourning the Dead*, THE CONVERSATION (Sept. 21, 2020, 8:14 AM), <https://theconversation.com/what-the-greek-classics-tell-us-about-grief-and-the-importance-of-mourning-the-dead-145827> (discussing Classical depictions of grief).

³ See Eric Deggans, *If You're Grieving Right Now, Here Are 5 Shows That Get It*, NPR (June 17, 2020, 5:01 AM), <https://www.npr.org/2020/06/17/877090656/if-youre-grieving-right-now-here-are-5-shows-that-get-it> (sharing expert analysis on current television shows which highlight various aspects of grief in a potentially cathartic manner).

⁴ See Donna M. Wilson et al., *A Study to Understand the Impact of Bereavement Grief on the Workplace*, 83 J. DEATH & DYING 187, 188 (2019).

⁵ Jason Devine, *As Population Ages, U.S. Nears Historic Increase in Deaths: Two States, A Third of Counties Have More Deaths than Births*, U.S. Census Bureau (Oct. 24, 2017), <https://www.census.gov/library/stories/2017/10/aging-boomers-deaths.html>

⁶ *Id.*

forefront for many Americans.⁷ According to a 2022 report issued by the Centers for Disease Control and Prevention, 2021 was “the deadliest year in United States history.”⁸ As of January 10, 2023, the U.S. death rate from COVID-19 exceeds one million; the global death rate exceeds 6.7 million.⁹ Some scholars suggest that the death rate has generated a mortality shock¹⁰ throughout the country. Experts estimate that for every COVID-19 death, an average of nine individuals suffer a family loss.¹¹ Under this tragic calculus an estimated 9.9 million individuals in the U.S., and over 57.5 million individuals globally, suffer the recent loss of a grandparent, parent, sibling, spouse, or child.¹²

Researchers predict that the impact of pandemic grief will ripple throughout the population for years¹³ because “COVID grief” differs from traditional grief in myriad ways due to sudden, random, and often socially distant losses.¹⁴ Today’s pandemic grief represents a

⁷ See Mike Stobbe & Assoc. Press, *COVID-19 and overdoses contributed to the deadliest year in U.S. history, new CDC study shows*, FORTUNE (Apr. 12, 2022, 12:04 PM), <https://fortune.com/2022/04/12/covid-19-drug-overdose-deaths-us-history-cdc-study/>

⁸ *Id.*

⁹ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (updated Jan. 10, 2023), ; see also *Coronavirus World Map: Tracking the Global Outbreak*, N.Y. Times, <https://www.nytimes.com/interactive/2021/world/covid-cases.html> (updated Jan. 10, 2023)

¹⁰ Ashton M. Verdary et al., *Tracking the reach of COVID-19 kin loss with a bereavement multiplier applied to the United States*, 117 PNAS 17695, 17695 (2020).

¹¹ *Id.* Experts have based this estimation upon U.S. kinship networks.

¹² This number was achieved by multiplying the total number of COVID-19 deaths by the experts’ ninefold factor – which accounts for multiple losses and overlap in losses. See *id.* As of January 10, 2023, total COVID-19 deaths summed 1,103,732. See *Coronavirus in the U.S.*, *supra* note 9. Multiplying this number by nine yields 9,933,588.

¹³ Claire Klobucista & Lindsay Maizland, *How the World Has Learned to Grieve in a Pandemic*, COUNCIL ON FOREIGN RELS. (May 19, 2020), <https://www.cfr.org/article/coronavirus-funeral-how-world-has-learned-grieve-pandemic>.

¹⁴*Id.*; Kathleen Doheny, *COVID-19 Grief is Different: What Managers Should Know*, SHRM (Jan 26, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/people-managers/pages/covid-grief.aspx>.

complex tapestry woven from threads of trauma,¹⁵ loss, and socioeconomic factors. It flows from multiple sources - including global concerns, systemic racism, pandemic job shifts, the death of role models, the loss of previously guaranteed rights, and regret for lost time and missed experiences.¹⁶ In short, the bereft mourn “the death of our previous lives” in addition to loss of loved ones.¹⁷

These ripples have and will invariably rock the workplace. Some commentators suggest such a “forced reckoning with what matters” contributed to a priority shift for the American worker, which sparked a broader reassessment of work relationships and life balance.¹⁸ This shift also fueled a mass exodus from the traditional workplace in a movement now known as “The Great Resignation,”¹⁹ and “The Big Quit.”²⁰ As former U.S. Secretary of Labor Robert Reich noted, “Workers are burned out. They’re fed up. They’re fried. In the wake of so much hardship, and illness and death during the past year, they’re not going to take it anymore.”²¹

Some scholars suggest the American workplace remains ill-equipped for such a massive swell of grief.²² While the pandemic

¹⁵ See Kat Lonsdorf, *People are developing trauma-like symptoms as the pandemic wears on*, NPR (Apr. 7, 2022, 5:01 AM), <https://www.npr.org/2022/04/07/1087195915/covid-pandemic-trauma-mentalhealth>.

¹⁶ Maria Aspan, *The biggest risk in business right now is grief*, FORTUNE (Sept. 27, 2020, 7:00 AM), <https://fortune.com/2020/09/27/covid-grief-at-work-business-coronavirus-mental-health/>.

¹⁷ *Id.*

¹⁸ Kathryn Himes, *‘The Great Resignation’ Misses the Point*, WIRED (Nov. 1, 2021, 9:00 AM), <https://www.wired.com/story/great-resignation-misses-the-point/>.

¹⁹ *Id.*; Abby Vesoulis, *Why Literally Millions of Americans Are Quitting Their Jobs*, TIME (Oct. 13, 2021, 6:59 AM), <https://time.com/6106322/the-great-resignation-jobs/>.

²⁰ Lisa Curtis, *Why the Big Quit Is Happening And Why Every Boss Should Embrace It*, FORBES (June 30, 2021, 11:31 PM), <https://www.forbes.com/sites/lisacurtis/2021/06/30/why-the-big-quit-is-happening-and-why-every-boss-should-embrace-it/>.

²¹ Vesoulis, *supra* note 19.

²² Chad Broughton, *The American Workplace Isn’t Prepared for This Much Grief*, ATLANTIC (Nov. 2, 2021), <https://www.theatlantic.com/culture/archive/2021/11/sorry-your-loss-now-get-back-work/620573/>.

prompted organizations to reconsider benefits like vacation time, wages, remote work, flex-time, and paid parental leave, few have yet to act upon the immediate need for bereavement policy.²³ Under sparse state and federal bereavement provisions,²⁴ organizations generally bear the burden to craft and execute their own bereavement policies. As these organizations struggle to balance productivity and profitability against workforce wellness, many arguably provide insufficient support for grieving workers.²⁵ Some organizations do not provide bereavement leave.²⁶ Others provide a brief duration²⁷ which remains arguably insufficient for a bereft worker to address the loss itself, long-lingering post-mortem property issues, or observance arrangements.²⁸ And despite the complex nature of human relationships and varying family structures across cultures,

²³ *Id.* Katie Lynch, *How the Pandemic has Exposed the Gap in Bereavement Support*, Forbes (May 24, 2021, 7:20 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2021/05/24/how-the-pandemic-has-exposed-the-gap-in-bereavement-support/?sh=391e3e976108>.

²⁴ To date, Oregon, Illinois, and Maryland have legislation addressing bereavement, while at least two other states have weighed proposals. See Doheny, *supra* note 14; see also *Governor Pritzker Signs Family Bereavement Leave Act into Law*, Illinois.gov (June 9, 2022), <https://www.illinois.gov/news/press-release.25026.html>. In 2018 the New York legislature overwhelmingly passed legislation affording paid bereavement to employees, but Governor Cuomo vetoed the bill. S8380A, 2018-19 Leg. Sess. (N.Y. 2018).

²⁵ See generally Lynch, *supra* note 23.

²⁶ Riia O'Donnell, *The Business Guide to Bereavement Leave Policies*, WORKEST (June 25, 2019), <https://www.zenefits.com/workest/guide-to-bereavement-leave-policies/>. While SHRM reports that 89% of employers offered some form of bereavement leave in 2019, its survey data is based upon a study in which only 2,763 organizations—roughly 5% of its membership base—participated. See *Leave and Flexible Working: SHRM Employee Benefits 2019*, SHRM (June 2019), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM%20Employee%20Benefits%202019%20Leave%20and%20Flexible%20Working.pdf>.

²⁷ Currently, the data varies. See Ruth Mayhew, *The Average HR Policy for Time Off for Deaths in Family*, CHRON (Jan. 28, 2019), <https://smallbusiness.chron.com/average-hr-policy-time-off-deaths-family-68630.html> (noting the average bereavement leave spans three to five days); see *infra* Part I.

²⁸ See *infra* Part I.

most bereavement policies only apply to the death of an immediate family member.²⁹

Although some states rally for paid leave benefits, many of these programs lack bereavement provisions.³⁰ Despite gaining a nod of recognition from the federal government,³¹ bereft workers lack feasible humane options for managing the loss of a loved one. In the absence of prevailing bereavement law, workers and organizations struggle to make legal sense of grief. While generally “medically normal,” grief is not “workplace normal.”³² Thus, workers may suffer adverse actions at work due to grief-related behaviors. Case law shows that grieving workers have attempted claims under Family and Medical Leave Act (FMLA) when terminated while grieving.³³ Although the text of FMLA offers protections for employees who are caring for family members with “serious health conditions,” the Act provides no coverage in the event the sick family member actually

²⁹ Most policies cover death of parent, sibling, spouse; note some policies do not cover, or provide lesser leave, for aunts & uncles, grandparents. See *infra* Part I.A.

³⁰ As of April 16, 2022, eleven states and the District of Columbia provide statewide family and medical leave policies, often modeled after the Family and Medical Leave Act. See *State Family and Medical Leave Laws*, National Conference of State Legislatures, (July 2022), <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>; Meredith Newman, *Statewide family leave set to become law in Delaware, as General Assembly passes bill*, DE ONLINE (April 15, 2022, 5:01 AM), <https://www.delawareonline.com/story/news/2022/04/15/delaware-statewide-paid-family-leave-passes/7315995001/>. The great majority of these programs apply to employees of organizations.

³¹ The American Families Plan indicated it “will guarantee twelve weeks of paid parental, family, and personal illness/safe leave by year 10 of the program, and also ensure workers get three days of bereavement leave per year starting in year one.” *The American Families Plan*, WHITE HOUSE (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/>.

The Parental Bereavement Leave Act of 2021 proposes that, within any twelve-month period, eligible employees receive up to 12 workweeks of leave to mourn the death of a son or daughter. S. 2935, 117th Cong. (2021).

³² See *infra* Part II.C.

³³ See *infra* Part II.A.

dies.³⁴ Other grieving Plaintiffs have innovated litigation routes under Title VII on the basis of religious discrimination.³⁵ These claims may fail under Title VII because grief or sudden loss of a loved one may impact an employee's interactions and production in a way which provides an employer with a legitimate nondiscriminatory reason to justify an adverse action.³⁶ And while in March 2022 the American Psychiatric Association added a new classification named "prolonged grief disorder" to its Diagnostic and Statistical Manual of Mental Disorders (DSM),³⁷ mental health experts disagree on whether grief constitutes a disorder, or simply represents a natural reaction to loss. This conflict may present challenges for future litigants under the ADA. Notably, this range of options—leave itself, or crafty litigation routes—exist only for employees³⁸; there exist minimal, if any, resources for independent workers in most states.³⁹

This article examines the issue of bereavement and the scarcity of related leave options in the pandemic workplace. Part I examines the landscape of grief and work, exploring the impact of grief upon the workplace and the worker. Part II examines litigation for bereft employees under FMLA and Title VII and considers the recent DSM classification for prolonged grief disorder under an ADA framework. Part III examines current state and federal leave statutes, then proposes reasonable bereavement protections for all workers—employees and independent workers alike—to reduce worker, organizational, and social burdens due to grief.

³⁴ 26 U.S.C. § 2611.

³⁵ See *infra* Part II.

³⁶ See *infra* Part II.

³⁷ APA Offers Tips for Understanding Prolonged Grief Disorder, AM. PSYCHIATRIC ASS'N (Sept. 23, 2021), <https://psychiatry.org/news-room/news-releases/apa-offers-tips-for-understanding-prolonged-grief>.

³⁸ See 29 C.F.R. § 825.110 (describing employee eligibility under FMLA); 42 U.S.C. § 2000e(f) (describing "employee" under Title VII).

³⁹ This article does not intend to suggest that these are the only litigation routes bereft workers have pursued – only that these routes are relatively common and misfit.

I. GRIEF AND THE WORKPLACE

A. *Exploring Workplace Bereavement Benefits*

1. *Murky data obscures the true state of bereavement benefits*

An examination of available research on workplace bereavement benefits reveals part of the larger issue in bereavement policy: there exists slim data. Research focused upon workplace bereavement and related leave remains relatively sparse in contrast to other workplace benefits studies.⁴⁰ In 2019, researchers conducting a global study of the impact of workplace grief noted they could not locate any “published or unpublished reports on the incidence of bereavement leaves from work in Canada or any other developed country.”⁴¹

Such a determination, however, skews toward hyperbole. Some data exists, though at the fringe of data sets, blended with other categories, or contradictory when compared to other resources. This cloudy data set likely contributes to the greater obscurity of bereavement leave data. For example, one study published in 2021 indicated that while employers may provide paid leave, “these benefits cover only 19% of civilian workers and are primarily available to workers in higher wage occupations.”⁴² The study did not specifically examine bereavement. In stark contrast, the Society of Human Resource Management (SHRM) reports that in 2018 roughly eighty-eight percent of companies offer some form of paid bereavement.⁴³ However, upon examination this data appears dramatically incomplete. It

⁴⁰ Wilson, *supra* note 4, at 188.

⁴¹ *Id.* at 188.

⁴² Pamela Joshi et al., *How much would family and medical leave costs workers in the U.S.? Racial/ethnic variation in economic hardship under unpaid and paid policies*, 24 CMTY., WORK & FAMILY 517, 518 (2021).

⁴³ 2018 EMPLOYEE BENEFITS: THE EVOLUTION OF BENEFITS, SOC’Y HUM. RES. MGMT. (2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf>; Doheny, *supra* note 14.

relies upon just 3,518 responses—roughly one percent of the entire SHRM membership pool of roughly 285,000 human resources professionals.⁴⁴ Yet another study reports that only sixty percent of U.S. private industry workers received paid bereavement leave, which was “often limited to three or fewer days.”⁴⁵ Finally, another 2018 study suggested that roughly ninety-four percent of responding corporate and public employee organizations offered paid bereavement leave.⁴⁶ It claimed that eighty-three percent of organizations offered a separate bereavement plan, while twelve percent of organizations offered bereavement leave as part of PTO.⁴⁷ However, it does not specify the survey pool. When taken at face value, out of context, and without critical examination of the survey pool (as professional articles seem to reflect⁴⁸), this data suggests that the vast majority of workers have access to bereavement benefits. Such a suggestion perpetuates bereavement scarcity by relying upon a sliver of a slice of all U.S. employer organizations – and by omitting self-employed and contract workers.

Bereavement also faces a methodology problem: it lacks a distinct characterization. Bereavement leave has yet to gain a clear category in U.S. Bureau of Labor Statistics (BLS) surveys. In 2021, the BLS issued a news release on U.S. employee benefits, based upon research from a sample containing roughly thirteen million participants across civilian, private, and government sectors.⁴⁹ Again, this

⁴⁴ EVOLUTION OF BENEFITS, *supra* note 43, at 20.

⁴⁵ Janell C. Bauer & Margaret A. Murray, “Leave Your Emotions at Home”: Bereavement, Organizational Space, and Professional Identity, 41 WOMEN’S STUD. COMM’N 60 (2018).

⁴⁶ Teri Dougherty, *Bereavement Leave: Does One Policy Fit All?* INT’L FOUND. EMP. BENEFITS PLANS: WORD ON BENEFITS (Aug. 24, 2017), <https://blog.ifebp.org/index.php/bereavement-leave-does-one-policy-fit-all>.

⁴⁷*Id.*

⁴⁸ See, e.g., Lynch, *supra* note 23 (relying on SHRM 2019 survey to claim that 89% of employers provide “some form of bereavement leave to their employees”).

⁴⁹ *News Release: Employee Benefits in the United States – March 2021*, BUREAU OF LAB. STAT (Sept. 23, 2021), <https://www.bls.gov/news.release/pdf/ebs2.pdf>. The news release

sample included organizations and employees, but not independent workers. The news release addressed paid sick, family, and consolidated leave plans—which may allow for uncategorized leave including time off for grief—but did not specifically address bereavement leave.⁵⁰ The report cited in the release likewise contained no distinct category for bereavement leave, though fifty-six percent of respondents demonstrated “paid funeral leave” of up to three days as a benefit.⁵¹ BLS defines bereavement as “time off to attend a funeral.”⁵²

Roughly nineteen percent of the lowest ten percent of U.S. wage earners have access to this limited paid “funeral leave.”⁵³ This represents just a portion of the growing disparity in accessing broader paid family leave benefits across income levels, in which higher-wage earners are more likely to benefit from bereavement and other leave options.⁵⁴ While lack of access to paid leave benefits presents a high risk of economic impact upon low-wage workers,⁵⁵ this issue in

was based upon the BLS National Compensation Survey. U.S. DEP’T OF LAB. & U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2021 (Sept. 2021), <https://www.bls.gov/ncs/ebs/benefits/2021/employee-benefits-in-the-united-states-march-2021.pdf>.

⁵⁰ News Release, *supra* note 49.

⁵¹ *See id.*; Robert W. Van Giezen, *Paid leave in the private industry over the past 20 years*, 2 BEYOND THE NUMBERS: PAY & BENEFITS 4 (Bureau Lab. Stats Aug. 2013). A 2013 explanation of a prior version of the report indicates that paid funeral leave “provides time off from work because of a death in the family,” limited to “a few days (for example, 3 paid days for immediate family members and 1 paid day for other relatives). *See also* O’Donnell, *supra* note 26.

⁵² O’Donnell, *supra* note 26.

⁵³ BLS National Compensation Survey, *supra* note 49 at Table 33.

⁵⁴ Vicki Shabo, *Even in the Midst of a Brutal Pandemic and Caregiving Crisis, Fewer than 1 in 4 U.S. Workers Has Paid Family Leave at Their Jobs*, NEW AM.: BETTER LIFE LAB (Sept. 23, 2021), <https://www.newamerica.org/better-life-lab/blog/even-in-the-midst-of-a-brutal-pandemic-and-caregiving-crisis-fewer-than-1-in-4-us-workers-has-paid-family-leave-at-work/>.

⁵⁵ *Policy Brief Examines Illness and Injury Among Low-wage Workers*, GW PUB. HEALTH, <https://publichealth.gwu.edu/content/policy-brief-examines-illness-and-injury-among-low-wage-workers> (last visited Feb. 21, 2022).

the context of the pandemic reveals an additional “wealth gap”⁵⁶ related to bereavement. Some of the lowest-paid workers are at greater risk of exposure to COVID-19.⁵⁷ Because these workers are more likely to live in larger households, and more likely to live with an older adult at home, their status increases the risk of exposure for their family members as well.⁵⁸ Although low-wage workers are more likely to contract COVID-19 at work and increase the risk of COVID-19 exposure and death for family members, they remain far less likely to access bereavement benefits in the event a family member or coworker dies.

Existing bereavement data also fails to include the millions of U.S. workers who identify as self-employed—a number which also lacks clarity. Just as bereavement leave lacks complete qualifiers in research, so does self-employment inquiry. “The true state of self-employment remains unknown” due to an “inconsistent—and perhaps incomplete—look at self-employment qualifiers” which bars accurate reporting.⁵⁹ The U.S. Bureau of Labor Statistics has admittedly struggled to keep up with evolution and complexities of the nontraditional workforce⁶⁰; as stated, organizations struggle with metrics. Recent BLS data suggests that roughly 15.9 million U.S.

⁵⁶ Anne Gulland, *The Covid wealth gap: how low paid workers are most at risk of death from the virus*, TELEGRAPH (Jan. 30, 2021, 8:11 AM), <https://www.telegraph.co.uk/global-health/science-and-disease/covid-wealth-gap-low-paid-workers-likely-die-virus/>.

⁵⁷ Rachel Garfield et. al., *Double Jeopardy: Low Wage Workers at Risk for Health and Financial Implications of COVID-19*, KFF (Apr. 29, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/double-jeopardy-low-wage-workers-at-risk-for-health-and-financial-implications-of-covid-19/>.

⁵⁸ *Id.*

⁵⁹ *Self-employment and gig economy trends in the U.S.*, INTUIT QUICKBOOKS (2019), <https://quickbooks.intuit.com/self-employed/report/>. The full report is available at <https://quickbooks.intuit.com/content/dam/intuit/quickbooks/Gig-Economy-Self-Employment-Report-2019.pdf>.

⁶⁰ See generally Blog Post, *New Recommendations on Improving Data on Contingent and Alternative Work Arrangements*, U.S. BUREAU LAB. STATS. (August 10, 2020), <https://blogs.bls.gov/blog/tag/independentcontractors/#:~:text=The%2010.6%20million%20independent%20contractors,percent%20of%20the%20total%20employed>

workers identify as self-employed – an increase from roughly 15.4 million in 2019, prior to the pandemic.⁶¹ In contrast, a Gallup study based on tax data indicated that in 2019 nearly 44 million workers— *20 million more workers than identified in BLS research for that year*— identified as self-employed. The Gallup study presents another metrics issue: it recognizes that 54% of self-employed workers “also do work as traditional employees.”⁶² It concludes that the BLS data likely fairly and accurately represents the number of workers who are primarily self-employed but fails to capture the ever-developing nuances in overlapping employment relationships.⁶³ Might some of these 44 million workers claim bereavement benefits? Perhaps instead it remains safer to suggest that at least 15 solely self-employed million workers lack access to bereavement benefits nationwide while organizations define their research methods.

2. *Existing benefits for workers, where available, are insufficient to address both loss and logistics*

Despite uncertainty regarding *who* benefits from bereavement plans, information on plans and coverage exists—and existing benefits appear inadequate. For example, consider “Kristy.”⁶⁴ In May 2020 Kristy investigated a thump in the bathroom and discovered her

⁶¹ This data was retrieved using the BLS Data Retrieval: Labor Force Statistics (CPS) tool available at <https://www.bls.gov/webapps/legacy/cpsatab9.htm>. The data was filtered for “self-employed workers, incorporated” and “self-employed workers, unincorporated.” The calculation occurred in January 2022.

⁶² GALLUP & QUICKBOOKS, GIG ECONOMY AND SELF EMPLOYMENT REPORT 11, 53 (2019), <https://quickbooks.intuit.com/content/dam/intuit/quickbooks/Gig-Economy-Self-Employment-Report-2019.pdf>.

⁶³ *Id.* at 54.

⁶⁴ Marguerite Ward, *America’s lack of bereavement leave is causing a grief crisis*, INSIDER (Feb. 7, 2022, 10:59 AM), <https://www.businessinsider.com/bereavement-leave-asking-time-off-work-funeral-2020-5>. The author of the article provided “Kristy” a pseudonym to protect her from potential workplace repercussions.

partner's unresponsive body blocking the bathroom door.⁶⁵ After the paramedics arrived and pronounced her partner dead, Kristy notified her employer.⁶⁶ Under company policy, Kristy qualified for one day of leave because she and her partner were unwed; however, her employer made an exception and granted her five days of bereavement leave.⁶⁷ Thus Kristy received a total of five days to recover from the shock of her partner's sudden death, notify their families, manage any estate issues, make funeral arrangements, and somehow find time to process her grief to be in a position to return to work and effectively perform her job functions.⁶⁸ According to Kristy, "You don't even get to grieve the first few days. You're in shock."⁶⁹

Likewise, columnist Mita Mallick recalls her experience in the aftermath of her father's death:

The days that followed seemed like a nightmare we could not wake up from. While my parents' finances were fortunately in good order, we had a long list of to-dos: choosing a casket, arranging the cremation, selecting a burial suit for my dad, declining or accepting an autopsy, cancelling dad's cell phone and his Social Security benefits, transferring bills into my mom's name, writing an obituary. Then there was the task of telling family and friends, a lifetime's worth, knowing that with every conversation, we were re-experiencing the trauma of his death.⁷⁰

As Kristy and Mallick note, family members must manage far more than their personal grief. In the aftermath of a loss, managing

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Mita Mallick, *It's Time to Rethink Corporate Bereavement Policies*, HARV. BUS. REV. (Oct. 5, 2020), <https://hbr.org/2020/10/its-time-to-rethink-corporate-bereavement-policies>.

legal, financial, bureaucratic, social and emotional affairs may consume between a few weeks to over a year.⁷¹ Such a large, multifaceted responsibility may quickly become quite complicated.⁷² Yet, Kristy's experience highlights the inertia of the sudden loss of a loved one: shock might stymie management of affairs. Of course, individual responses to death vary, and circumstances may differ.⁷³ The nature of the worker's relationship with the deceased may impact the length of time needed to manage affairs related to loss, and to grieve based on faith or personal need. Yet on the current spectrum of existing leave policies, Kristy's five-day benefit appears generous: many small to mid-sized organizations lack bereavement policies altogether.⁷⁴ And while sources vary on available benefits, it appears that typical bereavement leave period spans one to five days.⁷⁵

The duration of bereavement leave depends on the employee's familial—rather than emotional—relationship to the deceased,⁷⁶ distinguishing extended family members or beloved friends and coworkers from immediate family.⁷⁷ The International Foundation of Employee Benefits Plans (IFEBP) has identified via survey the average number of days of paid leave organizations provide based upon the employee's bloodline or legal relationship with the deceased. According to IFEBP data, most respondents offered three days off for

⁷¹ Leanne Potts, *What to Do When a Loved One Dies*, AARP (June 11, 2020), <https://www.aarp.org/home-family/friends-family/info-2020/when-loved-one-dies-checklist.html>; *Handling Your Loved Ones Affairs After They Die*, CROSSROADS HOSPICE & PALLIATIVE CARE (May 20, 2021), <https://www.crossroadshospice.com/hospice-palliative-care-blog/2021/may/20/handling-your-loved-ones-affairs-after-they-die/>.

⁷² *Id.*

⁷³ See Danny Creager & Sarah Myers, *Coping with Grief in the Workplace*, 45 COLO. LAW. 83 (2016).

⁷⁴ O'Donnell, *supra* note 26.

⁷⁵ *Id.*; see also Lynch, *supra* note 23 (indicating the average bereavement period lasts one to four days); Mallick, *supra* note 70 (noting bereavement periods span three to five days).

⁷⁶ Lynch, *supra* note 23.

⁷⁷ *Id.*

the death of a spouse, child, parent, grandparent, or grandchild—and just one day of bereavement leave for aunts, uncles, nieces, or nephews.⁷⁸ This tracks with BLS data which suggests that employers provide 3 days of leave for loss of immediate family and one day for death of extended family members.⁷⁹ Similarly, a popular sample bereavement policy suggests providing up to four consecutive days off for the loss of “the employee’s spouse, domestic partner, child, stepchild, parent, stepparent, father-in-law, mother, mother-in-law, son-in-law, daughter-in-law, brother, sister, stepbrother, stepsister, or an adult who stood in loco parentis to the employee during childhood.”⁸⁰ The policy further recommends one day off for the loss of a “brother-in-law, sister-in-law, aunt, uncle, grandparent, grandchild or spouse’s grandparent,” and just four hours of leave to attend a coworker’s funeral—but only so long as the absence does not impact company functions.⁸¹

Such a short bereavement period presents a direct conflict with certain faiths.⁸² While many faiths observe mourning rituals, some allow a certain number of days for observance of a loss. For example, Judaism practices Shiva—a period of mourning which may last up to seven days for family members who have lost a spouse, child, parent, or sibling.⁸³ Sikhism observes a mourning period which may last up to ten days after the funeral of a loved one.⁸⁴ During this observance, the bereft do not go to work.⁸⁵ And in the case of *Adeyeye*

⁷⁸ Dougherty, *supra* note 46; O’Donnell, *supra* note 26.

⁷⁹ Van Giezen, *supra* note 51.

⁸⁰ Policies: Bereavement Leave Policy, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/bereavement-policy.aspx>.

⁸¹ *Id.*

⁸² Part II., *infra*, explores bereavement and religious discrimination claims.

⁸³ *What is Shiva*, SHIVA.COM (2022), <https://www.shiva.com/learning-center/understanding/shiva/>.

⁸⁴ Jennifer Uzell, *Factsheet: Death and funerals in world religions*, RELIGION MEDIA CTR. (Mar. 27, 2018), <https://religionmediacentre.org.uk/factsheets/death-funeral-rituals-in-world-religions/>.

⁸⁵ *Id.*

v. Heartland Sweeteners, explored in Part II of this article, a worker sought up to five weeks of leave to facilitate ceremonial rites for his father's death overseas.⁸⁶ Thus, current leave plans likely exist in tension with certain religious observances in addition to the emotional, legal, financial, and bureaucratic demands of dealing with death.

In addition, blanket categories offering a set number of days off for specific types of blood relatives eschew the complex nature of human relationships. Evolving workplace dynamics yielded the rise of the "work spouse"—a close platonic workplace relationship that often mirrors marriage and often involves emotional attachment.⁸⁷ And yet, in the event of the death of a "work spouse," a bereft worker may only obtain up to four hours of leave to manage their grief under recommended policy.⁸⁸ Such policies also risk ignoring the growing number of families cohabitating in multigenerational housing.⁸⁹ In families in which grandparents, aunts, and uncles live with their extended family, multiple family members may regularly share in family caregiving⁹⁰ and form deeper emotional bonds akin to immediate family. Yet, a bereft worker in a multigenerational home may only receive one day of leave upon the loss of their closest aunt or uncle.⁹¹ In the event a worker could prove the deceased performed *in loco parentis*, they might gain an additional two to four days to process the loss of a close, influential family member.⁹²

Bereavement policy ignorant to workers' religious needs or

⁸⁶ 721 F.3d 444 (7th Cir. 2013).

⁸⁷ Kim Elsesser, *Let's Stop Talking About 'Work Spouses,'* FORBES (Feb. 13, 2020, 4:11 PM), <https://www.forbes.com/sites/kimelsesser/2020/02/13/lets-stop-talking-about-work-spouses/?sh=68f847af6399>.

⁸⁸ *Id.*; Bereavement Leave Policy, *supra* note 80.

⁸⁹ Cohn et al., *Financial Issues Top the List of Reasons U.S. Adults Live in Multigenerational Homes*, PEW RSCH. CTR (Mar. 24, 2022), <https://www.pewresearch.org/social-trends/2022/03/24/financial-issues-top-the-list-of-reasons-u-s-adults-live-in-multigenerational-homes/>.

⁹⁰ *Id.*

⁹¹ Bereavement Leave Policy, *supra* note 80.

⁹² *Id.*

family structures risk an erosion of trust between the worker and the organization. Columnist Katie Lynch notes:

Not only are some companies still not providing leave, but those that do provide it often fail to provide an adequate amount of time away and lack ongoing support for employees dealing with a grief event. When a company only provides employees with one day off following the loss of a loved one, it signals a lack of empathy and support from leadership.⁹³

Some critics further suggest that policies undermine the employee/employer dynamic when requiring proof of death. While this verification seems necessary to prevent abuse of leave time from an employer perspective, critics suggest this requirement promotes conflict, demonstrates an insensitivity toward the grieving worker's plight, and is "uncomfortable, unnecessary, and assumes ill intent of someone asking for leave."⁹⁴

While information on policy benefits exists, those benefits undermine workplace trust and fail to provide bereft workers with sufficient time off to manage the complexity of their loss and the cascade of post-mortem logistics. Meanwhile, the number of workers who benefit from these policies remains roughly undefined. The growing wave of platform workers, independent contractors,⁹⁵ or fully self-employed workers lack formal bereavement benefits due to the nature of their work relationship. Given the record number of recent deaths, the scarcity of benefits options and the impending grief

⁹³ Lynch, *supra* note 23.

⁹⁴ Mallick, *supra* note 70.

⁹⁵ The gig economy is expanding at a rate which exceeds the rate of the U.S. economy as a whole. Marcin Zgola, *Will the Gig Economy Become the New Working-Class Norm?*, FORBES (Aug. 12, 2021, 8:20 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/12/will-the-gig-economy-become-the-new-working-class-norm/>.

“tsunami”⁹⁶ heaves our workforce toward a bereavement crisis.

B. The Impact of Bereavement upon Work

Although there exists mixed or incomplete information on bereavement leave benefits and recipients, researchers have measured the impact of grief upon workers and the workplace.⁹⁷ A 2002 study found that grief cost the U.S. economy \$75 billion in annual production losses.⁹⁸ When adjusted for inflation, this amounts to over \$132 billion in late 2022.⁹⁹ Grief impacts worker performance, attendance, and production,¹⁰⁰ may cause workers to disconnect from themselves,¹⁰¹ and may foster extremes like work avoidance and overwork which may lead to resignation or career changes.¹⁰² Employers in one grief study expressed concern over workplace behaviors including “crying, being upset, being distracted, being irritable or unable to focus at work.”¹⁰³

Despite the brevity of available bereavement leave, experts consider two years as the standard timeframe for grief recovery.¹⁰⁴ Cases of extremely intense grief, however, may present prolonged or permanent effects including depression, physical and mental illness, and even death.¹⁰⁵ In particular, working parents suffering the loss

⁹⁶ Wilson, *supra* note 4, at 187.

⁹⁷ *Id.* at 188. This 2019 Canadian study performed an international exploration on research relating to grief and work.

⁹⁸ Ward, *supra* note 65.

⁹⁹ These calculations relied upon the U.S. Bureau of Labor Statistics CPI Inflation Calculator, at https://www.bls.gov/data/inflation_calculator.htm. As of final review of this article, the BLS Inflation Calculator provided inflation data for November 2022 as the most recent data.

¹⁰⁰ See Wilson, *supra* note 4, at 188-89; Ward, *supra* note 65.

¹⁰¹ Doheny, *supra* note 14.

¹⁰² Wilson, *supra* note 4, at 188.

¹⁰³ *Id.* at 191.

¹⁰⁴ *Id.* at 188.

¹⁰⁵ *Id.*

of a child may experience prolonged periods of grief which intensify during holidays or other significant periods.¹⁰⁶ Bereft parents are “at a higher risk for psychiatric hospitalization.”¹⁰⁷ The emotional range after the loss of a child spans severe anxiety, survivor guilt, obsessive thinking, loneliness, depression, and massive shifts in in life perspectives and priorities.¹⁰⁸ Some parents report experiencing “physical pain resulting from their grief similar to having been injured or mutilated” which lasts up to nine years after their loss.¹⁰⁹ These emotions manifest new behaviors in the context of work. Some parents may overwork to avoid their grief. As one parent noted, “I started to work and just threw myself into work. So now it’s like I’m a workaholic.”¹¹⁰ Others struggle to keep up with their workload, and overwork as a result.¹¹¹ Yet others who previously worked with children switch jobs or careers because “facing the children” is too difficult given their personal loss.¹¹² Grieving parents are ten times more likely to take sick time throughout the year.¹¹³

Research further suggests that despite the existing mental health argument that grief is “normal,”¹¹⁴ the normative professional workplace discourages grief expression.¹¹⁵ This restriction places a greater burden upon bereaving workers. “Grief is often an emotion that is positioned in contrast to what is acceptable in organizations . . . bereaved workers may find themselves in uncharted territory as they navigate new work/life and professional/personal tensions.”¹¹⁶

¹⁰⁶ Mary Jo Gilmer et al., *Changes in Parents After the Death of a Child from Cancer*, 44 J. PAIN & SYMPTOM MGMT. 572, 573 (2012).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 577.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Wilson, *supra* note 4.

¹¹⁴ See *infra* Part II.C. discussing the DSM controversy.

¹¹⁵ Bauer & Murray, *supra* note 45, at 60.

¹¹⁶ *Id.*

Scholars suggest the normative public/private and work/home dichotomies traditionally reinforce workplace expectations in grief display.¹¹⁷ “One challenge to managing grief [at work] . . . is the normalized pressure to remain silent and hide feelings of grief in the workplace.”¹¹⁸ Some workers hesitate to express grief at work out of concern that coworkers and management might perceive them as unprofessional.¹¹⁹ In the absence of comprehensive bereavement policy, this workplace emotional self-suppression meets the definition of emotional labor.¹²⁰ This sort of emotional labor results in worker self-estrangement, disillusionment, and burnout¹²¹—much like the massive worker shifts in our current workforce.

Given the pervasive and myriad nature of loss in the pandemic, workers may carry pandemic grief and related behaviors throughout the remainder of their careers. “[T]here are instances where one basically will take grief to their own grave.”¹²² Thus, worker grief may likely emerge at work at some point in one’s career. Normative workplace trends which discourage grief expression, combined with insufficient time for workers to properly address their grief, will continue to impact the workplace.

¹¹⁷ *Id.* at 61-64.

¹¹⁸ *Id.* at 63.

¹¹⁹ *See id.* at 71-76.

¹²⁰ *See e.g.,* ARLIE HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983) as a seminal example of the consequences of workplace emotional suppression. Emotional labor is related to one’s emotional management for the sake of presenting themselves and interacting with others in a certain way in order to perform their job. *See also* Julie Beck, *The Concept Creep of ‘Emotional Labor,’* ATLANTIC (Nov. 26, 2018) (discussing the evolution of the sociological term of “emotional labor” with Hochschild), <https://www.theatlantic.com/family/archive/2018/11/arlie-hochschild-housework-isnt-emotional-labor/576637/>.

¹²¹ HOCHSCHILD, *supra* note 120, at 186-89.

¹²² Ward, *supra* note 65.

C. “Covid Grief is Disenfranchised Grief”¹²³

Given the impact of grief upon the workplace and the existing benefits obscurity, the COVID-19 pandemic has accelerated the need to revisit workplace bereavement. Such inquiry benefits all pandemic-impacted workers, including lower-wage workers who are more likely to suffer COVID-19-related exposure and losses¹²⁴ and less likely to benefit from existing unpaid bereavement leave policies, if available.¹²⁵ As psychiatrist and American Psychiatric Association chair Joshua Morganstein observed, “Covid grief is disenfranchised grief”¹²⁶; it presents a new iteration of our prior understanding of bereavement, and due to the pervasive nature of the pandemic, it impacts our entire population. According to Morganstein, COVID-19 grief differs from our prior understanding of grief in a variety of ways. In the pandemic, the bereft often live with “grief they are unable to express through normal outlets.” COVID-19 infections and death remain quick and erratic: “[y]oung, healthy people may die, while older people with medical issues recover.”¹²⁷

Such unpredictability may exacerbate survivor guilt and contribute to other COVID-19 chaos, “such as multiple loved ones falling sick or dying at the same time, fear of job loss, or financial problems” —all of which may aggravate the COVID-19 grieving process.¹²⁸ Likewise, end-of-life goodbyes, when possible, differ due to COVID-19. “The traditional goodbye to loved ones, with handholding and hugging, has sometimes been replaced by a cell phone conversation with a health care worker as the go-between.”¹²⁹ Such emotionally distant and physically removed goodbyes provide

¹²³ Doheny, *supra* note 14.

¹²⁴ Garfield et al., *supra* note 57.

¹²⁵ See *supra* Part I.A.

¹²⁶ Doheny, *supra* note 14.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

challenges to acknowledging loss.¹³⁰ On a global scale, the pandemic's social distancing inhibits traditional grieving — which historically tends to be social.¹³¹ According to Baylor clinical professor William Hoy, “We cannot find anywhere a group of people in any era or any culture that has allowed the grieving to go it alone. The gathered community is essential to the grief process and the funeral process; it's as near a universal as we've got.”¹³² Yet, the pandemic has barred families from customary pre-burial rituals, prevented wakes and viewings, and forced many individuals to grieve alone.¹³³ Risk of infection has, in many cases, barred priests from entering hospitals to perform last rites; some now perform the ritual over the phone.¹³⁴ So too, then, has the pandemic altered access to emotional support in addition to impacting goodbyes and grieving. Where the bereft once found in-person support and physical contact, they find support via email, phone, or Zoom in the pandemic.¹³⁵

II. OPTIONS FOR BEREFT WORKERS

The COVID-19 pandemic illuminates a vacancy in bereavement legislation and workplace policy—for many workers, but particularly for lower-wage and independent workers. While workplace grief jeopardizes employee attendance and job performance, impacts production, and risks contributing to existing worker burnout, bereavement options seem slim when available. And, when available, leave may remain unpaid — which may, as demonstrated in this part, prevent a worker from accessing the leave or exacerbate a worker's situation by stacking a financial burden upon a worker's existing

¹³⁰ Klobucista & Maizland, *supra* note 13.

¹³¹ *Id.*

¹³² *Id.*

¹³³ For example, Islamic families were barred from pre-burial ceremonial bathing of the deceased. *Id.*

¹³⁴ *Id.*

¹³⁵ Doheny, *supra* note 14.

grief.

Perhaps the workplace shuns grief because it impacts production and focus, or because it is a reminder of our own mortality.¹³⁶ Grief might cause workers to question their purpose, or damage morale. Some feminist scholars suggest that sexism is at play: grief is perceived as a feminine display and is thus unwelcome in the traditional male-gendered workplace.¹³⁷ Yet others attribute the lack of workplace grief awareness to an obsolescent mindset, and a lack of legislation: “Currently, there is no federal requirement to provide paid leave even for a funeral, let alone time to grieve one’s loss. The fact that the U.S. Department of Labor calls this ‘funeral leave’ and not even bereavement leave shows how antiquated our view of bereavement remains.”¹³⁸ Whatever the cause, grief and the workplace struggle to coexist.

Just as grief seems barred from work, so it lacks a foothold in law. Workers who feel they have suffered an adverse action related to their grief seek protections under Title VII and the Family and Medical Leave Act. However, the great majority of courts agree that FMLA does not cover bereavement unless the worker’s grief has escalated to the level of a serious health condition.¹³⁹ Title VII claims—for example, religious discrimination claims related to spiritual or cultural death rituals—yield inconsistent results. Under Title VII, adverse actions are often justified when a worker demonstrates attendance issues or performs poorly.¹⁴⁰ Thus, workers who must work while grieving or who are distracted because of their grief may lose their Title VII claim. Likewise, grief may not be protected under the ADA because it may fail to meet the standard of disability.

¹³⁶ See *supra* Introduction; Part I B.

¹³⁷ See Bauer & Murray, *supra* note 45.

¹³⁸ Lynch, *supra* note 23.

¹³⁹ See *Hoban v. WBNCC Joint Venture*, No. 06-13142m, 2007 U.S. Dist. LEXIS 25407 (E.D. Mich. Apr. 5, 2007).

¹⁴⁰ See *infra* Part II.B.

A. The Family and Medical Leave Act Largely Fails to Address Bereavement

Congress enacted the Family and Medical Leave Act in the early 1990s to balance the competing interests of work and family, to provide a gender-neutral basis for leave in an effort to combat sex discrimination, and to “entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.”¹⁴¹ The Act applies to employers who employ “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”¹⁴² Employees eligible for FMLA include those who are afflicted with a serious health condition which renders them “unable to perform the functions of [their] job,” or who need time to care for a son, daughter, spouse, or parent with a serious health condition.¹⁴³ The Act defines a serious health condition as “an illness, injury, impairment or physical or mental condition” that involves either inpatient care or “continuing treatment by a health care provider,”¹⁴⁴ and generally requires a period of incapacity of more than three consecutive calendar days.¹⁴⁵

Soon after the enactment of the FMLA, Plaintiffs attempted to apply FMLA to bereavement claims. While the courts have remained unsympathetic, these arguments continue to emerge in district court filings nearly three decades later.¹⁴⁶ For example, in the 2019 case of

¹⁴¹ 29 U.S.C. § 2601(b) (1993).

¹⁴² 29 C.F.R. § 825.102 (2015).

¹⁴³ *Id.* § 825.112(a).

¹⁴⁴ 29 U.S.C. § 2611 (11) (2019).

¹⁴⁵ 29 C.F.R. § 825.115 (a) (2015).

¹⁴⁶ *See, e.g.* *Smith-Megote v. Craig Hosp.*, 229 F. Supp. 3d 1224 (D. Colo. 2017) (finding that a plaintiff had lost FMLA protections after the death of her mother, despite her assertion that she continued to take leave to care for herself and her sister); *Scott v. Great Lakes Cheese Co.*, No. 5:18-cv-2535, 2019 U.S. Dist. LEXIS 152321 (N.D. Ohio Sept. 6, 2019).

Scott v. Great Lakes Cheese Company, the Northern District of Ohio summarily addressed the question in a footnote: “bereavement leave or absence from work following the death of a family member is not protected under the FMLA because it is not a serious health condition.”¹⁴⁷ And in *Warren v. Time Warner Cable*, in response to the plaintiff’s argument that her bereavement leave was protected, the district court questioned “how the purpose of bereavement leave—taken to mourn the loss of a family member—is identical to [] FMLA leave.”¹⁴⁸

1. *FMLA leave ends upon death because the deceased do not require “care”*

Federal courts have adopted a narrow version of “care” under the Act.¹⁴⁹ Thus, FMLA does not cover employee bereavement because the Act does not view grief as “care” for oneself, nor for another: an employee’s dearly departed lacks basic needs requiring “care.”¹⁵⁰ This approach arguably centers upon employee utility: an employee must either contribute to work, or be incapable of work because they suffer from a serious health condition or because they actively care for a family member who suffers from a serious health condition.¹⁵¹ These protections end upon the death of the family member under the employee’s care—when the utility ends.¹⁵² Unless the employee can demonstrate that they too suffer from a serious health condition, FMLA does not generally address the need for

¹⁴⁷ *Scott*, 2019 U.S. Dist. LEXIS 152321 at *12 n.12.

¹⁴⁸ No. 17-CV-4029, 2020 U.S. Dist. LEXIS 185348 at *28 (E.D.N.Y. Sept. 28, 2020)

¹⁴⁹ Naomi Stern, *The Challenges of Parental Leave Reforms for French and American Women: A Call for a Revived Feminist-Socialist Theory*, 28 VT. L. REV. 321, 330 (2004).

¹⁵⁰ *See id.*; *see also* *Beal v. Rubbermaid Com. Prods., Inc.*, 972 F. Supp. 1216, 1226 (S.D. Iowa 1997).

¹⁵¹ *See* 29 U.S.C. § 2612 (a)(1) (2020).

¹⁵² *See* *Brown v. J.C. Penney Corp.*, 924 F. Supp. 1158, 1162 (S.D. Fla. 1996); Ruth Colker, *HYPERCAPITALISM: Affirmative Protections for People with Disabilities, Illness, and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 242 (1997).

physical and emotional self-care.

Many courts reference the case of *Brown v. J.C. Penny Corporation*,¹⁵³ which determined that when an employee takes FMLA leave to care for a sick family member, that employee's rights to FMLA leave end upon the death of that family member.¹⁵⁴ Plaintiff Ross Brown requested twelve weeks of FMLA leave to care for his terminally ill father out of state.¹⁵⁵ Roughly eight weeks into Brown's leave, his father died.¹⁵⁶ Instead of immediately notifying his employer of his father's death, Brown alleged that he "took care of all his father[']s affairs, requiring more of his time than when his father was still alive."¹⁵⁷ When Brown returned to work at the end of his twelve-week leave, the company offered him his former rate of pay in a different department because it had filled his former role in his absence.¹⁵⁸ Brown brought suit alleging that his employer violated FMLA, but the parties disputed whether Brown's actions fell under FMLA.¹⁵⁹ The court determined that Brown's actions in caring for his father's estate did not constitute "care" under the Act because, it reasoned, only the living may suffer from a serious health condition.¹⁶⁰ The court added, "if Congress wanted to ensure that employees on FMLA leave could take additional time off after a family member died from a serious health condition, it easily could have said so in the statute,"¹⁶¹ before concluding that Brown had abandoned his FMLA protections when he failed to immediately return to work upon his father's death.¹⁶²

¹⁵³ 924 F. Supp. 1158.

¹⁵⁴ *Id.* at 1163.

¹⁵⁵ *Id.* at 1159.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1161.

¹⁵⁸ *Id.* at 1159.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1162.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1163-164.

Beal v. Rubbermaid Commercial Products relied upon *Brown* when it determined that FMLA leave “is not meant to be used for bereavement because a deceased person has no basic medical, nutritional, or psychological needs which need to be ‘cared for.’”¹⁶³ In *Beal*, four plaintiffs brought a joint claim against their employer Rubbermaid, alleging that the organization violated FMLA in myriad ways which included termination or constructive discharge.¹⁶⁴ Plaintiff Julie McKay injured her back while working, sought immediate treatment, received no restrictions from her physician, and returned to work without missing additional time.¹⁶⁵ Roughly one month later, McKay’s son was killed in a car accident.¹⁶⁶ McKay took her allotted three days of funeral leave per company policy, and subsequently requested an additional thirty days of unpaid leave.¹⁶⁷ Roughly eight weeks later, soon after she returned from leave due to financial pressure,¹⁶⁸ McKay again injured her back at work.¹⁶⁹ As a result McKay missed her next shift.¹⁷⁰ When she informed Rubbermaid of her absence, Rubbermaid subsequently terminated her.¹⁷¹ In addition to claims surrounding her back injuries and subsequent care, McKay alleged that Rubbermaid violated FMLA when it failed to provide her additional leave for bereavement.¹⁷² The Southern District of Ohio disagreed, noting that “time off to care for a family member is allowed when a family member with a serious health condition is unable to care for his or her own basic needs.”¹⁷³ The court then determined that because a deceased family member has no

¹⁶³ See *Beal v. Rubbermaid Com. Prods., Inc.*, 972 F. Supp. 1216, 1226 (S.D. Iowa 1997).

¹⁶⁴ *Id.* at 1219.

¹⁶⁵ *Id.* at 1221.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1226.

¹⁶⁹ *Id.* at 1221.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1226.

¹⁷³ *Id.* (referencing 29 C.F.R. § 825.116 (1993)).

needs, a worker cannot use FMLA for their own bereavement.¹⁷⁴

Cases like *Brown* and *Beal* present a troubling premise: although Congress intended for FMLA to help balance competing work and family demands and address family and medical issues,¹⁷⁵ analyses involving death and bereavement seem to focus more on utility and the “medical” aspects rather than the “family” aspects. The Act recognizes a worker’s own medical needs when they arise to the level of a serious health condition, because arguably the worker cannot contribute to the workplace when suffering from such a condition. Likewise, FMLA suggests that a worker may take leave when they are contributing elsewhere as a caregiver.¹⁷⁶ And while FMLA presumes an expectation of the worker as a caregiver in circumstances involving a family member suffering from a serious health condition, it fails to acknowledge the need for self-care after such a difficult experience. Such protections simply terminate upon the death (or recovery) of the inflicted family member—the employee must immediately return to production. Notably, *Beal* also highlights the challenge workers face when accessing unpaid leave: they must also balance their economic needs against personal wellness. Plaintiff McKay returned to work early for economic reasons—not because she had fully processed, or recovered from, the death of her son.¹⁷⁷

2. FMLA adopts a narrow definition of “family”

The 2017 Colorado case *Smith-Megote v. Craig Hospital* also relied upon *Brown* to find that a plaintiff’s FMLA leave ended upon the death of the relative under their care – and further, that the Act did not protect the plaintiff’s care of her sister.¹⁷⁸ Plaintiff Lilia Smith-

¹⁷⁴ *Id.*

¹⁷⁵ 29 U.S.C. § 2601 (b) (1993).

¹⁷⁶ *Id.*

¹⁷⁷ *Beal*, 972 F. Supp. at 1226.

¹⁷⁸ *Smith-Megote v. Craig Hosp.*, 229 F. Supp. 3d 1224, 1227 (D. Colo. 2017).

Megote took FMLA leave in late July 2015 to travel to the Philippines to care for her ailing mother.¹⁷⁹ On August 9, Smith-Megote's mother died.¹⁸⁰ Instead of informing her employer of her mother's passing, the plaintiff "remained in the Philippines for roughly three weeks" before traveling to Spain to allegedly care for her ailing sister.¹⁸¹ She returned to the U.S. on September 1, and on September 3 she informed her employer that she was ready to return to work.¹⁸² Her employer learned of her mother's passing on September 4.¹⁸³ The company dismissed Smith-Megote on September 17 after it determined that FMLA did not apply to her absence after her mother's death, and that, in addition to her prior record, plaintiff failed to "produce a legitimate reason why she remained abroad for over three weeks after her mother's passing."¹⁸⁴

Smith-Megote brought suit in district court, asserting retaliation under FMLA, and the defendants moved for summary judgment.¹⁸⁵ While the parties agreed that she had suffered an adverse action and that it was related to her FMLA rights, they disputed whether she was eligible for FMLA for the period after her mother's death.¹⁸⁶ The plaintiff asserted that she was entitled to FMLA after her mother's death for the purposes of self-care and for the care of her sister—but without success.¹⁸⁷ Like *Brown* and *Beal*, the court in *Smith-Megote* agreed that "an employee is not entitled to go on or remain on FMLA leave for time spent mourning a family member's death."¹⁸⁸ It further found no evidence that Smith-Megote qualified for self-care under

¹⁷⁹ *Id.* at 1226.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1227.

¹⁸⁷ *Id.* at 1228.

¹⁸⁸ *Id.* at 1227.

the Act, and added that the Act does not apply to the care of siblings.¹⁸⁹

Smith-Megote demonstrates one example in which FMLA excludes bereavement and family. While the court recognizes that the plaintiff might have encountered logistical issues in returning to the United States immediately after her mother's death, it still recognizes that FMLA would not apply during the time it would take for the plaintiff to reasonably return to the United States from a foreign country.¹⁹⁰ The court also noted that the Act does not apply to siblings¹⁹¹: the care provision of FMLA applies to "the spouse, or a son, daughter, or parent, of the employee" if they have a serious health condition.¹⁹² Likewise, FMLA does not generally apply to live-in unwed domestic partnerships.¹⁹³ This suggests that, for example, in the case of co-parenting, co-habiting partners, each partner might be eligible for FMLA to care for their sick child, but not to care for each other in the event of sickness. As such the Act adopts a very narrow definition of family in addition to excluding bereavement.

3. *Grief often fails to rise to "incapacity" under FMLA*

FMLA may theoretically offer protection for grieving employees, though the odds remain slim. Courts have entertained inquiry exploring whether an employee's grief might constitute a serious health condition under FMLA. However, in these cases, courts have determined that the employee's grief must rise to the level of

¹⁸⁹ *Id.* at 1228.

¹⁹⁰ *Id.* at 1227.

¹⁹¹ *Id.* at 1228.

¹⁹² 29 U.S.C. § 2612 (a)(1)(C) (1993).

¹⁹³ In 2015, the Department of Labor issued a Final Rule defining "spouse" to include same-sex marriage. The definition includes "lawfully recognized" marriages. See *Final Rule to Revise the Definition of "Spouse" Under the FMLA*, U.S. DEPT OF LAB., <https://www.dol.gov/agencies/whd/fmla/spouse>.

incapacity to warrant FMLA protection. In *Fisher v. State Farm Mutual Auto Insurance*¹⁹⁴ and *Hoban v. WBNCC Joint Venture*,¹⁹⁵ the respective courts considered the possibility of bereavement as a serious medical condition before finding that the employees failed to demonstrate incapacity. In *Fisher*, the court concluded that appellant Stephen Fisher had “waived the incapacity issue” when, after the death of his father, he took two weeks of previously approved leave to manage the funeral and estate.¹⁹⁶ Fisher had requested sixty days of leave to function as executor, assist his grieving elderly mother, and manage his marriage and mental health.¹⁹⁷ However, Fisher’s physician diagnosed him with an “adjustment disorder,” prescribed antidepressants, recommended that Fisher return to work within two weeks rather than sixty days.¹⁹⁸ The physician also later testified that Fisher could have found a replacement executor to improve his mental health.¹⁹⁹ The court ultimately determined that Fisher was not incapacitated under the FMLA because he “actively discharged his duties as the executor of his father’s estate, continued to run the trucking business, and cared for his mother.”²⁰⁰ Likewise, in *Hoban*, the court found that the plaintiff Hoban’s grief did not rise to the level of a serious medical condition because, the day after his brother’s death, he visited his workplace before going to the dentist.²⁰¹

Fisher and *Hoban* echo the continued theme of utility in which the respective courts find no incapacity where bereft employees manage post-mortem affairs or (perhaps) show up to work out of habit in the shock of loss. This presents a troubling conundrum for bereft

¹⁹⁴ 1999 U.S. App. LEXIS 41143 (5th Cir. 1999) (unpublished opinion).

¹⁹⁵ 2007 U.S. Dist. LEXIS 25407 (E.D. Mich. 2007).

¹⁹⁶ 1999 U.S. App. LEXIS at *1, *4.

¹⁹⁷ *Id.* at *2.

¹⁹⁸ *Id.* at *2-3.

¹⁹⁹ *Id.* at *5.

²⁰⁰ *Id.* at *5-6

²⁰¹ *Hoban v. WBNCC Joint Venture*, 2007 U.S. Dist. LEXIS 25407 at *15 (E.D. Mich. 2007).

employees seeking FMLA leave: in committing the acts for which they need leave, including management of family affairs, employees disqualify themselves from accessing it.

4. *Reliance under FMLA risks poor workplace policy*

*Murphy v. FedEx National LTL, Inc.*²⁰² presents a curious scenario: reliance. Plaintiff Susan Murphy took FMLA 11 days after her spouse of 22 years—who was also her coworker—took FMLA leave for an illness.²⁰³ FedEx sent both Murphy and her spouse letters disclosing the terms of their leave: “failure to work on the first workday following the expiration of your FMLA leave for any reason will constitute a voluntary resignation by you unless the Company has approved an alternative arrangement prior to the expiration of your FMLA leave.” Although the hospital anticipated his quick release, Murphy’s spouse suddenly died less than two weeks later.²⁰⁴ That same day, while bereft, crying, and concerned for her job security, Murphy called her supervisor Jeff Karnes, who informed Murphy that she would not need to reapply for her position.²⁰⁵ Murphy alleged that days later, Karnes asked Murphy how much time she might need in light of her loss, and Murphy indicated that she needed thirty days “to take care of things.”²⁰⁶ Karnes informed Murphy the additional time was “not a problem”; he did not request medical documentation to determine whether Murphy “suffered from a ‘serious medical condition.’”²⁰⁷ Then, despite his assurances, Karnes completed Murphy’s termination paperwork the very next day, and discharged her

²⁰² 582 F. Supp. 2d 1172 (E.D. Mo. 2008).

²⁰³ *Id.* at 1175. (“Paul Murphy went on FMLA leave on August 17, 2006. Plaintiff went on FMLA leave on August 28, 2006 to care for her husband”).

²⁰⁴ *Id.* at 1176.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

three days later.²⁰⁸

In the lower court in *Murphy*, the parties disagreed over Murphy's purpose in taking leave "to take care of things."²⁰⁹ FedEx insisted that Murphy's leave was not approved under FMLA because she intended to use it for bereavement.²¹⁰ Murphy instead asserted that she sought leave for self-care, and thought her leave had been approved after her phone conversation with Karnes.²¹¹ The court determined that the employer had notice that Murphy was at least requesting leave, because the employer was aware of Mr. Murphy's death, and because the plaintiff had cried over the phone and indicated she needed to "take care of things."²¹² But because FedEx did not pursue inquiry to determine whether Murphy's situation qualified under FMLA, the court determined that Murphy acted in reliance when she continued her leave—under belief that her leave had been approved, despite never submitting any medical information.²¹³ Thus, the court estopped FedEx "from denying that it approved Plaintiff's FMLA leave."²¹⁴ Upon appeal, the Eighth Circuit upheld the estoppel theory: "an employer who makes an affirmative representation that an employee reasonably and detrimentally believed was a grant of FMLA leave can be estopped from later arguing that the employee was not in fact entitled to that leave because she did not suffer a serious health condition."²¹⁵ However, the court ordered on remand that the district court's new jury instructions would specify that Murphy needed to show that she reasonably believed FedEx had specifically granted her FMLA leave rather than leave in general

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1180.

²¹⁰ *Id.*

²¹¹ *Id.* at 1181.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 1182.

²¹⁵ *Murphy v. FedEx Nat'l LTL, Inc.*, 618 F.3d 893, 899-900 (2010 U.S. App.)

or some other kind of leave.²¹⁶

Smith-Megote also addressed reliance and estoppel.²¹⁷ The plaintiff argued that because her employer had approved her leave through mid-September 2015, and she relied upon that information and was ultimately terminated, her employer was barred from denying she was ineligible for leave after the death of her mother.²¹⁸ Unlike *Murphy*, however, the court in *Smith-Megote* determined estoppel did not apply. Citing the Tenth Circuit, *Smith-Megote* found that the employer did not intend for the plaintiff to act upon its conduct, and that the plaintiff was not ignorant of the true facts of the situation.²¹⁹ However, the overall tone of the court toward the Plaintiff seemed to suggest that the court did not fully believe Plaintiff's challenges in handling overseas family death and illness: "plaintiff simply took it upon herself to stay in the Philippines for about three additional weeks and then travel to Spain to check on her sister (who allegedly was experiencing health issues)."²²⁰

Regardless of their opposing outcomes, *Murphy* and *Smith-Megote* both recognize reliance and estoppel as a legitimate premise under FMLA. Thus, reliance presents a cautionary hypothetical for a sympathetic, lax, or noncommunicative employer. A grieving employee who reasonably believes their employer granted them FMLA may prevail without demonstrating that they suffer from a serious health condition under the Act. And yet, plaintiff who asserts estoppel because they used the full leave initially granted by their employer might fail where a court distrusts the employee's alleged ignorance to the facts. Either way, such outcomes hinge upon workplace communications. An employer who communicates with legitimate or false sympathy, as in *Murphy*, might risk later estoppel.

²¹⁶ *Id.* at 900.

²¹⁷ 229 F. Supp. 3d 1224 (D. Colo. 2017).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 1227-28.

Where the parties communicate far less, as in *Smith-Megote*, the risks of detrimental reliance and estoppel reduce. Such jurisprudence invites poor workplace policy: it might influence employers to altogether avoid the issue of employee bereavement.

Although Congress did not enact FMLA to address bereavement, bereft employees reach for it as a lifeline in a legal vacuum. As demonstrated, such claims typically fail or produce curious results. Given that death of a loved one is a possible logical outcome of caring for someone with a serious health condition, a rational solution might include bereavement protections under FMLA. By bringing bereavement claims under FMLA, however, parties ask the court to implement the wrong tool in place of one which American law has yet to craft. Perhaps because the initial framework of the Act sought to support women and mothers while balancing gender dynamics, lawmakers focused on the concept of birth or raising young children rather than elder care or death. Perhaps they overlooked bereavement for the previously posited philosophical, utilitarian, or gendered reasons. Regardless of the reasons, FMLA generally fails to protect grieving workers suffering the loss of a loved one.

B. Title VII and Bereavement

Workers have also turned to Title VII to litigate their grief. Like FMLA, Title VII was not designed to address bereavement. Title VII offers protection against workplace discrimination on the basis of “race, color, religion, sex, or national origin.”²²¹ While “grieving individual” does not directly constitute a protected class, certain grief practices based upon religious beliefs may benefit from Title VII protections. However, grief also rests at an intersection of mental health and faith – and Title VII provides an inappropriate framework for mental health. While Title VII often applies both an objective and

²²¹ 42 U.S.C. § 2000e-2(a)(1).

subjective standard when evaluating discrimination, a court might view a bereft worker as subjectively hyper-sensitive in an objectively neutral situation. Alternatively, a court may find employer responses to grief behavior as not adverse, or justified, under the *McDonnell Douglas* affirmative defense.²²²

1. *Religious accommodation claims may fail when intersections of faith and grief impact workplace communication and behavior*

Because religious accommodation cases require that the plaintiff show that the need for an accommodation was a motivating factor in the employer's adverse action,²²³ Title VII may fail employees who suffer from communication challenges when dealing with sudden loss or a short-notice religious observance. For example, the district court in *Blum v. Council Rock School District* found that an employer's denial of an employee's request to take the remainder of the day off work to help plan her father's upcoming funeral contributed to a pattern of discriminatory conduct on the basis of her religion.²²⁴ Yet in *Harris v. Labor Finders International*, the Middle District of Louisiana found no adverse action where, among other claims, the employer issued plaintiff a one-day suspension after he forgot to call in his absence to attend his grandmother's funeral that same day.²²⁵

Adeyeye v. Heartland Sweeteners also addresses questions of notice and whether custom and tradition constitute sincerely held religious

²²² Under the *McDonnell Douglas* burden shifting framework, an employer may articulate a legitimate non-discriminatory reason to justify an otherwise adverse action against an employee. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²²³ See e.g., *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772 (2015) (indicating that plaintiffs no longer need to show that their employer had "actual knowledge" of a need for an accommodation, but instead may show that the "need for accommodation was a motivating factor in the employer's decision).

²²⁴ No. 02-CV-769, 2003 U.S. Dist. Lexis 3022 (E.D. Pa. Feb. 14, 2003).

²²⁵ No. 17-692-SDD-EWD, 2019 U.S. Dist. Lexis 15187 at *4, *16 (M.D. La. Jan. 31, 2019).

belief under Title VII.²²⁶ Upon the death of his father, Plaintiff Sikiru Adeyeye submitted two formal requests to his Indiana employer for leave to travel to Nigeria for the funeral rituals.²²⁷ The first request, submitted in July, indicated that Adeyeye needed five weeks of leave in October to participate in all ceremonial rituals “according to our custom and tradition” and care for his mother.²²⁸ The letter described specific rituals: that the ceremony would last “three to four weeks,” that “two weeks after the burial there is a certain rite that all the children must participate,” that “after the third week, my mother will not come out until after one month when I have to be there to encourage her, and I have to kill five goats, then she can now come out,” and that these rituals were required to protect the lives of the children.²²⁹ After Heartland denied his first request in late August, Adeyeye appealed in mid-September—requesting one week of vacation and three weeks of leave, noting his presence in Nigeria was required: “I have to be there and involved totally in this burial ceremony being the first child and the only son of the family.”²³⁰ Heartland denied Adeyeye’s leave request due to “business need” and offered Adeyeye the option to voluntarily resign and reapply upon his return.²³¹ Compelled by his responsibility, Adeyeye “saved money for the trip, took out a loan using his car as collateral.”²³² On October 6, he returned to Nigeria to fulfill his ceremonial responsibilities in his father’s funeral.²³³ After Adeyeye returned to work on November 2, he discovered that Heartland terminated him on

²²⁶ 721 F.3d 444 (7th Cir. 2013).

²²⁷ *Adeyeye v. Heartland Sweeteners, LLC*, No. 1:11-cv-1115-WTL-TAB, 2012 U.S. Dist. LEXIS 173750, at *2 (S.D. Ind. Dec. 7, 2012).

²²⁸ *Id.* at *2-3.

²²⁹ *Id.* at *3.

²³⁰ *Id.* at *3-4.

²³¹ *Id.* at *4. Heartland had previously granted leave to another worker to care for a sick relative in Mexico, and had offered the “resignation and reapplication” option to a worker who traveled to Africa to marry. *Id.* at *5.

²³² *Id.* at *6.

²³³ *Id.*

October 14.²³⁴ He then brought claims of religion and national origin discrimination for failure to accommodate and termination under Title VII.²³⁵

The Indiana Southern District Court granted summary judgment for Heartland. The court questioned whether evidence of Adeyeye's participation in his father's ceremony constituted religious belief.²³⁶ During his deposition Adeyeye stated that "the rites and customs . . . the drums and people following [him] around and killing of goats" were his father's beliefs, not his own.²³⁷ Although Adeyeye asserted that his belief in the necessity of the ritual itself may differ from his belief of the need to perform it, the court remained skeptical.²³⁸ Ultimately, the court determined that even if Adeyeye could demonstrate religious belief, his claim failed on the notice requirement²³⁹ because Adeyeye's letters constituted insufficient evidence of notice of a need for religious accommodation.²⁴⁰ In an arguably narrow perspective on spirituality, the court stated, "Religious practice involves custom and tradition surely, but not all custom and tradition invoke the spiritual [T]he reference to custom and tradition at the exclusion of religion suggests that this request was not based on religion."²⁴¹

The Seventh Circuit reversed upon appeal, finding that "Adeyeye's religious request to attend his father's funeral in Nigeria so that he could perform specific rites, traditions, and customs was

²³⁴ *Id.*

²³⁵ *Id.* The lower court in *Adeyeye* stated that a plaintiff claiming failure to accommodate based on religious discrimination must demonstrate that the observance which conflicts with employment is religious in nature, that they notified the employer of the observance's conflict with work, and that the observance was the basis for their discrimination or discharge. *Id.* at *7-8.

²³⁶ *Id.* at *8-9.

²³⁷ *Id.* at *8.

²³⁸ *Id.*

²³⁹ *Id.* at *9.

²⁴⁰ *Id.* at *11.

²⁴¹ *Id.*

borne from his own personally and sincerely held religious beliefs,"²⁴² and that his absence to observe his religious practices directly caused his termination.²⁴³ The court further noted that the broader issue of religious belief rests upon sincerity—and that deeper analysis into an employee's conscious and subconscious, or questioning whether someone's beliefs were proper, remained outside of the court's scope.²⁴⁴ The Seventh Circuit also rejected Heartland's undue hardship affirmative defense, noting that the employer provided no evidence to support that granting Adeyeye his one-week paid vacation and three weeks of unpaid leave would burden the employer, particularly because the employer regularly employed temporary workers.²⁴⁵ Finally, the court disposed of Heartland's assertion that it provided Adeyeye a reasonable accommodation when it suggested voluntary termination and reapplication. "At the risk of belaboring the obvious, Title VII aimed to ensure that employees would not have to sacrifice their jobs to observe their religious practices. An option of voluntary termination with the right to ask for one's old job later is not a reasonable accommodation."²⁴⁶

Under *Adeyeye*, it appears as though at least one circuit might support leave accommodations for bereavement activities related to religion, given proper notice. However, when a worker's grief and observance impacts workplace behavioral expectations, a court may find justifiable adverse actions. *Price v. Cushman & Wakefield, Inc.* demonstrates the tensions between an employee's grief, their religious expression, and workplace expectations, all while acknowledging the heightened sensitivity of a bereft worker.²⁴⁷ Plaintiff Mark Price's three-month old son Noah was diagnosed with a terminal

²⁴² *Adeyeye v. Heartland Sweeteners*, 721 F.3d 444, 452 (7th Cir. 2013).

²⁴³ *Id.* at 454.

²⁴⁴ *Id.* at 452.

²⁴⁵ *Id.* at 455.

²⁴⁶ *Id.* at 456.

²⁴⁷ 808 F. Supp. 2d 670 (S.D. N.Y. 2011).

condition and spent his life hospitalized before dying at the age of three.²⁴⁸ Price had previously attended Chabad temple but became more devoted to his Jewish faith after Noah's diagnosis.²⁴⁹ After Noah's death, Price chose to "return to work as soon as possible to help distract him from thoughts of his son."²⁵⁰ He had requested not to receive emails during the days after Noah's death, which coincided with Rosh Hashanah, but complained that his supervisor Joanne Podell had emailed him.²⁵¹ Price had also stopped shaving in religious mourning; Podell told him he was not "present[ing] well."²⁵² Price alleged that Podell said she "would not take him to any meetings" when he told her his beard represented his mourning.²⁵³ Podell testified that she made no comments during Price's mourning, but admits she chastised him for not shaving after he had "come directly to work after spending the night at the hospital."²⁵⁴

Price's observance habits also shifted after Noah's passing. He began attending temple for morning prayer, and arriving at work between 8:30 a.m. and 9:00 a.m.²⁵⁵ One morning Price arrived at 9:15 a.m., and Podell asked him why he was late.²⁵⁶ Price stated that he had attended temple for morning prayer, and claims Podell told him to "pray at night."²⁵⁷ Price countered that he could only wear *tefillin*²⁵⁸

²⁴⁸ *Id.* at 677; see also *Price v. Cushman & Wakefield, Inc.*, 829 F. Supp. 2d 201, 208 (S.D. N.Y. 2011).

²⁴⁹ *Price*, 808 F. Supp. 2d at 677-78.

²⁵⁰ *Id.* at 679.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Price v. Cushman & Wakefield, Inc.*, 829 F. Supp. 2d 201, 216 (S.D. N.Y. 2011). Podell likely referred to an event prior to Noah's death.

²⁵⁵ *Price*, 808 F. Supp. 2d at 679.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *What Are Tefillin?*, CHABAD, https://www.chabad.org/library/article_cdo/aid/1918251/jewish/What-Are-Tefillin.htm (last accessed Nov., 6, 2022). A black leather box with leather straps, which Orthodox Jewish men wear during weekday morning prayer.

in the morning for Noah. According to Price, Podell replied, “We can’t have this anymore, if you want to work for me,” and made a chopping motion with her hand.²⁵⁹ Price then switched to a non-Chabad temple to attend an earlier service, and claimed that he lost the support of his Chabad community and rabbis.²⁶⁰ Price further alleged that in November of that same year, Podell denied his request to hang a *mezuzah* in his cubicle.²⁶¹ Price began praying more frequently in the office – multiple times each day - and alleged that Podell interrupted his prayers and would continue to stand in the room and interrupt him until he responded.²⁶² Soon after, Price and Podell disagreed over his commission arrangement.²⁶³ Price escalated the dispute to management, requesting to be held to what he understood as the initial arrangement, and asked to no longer work with Podell.²⁶⁴ After their split, Podell blocked Price from accessing his files for over three weeks which Price claimed inhibited his production.²⁶⁵ Price continued to complain to coworkers and managers about Podell and his commission – and was subsequently relocated to another floor for being “disruptive.”²⁶⁶ He met with management twice more to discuss his concerns. The company dismissed Price just one year after Noah’s death,²⁶⁷ later stating “his incessant complaints about the commission dispute had become disruptive in the workplace and his minimal production as an independent broker did not justify the

²⁵⁹ *Price*, 808 F. Supp. 2d at 679.

²⁶⁰ *Id.* at 680.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Price’s supervisor thought his commissions “would be adjusted to meet a goal of \$200,000 total annual compensation,” while Price had understood his commissions to be a flat rate of 20%. At the time, Price was working on a pending deal which would yield far over \$200,000 itself. Later his supervisor offered a tiered commission scheme which Price also disputed. *Id.* at 681.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 683.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 684.

organization's continued sufferance of his discontent."²⁶⁸

Upon summary judgment, the court determined that many of Price's claims prior to his termination were time-barred under Title VII, but survived under state or city law following Title VII framework.²⁶⁹ It found no adverse action where Podell threatened to fire Price, because it was an "unrealized threat"²⁷⁰ and she "did not ultimately terminate" him.²⁷¹ It noted that Price's time-barred claims related to the organization's failure to investigate his discrimination complaints, his relocation to another floor, and issue of his late arrival from prayers did not constitute adverse actions.²⁷² The court recognized how, in some cases, "an adverse action may include the threat of discipline or demotion for missing work in order to attend religious observances." Ultimately, however, the court found that Podell's threat - "We can't have this anymore, if you want to work for me" - was not sufficiently direct or explicit enough to constitute an adverse action.²⁷³ The court determined that Price's termination supported his claim for retaliation on the basis of his voicing his commission and discrimination concerns, and allowed his hostile environment claim to progress as well.²⁷⁴ After a bench trial, however, the court ruled fully in favor of the employer, finding that Price's disruptive behavior constituted a legitimate nondiscriminatory reason for the commission dispute, Price's relocation, and his termination.²⁷⁵ The court acknowledged the subjective requirement in hostile

²⁶⁸ Price v. Cushman & Wakefield, Inc., 829 F. Supp. 2d 201, 221 (S.D. N.Y. 2011).

²⁶⁹ Price, 808 F. Supp. 2d at 687-88.

²⁷⁰ *Id.* at 690.

²⁷¹ *Id.* at 688.

²⁷² *Id.* at 690.

²⁷³ *Id.* at 691 (internal quotations omitted).

²⁷⁴ *Id.* at 699.

²⁷⁵ Price v. Cushman & Wakefield, Inc., 829 F. Supp. 2d 201, 221 (S.D. N.Y. 2011).

environment claims²⁷⁶ but determined that the employer's actions were "relatively innocuous encounters" which Price only perceived as discriminatory "[g]iven the colossal stress and trauma he was enduring due to the illness and eventual death of his son."²⁷⁷

Adeyeye and *Price* exist at opposing poles under Title VII. In *Adeyeye*, Title VII protected an employee who provided notice in seeking a lengthy yet finite leave term to practice grief rituals. In *Price*, Title VII did not protect an employee who likely could not afford to seek unpaid leave for his rituals, instead overworked, and brought his grief and anxieties to work. Although it is unclear whether Price might have accessed FMLA or ADA protections, *Price* again highlights the burdens of unpaid leave: Price and his wife experienced heavy financial strain and "heightened anxiety" in addition to their loss because his wife had resigned from her career to care for their dying baby.²⁷⁸ *Price* further demonstrates the ways in which religion, family, illness, and grief intersect to impact an organization: a grieving worker without leave to process their loss may become disruptive to the detriment of both the worker's wellness and the work environment.. Taken together, *Adeyeye* and *Price* demonstrate how Title VII protects employees from religious discrimination in the workplace yet may not protect grief-related behavior at work.

²⁷⁶ Here the court noted that "the victim must also perceive that environment to be abusive" under Title VII and added that under the New York City law that "defendants can nevertheless still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences." *Id.*

²⁷⁷ *Id.* at 222.

²⁷⁸ *Id.* at 208.

C. Grief Under the ADA and Recent APA Diagnostic Definitions

The amended Americans with Disabilities Act would seem an appropriate framework for some instances of grief, although some scholars suggest that “disability status is [] shifty.”²⁷⁹ Under the Act, disability is defined as a “physical or mental impairment that substantially limits one or more of the major life activities of an individual.”²⁸⁰ Disability may also include “a record of such impairment,” or being “regarded as” having such impairment.²⁸¹ Mental impairments include “mental or psychological disorder[s]” including mental illness.²⁸² Just as FMLA analysis found no incapacity where bereft employees managed their family affairs while grieving, an ADA analysis might determine that grieving individual who managed affairs was not substantially limited in a major life activity. Courts have found in some instances that depressive symptoms akin to grief did not constitute a disability because it did not substantially limit a major life activity, or because the condition was a “temporary psychological impairment.”²⁸³ Yet courts have found disability where the

²⁷⁹ Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 732 (2014). Note that technically the amended portion of the Act is referred to as the ADAAA. However, because this article speaks to the broader Americans with Disabilities Act, it will refer to the Act as the ADA.

²⁸⁰ 29 C.F.R. § 1630.2(g)(1) (2012).

²⁸¹ *Id.*

²⁸² *Id.* § 1630.2(h)(2).

²⁸³ See *Bedford v. Michigan*, 722 Fed. App'x 515, 519 (6th Cir. 2018) (reviewing cases to determine circumstances which qualify stress and anxiety as disability under the Act); *Bliss v. Nationwide Mut. Ins. Co.*, No. SA-08-CA-864-FB, 2010 U.S. Dist LEXIS 49028 (W.D. Tex. Feb. 25, 2010) (same). Many modern cases rely on analyses that predate the 2008 Amendment which expanded the definition of disability, such as *Pack v. Kmart Corp.*, 166 F.3d 1300 (10th Cir. 1999) (finding no substantial interference with major life activity where depression impacted sleep, but there existed no evidence of severe, long term, or permanent impact); *Palmer v. Circuit Court, Social Serv. Dep't*, 905 F. Supp. 499 (N.D. Ill. 1995) (finding no disability where employee failed to show that her depression and paranoia substantially limited a major life activity and did not restrict her ability to perform a broad

plaintiff produces record evidence such as “history of antidepressants, medical certificates, and hospitalization.”²⁸⁴ A court would need to determine whether grief constitutes an impairment or is perceived as an impairment before evaluating whether it substantially limits a major life activity. Thus, a current controversy over the classification of grief—whether it is a natural or temporary response to loss, or whether it constitutes a disorder—may inhibit access to protection under the ADA.

The classification of grief remains a moving target: the medical community has debated over grief since at least the 1990s.²⁸⁵ Historically, although grief may mirror depression symptoms, the diagnostic definition of depression excluded bereavement – “the usual grieving after the loss of a loved one” – to avoid potential for false-positive depression diagnoses in grieving patients.²⁸⁶ In 2012, the American Psychiatric Association (APA) considered eliminating the “bereavement exclusion” from depression diagnoses when updating its fourth edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) to the fifth edition (DSM-V).²⁸⁷ Congress, courts, and agencies have relied on the DSM standards to determine eligibility under the ADA, FMLA, and other statutes; the DSM “is useful when classifying patients for insurance, research, or treatment

range of jobs), *aff'd*, 117 F.3d 351 (7th Cir. 1997); *Kotlowski v. Eastman Kodak Co.*, 922 F. Supp. 790 (W.D.N.Y. 1996) (chronic absenteeism and tardiness caused by depression was not enough to show substantial limitation of major life activities under ADA).

²⁸⁴ See e.g. *Williamson v. Larpenter*, No. 19-254 2019 U.S. Dist. LEXIS 133628 (E.D. La. July 15, 2019) (describing circumstances which qualify as a disability).

²⁸⁵ Ellen Barry, *How Long Should It Take to Grieve? Psychiatry Has Come Up With an Answer*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/health/prolonged-grief-disorder.html>.

²⁸⁶ Benedict Carey, *Grief Could Join List of Disorders*, N.Y. TIMES (Jan. 24, 2012), <https://www.nytimes.com/2012/01/25/health/depressions-criteria-may-be-changed-to-include-grieving.html>.

²⁸⁷ *Id.*

purposes.”²⁸⁸ Yet, legal scholars criticized over-reliance upon the DSM because the manual “increasingly lists sets of hypotheses, somewhat proved and somewhat unproved, that were reliably defined so as to be further studied and later further refined, proved, or disproved, rather than listing disorders.”²⁸⁹ The DSM-IV further cautioned legal practitioners that its clinical diagnoses may not rise to the legal standard of disorder, disability, disease, or defect.²⁹⁰

Thus, the APA’s proposed revision sparked uncertainty and debate within legal and mental health communities. Some mental health experts argued that although “[a]n estimated 8 to 10 million people lose a loved one every year, and something like a third to half of them suffer depressive symptoms for a month afterward,” eliminating the bereavement exclusion would pathologize normal behavior.²⁹¹ Others countered that the exclusion was not clinically proactive. “If someone is suffering from severe depression symptoms one or two months after a loss or a death, and I can’t make a diagnosis of depression That person may then not get the treatment they need.”²⁹² The legal community raised concerns of the DSM-V’s interactions with the 2008 amendments to the ADA,²⁹³ arguing that the removal of the bereavement exemption would “medicalize normal grief” and thus push grief out from bereavement policy and into the realm of the ADA’s interactive process.²⁹⁴ Roughly a decade later in March 2022, the APA updated the DSM-V to include “prolonged grief disorder.” This new diagnosis applies to “a narrow slice of the

²⁸⁸ See Douglas A. Haas, *Colloquium Article: Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction between the DSM-5 and Employment Law*, 44 LOY. U. CHI. L.J. 683, 684, 689 (2013).

²⁸⁹ *Id.* at 693 (internal quotations omitted).

²⁹⁰ *Id.*

²⁹¹ Carey, *supra* note 286.

²⁹² *Id.*

²⁹³ See generally Haas, *supra* note 288, at 694-716.

²⁹⁴ *Id.* at 709-10. Note Haas also mentions that this pushes grief into the realm of FMLA leave. *Id.* However, this article has already established how FMLA fails to address grief.

population who are incapacitated, pining, and ruminating a year after a loss, and unable to return to previous activities.”²⁹⁵ Critics again raise concerns over false positives or misclassification of grief as a mental illness, but proponents claim that the diagnosis remains available only in cases of extreme grief lasting longer than six months.²⁹⁶

Due to the very recent nature of the DSM-V classification, case law on prolonged grief disorder under the ADA has yet to emerge.²⁹⁷ A database search revealed only one grief case under the ADA which also referred to the previous DSM-IV standard for depressive disorder.²⁹⁸ In the 2021 case of *Jones v. McDonough*, the Tennessee Middle District Court found that the Act did not protect plaintiff Susan Jones while she grieved the loss of both of her parents.²⁹⁹ Although Jones claimed she suffered from anxiety and depression related to her grief, the court concluded that her physician had not diagnosed her with any disability.³⁰⁰ Instead, her physician reported that Jones experienced “difficulty concentrating and her productivity was going down,” had prescribed medication, and indicated that her condition would soon improve.³⁰¹ Thus *Jones* fails to provide any insight into grief under the ADA.

²⁹⁵ Ellen Barry, *How Long Should It Take to Grieve? Psychiatry Has Come Up With an Answer*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/health/prolonged-grief-disorder.html>.

²⁹⁶ *Id.*

²⁹⁷ A search for “prolonged grief disorder” yielded one case in which the court found that plaintiff’s prolonged grief disorder, in addition to other ailments, did not constitute disability for the purposes of Social Security Disability Insurance Benefits. *See Jennifer E. v. Kijakazi*, No. 1:20-3469-RBH-SVH (D.C. S.C. Aug. 20, 2021). This author intends to revisit the DSM classifications and the ADA in another article.

²⁹⁸ LEXIS search terms included: “DSM and ADA and grief or grieving or bereavement,” “DSM and ADA and depressive disorder” and further refined by “grief” and, alternatively, “bereavement.”

²⁹⁹ *Jones v. McDonough*, No. 3:19-cv-00310, 2021 U.S. Dist. LEXIS 48000, at *29 (M.D. Tenn. Mar. 15, 2021).

³⁰⁰ *Id.*

³⁰¹ *Id.*

Like FMLA and Title VII, the ADA appears to be another gray area for grief. Because the DSM lacks definitive guidance on the legal standard of a disorder, courts may not find a bright line solution from the new classification. And because mental health professionals disagree over whether grief constitutes a disorder or is simply a normal response to loss, courts may be reluctant to determine that grief constitutes an impairment under the ADA. Given the combined emergence of “prolonged grief disorder” as a classification and the current wave of grief, courts may soon be forced to once again venture into another area of law poorly equipped to analyze grief.

III. RECOMMENDATIONS FOR REASONABLE PAID BEREAVEMENT POLICY

Workplace grief rests upon a unique paradox. Although arguably “medically normal,”³⁰² grief is not “workplace normal.” As depicted in Part II, grief may manifest in undesirable workplace behaviors which may result in job loss or other adverse actions in the absence of sufficient bereavement leave or other support. Applying FMLA and Title VII frameworks to grief cases may yield inconsistent outcomes and force both employers and employees to navigate the dark seas of workplace grief without a compass. *Murphy* and *Smith-Megote* demonstrate how risk of reliance and subsequent estoppel may create confusion for employees, disadvantage employers, and inhibit communication over grief rather than promoting it in the workplace. *Price* depicts an extreme example of how grieving worker behavior may justify termination. And while the recent addition of prolonged grief disorder to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders³⁰³ grants

³⁰² Carey, *supra* note 286.

³⁰³ APA Offers Tips for Understanding Prolonged Grief Disorder (Sept. 23, 2021), <https://psychiatry.org/news-room/news-releases/apa-offers-tips-for-understanding-prolonged-grief>.

recognition to extreme grief, case law in this area has yet to develop, and the outcomes remain uncertain.

Rather than forcing litigants to muddle through ill-fitting frameworks, lawmakers should consider adopting an independent bereavement statute or incorporating bereavement into existing leave statutes. The presence of a prevailing bereavement statute could assist employers and employees with directly identifying a clear and prevailing law, thus reducing risk of reliance or confusion while offering workers and organizations a clearer path to navigate workplace grief. Given the underlying theme of financial hardship in cases like *Beal* and *Price*, a comprehensive leave policy should contain a paid provision to avoid forcing workers to choose between working and processing their grief. Studies demonstrate that an absence of paid leave harms children, workers, and organizations.³⁰⁴ Employers lose productivity and incur turnover costs, and many workers who take unpaid leave rely upon public assistance or incur heavy debt.³⁰⁵ In contrast, research suggests that paid family leave models, where implemented, had “a positive or neutral effect on productivity, profitability, turnover, and employee morale,”³⁰⁶ benefitting workers and businesses. One 2021 study determined that paid leave “can significantly reduce . . . economic constraints” minorities face and possibly promote minority leave-taking.³⁰⁷ Thus, paid leave would help alleviate the “leave gap” identified in Part I.

Current legislators are not working with an empty set. Some states—and the federal government—address bereavement in legislation. Legislators may benefit by pulling relevant provisions from other states to create a customized hybrid of existing policy.

³⁰⁴ U.S.: *Lack of Paid Leave Harms Workers, Children: Weak Laws, Discrimination Bad for Families and Businesses*, HUM. RTS. WATCH (Feb. 23, 2011, 5:46 AM), <https://www.hrw.org/news/2011/02/23/us-lack-paid-leave-harms-workers-children#>.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Joshi, *supra* note 42, at 530.

A. *The Current Shifting Landscape of Leave Policy*

1. *Federal government flirts with policy, but “is a tall order”*

The landscape of leave is shifting as states and federal law consider legislation. On the federal level,³⁰⁸ The White House promised new leave provisions which included bereavement support for American workers. In April 2021, President Biden announced the American Families Plan, which sought to create “a national comprehensive paid family and medical leave program that will bring America in line with competitor nations that offer paid leave programs.”³⁰⁹ In relevant part, the Plan provided workers with bereavement time:

It will guarantee twelve weeks of paid parental, family, and personal illness/safe leave by year 10 of the program, and also ensure workers get three days of bereavement leave per year starting in year one. The program will provide workers up to \$4,000 a month, with a minimum of two-thirds of average weekly wages replaced, rising to 80 percent for the lowest wage workers.³¹⁰

However, in October 2021 bereavement provisions were

³⁰⁸ Federal employees may be eligible to take up to two weeks of paid bereavement after suffering the death of a child. See *What Federal Employees Should Know About the New Paid Parental Bereavement Leave Benefit*, GOV'T EXEC. (Apr. 4, 2022), <https://www.govexec.com/pay-benefits/2022/04/opm-offers-guidance-implementing-new-paid-parental-bereavement-leave-benefit/363989/>.

³⁰⁹ *Fact Sheet: The American Families Plan*, THE WHITE HOUSE (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/>.

³¹⁰ *Id.*

reportedly stripped from the bill,³¹¹ and commentators remain doubtful: “Passing all – or even part – of the American Families Plan . . . [is] a tall order” with a high price tag of \$1.8 trillion.³¹²

Proponents of paid federal leave continue to advocate for the benefit, however. In a January 9, 2023 letter to The Office of Management and Budget Director Shalanda Young, sixteen senators requested “\$547 billion in mandatory, permanent spending over 10 years” to fund a “national paid family and medical leave program that would guarantee up to 12 weeks of paid parental, family caregiving, and personal medical leave to all working people in the United States.”³¹³ These senators, led by Senator Gillibrand, remind Director Young of the reality that “with the notable exceptions of those in select states that have forged a path forward on paid leave, a person’s access to paid leave is entirely dependent upon their employer’s generosity.”³¹⁴ It remains unclear from the text of these efforts whether bereavement will be included in proposed federal leave provisions. Regardless, given recent shifts in the political makeup of Congress, proponents of federal paid leave continue to face a funding hurdle as “the two parties have historically

³¹¹ Jake Epstein et al, *Biden in his campaign promised more family and medical leave for workers. Now Democrats are said to be stripping the benefits from his signature social-spending package*, BUS. INSIDER (Oct 27, 2021, 4:34 PM), <https://www.businessinsider.com/senate-democrats-strip-family-medical-leave-from-spending-package-2021-10>.

³¹² Heather Long, *Top 5 Takeaways from Biden’s American Families Plan*, WASH. POST (Apr. 28, 2021), <https://www.washingtonpost.com/business/2021/04/28/top-takeaways-american-families-plan/>.

³¹³ Press Release, Gillibrand Leads 15 Senate Colleagues In Push To Include 12 Weeks Of National Paid Family And Medical Leave In President Biden’s Budget (Jan. 12, 2023), <https://www.gillibrand.senate.gov/news/press/release/gillibrand-leads-15-senate-colleagues-in-push-to-include-12-weeks-of-national-paid-family-and-medical-leave-in-president-bidens-budget>; Letter to Director Young (Jan. 9, 2023), <https://www.gillibrand.senate.gov/imo/media/doc/FINAL%20Letter%20to%20OMB%20re%20FY24%20Paid%20Leave%20Request.pdf>.

³¹⁴ Letter to Director Young, *supra* note 313.

disagreed on how to pay for such programs.”³¹⁵

2. *State-level protections are few, and where available, vary*

Some states now acknowledge bereavement, through protections differ and generally fail to consider independent or self-employed workers. Recently Illinois has taken progressive steps in bereavement and sick leave policy. In 2016, Illinois enacted the Illinois Child Bereavement Act, which offered unpaid leave for parents grieving the loss of a biological, adopted or foster child, stepchild, ward, or “a child of a person standing in loco parentis.”³¹⁶ But in the summer of 2022, Illinois expanded the coverage of the Illinois Child Bereavement Act to include additional family members, effective January 1, 2023.³¹⁷ The Act, now called the Family Bereavement Leave Act (IFBLA), applies to employees and employers as defined by the FMLA,³¹⁸ and provides up to ten work days of unpaid bereavement leave to grieve, make arrangements, or attend the funeral (or “alternative to a funeral”) of a covered family member.³¹⁹ Under this recent expansion, covered family members now include an employee’s child or stepchild, spouse or domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent.³²⁰ Notably, where some policies may cover spouses, this new definition of a covered family member includes domestic partners—as recognized by any state’s law, or, alternatively, as “an unmarried

³¹⁵ Li Zhou, *Democrats are trying to keep the fight for paid leave alive*, VOX (Jan. 12, 2023), <https://www.vox.com/policy-and-politics/2023/1/12/23552186/kirsten-gillibrand-paid-leave-democrats-biden>; see also Gillibrand Press Release, *supra* note 313.

³¹⁶ The Child Bereavement Leave Act granted eligible employees up to ten workdays of unpaid bereavement. 820 ILL. COMP. STAT. 154 § 10 (2016).

³¹⁷ See Family Bereavement Leave Act, 820 Ill. Comp. Stat. 154 (2023).

³¹⁸ *Id.* § 5.

³¹⁹ *Id.* § 10.

³²⁰ *Id.* § 5.

adult person who is in a committed personal relationship with the employee,” or who is recognized as a domestic partner by the employee’s employer.³²¹

In addition to expanding bereavement protections beyond the loss of an existing child, Illinois also recognizes the loss and grief associated with challenges in family expansion. In addition to taking bereavement leave to grieve, attend services, or make arrangements related to the loss of a covered family member, under the IFBLA an employee may also take bereavement leave from work due to a miscarriage, “unsuccessful round of intrauterine insemination or of an assisted reproductive technology procedure,” a failed or contested adoption or surrogacy agreement, stillbirth, or “a diagnosis that negatively impacts pregnancy or fertility.”³²² The employee must take the leave within 60 days of notice of these incidents or notice of the covered family member’s death, and must, where practicable, provide their employer a minimum of forty-eight hours’ notice of their intent to take leave.³²³ The Act also prohibits the employer from taking adverse actions against employees who exercise their rights under the Act, oppose practices they believe to violate the Act, or support another in exercising their rights under the Act.³²⁴

Illinois also recently addressed general paid leave – which a worker might use for bereavement purposes. On January 10, 2023, the Illinois legislature passed the Paid leave for All Workers Act (PLFAWA).³²⁵ The PLFAWA, effective January 1, 2024,³²⁶ sets a floor for general-use paid leave. It will require employers to provide

³²¹ *Id.* The statute also seems to suggest that this domestic partner ought to be monogamous, as it describes the “unmarried adult person who is in a committed, personal relationship with the employee” as not one otherwise recognized by any state’s laws nor “in such a relationship with any other person.” *Id.*

³²² *Id.* § 10.

³²³ *Id.* § 10.

³²⁴ *Id.* § 20.

³²⁵ Paid Leave for all Workers Act, SB 208, 102d Gen. Assemb. (Ill. 2023).

³²⁶ *Id.* § 99.

earned paid leave to employees to be used “for any purpose.”³²⁷ Under the Act, employees are entitled to a minimum of forty hours of paid leave during a 12-month period.³²⁸ Workers will accrue “one hour of paid leave for every 40 hours worked” upon implementation.³²⁹ Employees may use their leave benefits as early as ninety days after the start of their employment (or the effective date of the PLFAWA).³³⁰ And notably, the Act contains a provision which seems to directly address the “death documentation requirement”³³¹ criticism: “An employee is not required to provide an employer a reason for the leave and may not be required to provide documentation or certification as proof or in support of the leave.”³³²

Further, like the IFBLA, the PLFAWA provides a framework for litigation so that workers who avail themselves of leave (including possibly bereft workers) no longer need to rely on the aforementioned ill-fitting frameworks to devise a cause of action. The PLFAWA prohibits an employer from taking, or threatening to take, an adverse action against any employee to exercises, attempts to exercise, or supports another’s attempt to exercise their rights under the Act.³³³ Like many anti-retaliation provisions, the Act’s provision also bars an employer for retaliating against any employee who opposes practices which they believe violate the Act.³³⁴

Since the completion of the preliminary draft of this article in May 2022, Illinois has taken powerful, purposeful strides toward supporting employers and grieving workers. However, these laws still fail to address self-employed, independent, or gig workers. The

³²⁷ *Id.* § 15.

³²⁸ *Id.* § 15(b).

³²⁹ *Id.*

³³⁰ *Id.* § 15(g).

³³¹ See Mallick, *supra* note 70. The specific issue of the death documentation requirement is addressed *supra* note 94.

³³² SB 208 § 15(e).

³³³ *Id.* § 25.

³³⁴ *Id.*

IFBLA relies on the definition of “employee” and “employer” under the FMLA.³³⁵ As stated in part II, a covered employer under the FMLA employs “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”³³⁶ And in order to be eligible, an employee must (1) work “for a covered employer”; (2) have “worked 1,250 hours during the 12 months prior to the start of leave”; work “at a location where the employer has 50 or more employees within 75 miles”; and have “worked for the employer for 12 months.”³³⁷ And the PLFAWA, while operating under a worker-funded model, relies upon the definition of “employee” as provided under the Illinois Wage Payment and Collection Act (IWPCA).³³⁸ The IWPCA defines “employee” as “any individual permitted to work by an employer in an occupation,” but excludes independent contractors and those “in an independently established trade, occupation, profession or business.”³³⁹ Accordingly, under this definition of employee, grieving independent contractors and self-employed workers in Illinois will likely remain ineligible for general-use paid leave benefits—which they might otherwise use for bereavement purposes.

Where other states have implemented worker-funded paid leave or seek to legislatively recognize bereavement,³⁴⁰ few states currently offer bereavement protections. Effective October 1, 2021, Maryland expanded its Flexible Leave Act (MFLA) to allow for bereavement leave.³⁴¹ The MFLA applies to employers with 15 or more employees “for each working day in each of 20 or more calendar weeks in the

³³⁵ See 820 Ill. Comp. Stat. 154 § 5.

³³⁶ 29 C.F.R. § 825.102 (2015).

³³⁷ See *id.* for the definition of “Eligible Employee” under the FMLA.

³³⁸ SB 208 § 10.

³³⁹ Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. 115 § 2 (2015).

³⁴⁰ In 2018 the New York legislature passed bereavement leave legislation in June 2018, but Governor Cuomo vetoed the bill. S.8380-A, 2017-18 Leg. Sess. (N.Y. 2018).

³⁴¹ Md. Code Ann., Lab. & Empl. § 3-802 (2021).

current or preceding calendar year.”³⁴² However, the provision appears to require only that “employers who offer paid leave allow it to be used for bereavement.”³⁴³ Accordingly, such a provision provides limited coverage.

Like Illinois, Oregon provides more expansive family bereavement leave for employees.³⁴⁴ The Oregon Family Leave Act (OFLA) expanded the definition of family beyond the immediate in addition to including bereavement.³⁴⁵ In relevant parts, the Act applies to employers with twenty-five or more employees “in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken.”³⁴⁶ In contrast to FMLA, OFLA “family members” include the employee’s spouse, children, grandparents, grandchildren, parents-in-law, and those with whom the employee related *in loco parentis*.³⁴⁷ And like the IFBLA, OFLA allows for bereavement leave of up to two weeks to be completed within 60 days of notice of death.³⁴⁸ Unlike the IFBLA, OFLA does not require forty-eight hours’ notice in the event of a death.³⁴⁹ Currently, leave under OFLA remains unpaid, but “[p]aid family leave is coming to Oregon in 2023.”³⁵⁰ On January 1, 2023, employers and employees began paying into the program.³⁵¹ Employees

³⁴² *Id.* § 3-802(b)(2).

³⁴³ Broughton, *supra* note 22.

³⁴⁴ Lynch, *supra* note 23.

³⁴⁵ The Oregon Family Leave Act. OR. REV. STAT. § 659A.150 – 659A.186 (2022).

³⁴⁶ *Id.* § 659A.153.

³⁴⁷ *Id.* § 659A.152(4). Recall FMLA allows for time off to care for a son, daughter, spouse, or parent with a serious medical condition. 29 C.F.R. § 825.112(a) (1993).

³⁴⁸ OR. REV. STAT § 659A.162 (2022).

³⁴⁹ *Id.* § 659A.165(2)(d).

³⁵⁰ *Oregon Family Leave Act (OFLA)*, OR. BUREAU LAB. & INDUS., (last visited April 29, 2022), <https://www.oregon.gov/boli/workers/pages/oregon-family-leave.aspx>

³⁵¹ *When does Paid Leave start?* PAID LEAVE OREGON, <https://paidleave.oregon.gov/Pages/default.aspx>.

are expected to access benefits by September 2023.³⁵²

California recently enacted Assembly Bill (AB) 1949, effective January 1, 2023.³⁵³ As an amendment to the California Family Rights Act, AB 1949 provides employees with 5 days of bereavement leave for the death of a spouse, domestic partner, child, parent, parent-in-law, sibling, grandparent, or grandchild.³⁵⁴ Under AB 1949, California bereavement leave remains unpaid unless an employee is otherwise eligible under an existing workplace policy provided by their employer.³⁵⁵ The law generously applies to employers with at least 5 employees nationwide.³⁵⁶

Like Illinois's forthcoming paid leave, California, Rhode Island, New York, and New Jersey already offer employee-financed publicly paid leave.³⁵⁷ At the time this note was composed, none of these other employee-financed programs addressed bereavement directly. Like Illinois's IFBLA—and unlike the PLFAWA—these plans function more akin to FMLA: each plan offers paid leave to “car[e] for a family[] member with a serious health condition”³⁵⁸ and thus exclude the deceased. Rhode Island Temporary Caregiver Insurance (RITCI) and New Jersey Family Leave Insurance (NJFLI) apply to private-sector employers who fall under their respective states' unemployment compensation law.³⁵⁹ New York State Paid Family Leave (NYS PFL), RITCI, and NJFLI are fully financed by employee payroll

³⁵² *Id.*

³⁵³ See *Bereavement Leave Now Protected in California*, NAT'L L. REV., (Sept. 30, 2022), <https://www.natlawreview.com/article/bereavement-leave-now-protected-california>.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Lack of Paid Leave Harms Workers*, *supra* note 304.

³⁵⁸ *Id.*

³⁵⁹ Lee Hansen, *OLR Research Report: Paid Family Leave Programs in California, New Jersey, and Rhode Island*, CONN. GEN. ASSEM. (2016), <https://www.cga.ct.gov/2016/rpt/2016-R-0030.htm>.

deductions.³⁶⁰ California Paid Family Leave (CPFL) differs from these other states in that CPFL provides benefits for any worker who opts into the program, *including the self-employed*.³⁶¹ Any customer “attached to the labor market prior to their leave period” is eligible for PFL – whether employed, looking for work or have an active unemployment claim.³⁶² Independent contractors or self-employed individuals are eligible to voluntarily elect into the program to receive PFL benefits.³⁶³

During its 2017-18 session, the New York legislature approved a bereavement bill.³⁶⁴ The bill passed the Senate by a vote of 61-1 and passed the Assembly by a vote of 111-32,³⁶⁵ and was drafted as an expansion of New York’s Paid Family Leave Bill. However, the business community strongly opposed the bill due to apparently ambiguous drafting. “[T]he bill as written appears to allow bereavement leave to be taken at any time after the death of a family member, seemingly with no restrictions.”³⁶⁶ According to the business community, the text of the bill would allow up to twelve weeks for bereavement leave per year to mourn the loss of a spouse, domestic

³⁶⁰ *New Jersey Paid Leave Programs*, THE STANDARD (2022) <https://www.standard.com/employer/pfl/new-jersey#tab-content-0-2>; *FAQ: Family Leave Insurance*, DEP’T OF LAB. & WORKFORCE DEV., (last visited Apr, 29, 2022), <https://www.myleavebenefits.nj.gov/help/faq/fli.shtml>.

³⁶¹ For information on California’s Paid Family Leave Program, see *Overview of California’s Paid Leave Program*, Emp. Dev. Dep’t, STATE OF CAL. (2022), https://edd.ca.gov/pdf_pub_ctr/de2530.pdf.

³⁶² *Id.*

³⁶³ *Paid Family Leave – Self Employed*, EMP. DEV. DEP’T, STATE OF CAL. (last visited Mar. 01, 2022), <https://edd.ca.gov/en/disability/paid-family-leave/Self-Employed/>.

³⁶⁴ S.8380-A, 2017-18 Leg. Sess. (N.Y. 2018).

³⁶⁵ *Id.*; see Jimmy Vielkind, *Cuomo Vetoes Bill on 12 Weeks of Paid Bereavement Leave*, WALL ST. J. (Dec. 31, 2018, 2:46 PM), <https://www.wsj.com/articles/cuomo-vetoes-bill-on-12-weeks-of-paid-bereavement-leave-11546284572>.

³⁶⁶ Letter on PFL expansion veto from members of New York State’s employer community to Mr. Alphonso B. David, Counsel to the Governor (Aug. 12, 2018), <https://www.bcnys.org/sites/default/files/PDFs/PFL-Expansion-Opposition-Letter-080218.pdf>.

partner, child, parent, grandchild, or grandparent – and the possibility of intermittent leave with little notice (as is likely in the case of bereavement) would likely undermine planning and cripple business functions.³⁶⁷ Governor Cuomo ultimately vetoed the bill.³⁶⁸

B. States Concerned About Bereavement Leave Might Consider Hybrid Models

As Parts I and II depict, the issue of workplace grief exists and remains on the rise in the wake of the COVID-19 pandemic and a record death toll. After “the deadliest year in U.S. history,” bereavement has grown far beyond a workplace issue. Today’s workforce is diverse. The nature of work itself, and worker classifications, vary and overlap in ways we might not have imagined years ago. Independent work is on the rise.³⁶⁹ Some workers are employees in one arena while simultaneously self-employed in another.³⁷⁰ Thus, implementing a bereavement policy modeled after more traditional FMLA definitions of “employer” and “employee” risks excluding independent and self-employed workers. Similarly, workers’ family structures, close emotional relationships, and belief systems vary in complexity, and may lie outside the traditional scope of previous definitions of “family.” As demonstrated in this note, the impact of loss of a loved one impacts a worker’s entire network – their family, friends, work relationships, and the organization. Thus bereavement concerns present an issue of public policy. States may look to existing legislative frameworks to develop a comprehensive policy to address modern workplace grief, protect all workers – not just employees –

³⁶⁷ *Id.*

³⁶⁸ S.8380-A.

³⁶⁹ See Andrew Pek, *How the Rise of the Gig Economy Influences the Workforce*, ENTREPRENEUR (Sept. 25, 2021), <https://www.entrepreneur.com/article/381850>; Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>.

³⁷⁰ GALLUP & QUICKBOOKS, *supra* note 62.

and reduce employers' burden of bearing the costs.

For example, an ideal model might build upon Illinois' and Oregon's expansive definition of family and their incorporation of bereavement into state-based family leave policy. That same model might consider the worker-funded or payroll deduction qualities of California, New York, New Jersey, Rhode Island, and Illinois (forthcoming) for implementation. And further, any state concerned about the well-being of its entrepreneurs and independent workers—particularly after the pandemic-prompted independent worker unemployment compensation crisis³⁷¹—might again pull from the California PFL model, granting self-employed and independent workers the option to contribute to the plan. States may also find the New York veto instructive in carefully tailoring the language of leave, ensuring a reasonable bereavement period which aids workers while buffering businesses from unnecessary or excessive disruption in production. The Illinois and Oregon bereavement plans again present clarity: bereft workers may benefit from up to two weeks of leave within sixty days of the death of a family member as defined under the plans.³⁷²

As research and case examples have demonstrated, workplace bereavement policy presents an exercise in balancing multiple factors within the full landscape of workers, in all their forms, and the workplace. Organizations must weigh production and profit against workplace wellness, while balancing the internal environmental and cultural impact of grief against the myriad risks stemming from issues of notice and workflow related to a worker's generally short-notice leave of absence. Likewise, they must evaluate the financial expense of implementing leave policy against the risk of lost revenues from unsupported bereavement – including potential costs

³⁷¹ Amy Traub, *7 Things We Learned About Unemployment Insurance During the Pandemic*, NELP (Nov. 16, 2021), <https://www.nelp.org/publication/7-things-we-learned-about-unemployment-insurance-during-the-pandemic/>.

³⁷² OR. REV. STAT § 659A.162 (2022).

related to worker replacement in extreme cases. Finally, organizations must consider the reality of the current state of mental health in the workforce. And where organizations do not bear the same level of responsibility toward a worker due to the worker's classification status, our legislatures must recognize its responsibility toward independent and self-employed workers as residents and citizens. Our legislatures bear the power to elevate "non-employees" to the same level as employees in terms of benefits access. As shown under the California model, these individuals could have the option to pay into a funded leave program. The benefits of such plans include a more mentally healthy workforce and population, more productive and profitable organizations, reduced turnover,³⁷³ and greater economic mobility for workers—particularly for minorities.³⁷⁴

Organizations should not bear this burden alone--nor should bereft individuals struggle in the absence of statutory protections. Worker-funded leave programs exist. Legislative frameworks for bereavement policy, including anti-retaliation provisions, exist. Plans covering self-employed and independent workers exist. While arguably challenging to implement, formulating a comprehensive bereavement policy is now entirely plausible given the presence of various existing frameworks for guidance.

CONCLUSION

The pandemic's effects will ripple out for years to come, plaguing workers and organizations. "We are going to be sweeping up the psycho-social-spiritual pieces of this for more than a generation."³⁷⁵ The growing roar of the impending "tsunami of bereavement

³⁷³ *Id.*

³⁷⁴ Joshi et al, *supra* note 42, at 530.

³⁷⁵ Klobucista & Maizland, *supra* note 13.

grief”³⁷⁶—from the pandemic itself, from massive social shifts, and from the loss of the baby boomer generation—will likely impact workers and organizations for years in ways which have yet to unfold. As University of Chicago’s Professor Chad Broughton opined, “the American workplace isn’t prepared for this much grief.”³⁷⁷

Without prevailing policy, American law likewise remains ill-prepared for this much grief. As mental health and bereavement issues continue to arise in the workplace, they will inevitably spill over into the empty space where policy ought to exist, risking further misapplication of legal frameworks which were never designed to address bereavement, the mental impact of grief, or the logistical aspects of a loved one’s death. In the absence of a prevailing comprehensive bereavement statute, workers and organizations are left to fumble through ill-fitting litigation frameworks which frequently bar them from effectively managing the myriad issues which arise after the death of a loved one. And where bereavement statutes exist, their provisions still generally leave independent or self-employed workers to conduct the tragic calculus of balancing the weight of their livelihoods against their burden of loss.

Workers and organizations deserve the right to proactively function under the guidance of a legitimate policy which acknowledges the needs of both groups and includes the growing number of independent and gig workers who often function without the protection of workplace benefits. Rather than allow misfit frameworks to yield absurdity and perpetuate trauma upon both workers and organizations, our legislators have an opportunity to access a variety of existing leave policies and proactively draft new options on bereavement for workers and organizations.

³⁷⁶ Wilson et al., *supra* note 4.

³⁷⁷ Broughton, *supra* note 22.