

FEDERALIZING DIRECT PAID LEAVE

Ryan H. Nelson*

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* Ryan H. Nelson is an Adjunct Professor of Law at New York Law School and Corporate Counsel in the Employment Law Unit at MetLife, one of the largest global providers of insurance and employee benefit programs where, *inter alia*, he provides advice and counsel on compliance with all aspects of leave laws. He received his J.D., *cum laude*, from the Benjamin N. Cardozo School of Law, Yeshiva University, and his B.S.B.A. with a major in Economics from the University of Florida. He would like to thank Prof. Julie C. Suk at the Benjamin N. Cardozo School of Law, Sherry Leiwant at A Better Balance, Jeff Hayes at the Institute for Women’s Policy Research, and Susan Flannery at MetLife for their valuable comments and insights. The views espoused in this Article are those of the author and do not necessarily represent the views of MetLife or its affiliates.

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INTRODUCTION

Beginning in the late-1990s and with nascent prominence over the past ten years, an ever-growing cadre of political divisions across the United States (i.e., states; counties; municipalities; Puerto Rico; and Washington, D.C.) has enacted laws requiring private employers¹ not only to allow certain employees to take a few days of leave from work annually for various reasons, but to pay those employees during their leave.² Because these laws uniformly allow employees to take leave to care for their own illnesses, injuries, or medical conditions, they are often known as paid sick leave laws.³ Yet, this appellation lacks precision given that such laws typically require employers to allow employees to take leave for myriad other reasons, as well.⁴ To that end, what truly differentiates these laws is not the genre of leave being regulated, but rather how these laws regulate payment. Indeed, such laws are unique in that they remain the only American laws requiring private employers to *directly* pay employees who take leave. Accordingly, a preferred moniker for such laws, and the one utilized throughout this Article, is “direct paid leave laws.”

1. This Article does not address laws exclusively regulating public employers, *see, e.g.*, ALA. ADMIN. CODE r. 670-X-14-.01 through 670-X-14-.04 (2016) (regulating public employers).

2. *See generally infra* Part I.C.

3. *Paid Sick Leave*, NEWARK, N.J., <http://www.ci.newark.nj.us/government/departments/health-and-community-wellness/paid-sick-leave/> [<https://perma.cc/4UNU-PFEX>] (last visited Apr. 30, 2017). Common alternative names for such laws include paid sick time or paid safe time laws, *Paid Sick & Safe Time Rules*, SEATTLE OFFICE OF LABOR STANDARDS, <http://www.seattle.gov/laborstandards/enforcement/rules-and-ordinances/paid-sick-and-safe-time> [<https://perma.cc/PN8F-CJRE>] (last visited Apr. 30, 2017); earned sick leave laws, *Minimum Wage Program*, SAN DIEGO, CAL., <https://www.sandiego.gov/treasurer/minimum-wage-program> [<https://perma.cc/7YPC-2XT4>] (last visited Apr. 30, 2017); earned sick time laws, *Paid Sick Leave Law*, N.Y.C. DEP'T OF CONSUMER AFFAIRS, <http://www1.nyc.gov/site/dca/about/paid-sick-leave-law.page> [<https://perma.cc/NC38-ZYWJ>] (last visited Apr. 30, 2017); and protected sick time laws, *Protected Sick Time*, ORE. BUR. OF LABOR & INDUS., WAGE & HOUR DIV., <http://www.oregon.gov/boli/WHD/OST/pages/index.aspx> [<https://perma.cc/VLZ2-W63Z>] (last visited Apr. 30, 2017).

4. *See, e.g., infra* text accompanying notes 191, 192.

In contrast, in recent years, employers have likewise been subjected to a smaller, but mounting, number of sub-federal political divisions: a) imposing payroll taxes on private employers and/or their employees to subsidize a government-administered fund from which certain employees can request payment while taking leave for various reasons,⁵ or b) requiring private employers to maintain insurance, the beneficiaries of which are certain employees who submit a claim for payment while taking leave for various reasons.⁶ Employers' chief obligations under these laws consist of paying a tax and/or levying a tax on employees; payment to employees on leave comes from the government, and the right to take leave, if any, is either no greater than extant rights provided by federal or state laws (e.g., the Family and Medical Leave Act, the California Family Rights Act) or overlaps substantially with such laws.⁷ In any event, employers regulated by such laws need not directly pay employees on leave, so employers' obligations are no greater than the obligations already imposed by the bevy of unpaid leave laws.⁸ Because these laws are principally known for allowing employees to take paid leave for situations falling under the umbrella of "family care," such as caring for a new child or an ill family member, these laws are often called paid family leave laws,⁹ although some such laws also allow certain employees to receive payment when taking leave to care for their own serious health condition.¹⁰ Consequently, these laws are similarly best described by how they regulate payment as opposed

5. *State Paid Family Leave Insurance Laws*, NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/research-library/work-family/paid-leave/state-paid-family-leave-laws.pdf> [<https://perma.cc/V5SA-YC89>] (last visited Apr. 30, 2017). For an example of such a law, see CAL. UNEMP. INS. CODE §§ 3300-3306 (West 2017) (regulating paid family leave).

6. N.Y. COMP. CODES R. & REGS. tit. 12, § 380-7.1 (2017).

7. Compare 29 U.S.C. §§ 2601-2654 (2017); CAL. GOV. CODE § 12945.2 (West 2017), with CAL. UNEMP. INS. CODE §§ 3300-3306 (West 2017).

8. See, e.g., CAL. GOV. CODE § 12945.2 (West 2017).

9. *Paid Family Leave*, CAL. EMP'T DEV. DEP'T, http://www.edd.ca.gov/Disability/Paid_Family_Leave.htm [<https://perma.cc/J39P-2J28>] (last visited Apr. 30, 2017). Common alternative names for such laws are paid family leave insurance laws, *State Paid Family Leave Insurance Laws*, NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/research-library/work-family/paid-leave/state-paid-family-leave-laws.pdf> [<https://perma.cc/EUE5-B6BY>] (last visited Apr. 30, 2017), and family leave insurance laws, *Family Leave Insurance*, N.J. DEP'T OF LAB. & WORKFORCE DEV., <http://lwd.dol.state.nj.us/labor/fli/fliindex.html> [<https://perma.cc/SR6V-E7QW?type=image&>] (last visited Apr. 30, 2017).

10. See, e.g., Universal Paid Leave Amendment Act of 2016, D.C. Legis. 21-264 §§ 104(a) (permitting benefits to be paid upon the occurrence of, among other things, qualifying medical leave); 101(6), (14), (15) (defining qualifying medical leave as, among other things, leave following the diagnosis or occurrence of an employee's serious health condition) (enacted Feb. 17, 2017), <http://lims.dccouncil.us/Download/34613/B21-0415-SignedAct.pdf> [<https://perma.cc/3TRM-5D3Q>].

to what types of leave they regulate. To that end, such laws best dubbed “indirect paid leave laws” — meaning payment to the employee comes from a non-employer source like a government-administered fund or an insurance carrier — in contrast to direct paid leave laws which require employers to pay employees directly.

Finally, for decades, employers have been regulated by hundreds of “unpaid leave laws,” which are both federal and sub-federal laws requiring that employers afford certain employees with unpaid leave.¹¹ Collectively, direct paid leave laws (AKA paid sick leave laws), indirect paid leave laws (AKA paid family leave laws), and unpaid leave laws encompass all of the leave laws regulating private employers in the United States.

Proponents of direct paid leave laws extol their merits on the grounds that they allow employees to take paid leave when they are sick, arguing that such laws reduce occupational injuries¹² and serve as a common-sense solution to employees’ Catch-22 of having to choose between their health and their job; improve the public health by enabling sick employees to stay home, thereby curtailing the spread of certain contagious diseases in the workplace; boost employee performance and morale by encouraging healthy and productive workers; and reduce turnover by offering an attractive employee benefit.¹³ In contrast, opponents of direct paid leave laws argue that they curtail employers’ freedom to choose which benefits to offer employees and force employers to increase the price of goods and services, limit their employees’ hours and other benefits, or cut jobs to offset the costs

11. See, e.g., *supra* note 7.

12. Abay Asfaw, Regina Pana-Cryan, & Roger Rosa, *Paid Sick Leave and Nonfatal Occupational Injuries*, 102 AM. J. OF PUB. HEALTH e59, e62 (2012) (“With all of the other variables we considered held constant, the odds of a nonfatal occupational injury were 28% lower among workers with paid sick leave.”).

13. For a pithy overview of the arguments supporting direct paid leave laws, see the Whereas clauses of the Model Earned Paid Sick and Safe Time Act of 2015, which was proposed jointly by A Better Balance and the National Partnership for Women and Families — two non-profit organizations advocating for such laws. A Better Balance & Nat’l P’ship for Women & Families, *Model Earned Paid Sick and Safe Time Act of 2015*, A BETTER BALANCE, <http://archives.abetterbalance.org/images/stories/Documents/sickdays/PaidSickTimeModel.pdf> (last visited Dec. 27, 2016); see also COUNCIL OF ECON. ADVISERS, THE ECONOMICS OF PAID AND UNPAID LEAVE 1-2 (2014), https://www.whitehouse.gov/sites/default/files/docs/leave_report_final.pdf (arguing for direct paid leave laws); NAT’L OP. RESEARCH CTR., UNIV. OF CHI., PAID SICK DAYS: ATTITUDES AND EXPERIENCES (2010), <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-attitudes-and-experiences.pdf> [<https://perma.cc/Z9RA-5FU3>] (same). A Better Balance also maintains a useful collection of research making the business case for such laws. *Tools and Resources for Paid Sick Time Campaigns*, A BETTER BALANCE, <http://www.abetterbalance.org/resources/tools-and-resources-for-paid-sick-time-campaigns/> [<https://perma.cc/FVA7-AHYC>] (last visited Dec. 27, 2016).

of offering paid leave.¹⁴ Rather than delve into this well-trod debate, this Article presupposes that the pros of laws that require employers to allow sick employees to take a few days of paid leave each year generally outweigh the cons of such laws.

But that does not mean that direct paid leave laws are perfect. Far from it. Yet, rather than redouble the common criticisms outlined above, this Article focuses instead on the strife that such laws cause employers unnecessarily — that is, burdens on employers wrought by direct paid leave laws that can be eliminated *without materially diminishing employees' rights*. What's more, this Article highlights the growing burden on national employers attempting compliance with direct paid leave laws, as well as why such laws place a substantially greater burden on employers than indirect paid leave laws and unpaid leave laws. In light of such burdens, this Article proposes a federal law that would minimize the burdens that direct paid leave laws impose on employers while concomitantly maintaining — and, in some cases, even augmenting — the bulk of employees' entitlements vis-à-vis paid leave.

Accordingly, and for the sake of context, Part I of this Article traces the history of direct paid leave laws, beginning with a brief recounting of why international law fails to guarantee leave to American workers and continuing with an overview of existing federal laws regulating leave, including those that arguably preempt sub-federal direct paid leave laws in certain circumstances, President Obama's executive order mandating direct paid leave for certain employees working on federal contracts and subcontracts, and proposed federal direct paid leave legislation. Next, this Part catalogues the dozens of direct paid leave laws across the United States, as well as their implementing rules and regulations and the sub-regulatory administrative agency guidance interpreting them. Finally, this Part explores the varied substance of direct paid leave laws, including requirements related to coverage, accrual, use, payment, caps on accrued leave and carryover,

14. For a well-researched critique of both direct paid leave laws and some of the leading studies supporting them, see MAXFORD NELSEN, FREEDOM FOUND., *THE EFFECT OF MANDATORY PAID SICK LEAVE POLICIES: REVIEWING THE EVIDENCE* (2014), <https://www.freedomfoundation.com/sites/default/files/documents/TheEffectofMandatoryPaidSickLeavePolicies-ReviewingtheEvidence.pdf> (arguing against direct paid leave laws); see also Claire Zillman, *The Paid Sick Leave Battle Continues, State by State*, FORTUNE, Feb. 11, 2015, <http://fortune.com/2015/02/11/paid-sick-leave-state-laws-bans/> [<https://perma.cc/6UPK-HMUM>] (discussing Wisconsin Governor Scott Walker signing a bill preempting a Milwaukee, WI direct paid leave law, arguing that “[p]atchwork government mandates stifle job creation and economic opportunity”) [hereinafter “Zillman Article”]; JAMES SHERK, THE HERITAGE FOUND., *CONGRESS SHOULD CONSIDER ALTERNATIVES TO MANDATORY PAID SICK LEAVE* (2007), <http://www.heritage.org/jobs-and-labor/report/congress-should-consider-alternatives-mandatory-paid-sick-leave> [<https://perma.cc/X2F3-32MD>] (arguing for alternatives to direct paid leave laws).

tracking and reporting of accrued but unused leave and other metrics, notices, the effect of termination and rehiring on accrued leave, required documentation, retaliation, private rights of action, and fines and damages.

Part II of this Article focuses on the “any-employer burdens” of direct paid leave laws — meaning the burdens that complying with any single law might cause *any* employer operating in that jurisdiction. However, as noted above, this Article avoids rehashing the frequent critiques that such laws limit employer freedom and force employers to increase prices, limit hours, kill jobs, or decrease other benefits. Such arguments are sufficiently ubiquitous. Rather, this Part explores seven oft-ignored, yet largely-curable burdens caused by direct paid leave laws — the first five of which could be remedied without employees losing *a single material right*, and the last two of which should be remedied despite the reasonable impact that doing so would have on employees’ entitlements. First, employers face substantial administrative burdens when forced to provide routine notice of certain information (e.g., the amount of paid time off each employee has accrued under a direct paid leave law) on or with each employee’s paystub even if that employee has alternative means of accessing such information. Second, employers are often left with paltry and/or burdensome guidance concerning how to pay employees who are compensated by means other than a salary or an hourly wage (e.g., employees paid on commission). Third, direct paid leave laws often offer insufficient, minimal, or no mechanisms affording employers with the means of dealing with employees who request or take unapproved or unscheduled leave or fraudulently request or take leave. Fourth, employers face substantial administrative burdens when evaluating coverage and accrual calculations under direct paid leave laws given that many such laws fail to aptly consider the transient and dynamic nature of some employers’ workforces. Fifth, many direct paid leave laws offer insufficient guidance regarding their impact, if any, on employers’ existing paid time off policies other than a vague assertion that a “more generous” employer policy obviates the need to comply with the law. Sixth, direct paid leave laws often force employers to allow leave in increments of time less than what preexisting, industry-standard attendance tracking systems permit. Seventh, direct paid leave laws prohibit employers from disciplining employees who take discretionary leave at a time that hurts the employer’s operations.

In contrast, Part III of this Article focuses on the “multijurisdictional-employer burdens” of direct paid leave laws — meaning the burdens on larger, national employers operating across multiple jurisdictions of complying with *many* direct paid leave laws. Indeed, looking at the effects of a single paid sick leave law in isolation focuses on the trees and misses the forest of more than 40 jurisdictions that have enacted varied direct paid

leave laws; promulgated rules or regulations implementing those laws; and/or issued lengthy, informal, routinely-updated, sub-regulatory guidance interpreting those laws, rules, and regulations (e.g., websites, opinion letters, fact sheets, flyers, frequently asked questions). First, the sheer magnitude of this tortured web of direct paid leave laws, rules, regulations, and sub-regulatory guidance forces employers with operations across the country to undertake Herculean compliance efforts. These efforts are compounded by short-sighted drafting, which has forced the administrative agencies interpreting direct paid leave laws to issue and regularly update their guidance, thereby forcing employers to keep tabs on ever-changing interpretations of a constantly-expanding list of poorly-worded laws. Second, the relative obscurity of the jurisdictions proposing these laws; the poor publication of proposed laws; and the minimal advanced notice before debates about, votes on, and signing of such laws affords employers and their advocates with insufficient time to react to and lobby for or against varied components of these laws, which often leaves legislatures without the valuable insight of large companies doing business in their jurisdiction. Third, these laws place national employers squarely between a rock and a hard place by forcing them to either provide premium benefits to all employees nationwide (i.e., the best aspects of each individual direct paid leave law across the country) or face not only difficult administration, but also morale problems in their workforce by allowing employees in the same job title to accrue leave at different rates with different caps; use that leave for different reasons; and earn different rates of pay based upon where they work and, in some cases, what they are working on (e.g., a federal contract).

Finally, Part IV of this Article concludes by arguing that Congress should pass and the President should sign the Uniform Direct Paid Leave Act (“UDPLA”) — a federal law proposed for the first time herein that would require private employers to provide direct paid leave to their employees while also preempting sub-federal laws occupying the field of direct paid leave. While this Article makes the first detailed case for UDPLA and remains the only proposal of its kind, such a proposal is novel neither with respect to paid sick leave laws¹⁵ nor with respect to other employment laws; indeed, such a federal law would clear out the burdens born of the morass of the existing patchwork of sub-federal direct paid leave laws in the same way

15. See *Workflex in the 21st Century Act*, H.R. 4219, 115th Cong. (2017-2018); Yuki Noguchi, *Businesses Push Back on Paid-Sick-Leave Laws*, NPR (May 8, 2017), <http://www.npr.org/sections/health-shots/2017/05/06/527053441/businesses-push-back-on-paid-sick-leave-laws> [<https://perma.cc/S27E-VEH3>] (highlighting proposed legislation that ostensibly would offer employers the option of offering a minimum amount of paid sick time in exchange for an exemption from direct paid leave laws); see also notes 131, 147, & accompanying text.

that Section 514(a) of the Employee Retirement and Income Security Act of 1974 (“ERISA”)¹⁶ “enable[d] employers to establish a uniform administrative scheme, which provide[d] a set of standard procedures to guide processing of claims and disbursement of benefits.”¹⁷ Importantly, UDPLA would have minimal adverse impacts on employers that are already doing what they should be doing (i.e., offering sufficient paid leave to their employees). Thus, UDPLA would have the dual effect of aiding employees by expanding entitlements to paid leave nationwide while simultaneously aiding employers by imposing national uniformity, increasing clarity vis-à-vis how the law will be interpreted, and minimizing unfair requirements — all of which would ease burdens and lower costs for employers. As Wisconsin Governor Scott Walker appropriately put it when defending his signing a state bill preempting municipal paid leave laws, “[p]atchwork government mandates stifle job creation and economic opportunity.”¹⁸

Significantly, legal research assessing the impact of direct paid leave laws on employers is non-existent because such laws are so new, and this Article stands in stark contrast to *all* empirical research to date on the impact of direct paid leave laws on employers. Such research accurately demonstrates that most employers are minimally or modestly burdened by having to comply with any single paid sick leave law.¹⁹ Yet, this research uniformly paints a misleading picture of the impact of such laws on

16. Employee Retirement Income Security Act of 1974 (“ERISA”), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 and 29 U.S.C.). ERISA’s preemption provision, located at Section 514(a) of the statute, provides that ERISA “shall supersede . . . all State laws insofar as they . . . relate to any employee benefit plan.” 29 U.S.C. § 1144(a) (2016).

17. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001).

18. See Zillman Article *supra* note 14.

19. Eileen Applebaum et al., *Good for Business? Connecticut’s Paid Sick Leave Law*, CTR. FOR ECON. & POLICY RESEARCH 2-4 (2014), <http://www.cepr.net/documents/good-for-business-2014-02-21.pdf> [<https://perma.cc/N3TC-KZXC>] [hereinafter “Connecticut Research Paper”]; Eileen Applebaum & Ruth Milkman, *No Big Deal: The Impact of New York City’s Paid Sick Days Law on Employers*, CTR. FOR ECON. & POLICY RESEARCH 3-5 (2016), <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf> [<https://perma.cc/LV7N-53PW>] [hereinafter “New York, NY Research Paper”]; Yolanda Branche, *Audit of the Accrued Sick and Safe Leave Act of 2008*, OFFICE OF THE D.C. AUDITOR (2013), <http://www.dcauditor.org/sites/default/files/DCA092013.pdf> [<https://perma.cc/2F7P-MJ24>] [hereinafter “District of Columbia Research Paper”]; Robert Drago & Vicky Lovell, *San Francisco’s Paid Sick Leave Ordinance: Outcomes for Employers and Employees*, INST. FOR WOMEN’S POLICY RESEARCH, (2011), https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/A138_edited.pdf [<https://perma.cc/936Z-MD4T>] [hereinafter “San Francisco, CA Research Paper”]; Jennifer Romich et al., *Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance*, UNIV. OF WASH. (2014), <https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf> [<https://perma.cc/HX6M-6VF5>] [hereinafter “Seattle, WA Research Paper”].

employers by examining only the burdens of complying with one direct paid leave law at a time, a problem often compounded by soliciting feedback from employers before the onslaught of direct paid leave laws took effect. Indeed, and as explained in depth below, the burdens imposed by direct paid leave laws are far greater than the sum of their parts,²⁰ and the majority of such laws have just taken effect in the past few years,²¹ suggesting that extant research on the burdens imposed on employers by direct paid leave laws fails to fully encapsulate the ramifications of these laws.

For example, the Center for Economic and Policy Research examined the experiences of employers with Connecticut's direct paid leave law between June 2013 and September 2013 and, understandably, concluded that the law "has had a modest impact on businesses in the state — contrary to many of the fears expressed by business interests prior to the passage of the legislation," even noting that "more than three-quarters of surveyed employers expressed support for [the law]";²² yet, the research paper does not report whether the employers surveyed operated in other jurisdictions with direct paid leave laws or whether they had difficulty complying with multiple direct paid leave laws at once. Similarly, another analysis conducted by the same non-profit organization examined the experiences of New York, NY employers from October 2015 to March 2016 and concluded that the burdens imposed by the city's direct paid leave law "were far more modest than opponents had feared," noting that "the new law was a 'non-event' for most employers";²³ again, the research paper does not report whether employers surveyed operated in multiple jurisdictions with direct paid leave laws or whether they had difficulty complying with multiple direct paid leave laws at once. An audit of the District of Columbia direct paid leave law from 2008 to 2013 by the Office of the District of Columbia Auditor "interviewed owners of businesses based in the District regarding the economic impact of the Act" and concluded that the law "did not have the economic impact of encouraging business owners to move a business from the District nor did [it] have the economic impact of discouraging business owners to locate a business in the District of Columbia."²⁴ Yet, the audit targeted only non-publically-owned employers (i.e., employers with an owner that the auditor could interview), and does not report whether the surveyed employers operated in multiple jurisdictions with direct paid leave laws or whether they had difficulty complying with multiple direct paid leave laws at once. An analysis of the direct paid leave law in San Francisco, CA

20. See *infra* Part III.A.

21. See *infra* Part I.C.

22. Connecticut Research Paper, *supra* note 19, at 3.

23. New York, NY Research Paper, *supra* note 19, at 3, 5.

24. District of Columbia Research Paper, *supra* note 19, at 7, 19.

from July 2009 to December 2009 conducted by the Institute for Women's Policy Research concluded that "[m]ost employers reported no difficulty providing sick days to their employees under the ordinance" and that "[t]wo-thirds of employers support the [law] and one-third are 'very supportive.'"²⁵ Again, however, the research does not encompass whether employers operated across multiple jurisdictions regulated by direct paid leave laws or whether they had difficulty complying with multiple direct paid leave laws at once. Finally, a University of Washington analysis of the Seattle, WA direct paid leave law from late 2012 to early 2014 found that "[i]mplementation was easy for some employers and caused temporary hassles for others"; "[a]bout a third of employers (32%) had difficulties with the required administrative tasks, such as working with payroll vendors" that were "frustrating but transient"; "[c]osts to employers and impact on businesses have been modest and smaller than anticipated"; and "70% of employers support the Ordinance."²⁶ Yet, like the other research papers cited herein, this analysis does not report if the surveyed employers were regulated by multiple direct paid leave laws or whether such employers had difficulty complying with several laws at once. Notably, as you can see from the dates of this research, in four out of these five papers (i.e., those analyzing the direct paid leave laws in Connecticut, the District of Columbia, San Francisco, and Seattle), the employers were surveyed about the burdens of direct paid leave laws predominantly or exclusively *before* 2014, which is when the majority of such laws went into effect.²⁷ Accordingly, this Article hypothesizes that any new research into the burdens that direct paid leave laws impose on larger, national employers will highlight the burdens outlined in Parts III and IV herein.

In conclusion, this Article argues that the recent wave of direct paid leave laws has been needlessly bittersweet. It is not just employees who are literally sick and tired of the current state of the law as they are guaranteed the right to paid leave in a paltry minority of political divisions across the country, but employers, too, are figuratively sick and tired of struggling to tread water amidst a torrent of needlessly-burdensome direct paid leave laws, regulations, rules, and sub-regulatory guidance. Passing UDPLA would cure both ailments by simultaneously improving the quality of employees' lives and relieving the multitude of avoidable burdens that direct paid leave laws are causing national employers. In short, it is time to federalize direct paid leave.

25. San Francisco, CA Research Paper, *supra* note 19, at 1, 3.

26. Seattle, WA Research Paper, *supra* note 19, at 5, 9.

27. *See infra* Part I.C.

I. AN OVERVIEW OF DIRECT PAID LEAVE LAWS

To understand why large, national employers in the United States are being subjected to dozens upon dozens of direct paid leave laws, it is necessary to briefly examine the broader international and federal legal landscape. More specifically, the following two Subparts explain why neither international nor federal law require private employers to directly pay employees on leave and how federal law may even preempt direct paid leave laws in certain circumstances.

A. *International Laws*

There is no treaty forcing the United States to require private employers to provide any form of leave to their employees. Although the United States is a member of the United Nations' International Labour Organisation ("ILO"),²⁸ which has adopted several conventions requiring ratifying member states to ensure that employees have obtained paid leave benefits,²⁹ the United States has failed to ratify any of these conventions,³⁰ and ILO conventions are not binding on ILO member states unless ratified by the

28. *Country Profile: United States*, ILO, http://www.ilo.org/dyn/normlex/en/?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102871 [<https://perma.cc/TS2J-238L>] (last visited Dec. 29, 2016).

29. Parts of two ILO conventions explicitly require member states to secure paid leave for certain employees. ILO Convention (No. 102) Concerning Minimum Standards of Social Security, arts. 13-18, Jun. 28, 1952, 210 U.N.T.S. 131, 140-42, <https://treaties.un.org/doc/Publication/UNTS/Volume%20210/volume-210-I-2838-English.pdf> [<https://perma.cc/RZ39-BGT2>]; ILO Convention (No. 130) Concerning Medical Care and Sickness Benefits, arts. 18-27, Jun. 25, 1969, 826 U.N.T.S. 3, 16-26, <https://treaties.un.org/doc/Publication/UNTS/Volume%20826/volume-826-I-11829-English.pdf> [<https://perma.cc/C64J-B2MQ>]. Several other ILO conventions arguably require member states to ensure that employees have access to paid leave. See ILO Convention (No. 121) Concerning Benefits in the Case of Employment Injury, July 8, 1964, 602 U.N.T.S. 259, <https://treaties.un.org/doc/Publication/UNTS/Volume%20602/volume-602-I-8718-English.pdf> [<https://perma.cc/HNG9-PWHF>]; ILO Convention (No. 128) Concerning Invalidity, Old-Age and Survivor's Benefits, arts. 7-25, June 29, 1967, 699 U.N.T.S. 185, 192-206, <https://treaties.un.org/doc/Publication/UNTS/Volume%20699/volume-699-I-10030-English.pdf> [<https://perma.cc/BS8M-BFKE>]; ILO Convention (No. 168) Concerning Employment Promotion and Protection Against Unemployment, arts. 13-25, June 21, 1988, 1654 U.N.T.S. 67, 73-77, <https://treaties.un.org/doc/Publication/UNTS/Volume%201654/v1654.pdf> [<https://perma.cc/TU5W-2963>]; ILO Convention (No. 183) Concerning the Revision of the Maternity Protection Convention, arts. 6-7, June 15, 2000, 2181 U.N.T.S. 253, 257-58, <https://treaties.un.org/doc/Publication/UNTS/Volume%202181/v2181.pdf> [<https://perma.cc/7JYK-J47K>].

30. *Ratifications of ILO Conventions: Ratifications for United States*, ILO, http://www.ilo.org/dyn/normlex/en/?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 [<https://perma.cc/X393-K5QW>] (last visited Dec. 29, 2016).

member state.³¹ Moreover, although Article 9 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) recognizes “the right of everyone to social security,”³² which the United Nations Economic and Social Council’s Committee on Economic, Social and Cultural Rights has interpreted to mean that “[c]ash benefits should be provided to those incapable of working due to ill-health to cover periods of loss of earnings,”³³ such interpretations are not binding³⁴ and, in any event, the United States is merely a signatory to ICESCR (subject to ratification, acceptance or approval),³⁵ which does not establish the consent to be bound, but rather creates an obligation to “refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.”³⁶ Finally, the Universal Declaration of Human Rights similarly guarantees to individuals the “right to social security” and “the right to security in the event of . . . unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control,”³⁷ but that declaration is not legally binding.³⁸

In sum, the only obligation that stems from international law facing the

31. Constitution of the International Labour Organization, art. 19, § 5(e), Apr. 1, 1919, 15 U.N.T.S. 40, http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIS_T_ENTRIE_ID:2453907:NO#A19 [<https://perma.cc/2KHC-UYW4>].

32. International Covenant on Economic, Social and Cultural Rights, art. 9, Dec. 16, 1966, 993 U.N.T.S. 3, 7, <https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf> [<https://perma.cc/RS9P-UBYZ>].

33. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 19: The Right to Social Security*, U.N. Doc. E/C.12/GC/19, ¶ 14 (2008), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQdrCvLm0yy7YCiVA9YY61Z8YHJWla0qOfZ9fbBAjHL%2ft85RO2hJnLTuaYFs2cO6jfqPZ9jzOmvcmMVZ5TrXkOB> [<https://perma.cc/UD6T-LCRA>].

34. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [<https://perma.cc/RXZ9-6M24>]; see also CHRISTOPHER C. JOYNER, *INTERNATIONAL LAW IN THE 21ST CENTURY* 114 (Rowman & Littlefield 2005) (“In interpreting a treaty text, the task becomes to ascertain what the text means to the parties collectively . . .”).

35. International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, United Nations, <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028002b6ed> [<https://perma.cc/EMC2-LRZ2>] (last visited Dec. 29, 2016).

36. *What Is the Difference Between Signing, Ratification and Accession of UN Treaties?*, United Nations, <http://ask.un.org/faq/14594> [<https://perma.cc/D3KW-7A4C>] (last visited Dec. 29, 2016); accord. Vienna Convention on the Law of Treaties, arts. 11, 18, *adopted* May 23, 1969, 1155 U.N.T.S. 331, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [<https://perma.cc/CUQ9-9JPL>].

37. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 22, 25(1) (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/index.html> [<https://perma.cc/4PY6-2FQZ>].

38. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

United States is to refrain, in good faith, from acts that would defeat the object and purpose of ensuring the right of everyone to “social security” provided by Article 9 of the ICESCR, a right that only arguably extends to providing paid leave to employees in certain circumstances. Therefore, short of the United States passing a ridiculous federal law that operates only to ban private employers from providing paid leave to their employees, international law has no material impact on the leave landscape in America.

B. *Federal Laws*

Given that no international law requires private employers to provide paid leave to their employees, we turn now to federal law. Although at least 145 countries have enacted national laws that afford paid leave to employees under various circumstances,³⁹ there is no federal law requiring all (or even most) private employers in the United States to provide such benefits. In fact, and as explained in greater detail below, some employers have argued that federal law preempts direct paid leave laws in certain situations. To that end, this Subpart begins by exploring the split in authority on the allegedly-preemptive nature of several federal laws and goes on to review the executive order that requires federal contractors and subcontractors to directly provide paid leave to certain employees working on those contracts, as well as the dozens of Congressional proposals for a federal direct paid leave law.

1. Allegedly-Preemptive Federal Laws

One brief note to begin: the only employers that can even *plausibly* argue that federal law preempts direct paid leave laws as applied to them are railroads and employers that provide paid leave to employees via a welfare benefit plan as that term of art is defined under ERISA. At present, there exist no plausible preemption arguments for non-railroad employers who offer paid leave as a payroll practice that falls outside the scope of ERISA’s regulation of welfare benefit plans.

With that substantial caveat in mind, we turn first to the case of *CSX*

39. World Health Org. [WHO], *The Case for Paid Sick Leave: World Health Report Background Paper No. 9*, at 8 (2010), <http://www.who.int/healthsystems/topics/financing/healthreport/SickleaveNo9FINAL.pdf> [<https://perma.cc/L7UV-WU5P>]. Notably, laws vary significantly from country to country with respect to the types of work excluded from paid leave benefits, the amount of hours worked necessary to qualify for benefits, whether all of some of an employee’s wages are afforded during leave, the length of leave that is paid, what diseases or conditions qualify for paid leave, whether there are any waiting times to receive benefits, and whether employees must provide medical documentation before qualifying for paid leave. *Id.* at 9.

Transportation, Inc. v. Healey,⁴⁰ in which a railroad-employer argued that ERISA⁴¹ and two federal laws applicable only to railroads (i.e., the Railroad Unemployment Insurance Act (“RUIA”)⁴² and the Railway Labor Act (“RLA”)⁴³) preempt the Massachusetts direct paid leave law⁴⁴ as applied to it. After bifurcating the proceedings and addressing only on the issue of RUIA preemption, the District Court found that the RUIA’s preemption provision⁴⁵ foreclosed enforcement of Massachusetts’s direct paid leave law against railroads.⁴⁶ Defendants timely appealed that decision to the U.S. Court of Appeals for the First Circuit,⁴⁷ where they were supported by the United States as amicus curiae.⁴⁸ The First Circuit affirmed to the extent that the RUIA preempted at least parts of the Massachusetts direct paid leave law, but remanded for analysis of whether the RUIA, RLA, and/or ERISA preempted the remaining parts of the law.⁴⁹

Notably, *Healey* remains the only case addressing the allegedly-preemptive nature of any federal law with respect to direct paid leave laws. However, the claims that CSX makes vis-à-vis ERISA preemption have been heard before with respect to unpaid state leave laws, albeit without a consensus resolving the argument. Indeed, as explained below, there is a split in authority with respect to whether ERISA preempts certain aspects of unpaid state leave laws.

For example, in *Aurora Medical Group v. Department of Workforce*

40. *CSX Transp., Inc. v. Healey*, No. 15-12865-NMG, 2016 U.S. Dist. LEXIS 90985 (D. Mass. July 2, 2016).

41. *Supra* note 16.

42. Railroad Unemployment Insurance Act of 1938 (“RUIA”), Pub. L. No. 75-722, 52 Stat. 1094 (1938) (codified as amended at 45 U.S.C. §§ 351-369). The RUIA applies only to railroads and not to any other employers. 45 U.S.C. § 351(a)-(b) (2016).

43. Railway Labor Act of 1926 (“RLA”), Pub. L. No. 73-442, 48 Stat. 1185 (1934) (codified as amended at 45 U.S.C. §§ 151-188). The RLA applies only to railroads and not to any other employers. 45 U.S.C. § 151 (2016).

44. *Infra* note 109.

45. 45 U.S.C. § 363(b) (2016) (“By enactment of this Act the Congress makes exclusive provision . . . for the payment of sickness benefits for sickness periods after June 30, 1947, based upon employment (as defined in this Act).”).

46. *Healey*, 2016 U.S. Dist. LEXIS 90985, at *21-25.

47. Def.’s Notice of Appeal, *CSX Transp., Inc. v. Healey*, No. 1:15-cv-12865, 2016 U.S. Dist. LEXIS 90985 (D. Mass. July 2, 2016), <https://dlbjbjzgk95t.cloudfront.net/084000/840077/https-ecf-mad-uscourts-gov-doc1-09517660211.pdf> [<https://perma.cc/S3NS-JWE2>].

48. Br. for the United States as Amicus Curiae in Supp. of Appellants and Reversal, *CSX Transp., Inc. v. Healey*, Nos. 16-2171 & 16-2172 (1st Cir. Dec. 20, 2016), <https://dlbjbjzgk95t.cloudfront.net/0875000/875681/https-ecf-ca1-uscourts-gov-cmefc-servlet-transportroom-servlet-showdoc-00107095432.pdf> [<https://perma.cc/2L57-H8PR>].

49. *CSX Transp., Inc. v. Healey*, Nos. 16-2171 & 16-2172, 2017 U.S. App. LEXIS 11251, at *2-3 (1st Cir. June 23, 2017).

Development, a nurse requested a leave of absence to adopt a child,⁵⁰ which is a permissible ground for unpaid leave under the Wisconsin Family and Medical Leave Act (“WFMLA”).⁵¹ The nurse also sought to substitute that *unpaid* leave of absence with *paid* sick leave that she had accrued pursuant to Aurora Medical Group’s Sick Pay Plan — a welfare benefit plan regulated by ERISA.⁵² Although the WFMLA allows employees to substitute employer-provided paid sick leave in lieu of WFMLA-provided unpaid leave,⁵³ Aurora Medical Group denied the nurse’s request to substitute the paid sick leave she had accrued under the Sick Pay Plan because she was not ill, and sick time under the plan was only payable to employees who are ill.⁵⁴ The nurse then filed a complaint with the Wisconsin Department of Workforce Development (“WDWD”), arguing that Aurora Medical Group had violated her WFMLA rights.⁵⁵ In response, Aurora Medical Group contended that the WFMLA, as applied here, was preempted by ERISA.⁵⁶ The WDWD concluded that ERISA did not preempt the WFMLA, citing as support language from the federal Family and Medical Leave Act (“FMLA”) that “nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.”⁵⁷ Upon petition from Aurora Medical Group, the state trial court affirmed the WDWD’s finding, as did the intermediate state appellate court on appeal.⁵⁸

The Supreme Court of Wisconsin also affirmed, holding that ERISA did not preempt the WFMLA. Foremost, the court explained that Section 401(b) of the FMLA “provides the authority, even encouragement, for the States to enact ‘greater family or medical leave rights than the rights established under this Act’”⁵⁹ Indeed, the court continued, the FMLA’s legislative history provides that “state family leave laws at least as generous as that provided in [the FMLA] (including leave laws that provide

50. *Aurora Med. Grp. v. Dep’t of Workforce Dev.*, 236 Wis. 2d 1, 5 (Wis. 2000).

51. WIS. STAT. § 103.10(3)(b)(2) (2016).

52. *Aurora Med. Grp.*, 236 Wis. 2d at 5; *cf.* ERISA Section 3(1), Advisory Op. 94-40A (Dep’t of Labor Dec. 7, 1994) <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/1994-40a> [<https://perma.cc/8HGR-EAVV>] (distinguishing between a payroll practice of providing paid sick leave and paid sick leave provided pursuant to a welfare benefit plan under ERISA).

53. WIS. STAT. § 103.10(5)(b) (2016).

54. *Aurora Med. Grp.*, 236 Wis. 2d at 5.

55. *Id.* at 6.

56. *Id.* at 7.

57. *Id.* (quoting 29 U.S.C. § 2651(b) (2016)).

58. *Id.* at 8.

59. *Aurora Med. Grp. v. Dep’t of Workforce Dev.*, 236 Wis. 2d 1, 23-24 (Wis. 2000) (quoting 29 U.S.C. § 2651(b) (2016)).

continuation of health insurance or other benefits, and paid leave), are not pre-empted by [ERISA], or any other federal law.”⁶⁰ Moreover, the court looked to Section 402(b) of the FMLA — which provides that the “rights established for employees under [the FMLA] . . . shall not be diminished by . . . any employment benefit program or plan” — as evidence of Congress’s intent not to diminish rights *advanced by* the FMLA (i.e., the right of states to enact greater family or medical leave rights than the rights that the FMLA provides).⁶¹ Accordingly, *Aurora Medical Group* stands for the proposition that ERISA does not preempt state laws like the WFMLA that complement the FMLA or, as relevant here, direct paid leave laws.

However, *Aurora Medical Group* was called into question by the Sixth Circuit’s opinion in *Sherfel v. Newson*.⁶² The relevant facts of *Sherfel* are familiar: a Wisconsin-based employee of a private employer had a baby and sought to replace the unpaid leave of absence, to which she was entitled under the WFMLA, with paid short-term disability leave.⁶³ She had accrued the short-term disability leave under her employer’s ERISA-regulated welfare benefit plan despite the fact that she did not qualify for payment under the terms of the plan.⁶⁴ The only material difference between the facts in *Sherfel* and the facts in *Aurora Medical Group* is that, in *Sherfel*, the employer (i.e., Nationwide Mutual Insurance Company) employed workers across 49 states, whereas the record in *Aurora Medical Group* is silent on whether the company employed anyone outside of Wisconsin at the time of the litigation.⁶⁵ Finding this distinction immaterial, the WDWD echoed its findings in *Aurora Medical Group*, holding that ERISA did not preempt the WFMLA and that Nationwide violated the WFMLA.⁶⁶ Nationwide appealed and, contrary to the WDWD’s interpretation, the District Court held that ERISA *did* preempt the WFMLA as applied to Nationwide’s case.⁶⁷

The Sixth Circuit agreed and affirmed for several reasons. First, citing a host of U.S. Supreme Court opinions, the Sixth Circuit recognized that ERISA would expressly preempt a state law if, among other things, that state law “(i) mandate[d] employee benefit structures, (ii) interfere[d] with nationally uniform plan administration, or (iii) create[d] alternative enforcement mechanisms for the recovery of benefits provided under an ERISA plan.”⁶⁸ Applying those precedents, the Sixth Circuit found the

60. S. Rep. No. 103-3 (1993), as reprinted in 1993-2 U.S.C.C.A.N. 3, 40.

61. *Aurora Med. Grp.*, 236 Wis. 2d at 20-21 (quoting 29 U.S.C. § 2652(b) (2016)).

62. *Sherfel v. Newson*, 768 F.3d 561 (6th Cir. 2014).

63. *Id.* at 566.

64. *Id.* at 564-65.

65. *Id.* at 565.

66. *Id.* at 566.

67. *Id.*

68. *Id.* at 567 (internal quotations and citations omitted).

WFMLA to be *expressly* preempted on three discrete grounds here: (i) it required the ERISA plan administrator to “pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents,”⁶⁹ (ii) it burdened Nationwide’s uniform administration of its ERISA plan across 49 states,⁷⁰ and (iii) it created an alternate enforcement mechanism outside of ERISA.⁷¹ Second, the court found that ERISA also *impliedly* preempted the WFMLA for two discrete reasons: (i) because “compliance with both federal and state regulations is a physical impossibility,”⁷² and (ii) because, as applied here, the WFMLA obstructs the full purposes and objectives of ERISA.⁷³

Responding to arguments that Sections 401(b) and 402(b) of the FMLA counsel against preemption (as the *Aurora Medical Group* court had held), the Sixth Circuit reasoned that those sections of the FMLA protect state laws only from being preempted *by the FMLA itself* and not any other federal law.⁷⁴ Indeed, upon recognizing that the FMLA merely *permits* states to enact laws providing greater family or medical leave rights than the rights established under the FMLA (as the WFMLA does by, inter alia, prohibiting employers from restricting their employees from substituting paid leave for unpaid leave) and does not *require* such enactments, the Sixth Circuit quoted the U.S. Supreme Court as stating, “[w]e fail to see how federal law would be impaired by pre-emption of a state law prohibiting conduct that federal law permitted.”⁷⁵ Finally, the Sixth Circuit dismissed the legislative history cited by the *Aurora Medical Group* court⁷⁶ for several reasons: (i) that legislative history belies the stated purpose of the FMLA; (ii) reliance on legislative history would be misplaced as federal law is unambiguous; (iii) the legislative history fails to reflect the intent of Congress; and (iv) the legislative history, if relied upon, resolves only the issue of express preemption, but not the issue of implied preemption (i.e., there would remain a conflict between ERISA and the WFMLA that could not be resolved but for preemption).⁷⁷

Accordingly, while *Aurora Medical Group* stands for the proposition that ERISA would not preempt direct paid leave laws, *Sherfel* stands for the opposite proposition (presuming, of course, that the employer offers paid

69. *Id.* (citing *Egelhoff*, 532 U.S. at 147) (internal quotations omitted).

70. *Id.* (citing *Egelhoff*, 532 U.S. at 150).

71. *Id.* (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990)).

72. *Id.* at 568 (citing *Boggs v. Boggs*, 520 U.S. 833, 844 (1997)) (internal quotations omitted).

73. *Id.* at 568 (citing *Egelhoff*, 532 U.S. at 148).

74. *Id.* at 569.

75. *Id.* at 569 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103-04 (1983)).

76. *See supra* note 60 & accompanying text.

77. *Sherfel*, 768 F.3d at 569-71 (citations omitted).

leave to employees via an ERISA-regulated welfare benefit plan). This split in authority lingers today, offering employers an option that may minimize the administrative burdens they face from complying with so many direct paid leave laws: cease their payroll practice of offering paid leave and create a welfare benefit plan regulated by ERISA that offers materially-identical paid leave benefits. On one hand, such employers may be able to avoid the burdens imposed by direct paid leave laws by arguing that such laws are preempted by ERISA as per *Sherfel*. However, on the other hand, such employers would increase their risk of litigation by subjecting themselves to new, ERISA-based causes of action (e.g., that they denied plan participants benefits under an ERISA plan⁷⁸) whereas employers' violations of their own payroll practices would likely fail to state claim upon which relief could be granted absent evidence that the payroll practice is tantamount to a contract or evidence of extenuating circumstances (e.g., an employee determinately relied upon the policy).

In conclusion, the federal legal landscape with respect to preemption of direct paid leave laws is muddy, to say the least. While one case (i.e., *Healey*) has held that the RUIA partially preempts at least one direct paid leave law as applied to railroads, no cases have addressed preemption of such laws outside of the railroad context. Finally, a split in authority exists between *Aurora Medical Group* and *Sherfel* regarding the preemptive effect of ERISA on state leave laws. Accordingly, non-railroad employers that do not offer paid leave via an ERISA-regulated welfare benefit plan are assuredly subject to the myriad direct paid leave laws detailed below, and all other employers would tread dangerously by ignoring such laws given the tenuous state of federal law on the subject.

2. Executive Order 13,706

On September 7, 2015, President Obama signed Executive Order 13,706, Establishing Paid Sick Leave for Federal Contractors,⁷⁹ which “requires parties that enter into covered contracts with the Federal Government [“federal contractors”] to provide covered employees with up to 7 days of paid sick leave annually, including paid leave allowing for family care,” among other reasons.⁸⁰ The U.S. Department of Labor (“DOL”) promulgated regulations implementing this order on September 30,

78. 29 U.S.C. § 1132(a)(1)(B).

79. Exec. Order No. 13,706, 80 Fed. Reg. 54,697 (Sept. 10, 2015), *reprinted in* 41 U.S.C. prec § 6301 (2016).

80. Final Rule: EO 13706, Establishing Paid Sick Leave for Federal Contractors, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., <https://www.dol.gov/whd/govcontracts/eo13706/> [<https://perma.cc/UH4F-95G2>] (last visited Jan. 17, 2017).

2016.⁸¹ Although the regulations state that they became effective November 29, 2016, the substantive obligations imposed by the regulations took effect January 1, 2017.⁸² The DOL also published substantial information about the order and its implementing regulations on its website.⁸³

Under the order and its implementing regulations, federal contractors must allow employees working 20% or more of their work hours in any given workweek on any federal contract or subcontract entered into on or after January 1, 2017 to accrue one hour of paid leave for every 30 hours worked on such a contract or subcontract up to a maximum accrual of 56 hours, all of which can be carried over to the next calendar year.⁸⁴ Employees can use accrued paid leave to be absent from work because of the employee's or a family member's illness, injury, or medical condition; to obtain for the employee or a family member diagnosis, care, or preventive care from a health care provider; or to address domestic violence, sexual assault, or stalking that targets the employee or a family member.⁸⁵ Employees can use leave in 1-hour increments with no limit on how much can be used at any one time.⁸⁶ Federal contractors can require reasonable advance notice of the need for leave of up to seven days (in the case of foreseeable leave) and can require employees to submit documentation of their need for more than three consecutive days of leave.⁸⁷ Finally, federal contractors not only need to notify employees of their rights via a poster, but also must notify employees of the amount of paid leave they have accrued but not used every pay period, upon termination (even if the federal contractor does not pay out accrued

81. Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 67,598 (Sept. 30, 2016) (codified at 29 C.F.R. pt. 13).

82. *Id.* at 67,600-01.

83. The Department of Labor's resources include a website containing additional information; a 5-page fact sheet; a 3-page overview; a separate website answering dozens of frequently asked questions; another website concerning how employees can determine if they are working on a federal contract; a document addressing the difference between the various types of paid sick leave, the FMLA, and state-provided paid family and medical leave; a poster; an informational video; a press release; and a blog post (although the link to this blog post is broken as of this writing). Final Rule: EO 13706, Establishing Paid Sick Leave for Federal Contractors, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., <https://www.dol.gov/whd/govcontracts/eo13706/> [<https://perma.cc/UH4F-95G2>] (last visited Jan. 17, 2017).

84. 29 C.F.R. §§ 13.5(a) (2016) (accrual of paid leave), 13.5(b) (maximum accrual and carryover), 13.4(e) (excluding employees performing less than 20% of work hours in a given workweek in connection with covered contracts), 13.2 (defining contract as including subcontracts and defining covered contracts as those resulting from solicitations or awards on or after January 1, 2017).

85. *Id.* § 13.5(c)(1).

86. *Id.* §§ 13.5(c)(2), (c)(4).

87. *Id.* §§ 13.5(d), (e).

paid leave upon termination), and upon reinstatement.⁸⁸

Notably, this executive order applies only to federal contractors (a group of employers that employ roughly 20% of the country's workforce⁸⁹) and federal subcontractors (a group of employers that employ an unknown percent of otherwise-uncovered employees). There exists no federal law affording paid leave to *all* American workers. Therefore, we turn briefly to proposed federal legislation that would fill this gap before diving into the varied sub-federal iterations of direct paid leave laws.

3. Proposed Federal Legislation

Several bills requiring private employers to directly pay employees on leave have been introduced in every session of Congress since 2004.⁹⁰ These bills have been supported by a pair of non-binding House of Representatives resolutions.⁹¹ Yet, none of these bills has passed either house of Congress,⁹² despite President Obama highlighting the need for federal paid sick leave legislation (i.e., direct paid leave legislation) in his 2015 State of the Union

88. *Id.* §§ 13.26 (one-time notice via poster), 13.5(a)(2) (notice per pay period and upon termination); *see also id.* § 13.5(b)(5) (employers are not required to pay accrued but unused paid leave upon termination).

89. Jonathan Capehart, *Obama Moves to Protect LGBT Federal Contractors and Employees*, WASH. POST (July 21, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/07/21/obama-moves-to-protect-lgbt-federal-contractors-and-employees/?utm_term=.8c82cf508665 [<https://perma.cc/R85F-QYZG>].

90. Healthy Families Act, H.R. 1516, S. 636, 115th Cong. (2017); Healthy Families Act, H.R. 932, S. 497, 114th Cong. (2015); Healthy Families Act, H.R. 1286, S. 631, 113th Cong. (2013); Pandemic Protection for Workers, Families, and Businesses Act, H.R. 4092, S. 2790, 111th Cong. (2009); Paid Sick Leave Act, H.R. 5849, 113th Cong. (2014); Healthy Families Act, H.R. 1876, S. 984, 112th Cong. (2011); Balancing Act of 2011, H.R. 2346, 112th Cong. §§ 171-83 (2011); Rebuild America Act, H.R. 5727, S. 2252, 112th Cong. §§ 241-54 (2012); Healthy Families Act, H.R. 2460, S. 1152, 111th Cong. (2009); Balancing Act of 2009, H.R. 3047, 111th Cong. (2009); Healthy Families Act, H.R. 1542, S. 910, 110th Cong. (2007); Healthy Families Act, H.R. 1902, S. 932, S. 1085, 109th Cong. (2005); Healthy Families Act, H.R. 4575, S. 2520, 108th Cong. (2004). Congress has also proposed indirect paid leave legislation. Family and Medical Insurance Leave Act, H.R. 1439, S. 786, 114th Cong. (2015); Family and Medical Insurance Leave Act of 2013, H.R. 3712, S. 1810, 113th Cong. (2013); Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. (2009); Family Leave Insurance Act of 2008, H.R. 5873, 110th Cong. (2008); Family Leave Insurance Act of 2007, S. 1681, 110th Cong. (2007); Paid Family and Medical Leave Act of 2005, H.R. 3192, 109th Cong. (2005). Finally, Congress has proposed requiring private employers to pay employees who the employers forced to stay home upon suspicion that the employee had symptoms of a contagious disease, Emergency Influenza Containment Act, H.R. 3991, 111th Cong. (2009), and Congress has proposed offering certain tax breaks to private employers who offer direct paid leave to their employees, Strong Families Act, S. 2354, 114th Cong. (2015); Strong Families Act, H.R. 5173, S. 2618, S. 2627, 113th Cong. (2014).

91. H.R. Res. 506, 114th Cong. (2015); H.R. Res. 507, 113th Cong. (2014).

92. *See supra* note 90.

Address.⁹³

C. *Sub-Federal Laws*

With no international or federal laws providing paid leave to all American employees, many states, counties, and municipalities, as well as Puerto Rico and Washington, D.C., have all taken it upon themselves to provide such entitlements. As of January 1, 2018, more than 40 political divisions have enacted direct paid leave laws. What follows is an overview of those laws; any laws enacted, regulations promulgated, or sub-regulatory guidance issued after January 1, 2018 are not included herein unless they preempt previously-enacted laws.

In 1998, Puerto Rico enacted the nation’s first direct paid leave law.⁹⁴ After nearly a decade without further laws, San Francisco, CA enacted the next direct paid leave law in 2007.⁹⁵ In 2008, Washington, D.C. followed

93. In that speech, President Obama said:

Today, we are the only advanced country on Earth that doesn’t guarantee paid sick leave or paid maternity leave to our workers. Forty-three million workers have no paid sick leave—43 million. Think about that. And that forces too many parents to make the gut-wrenching choice between a paycheck and a sick kid at home. So I’ll be taking new action to help states adopt paid leave laws of their own. And since paid sick leave won where it was on the ballot last November, let’s put it to a vote right here in Washington. (Applause.) Send me a bill that gives every worker in America the opportunity to earn seven days of paid sick leave. It’s the right thing to do. It’s the right thing to do. (Applause.)

President Barack Obama, State of the Union Address (Jan. 20, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [<https://perma.cc/894J-H8MM>] (last visited Jan. 23, 2017). President Trump has yet to support such a bill, although he called for paid family leave legislation (i.e., *indirect* paid leave legislation) in his 2017 joint address to Congress, saying, “My administration wants to work with members of both parties to make childcare accessible and affordable, to help ensure new parents that they have paid family leave—(applause)” President Donald Trump, Joint Address to Congress (Feb. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress> [<https://perma.cc/2CRK-PGMN>] (last visited May 6, 2017).

94. P.R. LAWS ANN. tit. 29, § 250d (2016). This law is also known as “Law 180.” *Gonzalez v. Spirit Airlines, Inc.*, 922 F. Supp. 2d 178, 184 (D.P.R. 2013).

95. S.F., CAL., ADMIN. CODE §§ 12W.1-12W.16 (2016), http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca (select the hyperlink for “California,” then “San Francisco Administrative Code,” then “CHAPTER 12W: SICK LEAVE”). San Francisco has amended the Sick Leave Ordinance once. S.F., Cal., Proposition E (June 7, 2016). The San Francisco Office of Labor Standards Enforcement has promulgated fifteen pages of rules implementing the ordinance and published a website containing information about it, 65 frequently asked questions about it, an eighteen-page overview of the key components of it, a fact sheet on it (although the link to that fact sheet was broken as of this writing), and thirteen frequently asked questions about the interaction between the city law and California’s direct paid leave law. *Paid Sick Leave Ordinance*

suit,⁹⁶ as did Milwaukee, WI, although a Wisconsin state law preempting such municipal legislation went into effect before the Milwaukee law's effective date.⁹⁷ In 2012, Connecticut⁹⁸ and Seattle, WA⁹⁹ passed direct paid leave laws, as did Long Beach, CA, although the Long Beach law covered only certain hotel workers.¹⁰⁰ In 2013, SeaTac, WA enacted a direct paid

(PSLO), S.F. OFFICE OF LABOR STANDARDS ENF'T, <http://sfgov.org/olse/paid-sick-leave-ordinance-pslo> [<https://perma.cc/Z6SK-R7AJ>] (last visited Nov. 25, 2016).

96. D.C. CODE §§ 32-131.01 through 32-131.17 (2016). Washington, D.C. has amended this law twice, albeit minimally the first time. Technical Amendments Act of 2008, D.C. Law 17-353, § 311(a) (2008); Earned Sick and Safe Leave Act of 2013, D.C. Law 20-89, § 2(b) (2014). The Washington, D.C. Department of Employment Services ("DOES") has promulgated twelve pages of rules implementing the law and published a website containing information about it. *Wage-Hour Compliance Involves Administering the Wage Laws of the District of Columbia*, D.C. DEP'T OF EMP'T SERVS., <http://does.dc.gov/page/wage-hour-compliance-involves-administering-wage-laws-district-columbia> [<https://perma.cc/4HR6-LYBR>] (last visited Nov. 25, 2016). DOES has also published several frequently asked questions addressing the law. *Frequently Asked Questions (FAQs)*, D.C. DEP'T OF EMP'T SERVS., OFFICE OF WAGE-HOUR COMPLIANCE, http://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/FAQs%20for%20OWH-Final.pdf [<https://perma.cc/GGN7-67WV>].

97. Marianne DelPo Kulow, *Legislating a Family-Friendly Workplace: Should It Be Done in the United States?*, 7 NW. J. L. & SOC. POL'Y 88, 99-100 n. 82 & accompanying text (2012); *infra* note 147; Zillman Article *supra* note 14 (discussing overview of the rationale behind the Wisconsin preemption law); MILWAUKEE, WIS., ADDITIONS TO MILWAUKEE CODE OF ORDINANCES, VOL. 1 173 (2016), <http://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/Ordinances/Volume-1/1HISTORY.pdf> [<https://perma.cc/F8PL-9ANF>].

98. CONN. GEN. STAT. §§ 31-57r through 31-57w (2016). Connecticut has amended this law once. H.B. 5269 (Conn. 2014). The Connecticut Department of Labor has published a website containing information about the law, fifteen pages of guidance interpreting it law (which has been amended at least once), and a 44-page Microsoft PowerPoint presentation providing an overview of it. *Connecticut General Statute 31-57r – Paid Sick Leave*, CONN. DEP'T OF LABOR, <https://www.ctdol.state.ct.us/wgwkstnd/sickleave.htm> [<https://perma.cc/3T8T-SWH5>] (last visited Nov. 25, 2016).

99. SEATTLE, WASH., MUN. CODE §§ 14.16.005-14.16.130 (2016), https://www.municode.com/library/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.16PASITIPASATI [<https://perma.cc/CE4K-KXH4>]. Seattle has amended the ordinance five times. Seattle, Wash., Ordinance 123,899, § 16 (June 19, 2012); Seattle, Wash., Ordinance 124,644, § 1 (Dec. 2, 2014); Seattle, Wash., Ordinance 124,960 (Dec. 17, 2015); Seattle, Wash., Ordinance 124,809, § 2 (July 17, 2015); Seattle, Wash., Ordinance 125,499 (Jan. 14, 2018). The Seattle Office for Civil Rights Rules has promulgated 27 pages of rules implementing the ordinance. *Paid Sick & Safe Time Rules*, SEATTLE OFFICE OF LABOR STANDARDS, <http://www.seattle.gov/laborstandards/enforcement/rules-and-ordinances/paid-sick-and-safe-time> [<https://perma.cc/AFR9-TLBP>] (last visited Nov. 25, 2016). The Seattle Office of Labor Standards has published a website containing information about the ordinance, a one-page checklist designed to guide employers in implementing a policy describing how they meet the requirements of the ordinance, a four-page sample policy, a one-page template waiver of unionized employees' rights under the ordinance pending the expiration of the existing collective bargaining agreement, a one-page fact sheet, and a 38-page questions and answers document. *Id.*

100. LONG BEACH, CAL., MUN. CODE § 5.48.020(c)-(g) (2016), <https://www.municode.com>

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leave law covering only certain hospitality and transportation workers,¹⁰¹ and Los Angeles, CA enacted a law covering only certain hotel workers.¹⁰²

In 2014, the flood gates opened. That year alone, direct paid leave laws

om/library/ca/long_beach/codes/municipal_code?nodeId=TIT5REBUTRPR_CH5.48HOM
O_5.48.020PAMICOSIDAHOWO [https://perma.cc/K5M6-MPTX].

101. SEATAC, WASH., MUN. CODE § 7.45.020 (2016), <http://www.codepublishing.com/WA/SeaTac/?SeaTac07/SeaTac0745.html#7.45.020> [https://perma.cc/N3K7-39TX]. Sea-Tac has published a website containing information about the ordinance and a four-page document (which has been revised at least once) containing several frequently asked questions about the ordinance. *Employment Standards Ordinance*, SEATAC, WASH., <http://www.ci.seatac.wa.us/index.aspx?page=681> [https://perma.cc/5YKU-LVDG] (last visited Nov. 25, 2016).

102. L.A., CAL., MUN. CODE § 186.02 (2016), [http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterxviiiemployeewagesandprotections?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:losangeles_ca_mc\\$anc=JD_186.02](http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterxviiiemployeewagesandprotections?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc$anc=JD_186.02).

in Jersey City, NJ;¹⁰³ Newark, NJ;¹⁰⁴ New York, NY;¹⁰⁵ Passaic, NJ;¹⁰⁶ and

103. JERSEY CITY, N.J., MUN. CODE §§ 4-1 through 4-10 (2016), https://www.municode.com/library/nj/jersey_city/codes/code_of_ordinances?nodeId=CH4PASITI [<https://perma.cc/9HUC-GV6X>]. Jersey City has amended this ordinance once. Jersey City, N.J., Ordinance 15-145 (Oct. 30, 2015). Jersey City has published a website containing information about it, a page of frequently asked questions for employers, and a page of frequently asked questions for employees. *Jersey City's Earned Sick Time Ordinance FAQs*, JERSEY CITY, N.J., <http://www.cityofjerseycity.com/resident.aspx?id=13872> [<https://perma.cc/NQ3V-CJK9>] (last visited Nov. 26, 2016).

104. NEWARK, N.J., CODE §§ 16:18-1 through 16:18-15 (2016), <http://clerkshq.com/default.ashx?clientsite=Newark-nj> [<https://perma.cc/7K42-HLBE>] (select “Newark Code” from the drop-down menu; then select “Title XVI Health, Sanitation and Air Pollution” followed by “Chapter 18 Sick Leave For Private Employees”). Newark has amended this ordinance once. Newark, N.J., Ordinance 6PSF-E (Jan. 28, 2014). Newark published a website containing information about the ordinance and a three-page document containing several frequently asked questions about it, but as of this writing that website is no longer active. *Paid Sick Leave*, NEWARK, N.J., <https://web.archive.org/web/20160609223111/http://www.ci.newark.nj.us/government/departments/health-and-community-wellness/paid-sick-leave> [<https://perma.cc/7YLR-XN68>] (last visited Nov. 26, 2016).

105. N.Y.C. ADMIN. CODE §§ 20-911 through 20-925 (2016). New York City has amended this law four times. N.Y.C. Local Law 2014/06 (Feb. 4, 2014); N.Y.C. Local Law 2014/07 (Mar. 20, 2014); N.Y.C. Local Law 2015/104 (Nov. 30, 2015); N.Y.C. Local Law 2017/199 (Nov. 6, 2017). The New York City Department of Consumer Affairs has promulgated eight pages of rules implementing the law, as well as a page of rules regarding workplace policies (although these rules are not codified in the Rules of the City of New York). N.Y. Comp. Codes R. & Regs. tit. 6, §§ 7-01 to 7-17 (2017), <https://www1.nyc.gov/assets/dca/downloads/pdf/about/Paid-Sick-Leave-Final-Rules.pdf> [<https://perma.cc/4AD8-ZFFK>]. The city has also published several websites about the law, a two-page reminder about the law, an eight-page document addressing employers' questions about the law, a separate 46-page document addressing frequently asked questions, a 20-page document addressing frequently asked questions solely for domestic workers, three template tracking spreadsheets, a model employee verification form, a model employee notification form, a model employee request to make up missed work form, and a full-length and a shorter training presentation. *Paid Sick Leave Law*, N.Y.C. DEP'T OF CONSUMER AFFAIRS, <http://www.nyc.gov/site/dca/about/paid-sick-leave-law.page> [<https://perma.cc/3MLX-ZEQ2>] (last visited Nov. 26, 2016); *Paid Sick Leave Law Information for Employers*, N.Y.C. DEP'T OF CONSUMER AFFAIRS, <http://www1.nyc.gov/site/dca/about/paid-sick-leave-employers.page> [<https://perma.cc/D94Q-3SK4>] (last visited Nov. 26, 2016).

106. PASSAIC, N.J., CODE §§ 128-1 through 128-14 (2016), <http://ecode360.com/29566426> [<https://perma.cc/BK47-RPB5>]. Passaic has published a website containing a fact sheet about the ordinance, a brochure, a flyer, a notice of employees' rights under the ordinance, and a two-page document addressing frequently asked questions. *Private Sector Paid Sick Leave Ordinance*, PASSAIC, N.J. OFFICE OF HUMAN SERVS., http://www.cityofpassaic.com/index.asp?SEC=BD3B38E9-18A3-4D03-B2C2-8FDA6F2331B1&DE=718B156B-8826-4D2E-A07E-1BDA778D2D19&Type=B_BASIC [<https://perma.cc/4X2G-8Q54>] (last visited Jan. 16, 2017).

Portland, OR¹⁰⁷ became effective, followed by similar laws in California;¹⁰⁸

107. PORTLAND, ORE., CODE § 9.01 (2016), <https://www.portlandoregon.gov/citycode/28174> [<https://perma.cc/UXX5-55J7>]. Portland has promulgated sixteen pages of rules implementing the ordinance. *What Is Protected Sick Time?*, PORTLAND, ORE., <https://www.portlandoregon.gov/sicktime/63898> [<https://perma.cc/V2WJ-L44Q>] (last visited Jan. 16, 2017). Portland published several websites containing information and background about the ordinance, as well as a 22-minute, 86-slide technical assistance training for employers; a separate 92-slide interactive training video; a three-page letter from the city notifying employees of the ordinance; a template of that letter for employers to provide to their employees; a poster; a website addressing 52 frequently asked questions about the ordinance; and a website assisting employees in filing a complaint for unpaid wages related to violations of the ordinance, but as of this writing the websites containing that information have been removed and replaced with a website claiming that Oregon state law preempts the Portland ordinance. *Protected Sick Time Ordinance*, PORTLAND, ORE., <https://www.portlandoregon.gov/sicktime/> [<https://perma.cc/9FZJ-J75T>] (last visited Jan. 16, 2017); *Protected Sick Time Ordinance*, PORTLAND, ORE., <https://web.archive.org/web/20170710035913/https://www.portlandoregon.gov/sicktime/> [<https://perma.cc/6RNS-FE7J>]. To that end, although Oregon state law preempts municipal paid *sick* leave laws, *infra* note 131, because Portland’s law offers employees the right to take paid leave for reasons other than sickness, *see* PORTLAND, ORE., CODE § 9.01.040(B)(2) (allowing leave to address domestic violence, harassment, sexual assault, or stalking), state law does not entirely preempt the Portland law.

108. CAL. LAB CODE §§ 245-49 (2016). California amended this law once. S.B. 3 (Cal. 2015). The California Department of Industrial Relations (“CDIR”) has published a website addressing dozens of frequently asked questions about the law. *California Paid Sick Leave: Frequently Asked Questions*, CAL. DEP’T OF INDUS. RELATIONS, http://www.dir.ca.gov/dlse/paid_sick_leave.htm [<https://perma.cc/ZCL2-8Y5V>] (last visited Jan. 16, 2017). CDIR’s Division of Labor Standards Enforcement has issued several opinion letters responding to public requests for clarification concerning this law. *DLSE Opinion Letters: By Subject*, CAL. DEP’T OF INDUS. RELATIONS, DIV. OF LABOR STANDARDS ENF’T, <https://www.dir.ca.gov/dlse/OpinionLetters-bySubject.htm> [<https://perma.cc/9FYX-GTTW>] (last visited Jan 16, 2017). Finally, unlike Oregon’s law, California’s paid sick leave law did not preempt the many California local paid sick leave laws. *Cf. infra* note 131 (preempting local Oregon paid sick leave laws).

Massachusetts;¹⁰⁹ Bloomfield, NJ;¹¹⁰ East Orange, NJ;¹¹¹ Emeryville, CA.;¹¹²

109. MASS. ANN. LAWS ch. 149, § 148C (2016). The Massachusetts Attorney General's Office ("MAGO") has promulgated fifteen pages of regulations implementing this law. 940 MASS. CODE REGS. 33.01-33.11 (LexisNexis 2016). MAGO has also published a website containing information about the law and its implementing regulations, 20 pages of frequently asked questions about the law, a 21-page PowerPoint presentation about the law, fact sheets designed to help employees determine if they qualify for leave under the law and if their employers' policies comply with the law, a sample earned sick time policy, and a sample verification for employers to use to authorize employees' use of leave. *Earned Sick Time*, MASS. ATT'Y GEN.'S OFFICE, <http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/leave-time/earned-sick-time.html> [https://perma.cc/SAT2-8TL2] (last visited Jan. 18, 2017).

110. BLOOMFIELD, N.J. CODE §§ 160-1 through 160-16 (2016), <http://ecode360.com/30343855> [https://perma.cc/9T2B-LQG9]. Bloomfield has published a website containing information about the law, eleven frequently asked questions about the law, a complaint form, and a notice of rights under the law. *Bloomfield: First N.J. Town this Year to Mandate Paid Sick Leave*, BLOOMFIELD, N.J., <http://www.bloomfieldtwpnj.com/main/press-release/bloomfield-first-nj-town-year-mandate-paid-sick-leave> [https://perma.cc/XR87-BNZE] (last visited Jan. 19, 2017).

111. EAST ORANGE, N.J., CODE §§ 140-1 through 140-15 (2016), <http://ecode360.com/29276090> [https://perma.cc/L37Q-KLA7]. East Orange has published a notice of rights under this law. *Health and Human Services*, EAST ORANGE, N.J., http://eastorange-nj.gov/?page_id=587 [https://perma.cc/E7JJ-CUN9] (select the "Paid Sick Leave" hyperlink) (last visited Jan. 19, 2017).

112. EMERYVILLE, CAL., MUN. CODE §§ 5-37.01, 5-37.03, 5-37.05 through 5-37.09 (2016), <http://www.codepublishing.com/CA/Emeryville/#!/emeryville05/Emeryville0537.html> [https://perma.cc/2JFX-9624]. Emeryville has amended this law twice. Emeryville Ordinance 15-008; Emeryville Ordinance 16-005A; Ordinance Table, EMERYVILLE, CAL., <http://www.codepublishing.com/CA/Emeryville/html/EmeryvilleOT.html> [https://perma.cc/WN4K-G26M] (last visited Jan. 21, 2017). Emeryville has published a website containing information about the law, 37 frequently asked questions about the law, a two-page document containing employer tools and resources, a poster, a notice, a template form for employees to designate someone to use their leave for if they do not have a spouse or registered domestic partner, a complaint form, and a seventeen-page overview presentation. *Minimum Wage Ordinance*, EMERYVILLE, CAL., <http://www.ci.emeryville.ca.us/1024/Minimum-Wage-Ordinance> [https://perma.cc/EZW4-GPS4] (last visited Jan. 19, 2017).

Eugene, OR;¹¹³ Irvington, NJ;¹¹⁴ Montclair, NJ;¹¹⁵ Oakland, CA;¹¹⁶ Patterson,

113. EUGENE, ORE., CODE §§ 4.570-84 (2015), <https://www.eugene-or.gov/DocumentCenter/View/17135> [<https://perma.cc/KL7F-E2RY>]. Eugene has promulgated fifteen pages of regulations implementing the law. EUGENE, ORE., SICK LEAVE ADMIN. R. R-4.582 (2015), <https://www.eugene-or.gov/2646/Sick-Leave-Ordinance> [<https://perma.cc/Y86J-MZ65>] (select the “Final Sick Leave Administrative Rules” hyperlink). Eugene has also published a website containing information about the law; three pages of frequently asked questions about it; a 68-page final report of a sick leave task force; several meeting agendas, meeting materials, and presentations about the proposals that predated the law; several articles, reports, and other resources about the proposed law; three pages of comments from the task force; and several webcasts discussing the law. *Sick Leave Ordinance*, EUGENE, ORE., <https://www.eugene-or.gov/2646/Sick-Leave-Ordinance> [<https://perma.cc/28UJ-XSNK>] (last visited Jan. 19, 2017). Although Oregon state law preempts municipal paid sick leave laws, *infra* note 131, because Eugene’s law offers employees the right to take paid leave for reasons other than sickness, *see* EUGENE, ORE., CODE §§ 4.578(2)(b) (allowing leave to address domestic violence, harassment, sexual assault, or stalking), state law does not entirely preempt the Eugene law.

114. Irvington, N.J., Ordinance MC-3513 (Sept. 10, 2014), <http://ecode360.com/documents/IR0792/source/541588.pdf> [<https://perma.cc/88WM-WV4S>].

115. Montclair, N.J., Ordinance 14-047 (Nov. 4, 2014), <http://ecode360.com/documents/MO0769/source/LF937986.pdf> [<https://perma.cc/PE9H-W27P>]. Montclair has published a website containing information about the law, several frequently asked questions addressing it, and a template complaint form. *Paid Sick Time Ordinance*, MONTCLAIR, N.J., http://www.montclairnjusa.org/index.php?option=com_content&view=category&layout=blog&id=341&Itemid=881 (last visited Jan. 20, 2017).

116. OAKLAND, CAL., CODE §§ 5.92.010, 5.92.030, 5.92.050 (2016), https://www.municode.com/library/ca/oakland/codes/code_of_ordinances?nodeId=TIT5BUTAPERE_CH5.92_CIMIWASILEOTEMST [<https://perma.cc/QBY8-JWUV>]. The Oakland City Administrator has promulgated twelve pages of regulations implementing the law. *Rules and Regulations for the Enforcement of Oakland’s Minimum Wage Law (Measure FF)*, OAKLAND, CAL., CITY ADM’R, <http://www2.oaklandnet.com/oakca1/groups/ceda/documents/marketingmaterial/oak058623.pdf> [<https://perma.cc/V69A-JRJK>] (last visited Jan. 20, 2017). Oakland has published a website containing information about the law, a poster, 47 frequently asked questions addressing the law, a document containing tools and resources for employers, a six-page summary of the ballot initiative that created the law, and a thirteen-page presentation containing information about the law. *Minimum Wage*, OAKLAND, CAL., CITY ADM’R, <http://www2.oaklandnet.com/government/o/CityAdministration/d/MinimumWage/index.htm> [<https://perma.cc/98U8-ECM8>]

NJ;¹¹⁷ Philadelphia, PA;¹¹⁸ and Trenton, NJ¹¹⁹ in 2015.¹²⁰ In 2016, direct paid leave laws went into effect in Oregon;¹²¹ Elizabeth, NJ;¹²² Los Angeles,

117. PATTERSON, N.J., CODE §§ 412-1 through 412-13 (2015), <http://ecode360.com/29601690> [<https://perma.cc/46LW-L6KM>]. Patterson has published a notice about the law. *Notice Regarding Sick Leave for Private Employers*, PATTERSON, N.J., <http://www.patersonnj.gov/egov/apps/document/center.egov?view=item;id=1471> [<https://perma.cc/JA5L-MAJS>] (last visited Jan. 21, 2017).

118. PHILA., PA., CODE §§ 9-4101 through 9-4116 (2016), [http://library.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title4thephiladelphiabuildingconstructio/subcodebthephiladelphiabuildingcode/chapter1administration?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:philadelphia_pa](http://library.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title4thephiladelphiabuildingconstructio/subcodebthephiladelphiabuildingcode/chapter1administration?f=templates$fn=default.htm$3.0$vid=amlegal:philadelphia_pa) (in the left-hand menu, select “Pennsylvania,” then “The Philadelphia Code,” then “TITLE 9. REGULATION OF BUSINESSES, TRADE AND PROFESSIONS,” then “CHAPTER 9-4100. PROMOTING HEALTHY FAMILIES AND WORKPLACES”). The Philadelphia Managing Director’s Office has published a website containing information about the law, a poster, a complaint form, and guidance on temporary/seasonal employees, compensation, and submitting a complaint. *Paid Sick Leave*, PHILA. MANAGING DIRECTOR’S OFFICE, <http://www.phila.gov/MDO/Pages/PaidSickLeave.aspx> [<https://perma.cc/S8F3-GHGL>] (last visited Jan. 21, 2017).

119. TRENTON, N.J., CODE §§ 2301-1 through 2301-13 (2016), <http://ecode360.com/30502988> [<https://perma.cc/Z9JH-5RJG>]. Trenton has published a website containing information about the law, ten frequently asked questions addressing the law, a poster, an intake questionnaire, and a brochure. *City of Trenton Paid Sick Leave Resources*, TRENTON, N.J., <http://www.trentonnj.org/Cit-e-Access/webpage.cfm?TID=55&TPID=15204> [<https://perma.cc/PEW3-L74X>] (last visited Jan. 21, 2017).

120. Pittsburgh, Pennsylvania also enacted a direct paid leave ordinance in 2015. Pittsburgh, Pa., Ordinance 2015-1825 (Aug. 13, 2015), <https://pittsburgh.legistar.com/LegislationDetail.aspx?ID=2448366&GUID=2652EE86-BB8B-45A1-AFF8-8FE280C9669B&Options=ID%7CText%7C&FullText=1> [<https://perma.cc/82M4-7UV9>]. However, that ordinance was successfully challenged in court as *ultra vires* before it went into effect. Sarah Anne Hughes, *How Pittsburgh’s Paid Sick Leave Law Ended Up Back in Court*, THE INCLINE (Nov. 14, 2016), <https://theincline.com/2016/11/14/this-is-how-pittsburghs-paid-sick-leave-law-ended-up-back-in-court/> [<https://perma.cc/7S3G-VH4W>] (last visited Jan. 21, 2017). The state appellate court affirmed the trial court’s decision. *Pa. Rest. & Lodging Assoc. v. City of Pittsburgh*, Nos. 79 C.D. 2016, 101 C.D. 2016 (May 17, 2017 Comm. Ct. of Pa.), available at https://dlbjbjzgnk95t.cloudfront.net/0925000/925113/79cd16_5-17-17.pdf [<https://perma.cc/QS77-ZA9R>].

121. ORE. REV. STAT. §§ 653.601-653.661 (2016). The Oregon Bureau of Labor and Industries (“BOLI”) has promulgated fifteen pages of rules implementing the law. ORE. ADMIN. R. §§ 839-007-0000 through 839-007-0120 (2016). BOLI’s Wage and Hour Division has published a website containing information about the law, several frequently asked questions addressing the law, a poster, a complaint form, a template for employers to notify their employees of accrued leave, and a template for employers to notify their employees when the employer cannot allow sick time in hourly increments due to undue hardship. *Protected Sick Time*, ORE. BUR. OF LABOR & INDUS., WAGE & HOUR DIV., <http://www.oregon.gov/boli/WHD/OST/pages/index.aspx> [<https://perma.cc/C4VD-BDP7>] (last visited Jan. 21, 2017).

122. ELIZABETH, N.J., CODE §§ 8.65.010-8.65.120 (2015), https://www.municode.com/library/nj/elizabeth/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.65SILEPREM [<https://perma.cc/SCT2-XBBB>].

CA;¹²³ Montgomery County, MD¹²⁴ (which includes cities like Bethesda, Gaithersburg, Germantown, Rockville, and Silver Spring¹²⁵); Morristown,

123. L.A., CAL., MUN. CODE § 187.04 (2016), [http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterxviiiemployeewagesandprotections?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:losangeles_ca_mc\\$anc=JD_187.04](http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterxviiiemployeewagesandprotections?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc$anc=JD_187.04) (in the center of the screen, select the hyperlink for “7” to the left of the words “Los Angeles Minimum Wage Ordinance,” then select the hyperlink for “187.04” next to the words “Sick Time Benefits.”). Notably, this ordinance provides lesser rights in some respects than the Los Angeles ordinance providing leave only to hotel workers, *see supra* note 102, so it does not effectively preempt that ordinance.

124. MONTGOMERY CTY., MD., CODE §§ 27-76 through 27-82 (2016), http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:montgomeryco_md_mc (in the left-hand menu, select “Maryland,” then “Montgomery County Code,” then “Part II. Local Laws, Ordinances, Resolutions, Etc.,” then “Chapter 27. Human Rights and Civil Liberties,” then “ARTICLE XIII. EARNED SICK AND SAFE LEAVE.*”). Montgomery County has amended this law once. Montgomery Cty., Md., Expedited Bill 32-16 (Nov. 9, 2016), http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/bill/2016/20161101_32-16A.pdf [<https://perma.cc/V4TN-BT2H>]. Montgomery County has published a poster and a fact sheet with seventeen frequently asked questions addressing the law. *Earned Sick and Safe Leave Law*, MONTGOMERY CTY., MD., https://www.montgomerycountymd.gov/humanrights/Resources/Files/EarnedSickandSavedLeave_Poster.pdf [<https://perma.cc/SUZS-B7JD>] (last visited Jan. 21, 2017); *Fact Sheet, Montgomery County Earned Sick and Safe Leave Law*, MONTGOMERY CTY., MD., https://www.montgomerycountymd.gov/humanrights/Resources/Files/MC_Earned_Sick_Factsheet_updatedJune2016.pdf [<https://perma.cc/A785-RTUW>] (last visited Jan. 21, 2017).

125. Montgomery County Towns & Cities, CONFERENCE & VISITORS BUR. OF MONTGOMERY CTY., MD, INC., <https://visitmontgomery.com/county-info/our-towns/> [<https://perma.cc/C64V-8YF2>] (last visited Mar. 18, 2017).

NJ;¹²⁶ New Brunswick, NJ;¹²⁷ Plainfield, NJ;¹²⁸ Santa Monica, CA;¹²⁹ and Tacoma, WA.¹³⁰ Notably, as of January 1, 2016, Oregon's law preempted

126. MORRISTOWN, N.J., ORDINANCE O-35-2016 (Sept. 14, 2016), http://www.townofmorristown.org/vertical/sites/%7B0813EA2E-B627-4F82-BBB0-DDEE646947B5%7D/uploads/O-35-2016_-_To_Implement_Paid_Sick_Leave.pdf [<https://perma.cc/3NZZ-JPEP>]. Morristown has also published a website containing information about the law, eleven frequently asked questions addressing the law, a notice, and an intake questionnaire. Morristown Paid Sick Leave, MORRISTOWN, N.J., http://www.townofmorristown.org/index.asp?SEC=D3B571F8-2DD6-4B86-9E0F-ABC6DD9044E4&Type=B_BASIC [<https://perma.cc/PTP7-X9WY>] (last visited Jan. 21, 2017).

127. NEW BRUNSWICK, N.J., MUN. CODE §§ 8.56.010-8.56.120 (2016), https://www.municode.com/library/nj/new_brunswick/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.56PASITIPASATILE [<https://perma.cc/P8NY-LEFN>]. New Brunswick has published a website containing information about the law, a separate website containing several frequently asked questions addressing the law, a notice, and a complaint form. *Paid Sick & Safe Time in New Brunswick*, NEW BRUNSWICK, N.J., <http://thecityofnewbrunswick.org/planninganddevelopment/paid-sick-safe-time-in-new-brunswick/> [<https://perma.cc/CA7M-T5F2>] (last visited Jan. 21, 2017).

128. PLAINFIELD, N.J., MUN. CODE §§ 8:5-1 through 8:5-13, <http://clerkshq.com/default.ashx?clientsite=plainfield-nj> [<https://perma.cc/A9N3-WD2U>] (in the left-hand menu, select "Plainfield City, NJ," then "VOLUME I CODE OF ORDINANCES," then "CHAPTER 8. HEALTH.," then "ARTICLE 5. SICK LEAVE FOR PRIVATE EMPLOYEES AND CITY EMPLOYEES.>"). Plainfield has amended this law once. Plainfield, N.J., Ordinance MC 2016-12 (May 9, 2016), http://plainfieldcitynj.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=1117&MediaPosition=&ID=2496&CssClass= [<https://perma.cc/X8NW-HY3D>]. Plainfield's Office of Health and Social Services has published a website containing information about the law, a notice containing nine frequently asked questions addressing the law, an intake questionnaire, and a template letter advising employers of potential noncompliance with the law. *Office of Health and Social Services*, PLAINFIELD, N.J., OFFICE OF HEALTH AND SOC. SERVS., http://plainfieldnj.gov/cm.s.aspx?page_id=318&page_name=Office_of_Health_and_Social_Services [<https://perma.cc/LZ4A-4DGF>] (last visited Jan. 21, 2017).

129. SANTA MONICA, CAL., MUN. CODE § 4.62.025 (2016), <http://www.qcode.us/codes/santamonica/> [<https://perma.cc/U9HE-W4W3>] (select the hyperlink for "Article 4 PUBLIC WELFARE, MORALS AND POLICY," then "Chapter 4.62 MINIMUM WAGE," then "4.62.025 Paid sick leave.>"). Santa Monica has amended this law once. Santa Monica, Cal., Ordinance 2515CCS (May 10, 2016), www.qcode.us/codes/santamonica/revisions/2515CCS.pdf [<https://perma.cc/W6U2-Y55C>]. Santa Monica has published a website containing information about the law; template social media posts; a notice, flyer, postcard, and template paycheck insert all containing information about the law; enforcement guides for employers and employees; a checklist for employers to ensure compliance; and a public service announcement about the law. *Minimum Wage Ordinance*, SANTA MONICA, CAL., <https://beta.smgov.net/strategic-goals/inclusive-diverse-community/minimum-wage-ordinance> [<https://perma.cc/4E7J-5Y9Q>] (last visited Jan. 21, 2017).

130. TACOMA, WASH., MUN. CODE §§ 18.10.010-18.10.100 (2016), <http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title18-MinimumEmploymentStandards.PDF> [<https://perma.cc/2CEM-3PF3>]. Tacoma has promulgated eleven pages of rules implementing the law. *Paid Leave Rules*, TACOMA, WASH., <http://cms.cityoftacoma.org/finance/paid-leave/tacoma-paid-leave-rules-and-regulations.pdf> [<https://perma.cc/7PGQ-4QJK>] (last visited Jan. 21, 2017). Tacoma has published two websites containing information about the

Oregon local laws addressing paid sick leave, overriding parts of the Portland and Eugene laws.¹³¹

In 2017, laws in Arizona;¹³² Vermont;¹³³ Berkeley, CA;¹³⁴ Chicago, IL;¹³⁵ Cook County, IL¹³⁶ (which includes the city of Chicago and many of

law, a two-page quick reference guide about the law, two additional websites containing frequently asked questions addressing the law (one website for employers and one for employees), a sixteen-page presentation for employers, a paid leave policy checklist for employers, a website and application for substituting “premium pay” for paid leave, a notice, a brochure, several posters, and a separate document containing eight pages of additional frequently asked questions. *Paid Leave*, TACOMA, WASH., <https://www.cityoftacoma.org/cms/one.aspx?objectId=75860> [<https://perma.cc/TGC6-ZMPQ>] (last visited Jan. 21, 2017); *Paid Leave Ordinance*, TACOMA, WASH., <http://www.cityoftacoma.org/cms/One.aspx?pageId=69789> [<https://perma.cc/2YGX-KWQF>] (last visited Jan. 21, 2017).

131. ORE. REV. STAT. § 653.661 (2017). Because the Portland and Eugene laws allow employees to take paid leave for reasons other than sickness, Oregon’s law only preempts parts of the Portland and Eugene laws. *Supra* notes 107, 113.

132. ARIZ. REV. STAT. §§ 23-371 to 23-381 (2016). The Industrial Commission of Arizona has published a website containing information about the law, frequently asked questions addressing it, a revised set of frequently asked questions, and a poster. *Frequently Asked Questions (FAQs) About Minimum Wage and Earned Paid Sick Time Laws*, INDUS. COMM’N OF ARIZ., <https://www.azica.gov/frequently-asked-questions-about-wage-and-earned-paid-sick-time-laws> [<https://perma.cc/9DCA-89A6>] (last visited May 30, 2017).

133. VT. STAT. ANN. tit. 21, §§ 481-87 (2016). The Vermont Department of Labor (“VDOL”) has promulgated 20 pages of rules implementing the law (although those rules remain uncodified as of this writing). *Vermont Earned Sick Time Rules*, VT. DEP’T OF LABOR, <http://labor.vermont.gov/wordpress/wp-content/uploads/Earned-Sick-Time-Rules.pdf> [<https://perma.cc/42DB-82SB>] (last visited Jan. 23, 2017). The VDOL has also published a website containing information about the law, a poster, and eight pages of frequently asked questions addressing the law. *Learn More About Vermont’s New Earned Sick Time Law*, VT. DEP’T OF LABOR, <http://labor.vermont.gov/learn-more-about-vermonts-new-earned-sick-time-law/> [<https://perma.cc/79UX-24EG>] (last visited Jan. 23, 2017).

134. BERKELEY, CAL., MUN. CODE §§ 13.100.010-13.100-120 (2016), <http://www.codepublishing.com/CA/Berkeley/html/berkeley13/Berkeley13100/Berkeley13100.html#13.100> [<https://perma.cc/N3XL-UTUS>].

135. CHI., ILL., MUN. CODE § 1-24-045 (2017), [http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago_il](http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il) (select the hyperlink for “Illinois,” then “Municipal Code of Chicago,” then “TITLE 1 GENERAL PROVISIONS,” then “CHAPTER 1-24 THE CHICAGO MINIMUM WAGE ORDINANCE,” then “1-24-045 Paid Sick Leave.”). Chicago has promulgated several pages of rules implementing the law. *Chicago Minimum Wage and Paid Sick Leave Rules Supporting Chapter 1-24 of the Municipal Code of Chicago*, CHI., ILL., <https://www.cityofchicago.org/content/dam/city/depts/bacp/Consumer%20Information/mwpslrulesfinal06282017.pdf> [<https://perma.cc/X8TE-7YU8>] (last visited June 30, 2017). Chicago has also published a website containing information about the law, a poster, a flyer about the law, and a complaint form. *Paid Sick Leave*, CHI., ILL., https://www.cityofchicago.org/city/en/depts/bacp/supp_info/paidsickleave.html [<https://perma.cc/74DR-WB5Y>]. (last visited June 30, 2017).

136. COOK CTY., ILL., CODE §§ 42-1 to 42-10 (2017), https://www.municode.com/library/il/cook_county/codes/code_of_ordinances?nodeId=PTIGEOR_CH42HURE_ARTIINGE_DIV1EASILE [<https://perma.cc/F62B-6HBT>]. The Cook County Commission on Human

its suburbs¹³⁷); Minneapolis, MN;¹³⁸ San Diego, CA;¹³⁹ Spokane, WA;¹⁴⁰ and St. Paul, MN¹⁴¹ went into effect. Finally, in 2018 (thanks to legislation that passed on or before January 1, 2018), the direct paid leave law in the states

Rights has proposed dozens of pages of rules implementing the law (although those rules remain uncodified as of this writing). Draft Regulations for Cook County Earned Sick Leave Ordinance, COOK CTY. COMM'N ON HUMAN RIGHTS, <https://www.cookcountyil.gov/file/4900/download?token=bP0vMI9D> [<https://perma.cc/R7G8-H2Z5>] (last visited Apr. 30, 2017). Cook County has also published a website containing information about the law. *Earned Sick Leave Ordinance and Regulations*, COOK COUNTY, ILL., <https://www.cookcountyil.gov/service/earned-sick-leave-ordinance-0> [<https://perma.cc/7MMG-H4ZC>] (last visited Apr. 30, 2017).

137. MUNICIPALITIES IN COOK COUNTY, IL, COOK CTY., ILL., CLERK, https://www.cookcountyclerk.com/sites/default/files/pdfs/UPDATED_Cook%20County%20Townships%20and%20Municipalities01232018.pdf [<https://perma.cc/RR42-9CQL>] (last visited Mar 18, 2018).

138. MINNEAPOLIS, MINN., CODE §§ 40.10-40.310 (2016), https://www.municode.com/library/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT2AD_CH40WORE [<https://perma.cc/6SM4-2PX4>]. The Minneapolis Department of Civil Rights has published a website containing information about the law, a checklist, a poster, and a seven-page presentation about the law. *Sick and Safe Time*, MINNEAPOLIS, MINN., DEP'T OF CIVIL RIGHTS, <http://www.ci.minneapolis.mn.us/sicktimeinfo/index.htm> [<https://perma.cc/V37R-JKM8>] (last visited Jan. 23, 2017).

139. SAN DIEGO, CAL., MUN. CODE §§ 39.0101-39.0116 (2016), <http://docs.sandiego.gov/municode/MuniCodeChapter03/Ch03Art09Division01.pdf> [<https://perma.cc/68UH-LYD5>]. San Diego has published a website containing information about the law, four pages of frequently asked questions addressing the law, and an overview of the law's enforcement process. *Minimum Wage Program*, SAN DIEGO, CAL., <https://www.sandiego.gov/treasurer/minimum-wage-program> [<https://perma.cc/76WS-35UL>] (last visited Jan. 23, 2017).

140. SPOKANE, WA., MUN. CODE §§ 09.01.010-09.01.140 (2017), <https://my.spokanecity.org/smc/?Chapter=09.01> [<https://perma.cc/86EB-5UNY>]. Spokane has amended this law once. *Id.* Spokane's Office of Labor Standards has published a website containing information about the law, twenty-five frequently asked questions addressing the law, a poster, an online certification form, and a form for submitting violations of the law. *Earned Sick and Safe Leave*, SPOKANE, WA., OFFICE OF LABOR STANDARDS, <https://my.spokanecity.org/business/doing-business/earned-sick-and-safe-leave/> [<https://perma.cc/PE6P-KPLM>] (last visited Jan. 23, 2017).

141. ST. PAUL, MINN., CODE §§ 233.01-233.21 (2016), https://www.municode.com/library/mn/st_paul/codes/code_of_ordinances?nodeId=PTIILECO_TITXXIIIPUHESAWE_CH233PUHESAWE [<https://perma.cc/3M9B-P6AU>]. The St. Paul Department of Human Rights and Equal Economic Opportunity has published a website containing information about the law and a website containing background about the law. *Earned Sick and Safe Time*, ST. PAUL, MINN., DEP'T OF HUMAN RIGHTS AND EQUAL ECON. OPPORTUNITY, <https://www.stpaul.gov/departments/human-rights-equal-economic-opportunity/contract-compliance-business-development/earned> [<https://perma.cc/QBP4-S26S>] (last visited Jan. 23, 2017); *Earned Sick and Safe Time Ordinance Background*, ST. PAUL, MINN., DEP'T OF HUMAN RIGHTS AND EQUAL ECON. OPPORTUNITY, <https://www.stpaul.gov/departments/human-rights-equal-economic-opportunity/earned-sick-and-safe-time/earned-sick-and-safe-2> [<https://perma.cc/E5Q7-2T52>] (last visited Jan. 23, 2017).

of Rhode Island¹⁴² and Washington¹⁴³ and Prince George's County, Maryland¹⁴⁴ went into effect, although a Maryland law enacted in early 2018 preempts the Prince George's County, Maryland law (but not the Montgomery County, Maryland law).¹⁴⁵

Notably, while Oregon has enacted a direct paid leave law and concomitantly preempted certain parts of local direct paid leave laws,¹⁴⁶ some states have passed laws preempting any attempts at municipalities passing certain direct paid leave laws while failing to enact a statewide direct paid leave law. Those states include Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Tennessee, and Wisconsin.¹⁴⁷

D. *The Typical Elements of a Direct Paid Leave Law*

What makes up a typical direct paid leave law? Foremost, we must distinguish between the *elements* of such laws (e.g., a provision requiring employers to allow employees to carryover accrued leave from one calendar year to the next) and the *content* of individual laws (e.g., the provision in Los Angeles, CA's direct paid leave law requiring employers to allow carryover of 72 hours of leave from one calendar year to the next). With that distinction in mind, this Subpart explores the typical *elements* of direct paid leave laws and gives a broad overview of how *content* within each element varies amongst jurisdictions, taking care to note significant outliers where

142. R.I. GEN. LAWS § 28-57-1 to 28-57-15 (2017).

143. WASH. REV. CODE §§ 49.46.200-49.46.210 (2017). The Washington State Department of Labor & Industries has published a website containing information about the law and the ongoing rulemaking process. *Initiative 1433: An Overview of the New Minimum Wage and Paid Sick Leave Requirements*, WASH. STATE DEP'T OF LABOR & INDUS., <http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/1443.asp> [<https://perma.cc/3URS-LE85>] (last visited Jan. 23, 2017). Finally, unlike Oregon, Washington's direct paid leave law did not preempt the many municipal direct paid leave laws in the state. *Cf. supra* note 131 (preempting local Oregon direct paid leave laws).

144. PRINCE GEORGE'S CTY., MD., CODE §§ 13A-119 to 13A-126 (2017), <https://princegeorgescountymd.legistar.com/LegislationDetail.aspx?ID=3150330&GUID=D9D7690E-BFD9-48BF-8ABF-88B3BAEF1718> [<https://perma.cc/B8QC-68VX>].

145. MD. CODE ANN., LAB. & EMPL. § 3-1302(D) (2018).

146. *Supra* note 131.

147. ALA. CODE § 11-80-16 (LexisNexis 2017); ARIZ. REV. STAT. § 23-204 (LexisNexis 2016); FLA. STAT. ANN. § 218.077 (LexisNexis 2016); GA. CODE ANN. § 34-4-3.1 (2016); IND. CODE ANN. §§ 22-2-16-1 through 22-2-16-4 (LexisNexis 2016); KAN. STAT. ANN. §§ 12-16,130 to 12-16,132, 19-26,114 (2016); LA. STAT. ANN. § 23:642 (2016); MISS. CODE ANN. § 17-1-51 (2016); MO. REV. STAT. § 285.055 (2016); N.C. GEN. STAT. § 95-25.1(c) (2016); OHIO REV. CODE ANN. § 4113.85 (LexisNexis 2017); OKLA. STAT. tit. 40, § 160 (2016); TENN. CODE ANN. § 7-51-1802(b)(1)(A) (2016); WIS. STAT. § 103.10(1m) (2016).

appropriate.¹⁴⁸

The most significant elements of any direct paid leave law are those related to coverage. That is, which employers and employees does the law regulate? To that end, most direct paid leave laws define which employers and employees are affected by the law. In terms of content, these laws typically define “employer” to mean all employers within the jurisdiction¹⁴⁹ or at least all private employers within the jurisdiction,¹⁵⁰ although a minority of laws define employers in certain industries or private employers who employ at least a minimum number of employees in the jurisdiction.¹⁵¹ Furthermore, direct paid leave laws almost always regulate only employees (i.e., not independent contractors),¹⁵² and often only employees who work a minimum number of hours in the jurisdiction (e.g., 80 hours per calendar year,¹⁵³ 80 hours per “year,”¹⁵⁴ 80 hours in any 120-day period,¹⁵⁵ two hours per week¹⁵⁶). Such laws also may exclude certain subsets of employees (e.g., employees exempt from overtime payments under the Fair Labor Standards Act, or FLSA;¹⁵⁷ employees other than “service workers”;¹⁵⁸ seasonal or defined-term employees, adjunct professors, some government employees, and employees covered by a collective bargaining agreement¹⁵⁹).

The next group of common elements concerns how much leave an employee has available, which includes elements related to accrual, carryover, retention of leave upon transfer out of the jurisdiction, and reinstatement of leave upon rehire. Most direct paid leave laws require accrual as soon as employment begins,¹⁶⁰ although some outliers permit

148. See *supra* Part I.B.2. for an overview of the elements and content of Executive Order 13,706.

149. See, e.g., D.C. CODE § 32–131.01(3)(A)-(B).

150. See, e.g., N.Y.C. ADMIN. CODE § 20-912(g).

151. See, e.g., CONN. GEN. STAT. § 31-57r(4).

152. See, e.g., MASS. ANN. LAWS ch. 149, § 148C(a); see also MASS. ATT’Y GEN.’S OFFICE, *Earned Sick Time in Massachusetts Frequently Asked Questions* 3 (2016), <http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf> [<https://perma.cc/E3NZ-P452>].

153. N.Y.C. ADMIN. CODE § 20-912(f). Note that this law technically excludes all employees for the first few days of January each year when it is impossible for any employee to have worked 80 hours that calendar year.

154. NEWARK, N.J., CODE § 16:18-2, <http://clerkshq.com/Content/Newark-nj/Books/Code/NewarkT16.htm> [<https://perma.cc/GDX5-NPLC>]. The term “year” is undefined, so employees and employers are left to guess whether it means calendar year or the most recent twelve months.

155. COOK CTY., ILL., CODE § 42-3(a)(1).

156. OAKLAND, CAL., CODE § 5.92.010.

157. P.R. LAWS ANN. tit. 29, § 250d(a) (citing *id.* §§ 250a, 250f).

158. CONN. GEN. STAT. § 31-57r(7).

159. PHILA., PA., CODE § 9-4103(3).

160. See, e.g., CAL. LAB. CODE § 246(b)(1).

employers to adopt a waiting period (e.g., accrual begins 90 calendar days after employment begins¹⁶¹). Nearly all such laws require employers to allow employees to accrue leave at a rate of one hour per a certain number of hours worked (usually 30 hours or 40 hours),¹⁶² although covered employees working in Puerto Rico accrue one hour of leave per month in which they work 115 hours in Puerto Rico.¹⁶³ Direct paid leave laws often cap the maximum amount of leave that employees can accrue (e.g., 72 hours per calendar year,¹⁶⁴ 80 hours total¹⁶⁵), although some fail to do so.¹⁶⁶ Most jurisdictions require employers to allow employees to carry over *some* of the leave they have accrued from one calendar year to the next (e.g., 40 hours¹⁶⁷), whereas a minority of jurisdictions fail to cap the amount of leave that can be carried over.¹⁶⁸ About half of direct paid leave laws explicitly require employers to permit employees to retain accrued leave if they transfer to another jurisdiction but remain with the same employer,¹⁶⁹ whereas the other half are silent on this topic.¹⁷⁰ Finally, most of these laws require employers to reinstate accrued leave to those employees who are rehired within a certain timeframe (e.g., 6 months,¹⁷¹ 90 days¹⁷²), although such laws often fail to address whether such leave should be reinstated if it was paid to the employee upon termination;¹⁷³ in contrast, a minority of such laws do not require such reinstatement.¹⁷⁴

With respect to use of accrued leave, the vast majority of direct paid leave laws require employers to allow employees to use accrued leave only after a waiting period, which is most often 90 calendar days¹⁷⁵ or, in rare cases, after 90 days worked.¹⁷⁶ A few jurisdictions restrict use of accrued leave to those employees who have worked a sufficient number of hours in

161. S.F., CAL., ADMIN. CODE § 12W.3(a).

162. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-372(A) (2016).

163. P.R. LAWS. ANN. tit. 29, § 250d(a) (2016).

164. EMERYVILLE, CAL., MUN. CODE § 5-37.03(b)(2)(i), (ii), (iii).

165. ORE. REV. STAT. § 653.606(3)(a) (2016).

166. *See, e.g.*, SPOKANE, WA., MUN. CODE § 09.01.030(A). Such jurisdictions do, however, cap the amount of leave that employees can use. *Id.* § 09.01.030(B).

167. PLAINFIELD, N.J., MUN. CODE § 8:5-3(7).

168. *See, e.g.*, SAN DIEGO, CAL., MUN. CODE § 39.0105(i).

169. *See, e.g.*, MORRISTOWN, N.J., ORD. O-35-2016, at § 3(10) (Sept. 14, 2016).

170. *See, e.g.*, VT. STAT. ANN. tit. 21, § 483 (2016).

171. ELIZABETH, N.J., CODE § 8.65.030(J).

172. ST. PAUL, MINN., CODE § 233.10(c).

173. *See id.* While no direct paid leave laws require payment of accrued but unused direct paid leave time upon termination, *see infra* note 205 & accompanying text, all such laws permit it.

174. *See, e.g.*, CHI, ILL., MUN. CODE § 1-24-045.

175. *See, e.g.*, PATTERSON, N.J., CODE § 412-4(F).

176. *See, e.g.*, L.A., CAL., MUN. CODE § 187.04(C).

the jurisdiction recently.¹⁷⁷ Such laws often limit the amount of advanced notice that employers can require employees to give in advance of using leave, typically permitting employers to require that employees give only up to seven or ten days of advance notice if the need for leave was foreseeable,¹⁷⁸ although some laws permit employers to require employees to give unspecified “reasonable” advance notice where the need for leave was foreseeable.¹⁷⁹ Similarly, direct paid leave laws often limit the circumstances under which employers can require employees to provide documentation of their need for leave, typically permitting employers to require that employees provide documentation only for leave of several days at a time (e.g., for leave of three consecutive days or more,¹⁸⁰ for leave of more than three consecutive scheduled workdays¹⁸¹), whereas a small subset of jurisdictions only permit employers to require documentation if the cost to employees to obtain such documentation is minimal (e.g., \$5.00 or less,¹⁸² under \$15.00¹⁸³). The vast majority of such laws restrict employee use of leave to a maximum number of hours per calendar year (usually 40 hours¹⁸⁴), whereas some laws contain no restrictions on how much leave can be used.¹⁸⁵ Many of these laws require employers to allow employees to use leave in minimum increments of at most one,¹⁸⁶ two,¹⁸⁷ or four hours,¹⁸⁸ whereas a minority of laws are silent on this issue¹⁸⁹ or require employers to allow employees to use leave in lesser minimum increments.¹⁹⁰ Direct paid leave laws uniformly permit employees

177. See, e.g., CONN. GEN. STAT. § 31-57s(b) (2016) (at least ten hours on average over the most recent calendar quarter).

178. See, e.g., MINNEAPOLIS, MINN. CODE § 40.220(c) (seven days); TACOMA, WASH., MUN. CODE § 18.10.030(D)(1) (ten days).

179. *Frequently Asked Questions About Wage and Earned Paid Sick Time Laws*, INDUS. COMM’N OF ARIZ., <https://www.azica.gov/frequently-asked-questions-about-wage-and-earned-paid-sick-time-laws> [<https://perma.cc/5WY3-UBLK>] (last visited Feb. 20, 2017) (“When foreseeable, an employee must make a good faith effort to provide notice of the need to use earned paid sick time in advance and should schedule the leave in a manner that does not unduly disrupt the employer’s operations.”).

180. BLOOMFIELD, N.J., CODE § 160-5(F).

181. ORE. REV. STAT. § 653.626(1)(a) (2016).

182. OAKLAND, CAL., CODE § 5.92.030(B)(4).

183. BERKELEY, CAL., MUN. CODE § 13.100.040(B)(7).

184. See, e.g., MONTCLAIR, N.J., ORD. 14-047, at § 3(2).

185. See, e.g., S.F., CAL., ADMIN. CODE § 12W.4(a).

186. See, e.g., TRENTON, N.J., CODE § 230-4(E).

187. See, e.g., CAL. LAB CODE § 246(k).

188. See, e.g., MONTGOMERY CTY., MD., CODE § 27-79(f).

189. See, e.g., D.C. CODE § 32-131.02(b); see also D.C. DEP’T OF EMP’T SERVS., OFFICE OF WAGE-HOUR COMPLIANCE, FREQUENTLY ASKED QUESTIONS (FAQs) 10, http://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/FAQs%20for%20OWH-Final.pdf [<https://perma.cc/FLK2-F7Y5>] (answer to question 7).

190. New York, NY’s law states that “employers may set a reasonable minimum increment for the use of sick time not to exceed four hours per day,” N.Y.C. ADMIN. CODE §

to take leave for illness, injury, and medical care, and the majority of such laws allow employees to take leave for additional reasons, although those reasons vary significantly (e.g., addressing domestic violence, sexual assault, or stalking; the declaration of a public health emergency; bereavement; public school closures;¹⁹¹ donating organs or bone marrow¹⁹²). The vast majority of such laws permit employees to take leave for their own sake or on behalf of a family member, though the definition of family member varies (e.g., a spouse or child;¹⁹³ a child, parent, spouse, domestic partner, grandparent, grandchild, sibling, or any designated person if the employee has no spouse or domestic partner¹⁹⁴). Lastly, direct paid leave laws typically prohibit employers from forcing employees to find a replacement before they use their accrued leave.¹⁹⁵

Key elements to direct paid leave laws concern payment. For salaried employees and hourly employees whose schedules are easy to discern, such laws typically require the employer to pay an employee taking leave what she or he would have earned had she or he worked.¹⁹⁶ However, the vast majority of laws are silent on how employees with variable hours should be paid (e.g., an employee who works between 35 and 45 hours each week in her or his discretion who takes leave all week). Moreover, most direct paid leave laws entirely fail to explicitly address how employers must pay employees who are paid, in whole or in part, with tips or gratuities, on commission or on a draw,¹⁹⁷ piecemeal, by payment in kind,¹⁹⁸ with equity (e.g., stocks, bonds, notes), or with bonuses or via a profit-sharing agreement.¹⁹⁹ Those laws that *do* account for some variations in the means of compensation vary with what they require of employers that pay

20-913(g), whereas the rules implementing the law go further that the law itself and purport to set further minimum increments of 30 minutes so long as such increments are used beyond the initial four-hour increment, N.Y.C. R. & REGS. tit. 6, § 7-05(b) (2017).

191. TACOMA, WASH., MUN. CODE § 18.10.030(C).

192. S.F., CAL., ADMIN. CODE § 12W.4(c).

193. CONN. GEN. STAT. § 31-57t(a)(2) (2016).

194. EMERYVILLE, CAL., MUN. CODE § 5-37.03(c)(1) (citing CAL. LAB CODE § 245.5(c)).

195. See, e.g., ST. PAUL, MINN., CODE § 233.04(g).

196. See, e.g., PATTERSON, N.J., CODE § 412-2 (definition of “paid sick time”).

197. A draw is “an advance against future anticipated incentive compensation (commission) earnings.” SOC’Y FOR HUM. RES. MGMT., COMMISSION-BASED PAY: SALES DRAW: WHAT ARE “DRAWS” UNDER A SALES COMPENSATION PLAN, AND HOW DO THEY WORK? (2012), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/sales%20compensation%20draws.aspx>.

198. Payment in kind is paying employees with “personal services such as meals, board, [or] lodging” instead of paying them with currency. Cf. *Employer Taxes and Wage Reporting Contribution Reports*, N.J. DEP’T OF LAB. & WORKFORCE DEV., <http://www.wnjp.in.state.nj.us/labor/handbook/chap1/chap1sec4ContributionReports.html> [<https://perma.cc/VB9W-UDG6>] (last visited Mar. 25, 2017).

199. See, e.g., ARIZ. REV. STAT. ANN. § 23-371(D) (2016).

employees with tips or gratuities (e.g., employers must pay tipped employees an hourly rate equal to their earnings “for the year” divided by 52 weeks;²⁰⁰ tipped employees on leave are not compensated for tips they would have received had they worked²⁰¹), on commission or on a draw (e.g., employers need not compensate commissioned employees on leave;²⁰² employers must pay commissioned employees on leave their base wage rate or minimum wage, whichever is greater;²⁰³ employers must pay commissioned employees an hourly rate equal to their earnings last calendar year divided by their hours worked last calendar year²⁰⁴), or piecemeal (e.g., employers must pay employees paid piecemeal an hourly rate equal to their earnings last calendar year divided by their hours worked last calendar year;²⁰⁵ employers may pay employees paid piecemeal either an hourly rate equal to their total compensation for the past 90 calendar days divided by the number of hours worked over that timeframe or in the same manner as the employer calculates wages for other forms of paid leave²⁰⁶). No direct paid leave law explicitly addresses payment in kind, payment with equity, or with payment via bonuses or a profit-sharing agreement, although some laws contain provisions that encompass such payments by requiring employers to pay employees on leave a percentage of their total earnings over a recent period of time.²⁰⁷ Finally with respect to payment elements, direct paid leave laws uniformly provide that employers need not pay employees for accrued but unused leave upon termination.²⁰⁸

Direct paid leave laws almost always require a posted notice, a notice to new hires, or a notice to current employees (although they are often vague about whether posting a flyer on a bulletin board or company intranet satisfies the requirement to notify employees).²⁰⁹ However, a small, but growing, subset of jurisdictions requires employers to routinely notify their employees of certain information (i.e., accrued but unused leave every time

200. P.R. LAWS. ANN. tit. 29, § 250d(d) (2016). The term “year” is undefined.

201. TACOMA, WASH., MUN. CODE § 18.10.010(S).

202. *Id.*

203. N.Y.C. ADMIN. CODE § 20-912(k).

204. *Paid Sick Leave Ordinance (PSLO)*, S.F. OFFICE OF LABOR STANDARDS ENF’T 12, http://sfgov.org/olse/sites/default/files/Document/PSL_Rules_%282007%29%202017%20Advisory.pdf [<https://perma.cc/28HZ-HJ8D>] (Rule 5.3). Notably, this requirement does not appear in the ordinance.

205. *Id.*

206. CAL. LAB. CODE § 246(l).

207. *See, e.g., id.*

208. *See, e.g.,* SAN DIEGO, CAL., MUN. CODE § 39.0105(k).

209. *See, e.g.,* MINNEAPOLIS, MINN., CODE § 40.250.

wages are paid;²¹⁰ accrued but unused leave once per quarter;²¹¹ accrued but unused leave “regular[ly]”;²¹² accrued but unused leave, leave taken year-to-date, and pay pursuant to leave taken year-to-date every time wages are paid²¹³).

The remaining elements of these laws represent a hodgepodge of requirements. In terms of enforcement, few jurisdictions with direct paid leave laws afford employees with a private right of action, although a handful do.²¹⁴ Such laws uniformly prohibit retaliation against any employees availing themselves of the law.²¹⁵ Compensatory damages typically represent the sole remedy available for violations of direct paid leave laws,²¹⁶ although several of these laws assess fines for noncompliance ranging from a few hundred to several thousand dollars.²¹⁷ Direct paid leave laws often state that they have no effect on more generous employer policies²¹⁸ and that they do not conflict with contrary terms of collective bargaining agreements.²¹⁹ Finally, these laws often differ substantially with respect to record retention requirements.²²⁰

210. BERKELEY, CAL., MUN. CODE § 13.100.060(D); CAL. LAB CODE § 246(i); MONTGOMERY CTY., MD., CODE § 27-79(g); SEATTLE, WASH., MUN. CODE § 14.16.030(K). Executive Order 13,706 requires similar notice every pay period for employees working 20% or more of their time on federal contracts or subcontracts. *Supra* note 88.

211. ORE. REV. STAT. § 653.631(1)(a) (2016).

212. WASH. REV. CODE § 49.46.210(1)(i) (2017).

213. ARIZ. REV. STAT. ANN. § 23-375(C) (2016).

214. *See, e.g.*, OAKLAND, CAL., CODE § 5.92.050(G).

215. *See, e.g.*, NEWARK, N.J., CODE § 16:18-6.

216. *See, e.g.*, PASSAIC, N.J., CODE § 128-8.

217. *See, e.g.*, CONN. GEN. STAT. § 31-57v(c) (fines range from \$100 to \$500 depending on the type of violation); MASS. ANN. LAWS ch. 149, § 148C(1) (citing *id.* § 27C(b)(1), (2)) (first violations are subject to a fine of up to \$7,500 or \$15,000, whereas repeated violations are subject to a fine of up to \$25,000).

218. *See, e.g.*, NEW BRUNSWICK, N.J., MUN. CODE § 8.56.110; *see also infra* Part II.E.

219. *See, e.g.*, PHILA., PA., CODE §§ 9-4103(3), 9-4104(8), 9-4112(2).

220. *See, e.g.*, S.F., CAL., ADMIN. CODE § 12W.6 (employers must maintain records for at least four years); COOK CTY., ILL., CODE §§ 42-1 through 42-10 (no record retention requirement); EAST ORANGE, N.J., CODE § 140-9 (employers must retain records indefinitely); *Vermont Earned Sick Time Rules* 18, VT. DEP’T OF LABOR, <http://labor.vermont.gov/wordpress/wp-content/uploads/Earned-Sick-Time-Rules.pdf> [https://perma.cc/K57R-EXLA] (last visited Jan. 23, 2017) (Section 12 of the Vermont Earned Sick Time Rules cites VT. STAT. ANN. tit. 21, § 393 for the proposition that employers must retain “records of the accrual and use of earned sick” for three years despite the fact that section 393 requires employers to retain only a “record of the hours worked by each employee and of the wages paid to him or her”; section 393 lacks any temporal component; and no record retention requirement appears in the law from which the implementing rules derive, VT. STAT. ANN. tit. 21, §§ 481-87).

II. “ANY-EMPLOYER BURDENS” OF DIRECT PAID LEAVE LAWS

This Part shines a light on the unnecessary burdens that direct paid leave laws place on employers that operate in any one of the jurisdictions referenced above without focusing on the most common proffered critiques of such laws (e.g., that they limit employer freedom and/or employees’ hours, pay, and fringe benefits). Short of the nationwide solution to such burdens proposed in Part IV, the likes of which would minimize the burdens that these laws impose on employers, any political division considering such a law or operating with an existing law could at least reduce the law’s burdens without materially decreasing the law’s efficacy by adopting the solutions proffered in this Part.²²¹

A. *Requiring Employers to Provide Routine Notices of Information Available Elsewhere and Information that Serves No Purpose*

In 2011 Seattle, WA became the first jurisdiction to require employers to provide routine notice to each employee of the amount of leave that she or he had available.²²² Thankfully, Seattle’s law explicitly provided that employers could “list. . . available paid leave on each pay stub *or* develop . . . an online system where employees can access their own paid leave information.”²²³ Montgomery County, MD enacted a similar law,²²⁴ and the President followed suit with Executive Order 13,706.²²⁵ In doing so, Seattle,

221. Notably, many *unpaid* leave laws impose similar burdens on employers (e.g., offering little to no recourse to employers to respond to fraudulent requests for leave, providing insufficient guidance on difficult coverage and accrual questions, restricting employers from disciplining employees who take discretionary leave that harms business operations). Thus, the solutions discussed in this Part could likewise minimize the burdens that unpaid leave laws impose.

222. SEATTLE, WASH., MUN. CODE § 14.16.030(K).

223. *Id.* (emphasis added).

224. MONTGOMERY CTY., MD., CODE § 27-79(g) (“An employer must provide an employee with a written statement of available earned sick and safe leave each time the employer pays wages to the employee. An employer may satisfy this requirement through an online system where the employee can access their own earned sick and safe leave balances.”).

225. Exec. Order. No. 13,706, 80 Fed. Reg. 54,697 (Sept. 7, 2015). The U.S. Department of Labor’s frequently asked questions about the order state that “[a] contractor’s existing procedure for informing employees of their available paid time off, such as notification accompanying each paycheck *or an online system an employee can check at any time*, can be used to satisfy or partially satisfy these requirements provided it is written (including electronically) and clearly indicates the amount of paid sick leave an employee has accrued separately from indicating amounts of other types of paid time off available.” U.S. DEP’T OF LABOR, WAGE & HOUR DIV., EXECUTIVE ORDER 13706 QUESTIONS AND ANSWERS, <https://www.dol.gov/whd/govcontracts/eo13706/faq.htm> [https://perma.cc/Ry8F-P4ZE] (last visited July 19, 2017) (emphasis added).

Montgomery County, and the federal government recognize that the ends to be achieved were ensuring that employees have notice of how much leave they have available. Indeed, whether that notice appears on a paystub or online is immaterial to achieving this end. Moreover, an ever-increasing number of employers have begun to provide access to such “employee self-service” systems not only to decrease the time it takes to secure wanted information, but also to increase the availability and accuracy of the information and improve productivity, thereby cutting down on administrative costs of having to *push* certain information to employees, favoring instead an option that allows employees to *pull* information, as needed.²²⁶ Affording employees access to an online system is, quite simply, a common-sense alternative to providing notice on a paystub.

Yet, unlike the laws in Seattle and Montgomery County and Executive Order 13,706, the laws in Oregon and Washington are silent with respect to whether allowing employees access to an online system satisfies the requirement to provide employees with routine “notification” of available leave.²²⁷ Arguably, providing employees with access to an online system affords them the opportunity to secure such notice themselves, but a textualist interpretation suggests that employers providing only access to an online system provide no notice to employees, but rather afford employees with the opportunity to receive notice, and thus fail to comply with the laws.

Finally, in stark contrast to the aforementioned jurisdictions, Arizona; Berkley, CA; and California each passed a law requiring individualized notice of available leave on or with every paystub *despite* the potential existence of an online system affording employees with access to such information. California’s law provides that an employer must provide employees with notice of the amount of paid sick time available “on either the employee’s itemized wage statement . . . or in a separate writing provided on the designated pay date with the employee’s payment of wages.”²²⁸ And, in case there were any ambiguity that employers could satisfy the law by giving employees access to an online system that allows them to check this information whenever they want, the California Department of Industrial Relations website confirms to employees that “[e]mployers must show how many days of sick leave you have available on

226. Dianna L. Stone et al, *The Influence of Technology on the Future of Human Resource Management*, 25 HUMAN RESOURCES MANAGEMENT REVIEW 216, 225 (2015) (discussing research on employee self-service systems).

227. ORE. REV. STAT. § 653.631(1)(a) (“An employer shall . . . [p]rovide written notification at least quarterly to each employee of the amount of accrued and unused sick time available for use by the employee.”); WASH. REV. CODE § 49.46.210(1)(i) (“The employer is responsible for providing regular notification to employees about the amount of paid sick leave available to the employee.”).

228. CAL. LAB CODE § 246(i).

your pay stub, or on a document issued the same day as your paycheck.”²²⁹ Arizona and Berkeley, CA similarly allow for no alternatives to printing each employees’ available leave on or with each paystub, and Arizona’s law goes even further — requiring the printing of the amount of leave taken by the employee to date in the year *and* the amount of pay the employee received for such leave on or with every paystub.²³⁰

Such laws lack logical mooring. They force employers to create or purchase a payroll system that can calculate employees’ leave entitlements (which requires a payroll system that can pull employees’ hire date from the employers’ human resources information system and pull employees’ hours worked from that hire date to the present from the employers’ system used to track hours worked), subtract any paid leave that employees have taken (which requires a payroll system that can pull employees’ absences data from the employers’ absence management system), and print the difference on or with a paystub (which requires more programming and space on a paystub that already may be stuffed with information). To go even further, the Arizona law further requires employers to secure a payroll system that can calculate the amount of pay employees have received for such leave, which requires taking the aforementioned absences data and cross-referencing wage rates on those dates (which requires a payroll system that can segregate and sum payments made for such leaves or pull wage rates as of different dates from a human resources information system).

Building or buying such a sophisticated payroll system takes substantial time and costs significant amounts of money. And for what? At the end of the day, employees in California (including those in Berkeley, CA) are provided with the *exact same information* that they would have otherwise been able to see online. There is simply no reason to force employers to expend such resources when doing so provides no discernable additional insight to employees.

Moreover, and potentially even more troublingly, the information required to appear on employees’ paystubs in Arizona appears to have *no purpose at all*. To wit, the purpose of providing employees with notice of available leave is to remind them that they have such leave to take. Without such notice, employees arguably would not know what their specific rights

229. *California Paid Sick Leave: Frequently Asked Questions*, STATE OF CAL. DEP’T OF INDUS. RELATIONS, http://www.dir.ca.gov/dlse/paid_sick_leave.htm [<https://perma.cc/4NLZ-YKEU>] (last visited Mar. 18, 2017).

230. ARIZ. REV. STAT. § 23-375(C) (“The amount of earned paid sick time available to the employee, the amount of earned paid sick time taken by the employee to date in the year and the amount of pay the employee has received as earned paid sick time shall be recorded in, or on an attachment to, the employee’s regular paycheck.”); BERKELEY, CAL., MUN. CODE § 13.100.060(D) (“Employers shall include the number of hours of Paid Sick Leave accrued to date in such records that they provide to Employees at the end of each pay period.”).

are under the law unless they were to calculate those rights themselves — an unlikely possibility for hourly employees whose paid leave entitlements may be difficult to calculate. But what is the purpose of providing employees with notice of the amount of paid sick time they've *already taken* this year? What could employees possibly do with such information? What is the purpose of notifying employees of how much pay they've received? Not how much pay they've received this *pay period*, mind you, which if paired with how much leave was taken during the pay period could ostensibly be used to audit the law's stricture that employers pay employees "at the same hourly rate" during their use of paid leave.²³¹ No — Arizona law requires notice of paid leave taken year to date and *total pay* received for taking paid leave. There are no legal rights that employees can avail themselves of by gleaning these pieces of information.

In sum, laws in several jurisdictions preclude employers from availing themselves of online systems that many employers already use, instead forcing employers to reprint on or with paystubs information that is readily available elsewhere or information that provides employees with no useful insights. It is asinine for laws to require such employers to calculate such information and print it on or with every paystub. Such provisions should be eliminated.

B. *Compensating Employees Paid Other Than by Salary or Hourly Wage*

While many employers compensate employees by salary or hourly wage,²³² some do not, choosing instead to compensate their employees, at least partially, in myriad ways.²³³ Yet, direct paid leave laws offer such employers limited to no guidance on how to handle payment of leave for such employees. Such silence leads to confusion and legal risk for employers, the likes of which could be eliminated or mitigated with proper guidance.

Moreover, even where direct paid leave laws account for variations in how employees are compensated, such laws often are poorly worded or require employers to conduct complicated calculations using data they would not otherwise need to track. For example, Puerto Rico's law requires employers to pay tipped employees taking leave at an hourly rate equal to

231. ARIZ. REV. STAT. § 23-371(D).

232. See, e.g., NAT'L FED. OF INDEP. BUS. RESEARCH FOUND., EMPLOYEE COMPENSATION & SMALL BUSINESS 14 (2016), www.nfib.com/assets/NFIB-Employee-Compensation-and-Small-Business.pdf [<https://perma.cc/K8PH-BRSG>] (finding that, on average, the polled employers paid at least 74.4% of their full-time employees solely by salary or hourly wage).

233. See *supra* notes 197, 198, & accompanying text.

their earnings “for the year” divided by 52 weeks,²³⁴ although the law defines only how to calculate a weekly wage and not an hourly wage, and the law fails to state whether earnings “for the year” means earnings over the past 12 months, earnings this calendar year, or earnings last calendar year. San Francisco, CA’s law’s implementing rules ostensibly require employers to pay commissioned employees taking leave at an hourly rate equal to their earnings last calendar year divided by their hours worked last calendar year which, for exempt employees, is presumed to be 40 hours per week “absent evidence that the Exempt Employee’s regular work week is less than 40 hours.”²³⁵ Yet, an employer would not know whether such evidence exists without tracking work hours for exempt employees — a burdensome requirement heretofore not imposed on employers. In California, employers may pay non-exempt employees who take leave either in the same manner as the employer calculates wages for other paid leaves of absence (if the employer offers any such leaves) or at an hourly rate equal to the employee’s total compensation for the past 90 calendar days divided by the number of hours worked over that timeframe,²³⁶ despite the fact that total compensation for the past 90 calendar days is not data readily available to most employers (whereas, in contrast, employers must report quarterly compensation data to the IRS,²³⁷ so compensation data in quarterly increments is relatively more-available). Also, the law offers no guidance concerning whether such an hourly rate is “locked” as of the first day the employee takes paid leave or whether it can change every day.²³⁸ In Arizona, employers ostensibly must

234. P.R. LAWS. ANN. tit. 29, § 250d(d).

235. CITY AND CTY. OF S.F. OFF. OF LABOR STANDARDS ENF’T, RULES IMPLEMENTING THE SAN FRANCISCO PAID SICK LEAVE ORDINANCE (PSLO), 12 (2017), http://sfgov.org/olse/sites/default/files/Document/PSL_Rules_%282007%29%202017%20Advisory.pdf [<https://perma.cc/86WG-CC5F>] (Rule 5.3). Notably, the ordinance itself contains no such requirement.

236. CAL. LAB. CODE § 246(l).

237. *Employer and Employee Responsibilities - Employment Tax Enforcement*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/employer-and-employee-responsibilities-employment-tax-enforcement> [<https://perma.cc/T47W-CHX5>] (last visited Mar 25, 2017).

238. For example, assume an employee wants to take Friday, August 1; Monday, August 4; and Tuesday, August 5 (all 8-hour work days) as paid leave, so the employer calculates that — as of Friday, August 1 — the employee earned \$4160.00 over the past 90 calendar days (i.e., May 3 to July 31) and worked 520 hours over the same period, meaning the employee should be paid \$8.00 per hour for the 8 hours of paid leave on Friday, August 1. As of Monday, August 4, the employer calculates that the employee still earned \$4160.00 over the past 90 calendar days (i.e., adding in the \$64.00 paid for August 1 and subtracting out the pay for the single 8-hour work day between May 3 and May 5 that fell out of the 90-day look-back period), but now has worked only 504 hours over the same period (subtracting the single 8-hour work day between May 3 and May 5 and the 8-hour paid leave day on August 1), meaning the employee should be paid \$8.25 per hour unless the law is intended to “lock in” the \$8.00 per hour rate for the duration of a multi-day leave of absence.

pay commissioned employees in the following order of priority: 1) at an hourly rate if such a rate “was previously established” (whatever and whenever that means); 2) the wages that the employee would have been paid, if known; 3) a “reasonable estimation” of the wages that the employee would have been paid; and 4) the weighted average of all hourly rates of pay during the previous 90 days, if the employee worked regularly during the previous 90-day period.²³⁹

Direct paid leave laws should offer simple guidance to allow employers to pay all of their employees lawfully without guessing or undertaking burdensome calculations. To that end, such laws should provide that employers must pay employees taking leave what the employee would have earned had she or he not been on leave or, if that is not calculable (e.g., the employee is paid partially in tips, so there is no way to know what the employee would have earned had she or he not been sick): a) for employees paid by the employer for at least a full calendar year, at a locked hourly rate equal to their earnings last calendar year (or the present market value thereof) divided by hours worked last calendar year or 2080 for employees whose hours were not fully tracked (i.e., the number of hours an employee would work at 40 hours per week for 52 weeks per calendar year); or b) for all other employees, at a locked hourly rate equal to their total earnings to date (or the market value thereof) divided by total hours worked to date or a pro rata share of 2080 hours for employees whose hours have not been fully tracked. Such a definition avoids parsing the means of compensation by type (e.g., salary, hourly, commission, payment in kind), ensures relative ease of administration for employers, and focuses on what the law *should* focus on — continuity of compensation for employees who expected to earn compensation, but could not because they were sick or needed leave for some other reason.

C. *Handling Fraudulent Requests and Insufficient Advance Notice*

Most direct paid leave laws permit employers to demand documentation from employees supporting the need for leave only for longer or consecutively-taken leaves.²⁴⁰ However, such laws fail to account for employees who fraudulently use leave in increments intended to evade the law. For example, if an employee calls in sick every Friday over the summer,

239. *Frequently Asked Questions (FAQS) About Minimum Wage and Earned Paid Sick Time*, INDUS. COMM’N OF ARIZ. 20 (2018), https://www.azica.gov/sites/default/files/media/FREQUENTLY%20ASKED%20QUESTIONS_MasterwTOC%20FINAL%20020518.pdf [<https://perma.cc/D9GX-67TM>] (last visited May 30, 2017). Arizona law is silent on these alleged requirements; they exist only in the form of sub-regulatory guidance.

240. *See supra* notes 180, 181, & accompanying text.

these laws would give employers no recourse to verify the employee's alleged need for leave. To mitigate against such fraud, direct paid leave laws should permit employers to demand from employees documentation of the need for leave not only for longer or consecutively-taken leaves, but also upon reasonable suspicion of fraud.

Moreover, while direct paid leave laws generally permit employers to require reasonable advance notice of employees' need to take leave where such need is foreseeable, many laws cap the notice employers can require at seven or ten days²⁴¹ even if the employee knew about the need for leave far earlier and the employee's delay in notifying the employer led to unnecessary administrative burdens for the employer. For example, if an employee at a San Diego, CA-based employer knew six months in advance about her need for in-patient surgery necessitating a two-week hospital stay, but failed to tell her employer of such need until one calendar week before the surgery, she would technically comply with the law despite the potential chaos it might cause her employer to find coverage for her two-week absence with only a week's lead time.²⁴² To avoid unnecessarily burdening employers in this manner while concomitantly placing no extra burdens on employees, direct paid leave laws should simply permit employers to require reasonable advance notice of employees' need to take leave where such need is foreseeable.

D. *Evaluating Difficult Coverage and Accrual Questions*

In certain jurisdictions, evaluating which employees are entitled to accrue and use leave requires employers to track where their employees physically are located during work hours. Take, for example, Cook County, IL's direct paid leave law. First, that law defines a "Covered Employee" as an employee who, "in any particular two-week period, performs at least two hours of work for an Employer while physically present within the geographic boundaries of Cook County."²⁴³ Applying this law to any employee with a fixed work location requires only that the employer discern whether that location is within the boundaries of Cook County — a relatively-simple task. But, what if we apply this law to transient employees like taxi drivers (who, if they are employees at all, would be non-exempt from overtime²⁴⁴)? There is no way to comply with this law short of outfitting taxis with GPS for an employer to assess whether a taxi driver is

241. See *supra* note 178 & accompanying text.

242. See generally *supra* note 139 for an overview of San Diego, CA's direct paid leave law.

243. COOK CTY., ILL., CODE § 42-2.

244. 29 U.S.C. § 213(b)(17) (2017).

picking up a customer in Cook County, driving a customer to a suburb in Lake County, or dropping off a customer at O'Hare Airport which sits in both Cook and DuPage Counties.²⁴⁵ Arguably, employers could force such non-exempt employees to supplement their federally-required timesheets²⁴⁶ with location information so the employer could have at least somewhat-reliable information about which work hours count toward paid leave accrual, but collecting, processing, and calculating such information would be an administrative nightmare.

To further complicate things, Cook County's law — like many direct paid leave laws — assumes that exempt employees work 40 hours per week, but neglects to recognize that those employees may also work transiently. Take, for example, a traveling salesperson (who, if they are employees at all, may be exempt from overtime under the outside sales exemption²⁴⁷). Such exempt employees would not complete timesheets, so there would be no way of discerning how many work hours would count toward a paid leave accrual without outfitting the salesperson's car with GPS and conducting the burdensome calculations explained above.

Faced with such difficulties, employers may simply ignore the law and presume that all employees working anywhere near Cook County are Covered Employees. Yet, this "solution" is not without risk: assume that an employer designates an employee as a Covered Employee to avoid having to outfit taxis or cars with a GPS, permits that employee to accrue 40 hours of time designated a paid leave, and allows the employee to take those 40 hours as leave in a calendar year. What happens if, later in the calendar year, the employee can prove that she or he actually became a Covered Employee for the first time? Then, and only then, would the employee be entitled to accrue legally-required paid leave, notwithstanding the fact that the employer had designated the previous 40 hours as paid leave. This problem is familiar with respect to tracking time under the FMLA where it goes by the colloquial name "double dipping."²⁴⁸

245. *Facility Data: O'Hare International Airport*, CHICAGO, ILL., DEP'T OF AVIATION, <http://www.flychicago.com/business/cda/factsfigures/pages/facility.aspx> [<https://perma.cc/296S-MK8Y>] (last visited Mar. 19, 2017).

246. *Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., <https://www.dol.gov/whd/regs/compliance/whdfs21.htm> [<https://perma.cc/L3SN-5JMF>] (last visited Mar. 19, 2017).

247. 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.500-541.504; *see also* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #17F: EXEMPTION FOR OUTSIDE SALES EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1-2 (2018) https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf [<https://perma.cc/LU4R-QXTZ>] (summarizing the outside sales exemption).

248. *Family and Medical Leave Act – FAQ for Employees*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/family-and-medical-leave-act-faq-for-employees> [<https://perma.cc/UKV6-CV3W>] (last visited Mar. 19, 2017).

The unintended risk of double dipping can be mitigated in either or two ways. Foremost, adopting a nationwide law would obviate the need for the vast majority of employers to calculate where their employees are located at all times since few employees routinely transit across national borders. Yet, even in lieu of such a nationwide law, these jurisdictions could ease the administrative burden on employers by offering an alternative for transient employees like Massachusetts did with its law. There, the Massachusetts Attorney General's Office clarified that employees with their "primary place of work" in Massachusetts accrue leave at a rate of one hour per 30 hours worked regardless of whether they work in Massachusetts or not.²⁴⁹ The Attorney General's Office goes on to explain that, among other things, "[i]f the employee spends work hours traveling outside Massachusetts (making deliveries, engaging in sales, etc.) but returns regularly to a Massachusetts base of operations before resuming a new travel schedule, Massachusetts is the primary place of work" and that "[i]f an employee is constantly switching locations of work, the primary place of work may be determined by assessing the state in which the employee spent the plurality of his or her working time over the previous benefit year."²⁵⁰ Although these explanations are not codified in law, and such "statutes are presumed not to apply extraterritorially unless there is clear legislative intent to the contrary,"²⁵¹ the Attorney General's Office's approach highlights how political divisions can minimize this Subpart's burdens.

E. Navigating "More Generous" Employer Policies

Many large employers offer employees a pool of paid leave that can be used for any purpose, thereby reducing the administrative burden of verifying that employees are using paid leave for a specific reason and offering employees greater flexibility to help achieve an optimal work-life balance. But administering such a pool in the face of certain direct paid leave laws becomes a chore. On one hand, imagine a Connecticut-based employer that offers its employees 120 hours of paid leave each calendar year, all of which accrues immediately on January 1,²⁵² all of which carries over to the next calendar year, and all of which can be taken in one-hour increments. This employer complies with the state's direct paid leave law because it

249. MASS. ATT'Y GEN.'S OFFICE, EARNED SICK TIME IN MASSACHUSETTS FREQUENTLY ASKED QUESTIONS 2 (2016), <http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf> [<https://perma.cc/MN2E-H2AX>].

250. *Id.* at 3.

251. *Hadfield v. A.W. Chesterton Co.*, No. 2008-4382, 2009 Mass. Super. LEXIS 230, at *3 (Sept. 15, 2009 Sup. Ct. of Mass.).

252. This practice is often known as "front loading."

“offers any other paid leave, or combination of other paid leave that (1) may be used for the purposes [required by law], and (2) is accrued in total at a rate equal to or greater than the rate described in [the law].”²⁵³ As you can see, Connecticut’s law is sufficiently well-written to accommodate a policy that allows employees to take leave for reasons other than those required by law.

On the other hand, however, imagine the same paid leave policy applied by a Newark, NJ-based employer to an employee who takes all 120 hours for bereavement leave. Newark’s direct paid leave law merely states that nothing in the law “shall be construed to discourage or prohibit an employer from the adoption or retention of a paid sick time policy more generous than the one required herein.”²⁵⁴ Yet, that same law mandates a minimum of 40 hours that can be used for illness, injury, health condition, or a public health emergency,²⁵⁵ ostensibly none of which would have been depleted by an employee using 120 hours of employer-provided bereavement leave. In this case, the law appears to require the employer to provide the employee with 40 *additional* hours of time off for illness, injury, health condition, or a public health emergency even though the 120 hours could have been used for this purpose. Alternatively, the employer could amend its policy by offering 40 hours of time that can be used only for the reasons specified by law and another 80 hours of which can be used for any purpose, although doing so would impose on the employer the burden of verifying why employees are taking leave, require a jurisdiction-by-jurisdiction approach to compliance, and decrease employee flexibility. In sum, Newark’s direct paid leave law and those like it may have the perverse effect of increasing burdens on employers with more generous leave policies and potentially decreasing employees’ rights.

To remedy this flaw, direct paid leave laws should be crafted in the style of the law in Connecticut — provide that employer policies comply with the law by offering leave that can be used for the purposes mandated by law if such leave is accrued at a rate at least equal to the rate required by law, assuming that all other legal requirements are met (e.g., carry over minimums, requirements concerning proof of medical documentation).

F. *Requiring Employers to Allow Relatively-Brief Minimum Increments of Leave*

As noted in the introduction, this Subpart begins the first of two Subparts that admittedly recommend remedies that would reduce

253. CONN. GEN. STAT. § 31-57s(c).

254. NEWARK, N.J., CODE § 16:18-12(a).

255. *Id.* at § 16:18-5(a).

employees' rights, albeit minimally. Nevertheless, for the reasons explained herein, jurisdictions should adopt these solutions.

Often, industry-standard attendance tracking systems permit employees to take leave only in hourly increments or increments of fractions of a day (e.g., quarter-day, half-day)²⁵⁶ to avoid employees taking leave in increments that would be unreasonably-difficult to track (e.g., leave of seven minutes and sixteen and a half seconds). Prior to the recent onslaught of direct paid leave laws, such systems were perfectly lawful. Yet, such laws often force employers to allow paid leave in increments of less than what their preexisting, industry-standard attendance tracking systems allow²⁵⁷ with no consideration for the incredible cost that revamping such systems would cost for employers, not to mention the difficulty of applying an hour-based system to employees that do not track their hours. For example, New York, NY's direct paid leave law ostensibly requires employers to allow leave in an initial four-hour increment, followed by thirty-minute increments so long as such thirty-minute increments are used in the same day as the initial four hours of leave.²⁵⁸

To minimize this burden, direct paid leave laws should allow employers to afford leave to employees in any reasonable increments or grandfather-in any preexisting attendance tracking systems — to the extent that systems' limitations foreclose the ability to offer leaves of shorter increments — as long as the increments available are reasonable. Admittedly, minimizing this burden on employers would reduce employees' rights to take leave in shorter increments, but at what cost are direct paid leave laws guaranteeing such rights? If an employer undertakes a six-figure revision to its attendance tracking system simply to allow employees to take leave in thirty-minute increments as opposed to half-day increments, what material benefits have employees gained, and when will the employer need to reinvest in another upgrade due to a new law that allows leave in an even-shorter increment? To wit, employees gain the ability to take relatively-small increments of paid leave and, in exchange, employers spend money that could be spent on offering employees increased compensation or benefits. Political divisions should reject such an unfavorable tradeoff in favor of direct paid leave laws allowing employers to afford leave in any reasonable increments.

256. See, e.g., *Rhea v. Gen. Atomics*, 227 Cal. App. 4th 1560, 1564-65 (2014) (“Although General Atomics has no written policy directing employees to record partial-day absences in any particular minimum increment, it is possible for an employee to record a partial-day absence in small increments, with some employees recording absences of as little as one-tenth of an hour. However, the majority of employees record partial-day absences in greater increments, with 98.8 percent of [relevant employees] recording partial-day absences of an hour or more.”).

257. *Supra* notes 186-189 & accompanying text.

258. *Supra* note 190.

G. *Restricting Employers from Disciplining Employees Who Take Discretionary Leave that Unduly Harms Business Operations*

If an employee comes down with the flu and needs to miss work, the absence may harm business operations. Take, for example, a skilled production line worker who performs a unique task that no other employee knows how to perform whose absence brings the entire line to a standstill. The employer may lose customers whose products are delayed, and the employee's coworkers may have to work harder given their colleague's absence, all of which are harms to the business's operations. But can we morally blame the employee? Of course not. Unless the employee went out looking to catch the flu, the absence was beyond the control of the employee, and no employer should punish an employee who typically can perform the basic functions of his or her job, but temporarily cannot due to illness.

However, direct paid leave laws often prohibit employers from disciplining employees who take *any* leave under the laws, even when the employee has some discretion vis-à-vis when or if to take leave. Take another few examples. Assume that an Oregon discharge nurse knows that Mondays are the busiest days of the work week, and while he has no desire to sit shiva for his estranged father-in-law who recently passed away, and in any event he could sit shiva any day that week, he takes Monday as bereavement leave to sit shiva and avoid the busy schedule. Or, how about a New York, NY personal income tax attorney who knows that her employer counts on her to work as hard as possible during the week leading up to April fifteenth each year, but who schedules her elective cosmetic surgery for that week despite having no medical justification to do so,²⁵⁹ and fails to even tell her employer until seven days in advance of her leave? Finally, consider a Philadelphia, PA retail cashier who is scheduled to work Black Friday from two p.m. to ten p.m., but instead reports to work at six p.m. because he went to his local police precinct at two p.m. to provide a statement concerning a recent case of stalking he witnessed despite the fact that the precinct was open at eight a.m. that morning, and there was nothing preventing him from providing a statement to the police when the precinct opened.

Any reasonable observer would look at these examples and conclude that the employee was taking advantage of the law. Yet, with limited exceptions,²⁶⁰ direct paid leave laws offer employers no recourse in such

259. New York, NY employees can use paid sick time for elective surgeries. *Paid Sick Leave Law FAQs*, N.Y.C. DEP'T OF CONSUMER AFFAIRS, <https://www1.nyc.gov/site/dca/about/paid-sick-leave-FAQs.page> [<https://perma.cc/THL7-ERGP>] (last visited July 5, 2017).

260. For example, the Industrial Commission of Arizona recommends that employees schedule leaves "in a manner that does not unduly disrupt the employer's operations." *Supra*

situations. To remedy this problem, political divisions should require employees to schedule their discretionary leaves such that they do not unduly disrupt the employer's operations, as some indirect paid leave laws and unpaid leave laws already do.²⁶¹ Alternatively, employers should be permitted to mandate the dates and times of leave for those employees who have discretion to take leave at different times so long as doing so does not cause the employee an undue burden. Furthermore, an ideal direct paid leave law would explicitly permit employers to discipline employees who schedule discretionary leave in a manner that unduly disrupts the employer's operations, fail to take leave as directed, and/or conceal the discretion they have from their employers. That being said, to curb any potential for abuse by employers, direct paid leave laws should explicitly codify that many types of leave (e.g., leave because of unforeseen illnesses, injuries, and medical conditions; leave to address domestic violence, sexual assault, or stalking) are presumed *not* to afford employees with any discretion to take leave at a later time, although employees would presumptively have the discretion to take leave earlier than planned. Such language would be vital so as to curtail employers from making arguments against public policy (e.g., "why don't you go see your doctor about the crippling pain in your chest next week when we're not so busy?").

III. "MULTIJURISDICTIONAL-EMPLOYER BURDENS" OF DIRECT PAID LEAVE LAWS

While the burdens outlined in Part II encumber employers operating in any jurisdiction with a direct paid leave law, the burdens described in this Part affect employers operating across multiple such jurisdictions. More specifically, this Part explores the burden of having to comply with more than 40 laws that all regulate the same thing in wildly different ways. Like

note 179. Yet, this recommendation is overbroad in that, for the reasons explained throughout this Subpart, it should only apply to discretionary leaves.

261. See, e.g., S. 5975, 65th Leg., 3rd Spec. Sess. § 12(2)(a) (Wa. 2017), <http://lawfilesexxt.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/5975-S.SL.pdf> [<https://perma.cc/V6WW-DA4R>] (providing that, "[i]f the necessity for leave for a family member's serious health condition or the employee's serious health condition is foreseeable based on planned medical treatment, the employee . . . [m]ust make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the healthcare provider of the family member, as appropriate"); 29 C.F.R. § 825.302(e) (providing that, "[w]hen planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment to work out a treatment schedule which best suits the needs of both the employer and the employee").

Part II, where feasible, this Part offers solutions for each burden identified notwithstanding the preferred solution described in Part IV which minimizes all burdens simultaneously.

A. *Reviewing Myriad Laws, Regulations, Rules, and Sub-Regulatory Guidance*

Take a moment and look back at Part I.C. and footnotes ninety-four through one hundred and forty-seven. Upon reflection, the sheer magnitude of the laws regulating employers is staggering. More than forty wildly-diverse laws regulate direct paid leave, many of which are further complicated by lengthy regulations, rules, and more and more guidance provided in the form of websites, opinion letters, frequently asked questions, templates, fact sheets, presentations, manuals, and on and on ad nauseum. Time and again, jurisdictions have no problem providing information on how to comply with *their* law, but when it comes to multijurisdictional employers that must wade through the morass of laws across the country, precisely *zero* jurisdictions have offered any guidance. As such, reviewing this mountain of nationwide material would take incredible amounts of time for an employer's legal counsel, not to mention the substantial time and effort required by management, human resources, and payroll professionals to ensure compliance. Moreover, large employers cannot simply ignore jurisdictions where none of their employees presently work; because of the growing prominence of work-from-home employees,²⁶² a prudent large employer should review all direct paid leave laws and prepare a nimble, all-encompassing compliance program that would be ready when a new work-from-home employee is hired into a jurisdiction where the employer previously employed no employees. It is unreasonable to ask employers to try to operate in an overregulated environment like this when there is simply *no need* for variations on employees' rights to paid leave. The right to enjoy paid leave itself is an indispensable right that should be guaranteed to employees, but such unnecessary variations in the laws that provide those rights waste innumerable hours of time for employers, the costs of which could and should be spent elsewhere.

To make matters worse, national employers are sometimes forced to ensure compliance with overlapping direct paid leave laws. For example, a San Francisco, CA employee working predominantly on a federal contract would be subject to three different direct paid leave laws (i.e., the laws of

262. Kenneth Rapoza, *One In Five Americans Work From Home, Numbers Seen Rising Over 60%*, FORBES, Feb. 18, 2013, <http://www.forbes.com/sites/kenrapoza/2013/02/18/one-in-five-americans-work-from-home-numbers-seen-rising-over-60> [<https://perma.cc/TV9R-9FPC>].

San Francisco and California, as well as Executive Order 13,706). As such, this employee could start using paid leave without any waiting period (a requirement under the executive order) despite the ninety-day waiting period imposed by the direct paid leave laws of San Francisco and California,²⁶³ and the employee would accrue up to seventy-two hours of paid leave (a requirement under San Francisco's law), despite lower maximum accruals under California law and the executive order.²⁶⁴ Such overlapping requirements make compliance incredibly difficult for employers.

Nearly a century ago, Justice Brandeis famously commented that states are the ideal "laborator[ies]" of democracy²⁶⁵ — arenas that allow ideas to be tested, finessed, and improved before federal law ossifies the best of those ideas into statute. What Justice Brandeis's conception of federalism neglected to consider was overlapping laboratories testing their ideas simultaneously, causing incredible burdens for the regulated entities struggling to keep tabs on the various experiments. Indeed, direct paid leave laws are often less-than-ideally drafted²⁶⁶ and routinely updated, forcing employers to keep tabs on ever-changing interpretations of an ever-growing list of poorly-worded laws. The sub-federal direct paid leave experiment has gone on long enough; it is time to cement the results of that experiment into federal law.

B. *Learning About Problematic Requirements Too Late*

Proposed federal legislation typically is published with ample time to receive public comment,²⁶⁷ routinely vetted heavily by the national press,²⁶⁸

263. 29 C.F.R. § 13.5(c); CAL. LAB. CODE § 246(c); S.F., CAL., ADMIN. CODE § 12W.4(d).

264. 29 C.F.R. § 13.5(b)(1); CAL. LAB. CODE § 246(j); S.F., CAL., ADMIN. CODE § 12W.3(d).

265. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

266. See, e.g., *supra* notes 154, 170, 173, 189, & accompanying text.

267. JOHN V. SULLIVAN, *HOW OUR LAWS ARE MADE* 12 (2007), <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf> [<https://perma.cc/967Z-U3Q5>] (providing information about public hearing on federal legislation); *but see* Jim Tankersley, *Republicans Ready to Move on a Tax Plan Few Have Seen*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/us/politics/tax-bill-trump-senate.html> [<https://perma.cc/3FX8-77VG>] (discussing a recent, high-profile example of proposed federal legislation passing without ample time for public comment).

268. See, e.g., Lydia DePillis, *In Surprise Show of Support, Filibuster-Proof Senate Majority Backs Paid Sick Leave*, WASH. POST (Mar. 26, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/26/in-surprise-show-of-support-filibuster-proof-senate-majority-backs-paid-sick-leave/?utm_term=.10e412d3ccea1 [<https://perma.cc/MW36-MKG9>]; Steven Greenhouse, *Bill Would Guarantee Up to 7 Paid Sick Days*, N.Y. TIMES (May 15,

and not susceptible to referenda.²⁶⁹ Similarly, proposed state legislation often is published online with sufficient time for public comment²⁷⁰ and often receives the attention of the press,²⁷¹ although some states allow legislation via public referenda.²⁷² Yet, the vast majority of direct paid leave laws are municipal laws — cities and counties — that often move from publishing proposed legislation to passing it in mere days,²⁷³ that often fail to secure sufficient press coverage,²⁷⁴ and that frequently allow ordinances to be passed by public referenda.²⁷⁵ As illustrated by one frustrated

2009), <http://www.nytimes.com/2009/05/16/health/policy/16sick.html> [<https://perma.cc/DLQ3-XJDG>].

269. Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 228 (2002).

270. NAT'L CONF. OF STATE LEGISLATURES, COVERAGE OF FLOOR PROCEEDINGS AND COMMITTEE HEARINGS, <http://www.ncsl.org/research/telecommunications-and-information-technology/legislative-webcasts-and-broadcasts.aspx> [<https://perma.cc/78GJ-EAJW>].

271. See, e.g., Melanie Mason, *Legislator Introduces Bill to Guarantee Paid Sick Days*, L.A. TIMES (Jan. 21, 2014), <http://articles.latimes.com/2014/jan/21/local/la-me-pc-paid-sick-leave-20140121> [<https://perma.cc/QLA2-A9ZP>].

272. UNIV. OF S. CAL. GOULD SCH. OF LAW, INITIATIVE & REFERENDUM INSTITUTE, INITIATIVE USE 1 (2017), [http://www.iandrinstute.org/docs/IRI%20Initiative%20Use%20\(2017-1\).pdf](http://www.iandrinstute.org/docs/IRI%20Initiative%20Use%20(2017-1).pdf) [<https://perma.cc/ELF5-YKUD>].

273. For example, Morristown, NJ's direct paid leave law was first introduced by the town council on August 9, 2016. *Agenda Packet for Regular Meeting of Morristown, N.J. Town Council on Tuesday, August 9, 2016*, MORRISTOWN, N.J. TOWN COUNCIL, <http://morristownnj.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=1007&Inline=True> [<https://perma.cc/3H4E-PVHY>] (last visited Apr. 12, 2017). It was passed by the town council just 35 days later on September 13, 2016. *Agenda Packet for Regular Meeting of Morristown, N.J. Town Council on Tuesday, September 13, 2016*, MORRISTOWN, N.J. TOWN COUNCIL, <http://morristownnj.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=1012&Inline=True> [<https://perma.cc/D65H-7GQE>] (last visited Apr. 12, 2017). The mayor signed the ordinance into law the following day. Morristown, N.J., Ordinance O-35-2016 (Sept. 14, 2016), http://www.townofmorristown.org/vertical/sites/%7B0813EA2E-B627-4F82-BBB0-DDEE646947B5%7D/uploads/O-35-2016_-_To_Implement_Paid_Sick_Leave.pdf [<https://perma.cc/88PC-WQAM>].

274. The first press coverage of Morristown, NJ's direct paid leave law were reports by a local city newspaper on the day it passed the town council and on the following day (when it was signed into law) by a county newspaper and another local city newspaper. Kevin Coughlin, *Morristown Tells Employers to Provide Paid Sick Days*, MORRISTOWNGREEN.COM (Sept. 14, 2016), <http://morristowngreen.com/2016/09/14/morristown-tells-employers-to-provide-paid-sick-days/> [<https://perma.cc/DML8-39K3>]; *Morristown Council Passes Paid Sick Days for Employees*, TAP INTO MORRISTOWN, <https://www.tapinto.net/town-s/morristown/articles/morristown-council-passes-paid-sick-days-for-empl> [<https://perma.cc/X66B-TT5T>] (last visited Apr. 12, 2017); Peggy Wright, *Morristown Mandates Businesses Give Paid Sick Time To Workers*, DAILY RECORD (Sept. 14, 2016), <http://www.dailyrecord.com/story/news/2016/09/14/morristown-mandates-businesses-give-paid-sick-time-workers/90280974/> [<https://perma.cc/4BRL-UEYM>].

275. UNIV. OF S. CAL. GOULD SCH. OF LAW, INITIATIVE & REFERENDUM INSTITUTE, LEGAL LANDSCAPE DATABASE (2017), [http://www.iandrinstute.org/docs/Legal%20Landscape%20\(version%2020080504\).xls](http://www.iandrinstute.org/docs/Legal%20Landscape%20(version%2020080504).xls) [<https://perma.cc/Q9C9-JXBV>].

councilmember debating his city's proposed direct paid leave law before an audience of just ten people, the lack of input from the business community — likely products of the relative speed of the legislation and the limited press it received — were causes for concern:

“I’m actually quite disappointed, and I’m going to point it out, that the business community in Morristown is woefully underrepresented this evening,” he said. “My concern is, did we truly solicit the opinions of the community? There’s quite a few non-profit associations here this evening and we appreciate those comments but did we truly vet it (the ordinance) like we truly vet ordinances?”²⁷⁶

As this councilmember accurately stated, employers and their advocates often find out too late about proposed direct paid leave laws. To take his observation a step further, debate over direct paid leave legislation would be improved by input not only from employers operating within the jurisdiction, but also employers operating across *multiple* jurisdictions.²⁷⁷ Without sufficient time for such employers to raise concerns like those outlined in this Article and offer solutions that do no harm to employees but mitigate burdens on employers, cities and counties risk propounding the burdens discussed herein. Moreover, to further compound the burdens on multijurisdictional employers, referenda and initiatives propose direct paid leave laws to voters without offering *any* opportunity to amend burdensome language; rather, voters are prompted to simply vote yes or no, thereby frustrating a city or county's ability to carefully craft direct paid leave laws with the nuance that they deserve.

To mitigate against these concerns, cities and counties should solicit input on direct paid leave laws from small employers within their jurisdiction *as well as* large employers who have a presence both inside and outside of their jurisdiction. By doing so, the political division can at least consider the burdens and solutions outlined in this Article. Further, advocates for direct paid leave laws should first attempt to raise their concerns via the legislative process as opposed to via a referendum to allow for proper consideration to be given to the burdens outlined herein.

276. Peggy Wright, *Morristown Mandates Businesses Give Paid Sick Time to Workers*, DAILY RECORD (Sept. 14, 2016), <http://www.dailyrecord.com/story/news/2016/09/14/morristown-mandates-businesses-give-paid-sick-time-workers/90280974/> [<https://perma.cc/34JY-PKT9>] (comments of Councilman Robert Iannaccone).

277. Extent research on the effect of direct paid leave laws on employers uniformly fails to address whether the surveyed employers operated across multiple jurisdictions. *See supra* text accompanying notes 19-26.

C. *Forcing Employers to Choose Between Unnecessary Costs and Morale Problems*

Imagine a national employer with employees in the same job title working across the country. Employees in some jurisdictions are legally entitled to paid leave whereas colleagues doing the same job somewhere else are not. As an employer, offering only the legal minimum across the country would engender morale problems between employees in the same job title who accrue paid leave at different rates with different caps, can use that leave for different reasons, and can even earn different pay rates for their leave. For example, a non-exempt salesperson working entirely on commission in Tampa, FL would be entitled to accrue no paid leave. The same employee in Sacramento, CA would accrue one hour of paid leave for every 30 hours worked, up to 24 hours total, that could be used for the employee or her or his family member for preventive care or “[d]iagnosis, care, or treatment of an existing health condition” or for specified purposes if the employee or family member is “a victim of domestic violence, sexual assault, or stalking” and would be paid at an hourly rate equal to the employee’s total compensation for the past 90 calendar days divided by the number of hours worked over that timeframe.²⁷⁸ The same employee in New York, NY would also accrue one hour of paid sick time for every 30 hours worked, but would get to bank up to 40 hours of time; would be unable to use it for purposes related to the employee or her or his family member being a victim of domestic violence, sexual assault or stalking; and would be paid minimum wage for any time taken.²⁷⁹ Notwithstanding the incredible difficulty of an employer administering such a multi-faceted policy, doing so would likely upset employees in those jurisdictions with no direct paid leave laws or less-generous laws.

Alternatively, multijurisdictional employers could opt to go above and beyond the legal minimum and provide paid leave equally to all employees. Many large employers already do so.²⁸⁰ However, to comply with all of the more than 40 direct paid leave laws across the country, employers would need to meet the nuances of each and every law, essentially allowing outliers (e.g., New York, NY’s law requiring employers to permit leave in an initial

278. *California Paid Sick Leave: Frequently Asked Questions*, CAL. DEP’T OF INDUS. RELATIONS, http://www.dir.ca.gov/dlse/paid_sick_leave.htm [<https://perma.cc/K2T2-X6UL>] (last visited Apr. 21, 2017).

279. *Paid Sick Leave Law FAQs*, N.Y.C. DEP’T OF CONSUMER AFFAIRS, <https://www1.nyc.gov/site/dca/about/paid-sick-leave-FAQs.page> [<https://perma.cc/88TT-KMWQ>] (last visited Apr. 21, 2017).

280. U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS, *EMPLOYEE BENEFITS IN THE UNITED STATES – MARCH 2017* (2017), <https://www.bls.gov/news.release/pdf/ebs2.pdf> [<https://perma.cc/NL9J-CTY4>] (Table 6 summarizes selected employee paid leave benefits).

four-hour increment followed by 30-minute increments in the same day;²⁸¹ Arizona's law requiring the printing of the amount of paid leave taken year-to-date and earnings received due to paid leave on or with every paystub;²⁸² Puerto Rico's law requiring employers to accrue up to 15 days of paid leave²⁸³) to drive a uniform, nationwide paid leave policy well beyond industry standards. Indeed, under this approach, a single amendment from any jurisdiction could force a nationwide policy change.

Moreover, it is entirely possible that this approach would result in an *unlimited* paid leave policy. Every direct paid leave law limits employees' rights by capping: 1) the amount of paid leave that can accrue; 2) the amount of paid leave that can be used; and/or 3) the amount of paid leave that can be carried over to the next year. But an employer attempting to craft a one-size-fits-all, all-compliant policy would need to comply with Seattle, WA's direct paid leave law (which does not allow employers to limit the amount of paid leave that can accrue²⁸⁴); San Francisco, CA's direct paid leave law (which does not allow employers to limit the amount of paid leave that can be used²⁸⁵); and Arizona's direct paid leave law (which does not allow employers to limit the amount of paid leave that can be carried over to the next year²⁸⁶). As such, the only way an employer would comply with all direct paid leave laws would be to allow employees to accrue limitless paid leave (i.e., paid leave without caps on how much leave accrues, how much leave can be used, or how much leave carries over to the next year).

So, what are employers to do? Offer the legal minimum, saving money but increasing the risk of employee morale issues? Offer a nationwide policy satisfying all direct paid leave laws, increasing costs for the sake of consistency? Perhaps some middle ground that complies with most direct paid leave laws while offering employees some mechanism for requesting that their employer nonetheless honor their legal rights? Truth be told: there is no good answer. Direct paid leave laws place multijurisdictional employers in a difficult position by forcing them to either provide premium benefits to all employees nationwide or face administrative burdens and

281. See *supra* note 190.

282. See *supra* note 230.

283. P.R. LAWS. ANN. tit. 29, § 250d(l) (2016)

284. *City of Seattle Paid Sick and Safe Time Ordinance, SMC 14.16, Questions and Answers*, SEATTLE OFFICE OF LABOR STANDARDS, <http://www.seattle.gov/Documents/Departments/LaborStandards/OLS-QA-PSST.pdf> [https://perma.cc/8DKZ-Q8VE] (last visited Apr. 21, 2017).

285. Cf. S.F., CAL. ADMIN. CODE §§ 12W.4(a) ("The employee may use all or any percentage of his or her paid sick leave to aid or care for the aforementioned persons."), 12W.4(d) ("An employee shall be entitled to use accrued paid sick leave beginning on the 90th day of employment, after which day the employee may use paid sick leave as it is accrued.").

286. ARIZ. REV. STAT. ANN. § 23-371(D)(4) (2016)

morale problems in their workforce by allowing employees in the same job title to accrue paid leave subject to different conditions.

IV. REMEDYING THE UNNECESSARY BURDENS WROUGHT BY DIRECT PAID LEAVE LAWS

The best means of resolving the unnecessary burdens that direct paid leave laws place on employers lies squarely with Congress and the President. To that end, this Article proposes the UDPLA, a putative federal law crafted with content that avoids the burdens outlined in Part II and an express preemption provision that eliminates the burdens outlined in Part III. Much like ERISA expressly preempted laws relating to employee benefit plans, thus clearing out variations in sub-federal laws and paving the way for employers to uniformly administer employee benefit plans,²⁸⁷ and like some states have done with respect to municipal laws within their jurisdiction,²⁸⁸ UDPLA should expressly preempt any sub-federal direct paid leave laws. By doing so, UDPLA would have the dual effect of aiding employees by expanding rights to paid leave nationwide while simultaneously aiding employers by imposing uniformity, increasing clarity vis-à-vis how legal nuances should be interpreted, and minimizing draconian requirements — all of which would ease administrative burdens and lower costs for employers that are already offering sufficient paid leave to their employees.

Congress can hash out the details that the public would no doubt care most about such as how much paid leave employers must afford, how quickly it accrues, reasons employees can take paid leave, and whether accrued leave must be paid out to employees upon termination. So long as these details mirror the most common elements of existing direct paid leave laws (e.g., accrual of up to five to ten days of paid leave at a rate of one hour per 30 or 40 hours worked; able to be taken by an employee of herself or himself or a family member because of injury, illness, or to seek medical care; no requirement to be paid out upon termination), those employers already offering industry-standard paid leave to their employees should be unaffected. Indeed, some of these details could be augmented in favor of employee rights (e.g., more paid leave, faster accrual, more reasons why an employee can take leave) and still fail to affect employers that already provide sufficient paid leave to their employees — to wit, the exact type of employers who should not be affected by such a law.

Finally, it is worth noting why UDPLA seeks only to standardize direct paid leave laws and not indirect paid leave laws or unpaid leave laws. First,

287. *See supra* text accompanying notes 16, 17.

288. *See supra* text accompanying notes 131, 147.

indirect paid leave laws without a stand-alone leave entitlement do not cause the same burdens outlined in Part II because such laws merely regulate payment rather than guarantee any leave entitlements,²⁸⁹ and thus require no routine notice to employees of accrued leave (Subpart II.A.), create no problems with handling fraudulent leave requests and insufficient advance notice of leave (Subpart II.C.), do not impose the burden of calculating which work hours entitle certain employees to leave (Subpart II.D.), fail to implicate more generous leave policies (Subpart II.E.), force no minimum leave increments (Subpart II.F.), and do not restrict employers from disciplining employees taking discretionary leaves (Subpart II.G.).²⁹⁰ Moreover, because indirect paid leave laws do not require direct payment from the employer to the employee, they generally cause no difficulty to the employer vis-à-vis calculating compensation (Subpart II.B.), although they could create difficulty administering the interplay between employer-provided pay benefits and legal pay entitlements to ensure that employees do not receive a windfall. Second, indirect paid leave laws do not cause any of the burdens outlined in Part III: because indirect paid leave laws are far less ubiquitous than direct paid leave laws and their requirements impose far less nuance than that of direct paid leave laws, they impose limited burdens on employers by sheer virtue of their multitudes and nuances (Subpart III.A.) and when employers learn about the burdens of those laws (Subpart III.B.); and because they impose no direct payment requirements, they generally do not force employers to choose between augmenting costs and employee morale problems (Subpart III.C.). Third, indirect paid leave laws are relatively-new and few in number compared to direct paid leave laws, suggesting that it may be prudent to allow the Brandeisian laboratories to continue experimenting a while longer. For these reasons, and given that indirect paid leave laws remain a means of sub-federal political divisions augmenting employees' rights in the tradition of shared federal and state responsibility for employment laws, this Article does not advocate for preempting them at this time.

With respect to unpaid leave laws and indirect paid leave laws with a stand-alone leave entitlement, the burdens imposed on employers by certain payment requirements (Subparts II.B. and III.C.) are moot. Moreover, although such laws could, in theory, require employers to provide notice to employees of accrued leave, thereby imposing the burdens outlined in Subpart II.A., such laws have yet to do so. Furthermore, although unpaid

289. *State Paid Family Leave Insurance Laws*, NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/research-library/work-family/paid-leave/state-paid-family-leave-laws.pdf> [<https://perma.cc/85YT-E9RF>] (last visited Apr. 30, 2017).

290. From an employer's perspective, indirect paid leave laws with a stand-alone leave entitlement are akin to unpaid leave laws, which are discussed below.

leave laws and indirect paid leave laws containing a stand-alone leave entitlement *do* cause employers similar burdens with respect to fraudulent leave requests and insufficient advance notice (Subpart II.C.), calculating which work hours entitle employees to leave (Subpart II.D.), more generous leave policies (Subpart II.E.), minimum leave increments (Subpart II.F.), disciplining employees taking discretionary leaves (Subpart II.G.), reviewing a multitude of laws with subtle nuances (Subpart III.A.), and learning about new burdens too late (Subpart III.B.), these burdens generally are less taxing on employers because they do not affect payment and because the reasons that employees take unpaid leave are far less common than an illness, injury, or medical condition, so many employers tend to handle employee requests to take unpaid leave less frequently and/or on an ad hoc basis rather than having to develop a proactive approach to review and comply with frequent requests to take leave pursuant to direct paid leave laws. And what's more, standardizing the significant variations in unpaid leave laws (e.g., the types of leave covered, the duration of leave permitted)²⁹¹ would call for substantial debate and consensus at the federal level — all to alleviate burdens that many employers find to be not unduly taxing. In theory, a federal law that preempts sub-federal unpaid leave laws could benefit employers by imposing uniformity and employees by expanding their rights to take unpaid leave for certain reasons, but there has yet to be a similar groundswell of support for unpaid leave as there has been for various iterations of paid leave,²⁹² further counseling against pushing for such legislation at this time.

In conclusion, direct paid leave laws impose unreasonable burdens on employers and especially on those employers whose business operations spread across the country. Passing a federal law like UDPLA would minimize these burdens to the delight of those employers already doing the right thing by providing sufficient paid leave to their employees while also expanding paid leave rights to employees. It's a win-win. As such, the federal government must take the reins by federalizing direct paid leave in America.

291. See, e.g., SOCIETY FOR HUMAN RESOURCE MANAGEMENT, IN ADDITION TO CALIFORNIA FAMILY RIGHTS ACT (CFRA) LEAVE, WHAT OTHER TYPES OF LEAVE ARE EMPLOYEES IN THE STATE OF CALIFORNIA ENTITLED TO? (2015), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/californialeavesotherthancfra.aspx>.

292. See *supra* text accompanying notes 93, 94.