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LEAVE IN THE TIME OF COVID: EXAMINING PAID SICK LEAVE LAWS

*Jennifer Bennett Shinall**

INTRODUCTION

In the wake of the COVID-19 pandemic, Congress (as well as several states¹) passed emergency paid sick leave legislation.² The federal legislation, known as the Families First Coronavirus Response Act (FFCRA), guaranteed most workers the right to eighty hours of sick leave at full pay while the employee was in COVID-19-related quarantine, plus an additional eighty hours of sick leave at two-thirds pay to care for another person in quarantine.³ Congress felt compelled to pass such legislation because the United States infamously lags behind all other developed countries in guaranteeing paid health-related leave for workers.⁴ Of the top twenty-two highest earning countries, the United States is the only country that does not provide paid leave for cancer treatment.⁵ The United States is one of three countries that does not provide paid sick leave for an influenza diagnosis.⁶ Moreover, the

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¹ E.g., D.C. CODE ANN. § 32-531.02A (2020); COL. REV. STAT. § 8-13.3-406 (2020); CAL. LAB. CODE § 246 (West 2020).

² For a summary of the congressional legislation, see DEPARTMENT OF LABOR, FAMILIES FIRST CORONAVIRUS RESPONSE ACT: EMPLOYEE PAID LEAVE RIGHTS, <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> [<https://perma.cc/D6KM-2D7H>].

³ Additionally, the FFCRA guarantees workers additional leave rights related to school and childcare closures. *Id.*

⁴ See Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RES. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/> [<https://perma.cc/TGL5-ST3D>]; see also Mallory Campbell, *Family Leave: Comparing the United States' Family and Medical Leave Act with Sweden's Parental Leave Policy*, 9 NOTRE DAME J. INT'L L. & COMP. L. 116-42 (2019); Jessica Deahl, *Countries Around the World Beat the U.S. on Paid Parental Leave*, NPR (Oct. 6, 2016), <https://www.npr.org/2016/10/06/495839588/countries-around-the-world-beat-the-u-s-on-paid-parental-leave> [<https://perma.cc/K4AJ-NDPH>].

⁵ CTR. FOR ECON. & POL'Y RES., UNITED STATES LAGS WORLD IN PAID SICK DAYS FOR WORKERS AND FAMILIES (2009), <https://cepr.net/documents/publications/psd-summary.pdf> [<https://perma.cc/FJ3E-XDG8>].

⁶ *Id.*

United States is the only OECD country that does not provide any form of paid parental leave after the birth of a child.⁷

Instead, the protections for U.S. workers who require short or long-term health-related leave are quite thin. The federal Family and Medical Leave Act (FMLA) only guarantees the right to twelve weeks of *unpaid* leave for serious health conditions.⁸ Furthermore, it solely applies to workers who have worked for at least one year and average at least thirty hours per week for an employer with fifty or more employees.⁹ Six U.S. states and territories—New York, New Jersey, Rhode Island, Hawaii, California, and Puerto Rico—also mandate short-term disability insurance for workers with serious health conditions.¹⁰ Additionally, the federal Americans with Disabilities Act (ADA) may provide some access to temporary leave through its reasonable accommodation guarantee,¹¹ but such access is limited to workers who are substantially limited in a major life activity.¹² Thus, in the absence of the FFCRA, only select U.S. workers with severe cases of COVID-19 would have ever possessed any legal right to paid leave upon contraction of or exposure to the virus.

Although the FFCRA may have initially provided an important stopgap for workers during the pandemic, its passage highlights the dearth of protections otherwise available for workers who experience health events, both major and minor. Although some employers may voluntarily provide their employees with leave benefits, U.S. workers have no federal legal right to job or paycheck protection for everyday illnesses like the common cold, influenza, or the norovirus.¹³ Additionally, workers who fall outside the narrow protections of the FMLA and ADA have no federal legal right to job

⁷ BIPARTISAN POL'Y CTR., PAID FAMILY LEAVE ACROSS OECD COUNTRIES (2020), <https://bipartisanpolicy.org/explainer/paid-family-leave-across-oecd-countries/#:~:text=Currently%2C%2024%20out%20of%2036,maternity%20and%20paternity%20leave%20periods> [<https://perma.cc/R86X-72ZP>]; see also Livingston & Thomas, *supra* note 4.

⁸ 29 U.S.C. § 2612(a)(1)(D) (2021).

⁹ 29 U.S.C. § 1211(2)(A)(i)-(ii) (2021).

¹⁰ See Jennifer Bennett Shinall, *Protecting Pregnancy*, 106 CORNELL L. REV. (publication forthcoming, manuscript at 11–12), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3543711.

¹¹ See, e.g., Notice No. 915.002, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, 37, 44–45, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [<https://perma.cc/FE8B-ZQUZ>] (recommending leave allowances as a form of reasonable accommodation under the ADA).

¹² See 42 U.S.C. § 12102(1) (2018).

¹³ See Usha Ranji, Michelle Long, & Alina Salganicoff, *Coronavirus Puts a Spotlight on Paid Leave Policies*, KFF (Dec. 14, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/coronavirus-puts-a-spotlight-on-paid-leave-policies/> [<https://perma.cc/45AF-9JAH>] (“There is no federal requirement for employers to provide paid family and medical leave.”).

or paycheck protection for even major health events, such as a heart attack.¹⁴ The result is that many U.S. workers must make the tough decision of whether to go to work sick or to risk losing their paycheck (or worse, their job). To some, the choice to go to work sick—a phenomenon known as presenteeism—may sound like a strong signal of work ethic and dedication.¹⁵ But presenteeism can be disastrous for workplace productivity.¹⁶ A sick worker is unlikely to perform at her highest level, which may have downstream effects for other workers.¹⁷ More significantly, in the case of infectious diseases, going to work sick has the potential to wipe out an entire office for a period of time.¹⁸

Presenteeism concerns are more than just hypothetical. In a 2019 survey conducted by the Society for Human Resource Management, ninety percent of workers admitted to going to work sick.¹⁹ The current COVID-19 pandemic has highlighted just how quickly contagious diseases can spread among a group of people in close contact—like coworkers—and exponentially increase the transmission rate of infectious diseases. In the absence of greater legal protections, that concern will persist in the post-pandemic world as we continue to confront influenza, new variants of the coronavirus, and other airborne illnesses.

Furthermore, even in the midst of the current pandemic, legal protections remain insufficient. The two weeks of paid leave upon contraction of or exposure to COVID-19 that is guaranteed by the FFCRA may have sounded more than generous at the beginning of the pandemic. But FFCRA mandatory leave rights expired on December 31, 2020.²⁰ And even if the next Congress

¹⁴ *Id.*

¹⁵ According to a survey by the Society for Human Resource Management, work ethic and dedication concerns drive a substantial portion of workers' decision to go to work sick. See Dana Wilkie, *9 in 10 Workers Admit Going to Work Sick*, SOC'Y FOR HUM. RESOURCE MGMT. (Nov. 7, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/coming-to-work-sick.aspx> [<https://perma.cc/A5Z5-C2WH>] (“Finally, attendance, or lack of it, is addressed in many annual performance reviews. An employee may avoid being out for extended periods—even if illness warrants the absence—for fear the manager might question his or her dedication or work ethic.”).

¹⁶ For a discussion on the perils of workplace presenteeism, see Paul Hemp, *Presenteeism: At Work—But Out of It*, HARV. BUS. REV. (Oct. 2004), <https://hbr.org/2004/10/presenteeism-at-work-but-out-of-it> [<https://perma.cc/R9ES-NYND>]; see also *Paid Sick Days Lead to Cost Savings for All*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (Oct. 2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/paid-sick-days-lead-to-cost-savings-savings-for-all.pdf> [<https://perma.cc/9HYW-Z3RF>].

¹⁷ See Hemp, *supra* note 16; NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 16.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Employers may still claim tax credits for granting FFCRA leave to employees through March 31, 2021, but granting leave to employees because of coronavirus exposure or infection is no longer mandatory. See Margaret R. Kurlinski & Rebeca M. Lopez, *Congress Extends FFCRA Tax Credit: Employer Options*, 11 NAT. L. REV. 61 (Dec. 30, 2020), <https://www.natlawreview.com/article/congress-extends-ffcra-tax-credit-employer-options> [<https://perma.cc/XQD9-86HU>].

were to extend the FFCRA's leave rights into 2021, nearly a year into the pandemic, multiple instances of infection and quarantine are a reality for many workers. Thus, two weeks of paycheck and job protection are no longer enough. For example, in households with more than one labor market participant, just one participant's exposure at work could send the entire household into quarantine. Households that rely on out-of-home schooling and childcare may be forced into quarantine from their child's exposure.²¹ Furthermore, because new scientific research suggests that COVID-19 antibodies may last for as little as three months, front-line workers may be particularly susceptible to more than one instance of infection.²²

Supplemental paid sick leave laws are necessary both now and in the future, and as this Article will argue, a promising model for such additional provisions already exists at the state level. State paid sick leave legislation is currently on the books in fourteen states and the District of Columbia.²³ Although a great deal of existing legal scholarship has focused on parental leave²⁴ and long-term medical leave,²⁵ virtually absent from the literature is any consideration of state paid sick leave legislation.²⁶ Unlike parental leave and medical leave, paid sick leave legislation covers workers with nonserious health conditions like the common cold, a stomach bug, or a minor infection.²⁷ Thus, this legislation can fill in the coverage gaps for workers with respect to both COVID-19 and other future illnesses.

²¹ Household quarantine as a result of a child's exposure at school or daycare may be particularly common since COVID-19 case rates for school and daycare staff are consistently higher than those of the general population. See Emily Oster et al., National COVID-19 School Response Dashboard, QUALTRICS, https://statsiq.co1.qualtrics.com/public-dashboard/v0/dashboard/5f78e5d4de521a001036f78e#/dashboard/5f78e5d4de521a001036f78e?pagelid=Page_c0595a5e-9e70-4df2-ab0c-14860e84d36a [<https://perma.cc/3XER-CCPF>] (last visited Apr. 6, 2021).

²² See F. Javier Ibarrodo et al., *Rapid Decay of Anti-SARS-CoV-2 Antibodies in Persons with Mild Covid-19*, 383 N. ENG. J. MED. 1085, 1085–87 (Sept. 10, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2025179> [<https://perma.cc/MTN4-VZCE>] (“Our findings raise concern that humoral immunity against SARS-CoV-2 may not be long lasting in persons with mild illness, who compose the majority of persons with Covid-19. It is difficult to extrapolate beyond our observation period of approximately 90 days because it is likely that the decay will decelerate.”).

²³ ARIZ. REV. STAT. §§ 23-364–23-371 (2020); CAL. LAB. CODE § 245 (Deering 2020); COLO. REV. STAT. § 8-13.3-401 (2020); CONN. GEN. STAT. § 31-57s (2020); D.C. CODE § 32-531.01 (2020); ME. REV. STAT. ANN. 26, § 637 (2020); MD. CODE ANN. LAB. & EMPL. § 3-1301 (LexisNexis 2020); MASS. GEN. LAWS 149, §§ 148C–148D (2020); MICH. COMP. LAWS § 408.961 (2020); N.J. REV. STAT. § 34:11D-1 (2020); N.Y. LAB. LAW § 196-b (Consol. 2020); OR. REV. STAT. § 653.606 (2020); 28 R.I. GEN. LAWS § 28-57-1 (2020); VT. STAT. ANN. § 21-481 (2020); WASH. REV. CODE §§ 49.46.180–49.46.200 (2020).

²⁴ See, e.g., Shinall, *supra* note 10 (unpublished manuscript at 5); David Fontana & Naomi Schoenbaum, *Unsexng Pregnancy*, 119 COLUM. L. REV. 309, 355 (2019); Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 787–803 (2018).

²⁵ See generally Jennifer Bennett Shinall, *Anticipating Accommodation*, 105 IOWA L. REV. 621 (2020).

²⁶ *Id.*

²⁷ In contrast, the federal Family and Medical Leave Act (FMLA) merely provides *unpaid* leave for

This Article will highlight some of the major features of this important yet understudied state legislation, which is far broader in terms of employer, employee, and illness coverage than existing federal laws. Although many features of the paid sick leave laws are employee-friendly, the Article will also highlight employer protections built into many state laws. The Article will conclude by presenting new empirical evidence suggesting that these laws work as intended to reduce worker presenteeism. While the laws may impose some costs for employers, the combination of reduced employee presenteeism and built-in legislative protections serve to mitigate any increased costs for employers. More than ever, COVID-19 has highlighted the need for such paid sick leave legislation nationwide, as the costs associated with airborne illness at work will not go away in the post-pandemic world.

I. EMPLOYEE-FRIENDLY FEATURES OF PAID SICK LEAVE LEGISLATION

In this section, I will highlight several of the salient features of state paid sick leave legislation that work to fill in the most glaring coverage gaps left by federal laws. These features are particularly relevant for workers who need short-term paycheck and job security guarantees in the context of COVID-19 and other contagious diseases.

A. *Extended Employer Coverage*

No federal law requires employers to provide paid leave to a worker, regardless of the seriousness of the worker's health condition.²⁸ Even the thin guarantees provided by the FMLA—which only guarantees workers *unpaid* leave—merely apply to the largest employers.²⁹ If an employer does not have fifty employees within a seventy-five-mile radius, the employer is not bound by the FMLA.³⁰ To put in context just how limiting this requirement is, eighty-eight percent of all businesses in the United States have fewer than fifty employees.³¹ Thus, an initial distinguishing feature of state paid sick leave laws is that they apply to almost all employers. According to the table below (“Table 1”), which details the most notable features of the fifteen existing paid leave laws, seven of these apply to all employers in the state,

workers with *serious* health conditions. See 29 U.S.C. §§ 2612(a)–(c) (2020).

²⁸ See, e.g., Ryan H. Nelson, *Federalizing Direct Paid Leave*, 20 U. PA. J. BUS. L. 623, 642 (2018).

²⁹ See 29 U.S.C. § 2611(4) (2020).

³⁰ See *id.*

³¹ See Counts by Company Size, NORTH AM. INDUSTRY CLASSIFICATION SYS. ASS'N (2020), <https://www.naics.com/business-lists/counts-by-company-size/> [<https://perma.cc/J7YS-JBY7>].

regardless of size. Six of the remaining laws have far lower minimum employee threshold requirements for employer coverage than federal law. The result is that most employers are bound by existing state paid leave laws, in sharp contrast to the FMLA.

Table 1. State Paid Sick Leave Laws

State	Stat. Code	Eff. Date	Employers Covered	Employees Exempted	Hours Accrual	Max Hours Per Year	Carry Over Hours	Private Right of Action	Local Preemption
Ariz.	Ariz. Rev. Stat. §§ 23-364, 23-371 et seq.	Dec. 9, 2016	All	Government employees	1 hour/30 hours worked	≥15 employees: 40 hours/year <15 employees: 24 hours/year	Yes	Yes	No
Cal.	Cal. Lab. Code § 245 et seq.	Jan. 1, 2015	All	Flight crews, railway workers, workers covered by CBAs	1 hour/30 hours worked	48 hours/year	Yes	No	No
Co.	CO ST § 8-13.3-401 et seq.	Jan. 1, 2021	All	Railway workers, government employees	1 hour/30 hours worked	48 hours/year	Yes, up to 48 hours	Yes, after admin. process	No
Conn.	Conn. Gen. Stat. § 31-57r et seq.	Jan. 1, 2012	≥50 employees	Nonprofit workers, some manufacturing workers, temporary workers	1 hour/40 hours worked	40 hours/year	Yes, up to 40 hours	No	No
D.C.	D.C. Code § 32-531.01 et seq.	Nov. 13, 2008	All	Work-study students, health care workers in premium pay programs, babysitters, construction workers covered by CBAs	≥100 employees: 1 hour/37 hours worked 25-99 employees: 1 hour/43 hours worked ≤24 employees: 1	≥100 employees: 56 hours/year 25-99 employees: 40 hours/year ≤24 employees: 24	Yes	Yes	No

					hour/ 87 hours worked Restaurant/bar with ≤99 employees: 1 hour/43 hours worked	hours/ year Restaurant/bar with ≤99 employees: 40 hours/ year			
Me.	ME. REV. STAT. ANN. 26, § 637 (2020)	Jan. 21, 2021	≥10 employees	Workers covered by CBAs, government employees	1 hour/40 hours worked	40 hours/ year	Not specified	No	Yes
Md.	MD. CODE ANN. LAB. & EMP. L. § 3-1301 et seq. (LexisNexis 2020)	Feb. 11, 2018	≥15 employees	Works ≤12 hours per week, agricultural workers, temporary workers, some realtors, construction workers covered by CBAs, minors	1 hour/30 hours worked	40 hours/ year	Yes, up to 40 hours	Yes	Yes, preempts future laws only
Mass.	MASS. GEN. LAWS §§ 148C-148D (2020)	July 1, 2015	≥11 employees	Government employees, work-study students, railway workers (via judicial decision)	1 hour/30 hours worked	40 hours/ year	Yes, up to 40 hours	Yes	No
Mi.	MICH. COMP. LAWS § 408.961 (2020) et seq.	Mar. 29, 2019	≥50 employees	Works ≤25 hours per week, government employees, railway workers, airline workers, temporary workers, variable hour	1 hour/35 hours worked	40 hours/ year	Yes, up to 40 hours	Yes, after admin. process	No

				workers, trainees, minors, some workers covered by CBAs					
N.J.	N.J. REV. STAT. § 34:11D-1 (2020) et seq.	Oct. 29, 2018	All	Government employees covered by another PSL law, per diem healthcare employees, construction workers covered by CBAs, some other workers covered by CBAs	1 hour/30 hours worked	40 hours/year	Yes, up to 40 hours	Yes	Yes
N.Y.	N.Y. LAB. LAW § 196-b (Conso l. 2020)	Sept. 30, 2020	≥5 employees	Some workers covered by CBAs	1 hour/30 hours worked	≥100 employees: 56 hours/year <100 employees: 40 hours/year	Yes	No	Yes, but only preempts cities <1 million people
Or.	OR. REV. STAT. § 653.606 (2020)	Jan. 1, 2016	≥10 employees	Work-study students, railway workers, workers employed by family, workers covered by CBAs	1 hour/30 hours worked	40 hours/year	Yes, up to 40 hours	Yes	Yes
R.I.	28 R.I. GEN. L AWS. § 28-57-1 (2020) et seq.	July 1, 2018	≥18 employees	Work-study students, interns/apprentices, some nurses, state and local government employees,	1 hour/35 hours worked	40 hours/year	Yes	No	Yes

				employees exempt from minimum wage law					
Vt.	VT. STAT. ANN. § 21-481 (2020) et seq.	Jan. 1, 2017	All employers after first year of business	Works <18 hours/week, minors, temporary workers, some state government employees, federal employees, per diem workers, substitute teachers, owners of unincorporated businesses, workers covered by CBAs	1 hour/52 hours worked	40 hours/year	Yes	No	No
Wash.	WASH. REV. CODE §§ 49.46.180-49.46.200 (2020) et seq.	Jan. 1, 2018	All	Employees exempt from minimum wage law, some temporary workers, nonprofit workers, state and local government employees, construction workers covered by CBAs	1 hour/40 hours worked	None	Yes, up to 40 hours	Yes	No

B. Extended Employee Coverage

The FMLA's scope of coverage is further limited by its employee limitations, which exclude employees who have worked for less than a year or have worked for less than thirty hours per week from its unpaid leave

guarantees.³² As detailed in Table 1, however, state paid leave laws apply to both part and full-time workers, regardless of their tenure. This component of the paid sick leave laws is particularly crucial to address gender disparities in access to leave since over sixty percent of part-time workers are female.³³ State paid sick leave laws work by providing one hour of sick leave based on the number of hours worked, in order to ensure that full-time workers will accrue days of sick leave more rapidly than will part-time workers. Although the actual rate of sick leave accrual varies by state, this common structure addresses both fairness concerns (i.e. concerns that full-time workers *deserve* more sick leave) and practicality concerns (i.e. concerns that full-time workers *need* more sick leave) that may arise by covering part-time workers.

Also common to all state paid sick leave laws is the broad scope of industries and occupations covered. Indeed, as seen in Table 1, the employees specifically excluded from most laws—such as governmental employees, railway workers, and workers covered by collective bargaining agreements—typically have paid sick leave rights through other state laws or contractual guarantees. In sum, unlike federal law, exclusion from paid sick leave rights is the exception, not the rule, under the fifteen existing statutes.

C. *Non-Serious Illness Coverage*

Perhaps the most significant innovation of state paid sick leave laws is that they offer coverage for everyday, short-term illnesses. Contrast federal legal protections: the FMLA is only available for “serious health conditions,” which requires hospital inpatient care or “continuing treatment by a healthcare provider.”³⁴ Similarly, to the extent that the reasonable accommodation provisions of the ADA may provide some leave rights, those rights would be limited to individuals with “a physical or mental impairment that substantially limits one or more major life activities.”³⁵ In other words, the FMLA and ADA do not reach most cases of the common cold, influenza, and even COVID-19.³⁶ And yet, highly infectious diseases like the common cold, influenza, and COVID-19 can wipe out an entire workplace for a period

³² 29 U.S.C. § 2611(2) (2018).

³³ See Full-Time/Part-Time Employment, U.S. DEP’T OF LAB. (2020), <https://www.dol.gov/agencies/wb/data/latest-annual-data/full-and-part-time-employment> [<https://perma.cc/GM5V-EXF8>].

³⁴ 29 U.S.C. § 2611(11) (2018).

³⁵ 42 U.S.C. § 12102(1)(A) (2018).

³⁶ Approximately eighty percent of COVID-19 cases are asymptomatic, mild, or moderate, and do not require hospitalization. See, e.g., Shelby Lin Erdman, *Even ‘Mild’ Covid-19 Can Be a Lengthy, Challenging Illness*, CNN (Oct. 8, 2020), <https://www.cnn.com/2020/10/08/health/covid-19-symptoms-mild-moderate-severe-wellness/index.html> [<https://perma.cc/JC33-AZ9K>]; Julia Rics, *What It’s Like to Have a ‘Mild’ Case of COVID-19*, HEALTHLINE (Feb. 2, 2021), <https://www.healthline.com/health-news/what-its-like-to-survive-covid-19> [<https://perma.cc/TG3Q-EXMM>].

of time, potentially raising greater presenteeism cost concerns than long-term illnesses like cancer and heart disease.³⁷

Unlike federal laws, state paid sick leave laws allow employees to take leave for *any* physical or mental illness, injury, or health condition, regardless of the gravity or expected duration.³⁸ As such, these laws reduce the pressure on employees to go to work when they are contagious, which can ultimately be quite costly for the employer.³⁹ Most paid sick leave laws even allow leave for preventative care,⁴⁰ which could reduce long-term employee absences in the future.⁴¹ In the absence of job or paycheck protection, many employees will understandably feel pressure to go to work sick, no matter how unproductive they are and no matter how many coworkers they infect. Paid sick leave laws can alleviate these difficult choices for employees by providing much needed job and paycheck security on days when an employee's presence at work is likely to do more harm than good.

D. Reduced Documentation and Notice Requirements

Highly related to the innovation of nonserious illness coverage is the reduced documentation and notice requirements of paid sick leave legislation. Although optional, the FMLA allows employers to require written medical certification before an employee takes unpaid leave.⁴² The requirements for written FMLA certification are fairly extensive, requiring a health care provider to detail relevant medical facts of the employee's health

³⁷ For a scholarly account of how presenteeism is particularly dangerous and costly in health care settings, see Eric Widera, Anna Chang, & Helen L. Chen, *Presenteeism: A Public Health Hazard*, 15 J. GEN. INTERN. MED. 1244, 1244–47 (2010) (detailing an outbreak of gastroenteritis at a long-term care facility caused by employee presenteeism).

³⁸ Most paid sick leave laws contain similar language regarding use of leave. *See, e.g.*, MD. CODE ANN., Lab. & Empl. § 3-1305(a)(1)–(2) (2021) (“An employer shall allow an employee to use earned sick and safe leave . . . to care for or treat the employee’s mental or physical illness, injury, or condition . . . to obtain preventive medical care for the employee or employee’s family member”); MICH. COMP. LAWS ANN. § 408.964(1)(a) (2020) (“An employer shall allow an eligible employee to use paid medical leave accrued under section 3 for any of the following . . . The eligible employee’s mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the eligible employee’s mental or physical illness, injury, or health condition; or preventative medical care for the eligible employee”); N.J. STAT. ANN. § 34:11D-3(a)(1) (2020) (“An employer shall permit an employee to use the earned sick leave accrued pursuant to this act for any of the following . . . time needed for diagnosis, care, or treatment of, or recovery from, an employee’s mental or physical illness, injury or other adverse health condition, or for preventive medical care for the employee”).

³⁹ Although cost estimates of presenteeism vary widely, one study has estimated the total cost of presenteeism in U.S. workplaces at \$150 billion. *See* Hemp, *supra* note 16.

⁴⁰ *See, e.g.*, Widera, Chang, & Chen, *supra* note 37.

⁴¹ Indeed, a major selling point of implementing wellness programs for employers is reduced health care costs as a result of increased preventative care. *See, e.g.*, *Managing Healthcare Costs*, SOC’Y FOR HUM. RESOURCE MGMT., <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managinghealthcarecosts.aspx> [<https://perma.cc/VX8J-4ECS>].

⁴² *See generally* 29 U.S.C. § 2613 (2018).

condition and to estimate the duration of the condition.⁴³ The FMLA also requires employees to give thirty days advance notice whenever their leave is “foreseeable.”⁴⁴ Similar to the FMLA, the ADA allows employers to undertake medical inquiries and medical examinations of employees if they are “job related and consistent with business necessity” before making an accommodation.⁴⁵

In sharp contrast, state paid sick leave laws impose no notice or documentation requirements on employees for most instances of leave. Although some state statutes require a shortened notice period for foreseeable leave (typically one week),⁴⁶ most merely require employee notice “as soon as practicable.”⁴⁷ Unlike the FMLA, such notice need not take the form of written documentation from a health care provider. Instead, most paid sick leave statutes allow employees to notify the employer of their need for leave by email or by simple oral notification.⁴⁸ Moreover, as long as the leave is less than three consecutive days in duration, employees need not produce *any* supporting documentation from a health care provider to explain the reason for their leave.⁴⁹ Even in longer-term leave cases where supporting documentation is required, the requirements are far less stringent than FMLA certification. While some statutes allow employers to require “[d]ocumentation signed by a health care professional indicating that paid sick leave time is necessary” for leave over three days, sufficient documentation need not contain medical facts about the employee’s

⁴³ See 29 U.S.C. § 2613(b) (2018).

⁴⁴ See 29 U.S.C. § 2612(e)(1) (2018).

⁴⁵ See 42 U.S.C. § 12112(4)(A) (2018).

⁴⁶ See, e.g., CONN. GEN. STAT. § 31-57t(b) (2021) (allowing employers to require seven days’ notice for foreseeable leave); N.J. STAT. ANN. § 34:11D-3 (2020) (prohibiting employers from requiring more than seven days’ notice for foreseeable leave); D.C. CODE § 32-531.03(a) (2021) (allowing employers to require ten days’ notice for foreseeable leave, the most of any paid sick leave statute); see also MASS. GEN. LAWS ANN. ch. 149, § 148C(g) (2021) (“When the use of earned sick time is foreseeable, the employee shall make a good faith effort to provide notice of this need to the employer in advance of the use of the earned sick time.”).

⁴⁷ CONN. GEN. STAT. § 31-57t(b) (2021); see also N.J. STAT. ANN. § 34:11D-3 (2020) (“If the reason for the leave is not foreseeable, an employer may require an employee to give notice of the intention as soon as practicable, if the employer has notified the employee of this requirement.”).

⁴⁸ See, e.g., ARIZ. REV. STAT. ANN. § 23-373(B) (2021) (“Earned paid sick time shall be provided upon the request of an employee. Such request may be made orally, in writing, by electronic means or by any other means acceptable to the employer.”); COLO. REV. STAT. ANN. § 8-13.3-404(2) (2020) (“The request may be made orally, in writing, electronically, or by any other means acceptable to the employer.”); R.I. GEN. LAWS ANN. § 28-57-6(b) (2020) (“Paid sick and safe leave time shall be provided upon the request of an employee. Such request may be made orally, in writing, by electronic means, or by any other means acceptable to the employer.”).

⁴⁹ See, e.g., 28 R.I. GEN. LAWS ANN. § 28-57-6(f) (2020); see also MASS. GEN. LAWS ANN. ch. 149, § 148C(f) (2021) (“Subject to the provisions of subsection (n), an employer may require certification when an earned sick time period covers more than 24 consecutively scheduled work hours.”); N.J. STAT. ANN. § 34:11D-3 (2020) (“For earned sick leave of three or more consecutive days, an employer may require reasonable documentation that the leave is being taken for the purpose permitted . . .”).

condition.⁵⁰ Furthermore, longer-term leave documentation requirements often include additional protective language to ensure that “[a]n employer’s requirements for verification may not result in an unreasonable burden or expense on the employee.”⁵¹

Taken together, the combination of reduced notice requirements and nonserious health condition coverage make leave far more accessible to employees in everyday life under state paid leave statutes than under federal law. By reducing barriers to taking leave, state paid sick leave statutes present a promising method to ensure that employees refrain from coming to work sick—especially when contagious. The benefits of these laws are relatively obvious for employees, yet employer interests must be further taken into account. The next section describes the employer benefits of state paid sick leave legislation, particularly focusing on existing statutes’ built-in employer protections.

II. EMPLOYER PROTECTIONS IN PAID SICK LEAVE LEGISLATION

Protective employee legislation is notoriously difficult to pass at any level of government since businesses rightfully have concerns about the effects on their bottom lines.⁵² Yet almost all state paid sick leave laws have protections built into them with employers in mind. Although these laws’ potential to reduce employee presenteeism may inherently lead to cost savings for employers, the additional protections built into existing state laws serve to mitigate any remaining employer cost concerns. This section reviews the most common protections extended to employers in existing state paid sick leave statutes.

⁵⁰ 28 R.I. GEN. LAWS ANN. § 28-57-6(f)(2) (2020); *see also* MASS. GEN. LAWS ANN. ch. 149, § 148C(f) (2021) (“Any reasonable documentation signed by a health care provider indicating the need for earned sick time taken shall be deemed acceptable certification for absences An employer may not require that the documentation explain the nature of the illness.”); N.Y. LAB. LAW § 196-b (2020) (“An employer may not require the disclosure of confidential information relating to a mental or physical illness, injury, or health condition of such employee or such employee’s family member . . . as a condition of providing sick leave pursuant to this section.”).

⁵¹ 28 R.I. GEN. LAWS ANN. § 28-57-6(g) (2020); *see also* WASH. REV. CODE ANN. § 49.46.210(1)(g) (2021) (“An employer’s requirements for verification may not result in an unreasonable burden or expense on the employee and may not exceed privacy or verification requirements otherwise established by law.”).

⁵² *See, e.g., Policy Watch: Workplace Flexibility + Leave*, SOC’Y FOR HUM. RESOURCE MGMT., https://www.shrm.org/executive/policy-watch/pages/workplace_flexibility_leave.aspx [<https://perma.cc/9W6Q-TX56>] (“U.S. employers are burdened by a patchwork of state and local paid leave laws that create a fragmented compliance system for them to navigate.”); *Employment Policy: State Labor Issues*, U.S. CHAMBER OF COM., <https://www.uschamber.com/employment-policy> [<https://perma.cc/2CSZ-KMYU>] (“Advocates of increased regulation are not satisfied with just pursuing action at the federal level. They have also taken their agenda to state and even local government. In the process, they are creating a patchwork of different standards that multi-state employers can find difficult to meet.”).

A. *Earned Hours Caps*

The most apparent employer protection built into state paid sick leave legislation is an explicit cap on the number of sick days an employee can earn per year. As seen in Table 1, fourteen of fifteen existing laws cap the number of paid sick leave hours an employee can earn per year.⁵³ Typically, these caps are approximately one week of full-time work; the mode cap length (in nine of fifteen jurisdictions) is forty hours of paid sick leave annually. These caps ensure that employers—and especially smaller employers—are not beholden to pay workers who are absent for long periods of time. Along these lines, the caps also ensure that paid sick leave is used as intended—for short-term leave. Health conditions that require longer term leaves are not the intended target of state paid sick leave legislation. Instead, longer-term leaves should fall within the ambit of the FMLA, the ADA, and their state analogues.

B. *Leave Waiting Period*

As detailed in Table 1, existing paid sick leave laws allow employees to accrue paid sick leave based on previous hours worked. Still, some employers might be concerned about extending paid sick leave rights to new employees. The early employment period is critical for determining whether a job will be a good match for a new employee.⁵⁴ As such, employers may be particularly hesitant to pay an absent worker who has not been at the job for long and is unlikely to remain in the job for much longer. To address these employer concerns, thirteen of the fifteen existing paid sick leave laws contain leave usage waiting periods.⁵⁵ The usual waiting period is three to

⁵³ See Table 1, *supra* Part I.A. The state of Washington has the only paid sick leave law without a cap on hours that an employee may earn each year.

⁵⁴ Job match (and job mismatch) is a term of art in economics literature, signifying whether the employee is a good fit for the work at hand. For more robust discussions of job matching and its importance with respect to employee costs, productivity, and turnover, see Joni Hersch, *Optimal 'Mismatch' and Promotions*, 33 *ECON. INQUIRY* 611 (1995); Nachum Sicherman, *Overeducation in the Labor Market*, 9 *J. LAB. ECON.* 101 (1991); Richard R. Verdugo & Naomi Turner Verdugo, *The Impact of Surplus Schooling on Earnings*, 24 *J. HUM. RESOURCES* 629 (1989); Boyan Jovanovic, *Job Matching and the Theory of Turnover*, *J. POL. ECON.* 972 (1979).

⁵⁵ See Table 1, *supra* Part I.A. The only two jurisdictions without new employee waiting periods are Colorado and New York.

four months,⁵⁶ which coincides with many employers' probationary periods for new employees.⁵⁷

C. *Not a One-Size-Fits-All Model*

Not all employers are created equal. Some are large, some are small, some are more established in the marketplace, and some are more profitable than others. As such, another protection commonly extended to employers in paid sick leave laws acknowledges that some employers may be better positioned to administer and finance mandatory paid sick leave for their workers.⁵⁸ As seen in Table 1, legislatures often proxy employers' ability to administer and finance mandatory paid sick leave by their size. Eight states, as previously discussed in Section II.A., exempt the smallest employers from paid sick leave mandates altogether.⁵⁹ Other states, such as Arizona and New York, limit the maximum number of sick leave hours an employee may earn annually if working for a small employer. The threshold size varies significantly by state; Arizona imposes a higher hours cap on employers with more than fifteen employees, while New York imposes a higher hours cap on employers with more than one hundred employees. Similarly, the District of Columbia imposes different requirements on employers based on size for both accrual of paid sick leave hours and for maximum annual hours caps.

Instead of relying on employer size as a proxy, Vermont takes an entirely different approach to estimating employers' ability to administer and finance mandatory paid sick leave. Vermont's law seems to acknowledge that implementing paid sick leave may be particularly difficult for new businesses and, as a result, exempts employers in their first year of business from the paid sick leave requirement.

⁵⁶ Arizona, California, DC, Massachusetts, Michigan, Oregon, Rhode Island, and Washington all have ninety-day waiting periods. Maryland's waiting period is 107 days, while Maine and New Jersey have 120-day waiting periods. Connecticut's waiting period is 680 hours (equivalent to seventeen weeks, or about four months of full-time work). Vermont is the only state with an extended waiting period of one year. Rachel Blakely-Gray, *Paid Sick Leave Laws by State: The Chart, Map, & Accrual Info You Need*, PATRIOT (Mar. 2, 2021), <https://www.patriotsoftware.com/blog/payroll/state-mandated-paid-sick-leave-laws/> [<https://perma.cc/R4VR-J423>].

⁵⁷ Paul Falcone, *Legal Implications of Probationary Periods*, SOC'Y FOR HUM. RESOURCE MGMT. (Sep. 8, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/legal-implications-of-probationary-periods.aspx> [<https://perma.cc/N8PF-5J97>] (“[M]ost employers use probationary time frames of sixty or ninety days . . .”).

⁵⁸ *Id.*; see also News Release, U.S. Department of Labor Announces New Paid Sick Leave And Expanded Family and Medical Leave Implementation, U.S. DEP'T OF LAB., WAGE AND HOUR DIVISION (APR. 1, 2020), <https://www.dol.gov/newsroom/releases/whd/whd20200401> [<https://perma.cc/54EG-VLZ8>].

⁵⁹ See Table 1, *supra* Part I.A. The eight states with minimum employee requirements for paid sick leave applicability are Connecticut, Maine, Maryland, Massachusetts, Michigan, New York, Oregon, and Rhode Island.

D. Limitations on Carry-Over Hours

Another hours cap frequently imposed by legislatures to protect employers' bottom lines is a limit on the number of paid sick leave hours an employee may carry over from the prior year. In theory, such limitations protect employers from having to pay an employee during an extended absence in any given year.⁶⁰ Like earned hours caps, the limitations on annual carry-over hours also ensure that paid sick leave is used as intended—for short-term leave only (since the caps effectively prohibit an employee from taking extended paid leave with accrued time from prior years).⁶¹ As noted in Table 1, eight of the fifteen existing paid sick leave laws have carry-over hour limitations, usually equivalent to one week of full-time work.⁶²

E. Limitations on Litigation

Employers are often quick to decry frivolous lawsuits and excess litigation by employees.⁶³ In the midst of the COVID-19 pandemic, employers have been particularly vocal, lobbying as a group to pass liability shields against potentially litigious employees who are exposed to the virus at work.⁶⁴ Although the COVID-19 liability shield legislation was ultimately

⁶⁰ See, e.g., ANNUAL LEAVE, U.S. DEP'T OF COM., OFFICE OF HUM. RESOURCE MGMT., <https://www.commerce.gov/hr/practitioners/leave-policies/annual-leave> [<https://perma.cc/37X6-GTH6>]; see also Brian V. Alcala & Brittany A. Bogaerts, *Cook County Expands Paid-Sick-Leave Law to Suburban Employers*, SOC'Y FOR HUM. RESOURCE MGMT. (Oct. 19, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/cook-county-paid-sick-leave-law.aspx> [<https://perma.cc/9VJ3-CYK2>].

⁶¹ *Id.*

⁶² Connecticut, Maryland, Massachusetts, Michigan, New Jersey, Oregon, and Washington have forty-hour paid sick leave carry-over caps. Colorado has a forty-eight hour paid sick leave carry-over cap. Blakely-Gray, *supra* note 56.

⁶³ As a result, a cottage industry, consisting of lawyers and human resource professionals advising employers on how to avoid "frivolous" lawsuits, has developed. See, e.g., Mark Feffer, *The Best Way to Avoid Frivolous Legal Actions is to Communicate*, SOC'Y FOR HUM. RESOURCE MGMT. (May 30, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/avoiding-frivolous-actions.aspx> [<https://perma.cc/JU6U-N2RS>]; *4 Ways to Prevent Employee-Related Lawsuits*, INC. (Sep. 26, 2016), <https://www.inc.com/insperity/four-ways-to-prevent-employee-related-lawsuits.html> [<https://perma.cc/9LZB-TABR>].

⁶⁴ At least sixteen states have passed COVID-19 liability shields for employers, largely as the result of a strong business lobby in these states. See Ronald M. Shoss & Cindy M. Dinh, *COVID-19 Liability Shield Laws Enacted in Several US States*, LEXOLOGY (Oct. 26, 2020), <https://www.lexology.com/library/detail.aspx?g=f7ee480a-41af-4e4a-a092-163cfd71726> [<https://perma.cc/UR72-XU7W>]. Moreover, the liability shields have passed in spite of the fact that employee plaintiffs likely already faced an uphill battle in establishing liability against their employers under preexisting laws. Charles Toutant, *People Are Now Suing Their Bosses Over COVID-19 at Work, But Can They Win in Court?*, N.J. LAW J. (Nov. 3, 2020), <https://www.law.com/njlawjournal/2020/11/03/people-are-now-suing-their-bosses-over-covid-19-at-work-but-can-they-win-in-court/?slreturn=20210006112333> [<https://perma.cc/67TY-NFW5>] ("I think the plaintiffs are going to have a very, very difficult time proving causation, or

unsuccessful at the federal level,⁶⁵ several states have succumbed to employer pressure, passing shields that render a successful lawsuit nearly impossible for employees who are harmed by a workplace COVID-19 exposure.⁶⁶

Employers' perennial front-of-mind concerns over frivolous lawsuits and excess litigation often make new employee benefit legislation quite difficult to pass.⁶⁷ Thus, to overcome the automatic association of more benefits with more lawsuits, many state paid sick leave laws have placed limitations on employees' rights to sue.⁶⁸ As detailed in Table 1, not all states allow employees to sue employers directly for a believed violation of a paid sick leave law. Colorado and Michigan require employees to file an administrative complaint before suing their employers, much like federal employment discrimination statutes require employees to file a charge with the Equal Employment Opportunity Commission before suing.⁶⁹ Six other states—California, Connecticut, Maine, New York, Rhode Island, and Vermont—rely exclusively on an administrative process for employee sick leave claim resolution. Such limitations on litigation may give paid leave laws a more employer-friendly gloss, but they are not necessarily unfriendly to employees. A well-administered administrative process can be preferable

proving the point of contraction, for this purpose, when it's flying around in the air, which we know the COVID virus does. How do you prove how you picked it up?"

⁶⁵ The Safe to Work Act failed to pass the Senate in July 2020. See Safe to Work Act, S.4317, 116th Cong. (2020).

⁶⁶ See, e.g., Buckner Wellford et al., *Tennessee Joins States Extending Immunity to Businesses for COVID-19 Liability Issues*, BAKER DONELSON, (Aug. 24, 2020), <https://www.bakerdonelson.com/tennessee-joins-states-extending-immunity-to-businesses-for-covid-19-liability-issues> [<https://perma.cc/B2ZF-B7HZ>]; J. Micah Dickie, *Georgia Businesses Receive COVID-19 Liability Protection*, SOC'Y FOR HUM. RESOURCE MGMT. (Aug. 10, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/georgia-businesses-receive-covid-19-liability-protection.aspx> [<https://perma.cc/KG3M-BJ8F>]; Lisa Nagele-Piazza, *Here's What Employers Need to Know About COVID-19 Liability Shields*, SOC'Y FOR HUM. RESOURCE MGMT. (Sep. 4, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/what-employers-need-to-know-about-covid-19-liability-shields.aspx> [<https://perma.cc/7HYT-TAQR>] ("Some laws are broad, while others only protect employers in certain industries. For example, Georgia's law creates a rebuttable presumption that the plaintiff assumed the risk of exposure, transmission, infection or potential exposure to COVID-19, unless the plaintiff is asserting certain claims involving gross negligence, willful misconduct or reckless behavior.").

⁶⁷ See Annie Palmer, *There's a Fight Brewing Over Whether Companies are Responsible When Workers Get Coronavirus*, CNBC (June 19, 2020, 10:04 AM), <https://www.cnbc.com/2020/06/19/coronavirus-lawsuits-businesses-and-labor-groups-clash-over-liability.html> [<https://perma.cc/K4TR-945P>].

⁶⁸ See Jennifer Bennett Shinall, *Less is More: Procedural Efficacy in Vindicating Civil Rights*, 68 ALA. L. REV. 49, 2 (2016).

⁶⁹ How to File a Charge of Employment Discrimination, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/how-file-charge-employment-discrimination> [<https://perma.cc/NL9Z-N3L6>] ("The laws enforced by EEOC, except for the Equal Pay Act, require you to file a charge before you can file a lawsuit for unlawful discrimination.").

for employees since it can avoid both the costs and time expenditures associated with litigation.⁷⁰

F. Preemption

A final employer-friendly feature of many state paid sick leave laws addresses the common employer concern that a “patchwork of laws” governing employee benefits is too difficult for employers to navigate.⁷¹ As such, six state legislatures have included local preemption provisions within their paid sick leave laws. These provisions prevent localities within the state from passing a paid sick leave law more generous than the state law.⁷² When passed as part of a paid sick leave law, preemption provisions can represent a legislative compromise, meant to ease the administrative burden on employers attempting to comply with a web of state and local laws.⁷³ Note, however, that paid sick leave preemption provisions can take a decidedly more anti-employee form—sixteen states have passed paid sick leave preemption laws *in the absence of a state paid sick leave law*.⁷⁴ Such standalone preemption laws, often championed by ultra-conservative groups,⁷⁵ have been criticized as hamstringing localities from responding to worker needs, especially during the COVID-19 pandemic.⁷⁶

⁷⁰ For an examination of several local administrative processes to administer civil rights claims, and an argument that well-administered administrative processes are better for employees than litigation, see Jennifer Bennett Shinnall, *Less is More: Procedural Efficacy in Vindicating Civil Rights*, 68 ALA. L. REV. 49 (2016).

⁷¹ See Allen Smith, *HR Asks Congress for Relief from Growing Number of Paid Leave Laws*, SOC’Y FOR HUM. RESOURCE MGMT. (Dec. 7, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/hr-asks-congress-for-relief-from-growing-number-of-paid-leave-laws.aspx> [<https://perma.cc/AR68-UF74>] (“The maze of conflicting paid leave laws has become too burdensome for employers . . .”); see also SOC’Y FOR HUM. RESOURCE MGMT., *supra* note 52.

⁷² As seen in the above Table 1, Maine, Maryland, New Jersey, New York, Oregon, and Rhode Island’s paid sick leave laws all contain local paid sick leave law preemption provisions. See Table 1, *supra* Part I.A.

⁷³ But see Marni von Wilpert, *State and Local Policymakers Should Beware Preemption Clauses*, ECON. POL’Y INST. (Jan. 18, 2018), <https://www.epi.org/blog/state-and-local-policymakers-should-beware-preemption-clauses-snuck-into-legislation/> [<https://perma.cc/SD97-MCUN>] (“While preemption of local governments may seem a harmless compromise to get a bill enacted now, these laws can handcuff localities who may need to act to help working people in the future.”).

⁷⁴ See Alayna Alvarez, *As More Cities Push for Paid Sick Leave, States Push Back*, PEW RES. CTR. (Sept. 24, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/24/as-more-cities-push-for-paid-sick-leave-states-push-back> [<https://perma.cc/H59J-ZR3F>] (listing the states with local paid sick leave preemption laws).

⁷⁵ For example, standalone paid sick leave preemption laws are supported by the American Legislative Exchange Council as well as the Koch brothers. See *id.*

⁷⁶ See, e.g., H. Elizabeth Peters, John Marotta, & Emily Bramhall, *State Preemption of Local Paid Sick Days Ordinances: Lessons from a Pandemic*, URB. INST. (Oct. 29, 2020), <https://www.urban.org/research/publication/state-preemption-local-paid-sick-days-ordinances> [<https://perma.cc/E4VQ-RABW>]; Elise Gould & David Cooper, *COVID-19 Pandemic Makes Clear That We Need National Paid Sick Leave Legislation*, ECON. POL’Y INST. (Mar. 13, 2020, 3:04 PM), <https://www.epi.org/blog/covid-19-pandemic->

In sum, existing state paid sick leave laws include a variety of protections for employers; they are not strictly one-sided entitlements to employees at the expense of employers. In fact, as discussed in Part II of this Article, even in the absence of these additional employer protections, paid sick leave legislation may actually benefit employers by reducing presenteeism, assuming paid sick leave legislation works as intended. Thus, the critical question remains: Do paid sick leave laws work as intended? The next section discusses the currently available evidence on this question, which appears promising.

III. DOES PAID SICK LEAVE LEGISLATION WORK AS INTENDED?

Empirical research on the efficacy of paid sick leave legislation is in its infancy—in part because paid sick leave laws are relatively new, but also in part because little labor market data exist to address the question.⁷⁷ Testing whether a paid sick leave law functions in practice requires comparative data on how likely workers are to come to work sick, both before and after the law's passage. Yet knowing how likely workers are to come to work sick requires data on a worker's actual or self-reported disease status, which simply does not exist in the major U.S. observational labor market datasets.⁷⁸

Given the data limitations, only one prior article has examined the efficacy of paid sick leave laws empirically. Using Google citywide influenza data from the United States, the authors hypothesized that local spread of the disease would be lower in cities with paid sick leave laws (since workers citywide would feel less pressure to come to work sick).⁷⁹ The researchers

makes-clear-that-we-need-national-paid-sick-leave-legislation/ [https://perma.cc/EB6Q-DEKD]. For a thorough discussion of the recent rise in state preemption laws targeting more liberal local ordinances, see Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403 (2017).

⁷⁷ See Paid Sick Leave, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 21, 2020), <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx> [https://perma.cc/C7JM-KRG8] (showing that paid sick leave laws are relatively new, as the first was enacted in 2011).

⁷⁸ The American Community Survey, for example, does not ask respondents any questions about health or disease status. See 2014–2018 PUMS ACS Data Dictionary, U.S. BUREAU OF LAB. STAT. (2020), https://www2.census.gov/programssurveys/acs/tech_docs/pums/data_dict/PUMS_Data_Dictionary2014-2018.pdf [https://perma.cc/THA5-PKSW]. The Current Population Survey merely asks respondents to self-report their general health status on a scale of excellent to poor in its March Annual Social and Economic Supplement. See 2020 Annual Social and Economic Supplement Data Dictionary 6C-65, U.S. BUREAU OF LAB. STAT. (2020), <https://www.census.gov/data/datasets/time-series/demo/cps/cps-asec.html> [https://perma.cc/U5RZ-RW2X]. Moreover, even though the Behavioral Risk Factor Surveillance System contains far more information on respondents' health status, it does not ask about short-term diseases like influenza (other than vaccination status), nor does it ask about going to work sick. See CTRS. FOR DISEASE CONTROL & PREVENTION, 2018 BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM CODEBOOK (2019).

⁷⁹ See Stefan Pichler & Nicholas R. Ziebarth, *The Pros and Cons of Sick Pay Schemes: Testing for Contagious Presenteeism and Noncontagious Absenteeism Behavior*, 156 J. PUB. ECON. 14 (2017).

found evidence that influenza rates were lower in cities with paid sick leave mandates and found additional evidence supporting their hypothesis using German data.⁸⁰ Although the article could not directly tie the lower influenza rates to reduced workplace spread, it was highly suggestive that paid sick leave laws reduced worker presenteeism, which not only had positive effects on the workplace but on the entire locality.⁸¹

Supporting these prior empirical findings is a novel dataset which *does* directly measure worker presenteeism. The American Time Use Survey (ATUS) has been administered by the Bureau of Labor Statistics since 2003 to approximately half of households that have completed their participation in the larger Current Population Survey. Although the ATUS interview primarily focuses on respondents' time use throughout the day, the ATUS has occasionally included additional modules for respondents,⁸² including the Leave and Job Flexibilities Module.⁸³ The ATUS Leave Module was administered in 2017 and 2018 to all ATUS respondents who were employed, including both wage and salary workers.⁸⁴ For the purposes of this Article, ATUS Leave Module respondents answered two particularly salient questions: first, whether respondents took leave from their job the week prior to the survey because they were sick, and second, whether respondents abstained from taking leave from their job the month prior to the survey, despite the fact that they were sick.⁸⁵

The figure below ("Figure 1") presents the ATUS Leave Module responses to the first question. All estimates separate men and women, given the substantial literature indicating that health status may have differential (and perhaps intersectional) impacts based on a worker's gender.⁸⁶ The effects are substantial for men: male workers in states with paid leave

⁸⁰ *Id.* at 23–26.

⁸¹ *Id.* at 27.

⁸² One example of a widely used ATUS module is the Eating and Health Module. For another study using the ATUS Eating and Health Module, see Jennifer Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101 (2016).

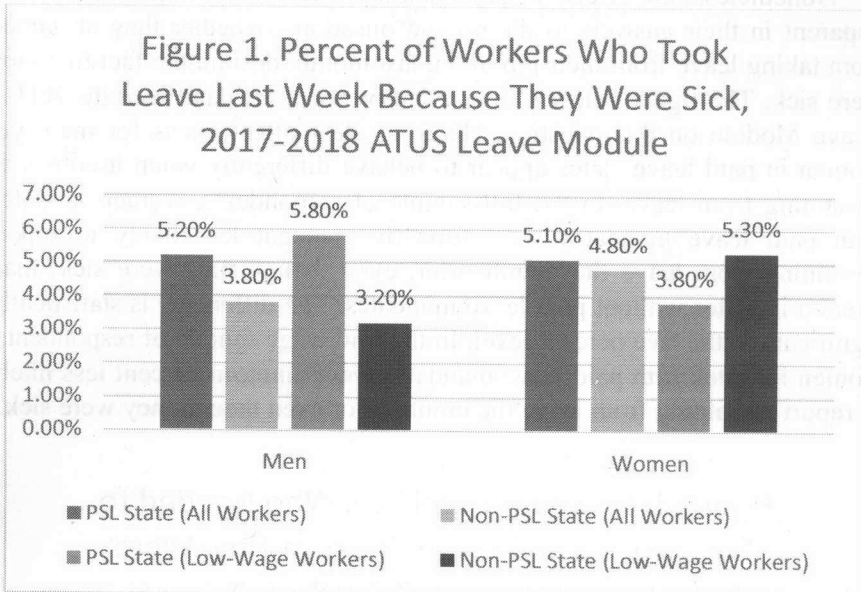
⁸³ The ATUS also included a Leave Module in 2011, but its questions and resulting data are not directly comparable to the 2017–2018 Leave Module and, thus, are excluded from the present study. See U.S. BUREAU OF LAB. STAT., AMERICAN TIME USE SURVEY USER'S GUIDE 20 (2020), <https://www.bls.gov/tus/atususersguide.pdf> [<https://perma.cc/52L7-UFUJ>].

⁸⁴ Self-employed workers were excluded from participating in the module. See American Time Use Survey Data Dictionary: 2017–2018 Leave and Job Flexibilities Module Data Variables Collected in the Module 3, U.S. BUREAU OF LAB. STAT. (2019), <https://www.bls.gov/tus/lvmintcodebk1718.pdf> [<https://perma.cc/S87Y-S5DM>].

⁸⁵ *Id.* at 13, 19.

⁸⁶ See, e.g., Michelle A. Travis, *Gendering Disability to Enable Disability Rights Law*, 105 CAL. L. REV. 837 (2017); Jennifer B. Shinall, *The Substantially Impaired Sex*, 101 MINN. L. REV. 1099 (2017); see also Kathleen Beegle & Wendy A. Stock, *The Labor Market Effects of Disability Discrimination Laws*, 38 J. HUM. RESOURCES 806 (2003); Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915 (2001).

mandates were thirty-eight percent more likely to report taking leave the week prior because they were sick than male workers in states without paid leave mandates. The difference is statistically significant at the five percent level. In contrast to men, no clear effect exists for women.



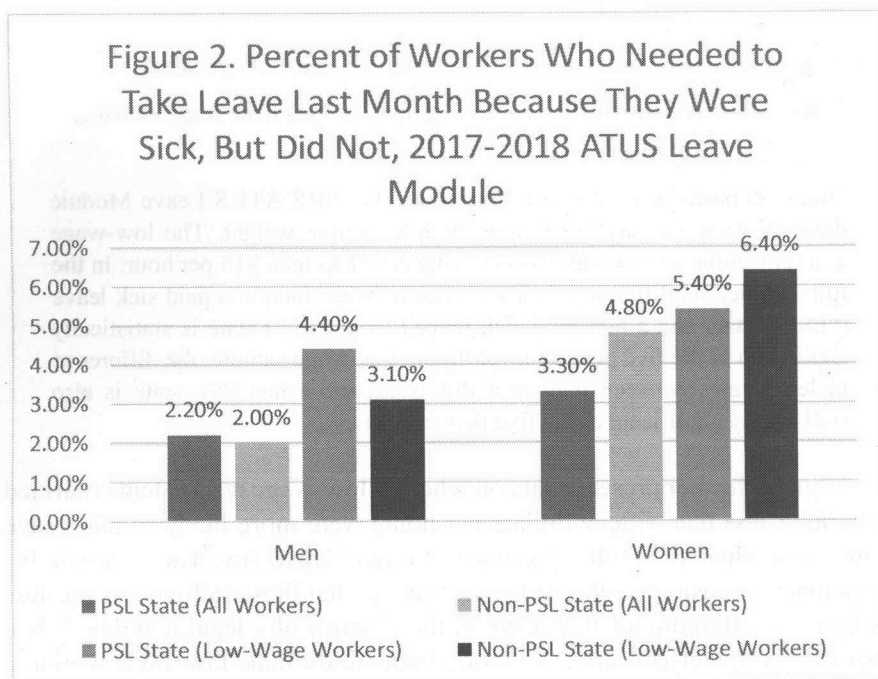
Notes: Reported estimates are from the 2017–2018 ATUS Leave Module data; all estimates use the Leave Module sample weight. The low-wage worker sample includes all workers who earn less than \$15 per hour. In the full sample, the difference in leave rates between men in a paid sick leave (“PSL”) state and a non-paid sick leave (“Non-PSL”) state is statistically significant at the five percent level. In the low-wage sample, the difference in leave rates between men in a PSL state and a non-PSL state is also statistically significant at the five percent level.

Figure 1 further presents data on whether low-wage respondents (defined as earning less than fifteen dollars per hour) were more likely to take leave from work when sick in the presence of a paid leave law. The rationale for particularly focusing on low-wage workers is that these individuals are less likely to be offered paid sick leave in the absence of a legal mandate.⁸⁷ Not surprisingly, the effects are even more dramatic for male low-wage workers: in states with paid leave mandates, male low-wage workers were eighty-one

⁸⁷ For a discussion of the gaps in voluntary employer provision of paid leave between low and high-status workers (in the context of paid *family* leave), see Bennett Shinall, *supra* note 24.

percent more likely to report taking leave the week prior because they were sick than those in states without paid leave mandates. The difference for men is again statistically significant at the five percent level. But as with the full sample analysis, no clear effect exists for women.

Nonetheless, the effects of paid sick leave laws on female workers are apparent in their answers to the second question—whether they abstained from taking leave from their job in the last month, despite the fact that they were sick. The figure below (“Figure 2”) presents the data from the ATUS Leave Module on this question. Here, no clear effect exists for men, yet women in paid leave states appear to behave differently when it comes to abstaining from leave. In the full sample of respondents, women in states with paid leave mandates were forty-five percent less likely to report abstaining from leave the month prior, even though they were sick, than women in states without paid leave mandates. The difference is statistically significant at the five percent level. In the low-wage sample of respondents, women in states with paid leave mandates were nineteen percent less likely to report abstaining from leave the month prior even though they were sick.



Notes: Reported estimates are from the 2017–2018 ATUS Leave Module data; all estimates use the Leave Module sample weight. The low-wage worker sample includes all workers who earn less than \$15 per hour. In the

full sample, the difference in leave rates between women in a PSL state and a non-PSL state is statistically significant at the five percent level.

Although men and women apparently respond to the two ATUS Leave Module questions in a systematically different manner, both questions address the issue of employee presenteeism. Taken together, the data on both questions suggest that male and female workers may be less likely to go to work ill in a state with a paid sick leave mandate. Given that reduction in employee presenteeism serves as a major justification in favor of passing such mandates, the ATUS Leave Module data corroborates earlier findings that paid sick leave laws work as intended. In future empirical research, I plan to unpack the ATUS Leave Module data more thoroughly to examine, among other issues, whether the apparent presenteeism effects hold once respondents' demographic and socioeconomic characteristics are taken into account.

CONCLUSION

More than ever before, the COVID-19 pandemic has exposed the dangers of encouraging employees to go to work sick.⁸⁸ Workers with contagious diseases can cost employers far more than just their individual loss of productivity due to illness.⁸⁹ If they spread their disease to their coworkers, they can cost employers an entire office full of productivity loss due to illness.⁹⁰ Yet unfortunately, since federal law does not guarantee any rights to *paid* leave under any circumstances, many workers presently have no choice but to go to work when they are ill. To call out of work—even with a highly infectious disease—could risk not only their paycheck, but their job security.

Although workers enjoyed a brief federal entitlement to paid leave during the COVID-19 pandemic via the FFCRA, that leave entitlement has now expired. In the absence of any additional leave entitlements, employers can expect worker presenteeism to rise and, as a result, transmission of COVID-19 and other contagious diseases to rise with it. Future empirical research should further examine how well paid sick leave mandates fill in the current

⁸⁸ “The most effective thing employers can do to prevent the spread of coronavirus is to make sure workers stay home when they are sick[.]” Lisa Nagele-Piazza, *Coronavirus Outbreak Prompts Employers to Review Sick Leave Policies*, SOC’Y FOR HUM. RESOURCE MGM’T (March 4, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-sick-leave-policies.aspx> [<https://perma.cc/7GH8-7KQ7>].

⁸⁹ See Hemp, *supra* note 16.

⁹⁰ *Id.*

gaps in federal workplace protections, but the initial empirical evidence is promising—state paid sick laws appear to work as intended and reduce presenteeism. Thus, paid sick leave laws may be all that stands between a functioning workplace and shutdown, particularly during a pandemic.