

PAID SICK LEAVE AND PAID FAMILY AND MEDICAL LEAVE LAWS: *STAYING AHEAD OF THE TREND*



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Introduction

Over the past decade, the leave of absence landscape has experienced a sea change as states and municipalities nationwide have adopted a myriad of laws and regulations governing paid time off in the private sector.

Much of the initial state legislation consisted of paid sick leave laws requiring employers to provide paid time off when an employee is ill or injured. However, states quickly expanded the reach of mandatory paid leaves to require paid time off to care for ill or injured family members or if the employee or a family member has been the target of domestic or sexual assault, harassment, or stalking.

One of the most impactful trends in leave-of-absence legislation has been the enactment of state paid family and medical leave programs (PFML). These PFML programs provide workers with paid leave benefits during qualifying periods of absence. Laws mandating some form of PFML benefits have been enacted in California, New Jersey, Rhode Island, New York, Washington, Massachusetts, District of Columbia, and most recently, Connecticut and Oregon. Hawaii provides paid leave benefits to covered employees under a state disability program.



In an incredibly broad leap, two jurisdictions – Maine and Nevada – passed laws in 2019 mandating that certain private employers provide eligible employees with paid time off that can be used for any purpose. When these laws go into effect, employees will be able to use accrued paid time off, up to a maximum number of hours per year, for whatever reason the employee chooses.

The rapid proliferation of state and local paid leave laws, with differing and potentially conflicting requirements, presents significant administrative and compliance challenges for employers, especially those with multi-state operations. This paper describes the rise of paid sick leave and family and medical leave legislation and offers insights for employers affected by the rapid evolution in paid leave laws.

Accessibility of Paid Sick Leave

The basic concept of sick leave is easy to grasp: **time off from work, paid or unpaid, on account of an employee's temporary inability to perform job duties because of illness or injury.** Many employers do not want employees coming to work when they are sick. But the reality for many workers is that they cannot afford taking time off of work without pay or job protection.



In the United States, employers are not required to provide paid sick leave to their employees, absent an applicable paid sick leave law. The U.S. Department of Labor's Bureau of Labor Statistics reports that, in March 2018, "71 percent of workers in private industry had paid sick leave benefits. About 6 in 10 of those workers received a fixed number of sick leave days each year. Four percent could use sick days as needed, and the rest were in consolidated leave plans, which provide time off for workers to use for a variety of purposes."¹

The amount of sick leave provided by employers to employees varies by size of the employer and length of service. On average, however, private sector workers in the U.S. received an average of seven days of sick leave per year in 2018:

Average number of paid sick leave days per year for workers in private industry, by length of service and establishment size, March 2018 ²

Length of Service	All Establishments	1 to 49 workers	50 to 99 workers	100 to 499 workers	500 workers or more
After 1 year	7	6	6	7	8
After 5 years	7	7	6	7	9
After 10 years	7	7	6	7	9
After 20 years	8	7	6	8	10

Kin Care Legislation

The U.S. Department of Labor's statistics above reveal that more than 1 in 4 private sector workers remain without access to paid sick leave. Further, not every employer that offers paid sick leave does so pursuant to a policy that is sufficient to cover the health needs of employees and their families. Traditionally, paid sick leave policies permitted paid time off only for an employee's own health needs --not when the employee needs to care for the health needs of an employee's family member such as a dependent child, spouse, or elderly parent.



1 in 4 private sector workers remain *without* access to paid sick leave

Almost two decades ago, a few states began addressing this perceived gap by enacting the first “kin care” laws.³ Kin care laws require employers with existing sick leave policies to allow employees to use a portion of available sick leave to care for an injured or ill family member. Kin care laws, however, do not require employers to offer paid sick leave; they merely mandate an additional reason for which employer-provided sick leave may be used. Kin care laws continue to be introduced in state legislatures, especially in states that do not mandate other forms of paid family leave.⁴ In 2019, New Mexico enacted a caregiver leave act that permits employees who have accrued paid sick leave to use it for family caregiving duties.⁵

The Rise of Mandatory Paid Sick Leave Legislation

Mandatory paid sick leave laws followed in the wake of kin care legislation. In 2007, San Francisco became the first municipality to mandate that employers provide paid sick leave to employees.⁶ In 2011, Connecticut became the first state to enact a law requiring employers in the state to provide paid sick leave to certain employees in the private sector.⁷

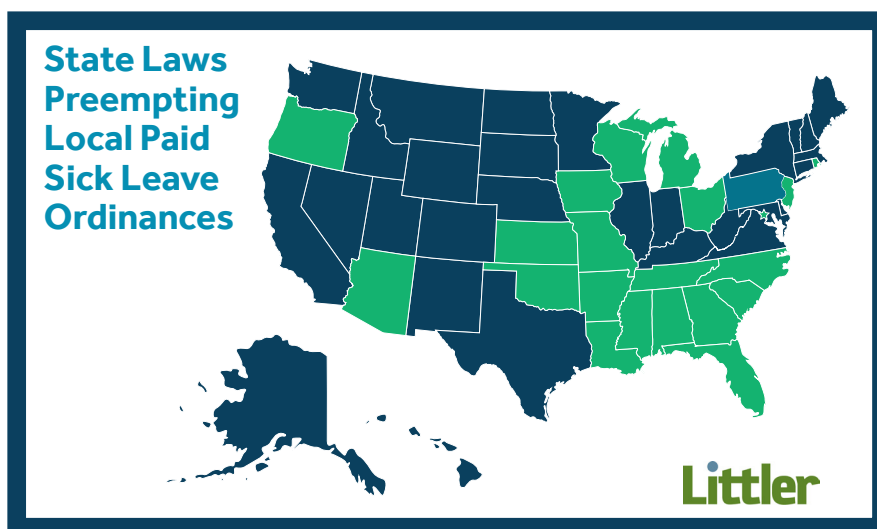
These firsts paved the way for a plethora of similar legislation to be implemented by cities, counties, and states across the nation. As of the date of publication, eleven states and the

District of Columbia have enacted statewide laws requiring private employers to provide paid sick leave to workers: Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont, Washington, and D.C. Many of these laws also permit employees to use the mandated paid leave as “safe” time for reasons related to domestic or sexual violence, assault, harassment, and/or stalking.

To date, more than twenty individual municipalities – including towns, cities, and counties – have passed local laws requiring paid sick leave in the private sector. However, some of these mandates, such as the one enacted in Eugene, Oregon, have been nullified by subsequently passed state legislation preempting the local laws, as discussed below.⁸ Others have been halted by legal challenges in the court system, including the ordinances passed in Austin, Texas and Pittsburgh, Pennsylvania.⁹

Stay in Your Lane: *Preemption Legislation*

In response to local governments’ activity in the paid sick leave arena, numerous states have passed legislation prohibiting local governments and municipalities from passing local paid leave laws. To do so, they invoke the power of the state to “preempt” local laws providing greater or different rights than those provided under state law. As shown in green in the graphic below, almost half of the U.S. states have passed preemption legislation.¹⁰



Preemption legislation can be seen by some as unfriendly to workers’ rights, but supporters of preemption claim it is necessary to avoid regulatory inconsistencies and ensure that burdensome labor costs are not being imposed on employers which

could hurt businesses and discourage companies from hiring workers in the state. In addition, without preemption, employers operating in a single location may potentially be covered by multiple laws, such as a city ordinance, a county law, and/or a state law, all of which may impose different requirements regarding the provision of sick leave. One example is in Chicago, where employers may be covered by the Chicago city ordinance mandating paid sick leave and the Cook County county-wide ordinance requiring paid sick leave.¹¹ Another is in Montgomery County, Maryland, where employers may be covered by Maryland’s statewide sick leave law as well as Montgomery County’s local sick leave ordinance.¹² Compliance with multiple regulatory schemes on the same type of benefit can be confusing and onerous for employers.

Paid Family and Medical Leave: *States Take the Lead*



The federal Family and Medical Leave Act of 1993 (FMLA), which requires employers with 50 or more employees to provide unpaid time off to eligible employee for certain reasons, is more than two decades old. In the past 25 years since the FMLA's enactment, the U.S. Congress has not enacted a law that would require paid time off for an employee's medical or family-care needs.¹³

In the absence of a federal solution, states have stepped in to enact laws that provide either paid disability benefits and/or paid family and medical leave benefits that offer partial wage replacement when workers must miss work due to their own serious health condition, in order to bond with a new child, or to care for family members with a serious illness or injury.

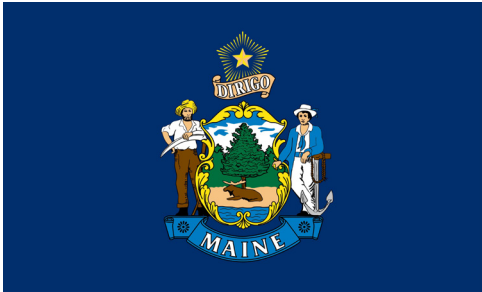
As stated in the introduction, eight states plus the District of Columbia have passed legislation establishing some sort of paid family and/or medical leave program, although some of these new PFML laws have not yet been implemented. Each year, additional states introduce similar legislation so the trend toward passing these laws will likely continue.

**8 states plus the
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The difficulty facing employers is that these paid family and medical leave laws differ greatly from state to state. Some states have combined family and medical leave insurance programs, while others offer separate disability and family care insurance programs, or only a disability insurance program. The eligibility requirements, responsibility for monetary contributions into the program, amount of contributions, qualifying reasons for leave, number of weeks of wage replacement benefits, amount of weekly benefits, and process for obtaining benefits under the programs all vary by jurisdiction. The result is a complex web of state entitlements that must be addressed on top of any employment benefits offered by individual employers.

Paid Time Off for Any Purpose: *The Next Generation*



The newest type of state leave law is paid time off that may be used for any reason. Passed in 2019, Maine and Nevada will require employers to provide accrued paid time off that can be used by employees for any purpose, up to a usage cap. Just as private employment policies have progressed from separate vacation and sick time accruals to a single paid time off (PTO) accrual, these new laws do not require the same degree of policing and involvement by the employer to confirm the validity of the purposes underlying the leave. Because of this, laws requiring general paid time off are less likely to result in employers eliciting extraneous information concerning an employee's health and family medical history. Illustratively, Nevada's law specifically states that employees do not have to

provide any reason to the employer for a request to use leave accrued pursuant to the new law.¹⁴

On their face, these laws may seem simpler for employers and liberating for employees, however, they can create potential pitfalls if employees are using paid time off for purposes that may be covered by a job-protected leave law such as the federal FMLA or a similar state law. For example, if an employee does not provide information to an employer that would allow the employer to designate time off as FMLA leave when FMLA-qualifying, the employer may inadvertently run afoul of the law. Further, if an employer is not aware that an employee may be ill, injured, or disabled, the employer may not know whether it needs to take further actions, such as referring an injury for workers' compensation coverage, engaging in the ADA interactive process, or requiring a fitness-for-duty certification before return to work.

Two states do not make a trend, but it will be interesting to see if other states follow the lead of Maine and Nevada in mandating paid time off to be taken for any reason.



The Rise of Mandatory Paid Sick Leave Legislation

The web of interrelated and potentially conflicting paid leave laws makes employer compliance difficult. To help you navigate the murky compliance waters, here are our best practice tips:

- Carefully examine current leave and payroll policies and practices to ensure that employees covered by applicable laws are receiving the benefits to which they are (or will become) entitled.
- If you have a paid sick leave policy, consider whether you may continue to use that policy (with or without revisions) to meet any state or local mandated paid sick time entitlements.
- If you provide paid disability, medical leave, bonding/parental leave, or other family leaves in states that have enacted state-administered disability or family and medical leave programs, determine whether your current policies may be revised to meet the requirements of the state program so that upon state approval, your private plan will exempt you from the state program.
- Even if not opting to use a private plan in lieu of a state-administered PFML program, consider whether your existing policy should be revised to reflect that employer-provided benefits will run concurrently with the state benefits, may be used to “top off” benefits paid by the state agency to equal 100% of the employee’s wages during leave, or may be offset by the amount of state benefits.
- Remember that employers may not be able to “force” employees to apply for state PFML benefits, so there may be circumstances when employees may use both the state and employer-provided benefits.
- Update employee handbooks, portals, or intranet sites to reflect new benefits that employees are entitled to receive under applicable laws.
- Train human resources personnel, managers, supervisors, and payroll specialists on the leave laws applicable to your workforce, especially as it relates to avoiding discrimination and retaliation against employees who use paid leaves.
- Stay apprised of new leave laws that may impact your organization by subscribing to Reed Group’s blog (www.reedgroup.com/blog/) and listening to our quarterly compliance webinars

Multi-state employers face significant challenges in administering the myriad of paid leave laws, including complying with notice requirements, handling overlapping benefits, tracking job-protected leaves, and other tricky leave requirements. Engaging ReedGroup's absence management services to handle these tasks for you may be the most effective and compliant solution to address the ever-changing leave landscape.

Please contact us for more information and a demonstration of our industry-leading software, LeavePro® here:

reedgroup.com/contact-us/#sales



Additional Resources

If you'd like to learn more about paid sick leave and paid family and medical leave laws, we offer more detailed analysis on many different topics.

To access updated, cutting edge information on leave developments, be sure to check out Reed Group's compliance blog at www.reedgroup.com/blog/ and our Compliance Quick Tips on our YouTube channel at <https://bit.ly/2YD2TNy>.

Information provided in this whitepaper is intended for general educational use. It is not intended to provide legal advice. ReedGroup does not provide legal services. Consult an attorney for legal advice on this or any other topic.

Sources

- ¹ Bureau of Labor Statistics, U.S. Department of Labor, The Economics Daily, Private industry workers with sick leave benefits received 8 days per year at 20 years of service, <https://www.bls.gov/opub/ted/2019/private-industry-workers-with-sick-leave-benefits-received-8-days-per-year-at-20-years-of-service.htm> (visited July 07, 2019).
- ² Bureau of Labor Statistics, U.S. Department of Labor, National Compensation Survey: Employee Benefits in the United States, March 2018, https://www.bls.gov/ncs/ebs/benefits/2018/benefits_leave.htm (visited July 07, 2019).
- ³ Effective January 1, 2000, employers in California who offered paid sick leave to their employees were required to allow those employees to use up to one-half of accrued sick leave to care for an ill child, parent or spouse who is ill. See California Labor Code § 233.
- ⁴ For example, legislators introduced a kin care bill in New York in January 2019 that would require employers with 50 or more employees to allow sick leave to be used for the care of employees' immediate family, household members or domestic partners in those medical situations not covered by the federal FMLA. See New York Assembly Bill 1214, https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01214&term=2019&Text=Y.
- ⁵ On April 3, 2019, New Mexico Governor Michelle Lujan Grisham signed legislation (S.B. 123) enacting the Private Caregiver Leave Acts.
- ⁶ San Francisco Admin. Code § 12W et seq., <https://sfgov.org/civilservice/SAN-FRANCISCO-ADMINISTRATIVE-CODE>.
- ⁷ Connecticut Paid Sick Leave Act, Conn. Gen. Stat. § 31-57r et seq., <http://www.ctdol.state.ct.us/wgwkstnd/SickLeaveLaw.htm>.
- ⁸ Or. Rev. Stat. §§ 653.601 et seq.
- ⁹ See e.g., <https://www.texastribune.org/2018/08/17/state-appeals-court-temporarily-blocks-austins-paid-sick-leave-ordinan/> (viewed 7/24/19).
- ¹⁰ MICHAEL LOTITO, D. MARK WILSON, SEBASTIAN CHILCO, CORINN JACKSON, AND E.R. ANDERSON, PAID SICK LEAVE: DECONSTRUCTING THE PATCHWORK TO DEVELOP A WAY FORWARD (May 6, 2019), https://www.littler.com/files/wpi_paid_sick_leave_report_-_may_2019.pdf (Appendix A).
- ¹¹ Cook County Earned Sick Leave Ordinance, Cook County Code §§ 42-1 et seq.; Chicago Code §§ 1-24-010 et seq.
- ¹² Md. Code Ann. Lab. & Empl. §§ 3-1301 et seq.; Montgomery County Code Chapter 27, Article XIII.
- ¹³ Numerous bills have been introduced in both houses of Congress over the years, but to date, none have passed. See e.g., Senate Bill 463, "Family Act," introduced by Kirsten Gillibrand (D-NY) on Feb. 12, 2019, which would provide up to 12 weeks of partial wages for leave for certain reasons; Senate Bill 920, "New Parents Act of 2019," introduced by Marco Rubio (R-FL) and Mitt Romney (R-UT) on March 27, 2019, which would allow parents to pull forward up to 3 months of their Social Security benefits to use for paid parental leave in exchange for delaying their receipt of Social Security retirement benefits.
- ¹⁴ Nevada Senate Bill No. 312; <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6553/Text>.