

**Statement by The ERISA Industry Committee
to the
Committee on Education and Labor
Subcommittee on Workforce Protections
U.S. House of Representatives**

Hearing
**Balancing Work, Health, and Family: The Case for Expanding the Family and Medical
Leave Act**

February 11, 2020

Introduction and About The ERISA Industry Committee (ERIC)

Chairwoman Adams, Ranking Member Byrne, and members of the Subcommittee, thank you for this opportunity to submit a statement for the record on behalf of The ERISA Industry Committee (ERIC) on the hearing entitled, “Balancing Work, Health, and Family: The Case for Expanding the Family and Medical Leave Act.”

As Congress and the House Committee on Education and Labor Subcommittee on Workforce Protections (the Subcommittee) consider federal paid family and medical leave legislation, it is critically important to recognize that millions of employees already receive generous paid leave benefits funded solely by large, multistate employers. Representing large employers with workers across the country, ERIC urges the Subcommittee to ensure that efforts to address this issue do not impede the ability of large, multistate employers to continue to provide generous paid leave benefits to their nationwide workforce. These employers are already being forced to restructure and rethink their benefits programs due to the inconsistent, complex, and varied state paid leave programs, standards, and requirements that currently exist and are continually proliferating and expanding. In addition, ERIC urges the Subcommittee to support the large employers that pay for generous paid leave benefits without participation in a federal program by exempting them from administrative requirements of state and local paid leave program rules, as well as any additional federal rules that are implemented.

While today’s federal paid leave debate currently centers around either the need for paid family and medical leave benefits by today’s workforce or the economic feasibility of expanding access to them, there remains an unfortunate lack of discussion regarding the effect that the current state patchwork has had on the ability of multistate employers to continue designing and providing generous paid leave benefits for millions of their American workers. This hearing provides an important opportunity to highlight the need to ensure that efforts to expand the availability of paid leave benefits do not harm the employees who are already receiving benefits that support families across the country.

Collectively, the companies that ERIC represents provide the greatest source of paid leave benefits for American workers. Each of you and your constituents likely engage with an

ERIC member company on a daily basis when you drive a car or fill it with gas, use a cell phone or a computer, visit a bank or hotel, fly on an airplane, watch TV, benefit from our national defense, go shopping, receive or send a package, use cosmetics, or enjoy a soft drink. In addition to paid leave benefits, our member companies offer comprehensive retirement and health benefits to their employees and their families to attract and retain talent as well as provide well-being and peace of mind for their workforce. As states implement more rules and requirements pertaining to paid leave, it becomes more difficult for national employers to comply with the various rules established by the states. These costs of compliance do nothing to expand the benefits available to workers and their families. Consequently, state laws which are meant to expand paid leave benefits to their citizens are having the opposite effect for employees of large, multistate employers. The Subcommittee has an opportunity to address this problem and support paid leave programs without placing the burdens directly on taxpayers by exempting employers that already provide paid leave benefits from federal and state program rules.

Large Employers Already Provide Significant Paid Leave Benefits

Since its enactment in 1993, the federal Family and Medical Leave Act (FMLA) remains the only piece of federal legislation applicable to family and medical leave for private sector employees and has worked as the basis from which employer-provided paid leave benefit program standards have been drawn and implemented. While this legislation marked an expansion of access to leave benefits, many American workers remain unable to make use of this leave due to their inability to miss a paycheck and take needed time off to care for themselves or their family without endangering their financial security. As such, we understand the Subcommittee's interest in expanding this legislation. However, millions of employees do currently enjoy paid leave benefits and are able to do so thanks to the programs provided by their employers.

The greatest source of paid family and medical leave benefits to American workers to date remains large, multistate employers that design and administer generous employee benefit plans tailored to best fit the needs of their employees. According to data from the Bureau of Labor Statistics, 11% of private industry workers employed by a company with fewer than 50 employees have access to paid family leave benefits; for those working for an employer with between 50 and 99 employees, this rate rises to 15%; for those with between 100 and 499 employees the rate is 18%; and for those with 500 or more employees, the rate rises further to 25%.¹ This increase remains true for even larger, multistate employers – such as ERIC member companies which range in size from 10,000 to over 1 million employees working in the United States.

In order to demonstrate the invaluable role that large, multistate employers have played in securing and providing these paid leave benefits for their employees, ERIC surveyed member

¹ Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Access to paid and unpaid family leave in 2018 on the Internet at <https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm> (visited October 07, 2019).

companies to quantify current paid family and medical leave benefit practices.² Of survey participants: 90% provide paid parental leave to care for or bond with a newly born or adopted child; 65% provide paid family leave to care for a family member with a serious medical illness; and 100% provide both short-term and long-term disability leave to attend to a serious personal medical incapacity. In addition to leave benefits categorized as family and medical leave similar to those established by the FMLA, ERIC member companies are at the forefront of designing and providing other types of paid leave benefits such as maternity leave, bereavement leave, marital leave, school event leave, sabbaticals, and general paid time off that state and federal insurance programs do not have the means or resources to design and provide.

The issue at the center of today's political paid family and medical leave debate should not be whether to impose further mandates and restrictions on large, multistate employers that already provide generous benefits, but rather how to allow these employers to continue providing these benefits on a consistent and nationwide basis. ERIC encourages Congress to exempt employers that provide paid leave benefits from current state mandates and any future state and federal mandates on paid leave benefits.

State Paid Family and Medical Leave Laws Create a Complicated Patchwork for Multistate Employers

In the decades since enactment of the FMLA, the public movement for a national paid family and medical leave policy has been taken up by state legislatures. Since California's creation of the first ever state-administered paid family and medical leave insurance program in 2004, seven additional states and the District of Columbia have enacted legislation creating similar social insurance programs – no two of which share the same standards, definitions, available benefits, or compliance requirements. This trend of independent state legislation has continued to grow, as more than 35 states introduced and considered over 350 bills related to paid leave during the 2019 state legislative sessions alone. This activity suggests an imminent expansion of the patchwork of laws, regulations, guidance directions, and administrative processes that multistate employers will need to contend with in a very short period of time in order to comply and continue productive operation in these states.

As discussion of national paid family and medical leave continues, federal debate fails to recognize and address the severe impact that the current patchwork of state programs has had on multistate employers as well as the millions of employees nationwide to whom these employers currently provide generous paid family and medical leave benefits. With the creation of each new state program, employers have been laden not only with the direct costs of funding these social insurance programs, but with the legal, consulting, and administrative costs of ensuring compliance with each and every unique state program requirement, ultimately affecting their ability to continue to design and provide innovative paid leave benefits for their employees.

² The survey of membership was voluntary and does not represent a scientific survey. Twenty-nine member companies participated in the survey. These participating member companies represent roughly 3 million employees.

Our survey revealed that 86% of participating companies currently operate in 40 or more states and manage their employee benefit programs to comply with the contribution, administration, reporting, and other requirements of all existing state paid family and medical leave programs, demonstrating the daunting compliance task currently faced by these companies. This is in addition to the cost of actually providing the benefits. The pattern of continuous revision of state policies carries with it ever-growing costs on national, multistate employers, threatening to undermine the ability of these employers to continue advancing and providing the very paid family and medical leave benefits that these state programs are intended to advance.

Compliance with state paid family and medical leave insurance programs impose draining costs that are independent from, and unrelated to, actually providing paid leave benefits to employees. These costs include, but are not limited to, deciphering and translating program requirements, hiring benefits administration staff, and building the expansive infrastructure needed to support these new compliance efforts. The nature and extent of each costly compliance endeavor depends on the unique procedures of each state program and needs to be independently repeated for each and every jurisdiction that decides to create its own paid family and medical leave program.

Below is a list of some of the issues that impose compliance costs and other burdens on national employers. These issues demonstrate that simply paying more benefits will not erase these burdens. These challenges all highlight the real and present need for federal legislation that provides relief from the current patchwork of state paid family and medical leave standards to allow large, multistate employers to continue to provide generous, effective, and efficient benefits to their employees across the country.

a. Administrative Burdens

Administrative burdens imposed on employers include requirements as to how to provide employees with notice of paid leave benefits, the timing and language of the notices, recordkeeping, reporting, and information technology systems, the costs of which in no way provide better paid leave benefits for employees. Employers are often required to maintain duplicate records that are either already gathered and retained by state administrators, or irrelevant records that have no bearing on administration of the state program. For example, the recordkeeping requirements of the D.C. Universal Paid Leave Program require employers to report all dates of family and medical leave taken by all employees, as well as prepare and provide a full description of all paid and unpaid leave benefits offered by the employer – information that is irrelevant to the administration of the program’s paid family and medical leave benefits.³

For businesses operating in multiple states and maintaining comprehensive records on their employees, uniformity of administrative systems and practices is critical to their ability to function efficiently at scale. In order for these businesses to effectively administer paid leave programs, they must be able to implement a comprehensive, uniform system. However, the

³ D.C. Mun. Regs. tit. 7, § 3408(j)

differing requirements and stipulations created by individual state paid family and medical leave programs make this impossible and unnecessarily costly.

b. Treatment of Contractors and Temporary Employees

Existent state paid family and medical leave programs treat individuals contracted to complete work for an employer very differently. While some programs clearly and concisely limit benefit eligibility to individuals directly and regularly employed by an employer, as is the case under the FMLA, some programs – like that of Massachusetts – have complicated this area by making employers responsible for the notice, recordkeeping, reporting, contribution, and administration requirements related to paid family and medical leave program benefits.⁴ One member company interviewed by ERIC shared that not only do policies like this burden employers with administrative responsibility for those outside of their own company, but also force employers to reconsider operational practices, like hiring contractors, moving forward.

While policies like this are intended to prevent loopholes for employers like staffing agencies and further expand access to paid family and medical leave, they result in an unnecessary layer of compliance burdens for the large number of employers that make regular use of contractors for a wide range of short-term tasks and may lead to a decrease in commerce conducted between employers and contractors who rely on their contracts. This problem becomes even more complicated considering that contractors often travel for work across multiple jurisdictions and regularly change domiciles, making the calculus of how benefits are tracked and administered nearly impossible – particularly when jurisdictions have different reporting and tracking requirements.

c. Interaction with Other Paid Leave Benefits

Paid family and medical leave is only one of many different types of employee benefits offered by employers to their workers across the country. No one-size-fits-all benefit policy could ever be designed that would satisfy every employee in every industry. As states place more and more emphasis on paid family and medical leave and continue to individually increase leave amounts and expand the standards governing this one type of leave, they ultimately curtail the flexibility of employers to design and provide new and creative leave benefits that are best tailored to the needs of their individual workforce.

Moreover, state programs are not uniform in the way that they require paid family and medical leave to interact with the different types of leave offered by employers. For example, states have established various employee eligibility and waiting requirements, affecting the ability of workers in different states to access state paid leave benefits. In addition, they often require employees to interact with both the state program and the employer program, further complicating the process employees must follow to receive their benefits. The complexity of

⁴ Mass. Gen. Laws ch. 175M, § 1; Mass. Gen. Laws ch. 149, § 148B(a)

state requirements, which vary from program to program, create substantial stress for employees already undergoing trying periods of their lives.

d. Employee Benefit Parity

Employers take pride in the benefits they are able to offer their workforce and largely desire to provide equitable, generous benefits to all of their employees regardless of where they live or work. Aside from employee recruitment, retention, and increased overall productivity, a major reason for this desire stems from the value of employee transferability between different locations when an opportunity for promotion or transfer becomes available or when an employee simply wants to relocate due to personal or familial factors. Because the current patchwork of state paid family and medical leave programs often establish differently structured benefits in different states and jurisdictions, employers that wish to maintain parity of benefits between employees in different states have to perform a balancing act to ensure that i) employees in one state are not receiving inferior benefits compared to their counterparts in another state because of differences in state program standards, and ii) that employees are not dissuaded from otherwise desirable relocation because they are wary of the difference in available employee benefits. While employers strive to avoid these discrepancies and maintain uniform benefits across their national operation, it is extremely difficult to do so completely under the current patchwork of state paid leave programs.

e. Limitation of Wage Replacement

The portion of wage replacement provided by state programs varies widely between states and is never the full amount of wages that the individual would have received if they had continued to work instead of taking family and medical leave. Levels of wage replacement are typically further limited by a statewide cap on the total amount an individual can receive in a pay period. These wage replacement levels stand in stark contrast to paid family and medical leave benefits provided by employers who typically pay the entirety of ordinary wages to an employee on leave.

The wage replacement rates of state paid family and medical leave programs stand in stark contrast to the voluntary benefits provided directly by employers, who typically pay the entirety of ordinary wages to an employee on leave, as if they were still working during their period of leave. All member companies interviewed by ERIC reported that they provide full wage replacement to employees on paid family and medical leave, without caps or limits. While many state programs allow employers to provide supplemental benefits to offset the difference between state program wage replacement and the wages normally earned by an employee, this creates a two-tiered benefit administration system, ultimately burdening employees in need of wage replacement and creating unnecessary administrative costs for employers. Furthermore, this can cause inconsistent benefit outcomes among employees which, as mentioned above, contradicts the primary reason that employers implement nationwide benefits.

f. Employer Vulnerability to Specious Litigation

By operating in multiple states, employers are required to comply with the laws and regulations of the various states and ultimately open themselves to the risk of potential litigation under the laws of that jurisdiction. The laws and regulations surrounding compliance with state paid family and medical leave programs are no different in this regard. However, as the majority of these state programs are relatively new, there is very little understanding of, or precedent for, how particular state program requirements are to be interpreted and enforced by the courts of different states.

A prime example of the ways in which states have begun to establish dangerous legal liabilities involves employee job protection while on leave. Under the FMLA, and most state paid leave programs, an employee is protected from retaliation by their employer due to their use of qualified leave and the employee must be returned to the same or an equivalent position upon return from leave as they held prior to taking leave. However, in Massachusetts language was included in the creation of the state program stipulating that any negative change in an employee's terms of employment experienced while on qualified leave, or during the following six months, is presumed to be retaliation on the part of the employer.⁵ Furthermore, to rebut this presumption, an employer must provide clear and convincing evidence that the employer had sufficient independent justification for taking such action.⁶

Instances such as this presumed discrimination represent an egregious step by state programs which have the potential to open employers up to a wide range of extremely costly legal challenges; legal oversights such as these could effectively debilitate employee management of any kind by employers. By treading into legal standards that were once uniform under federal law and the FMLA, states have begun to dangerously balkanize the predictability of employer operation within their jurisdictions and drive a wedge between employers and employees that would not otherwise exist.

Employers that Offer Paid Leave Benefits Need Relief from State and Federal Mandates

ERIC member company anxieties are exacerbated by the rapidly expanding patchwork of state paid family and medical leave policies, each of which implement their own unique and exclusive standards, definitions, and requirements that operate independent of comparable state or federal criteria. These requirements do not add to the value of paid leave benefits; compliance with such a diverse and fluid set of state standards negatively impacts the ability of large, multistate employers to provide valuable paid family and medical leave benefits to their employees across the country. We strongly encourage the Subcommittee to provide relief from the current patchwork of state paid family and medical leave standards for our member companies – who currently provide generous paid family and medical leave benefits to their employees.

⁵ Mass. Gen. Laws ch. 175M, § 9(c)

⁶ *Id.*

Conclusion

Thank you for this opportunity to share our views with the Subcommittee. The ERISA Industry Committee and our member companies are committed to working with Congress toward a solution that allows employers who already provide generous paid leave benefits to continue to do so without being subject to state or federal mandates and the burdensome costs that come with them. We look forward to working with the Subcommittee and all other interested parties to enact legislation that expands access to paid leave benefits for more Americans without any unintended, negative consequences to those already receiving these valuable benefits.