



Paying the Way

Large Employers and
the State Paid Leave Patchwork

ERIC

THE ERISA
INDUSTRY COMMITTEE
*Shaping benefit policies
before they shape you.*

ERIC is a national advocacy organization that exclusively represents large employers that provide health, retirement, paid leave, and other benefits to their nationwide workforces.

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With member companies that are leaders in every sector of the economy, ERIC advocates on the federal, state, and local levels for policies that promote flexibility and uniformity in the administration of their employee benefit plans.

ERIC members are large, nationwide employers—generally companies with more than 10,000 employees—that provide comprehensive employee benefits to workers and families across the country. ERIC represents member companies exclusively in their capacity as large plan sponsors.

Individuals at ERIC member companies serve in one of three capacities:



**Benefits Design
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In-House Legal Counsel



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Executive Summary

Large employers provide generous paid leave benefits to their nationwide workforce on a voluntary basis, paid for with employer funds. They offer these paid leave programs not only to recruit and retain talent, but to ensure financial security and flexibility for their employees, especially in times of need. However, these programs are being upset—and sometimes even dismantled—due to the cost and operational challenges of complying with an ever-increasing number of state and local paid leave mandates.

Many states and localities go well beyond mandating that employers must provide paid leave, also imposing on employers burdensome administrative requirements that do nothing to increase the benefits employers provided to their workers. The proliferation of administrative, record-keeping, and compliance burdens are creating a costly regulatory nightmare, particularly for employers with operations in many states.

Consequently, state laws that are meant to expand paid leave benefits to their residents are having the opposite effect for employees of large, multistate employers. In order to comply with various rules and mandates, large employers find they must restructure their benefits based on the peculiarities of state rules and not on what may provide the most valuable benefits to their employees. As a result of this patchwork of redundant state requirements, employees who previously received valuable and efficient paid leave benefits through their employers have experienced a decline in the benefits they receive.

As Congress considers federal paid leave legislation, lawmakers must ensure that any proposal supports the ability of large, national employers to provide uniform and generous paid leave benefits to their employees across the country and does not add to the already unwieldy state paid leave patchwork. The employers that voluntarily offer valuable paid leave benefits to their national workforces do not ask for government help in paying for or providing these benefits, but for a national paid leave exemption or safe harbor that provides relief from the current patchwork of inconsistent and arbitrary state policies, which ultimately do nothing to secure better benefits for their employees.

Representing large employers with workers in every state, The ERISA Industry Committee (ERIC) is an integral part of policy debates surrounding paid leave benefits. While today's federal paid leave discussion currently centers around either the need for employees to have paid family and medical leave benefits or the economic feasibility of expanding access to paid leave benefits, there remains an unfortunate lack of discussion regarding the effect that the current state patchwork has on the ability of multistate employers to design and provide generous paid leave benefits for their millions of American workers.

This paper highlights the problems created by the current patchwork of state and local paid leave policies as well as the need to ensure that federal, state, and local paid leave legislation supports employers already providing voluntary and generous employer-funded paid leave benefits that aid workers and their families across the country.

HISTORY AND BACKGROUND

What we today refer to as “family and medical leave” was first categorized and popularized by the 1993 enactment of the Family and Medical Leave Act (FMLA), which required employers with 50 or more employees to provide up to 12 weeks of unpaid leave for qualifying employees to tend to serious personal events like the birth or adoption of a child, the sickness of a family member, or one’s own personal medical incapacity. Since its enactment, the FMLA has been the basis from which employers have voluntarily designed and offered paid leave benefits to their nationwide workforces.

While the FMLA provides broad access to unpaid family and medical leave, access to paid leave benefits is available primarily to employees working for large, multistate employers.¹ According to data from the Bureau of Labor Statistics,²

- ▶ 11% of private industry workers employed by an employer with fewer than 50 employees receive such 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%
- ▶ For those with 500 or more employees, the rate rises further to 25%

Among ERIC member companies, each of which has thousands of employees across the country, this rate of increase continues and demonstrates the historic success of large, multistate employers in expanding access to paid leave benefits.

In the absence of federal action in the area of paid leave policy, advocates for paid leave benefits have gone state by state (and city by city) to foster discussion of these policies and seek the creation of mandatory state paid leave insurance programs.³ California created the first state-mandated paid family and medical leave insurance program in 2004, which compiles wage contributions to fund wage replacement benefits for employees taking family or medical leave. Since then, seven additional states and the District of Columbia have enacted legislation creating similar mandatory insurance programs, each of which provides varying levels of paid leave benefits and applies its own unique requirements and compliance burdens. Significantly, no two jurisdictions share the same standards, definitions, available benefits, or compliance requirements, meaning that employers operating across multiple states have to contend and comply with inconsistent, and sometimes conflicting, state programs. This trend of independent state legislation has continued, as more than 35 states introduced and considered over 350 bills related to paid leave during 2019 state legislative sessions alone.

1 The Families First Coronavirus Response Act was passed in response to the pandemic created by COVID-19 (novel coronavirus) and created, for the first time, federally-mandated paid sick and family leave benefits applicable to private employers with fewer than 500 employees for certain COVID-19 related absences. While this significantly expanded paid leave benefits available to employees working for smaller employers, the provisions of the law are temporary and apply only from April 1, 2020 through December 31, 2020.

2 Bureau of Labor Statistics, U.S. Department of Labor, The Economics Daily, Access to paid and unpaid family leave in 2018 at <https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm> (visited April 17, 2020).

3 Many cities and localities around the country have adopted ordinances requiring employers to provide specified paid leave benefits to employees within their jurisdiction, regardless of existing paid leave programs or laws applicable throughout their state. These local policies have further fragmented the current paid leave patchwork and cause regular overlap and conflict between inconsistent paid leave standards.

As Congress continues to debate current national paid family and medical leave proposals, federal legislators should be aware that the current patchwork of state programs already has had severe negative impact on large, 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 insurance programs, but also 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 or administer a single plan designed for their nationwide workforce.

Congress has an opportunity to provide relief from the patchwork of current state and local policy burdens, granting employees and employers with much needed flexibility and ultimately improving the paid leave benefits enjoyed by millions of American workers and their families.

LARGE COMPANY SURVEY FINDINGS

To better understand the challenges created by the current patchwork of state paid family and medical leave programs, ERIC conducted a survey of our member companies, each of which employs more than 10,000 employees, and held interviews with executives of these companies—individuals who directly oversee employer paid leave benefit programs. Our survey of employer experience with paid family and medical leave explored the extent of current paid leave benefits offered by multistate employers, the problems posed by compliance with differing state programs, and the unintended impact that the current state patchwork has on workers' paid leave benefits.

The survey and interviews illuminated the extent to which large, multistate employers currently design and provide generous paid leave benefits to their employees nationwide, regardless of whether state or local paid leave mandates apply to them. Of the ERIC member company survey participants:

- ▶ 100% provide access to both short-term and long-term disability leave to address a serious personal medical incapacity⁴
- ▶ 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

In addition to providing family and medical leave benefits, these companies are at the forefront of designing and providing additional paid leave benefits such as sick leave, safe leave, maternity leave, bereavement leave, wedding leave, school event leave, and general paid time off that are not addressed in state paid leave programs. The value and scope of these benefits provided by large, multistate employers stand in stark contrast to national private-sector averages and frequently surpass the leave provided by state-mandated paid leave programs.

Of critical concern, however, our survey and interviews identified that many state programs have had counterproductive effects on the level of benefits that multistate employers offer their employees. Despite operating in a wide range of industry sectors and managing independent employee benefits programs, all the multistate employers that ERIC interviewed reported a number of common concerns significant to the federal paid leave conversation:

⁴ Short-term and long-term disability benefits are used by employees to take paid time off of work to address their own physical or medical incapacity to work. State paid family and medical leave laws and programs provide leave for an employee's own illness or incapacity, but do not consider the redundancy that is created in light of widespread access to short-term and long-term disability benefits addressing the same concern.

- ▶ The current patchwork of one-size-fits-all state program standards often creates inefficient administration processes
- ▶ Rigid state paid leave programs remove large employers' flexibility to address the unique paid leave needs of their workforce
- ▶ Expansive state paid leave legal standards expose employers to liability and specious litigation
- ▶ State paid leave policies do not effectively consider their impact on multistate employers already providing valuable, generous, and consistent benefits on a nationwide basis
- ▶ The challenges posed by inconsistent state paid leave laws ultimately drain resources that would be used to provide more valuable paid leave benefits

ERIC presents this report to help policymakers and all interested parties:

- ▶ Recognize the successes that large, multistate employers have had in designing and providing generous and efficient paid leave benefits to their nationwide workforces
- ▶ Understand the complex challenges and costs imposed by the current patchwork of state paid family and medical leave rules
- ▶ Realize the urgent need to provide employer relief from the patchwork of inconsistent state paid family and medical leave laws and programs

Large, multistate companies are at the forefront of supporting employees by voluntarily providing a wide range of valuable paid leave benefits, including:

- ▶ Parental Leave
- ▶ Family Leave
- ▶ Medical Leave
- ▶ Sick leave
- ▶ Safe leave
- ▶ Maternity leave
- ▶ Bereavement leave
- ▶ Wedding leave
- ▶ School event leave



Table of Contents

Executive Summary	2
Table of Contents	6
Introduction	7
Current State of Paid Family and Medical Leave	9
Federal Activity in Family and Medical Leave	9
Large Employers Already Provide Significant Paid Leave Benefits	10
State Paid Family and Medical Leave	12
The Multistate Compliance Landscape	13
Challenges Posed by the Current Patchwork of Paid Family and Medical Leave.....	15
Administrative Burdens	16
Treatment of Independent Contractors and Temporary Employees	18
Interaction with Other Paid Leave Benefits	19
Employee Benefit Parity	20
Limitation of Wage Replacement	21
Complication of Employee Access to Benefits	22
Disincentivized Creation of Voluntary Benefit Programs.....	22
Employer Vulnerability to Specious Litigation	23
Conclusion.....	24



Introduction

Paid leave benefits provide critical financial security and flexibility to today's workforce, granting employees job protection, the ability to better balance work and family life, and ultimately improving productivity within their work environments. The enactment of the federal Family and Medical Leave Act of 1993 (FMLA) formed the contemporary understanding of "family and medical leave," which provides qualifying employees with unpaid, protected leave time to care for a new child (following birth, adoption, or placement for foster care), to care for an ailing family member, to address one's own personal medical condition or need for preventive care, or for certain military-related absences (such as to care for a servicemember).

While the FMLA provides unpaid leave to millions of Americans, many large employers go far beyond this by voluntarily designing and providing generous paid leave benefits to their employees. Despite this, not all sizes of employers are able to provide these valuable benefits. As a result, advocates for paid leave have created a broad political movement at the federal, state, and local levels to expand access to paid family and medical leave benefits through direct employer mandates and social insurance programs. States intend for these mandates and programs to provide employees with job protection as well as continuing income that enables leave to be accessed with peace of mind; however, they unfortunately ignore the paid leave successes of large, multistate employers.

The ERISA Industry Committee (ERIC) appreciates efforts to secure access to paid leave benefits for those Americans that do not currently have them, but we are concerned that aggregate efforts at the state and local level have unintended, negative consequences on the employees who already have access to these critical benefits as well as the employers that currently offer them. While there remain employers unable to provide these valuable benefits, and there is room for state initiatives to aid them in doing so, the aim of state paid leave policy should not be to harm the employees that already receive these benefits or the employers that already provide them.

Therefore, ERIC urges policymakers to provide relief from the complex state patchwork of burdensome administrative and compliance requirements so employers can continue to provide valuable paid leave benefit programs directly to their nationwide workforce, free of the inefficient influences of state and local mandates and any future federal mandate.

ERIC recently conducted a survey of our large employer member companies and interviewed member companies' employee benefits executives. Our survey of employer practices explored the extent of current paid leave benefits offered by multistate employers, the problems posed by compliance with differing state program requirements, and the unintended impact that the current state patchwork has on workers' paid family and medical leave benefits.

As this paper discusses, while many large employers proactively provide paid family and medical leave, the additional burden of complying with a complex patchwork of state program requirements is significant and costly. Compliance in today's paid leave landscape is not a matter of simply providing more benefits; it requires companies to decipher ever-changing state requirements and maintain multiple independent employee benefit programs, each with different structures, reporting requirements, and definitions. As Congress looks at federal legislation addressing paid family and medical leave, we urge lawmakers to recognize that:

- ▶ Large, multistate employers are already proactively providing generous paid leave benefits funded entirely by the employer
- ▶ Large employer paid leave programs are at the cutting edge of benefit design, often reaching beyond circumstances included in traditional “family and medical leave”
- ▶ The ability of large, multistate employers to provide innovative, flexible benefits nationwide supports American workers and marketplace competition
- ▶ The patchwork of compliance requirements mandated by state paid leave programs places untenable burdens and costs on large, multistate employers
- ▶ These costs and challenges ultimately hurt employees by affecting the benefits that their employers are able to design and provide while complying with the patchwork of inconsistent state standards





Current State of Paid Family and Medical Leave

FEDERAL ACTIVITY IN FAMILY AND MEDICAL LEAVE

Since its enactment in 1993, the federal FMLA has been the basis from which employer-provided paid leave benefit program standards have been drawn and implemented. The FMLA currently entitles those working for an organization with 50 or more employees to take up to 12 weeks of unpaid, job-protected leave each calendar year to care for a new child (following the child's birth or placement through foster care or adoption), to care for the employee's spouse, child, or parent who has a serious medical condition, to address a serious personal health condition that makes the employee unable to perform the essential functions of his or her job, or to attend to certain military-related absences (including to care for an injured servicemember).

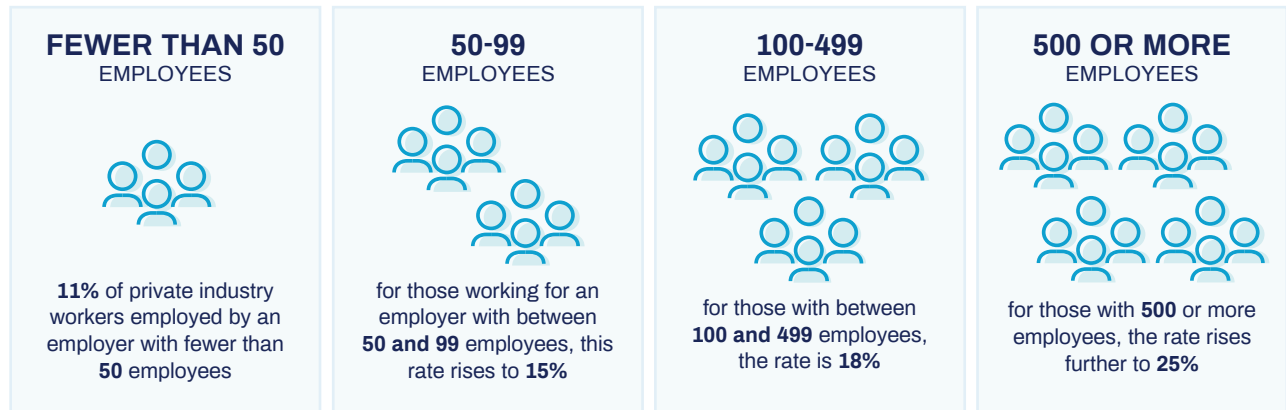
While the FMLA marked an expansion of access to unpaid leave benefits, it is important to realize that millions of employees currently enjoy paid leave benefits because of voluntary programs provided and funded entirely by their employers. If state programs become too burdensome or costly, employers may be forced to reduce certain paid leave benefits that they currently provide or draw resources from other employee benefits. Thus, state programs could result in the very opposite effect of what is intended.

LARGE EMPLOYERS ALREADY PROVIDE SIGNIFICANT PAID LEAVE BENEFITS

The enactment of the FMLA established broad access to unpaid leave benefits and prompted many employers to consider designing and providing generous paid leave benefits to millions of their employees. Large, multistate employers have continued to popularize and innovate these valuable benefits in order to recruit and retain talent, foster employee well-being, and, therefore, gain a competitive edge in their respective industries. Companies have developed flexible benefit programs tailored to the individual needs of both their employees and their businesses as a whole. These paid leave programs treat employees fairly regardless of the state in which they live or work. Competitive employment practices have since continued to foster steady innovation and improvement in paid family and medical leave and have led to the creation by large employers of the most generous paid leave benefit practices enjoyed by American workers today.

The greatest source of paid family and medical leave benefits for American workers to date has been large, multistate employers that design and administer generous employee benefit plans tailored to best fit the needs of their employees.⁵

Large employers offer the most paid leave benefits



This data shows a direct correlation between the size of an employer and both the ability and likelihood of providing paid family leave benefits to their employees. This proportionate increase includes larger, multistate employers—such as ERIC member companies which each have 10,000 or more employees working in the United States.

In order to determine the role that large, multistate employers have played in securing and providing paid leave benefits for their employees, ERIC conducted an online survey of member companies to quantify current paid family and medical leave benefit practices.⁷ Of survey participants:

- ▶ 100% provide both short-term and long-term disability leave to attend to a serious personal medical incapacity
- ▶ 90% provide paid parental leave to care for and bond with a newly-born or adopted child
- ▶ 65% provide paid family leave to care for a family member with a serious medical illness

Notably, these numbers dwarf the BLS data described above and national averages of smaller-sized employers as multistate employers design their paid leave benefit programs to be efficient and scalable on a national stage.

In addition to leave benefits categorized as family and medical leave, similar to those established by the FMLA, the companies surveyed and interviewed by ERIC are at the forefront of designing and providing paid leave benefits such as maternity leave, bereavement leave, wedding leave, school event leave, sabbaticals, and general paid time off that state programs do not provide or require. Because large, multistate employers have historically had the flexibility to tailor employee benefits to the unique needs of their workforces, their employees have been able to have access to a spectrum of generous benefits that extend far beyond paid family and medical leave. The value and scope of these benefits also stand in stark contrast to national private-sector averages.

⁵ We recognize that the Families First Coronavirus Response Act established narrow paid leave for parents whose child or dependent had their school or care facility closed as a result of COVID-19; however, it is a temporary mandate and the long-term impact is unclear.

⁶ Bureau of Labor Statistics, U.S. Department of Labor, The Economics Daily, Access to paid and unpaid family leave in 2018 at <https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm> (visited October 07, 2019).

The successful paid leave programs of large, multistate employers should serve as models and inspiration for proposed government programs at the federal, state, and local levels aimed at securing these benefits for a greater part of America's workforce. A recent compilation report from the National Partnership for Women and Families details the role that large, multistate employers have played in developing new and improved paid family and medical leave benefits. The report provides a list of more than 100 large companies that have expanded their paid leave benefits since 2015 alone.⁸

The issue at the center of today's political paid family and medical leave debate is not whether large, multistate employers are doing enough to provide these critical benefits to their employees, but rather how to best encourage the evolution of private-industry practices and expand access to these benefits for a larger portion of America's workforce. To best accomplish these goals, Congress must provide relief from the patchwork of various state and local mandates that have undermined the efficiency and value of voluntary employer-provided paid leave benefit programs.

"There is a misconception that large employers and their labor force are in direct conflict over these issues, but this could not be further from the truth. These benefits are invaluable to our employees and, at the end of the day, if employees are not productive, the company is not productive."

Senior Benefits Executive, Fortune 500 Pharmaceutical Company



STATE PAID FAMILY AND MEDICAL LEAVE

In the decades since enactment of the FMLA, the public movement for a national paid family and medical leave policy to bridge the gap between available employer-provided benefits and universal access has continued to grow. In the absence of federal legislation addressing this movement, state legislatures have taken up the task of attempting to secure these benefits for more of their residents. This shift started in California, which began operation of the very first state-mandated paid family and medical leave insurance program in 2004, demonstrating how a state could take action in this space. California did not mandate that all employers provide paid family and medical leave benefits to their employees. Instead, the state created a social insurance program that collects contributions from employers based on employee earnings to be later accessed by employees when the need for family and medical leave arises.

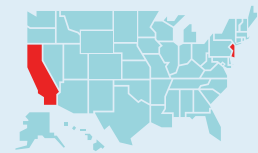
While the California program provided an opportunity for additional workers to attain paid leave benefits, large companies that already provided generous paid family and medical leave benefits had to run parallel programs or alter their employee benefits programs to comply with the particular requirements established by the state program, regardless of the generosity of the employer's existing benefits. In 2009, New Jersey followed suit, creating its own state paid family and medical leave insurance program with its own independent program standards, causing employers there to similarly rearrange employee benefits programs to meet unique compliance requirements. These new statutes also meant that multistate employers with employees in both California and New Jersey now had to design and operate two completely different employee benefits programs, separate from the original paid leave program that they were previously providing.

These new state insurance programs signaled the start of an exponential spread of state paid family and medical leave policies. In the years since these original state programs were created, six additional states and the District of Columbia have enacted legislation creating their own paid family and medical leave insurance programs, no two of which share the same program standards, definitions, available employee benefits, or compliance requirements. As of 2020, California, Connecticut, the District of Columbia, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington have each created their own paid family and medical leave insurance program. Three of these programs began operation in 2019 alone, while legislation creating similar programs in two additional states was enacted in the same year. The result has been a torrent of new administrative challenges and costs for employers without noticeable change to the paid leave benefits received by their employees in these new states.

“These state policies do not happen in a vacuum; they have real-world impacts on businesses and affect their ability to administer the benefits that their employees need most.”

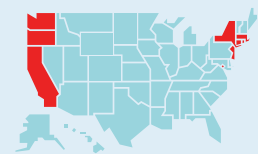
Senior Benefits Executive, Fortune 500 Pharmaceutical Company

Changing patchwork of paid leave laws and programs



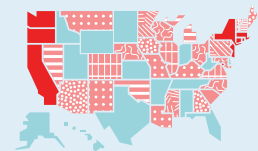
Pre-2009

California and New Jersey



2020

California, Connecticut, The District of Columbia, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington



Future State Patchwork

More than 35 states considered over 350 pieces of paid leave legislation in 2019 alone.

THE MULTISTATE COMPLIANCE LANDSCAPE

“So much emphasis is put on one-size-fits-all paid leave benefits under state policies, that people who have different benefit needs are overlooked.”

Benefits Program Manager, Fortune 500 Consumer Food Company

There are now seven separate state paid family and medical leave insurance programs in operation across the country, with two others currently in regulatory development.⁹ With the creation of each new state program, employers have been laden not only with the direct contribution or administrative costs of participation in the new program, but also with the legal, consulting, and additional administrative costs of ensuring compliance with the individual requirements of every unique state program. According to a 2018 Mercer survey of employer absence and disability management practices, 64% of participating employers (of different sizes and in various industries) reported seeing an increase in resources needed to handle state and locally mandated paid leave over the past five years.¹⁰ This rise in costs is largely attributable to the nature of state paid family and medical leave programs, each of which features a long list of requirements and definitions that vary from state to state, including:

- ▶ Duration of leave
- ▶ Method of program funding
- ▶ Definition of family member
- ▶ Benefit eligibility
- ▶ Job protection
- ▶ Coordination of benefits
- ▶ Benefit accrual—and many others

Employers that operate across the country with employees who live or work in different cities and states experience even greater costs when complying with the many and varying jurisdictional requirements. Unlike local and regional employers that have only one state law with which to comply, large, multistate employers must meticulously adapt their expansive employee benefit programs to incorporate the standards established by different state laws, regardless of how generous their established benefit programs are. The ultimate goal of these state paid leave policies should be to provide valuable benefits to employees, not micromanage employers' benefit administration.



⁹ This paper does not address temporary paid leave programs established in response to the COVID-19 pandemic, including the Emergency Family and Medical Leave Expansion Act passed as part of the FFCRA. It is unclear what impact these time-limited benefits will have on the landscape of state and local paid leave throughout the United States.

¹⁰ Mercer, Survey on Absence and Disability Management: 2018 Survey Report (2018)

Our member company survey revealed that 86% of our large employer respondents now operate in 40 or more states and currently manage their employee benefit programs to comply with the specific contribution, administration, reporting, and other requirements of all existing state paid family and medical leave programs—evidence of the daunting compliance task faced by these companies. In addition, emerging regulations and updates to state programs add ever-increasing costs for multistate employers. These costs threaten to undermine the ability of these employers to continue designing and providing the very paid family and medical leave benefits that these state programs are intended to encourage.

Even with these existing challenges, the burden of implementing state paid family and medical leave programs is poised to expand. During the 2019 state legislative sessions, more than 35 states introduced and considered over 350 bills related to paid leave. Of these, several states are on the verge of passing legislation that would create their own paid family and medical leave insurance programs, and dozens are expected to take up the topic again in future sessions.¹¹

The value of paid leave benefits, as well as the desire to expand access to them, has only been highlighted by the COVID-19 public health emergency, which spurred federal legislators to create temporary emergency paid sick leave and emergency paid family and medical leave programs. These federal responses have placed even further strain on employer-provided paid leave benefits of all shapes, sizes, and sources. This increasing activity, both at the state and federal levels, points toward a substantial expansion of the patchwork of laws, regulations, guidance directions, and administrative processes that multistate employers will need to contend with in the future – none of which helps to fund more generous paid leave benefits for American workers or their families. Federal policymakers must therefore address the pressing need to streamline the state patchwork and allow voluntary employer-provided benefit programs to maximize the paid leave benefits available to their employees.

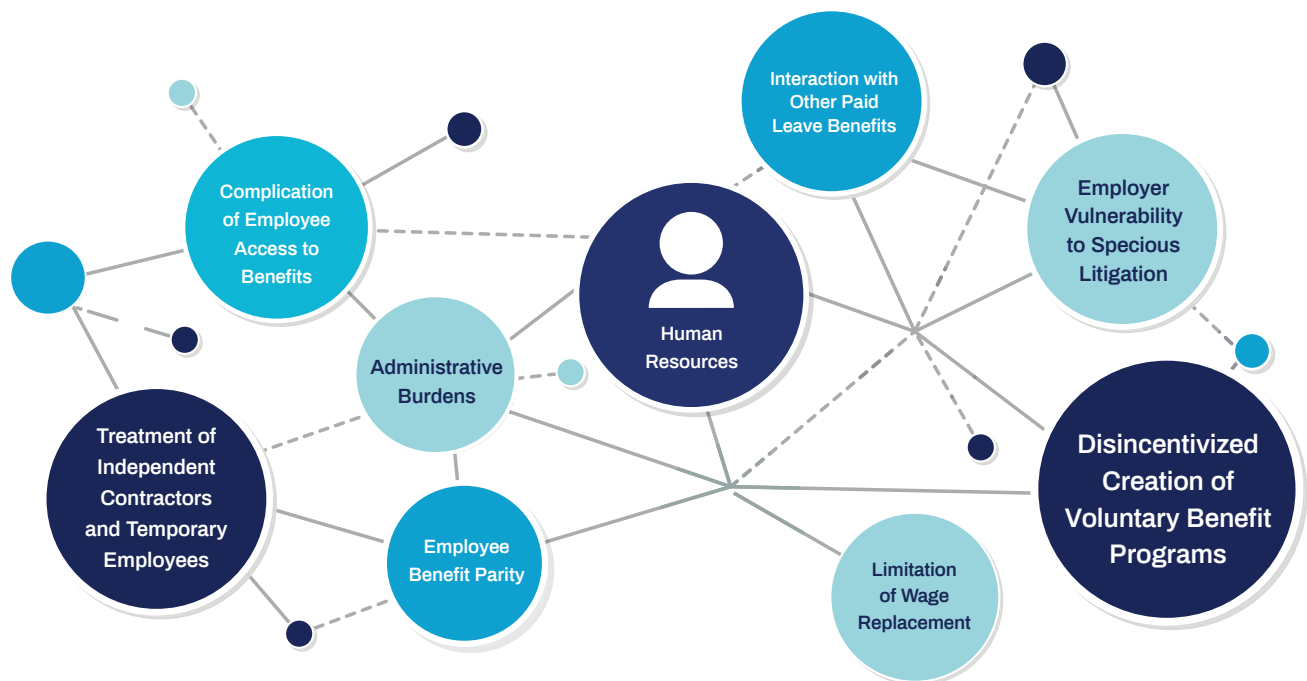
11 It is expected these efforts will only intensify as states continue to respond to the economic and health crisis posed by the COVID-19 pandemic.



Challenges Posed by the Current Patchwork of Paid Family and Medical Leave

In addition to conducting our survey, ERIC interviewed member companies' benefits executives—in industry sectors ranging from manufacturing to banking, transportation, computer technology, and health care—in order to gain a more detailed understanding of the specific challenges imposed on employers by the current patchwork of state paid leave standards. Despite operating in different industries and managing separate and unique employee benefits programs, benefits executives enumerated several common challenges. Many of these pressing problems have been echoed by business communities throughout the country that have often shared their concerns with state and local legislators and regulators, as well as with ERIC.

Below, we highlight key challenges that underscore the urgent and immediate need for federal legislation that provides relief from the current patchwork of state paid family and medical leave standards and allows large, multistate employers to continue to provide generous, effective, and efficient benefits to their employees across the country.



ADMINISTRATIVE BURDENS

Compliance with state paid family and medical leave insurance programs impose excessive costs that are independent from, and unrelated to, actually providing benefits to employees. These costs include, but are not limited to, deciphering and translating program requirements, analyzing impacts on and coordination with existing company benefits, 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 depend on the unique features of each state program and need to be independently repeated for each and every jurisdiction that decides to create its own paid family and medical leave program.

Predictably, these costs are a major concern for employers. In fact, 47% of employers stated that mitigating administrative costs was their single greatest priority moving forward within employee absence program administration; this was the top reported concern among survey participants.¹² The best way to achieve this priority is for federal lawmakers to provide relief from the unnecessary administrative costs imposed by the state patchwork and establish a process by which large, multistate employers that voluntarily offer generous paid leave benefits, across the country can be exempt from individual state standards.

Employee Notice

Much like the federal FMLA, state paid family and medical leave programs require employers to provide notice to their employees informing them of the benefits made available by the standards of each state program. Each state imposes unique notice requirements that cover not only the content and form of the notices, but a range of timing requirements as well. Added together, large employers are required to comply with dozens of requirements related to notice which, depending on the particular state program, can be duplicative and disorganized. While a majority of states require that notice simply be provided to an employee upon hire, other states have adopted far more onerous notice requirements. For example, New Jersey requires employers to provide notice to an employee when they are hired, when the employer is notified of an employee's need for leave, and upon request of the employee.¹³

These notice requirements alone require constant attentiveness on the part of employers as penalties are often imposed for a failure to do so. Under the D.C. Universal Paid Leave Program, employers are similarly required to provide notice to employees via a poster, annually, upon hire, and at any time the employer becomes aware that leave is needed (regardless of whether paid leave under the program is specifically requested by the employee).¹⁴ Furthermore, employers who fail to provide this wide array of notices in D.C. are also assessed a penalty of \$100 per employee, per day, when notice is not provided as required.¹⁵ Penalty schemes like this can easily pile up, posing enormous liability for multistate employers and potential disaster for smaller employers. Again, penalties like these are incredibly harmful to businesses, and do nothing to improve the benefits available to their employees.

While employees certainly need to be informed as to the paid family and medical leave that is available to them, multistate employers operating across different cities, towns, counties, and states are faced with major compliance challenges when forced to update and distribute different notices at different times to employees within the same company. These requirements create additional confusion and uncertainty for employers that allow telework or have mobile or temporary personnel who work in more than one state,

¹² Mercer, Survey on Absence and Disability Management: 2018 Survey Report (2018)

¹³ N.J. Admin. Code § 43:21-39.1(g)

¹⁴ D.C. Mun. Regs. tit. 7, § 3407.7

¹⁵ Id.

as modern work structures are often difficult to reconcile with a patchwork of state employee benefit laws. Such a notice regime undermines the ability of employers to efficiently communicate with a nationwide workforce. These costs only continue to accumulate when states make changes or amendments to the standards of their programs, requiring employers to reevaluate compliance parameters and redesign physical and electronic notices.

Record-Keeping and Reporting Requirements

State paid family and medical leave programs typically create requirements that employers collect, retain, and submit data on their employees to the state administrative organization that regulates the program. The required information spans a broad data range from employee wages, hours worked, dates of pay, and dates of hire, to more personal data otherwise protected as confidential, such as tax information. Employers are also often required to maintain duplicative 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 record-keeping 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 and is only required as data for other government studies.¹⁶

For businesses operating in multiple states and maintaining comprehensive employment records, uniformity of national record-keeping systems and practices is critical to their ability to function efficiently at scale. In order for these businesses to track the eligibility for, accrual of, and use of benefits by tens of thousands of employees, they must be able to implement a comprehensive, uniform system compatible with benefit plan requirements and systems. However, the different record-keeping requirements created by individual state paid family and medical leave programs make this nearly impossible, as employers are forced to document, compile, and report certain information in particular states, but do not have a uniform, multistate reporting mechanism available to them. Thus, multistate employers are required to implement more than one records system to track different information required by individual state programs. Moreover, in an effort to expedite benefit payments to employees, employers are often given very limited periods in which to evaluate and respond to governmental requests, requiring that systems not only be comprehensive, but also that specific items be quickly retrievable. Implementing these additional systems is an administrative and financial burden that takes resources away from other benefit programs.

“A small number of organizations are fortunate enough to have the attorneys and resources that are needed to stay on top of and comply with these constantly changing state paid leave standards. I cannot imagine how state lawmakers expect employers of different sizes to be able to cope with this patchwork while trying to grow and expand to other states.”

Senior Benefits Program Manager, Fortune 500 Benefit Management Company

¹⁶ D.C. Mun. Regs. tit. 7, § 3408(j)

In today's information age, large employers are primarily dependent on digitized telecommunications and record-keeping systems to be able to expand into multiple states and maintain seamless operations, as well as manage thousands of employees, across different jurisdictions. Many of the individual record-keeping and benefit administration standards established by different state paid family and medical leave programs are incompatible, and many companies have found it to be an unsurmountable challenge to develop a unified IT system that can support compliance with all state program requirements.

The difficulty of including different or conflicting state program standards in a single employer benefit program means that employers are often forced to hire and manage different technology vendors in order to establish and operate multiple digital systems. According to Mercer's 2018 employer survey, 38% of participating employers have had to hire third-party administrators to stay on top of the tracking, administrative, and compliance requirements of state and local paid leave ordinances.¹⁷ Despite this type of action, however, reliance on third-party vendors means that critical employer databases are often unable to exchange information smoothly between one another, leading to burdensome and inefficient administration of workforces across the country. For example, a member company participating in an ERIC interview shared that, due to different paid family and medical leave requirements in California and New York, it must maintain differently structured digital record-keeping systems, and that these systems must be maintained separately from one another, without data-sharing capabilities. This incompatibility causes the management of vast corporate structures to become increasingly fragmented, inefficient, and expensive.

TREATMENT OF INDEPENDENT CONTRACTORS AND TEMPORARY EMPLOYEES

Existing 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 employed by an employer for a certain minimum period, as is the case under the FMLA, some programs—like that of Massachusetts—have complicated this area by making employers responsible for the notice, record-keeping, reporting, contribution, and administration requirements related to paid family and medical leave program benefits for contract workers as well.¹⁸

These policies result in an unnecessary layer of compliance burdens for the many employers that make regular use of contractors for a wide range of short-term tasks. This problem becomes even more complicated for contractors who often travel for work across multiple jurisdictions and regularly change domiciles. This type of mobility makes the calculus of how benefits are tracked and administered nearly impossible—particularly when jurisdictions have different reporting and tracking requirements.

¹⁷ Mercer, Survey on Absence and Disability Management: 2018 Survey Report (2018)

¹⁸ Mass. Gen. Laws ch. 175M, § 1; Mass. Gen. Laws ch. 149, § 148B(a)



Until issues such as these are addressed by lawmakers at the federal level, employees and employers will continue to be plagued by incompatible and sometimes conflicting state and local standards.

INTERACTION WITH OTHER PAID LEAVE BENEFITS

Large employers like ERIC member companies offer many different types of paid employee benefits to their workers across the country in addition to paid leave, including:

- ▶ Parental leave
- ▶ Family leave
- ▶ Medical leave
- ▶ Sick leave
- ▶ Safe leave
- ▶ Maternity leave
- ▶ Bereavement leave
- ▶ School activity leave
- ▶ Wedding leave
- ▶ General paid time off, and many more



A major reason why employers offer such a vibrant variety of paid leave benefits is that employees have individual needs and that there are few benefits or reasons for leave that all workers will need or make use of in any given year. No one-size-fits-all benefits 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 increase leave amounts, and expand certain 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 workforce.

Furthermore, the severe compliance costs imposed by state paid leave programs can eat away at funds that would have otherwise been used to provide more generous paid family and medical leave benefits, forcing employers to simply provide the state program minimum.

Similarly, 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, a majority of states impose a predetermined waiting period before employees become eligible to receive paid leave benefits through the state program. Such a waiting period is employed by the D.C. Universal Paid Leave Program, which requires employees to wait seven days before they can receive benefits through the program.¹⁹ In the interim, employees may be required to exhaust all available paid sick leave in order to receive any wages at all during this waiting period or rely on some other employee benefit or insurance.

¹⁹ D.C. Mun. Regs. tit. 7, § 3504

According to member companies interviewed by ERIC, a waiting period such as this would never be imposed by their employer-provided paid leave benefit programs, allowing employees to receive their much-needed benefits far sooner. It is difficult for states to account for all possible situations and ensure that other employee benefits are not wasted or made obsolete. The complexity of state requirements, which vary from program to program, create substantial stress for employees already undergoing stressful periods in their lives.

“These state laws create obstacles that prevent companies like us from factoring in our own benefits and addressing additional needs of our workers.”

Benefits Design Program Manager, Fortune 500 Technology Company

EMPLOYEE BENEFIT PARITY

Employers take pride in the benefits they are able to offer their employees, and generally 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 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 reasons. As working remotely and regular changes in location are becoming more prevalent in a modernizing workforce, this will become an increasing issue. Because the current patchwork of state paid family and medical leave programs results in benefit structures that vary widely by jurisdiction, employers that wish to maintain parity of benefits between employees in different states have to perform a balancing act to ensure that:

- ▶ Employees in one state are not receiving inferior benefits compared to their counterparts in another state because of differences in state program standards
- ▶ Employees are not dissuaded from accepting an otherwise desirable relocation offer because they are wary of the difference in available employee benefits

For example, an employee eligible for paid family and medical leave while working for an employer in New York would be able to receive wage replacement at a rate of 67% of their ordinary wage up to a cap, while their neighbor working for the same employer in New Jersey would receive 85% of their average weekly wage.²⁰ Similarly, an employee currently working in New York who is eligible for 12 weeks of paid family and medical leave benefits may be loath to take a promotion or transfer offer in neighboring Rhode Island that would result in their being eligible for only four weeks of paid family and medical leave under that state's program. 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.

“When designing employee benefits, our goal is always to treat our employees as generously and as equally as possible.”

Benefits Design and Development Manager, Fortune 500 Technology Company

²⁰ The New York Paid Leave Benefit Law wage replacement rate is currently at 60% but will rise to 67% in 2021 as part of the program's phased implementation.

LIMITATION OF WAGE REPLACEMENT

The amount of employee wages that would be replaced under state paid family and medical leave insurance program benefits varies by state and regularly falls short of the amount that a large employer benefit program would typically provide. State paid family and medical leave insurance programs operate by gathering wage contributions into a central fund that is then used to replace the wages of individuals who take leave for a reason that qualifies for state program benefits. The amount of contributions assessed to each employee within the state is a set percentage of the wages earned by that individual. A major drawback of this system is that the portion of wage replacement provided by state program benefits varies widely between states and is generally below 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 also typically limited by a statewide cap on the total amount of wage replacement that an individual can receive in a pay period.

The wage replacement rates of state paid family and medical leave programs stand in stark contrast to the voluntary benefits provided directly by large employers, which typically pay the employee the entirety of his or her regular wages while they are 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 for the duration of the employer-provided 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 complicating employees' access to much needed benefits and creating unnecessary administrative costs for employers. Furthermore, this can cause inconsistent benefit outcomes among employees and could even cause an employee to have repayment obligations to the government or their employer. As discussed above, these unintended consequences demonstrate the reasons why it is vastly more beneficial for employers and employees when employers can design and operate nationwide benefit programs that interact more directly with their employees than would a state-run program.

“These state programs are for workers who would otherwise lose their jobs or homes if they had to miss work. However, they do not seem to increase the leave benefits of employees within large companies and should therefore not tie the hands of companies that already design and administer generous paid leave programs.”

Benefits Policy Director, Fortune 500 Technology Company

COMPLICATION OF EMPLOYEE ACCESS TO BENEFITS

Employees participating in and contributing to a state paid family and medical leave program often face benefit application procedures and administrative processes that are far more complicated and far less efficient than those they would be required to complete through a voluntary paid family and medical leave benefit provided by their employer. In cases where employers do in fact provide supplementary paid leave benefits to ensure full wage replacement for their employees, those employees are still required to first go through the entire state program administrative process and then go through the employer's additional administrative process to receive full wage replacement.

Employees generally take paid leave because of a serious and often stressful personal or family event. The complicated steps that state programs require of employees to collect their paid leave benefits can place additional and avoidable strain on them. For example, several companies interviewed by ERIC attested to the fact that employees in California and other states often struggle to complete multiple paid leave application processes due to the serious family event that necessitated their use of leave. When employees are forced to jump through hoops to receive the wage replacement that they could have received directly from their employer, it often results in economic loss and a poor outcome for the employee and their family. This added complexity is avoided entirely when an employee is able to efficiently receive generous paid leave benefits from their employer, without any engagement with the state-run program. Because of this reality, employers that voluntarily offer paid leave benefits that are more generous than state program requirements should be able to opt out of the state program easily, without additional costs or unnecessary administrative burdens.

DISINCENTIVIZED CREATION OF VOLUNTARY BENEFIT PROGRAMS

Currently, all state paid family and medical leave programs—except for Washington D.C. and Rhode Island—provide an exemption from required participation for employers already administering a voluntary, employer-provided paid family and medical leave benefit program for their employees. In states that provide such an exemption, the voluntary, employer-provided program generally must confer all of the same, or better, rights and protections to its employees as would be provided under the state program and cannot cost employees any more than they would be charged if they were to participate in the state program. These voluntary programs are certified by the administrative body charged with the state's paid family and medical leave, and typically require employers to cover the cost of certification, which also differs from state to state. Essentially, employer participation in an inefficient state insurance program is replaced with employer participation in an inefficient certification and exemption process.

Because of the compliance costs and administrative inefficiencies associated with participation in most state programs, several employers interviewed by ERIC have chosen to make minor changes to their voluntary, employer-provided paid leave benefit programs in order to claim these individual state exemptions when available. However, the majority of these state programs are relatively new, cannot be applied flexibly to subclasses of employees, and the exact extent of the rights and protections provided by program standards has not been definitively established through legislation, regulations, or guidance in every state currently operating a program.

For example, many employers interviewed by ERIC explained the reality that requirements, rights, and protections of the Massachusetts paid family and medical leave program are so murky that they have concluded that an attempt to claim a program exemption for their voluntary benefit program could end up being just as costly, if not more costly, than simply complying with the participation requirements of the state program. Furthermore, many state program exemptions, such as the Massachusetts program exemption,

do not entirely relieve an employer from state reporting requirements; in fact, failure to maintain records and submit regular reports to state administrators may end in a revocation of the employer exemption.²¹ Employers cannot simply take on these costs without offsetting reductions, including reduction in paid leave or other employee benefit programs. These disincentivizing policies ultimately lower the paid leave that could have been available to employees through the employer-provided benefit program.

Complexities in state exemption processes can unfairly dissuade employers from seeking exemptions for their voluntary programs, all to the advantage of state programs. By forgoing exemption, large employers shift their paid leave benefits to state paid leave insurance programs that require employee wage contributions. This mechanism benefits state programs, while denying employee access to potentially more generous and efficient paid family and medical leave benefits from their employers.

EMPLOYER VULNERABILITY TO SPECIOUS LITIGATION

State paid family and medical leave programs carry with them unseen legal costs that employers are saddled with even after they are able to comply with program standards. By operating in multiple states, employers are required to comply with the laws and regulations of those various states and ultimately open themselves to the risk of potential litigation under the laws of the particular jurisdictions. 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.²² Furthermore, to rebut this presumption, an employer must provide clear and convincing evidence that the employer had sufficient independent justification for taking such action.²³

Instances such as this presumed discrimination represent an egregious step by state programs that has the potential to open employers up to a wide range of extremely costly, and possibly baseless, legal challenges. Legal oversights such as these could effectively undermine employee management and administration on a national scale. By treading into legal standards that were once uniform under federal law and the FMLA, states have begun to dangerously impinge on business operations within their jurisdictions and threaten employer-employee relations.

²¹ Mass. Gen. Laws ch. 175M, § 11(c)

²² Mass. Gen. Laws ch. 175M, § 9(c), 458 CMR 2.16(3)

²³ Id.



Conclusion

ERIC shares the goal of increasing access to paid family and medical leave benefits for American workers and their families. However, we are alarmed 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, and often directly conflict with other state or federal paid leave measures. Compliance with such a diverse and fluid set of state standards undermines the ability of large employers to provide valuable paid family and medical leave benefits, as well as other paid leave benefits, to their employees across the country.

As the current patchwork of state and local paid leave laws does not increase the benefits voluntarily offered by large, multistate employers and instead detracts from the value of benefits received by employees, ERIC strongly urges federal lawmakers to establish a national paid leave exemption process or safe harbor that provides relief from the current state patchwork for employers who already provide generous paid family and medical leave benefits to millions of employees and their families across the country.



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