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Expanding Paid Sick Leave Programs in
the Wake of COVID-19

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Expanding Paid Leave Programs in the Wake of COVID-19

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Abstract

The COVID-19 pandemic is having a profound effect on the U.S. workforce. Employers are struggling to make workforce decisions with the added constraint of preventing further spread of the virus, including the number of employees needed to operate at less-than-capacity and the number of employees that can work from home. Existing company policies and employment contracts may not effectively address employees' personal experience with a situation like COVID-19, which may include a medical diagnosis of the virus, the need to quarantine due to exposure to another infected person, or the need to care for a child whose school or daycare is shut down due to the pandemic. In this paper, we explore the implications of the COVID-19 pandemic for employers providing paid sick leave and paid family medical leave. Employers are facing a growing number of lawsuits alleging noncompliance with the Families First Coronavirus Response Act (FFCRA). Paid sick leave mandates may be increasing employers' exposure to employment practices liability insurance (EPLI), thus further complicating the legal considerations for employers as they navigate evolving guidelines for employee safety in the midst of a pandemic.

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Introduction

The COVID-19 pandemic is having a profound effect on the U.S. workforce. Early efforts to contain the spread of the virus forced businesses to consider whether their operations were considered “essential,”¹ whether they could continue to operate under a modified business model, or whether they could afford to cease operations for an unknown period of time. Many companies faced state and local mandates to close completely, which have been loosened six months into the pandemic for some types of businesses and in certain locations. Consequently, employers are reacting to an evolving situation as they make workforce decisions with the added constraint of preventing further spread of the virus, including the number of employees needed when operating at less-than-capacity, the number of employees that need to be onsite, and the number of employees that can work from home.

Findings from the 2020 supplement to the Current Population Survey (CPS) conducted by the U.S. Bureau of Labor Statistics (BLS) indicates that 35% of employed people worked at home in May because of the pandemic. The share working at home dropped to 25% in July as more businesses began to reopen. The BLS survey also indicates that 49.8 million people reported that they were unable to work in May because their employer closed or lost business due to the pandemic. While the number dropped to 31.3 million in July, it represents 12% of the civilian noninstitutional population. Among these individuals, only 13% received some pay from their employer for the hours not worked. The BLS survey does not indicate the share of these individuals affected specifically by either a reduction in business versus closure due to stay-at-home mandates in their communities.²

Workforce decisions facing employers are not trivial, and they depend largely on the financial viability of the employer. Evidence provided by Bartik et al. (2020) indicates that the median small business with more than \$10,000 in monthly expenses had about two weeks of cash on hand at the beginning of the outbreak in late March. Many small businesses were able to secure loans and claim payroll tax credits through the Coronavirus Aid, Relief, and Economic Security (CARES) Act,

1. State governments defined “essential” businesses in March and April during initial shutdown actions. Most states agreed that the following businesses were essential: grocery stores, farms and food manufacturers, restaurants (takeout and delivery only), pet supply stores, hospitals, health care providers and other health care facilities, pharmacies, banks, post offices and other mail and shipping businesses, law enforcement, gas stations, auto repair shops, laundromats, airports and other transportation hubs, power plants, home service professionals (e.g., HVAC repair technicians), and shelters. Other types of businesses deemed essential in some states include hardware stores, liquor stores, office supply stores, cannabis dispensaries, and gun stores.

2. For a list of state stay-at-home mandates, including the dates enacted and dates restrictions were lifted, see <https://www.finra.org/rules-guidance/key-topics/covid-19/shelter-in-place>.

but many businesses have had to close for good.^{3,4} Large businesses may have more financial resources to weather a shut-down, but they may face additional costs of compliance and a reduction in operating revenues as pandemic-related measures, such as social distancing and sanitation requirements, become the norm.

In addition to the workforce decisions that stem from the pandemic-induced changes to operations, employers must also respond to an enhanced focus on employee protections. A variety of organizations have produced guidelines for businesses responding to COVID-19, including the federal Centers for Disease Control and Prevention (CDC),⁵ the U.S. Department of Labor (DOL) Occupational Safety and Health Administration (OSHA),⁶ and the U.S. Equal Employment Opportunity Commission (EEOC).⁷ The guidelines provide recommendations on business activities, including testing protocols, implementing policies for social distancing, providing personal protective equipment (PPE), and improving ventilation systems.

Finally, employers must respond to their employees' personal experiences with the virus. Existing company policies and employment contracts may not effectively address employees' personal experience with a situation like COVID-19, which may include a medical diagnosis of the virus, the need to quarantine due to exposure to another infected person, or the need to care for a child whose school or daycare is shut down due to the pandemic. The FFCRA, effective April 1, extended the eligibility provisions in the federal Family and Medical Leave Act of 1993 (FMLA) to require employers with fewer than 500 employees to provide leave for pandemic-related issues. Moreover, the FFCRA requires employers to provide *paid* sick leave and *paid* family leave for employees through Dec. 31. Small and midsize employers are provided refundable tax credits to reimburse the cost. While large employers are not required to provide any paid leave, many commonly provide paid sick leave as well as paid family and medical leave (Kess, 2020).

3. In a recent report for MarketWatch, Yelp reported that of all the business closures since March 1, 55% (72,842 businesses) will never reopen again.

4. The CARES Act also expanded eligibility and benefits for unemployment insurance (UI) and provided one-time direct cash payments to mitigate the impact of job loss. An initial assessment of the effects of the CARES Act indicates that it was effective in reducing food insecurity among those who received UI benefits (Karpman & Acs, 2020).

5. The CDC provides guidance for different types of organizations on its website at <https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc>.

6. OSHA's "Guidance on Preparing Workplaces for COVID-19" is provided at <https://www.osha.gov/Publications/OSHA3990.pdf>.

7. The EEOC provides information for complying with anti-discrimination laws, including the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973, and other equal employment opportunity (EEO) laws, during the COVID-19 pandemic. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eo-laws>.

In this paper, we explore the implications of the COVID-19 pandemic for employee sick leave and family medical leave policies.⁸ The paper begins with an overview of federal laws related to sick leave and family leave, including the newly-enacted FFCRA. This is followed by a discussion of state legislative actions that mandate paid sick leave and the temporary expansion of these laws during the current pandemic. Finally, we provide a discussion of the legal considerations for employers as they navigate evolving requirements for compliance and the implications for EPLI.

Overview of Federal Sick Leave and Family Medical Leave Policies

Since the enactment of the FMLA,⁹ many companies have been required to provide unpaid leave to eligible employees for certain qualifying conditions. The FMLA requires employers to maintain the employee's group health benefits during the leave and allow the employee to return to the same or an equivalent job at the end of the leave. It applies to all public agencies and all private sector employers who employ 50 or more employees for at least 20 weeks in the current or previous year. Within these companies, employees are eligible for leave if: 1) they have worked at least 12 months for the employer; 2) they have worked 1,250 hours in the 12 months prior to the leave; and 3) they work at a location where the employer has 50 or more employees within 75 miles. Prior to the pandemic, there were no federal legal requirements for an employer to provide paid sick leave. The FMLA only requires unpaid leave, but an employer may require the employee to use their accrued paid vacation leave or paid sick or family leave for some or all of the leave period.

Many different types of events qualify for FMLA leave. The most common qualifying event involves the employee's own medical condition, i.e., "a serious health condition" that prevents the employee from performing the functions of their job. However, the FMLA is best known for providing maternity leave rights for qualified female employees. This is because many state laws, union contracts and employer policies already covered leave for workers with health conditions before the enactment of the FMLA (Waldfogel, 1999).

Based on a survey of employers in 2004, the Employment Policy Foundation (EPF) estimated that FMLA compliance cost employers \$21 billion that year, including the direct cost of net labor replacement costs, the continuation of group health benefits, and the loss in productivity. The median amount of unpaid leave taken by employees under the FMLA was about 10 days between 1995 and 2000 (Waldfogel, 2001). Small employers have complained that the paperwork is

8. Other leave policies offered by many employers include vacation time, maternity leave and paternity leave.

9. See 29 USC 2612(a)(1).

burdensome, and the FMLA has a significant effect on productivity and profitability (Phillips, 2002). Although roughly 60% of the U.S. workforce is eligible for leave under the FMLA, many employees do not take leave because they cannot afford it. Proposals for mandating paid leave face significant funding hurdles. The National Federation of Independent Business (NFIB) argues that paid leave would have dire financial consequences for small businesses, which do not have the resources to cover such a program and would struggle to hold a job open or cover an employee's duties with a replacement when an employee is on leave.

As the reach and seriousness of the pandemic began growing in March, the U.S. Congress (Congress) passed the FFCRA—the first national paid sick leave policy—to address a variety of emerging pandemic issues.¹⁰ Effective April 2 and set to expire Dec. 31, the FFCRA established new requirements for employers with fewer than 500 employees to provide up to 80 hours of emergency paid sick leave to employees that need to take leave from work for COVID-19-related reasons. The Emergency Paid Sick Leave Act of the FFCRA states:

“An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.”

In addition, the Emergency Family and Medical Leave Expansion Act of the FFCRA requires that certain employers provide up to 10 weeks of paid leave and two weeks of unpaid leave to an eligible employee if the employee cannot work or telework because the employee needs to care for a child under 18 and the child's

10. Public Law 116-127; H.R. 6201.

school or place of care is either closed or unavailable due to the COVID-19 public health emergency. To offset the cost of providing both types of benefits to employees, employers receive refundable tax credits.

It is too soon to measure the economic effects of the FFCRA after only five months, but one innovative study uses cellular device data to estimate the effect of the FFCRA on social distancing, as measured by the mobility data gleaned from the devices (Andersen et al., 2020). The authors find that the FFCRA is associated with an initial reduction in working full-time at the workplace (measured by the share of devices that are located in the workplace eight or more hours per day) by 17.7%.

State and Local Actions to Expand Paid Leave Policies

While it is premature to measure the economic effects of the FFCRA after only five months, existing state and local paid sick leave programs may offer some indication of what to expect from the national paid leave program. Since 2011, 12 states; Washington, DC; and Puerto Rico have enacted laws to require certain employers to provide paid sick leave. Since the outbreak of the pandemic, several states have broadened access to paid sick leave. These expansions have taken a variety of forms, as follows:

- The Colorado Health Emergency Leave with Pay (Colorado HELP) requires employers in select industries to provide up to four days of paid sick leave for employees being tested for COVID-19. A separate bill requires employers to provide a minimum of one hour of paid sick leave for every 30 hours worked, up to 48 hours in a year.
- New Jersey expanded its Earned Sick Leave law on March 25 to increase coverage in public health emergency situations.¹¹ The original Earned Sick Leave law allowed employees to use accrued leave time if their place of work or childcare setting was closed by order of a “public” official. The new law, which is permanent, also allows employees to use accrued time if their place of business is closed by the governor’s executive orders or if they are advised by a health care provider to quarantine for precaution.
- New York’s paid leave package was initially designed to address the pandemic. It requires employers with more than 100 employees to provide 56 hours of paid sick leave for any quarantine or isolation order. Mid-sized and small employers worth more than \$1 million are required to provide 40 hours of paid sick leave, while small employers must provide unpaid leave for the duration of any quarantine or isolation order. The package

11. For more information on the expansion of New Jersey’s Earned Sick Leave law, see <https://www.mintz.com/insights-center/viewpoints/2226/2020-04-24-updated-new-jersey-enacts-permanent-leave-law-expansions>.

provides full wage replacement to workers who do not receive 14 days of paid sick leave and apply for “quarantine leave” benefits. On April 3, the governor passed Assembly Bill A9506B to expand the eligible reasons for using paid sick leave.

- North Carolina expanded the paid leave benefits provided to teachers. Initially, public school employees were eligible to receive up to 168 hours of paid sick leave for April and 96 hours of retroactive paid leave for the latter half of March.¹² The emergency paid leave was extended to May 31, and under the extension, the maximum number of hours available to employees increased to 328.¹³
- Governor Kate Brown of Oregon announced the Oregon Worker Quarantine Fund on Aug. 1. The fund will pay farmworkers age 18 or older \$430 per week to quarantine for one to two weeks after exposure to or diagnosis of COVID-19.
- Puerto Rico amended paid sick leave requirements in April. The amendment requires private employers to extend paid leave for an additional five days to employees who suffer or are suspected to suffer from COVID-19 and have exhausted their accrued sick leave.
- Washington’s Proclamation 20-67, issued by Governor Jay Inslee on Aug. 13, provides emergency supplemental compensation to food production workers who need to quarantine but have no access to sick leave. The State Department of Commerce plans to use \$3 million in CARES Act funds to reimburse employers for providing this benefit.

Other states looking to enact paid sick leave laws have been unsuccessful to date. A bill requiring employers in Virginia to provide paid sick leave for employees in public health emergencies was recently defeated (Aug. 21). California, Massachusetts, Michigan, Nevada and Pennsylvania are reportedly working on new or revised mandates to address shortcomings of the FFCRA, which has exempted employers of 100 million employees.

Table 1 provides a short description of all state paid leave laws.¹⁴

12. See <https://www.newsobserver.com/news/local/education/article241660686.html>.

13. See <http://pulse.ncpolicywatch.org/2020/05/01/state-extends-emergency-leave-for-school-employees-for-one-month/>.

14. Examples of cities that implemented sick leave mandates include San Francisco, Seattle, Portland, New York City and Philadelphia. For a comprehensive list of state, county and city paid sick time laws as of July 16, see <https://www.abetterbalance.org/paid-sick-time-laws/?export>.

**Table 1:
State Paid Sick Leave Laws**

State and Statute	Who is Covered?	Accrual of Sick Leave Hours (Note: new enactments specifically referring to the COVID-19 pandemic are in bold)
Arizona Earned Pay Sick Time § 23, Article 8.1 (2016)	Private-sector employers and local governments	One hour of paid sick leave for every 30 hours worked. Maximum of 40 hours per year.
California Healthy Workplaces, Healthy Families Act LAB 2-1-1 Article 1.5 (2014)	Public and private employers	One hour of paid sick leave for every 30 hours worked. Employers may cap total paid sick leave at six days per year.
Colorado HELP, Healthy Families and Workplaces CRS 24-34-402.7 (2020)	Employers in select industries	Up to four days of paid sick leave for employees being tested for COVID-19 in select industries. One hour of paid sick leave for every 30 hours worked. Maximum of 48 hours per year.
Connecticut Sick Leave for Employees § 31-57r – 31-57w (2011)	Employers with more than 50 employees	One hour of paid sick leave for every 40 hours worked. Maximum of 40 hours per year.
Washington, DC Employee Sick Leave § 32–131 (2014, 2016)	Public and private employers	<ul style="list-style-type: none"> ▪ Employers with 100 or more employees: One hour of paid sick leave for every 30 hours worked. Maximum of seven days per year. ▪ Employers with 25–99 employees: One hour of paid sick leave for every 43 hours worked. Maximum of five days per year. ▪ Employers with 1–24 employees: One hour of paid sick leave for every 87 hours worked. Maximum of three days per year.
Maine Healthy Workforces and Healthy Families LD 396 (2019, eff. 1/21)	Public and private employers with more than five employees	One hour of paid sick leave for every 30 hours worked. Employee may carry forward 40 hours of accrued earned paid sick leave to the following year.
Maryland Healthy Working Families Act MD Lab & Emp Code § 3-1304 (2018)	Public and private employers with more than 15 employees	One hour of paid sick leave for every 30 hours worked. Maximum of 40 hours per year.
Massachusetts Earned Sick Time for Employees § 1-149 (2014)	Public (not federal) and private employers with 11 or more employees	One hour of paid sick leave for every 30 hours worked. Maximum of 40 hours per year.
Michigan Paid Medical Leave Act § 408 (PA 338, PA 369) (2018)	Public (not federal) and private employers with 50 or more employees	One hour of paid sick leave for every 35 hours worked. Maximum of 40 hours per year.
Nevada § 608 NRS (2019)	Private employers with 50 or more employees	0.01923 hours of sick leave for every hour worked (approximately one hour of leave for every 52 hours worked). Employers can limit leave to 40 hours per year.
New Jersey Earned Sick Leave Law NJSA 34:11 D-2(a) (2018)	Public and private employers	One hour of paid sick leave for every 30 hours worked. Maximum of 40 hours per year. Carryover of accrued but unused sick leave limited to 40 hours.

Source: National Conference of State Legislatures (NCSL) (2020).

**Table 1:
State Paid Sick Leave Laws (continued)**

State and Statute	Who is Covered?	Accrual of Sick Leave Hours (Note: enactments specifically referring to the COVID-19 pandemic are in bold)
New York Paid Sick Leave Law §8091 (2020, eff. 2021)	Private employers	<ul style="list-style-type: none"> • Employers with 100 or more employees must provide at least 56 hours of paid sick leave for the duration of any quarantine or isolation order. • Mid-size employers and small employers worth more than \$1 million must provide up to 40 hours of paid sick leave for the duration of any quarantine or isolation order. • Small employers must provide at least 40 hours of unpaid sick leave for the duration of any quarantine or isolation order. <p>*Temporary sick leave measures, enacted in response to the COVID-19 pandemic, were expanded on April 3 to expand eligible reasons for use.</p>
Oregon Mandatory Provision of Sick Time § 537 (2015)	Public and private employers	<ul style="list-style-type: none"> ▪ Employers with 10 or more employees: One hour of sick leave for every 30 hours worked. ▪ Employers with fewer than 10 employees: One hour of unpaid leave for every 30 hours worked.
Puerto Rico Act 180 §250d Act 37-2020	Public and private employers	At least one day of paid sick leave every month. Emergency paid leave of an additional five days to employees who suffer or are suspected to suffer from COVID-19, if they have exhausted their accrued sick leave.
Rhode Island Healthy and Safe Families and Workplaces Act § 28-57-5 (2017)	Public and private employers with 18 or more employees in previous years' two highest employment quarters	One hour of sick leave for every 35 hours worked. Maximum of 40 hours per year.
Vermont Earned Sick Time Rules 21 V.S.A. §§ 481-486 (2016)	Public and private employers (new employers exempt until one year after hiring their first employee)	One hour of sick leave for every 52 hours worked. Employers can cap leave at 40 hours per year.
Washington Paid Sick Leave § 49.46 RCW, §296-128 WAC (2016)	Public and private employers	One hour of sick leave for every 40 hours worked. Employees must be allowed to carry over up to 40 hours of unused sick leave per year.

Source: National Conference of State Legislatures (NCSL) (2020).

Paid Sick Leave Coverage and Utilization

Greenwald and Fronstin (2019) report that 67% of full-time workers in the U.S. were offered paid sick leave. These results, based on a survey of 1,025 workers in the U.S. ages 21 to 64, suggest that workers in some industries have more access to paid sick leave than others. 97% of employees in the Public Administration and Government sector reported access to paid sick time, while only 43% of employees in the Accommodation and Food sector had such access. The BLS reports that paid sick leave coverage also varies by income level. 92% of workers in the top quarter of earnings can take advantage of paid sick leave, while only 31% of those in the bottom 10% of earnings have this benefit (DeSilver, 2020).

Sick leave programs offer employees an option to stay home with full pay when they are ill or need to care for sick children. Economic benefits accrue to the employee and the employer. These include better health outcomes for employees

and their family members, a reduction in contagion among coworkers and, consequently, lower turnover and higher productivity (Lovell, 2004). Employers recognize that productivity is lower when employees are not healthy, but they may be concerned about the costs associated with providing a paid sick leave benefit, including the wages paid to the employee on leave and costs to retain a temporary replacement employee.¹⁵ Goetzel et al. (2004) report that the productivity losses associated with employees who work with a medical condition are greater than the cost of employee absence and health and disability benefits. However, a paid leave program may lead to moral hazard and overreporting of sickness. Puhani and Sonderhof (2010) show that a reduction in sick leave benefits—from 100% to 80% of wages—is associated with a reduction in days of absence from work and no significant effect on health outcomes. Pichler and Ziebarth (2017) explain that a paid sick leave mandate should reduce contagious presenteeism—i.e., when the employee with a contagious disease goes to work and spreads the disease to coworkers or customers—but may increase noncontagious absenteeism; i.e., when a noncontagious employee calls in sick.

Empirical analyses of state-level mandated paid sick leave programs and paid family and medical leave programs generally find no effect on employment or wages, nor do they note any spillover effects on non-mandated benefits. However, these programs have had significant effects on leave-taking. Andersen et al. (2020) find that newly covered employees take about two additional sick days a year. Baum and Ruhm (2016) find that California’s paid family leave program increased leave use for childbirth by both parents—almost five weeks for the average covered mother and two to three days for the corresponding father. Stearns and White (2018) evaluate the programs in Connecticut and Washington, DC and document an increase in illness-related absences, but no effect on non-illness related absences. The findings of Callison and Pesko (2020) contradict this result; they find no evidence that paid sick leave mandates an increase in absences for own-illness reasons. Rather, they find increases in leaves for childcare problems and other personal/family obligations. They also find that paid sick leave mandates a reduction in contagious presenteeism by 4.5 percentage points.

A simulation conducted in 2017 to measure the likely effects of a national paid family and medical leave policy suggests that a change from the FMLA (leave without pay) to a system with paid sick days would increase the number of workers taking leave by 9–13%, depending on the coverage and eligibility criteria (Hayes et al., 2017).¹⁶ The study pins the expected cost of the benefit between 0.10% and 0.29% of payroll, depending on whether the leave covers only an employee’s own health or includes additional coverage for caregiving. In April, the U.S. Congressional Budget Office estimated that the FFCRA would add \$192 billion to

15. Gault et al. (2014) discuss evidence suggesting that the length of time and the costs incurred by firms to replace an employee are substantial.

16. Joshi et al. (2019) also provide an assessment of the cost to the U.S. of providing paid family and medical leave, with an emphasis on potential racial and ethnic disparities.

the U.S. deficit over the 2020–2030 budget window.¹⁷ More than half of the total estimated cost comes from the tax credit to compensate businesses for providing paid sick leave and paid family and medical leave to employees for COVID-19-related purposes.

To the extent that the cost to provide mandated paid sick leave benefits are fully reimbursed or subsidized through state and federal programs, such as the FFCRA, employers incur only the added administrative burden associated with applying for funds or tax credits. Unfunded paid sick leave mandates affect smaller companies to a much greater extent, which is why many state mandates do not extend to small businesses (e.g., with less than 50 employees). Larger employers can more easily absorb the costs of complying with paid sick leave mandates.

The cost to employers for providing paid sick leave during the COVID-19 pandemic may be overshadowed by a variety of other pandemic-related operating costs, including increased pay for front-line workers, expanded cleaning and sanitization, the purchase of PPE, testing, and the installation of features (e.g., Plexiglas dividers) to enhance safety and accommodate social distancing. For example, the Wall Street Journal reports that T-Mobile US Inc. has spent \$50 million on cleaning and safety gear.¹⁸

Differential Impact of Paid Sick Leave Policies

A compelling argument against federal or state mandates for employers to provide paid sick leave is that these have disproportionate effects across the economy. Although studies of paid sick leave legislation passed in various cities and states find no negative impact on business growth in the aggregate (Lovell, 2006; Petro, 2006; Pichler and Ziebarth, 2020), there may be differential effects across establishments of varying size and in certain market segments. It is therefore important that state insurance regulators considering a paid sick leave mandate bear in mind the implications for particular individuals when establishing the criteria for eligibility. As noted above, smaller businesses may face a larger cost of compliance with paid sick leave mandates. We note that before the pandemic, the U.S. Small Business Administration (SBA) reported that small businesses were driving job growth in the U.S.¹⁹ Paid sick leave mandates applied to smaller businesses, coupled with the revenue losses stemming from mandated business closures, may exacerbate the ability for smaller establishments to recover from the pandemic.

17. The cost of the FFCRA is discussed by the Committee for a Responsible Federal Budget at <https://www.crfb.org/blogs/families-first-coronavirus-response-act-will-cost-192-billion>.

18. See <https://www.wsj.com/articles/how-much-covid-19-cost-those-businesses-that-stayed-open-11592910575>.

19. See <https://advocacy.sba.gov/2019/04/24/small-businesses-drive-job-growth-in-united-states-they-account-for-1-8-million-net-new-jobs-latest-data-show/>.

Many of the employees that work in occupations or for businesses that are designated essential during the pandemic were not previously covered by paid sick leave programs.²⁰ This population may face more intense pressure to work even when sick. Thus, paid sick leave policies not only benefit the employee, but they have added implications for public health. While some states have taken additional actions to ensure that these individuals are protected by paid sick leave, it is important to consider whether certain eligibility criteria (e.g., exemptions for small businesses) have the unintended consequence of overlooking essential workers.

Sick leave mandates also generally overlook employees in the gig-economy who perform on-demand services for transportation companies, such as Lyft, Uber or grocery delivery. These individuals are considered independent contractors or “on-demand” employees; therefore, they are not subject to the same rules as regular employees.²¹ Without access to paid sick leave, these employees are incentivized to continue working when sick, thus further endangering public health. State and local regulators should consider how a paid sick leave mandate can be extended to this population. The City of Seattle passed an ordinance (Ordinance 126091, June 2020) to require paid sick and paid safe time to gig-employees.²² The City of Philadelphia passed a similar bill to extend paid sick leave to gig workers in September.²³

Legal Considerations for Employers

As employers evaluate their workforce needs and pandemic-related safety guidelines, it is important that they consider the costs of noncompliance with the FFCRA and other state-level paid sick leave mandates. Employers, including managers and supervisors, may be sued by employees if they violate provisions of the FFCRA.²⁴ One important difference between the FFCRA and traditional employment-related claims is that employees do not have to exhaust administrative remedies (e.g., using a mediation program) before filing a private lawsuit. Practical guidance for employers, highlighting important definitions and eligibility criteria, is provided by many organizations, including the DOL and the Society for Human Resource Management (SHRM).²⁵

20. See <https://shift.hks.harvard.edu/newsroom/essential-but-unprotected-most-service-sector-workers-lack-paid-sick-leave-amid-covid-19-pandemic/>.

21. The designation has recently been the subject of a lawsuit in California. See <https://www.kdrv.com/content/news/573117061.html>.

22. See <https://www.seattle.gov/Documents/Departments/LaborStandards/126091%20Code%20Reviser%20Version.pdf>.

23. See <https://www.inquirer.com/news/coronavirus-paid-sick-leave-philadelphia-gig-workers-20200910.html>.

24. The FFCRA adopts the FMLA definition of an “employer” to include “any person who acts, directly or indirectly in the interest of an employer to any of the employees of such an employer.”

25. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> and [https://www.shrm.org/ResourcesAndTools/tools-and-samples/exreq/Pages/Details.aspx?Erid=1541#:~:text=The%](https://www.shrm.org/ResourcesAndTools/tools-and-samples/exreq/Pages/Details.aspx?Erid=1541#:~:text=The%20)

EPLI coverage specifically excludes FMLA violations, preventing recovery of defense costs and settlements associated with FMLA claims. However, most EPLI policies include a coverage give-back for “retaliation” that provides coverage that can be applied if an employee believes they were retaliated against for attempting to exercise their right to leave.

Fisher Phillips’ COVID-19 Employment Litigation Tracker provides a summary of all traditional employment cases that were a direct result of the pandemic.²⁶ As of Nov. 30, a total of 1,140 cases had been filed. In July, the most common types of complaints alleged workplace discrimination. By November, a larger share of these cases involved sick leave. Overall, the most common cases relate to remote work and leave conflicts; i.e., 303 or 26.5%. While complete details on the individual cases are not available, Fisher Phillips notes that they typically involve an employee alleging that they were denied leave or denied the opportunity to work from home, typically under the FFCRA. Three states account for over 40% of these cases: California (14.9%), Florida (13.6%), and New Jersey (15.9%). More than 75% of the cases are filed by employees in the health care industry, especially those in small businesses, i.e., 1–50 employees.

Conclusion

The costs incurred by employers to address COVID-19 are mounting as the virus continues to spread. Most of the human resources (HR)-related costs are now identifiable (e.g., the costs of providing PPE, technology costs to allow telecommuting, and costs for adding accommodations for social distancing). Less clear are the potential legal costs arising out of the effects of the COVID-19 pandemic on employment-related liability. Existing company policies and employment contracts will need to be reevaluated to ensure that they effectively address employees’ personal experience with a situation like COVID-19. Paid sick leave mandates may be increasing employers’ liability exposure, further complicating the legal considerations for employers as they navigate evolving guidelines for employee safety in the midst of a pandemic.

20U.S.%20Department%20of%20Labor,emergency%20family%20and%20medical%20leave.

26. See <https://www.fisherphillips.com/covid-19-litigation>.

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Cummins, J. David and Richard A. Derrig, eds., 1989. *Financial Models of Insurance Solvency*, Norwell, Mass.: Kluwer Academic Publishers.

Manders, John M., Therese M. Vaughan and Robert H. Myers, Jr., 1994. “Insurance Regulation in the Public Interest: Where Do We Go from Here?” *Journal of Insurance Regulation*, 12: 285.

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“Spreading Disaster Risk,” 1994. *Business Insurance*, Feb. 28, p. 1.

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