

TOO SICK TO WORK? DEFENDING THE PAID SICK LEAVE MOVEMENT AND THE NEW JERSEY PAID SICK LEAVE ACT

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I. INTRODUCTION.

A blue-collar worker’s newborn son was having seizures, but the father had to return to work before the boy returned from the hospital.¹ A young woman’s mother fell in her home, but the daughter could not risk missing work to care for her parent.² A victim of sustained domestic violence needed time off work to seek legal advice, but feared losing a day’s worth of wages.³ These are stories of United States workers who would benefit from a nationally mandated paid sick leave policy. Unfortunately, these stories reflect a common reality as the United States remains one of the only industrialized nations to lack access to universal paid sick leave.⁴

Twenty-five years ago, President Bill Clinton signed into law the Family and Medical Leave Act (“FMLA”), a law designed to help workers balance both job and family responsibilities.⁵ The FMLA was a critical step in protecting workers in such circumstances as it was the first and still only piece of federal legislation that allows workers to care for a child, ill family member, or their own serious personal illness without jeopardizing

¹ See Family and Medical Leave Act, 29 U.S.C. § 2612 (2012) (noting that the Family and Medical Leave Act only permits certain eligible employers to provide “unpaid” family leave for employees to care for child with serious health condition).

² See *Id.* (noting that FMLA limited to eligible employees to receive unpaid leave to care for parent who suffers from serious health condition).

³ See ELLEN RIDLEY ET. AL, MAINE DEP’T OF LABOR AND FAMILY LAW CRISES, DOMESTIC VIOLENCE AT WORK: HOW PERPETRATORS IMPACT EMPLOYMENT, 17 (2005) (citing that an estimated 60% of domestic-violence victims lose their jobs as direct result of their abuse)
https://www1.maine.gov/labor/labor_stats/publications/dvreports/survivorstudy.pdf.

⁴ Stefan Pichler & Nicolas Ziebarth, Upjohn Inst., *Labor Market Effects of US Sick Pay Mandate*, 53 JOURNAL OF HUMAN RES. 1 (2018) (“The United States, Canada, and Japan are the only industrialized countries that do not provide universal access to paid sick leave.”); Jon Greenberg, *Yes, the United States is the Only Industrialized Nation Without Paid Family Leave*, POLITIFACT, (July 25, 2016), <https://www.politifact.com/truth-ometer/statements/2016/jul/25/kirsten-gillibrand/yes-us-only-industrialized-nation-without-paid-fam/>); see generally Jody Heymann Et AL., CONTAGION NATION: A COMPARISON OF PAID SICK LEAVE POLICIES IN 22 COUNTRIES 1 (2009) http://cepr.net/documents/publications/paid-sick-days-2009-,_05.pdf (e.g., notably, United States is only nation out of top-twenty richest nations to not have any paid sick leave).

⁵ Family and Medical Leave Act, 29 U.S.C. § 2601 (2012).

their employment.⁶ Although the FMLA is instrumental in expanding employee opportunities for leave, leave under the FMLA is unpaid, which remains a major shortcoming of the Act.⁷ Another major criticism of the FMLA is that it predominantly benefits middle- and higher-income workers.⁸ Employers are more likely to offer more robust and substantial paid-leave options to higher-income employees than to their lower-income counterparts.⁹ In fact, private employers are not required to offer any paid sick leave to their employees.¹⁰ As a result, forty-four million workers—primarily within low-income brackets—lack access to even a single paid sick day in the United States.¹¹

Consequently, the lack of mandatory paid sick leave coverage forces contagious or ill employees to work while sick and spread illness in the workplace.¹² Those suffering from influenza and other diseases choose to work while sick, since taking time off can come at a significant cost, *i.e.*, the loss of payment, job-advancement opportunities, or even their careers.¹³ The decision to work while sick then causes illness to spread through workplace environments rapidly, which decreases productivity and harms both the employer and other employees.¹⁴ The shortage of paid sick leave policies has, therefore, led to an increase in “presenteeism,” which is the lost productivity attributed to the sub-par performance of employees who work when sick.¹⁵

⁶ *Id.*

⁷ 29 U.S.C. § 2612(c).

⁸ Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 5-6 (2007) (recognizing that low-wage working women were less likely to have access to family leave than high-income women).

⁹ See ANN C. CROUTER & ALAN BOOTH, WORK FAMILY CHALLENGES FOR LOW INCOME-PARENTS AND THEIR CHILDREN, 4-5 (2004).

¹⁰ Family and Medical Leave Act, 29 U.S.C. § 2601 (2012) (recognizing that there are no federal legal requirements for paid sick leave at this time).

¹¹ Jordan Weissmann, *The President Would Like You to Take a Sick Day*, SLATE (Sept. 29, 2016, 9:00 AM), http://www.slate.com/articles/business/moneybox/2016/09/an_interview_with_president_barack_obama_about_extending_paid_sick_leave.html (“there are some 44 million workers in the private sector without paid leave.”).

¹² Pichler & Ziebarth, *supra* note 4, at 4 (“In almost half of all cases, the reasons indicated for such presenteeism behavior were directly related to a lack of paid sick leave coverage.”).

¹³ NAT’L P’SHIP FOR WOMEN & FAMILIES, EVERYONE GETS SICK. NOT EVERYONE HAS TIME TO GET BETTER, 1-2 (2011).

¹⁴ VICKY LOVELL, INST. FOR WOMEN’S POLICY RESEARCH, NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON’T HAVE PAID SICK LEAVE 4-5 (2004) (“despite their show of loyalty, workers who show up while sick are not likely to be able to perform at their usual level of productivity.”).

¹⁵ JODIE LEVIN-EPSTEIN, CTR. FOR LAW AND SOC. POLICY, PRESENTEEISM AND SICK DAYS 1 (2005), <https://www.clasp.org/sites/default/files/public/resources-and->

Due to the shortcomings of the FMLA and the negative implications of workplace presenteeism, paid sick leave in the United States has received attention at the federal, state, and local levels.¹⁶ At the national level, the Healthy Families Act (“HFA”), reintroduced in Congress in 2019, proposed a federal sick pay mandate that covered employees in businesses with more than fifteen employees.¹⁷ If passed, the HFA would affect millions of employees who do not have paid sick day benefits, which comprises roughly 29% of the private labor force.¹⁸ This universal paid sick leave program would also help alleviate the problems associated with presenteeism.¹⁹ The United States, however, continues to lack federal legislation that mandates paid sick leave.²⁰

Over the last decade, support for sick leave mandates has grown substantially in the United States.²¹ San Francisco became the first municipality to implement a paid leave mandate in 2006.²² Since then, over thirty-five cities implemented paid sick day requirements, including Washington D.C., Seattle, New York City, Portland, Philadelphia, and Oakland.²³ State governments have also been progressive in enacting paid sick leave legislation. Connecticut was the first state to mandate paid sick leave in 2012 and eleven additional states implemented paid sick day policies thereafter.²⁴ There are also over a dozen states that have pending legislation regarding paid sick leave mandates.²⁵

New Jersey traditionally leads the nation in implanting progressive legislation to assist the needs of working families. In 1989, four years before the passage of the FMLA, New Jersey enacted its own family leave

publications/publication-1/0212.pdf.

¹⁶ See Pichler & Ziebarth, *supra* note 4, at 1 (explaining that over the last decade, support for sick leave mandates has grown substantially in the United States).

¹⁷ The Healthy Families Act, H.R. 1784, 116th Cong. (2019).

¹⁸ NAT’L P’SHIP FOR WOMEN & FAMILIES, THE HEALTHY FAMILIES ACT: FACT SHEET 1 (2018), <http://www.nationalpartnership.org/our-work/resources/workplace/paid-sick-days/the-healthy-families-act-fact-sheet.pdf>.

¹⁹ LEVIN-EPSTEIN, *supra* note 15, at 1.

²⁰ *Sick Leave*, U.S. DEP’T LABOR, <https://www.dol.gov/general/topic/workhours/sickleave> (last visited Nov. 21, 2019) (“Currently, there are no federal legal requirements for paid sick leave.”).

²¹ See Pichler & Ziebarth, *supra* note 4, at 1.

²² SAN FRANCISCO, CAL., ADMIN. CODE § 12.W.3 (2006).

²³ Alayna Alvarez, *As More Cities Push for Paid Sick Leave, States Push Back*, PEW CHARITY TRUSTS (Sep. 24, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/24/as-more-cities-push-for-paid-sick-leave-states-push-back>).

²⁴ CONN. STAT. §§ 31-57r-31-57w; *see also id.*

²⁵ Kevin Callison & Michael E. Pesko, *The Effect of Paid Sick Leave Mandates on Access to Paid Leave and Work Absences*, UPJOHN INSTITUTE 1 (2017).

law, the New Jersey Family Leave Act (“NJFMLA”).²⁶ Like the FMLA, leave taken under the NJFMLA is also unpaid.²⁷ Thus, many working families in New Jersey could not take advantage of family and medical leave due to a lack of financial assistance. For instance, 1.2 million workers or 38% of New Jersey’s private-sector workforce lacked access to paid sick leave.²⁸ This landscape was effectively altered on May 2, 2018, when Governor Phil Murphy signed New Jersey’s first statewide paid sick leave ordinance, the New Jersey Paid Sick Leave Act (“NJPSLA”).²⁹

This comment argues that the NJPSLA will nurture a healthy work environment by minimizing presenteeism, increasing employee productivity, and supporting New Jersey workers—specifically minorities, women, and those in lower-income brackets. Part II of this comment provides an overview of the paid sick leave landscape in the United States. Part III explores the new features and details of the NJPSLA. Part IV consolidates studies from other cities and states that have adopted paid sick leave mandates—demonstrating that paid sick leave can increase worker productivity, expand employee coverage, and reduce workplace presenteeism. Finally, Part V explains that even though a national standard is necessary for the United States to provide paid sick leave to all workers in the private sector, the movement in Congress remains at a standstill. Therefore, to expand private-sector coverage of paid sick leave, minimize presenteeism, and align the United States with other industrialized nations, cities and state legislatures, which are in the best position to provide pragmatic solutions, should continue to enact paid sick leave policies. Further, as studies from Connecticut, San Francisco, New York City, and Seattle confirm, the NJPSLA will extend benefits to over a million New Jersey workers with little to no added cost on employers operating within the state.

²⁶ New Jersey Family Medical Leave Act, *N.J. STAT. ANN. § 34:11B-1 (1989)*.

²⁷ *N.J. STAT. ANN. § 34:11B-4* (noting that the NJFLA, like the FMLA, provides for job protection for leaves of up to twelve weeks, but does not provide wage replacement).

²⁸ DANIELLE LINDEMANN & DANA BRITTON, CTR. FOR WOMEN AND WORK, *EARNED SICK DAYS IN JERSEY CITY: A STUDY OF EMPLOYERS AND EMPLOYEES AT YEAR ONE 3 (2015)*.

²⁹ *See N.J.S.A. §§ 34:11D-1-11*.

II. BACKGROUND AND OVERVIEW OF THE PAID SICK LEAVE LANDSCAPE.

A. *The Implementation of Paid Sick Leave: How the United States Stacks Up.*

On a global scale, the United States has fallen behind other developed nations in providing paid sick leave to employees.³⁰ Worldwide, workers in 145 countries have access to paid sick time, which includes lost-wage compensation for employees who are absent due to temporary illness or incapacitation.³¹ The United States, Canada, and Japan remain the only industrialized countries that do not provide universal access to paid sick leave.³² By comparison, countries like Sweden, Germany, and France provide many months—even years—of paid maternity leave, childcare options, and other supportive policies.³³

On a national level, studies from other countries demonstrate that paid sick leave legislation reduces infant mortality, improves maternal health, and increases the number of women in the workforce.³⁴ Yet, the United States continues to lag behind most of the developed—as well as developing—world with regards to family leave benefits.³⁵ Currently, only about 65% of American full-time workers have access to sick leave, whereas low-income, part-time and service-sector workers have coverage rates of less than 20%.³⁶

The last major policy change for the United States occurred in 1993 when Congress passed the FMLA with bipartisan support, guaranteeing

³⁰ JENNIFER ROMICH, BMC PUB. HEALTH, LOCAL MANDATE IMPROVES EQUITY OF PAID SICK LEAVE COVERAGE: SEATTLE'S EXPERIENCE, 1 (2017).

³¹ *Id.*

³² Pichler & Ziebarth, *supra* note 4, at 1.

³³ Jessica Mason, *The U.S. Is Decades Behind the World on Paid Leave*, SLATE (Feb. 6, 2018), <https://slate.com/human-interest/2018/02/the-u-s-is-decades-behind-the-world-on-paid-leave-this-gives-us-an-advantage.html>).

³⁴ *Id.*

³⁵ REBECCA RAY ET AL., CTR. FOR ECON. AND POLICY RESEARCH, PARENTAL LEAVE POLICIES IN 21 COUNTRIES: ASSESSING GENEROSITY AND GENDER EQUALITY 1 (2009) (“Most countries provide from three months to a year of full-time-equivalent paid leave; Sweden, for example, is one of the most generous of the countries, providing 40 weeks of full-time paid leave. The United States, however, is one of only two countries that offered no paid leave.”).

³⁶ Pichler and Ziebarth, *supra* note 4, at 1; *see also* RAY ET AL., *supra* note 34, at 9 (“The FMLA sets a minimum standard for parental leave, but as a result of its exclusion of small employers and short-tenure workers, only about 40 percent of U.S. workers are eligible for the FMLA. Moreover, United States employers as a group have not filled this gap. While 60 percent of workers are “eligible” for FMLA-related leave, only about one-fourth of U.S. employers offer fully paid “maternity-related leave” of any duration, and “one-fifth of U.S. employers offer no maternity-related leave of any kind, paid or unpaid.”).

twelve weeks of job-protected unpaid leave to more than half of American workers.³⁷ Leave under the FMLA, however, has significant limiting circumstances, as it is unpaid, applies only to employers with fifty or more employees within seventy-five miles of the worksite in question, and is limited to certain serious medical conditions.³⁸ This is considered one of the most significant limitations under the FMLA, as serious illnesses or injuries of employees and their family members may still not fit within the FMLA's definition of a "serious health condition."³⁹

By limiting the FMLA to only serious medical conditions, Congress evidently excluded certain short-term illnesses.⁴⁰ A "serious health condition" that qualifies an employee for FMLA leave is "an illness, injury, impairment or physical or mental condition" that involves inpatient care or continuing treatment by a health care provider.⁴¹ This provision of the FMLA is one of the most heavily litigated issues, considering that this definition may not encompass the flu, the common cold, or similar common illnesses.⁴² American workers, therefore, cannot take advantage of FMLA leave when facing minor health conditions.

Access to paid sick leave is also skewed among particular groups of Americans, as 78% of restaurant workers and 60% of workers who care for children or the elderly lack any paid sick leave opportunities.⁴³ Huge numbers of workers—disproportionately females, low-income workers, and minority workers—work while sick because they cannot afford to lose a paycheck or their job.⁴⁴ Poor women are among the sociodemographic groups who have the least access to leave, as "two-thirds of low-income

³⁷ Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2019).

³⁸ Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(2)(B)(ii) (2019); *see e.g.* 29 U.S.C. § 2611(11) ("The 1993 Family and Medical Leave Act requires a subset of employers (those with 50 or more employees) to provide a subset of employees (those who have worked for their employer for at least 1250 hours in the 12 months prior to the leave) with unpaid leave to address a subset of circumstances, when a close family member (limited to a child, parent, or spouse) has a 'serious health condition' (not a common illness).").

³⁹ 29 U.S.C. § 2601 (allowing eligible employees to take up to twelve weeks of leave "to care for a spouse or a son, daughter, or parent of the employee" who suffers from a serious health condition); *see also* Robin Runge, *Redefining Leave from Work*, 19 GEO. J. POVERTY L. & POLICY 445, 454 (2012).

⁴⁰ Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(2)(B)(ii) (2019).

⁴¹ *Pollard v. N.Y. Methodist Hosp.*, 861 F.3d 374, 379 (2d Cir. 2017) ("A serious health condition includes physical or mental conditions that involve inpatient care or continuing treatment by a health care provider") (citing 29 U.S.C. § 2611(11)).

⁴² Runge, *supra* note 39, at 454.

⁴³ VICKY LOVELL, INST. FOR WOMEN'S POLICY RESEARCH, *WOMEN AND PAID SICK DAYS: CRUCIAL FOR FAMILY WELL-BEING 1* (2007), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B254.pdf>.

⁴⁴ *Id.*

women and three-fourths of very poor women do not get paid when they miss work to care for sick children.”⁴⁵ The repercussions are demonstrable, as the research suggests that 19% of low-wage working mothers lose their jobs for being sick or caring for a sick child.⁴⁶

Coverage rates for paid leave are also highly dependent on one’s socioeconomic class. While middle-age full-time employees have relatively high coverage rates of paid sick leave, the rates fall below 20% for part-time and low-income employees.⁴⁷ Employees with wages less than \$20 per hour were more than three times likely to report working while sick than employees with wages above \$30 per hour.⁴⁸ Despite the absence of a national standard, a growing number of politicians and lawmakers have proposed serious policy solutions at the federal level.

B. Action at the Federal Level.

Paid leave—whether in the form of sick days or time off to care for a new child—receives both political and popular support.⁴⁹ Polling suggests that approximately 88% of Democrat and 71% of Republican voters favor “requiring employers to offer paid leave to parents of new children and employees caring for sick family members.”⁵⁰ The issue of paid sick leave is consistently raised in Congress, although a federal law does not appear likely in the near future.⁵¹ During the July, 2018, senate hearing, for example, lawmakers split along party lines on how to adequately pay for time off.⁵² Democrats appeared to favor laws funded through increased employer and worker taxes.⁵³ In contrast, Republicans wanted workers to pay for sick leave by delaying eligibility for Social Security benefits based on the amount of sick leave taken.⁵⁴

⁴⁵ DANIELLE LINDEMANN & DANA BRITTON, CTR. FOR WOMEN AND WORK, EARNED SICK DAYS IN JERSEY CITY: A STUDY OF EMPLOYERS AND EMPLOYEES AT YEAR ONE 4 (2015).

⁴⁶ *Id.* (“Specifically, previous research conducted by the Center for Women and Work about ESD in New Jersey has indicated that women and underserved minorities are less likely than other groups to have access to leave.”).

⁴⁷ Philip Susser & Nicholas R. Ziebarth, *Profiling the US Sick Leave Landscape: Presenteeism among Females*, HEALTH SERV.S RESEARCH 2305, 2314 (2016).

⁴⁸ *Id.*

⁴⁹ Julia Isaacs et al., *Paid Family Leave in the United States: Time For a New National Policy*, CTR. OF LABOR, HUMAN SERV.S, AND POPULATION 1 (May 2017) https://www.urban.org/sites/default/files/publication/90201/paid_family_leave_0.pdf.

⁵⁰ *Id.*

⁵¹ Joyce Rosenberg, *Paid Sick Leave Is Great for Employees, But Some Business Owners Are Struggling to Make It Happen*, INC. (Aug. 1, 2018), <https://www.inc.com/associated-press/paid-sick-leave-great-for-employees-business-owners-struggle.html>).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Democrat-sponsored proposals include the Family and Medical Insurance Leave Act (“Family Act”), which would create an affordable and self-sustaining national family and medical leave insurance fund to provide workers with a portion of their wages for a limited period of time to address their own serious health conditions.⁵⁵ If enacted, the Family Act would offer new parents up to twelve weeks off at 66% of their monthly wages, which is paid for by a 0.2% payroll tax upon both the employee and employer.⁵⁶ Nearly all workers would be eligible for the program, which would provide benefits for pregnancy, childbirth, a serious health condition of a parent, spouse, domestic partner or child, caring for a new child, and for specific military caregiving and leave purposes.⁵⁷ Although New York Democratic Senator Kirsten Gillibrand has introduced the Act in each congressional session since 2013, the Family Act has not yet passed into law.⁵⁸

The Healthy Families Act (“HFA”) is another federally mandated piece of paid sick leave legislation that is particularly popular among Democrats in Congress.⁵⁹ The HFA has been introduced in every congressional hearing since 2004.⁶⁰ In March 2019, Congresswoman Rosa DeLauro (D-CT) and Senator Patty Murray (D-WA) reintroduced the bill, which allows workers to earn paid sick leave when they are sick, to care for a family member, and to address the impacts of domestic violence, stalking, and sexual assault.⁶¹

Specifically, the HFA, which proposes federally-mandated, employer-provided paid sick days for all employees in businesses with fifteen or more employees, potentially resolves the ongoing battle regarding paid sick leave policy measures.⁶² The HFA provides “up to seven protected paid sick days each year to be used [by employees] to recover from their own

⁵⁵ Megan Sholar, *Yes, Gillibrand And DeLauro Introduced A Family Leave Bill. More Important, Republicans Are Introducing Paid Leave Bills, Too*, WASHINGTON POST (Feb. 20, 2019), <https://www.washingtonpost.com/politics/2019/02/20/yes-gillibrand-delauro-introduced-family-leave-bill-more-important-republicans-are-introducing-paid-leave-bills-too/>).

⁵⁶ *Id.* (citing The Family and Medical Insurance Leave Act, H.R. 1185, 116th Cong. (2019)).

⁵⁷ Family and Medical Insurance Leave Act or the FAMILY Act, S. 337, 115th Cong. (2017).

⁵⁸ Sholar, *supra* note 55.

⁵⁹ The Healthy Families Act, H.R. 1784, 116th Cong. (2019).

⁶⁰ Patricia Stoddard-Dare et al., *Paid Sick Leave and Psychological Stress: An Analysis on U.S. Workers*, 88 AM. J. ORTHOPSYCHIATRY 1, 6 (2018).

⁶¹ Press Release, U.S. Representative Rosa DeLauro, *DeLauro, Murray Reintroduce Healthy Families Act to Allow Workers to Earn Paid Sick Days* (March 15, 2017) (on file at <https://delauro.house.gov/media-center/press-releases/delauro-murray-reintroduce-healthy-families-act-allow-workers-earn-paid>).

⁶² The Healthy Families Act, H.R. 1784, 116th Cong. (2019).

illnesses, access preventive care, provide care to a sick family member, or attend school meetings related to a child's health condition or disability."⁶³ Despite the legislation's popular support among Democrats, the bill has continued to stall in the House of Representatives.⁶⁴

In response to Congress's inability to pass the HFA, President Obama issued an Executive Order ("EO") requiring federal contractors and subcontractors to provide paid sick leave to their employees.⁶⁵ At the end of his term, and frustrated by the Republican-controlled Congress, President Obama issued the EO, which requires federal contractors and subcontractors to provide at least seven days of paid sick leave per year to their employees.⁶⁶ The EO effectively extended paid sick leave to nearly 300,000 workers.⁶⁷ President Donald Trump, posturing himself to be a proponent of parental leave, has yet to rescind the EO.⁶⁸

Republicans, meanwhile, came forward with a controversial proposal, known as the Working Families Flexibility Act, which allows employers to offer paid leave as compensation for overtime work.⁶⁹ Another Republican proposal is the Strong Families Act, which offers tax credits for businesses voluntarily offering leave.⁷⁰

Republican senator and former presidential candidate Marco Rubio introduced the Economic Security for New Parents Act ("ESNPA") on

⁶³ *Id.*

⁶⁴ Human Rights Campaign, Healthy Families Act (Oct. 2, 2019) (noting that the bill was reintroduced on March 14, 2019 by Rep. Rosa DeLauro to the House of Representatives and in the Senate by Sen. Patty Murray (D-WA)), <https://www.hrc.org/resources/healthy-families-act>.

⁶⁵ Exec. Order No. 13706, 29 C.F.R. § 13.5 (2015); *see also* Michele Gehrke & Anne Barnett, *Patchwork of Rapidly Expanding Paid Sick Leave Laws Presents Challenges for Employers*, 42 EMP. REL. TODAY 65, 74 (Jan. 13, 2016).

⁶⁶ Exec. Order No. 13706, 29 C.F.R. § 13.5 (2015).

⁶⁷ Bill Chappell, *Obama Orders Federal Contractors to Provide Paid Sick Leave*, NAT'L PUB. RADIO, (Sept. 7, 2015), <https://www.npr.org/sections/thetwo-way/2015/09/07/438340379/obama-orders-federal-contractors-to-provide-paid-sick-leave> ("Former President Obama stated after signing the order that 'This will give about 300,000 working Americans access to paid sick leave for the first time.'").

⁶⁸ Eric Wagner, *Guaranteed Paid Sick Leave for Contractors, and Changes to the Annual Charitable Giving Drive*, GOV'T EXECUTIVE (Aug. 22, 2018), <https://www.govexec.com/pay-benefits/pay-benefits-watch/2018/08/guaranteed-paid-sick-leave-contractors-and-changes-annual-charitable-giving-drive/150746/>; *see generally* JULIA ISAACS ET AL., CTR. OF LABOR, HUMAN SERVICES, AND POPULATION, PAID FAMILY LEAVE IN THE UNITED STATES: TIME FOR A NEW NATIONAL POLICY 1 (2017) ("In September 2016, Donald Trump supported a paid family leave plan where working mothers would qualify for six weeks of unemployment insurance benefits after childbirth.").

⁶⁹ Working Families Flexibility Act, H.R.1180, 115th Cong. (2017).

⁷⁰ Strong Families Act, H.R. 3595, 115th Cong. (2017-2018); *see also* Miriam Rodriguez, *The Impact of Paid Family Leave on New Jersey Businesses*, Bloustein School of Planning and Public Policy, RUTGERS THE STATE UNIV. OF N.J. (2012), <http://bloustein.rutgers.edu/wp-content/uploads/2012/03/Ramirez.pdf>.

August 2, 2018, which is a recent Republican-backed proposal.⁷¹ Unlike the Family Act, the ESNPA would not raise taxes.⁷² Rather, the ESNPA would provide parents with at least two months of paid leave by pulling funds from their future social security benefits.⁷³ In exchange, workers would then be required to delay taking Social Security for three to six months after retirement.⁷⁴ Critics of Senator Rubio's legislation argue that his proposal only covers leave for parents to care for new children, excluding nearly 75% of leave taken for other reasons covered by the FMLA, such as to care for a seriously-ill family member, to recover from illness or injury, or for military care.⁷⁵ Democrats also argue that Rubio's legislation does not need to draw on Social Security funding to work effectively, considering Social Security is already an underfunded program.⁷⁶

The outpour of legislation from both parties presents an opportunity for lawmakers to address and alleviate the problems caused by insufficient paid sick leave policies. Still, the United States has not adopted any piece of federal legislation mandating paid sick days, and these proposals face long odds of success in the current Congress.⁷⁷ While both Democrats and Republicans recognize that universal paid leave is a noteworthy cause, it remains unclear how the two parties intend to bridge the gap on the question of funding.⁷⁸ Republicans support programs that generally do not raise taxes, and provide funding through delaying Social Security in the future or by providing paid leave as an incentive for overtime

⁷¹ Economic Security for New Parents Act, H.R. S.3345, 115th Cong. 2D Sess. (2018).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Pamela Wolf, *Rubio Unveils Bill that Trades Social Security Benefits for New Parent Leave*, WOLTERS KLUWER (last visited Nov. 21, 2019), <http://www.employmentlawdaily.com/index.php/news/rubio-unveils-bill-that-trades-social-security-benefits-for-new-parent-leave/>; Emily Peck & Igor Bubic, *Rubio's New Parental Leave Plan Is Funded With Your Retirement Savings*, HUFFINGTON POST (Aug. 2, 2018), https://www.huffingtonpost.com/entry/marco-rubio-parental-leave-plan-retirement-savings_us_5b632414e4b0b15abaa0badb ("Significantly, the bill leaves out those who need to care for sick family members or tend to their own serious health issues. About 75 percent of those who take unpaid time off through the federal Family and Medical Leave Act use the time for those purposes.").

⁷⁶ Daniel Flatley, *The Real Problem With Paid Family Leave Is How to Fund It*, BLOOMBERG BUSINESSWEEK (May 13, 2019), <https://www.bloomberg.com/news/articles/2019-05-13/despite-bipartisan-effort-paid-family-leave-is-still-years-away>).

⁷⁷ *Id.*

⁷⁸ Morgan Lyles, *Millions of Americans Could Finally Get Paid Family Leave—If Lawmakers Can Agree on Who Pays*, TIME (May 16, 2019), <https://time.com/5590167/paid-family-leave-united-states/>).

work.⁷⁹ Democrats are less concerned with tax increases, as Senator Gillibrand's HFA would be funded by a 0.2% payroll tax levied on both employees and employers.⁸⁰ These differences have effectively prevented tens of millions of adults in the workforce from gaining access to paid family leave.⁸¹

C. A Divided Issue: State Legislatures and Cities Requiring Paid Sick Leave.

Despite the lack of movement at the federal level, cities and states have taken initiative in enacting their own paid sick leave laws. Cities enact paid sick leave legislation through their police power delegated by their respective states.⁸² The details of the bills differ from city-to-city and state-to-state, although one common feature in each state's paid sick leave law ensures employees the right to use their sick leave to care for family members.⁸³ In addition, all paid sick leave laws have a notice requirement, meaning that employers must notify their employees of their right to take sick leave and the terms under which it may be used.⁸⁴ Paid sick leave laws also contain several differences, as certain mandates exclude small firms or offer exemptions. Accrual rates also vary between the states, usually ranging from one hour of sick leave for every thirty-to-forty hours of work performed.⁸⁵ Most states, however, allow employers to provide employees with a lump sum of sick leave at the beginning of the year.⁸⁶ The definition of a family member can also differ from state to state.⁸⁷

Connecticut was the first state to require mandated private sector paid sick leave when they enacted the Paid Sick Leave Act in 2011.⁸⁸ California followed suit by passing the Healthy Workplace, Healthy Families Act of 2014.⁸⁹ Massachusetts became the third state to require paid sick leave

⁷⁹ Economic Security for New Parents Act, H.R. S.3345, 115th Cong. 2D Sess. (2018); Working Families Flexibility Act, H.R.1180, 115th Cong. (2017); *see contra* The Healthy Families Act, H.R. 1784, 116th Cong. (2019).

⁸⁰ Sholar, *supra* note 58.

⁸¹ Lyles, *supra* note 78.

⁸² Jorge Galva Et Al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REP. 20, 20 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2569983/>.

⁸³ Drew Lunt, *The Mandatory Sick Leave Movement Is Gaining More Ground*, THE EMP'T L. HANDBOOK (Feb. 20, 2018), <https://www.employmentlawhandbook.com/leave-laws/mandatory-sick-leave-movement-gaining-ground/>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Connecticut Paid Sick Leave Act, CONN. STAT. § 31-57r (2012).

⁸⁹ *Healthy Workplaces, Healthy Families Act of 2014*, CAL. LAB. CODE § 245(e).

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after the voters in the state approved the Earned Sick Time for Employees ballot measure during the 2014 general election.⁹⁰ The Oregon and Vermont legislatures did the same in 2015 and 2016, respectively.⁹¹ Voters in Arizona and Washington approved ballot measures in their 2016 general elections that required employers to provide paid sick leave in these states.⁹² The Rhode Island Legislature passed paid sick leave legislation in 2017, which went into effect July 1, 2018.⁹³ In Maryland, the legislature overrode a gubernatorial veto of paid sick leave legislation in January 2018, and the law took effect in February 2018.⁹⁴ New Jersey enacted its own mandatory Paid Sick Leave Act on May 2, 2018, which took effect October 29, 2018.⁹⁵

As several states continue to move towards adopting paid sick leave, other states have adopted laws that do precisely the opposite, and prohibit cities and towns from enacting paid sick leave.⁹⁶ At this time, at least twenty states passed measures that ban municipalities from passing paid sick leave laws.⁹⁷ Georgia, Louisiana, Tennessee, Mississippi, Kansas, Indiana, Arizona, Oklahoma, and Alabama—in addition to Florida and Wisconsin—passed preemption laws prohibiting enactment of paid sick leave policies, with eight of the eleven gaining adoption since 2013.⁹⁸ “Preemption” in this context refers to a situation where a state law is enacted to block a local ordinance from taking effect—or dismantle an existing ordinance.⁹⁹

⁹⁰ Massachusetts Earned Sick Time Law, MASS. GEN. LAWS ch. 149, § 148C (2014 approved ballot measure).

⁹¹ Oregon’s Sick Time Law, S.B. 454, 78th Leg. Assemb. (Or. 2015); Vermont Earned Sick Time Law, 21 V.S.A. § 384.

⁹² Arizona Earned Paid Sick Time (2016 approved ballot measure), ARIZ. REV. STAT. §§ 23-371; Wash. Dep’t of Labor & Ind., Initiative 1433, (2016 approved ballot measure).

⁹³ Rhode Island Healthy and Safe Families and Workplaces Act, H.B. 5413, 2017-18 Leg. Sess. (R.I. 2017).

⁹⁴ Maryland Healthy Working Families Act, S.B. 1, 417th Assemb. Sess., Md. ALS 1 (2003).

⁹⁵ New Jersey Paid Sick Leave Act, N.J. STAT. ANN. § 34:11D.

⁹⁶ Callison & Pesko, *supra* note 25, at 1.

⁹⁷ Marti von Wilpert, *State and Local Policymakers Should Beware Preemption Clauses*, ECON. POLICY INST. (Jan. 18, 2018, 12:53 PM), <https://www.epi.org/blog/state-and-local-policymakers-should-beware-preemption-clauses-snuck-into-legislation/>.

⁹⁸ Claire Zillman, *The Paid Sick Leave Battle Continues, State by State*, FORTUNE (Feb. 11, 2015), <http://fortune.com/2015/02/11/paid-sick-leave-state-laws-bans/>.

⁹⁹ Wilpert, *supra* note 83, at 3; Yuki Noguchi, *Businesses Push Back on Paid-Sick-Leave Laws*, HEALTH NEWS NAT’L PUB. RADIO, (May 6, 2017, 7:15 AM), <https://www.npr.org/sections/health-shots/2017/05/06/527053441/businesses-push-back-on-paid-sick-leave-laws> (stating that preemption laws are increasingly common, and not just for paid leave. Some states have laws that preempt city and county ordinances governing minimum wage, anti-discrimination policies, or ridesharing).

The stark contrast represents the political division regarding paid sick leave time. Advocates for paid sick leave see benefits for both the employee and the employer by increasing employee production, reducing the spread of contagion, and boosting workplace morale. In contrast, opponents believe that government mandates on paid sick leave are an intrusion on private businesses and force employers to bear the cost of offering this benefit, which can be especially burdensome on small businesses.

D. A Closer Look at New Jersey's Medical Leave Laws.

New Jersey has traditionally led the nation on progressive legislation in the realm of family medical leave. In addition to the rights granted by the FMLA, employees are entitled to leave for family and/or medical reasons under the New Jersey Family and Medical Leave Act (“NJFLA”).¹⁰⁰ In many aspects, the New Jersey Family Leave Act and the Federal Family Medical Leave Act are very similar, but they are not identical.

Eligible employees are entitled to take NJFLA leave for any of the following qualifying reasons: the birth of a child, the placement for adoption of a child, or to care for a parent, child, sibling, grandparent, parent-in-law, and “any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship” suffering from a serious health condition.¹⁰¹ An employee is eligible for NJFLA leave if the employee worked at least twelve months in New Jersey for the covered employer and worked at least 1,000 base hours during the immediately preceding twelve-month period.¹⁰²

The NJFLA is similar to the FMLA because it provides unpaid leave to certain workers of covered employers to care for their family members.¹⁰³ However, one key difference is that the NJFLA does not

¹⁰⁰ *N.J. STAT. ANN. § 34:11B-1.*

¹⁰¹ See A.B. 3975, 218th Leg. (N.J. 2019) (“On February 19, 2019, Governor Phil Murphy signed legislation that amended and significantly expanded New Jersey’s existing Family Leave Act (NJFLA). First, the amendment reduced the employer size threshold to 30 employees, compared to the 50-employee threshold that previously applied. The amendment expanded the definition of ‘family member’ to include ‘parent-in-law,’ ‘sibling,’ ‘grandparent,’ and ‘any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship.’ Finally, the amendment reduced the advance notice requirement from 30 days to 15 days when an employee requests intermittent leave to care for a family member with a serious health condition.”).

¹⁰² See New Jersey Family Leave Act, N.J.S.A. § 34:11B-4 (2019).

¹⁰³ Compare N.J.S.A. § 34:11B-4 (stating that the NJFLA provides employees with up

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provide for leave to care for one's own serious health condition—eligible employees may take NJFLA leave only to care for a family member.¹⁰⁴ Another difference is that FMLA only covers employers with a minimum of fifty employees within a seventy-five mile radius of the work place, while the NJFLA specifies that the employer should have, at a minimum, thirty employees anywhere in the world.¹⁰⁵ The NJFLA also provides employees with up to twelve weeks of unpaid protected leave in a twenty-four month period while FMLA provides up to twelve weeks of leave in a twelve-month period.¹⁰⁶ Lastly, the FMLA requires covered employees to work with the organization for at least twelve months and 1,250 hours in the last twelve months.¹⁰⁷ On the other hand, the NJFLA requires an employee to have worked with the organization for twelve months but only requires 1,000 hours in the preceding twelve months.¹⁰⁸ Both the FMLA and NJFLA can run concurrently if an employee qualifies for both simultaneously.¹⁰⁹

III. NEW JERSEY'S MOST RECENT LEAVE LAW: THE NEW JERSEY PAID SICK LEAVE ACT.

In May of 2018, New Jersey Governor Phil Murphy delivered on his campaign promise when he signed into law the New Jersey Paid Sick Leave Act (“NJPSLA”).¹¹⁰ Part III outlines significant components of the newly enacted NJPSLA which went into effect October 29, 2018.

A. Preemption of Municipal Ordinances.

Before the NJPSLA was passed, “over a dozen New Jersey municipalities” already passed their own paid sick leave laws, creating a confusing landscape for employers conducting business throughout New Jersey.¹¹¹ The Act, however, contains strong preemption language, which

to twelve weeks of unpaid protected leave in a twenty-four-month period), *with* Family Medical Leave Act of 1993, 29 U.S.C.S. § 2612 (2009) (stating that FMLA provides up to twelve weeks of leave in a twelve-month period).

¹⁰⁴ N.J.A.C. § 13:14-1.5(a) (“An eligible employee may take 12 weeks of family leave within any 24 month period in order to provide care made necessary by reason of: the birth of a child of the employee; the placement for adoption of a child with an employee; or the serious health condition of family member of the employee.”).

¹⁰⁵ 29 U.S.C.S. § 2611(2)(B)(ii) (2019); *see also* N.J.S.A. § 34:11B-3 (2019).

¹⁰⁶ 29 U.S.C.S. § 2611(2)(B)(ii) (2019); *see also* N.J.S.A. § 34:11B-4 (2019).

¹⁰⁷ 29 U.S.C.S. § 2611 (2019).

¹⁰⁸ N.J.S.A. § 34:11B-3 (2019).

¹⁰⁹ *See generally* Stefanie Riehl, *Family and Medical Leave, NEW JERSEY BUS. & INDUSTRY ASS'N*, (Jun. 28, 2019), <https://www.njbia.org/family-medical-leave/>.

¹¹⁰ N.J.S.A. § C.34:11D-1.

¹¹¹ *See* William Horwitz & Gregg Settembrino, *New Jersey Paid Sick Leave Law Becomes Effective on October 29, 2018*, *THE NAT'L L. REV.* (July 23, 2018),

bars New Jersey municipalities from enacting their own ordinances, rules, resolutions, or regulations regarding paid family and medical leave.¹¹² This preemption aspect of the Act is beneficial for employers, as they only have to comply with the new Act, rather than a patchwork of local laws.¹¹³

B. Employee Coverage.

The NJPSLA has unique characteristics compared to other leave laws that currently exist in New Jersey. The differences arise with the NJPSLA's application. Under the new ordinance, all New Jersey employees qualify for sick leave, except for per diem healthcare employees, construction workers employed pursuant to a collective bargaining agreement, and public employees who already have sick leave benefits.¹¹⁴ The NJPSLA therefore applies to any person or entity with employees in the state, and there is no exemption for employer size under this law: all employers within the state are required to provide sick leave benefits.¹¹⁵ The Act also expands the definition of "employee" as both part-time and temporary employees are entitled to leave.¹¹⁶ There is also no minimum hours-worked requirement for the law to take effect.¹¹⁷ This is exceptional, considering the fact that other leave laws in New Jersey have a small business exception and an hours-worked requirement for covered workers.¹¹⁸

<https://www.natlawreview.com/article/new-jersey-paid-sick-leave-law-becomes-effective-october-29-2018>); Annemaria Duran, *New Jersey Paid Sick Leave Act*, SWIPELOCK (Nov. 16, 2018), <https://www3.swipeclock.com/blog/new-jersey-paid-sick-leave-act/>) (noting that those cities included "East Orange, Newark, Jersey City, Montclair, Passaic, Paterson, Irvington, Trenton, Bloomfield, Elizabeth, New Brunswick, Plainfield, and Morristown.").

¹¹² N.J.S.A. § 34:11D-8 (2019) ("The provisions of this act shall preempt any ordinances, resolution, law, rule, or regulation regarding earned sick leave adopted by the governing body of a county or municipality.").

¹¹³ Horwitz & Settembrino, *supra* note 97; *see generally* N.J.S.A. § C.34:11D-8.

¹¹⁴ *See* N.J.S.A. § C.34:11D-1 (further defining "Per diem health care employee" in the Act as any: "health care professional licensed in the State of New Jersey employed by a health care facility licensed by the New Jersey Department of Health; any individual that is in the process of applying to the New Jersey Division of Consumer Affairs for a license to provide health care services who is employed by a health care facility licensed by the New Jersey Department of Health; or any first aid, rescue or ambulance squad member employed by a hospital system.").

¹¹⁵ *See id.* ("Employee" means an individual engaged in service to an employer in the business of the employer for compensation.").

¹¹⁶ *Id.*; *see also* Earned Sick Leave FAQs, https://www.nj.gov/labor/forms_pdfs/lwdhome/Legal/earnedsickleave.pdf ("The Earned Sick Leave Law makes no distinction for coverage between part-time or seasonal employees and full-time employees.").

¹¹⁷ Duran, *supra* note 111.

¹¹⁸ N.J. STAT. ANN. § 34:11B-4 (stating that an employee is eligible for NJFLA leave if the employee has worked at least twelve months in New Jersey for the covered employer and has worked at least 1,000 base hours during the immediately preceding twelve-month

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Notably, the term “family member” is defined more broadly under the Act than the NJFLA and FMLA, and includes grandchildren, siblings, grandparents, domestic partners, civil-union partner, spouses, and those people with “the equivalent of a family relationship” to the employee.¹¹⁹ The NJPSLA also provides leave of absence for domestic or sexual abuse of an employee or an employee’s family member.¹²⁰ The Act expands leave for public health emergencies, attendance at school-related conferences, meetings, or other events to care for an employee’s child, none of which were covered by former New Jersey leave laws.¹²¹

C. Accrual and Carry Over.

The NJPSLA provides employers with two options for providing sick leave; the accrual or annual methods. Under the accrual method, employees can accrue one hour of leave for every thirty hours worked.¹²² Under the annual method, an employer can provide employees with “full complement” of earned sick leave on the first date of the benefit year, which is defined by the employer.¹²³ Regardless of the method, employers are under no obligation to allow an employee to use, or to carry over from one benefit year to the next, more than forty hours of earned sick leave.¹²⁴

D. Notice and Documentation.

New Jersey employers are responsible for notifying employees of their rights under the NJPSLA, which includes accrual rates, the right to file a complaint, and to be free from retaliation.¹²⁵ Like many other leave laws, employers must put employees on notice of their rights under the Act in a conspicuous place and provide written copies of the notice to employees within thirty days of the date on which the Commissioner issues

period).

¹¹⁹ N.J. STAT. ANN. § 34:11D-1.

¹²⁰ N.J. STAT. ANN. § 34:11D-3(a)(3); *see generally* Steve Flamisch, *NJ Earned Sick Leave Covers Domestic Violence, Sexual Assault, Stalking*, RUTGERS SCH. OF MGMT. AND DOMESTIC REL. (Oct. 25, 2018), <https://smlr.rutgers.edu/news/nj-earned-sick-leave-covers-domestic-violence-sexual-assault-stalking> (explaining that paid leave for these services and treatments is vital, as New Jersey experienced 63,420 incidents of domestic violence in 2016).

¹²¹ N.J. STAT. ANN. § C.34:11D-3(a)(4).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (“The employer shall not be required to permit the employee to accrue or use in any benefit year, or carry forward from one benefit year to the next, more than 40 hours of earned sick leave.”).

¹²⁵ N.J. STAT. ANN. § 34:11D-7(a); *see also* New Jersey Dep’t of Labor and Workforce Development, *New Jersey Earned Sick Leave Notice of Employee Rights*, https://nj.gov/labor/forms_pdfs/mw565sickleaveposter.pdf.

the notice, or at the time of hiring for employees hired after that date.¹²⁶ The regulations permit an employer to meet the conspicuous-posting requirement with an internet or intranet site available to employees.¹²⁷ Additionally, an employer may provide the individual notice required by the Act via e-mail.¹²⁸

Employers may also require employees to provide advance notice of an intention to use earned sick leave.¹²⁹ If an employee's leave is foreseeable, employers may require up to seven days advance notice, to keep documentation of the event.¹³⁰ Employers may prohibit employees from using foreseeable paid sick leave on certain dates, and require documentation for unforeseeable sick leave used during such dates.¹³¹ When leave is not foreseeable, an employee may be required to give notice of their intention to use leave as soon as practicable, if the employer notified the employee of this requirement.¹³² Employers can also require employees to provide documentation for paid sick leave of three or more consecutive days.¹³³

E. Penalties and Private Right of Action.

The NJPSLA imposes the same penalties as other wage and hour violations. There are three provisions within the Act that address penalties for violations: in the discrimination/retaliation section, in the recordkeeping section, and in a general penalty provision.¹³⁴ Each section imposes penalties through the New Jersey Wage and Hour Law, which include fines and administrative penalties.¹³⁵ In the event that an employer fails to provide earned sick leave in the amount and manner prescribed by law, individual employees have a basis for a wage claim against his or her employer.¹³⁶ The employee has the right to pursue civil litigation against

¹²⁶ *Id.* (“Each covered employer shall conspicuously post the notification in a place or places accessible to all employees in each of the employer’s workplaces.”).

¹²⁷ N.J. STAT. ANN. § 34:11-56.12.

¹²⁸ *Id.*

¹²⁹ N.J. STAT. ANN. § 34:11D-3(b).

¹³⁰ *Id.* (“If an employee’s need to use earned sick leave is foreseeable, an employer may require advance notice, not to exceed seven calendar days prior to the date the leave is to begin.”).

¹³¹ *Id.*

¹³² *Id.*

¹³³ N.J. STAT. ANN. § 34:11D-3(b) (“For earned sick leave of three or more consecutive days, an employer may require reasonable documentation.”).

¹³⁴ N.J. STAT. ANN. § 34:11D-1; N.J. STAT. ANN. § 34:11-56a24; N.J. STAT. ANN. § 34:11-D-5.

¹³⁵ N.J. STAT. ANN. § 34:11-56a25.

¹³⁶ N.J. STAT. ANN. § 34:11-56a25; *see also Wage and Hour Compliance FAQs*, NEW JERSEY DEP’T OF LABOR AND WORKFORCE DEVELOPMENT,

the employer and could recover the monetary value of the unpaid leave, plus costs and attorney fees.¹³⁷

Employers who violate the Act are subject to the penalties and remedies afforded to employees under the New Jersey Wage and Hour Law, which includes monetary damages, attorneys's fees and costs, *plus liquidated damages in an amount equal to the unpaid leave*.¹³⁸ Fines under the New Jersey Wage and Hour Law include \$250 for a first offense, and \$500 dollars for subsequent offenses.¹³⁹ For "willful violations," or when an employer intentionally disregards the law or acted with indifference, penalties increase between \$100 and \$1000 and ten and ninety days in prison.¹⁴⁰ For further "willful" violations, employers are fined between \$500 and \$1000 and/or face between ten and 100 days in prison.¹⁴¹ Notably, the NJPSLA creates a rebuttable presumption for retaliatory action if an employer takes adverse action within ninety days of an employee filing a complaint alleging a violation of the NJPSLA or engages in other forms of protected activity under the Act.¹⁴²

IV. ANALYSIS.

This part will consider the proposed effects of NJPSLA against the backdrop of its criticisms. Proponents of paid sick leave legislation claim that paid sick time will reduce turnover, increase productivity, and reduce the spread of contamination in the workplace. However, opponents cite the economic burdens that sick leave will place on businesses—particularly small to mid-sized companies—who may bear the costs of managing and providing the leave.¹⁴³

One of the main sources of controversy regarding paid sick leave mandates is the possibility that it could hurt employment and wage growth.¹⁴⁴ The critics argue that providing paid leave from work to all

https://www.nj.gov/labor/wagehour/content/wage_and_hour_compliance_faqs.html (last visited Nov. 21, 2019).

¹³⁷ N.J. STAT. ANN. § 34:11-56a25; *see also* Evandro Gigante Et Al., *Proposed Rules Issued for New Jersey Paid Sick Leave Act*, PROSKAUER LAW AND WORKPLACE, (Sept. 26, 2018), <https://www.lawandtheworkplace.com/2018/09/proposed-rules-issued-for-new-jersey-paid-sick-leave-act/>.

¹³⁸ N.J. STAT. ANN. § 34:11-56a22 ("when the Commissioner of Labor finds that an individual has violated that act, the commissioner is authorized to assess and collect administrative penalties, up to a maximum of \$250 for a first violation and up to a maximum of \$500 for each subsequent violation.").

¹³⁹ *Id.*

¹⁴⁰ N.J. STAT. ANN. § 34:12-1.2(a)(8)(b).

¹⁴¹ N.J. STAT. ANN. § 34:12-1.2(a)(8)(c).

¹⁴² N.J. STAT. ANN. § 34:11D-4(b).

¹⁴³ Pichler & Ziebarth, *supra* note 4, at 28.

¹⁴⁴ *Id.* at 2.

employees would be expensive, ultimately stifling the economy, and forcing them to hire fewer employees.¹⁴⁵ Employers also raised concerns about the feasibility of keeping a business running if all employees have the flexibility and the right to take leave for reasons that may not qualify under the law. Thus, opponents argue that paid sick leave laws encourage employee absenteeism and abuse.¹⁴⁶ Since it is too early for empirical studies on the effects of New Jersey's Paid Sick Leave Act, this Part will reconcile studies from other states to address the proposed effectiveness of Governor Murphy's legislation.

A. Addressing the Opposition in New York City.

In June, 2013, New York City became the seventh—and the largest—United States jurisdiction to create a legal right to paid sick leave, with the passage of the Earned Sick Time Act (“ESTA”).¹⁴⁷ The Act took effect in April 2014.¹⁴⁸ Under the ESTA, covered employers with five or more employees accrue job-protected paid sick leave at a rate of one hour for every thirty hours worked.¹⁴⁹ The Act was historic in its scope, covering 3.4 million workers employed in New York City—1.2 million of whom did not have access to paid sick days prior to its passage.¹⁵⁰

The reaction to the ESTA is illustrative. When the law was first proposed, the opposition predicted a “death knell” for New York City's economy, leading to increased unemployment, shuttered businesses, and stymied economic growth.¹⁵¹ The critics also predicted that such a law would invite widespread abuse by employees.¹⁵² However, these predictions proved to be unfounded.¹⁵³ Survey results of 352 employers with five or more workers, all of whom were covered by the paid sick day provisions, suggest that the effects of the Act on the business operations of New York City employers were “far more modest than the opponents had

¹⁴⁵ EILEEN APPELBAUM & RUTH MILKMAN, CTR. FOR ECON. AND POLICY RESEARCH, NO BIG DEAL: THE IMPACT OF NEW YORK CITY'S PAID DAYS LAW ON EMPLOYERS, 1, 3 (2016).

¹⁴⁶ Paid Sick Time Act, N.Y.C. Council Int. No. 0097-2010 (2010); Callison & Pesko, *supra* note 25, at 1.

¹⁴⁷ NYC CONSUMER AFFAIRS, NYC'S PAID SICK LEAVE LAW FIRST YEAR MILESTONES, 15 (2015) <https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeaveLaw-FirstYearMilestones.pdf>.

¹⁴⁸ *Id.* at 15.

¹⁴⁹ Paid Sick Time Act, N.Y.C. Council Int. No. 0097-2010 (2010).

¹⁵⁰ NYC CONSUMER AFFAIRS, NYC'S PAID SICK LEAVE LAW FIRST YEAR MILESTONES 5 (2015) <https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeaveLaw-FirstYearMilestones.pdf>.

¹⁵¹ *Id.* at 31.

¹⁵² Jen Kinney, *Mandatory Paid Sick Leave Isn't Hurting NYC Businesses*, NEXT CITY (Sept. 16, 2016), <https://nextcity.org/daily/entry/nyc-paid-sick-leave-study-impacts>.

¹⁵³ APPELBAUM & MILKMAN, *supra* note 145, at 3.

feared.”¹⁵⁴ The vast majority of employers surveyed—nearly 94%—reported the law “had no effect on business’ productivity, while 2% of them reported that productivity actually increased.”¹⁵⁵ By their own account, employers were able to adjust quite easily to the new law, and for most the cost impact was minimal to nonexistent.¹⁵⁶

Significantly, New York City’s paid sick leave ordinance had little to no effect on employer’s bottom lines.¹⁵⁷ One explanation for this minimal cost impact was that most employers covered short absences of employees taking sick leave by temporarily assigning work to other workers, “allowing employees to swap shifts, putting the work on hold, or having some employees work from home while out sick.”¹⁵⁸ Another reason for the minimal cost impact was the minimal use of paid sick leave by employees.¹⁵⁹ On average, employers recognized that only three-quarters of workers used their available paid sick leave; and in the twelve months preceding the survey, only a quarter of workers used their available sick leave.¹⁶⁰ With the vast majority of employers surveyed—nearly 98%—there were no known cases of abuse and only 0.3% of employers reported more than three cases of abuse.¹⁶¹ This suggests that “employees treat paid sick days not as an entitlement, but as insurance, to use when illness strikes the worker or a family member.”¹⁶²

In short, New York City employers have expressed fear, but such fears have not materialized. New York City’s Paid Sick leave law was a “non-event” for most employers, and, significantly, the law expanded leave to millions of workers in New York City to care for themselves and their loved ones.¹⁶³ Only a year and a half after the law’s enactment, New York City employers’ opposition of paid sick day laws had dissipated; 86% of employer respondents supported the ESTA and 53% indicated that they

¹⁵⁴ APPELBAUM & MILKMAN, *supra* note 145, at 3.

¹⁵⁵ APPELBAUM & MILKMAN, *supra* note 147, at 4.

¹⁵⁶ APPELBAUM & MILKMAN, *supra* note 147, at 3.

¹⁵⁷ APPELBAUM & MILKMAN, *supra* note 147, at 3 (asserting that among the employers who reported an impact on their bottom line (14% of respondents), only 9% reported a cost increase of less than 3% in their overall costs).

¹⁵⁸ APPELBAUM & MILKMAN, *supra* note 145, at 3.

¹⁵⁹ APPELBAUM & MILKMAN, *supra* note 145, at 4.

¹⁶⁰ APPELBAUM & MILKMAN, *supra* note 145, at 4.

¹⁶¹ APPELBAUM & MILKMAN, *supra* note 145, at 4.

¹⁶² APPELBAUM & MILKMAN, *supra* note 145, at 4.

¹⁶³ NYC CONSUMER AFFAIRS, NYC’S PAID SICK LEAVE LAW FIRST YEAR MILESTONES 28 (2015) (citing that New York’s Earned Sick Leave Law would create a legal right to sick leave for 3.4 million workers, 1.2 million of whom did not previously have access to this benefit) <https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeaveLaw-FirstYearMilestones.pdf>.

were “very supportive” of the city’s legislation.¹⁶⁴

B. Success in San Francisco: Paid Sick Leave Significantly Increased Employee Coverage Without Impacting Profitability.

On February 5, 2007, San Francisco was the first jurisdiction to enact a mandatory paid sick policy.¹⁶⁵ Similar to the NJSPLA, the San Francisco Paid Sick Leave Ordinance (“PSLO”) requires employers to provide paid sick leave to all employees (including part-time and temporary workers) who perform work in San Francisco.¹⁶⁶ Under the PSLO, paid sick leave begins to accrue after the first ninety calendar days of employment, and employees earn one hour of paid sick leave for every thirty hours worked.¹⁶⁷ The number of accrued paid sick leave that can be carried over from year to year is capped at seventy-two hours for large employers and forty-five hours for small employers.¹⁶⁸

In general, survey results of San Francisco employers and workers suggest that the law functions well.¹⁶⁹ In a study aimed to measure the effects of San Francisco’s PSLO, the American Journal of Public Health examined how paid sick days were used, the costs and benefits for employers and employees, and the rates of employer compliance.¹⁷⁰ Specifically, surveyed firms were asked details about their leave policies, changes to their leave policies, and business operations in response to the PSLO.¹⁷¹

The responses to the PSLO in San Francisco were encouraging; studies reported that employee coverage significantly increased following the implementation of the ordinance.¹⁷² For example, after the mandated paid sick leave ordinance took effect, 18% of firms in San Francisco instituted a new sick leave policy between 2006 and 2009.¹⁷³ Although a majority of San Francisco firms (73%) offered some form of sick leave before adopting the ordinance, the proportion of firms with a sick leave policy increased from 73% to 91% over a three-year period, with a large

¹⁶⁴ *Id.* at 28.

¹⁶⁵ Carrie Colla Et Al., *Early Effects of the San Francisco Paid Sick Leave Policy*, 104 AM. J. OF PUB. HEALTH 2453, 2453 (2014).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ S.F. ADMIN. CODE § 12W.3(d) (2017).

¹⁶⁹ DRAGO & LOVELL, *supra* note 177, at 22.

¹⁷⁰ Colla et al., *supra* note 147, at 2454.

¹⁷¹ Colla et al., *supra* note 147, at 2454.

¹⁷² Colla et al., *supra* note 147, at 2458.

¹⁷³ Colla et al., *supra* note 147, at 2454 (positing that “gains were concentrated in firms with fewer than 100 employees, where the proportion of firms offering sick leave rose by 20% in contrast to large employers whose coverage increased by only 9%.”).

gain among firms with fewer than 100 workers.¹⁷⁴ By 2009, two years after the law took effect, 99% of workplaces with twenty or more employees offered paid sick leave.¹⁷⁵ Low-wage workers in San Francisco significantly benefitted from the ordinance, especially those working the food service and accommodation sectors.¹⁷⁶

Notably, and despite the fact that five or nine sick days were available under the PSLO, surveyed workers only used an average of three paid sick days during the previous year, and one-quarter of employees did not use a single paid sick day.¹⁷⁷ Similar rates were found in New York City.¹⁷⁸ The structure of paid leave seems to provide an incentive for employees to treat paid sick leave as a form of insurance, saving paid sick days for when they actually need the time to face their own illness or that of a family member.

Also, similar to the findings in New York City, employers in San Francisco demonstrated strong support for the PSLO after it took effect, as two-thirds of employers supported the law and one-third were “very supportive.”¹⁷⁹ Employers reported that “the PSLO had no effect on the predictability of employee absence, employee morale, customer service, or employees coming to work sick.”¹⁸⁰ Only a few employers faced increased costs under the PSLO; one in seven employers reported adverse effects on profitability, with a similar proportion of employees reporting fewer raises, bonuses, or reductions in other benefits.¹⁸¹ In part, the research suggests that employers were able to “offset potential costs by having co-workers fill in when others were absent, rather than hiring replacement workers.”¹⁸²

By and large, San Francisco employers could adjust to the paid sick leave ordinance with minimal effects on their overall business and their bottom line. Most employers could implement the PSLO with minimal impacts on their profitability, while expanding thousands of workers’s access to paid, job-protected illness leave.

¹⁷⁴ Colla et al., *supra* note 147, at 2454.

¹⁷⁵ Colla et al., *supra* note 147, at 2454.

¹⁷⁶ *Id.* (specifying that the accommodation and food services industries, a low-wage sector in San Francisco, were significantly more likely to incorporate a new sick leave policy in response to the PSLO.)

¹⁷⁷ S.F. Admin. Code § 12W.3(d); *see also* ROBERT DRAGO & VICKY LOVELL, INST. FOR WOMEN’S POLICY RESEARCH, SAN FRANCISCO’S PAID SICK LEAVE ORDINANCE: OUTCOMES FOR EMPLOYERS AND EMPLOYEES 8-9 (2011).

¹⁷⁸ APPELBAUM & MILKMAN, *supra* note 145, at 4.

¹⁷⁹ DRAGO & LOVELL, *supra* note 177, at 22 (“These rates of utilization—which are well below the caps of five and nine days—suggests that employees view paid sick days as a form of insurance, a valuable benefit when illness strikes, only using it when needed.”).

¹⁸⁰ DRAGO & LOVELL, *supra* note 177, at 19.

¹⁸¹ DRAGO & LOVELL, *supra* note 177, at 25.

¹⁸² DRAGO & LOVELL, *supra* note 177, at 25.

C. Seattle's Paid Sick and Safe Time Act Dramatically Increased Availability of Paid Sick Leave for Part-Time and Hospitality-Sector Workers.

Seattle, Washington is also ranked among the earliest adopters of paid sick leave legislation.¹⁸³ The City of Seattle Paid Sick and Safe Time Act ("PSSTA") took effect on September 1, 2012, requiring employers to provide paid leave for sick days to full time, part-time, temporary, and occasional basis workers who work within twelve miles of the city limits.¹⁸⁴ Seattle aligned itself with other jurisdictions with paid sick leave requirements, including San Francisco (2007), Washington D.C. (2009), and Connecticut (2012).¹⁸⁵ Through measuring the effects of Seattle's ordinance a year after its implementation, local paid leave mandates can dramatically increase employee coverage, particularly for part-time and hospitality workers.

A study by the University of Washington set out to determine the impact of Seattle's PSSTA.¹⁸⁶ The survey contacted a random sample of Seattle employers before the Ordinance went into effect, and one year later.¹⁸⁷ Specifically, data was collected between July and October of 2012, and between August and November of 2013.¹⁸⁸ The research drew on responses from 345 employers who were subject to the PSSTA.¹⁸⁹

At baseline, which spanned the time of the PSSTA's initial passage on September 1, 2012, 79.5% of employers offered some form of paid sick leave to some employees.¹⁹⁰ One year after the PSSTA took effect, the rate of coverage grew to 90.6%.¹⁹¹ Employers with full-time employees largely offered paid sick leave to full-time workers at baseline (80.8%), but this rate of coverage grew significantly over the first year to 93.9%.¹⁹² In contrast to full-time employee offerings, fewer than half of employers offered leave to their part-time workers, but this considerably increased to two-thirds over the first year.¹⁹³

¹⁸³ JENNIFER ROMICH, BMC PUB. HEALTH, LOCAL MANDATE IMPROVES EQUITY OF PAID SICK LEAVE COVERAGE: SEATTLE'S EXPERIENCE 4 (2017).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ JENNIFER ROMICH, BMC PUB. HEALTH, LOCAL MANDATE IMPROVES EQUITY OF PAID SICK LEAVE COVERAGE: SEATTLE'S EXPERIENCE 4 (2017).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² ROMICH, *supra* note 31, at 1.

¹⁹³ ROMICH, *supra* note 31, at 1.

The ordinance also had a substantial effect on industries where employees typically lack access to paid sick leave. For instance, in the hospitality industry, the coverage rate more than tripled from 27.5% when the Ordinance took effect to 85.0% one year later.¹⁹⁴ Seattle’s experience matched the findings in San Francisco, demonstrating that marginalized workers—those in low paying and part-time positions—are likely to gain significant coverage through mandated paid sick leave policies.¹⁹⁵ This is valuable, considering that the ordinance benefitted groups that were in need of paid sick leave the most—those working for small employers in low wage industries.

D. Empirical Research at the State Level: Connecticut’s Experience.

Following the trends set forth in San Francisco, and in an effort to reduce employee “presenteeism,” Connecticut became the first state in the nation to pass legislation requiring certain employers to allow workers to earn paid sick leave.¹⁹⁶ The law allowed workers to earn up to five days of paid sick leave per year.¹⁹⁷ Employees accrue one hour of paid sick leave for each forty hours worked, and could begin to use their paid sick days upon completion of 680 hours of employment.¹⁹⁸ In measuring the effects of Connecticut’s paid sick leave legislation, the survey results demonstrated, and the site visits and employer interviews confirmed, that the Connecticut law was beneficial to businesses in the state—contrary to many of the fears expressed by businesses prior to the passage of the legislation.¹⁹⁹

Similar to other jurisdictions, for larger employers in the state of Connecticut, the vast bulk of employers—those with fifty or more employees—already provided paid sick leave to some or all of their employees before the law took effect.²⁰⁰ This indicates that larger employers were not negatively affected by the ordinance, and the administrative burdens of the law were minimal.²⁰¹ Most large employers reported “a ‘modest’ impact or no impact of the law on their costs or business operations.”²⁰²

¹⁹⁴ ROMICH, *supra* note 31, at 1.

¹⁹⁵ Colla et al., *supra* note 147, at 2454.

¹⁹⁶ CONN. STAT. § 31-57s (2012).

¹⁹⁷ CONN. STAT. § 31-57s(a)(3) (stating that the law accrues in one-hour increments up to a maximum of forty hours per calendar year, which is the equivalent of 5 days per year).

¹⁹⁸ *Id.*; *see also* CONN. STAT. § 31-57s(b).

¹⁹⁹ EILEEN APPELBAUM ET AL., CTR. FOR ECON. AND POLICY RESEARCH, GOOD FOR BUSINESS? CONNECTICUT’S PAID SICK LEAVE LAW (2014).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

Similar to the results in Seattle and San Francisco, the largest increases in paid sick leave coverage after the law went into effect were in industries where workers needed the assistance the most, *e.g.*, healthcare, education and social services, hospitality, and retail.²⁰³ Part-time workers, who were rarely covered before the law took effect, benefitted disproportionately from the passage of Connecticut's legislation.²⁰⁴ As was the case in New York and San Francisco, few Connecticut employers reported abuse of the new law, and many employers reported positive benefits such as improved morale and reductions in the spread of illness in the workplace.²⁰⁵ Five years after Connecticut's Paid Sick Leave Act was enacted, over three-quarters of surveyed employers express support for the law.²⁰⁶

Connecticut's legislation provided paid leave to tens of thousands of Connecticut workers, with modest effects or none at all on the state's businesses and an increased approval for paid sick leave overtime.²⁰⁷ The concerns articulated by many business associations that the law would impose heavy burdens on employers and invite worker abuse were again misplaced; and instead, the impact of the new law on business was minimal. In short, similar to the experiences of other municipalities, the law brought paid sick leave to large numbers of part-time workers in the state for the first time, especially in industries like hospitality and retail.

E. The Public Policy Perspective: Paid Sick Leave as a Solution to Workplace Presenteeism.

Government officials urge all workers to stay home if they present flu-like symptoms, but this is not always a realistic option for millions of workers.²⁰⁸ Many employees in the U.S. cannot heed the government's advice, because this could cost them their paycheck and job security.²⁰⁹

The inability to self-quarantine and stay at home while sick during the flu season is linked to the lack of access to paid sick leave.²¹⁰ During the height of the H1N1 pandemic in 2009, workers without paid sick leave were far more likely than those with higher rates of leave to go to work

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ APPELBAUM, *supra* note 199, at 18.

²⁰⁶ APPELBAUM, *supra* note 199, at 18.

²⁰⁷ APPELBAUM, *supra* note 199, at 2.

²⁰⁸ NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 13, at 5 ("When government officials advised workers to stay home during the 2009 H1N1 'swine' flu pandemic, millions of workers without paid sick days didn't have this option—as they risked losing critical income and even their job. As a result, the nation's health was jeopardized.")

²⁰⁹ NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 13, at 5.

²¹⁰ Stoddard-Dare et al., *supra* note 60, at 1.

while sick.²¹¹ It was estimated that eight million workers worked while sick between September and November 2009, which may have infected up to seven million of their co-workers.²¹² A recent study used Google Flu data to demonstrate that influenza-like infection rates decrease significantly when workers gain access to paid sick days.²¹³ By comparing the rates of influenza-like illnesses in regions with paid sick days policies—including the District of Columbia, Connecticut, California, Massachusetts, and Oregon—with those lacking such laws, the study found that infection rates decrease by about 10% when employees gain access to paid sick days.²¹⁴

Another public health problem posed by presenteeism is foodborne illnesses in restaurants. The Food and Drug Administration guidelines recommend that workers with norovirus-related illnesses work on a restricted basis until twenty-four hours after symptoms subside.²¹⁵ However, workers with jobs in the food industry are among the least likely groups to have job-protected paid time off, as three in four food service workers lack access to even a single paid sick day.²¹⁶ For example, a Chipotle restaurant employee in Kent, Ohio had no choice but to come to work sick with the norovirus, which aggressively infected 500 people.²¹⁷ It was estimated that the outbreak cost the Kent community between \$130,000 and \$300,000.²¹⁸ The Kent Chipotle example, one of the most researched outbreaks in recent years, is not an isolated event. There are approximately seventy-six million instances of foodborne illness nationwide each year; and food-service workers who go to work despite being sick were among the leading causes of such outbreaks.²¹⁹

²¹¹ ROBERT DRAGO & KEVIN MILLER, INST. FOR WOMEN'S POLICY RESEARCH, SICK AT WORK: INFECTED EMPLOYEES IN THE WORKPLACE DURING THE H1N1 PANDEMIC 5 (Jan. 2010) <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B284.pdf>.

²¹² *Id.* at 1.

²¹³ STEFAN PICHLER & NICOLAS R. ZIEBARTH, NAT'L BUREAU OF ECON. RESEARCH, THE PROS AND CONS OF SICK PAY SCHEMES 7 (2016).

²¹⁴ *Id.*

²¹⁵ M KEECH, A.J. SCOTT, AND P. J. J. RYAN, THE IMPACT OF INFLUENZA AND INFLUENZA-LIKE ILLNESS ON PRODUCTIVITY AND HEALTHCARE RESOURCE UTILIZATION IN A WORKING POPULATION, OCCUPATIONAL MEDICINE 85 (1998) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.484.3961&rep=rep1&type=pdf>.

²¹⁶ Expanding Access to Paid Sick Leave: The Impact of the Healthy Families Act on America's Workers, JOINT ECON. COMM. OF THE U.S. CONG. (March 2010), http://jec.senate.gov/public/index.cfm?a=Files.Serve&File_id=abf8aca7-6b94-4152-b720-2d8d04b81ed6.

²¹⁷ April Hirsh, *Outbreak in Ohio: Cost of the 2008 Norovirus Incident in Kent*, POLICY MATTERS IN OHIO 4 (Aug. 2008) <http://www.policymattersohio.org/OutbreakInOhio2008.htm>.

²¹⁸ Hirsh, *supra*, note 3, at 1.

²¹⁹ *Foodborne Illness*, CTRS FOR DISEASE CONTROL AND PREVENTION www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections_g.htm.

Presenteeism also burdens the economy because employees who attend work while sick reduce productivity levels.²²⁰ While presenteeism seems attractive for organizations at first glance, employers are beginning to realize that it represents a “silent” but significant drain on productivity.²²¹ Presenteeism has become a serious issue in today’s business world—for both the employee and the employer. According to an article by Graham Lowe entitled “*Here in body, absent in productivity*,” presenteeism hurts output, quality of work-life and employee health.”²²² Researchers at Harvard estimate that the cost of presenteeism is more than seven times greater than absenteeism.²²³ When translated into dollar figures, the Harvard Business Review estimates that American companies suffer more than \$150 billion in presenteeism costs per year.²²⁴

Paid sick day legislation can legitimately minimize the negative externalities of workplace presenteeism. First, the research suggests that workers without access to paid sick leave go to work while sick, spreading diseases like the flu and endangering the health and welfare of others.²²⁵ Further, failure to provide paid sick days increases the likelihood of a viral outbreak at a food-serving establishment, resulting in substantial community costs. The norovirus outbreak in Kent, Ohio demonstrates how one community could have averted substantial costs if all Ohio employees working for medium and large employers had the right to earn paid sick days.²²⁶ While estimates of productivity losses vary, research consistently demonstrates that working while sick decreases employee productivity and performance. Providing workers with paid sick days will ensure that businesses who have responsible policies are not bearing part of the cost for businesses with a less responsible approach.

²²⁰ Wilpert, *supra* note 84, at 3.

²²¹ Evangelia Demerouti Et Al., *Present but sick: a significant drain on productivity*, 14 CAREER DEV. INT’L 1 (2009).

²²² Graham Lowe, *Here in body, absent in productivity: Presenteeism hurts output, quality of work-life and employee health*, CANADIAN HR REPORTER (last updated Dec. 4, 2002) <https://www.hrreporter.com/article/2207-here-in-body-absent-in-productivity/>.

²²³ Garry Mullins, *Contingent Workers and Occupational Health: A Review on the Effects of Non-Traditional Work Arrangements*, HARVARD PUB. HEALTH REVIEW (2018). <http://harvardpublichealthreview.org/garry/>.

²²⁴ Paul Hemp, *Presenteeism: At Work—But Out Of It*, HARVARD BUS. REVIEW (Oct. 2004).

²²⁵ Garry Mullins, *Contingent Workers and Occupational Health: A Review on the Effects of Non-Traditional Work Arrangements*, HARVARD PUB. HEALTH REVIEW (2018). <http://harvardpublichealthreview.org/garry/>.

²²⁶ Hirsh, *supra*, note 3, at 1.

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F. Synthesizing the Evidence: New Jersey's Paid Sick Leave Act Is A Good Sign For New Jersey Workers.

The passage of New Jersey's Paid Sick Leave Act has left many business organizations concerned over anticipated increases in cost, the potential for abuse of the law, and difficulty in tracking hours of paid sick leave earned by employees. However, as the survey results at the state and local levels indicate, these fears are unlikely to materialize. Connecticut's paid leave law and the city ordinances passed by New York City, San Francisco, and Seattle all demonstrate the positive effect that paid sick leave programs can have on the financial and physical well-being of working families.

The State of Connecticut reported that the vast majority of employers saw minimal effects on cost and made no changes such as increased prices or reduction in employee hours.²²⁷ In New York City, the cost impact of the paid sick leave legislation was minimal, in part because co-workers typically covered the work of those out on paid sick leave.²²⁸ Not only did most employers experience no abuse of the paid sick leave law, but most workers typically did not use all of the paid sick days that were available to them.²²⁹ The same pattern held true in San Francisco, supporting the conclusion that paid sick leave laws act as a form of insurance: many individuals pay for but do not use health insurance in a given year and, for those who do use it, it is rare for an individual to use each and every benefit provided in a given plan.²³⁰

San Francisco experienced competitive job and business growth that exceeded growth rates in neighboring counties after its paid sick leave law took effect, especially in certain low-wage industries.²³¹ After Seattle's implementation of paid sick leave law, coverage of paid sick leave more than tripled in sectors with restaurant and hospitality workers.²³² Employers experienced no abuse of the paid sick leave law and most

²²⁷ EILEEN APPELBAUM ET AL., *supra*, note at 13 (“as a result of Connecticut’s paid sick leave law, it is not surprising that very few of them made any changes in wages, prices, employee hours or other business practice.”) <http://cepr.net/documents/good-for-buisness-2014-02-21.pdf>.

²²⁸ APPELBAUM & MILKMAN, *supra* note 145, at 4.

²²⁹ APPELBAUM & MILKMAN, *supra* note 145, at 4.

²³⁰ ROBERT DRAGO & VICKY LOVELL, INST. FOR WOMEN’S POLICY RESEARCH, SAN FRANCISCO’S PAID SICK LEAVE ORDINANCE: OUTCOMES FOR EMPLOYERS AND EMPLOYEES 8-9 (2011).

²³¹ MILLER, K., & BENATAR, SAN FRANCISCO EMPLOYMENT GROWTH REMAINS STRONGER WITH PAID SICK DAYS LAW THAN SURROUNDING COUNTIES. INSTITUTE FOR WOMEN’S POLICY RESEARCH PUBLICATION (SEPT. 2011) <https://iwpr.org/publications/san-francisco-employment-growth-remains-stronger-with-paid-sick-days-law-thansurrounding-counties/>.

²³² ROMICH, *supra* note 31, at 1.

workers typically did not use all of the paid sick days that were available to them.²³³ Therefore, the benefits of paid sick leave ordinances extended paid sick days to millions of workers who previously lacked coverage, outweighing the very little expenses to employers.²³⁴

Prior to approving the NJPSLA, Governor Murphy estimated that 1.1 million New Jersey workers were unable to earn paid sick leave.²³⁵ According to the sponsors of the bill, the law will increase the value of doing business in the Garden State while “simultaneously broadcasting the message that they value their workers immensely.”²³⁶ Based on the effectiveness from these studies and from the beneficial reports of other states, these projections are well-founded. Governor Murphy’s new paid sick leave legislation will expand coverage for thousands of New Jersey workers, especially those of lower incomes and workers in certain industries—all while posing little to no burden on employers operating within the state.

V: CONCLUSION.

Our nation’s failure to establish a basic paid sick day’s standard is a significant cost to employees, families, and the overall public health. Both men and women are often trapped between their job responsibilities and having to care for a child or seriously ill family member. For many American workers, a day home sick or a day off work to care for a sick child means foregoing a paycheck. The United States needs a national paid sick day standard to protect all working people. At the federal level, Congress passed the FMLA in 1993, ensuring up to twelve weeks of unpaid leave to eligible workers—accounts for about half of the workforce, mainly employees at large firms. Although vigorous policy activity is taking place on the local level to achieve mandated paid sick leave, federally guaranteed paid sick leave legislation has yet to pass.

While the best solution would be to create a federal law mandating paid sick leave, the overall efforts in Congress remain unsuccessful. The HFA—guaranteeing seven paid sick days a year for employers with at least fifteen employees—would allow workers to care for their own health needs or for a sick family member. Even though this federal sick-leave bill has

²³³ APPELBAUM & MILKMAN, *supra* note 145, at 4.

²³⁴ NYC CONSUMER AFFAIRS, NYC’S PAID SICK LEAVE LAW FIRST YEAR MILESTONES 5 (2015) <https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeaveLaw-FirstYearMilestones.pdf>.

²³⁵ Dustin Racioppi, *New Jersey Workers To Get paid Sick Leave Later This Year*, USA TODAY (May 3, 2018), <https://www.usatoday.com/story/money/nation-now/2018/05/03/new-jersey-paid-sick-leave/576147002/> (“Bill sponsors said an estimated 1.1 million New Jersey workers are unable to earn sick leave”).

²³⁶ *Id.*

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received more widespread support than its predecessors, the overall efforts in Congress towards nationally mandated paid sick leave remains at a stand-still. Therefore, in situations where federal legislation becomes stagnant, the local government and states are in the best position to step in and adopt measures to protect the public health. Until a federal law is implemented, and as paid sick leave laws continues to gain momentum throughout the United States, cities and states need to continue to progress and expand their enactment of paid sick leave laws across the country.

The growing surge at the city and state level in guaranteeing paid sick days to workers in their cities is promising. The studies of mandated paid sick leave in New York City, San Francisco, Seattle, and Connecticut all provide useful insights for policymakers, advocates, and the business community to consider as a national policy comes into fruition. This comment suggests that these studies also provide a valuable understanding that NJPSLA, the latest victory at the state level, will extend paid sick leave benefits to hundreds of thousands of new workers in the state, all while posing little to no negative effect on the state's economy.²³⁷ Drawing on this momentum and the lessons of these new mandated sick leave policies throughout the country, is the opportunity to bring a nationally mandated policy in the twenty-first century, thereby improving the economic circumstances of millions of Americans and working families.

²³⁷ Dustin Racioppi, *New Jersey workers to get paid sick leave later this year*, USA TODAY (May 3, 2018).