



March 29, 2016

William Pound,
Executive Director
National Conference of State Legislatures
7700 East First Place
Denver, CO 80203

Re: State Legislation Mandating Provision of Paid Sick Leave by Employers

Dear Mr. Pound:

On behalf of the American Benefits Council ("Council"), we are writing regarding the growth in state- and municipal-level laws mandating employer-provided paid sick leave programs.

The Council is deeply concerned about the growing number of these types of laws and the difficulties and costs that they impose on employers. As discussed below, the Council urges the National Conference of State Legislatures ("NCSL") to take a leadership role in facilitating the adoption of a more coordinated effort by state governments with respect to these types of laws – one that focuses on the importance of paid leave programs without unduly burdening employers and their businesses.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members employ more than 100 million Americans.

BACKGROUND

Over 40 years ago, Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA"). Congress did so, in part, because it believed it important, and in the best interests of employers and employees alike, to have uniformity in the laws relating to the provision of employee benefits. This is because such uniformity allows employers to offer consistent benefit packages to employees, which results in reduced administrative burdens and costs. Uniformity also permits employers the ability to communicate a

consistent policy that can be better understood and utilized by employees. Employer-sponsored plans, as well as their participants and beneficiaries, also benefit from ERISA's uniform rules relating to reporting and disclosure, the fiduciary standard of care that applies to plan administration, and rights and remedies that are available to participants and dependents.

To facilitate these important policy goals, Congress included in ERISA a specific provision that provides for the preemption of state laws that "relate to" employer-sponsored welfare and pension plans. *See* ERISA Section 514.

Currently, ERISA's preemption provision may not extend to state paid leave laws. However, this does not mean that the principles behind preemption – specifically, the value of having uniformity in rules and regulations – should not apply in the context of state paid leave laws. Quite the contrary, as the discussion of the various state paid leave laws below indicates, these laws can and, in fact, do differ in materials respects from one another.

The growing patchwork of state and local paid leave laws makes it very difficult for multistate U.S. employers to comply all of these laws. In addition to leading to increased administrative complexity for employers, as well as possibly reduced compliance rates, it is very costly for employers to implement the tailored procedures, payroll practices, and state- or municipal-level reporting and payment processes necessary to comply with all of these laws. From the employee's perspective, the variety of laws that exist, and their differing terms, also leads to confusion and concern for employees (and their families). An employee may see a fellow colleague in a given locality earning paid leave that is markedly different from that which they receive from the same employer. Such differences in benefits are generally to be avoided as they can lead to a sense of inequity and concern among employees, as well as employee disenchantment and reduced employee morale.

Lastly, for the reasons noted above, these laws could discourage employers from establishing business operations in a given locale. Where this happens, we all lose – employers (who may lose access to talented, skilled, and interested workers), employees (who may lose access to a high-quality employer) and the state locality itself (which may lose access to new business entrants, as well as all the attendant benefits such as increased tax revenues).

OVERVIEW OF CURRENT LAWS

At the current time, the Council is aware of four states – California, Connecticut, Massachusetts, and Oregon – that have implemented paid leave laws. Even a cursory review of these four state laws indicate the material differences that exist among and

between the four laws, and the difficulties that U.S. employers will now face in navigating this patchwork of paid leave laws.

For example, California's law, The Healthy Workplaces, Healthy Families Act of 2014 generally allows an eligible employee to accrue sick leave at a rate of no less than one hour for every 30 hours worked, after 90 days of employment. An employer can limit an employee's use of paid sick days to 24 hours or 3 days in each year of employment.

In contrast, Connecticut's law, The Paid Sick Leave Act, requires employers with 50 or more employees to provide paid sick leave to "service workers," which accrues at a rate of one hour of paid sick leave for every 40 hours worked up to a maximum of 40 hours per calendar year. Employees can use accrued sick leave after completing 680 hours of work, provided they worked an average of 10 or more hours a week for the employer in the most recent calendar quarter.

As you can see from the above comparison, while the California and Connecticut laws share the same goal – providing employees with access to paid sick leave, based upon an accrual methodology related to hours worked, the laws differ in materials respects. First, the California law applies to all employers, whereas the Connecticut law only applies to employers with 50 or more employees. Second, Connecticut's law provides for the accrual of one hour of paid sick leave for every 30 hours worked – but with respect to hours worked *after* 90 days of employment; whereas California's law bases the accrual of a single hour off a higher hour threshold of 40 hours. And under the California law, an employee can only accrue a maximum of 40 hours of paid sick leave per calendar year. The California and Connecticut laws also differ on when and how an employee can use their accrued paid sick leave. As mentioned above, under the California law, an employer can limit an employee's use of paid sick days to 24 hours or 3 days in each year of employment. Per the terms of the Connecticut law, an employee can access all of their accrued leave without limit, but only after completing 680 hours of work, and provided that they worked an average of 10 or more hours a week for the employer in the most recent calendar quarter.

Below is a brief summary of the paid sick leave laws in Massachusetts and Oregon as well.

- *Massachusetts* – The Earned Sick Time for Employees Law requires employers with eleven or more employees to provide up to 40 hours of paid sick leave per calendar year. Employees accrue sick leave at the rate of one hour for every 30 hours worked up to a maximum of 40 hours per calendar year. Paid sick leave can be used any time after the 90th day after hire. The law applies to employees whose primary place of employment is Massachusetts, regardless of where the employer is located.

- *Oregon* – SB 454 requires employers with 10 or more employees to provide up to 40 hours of paid sick leave; however, employers with more than six employees that are located in a city with a population exceeding 500,000 people must also provide paid leave. Employees accrue sick leave at the rate of one hour for every 30 hours worked up to a maximum of 40 hours per calendar year.

We note that many other states appear to have bills under consideration that would require employers to provide some level of paid sick leave. In addition, the Council understands that the District of Columbia and a number of local municipalities have implemented their own laws and ordinances, including: Montgomery County, Maryland; Newark, New Jersey; New York City; Oakland, California; Philadelphia; Pittsburgh; San Diego; San Francisco; and Seattle, among others.

A cursory review of the current patchwork of laws demonstrates the mounting problem for employers in having to understand and comply with a set of laws that may vary regarding:

- Which employers are subject to the laws;
- Which employees are entitled to accrue paid sick leave;
- When employees begin to accrue paid sick leave;
- The rate at which sick leave can be accrued;
- The maximum amount of sick leave that can be accrued;
- Service requirements for employees before sick leave can be utilized;
- Notice that must be provided to employees regarding their rights under the law;
- Whether paid sick leave earned in one year “rolls over” into subsequent years;
- Permissible reasons for using paid sick leave (e.g., some laws permit sick leave to be used for specific purposes such as purposes related to domestic violence, bonding with a newborn, dealing with the death of a family member)
- Whether the sick leave can be used to care for family members or loved ones, and if so, for whom;
- If sick leave can be used to care for children, how “child” is defined;
- Exceptions for collectively bargained employees; and
- Whether the law creates a private cause of action for employees.

In addition to employers having to identify and comply with the growing patchwork of state and local paid leave laws, on Labor Day 2015, President Obama issued Executive Order 13706, which requires federal contractors to provide their employees with up to 56 hours of paid sick leave annually. The Executive Order applies to all covered contracts resulting from solicitations issued on or after January 1, 2017. As

a result, some employers will also now have to take into account federal sick leave obligations as well as the state and municipal laws and regulations detailed above.

RECOMMENDATIONS

It is clear that if employers have to comply with all of these conflicting and inconsistent laws and regulations (more of which are likely in the future), the result will be significantly increased administrative burdens for employers, confusion on the part of employees with regard to their specific rights, and an increase in litigation and state enforcement actions against employers. For example, an employer operating in the New York metropolitan tri-state area (encompassing Connecticut, New Jersey, and New York) would have to track its obligations under the Connecticut Paid Sick Leave Act), the nine municipal sick leave ordinances that have been enacted in various cities in New Jersey, and New York City's Earned Sick Time Act. This would be in addition to any additional requirements that might be dictated by collective bargaining agreements and/or Executive Order 13706.

The Council urges the NCSL and its members to take a leadership role in encouraging the development and adoption of uniform laws.

In the absence of federal law preempting state and local paid sick leave statutes, the Council encourages NCSL to take a leadership role in encouraging the adoption by state and municipalities of a more concerted approach to the design and enactment of paid sick leave laws. For example, we point to the NAIC as an example of how states and municipalities could work in concert better – through the adoption of model acts and regulations – to more uniformly adopt paid sick leave laws.

The benefits of adopting a more concerted approach to the design and implementation of these laws are numerous. First, states and municipalities would benefit from the sharing of each ideas and experiences regarding the design and adoption of paid sick leave laws. Second, use of a more public and concerted process would allow for increased input from various stakeholders, including employers, public interest and policy groups, and groups representing the interests of employees. Third, it would result in increased legislative and administrative efficiencies for states as they would be able to utilize the model acts and regulations in their own states when enacting and implementing the leave laws. Fourth, it should help ensure that an employer operating in a state with a particular paid sick leave law might be competitively disadvantaged relative to another employer operating in a state with a less expansive paid sick leave law.

And fifth, it should reduce unnecessary and confusing differences in states' laws, which should, in turn, minimize undue costs and administrative complexities on American businesses.¹

The Council urges NCSL and its members to adopt laws that recognize, and give credit to employers for, the offering of paid leave programs.

Our members understand the value and importance of well-crafted paid leave programs. They help reduce unexpected employee absenteeism and also foster increased employee health and well-being. Well-designed programs also can help minimize unnecessary and unexpected disruption in the workplace. These programs can, in turn, lead to increased business outcomes through reduced interference with manufacturing and business processes, as well as increased business performance and profitability.

For these and other reasons, nearly all of members offer very robust paid leave programs for their employees. They often provide between two and four weeks of paid leave – even for employees in their first or early years of employment. These programs, however, may differ in certain respects from the unique requirements contemplated by a given state or local law. For example, many of our members' programs allow for the accrual of *more* overall paid leave than that which is required by a given state law; however, our member's programs may use an accrual rate that differs from that required by the law.

To help minimize unnecessary interference with employer programs, and in recognition of the fact that many employers' programs offer very significant programs – programs that have been in effect for many, many years – we urge NCSL and its members to pursue the adoption of paid leave laws that would find an employer to be in compliance with such laws to the extent that the employer's program substantially complies with the given terms of the law, or if the employer's paid leave program is substantially equivalent to that required by the law (after taking into account differences under the employer's program in the maximum amount of paid leave that can be accrued, the rate upon which paid leave can be accrued, and when and for what purpose the accrued leave can be used).

At a minimum, NCSL and its members should pursue the development of consistent terminology to be used by states and localities when enacting paid leave laws.

¹ The Council also encourages NCSL and its member states to undertake efforts to minimize the extent of additional and/or conflicting paid leave laws at the local level (e.g., town, county or city laws), to the extent permitted by a state's "home rule" provisions, to help ensure that employers are not made potentially subject to paid leave laws in addition to those at the state or federal level.

In reviewing the numerous paid leave laws currently in effect as well as those under consideration by states and localities, they often differ in the definitions and terminology used when setting forth the material aspects of the mandated paid leave. As but one example, some laws focus on leave for employee illness or that of his or her family (i.e., more traditional sick leave), whereas other laws may encompass broader family and medical leave, as well as vacation pay.

The Council urges the NCSL and its members to foster the development of consistent terminology for use by states and localities in enacting paid leave programs. The benefits of such an approach are numerous. First, it should help minimize unneeded confusion among employers and employees alike – since we all would be working from the same “playbook” of terms and definitions. Second, it would minimize unnecessary administrative burdens or costs on employers in complying with these paid leave laws. Third and finally, it would result in increased understanding of, and compliance with, state and local paid leave laws, which would benefit all – employers and employees alike.

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Given the very competitive global marketplace in which American businesses operate, we all must work carefully and together to help ensure that that U.S. companies have the best platform from which to grow and succeed. We welcome any opportunity to work with NCSL and its member states to facilitate a more concerted approach to the enactment and implementation of paid leave laws – one that will ensure American businesses are not forced to bear undue administrative burdens or costs and will help best position American businesses for continued growth and success.

If you have any questions or would like to discuss further, please contact me or Diann Howland, Vice President, Legislative Affairs, at (202) 289-6700.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive, flowing style.

Lynn D. Dudley,
Senior Vice President,
Global Retirement and Compensation Policy
American Benefits Council

cc: Laura Rose
Jeffrey Hurley