



American Benefits Council

Benefits Briefing: Paid Leave Laws & Challenges for Employers

April 14, 2016

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Overview

- Intersection of paid leave laws and ERISA
- Overview of state and municipal paid family medical and sick leave laws
- Federal legislative activity
- Employer considerations/strategies

Intersection with ERISA

- Most employee benefits are governed by ERISA
- One important principle behind ERISA is the need for uniformity in the laws
 - Consistency
 - Administrative ease
 - Reduces costs and confusion
- Section 514 of ERISA specifically provides for preemption of state laws that “relate to” employer-sponsored welfare and pension plans (with limited exceptions)

Intersection with ERISA

- State paid leave laws generally have been found **not** to be subject to ERISA preemption
 - Why? Because they relate to payroll practices that are not considered welfare benefit plans under ERISA
- See, e.g., DOL Advisory Opinion 2005-13A
 - DOL: ERISA preemption does not apply to a state leave law even if it relates to an ERISA plan because it would “impair” the Family Medical and Leave Act (“FMLA”), which expressly encourages more generous state family leave laws
- The result: a growing patchwork of state and local paid leave laws creating additional complexity and expense for employers

Paid Leave Laws

- Can take many forms; but generally reduce down to the following two types:
 - Paid sick leave for the employee
 - Paid family leave
- Likely to overlap, but **not** fully align, with employer's FMLA obligations or voluntary paid leave policy
- Multiplying quickly across the country...

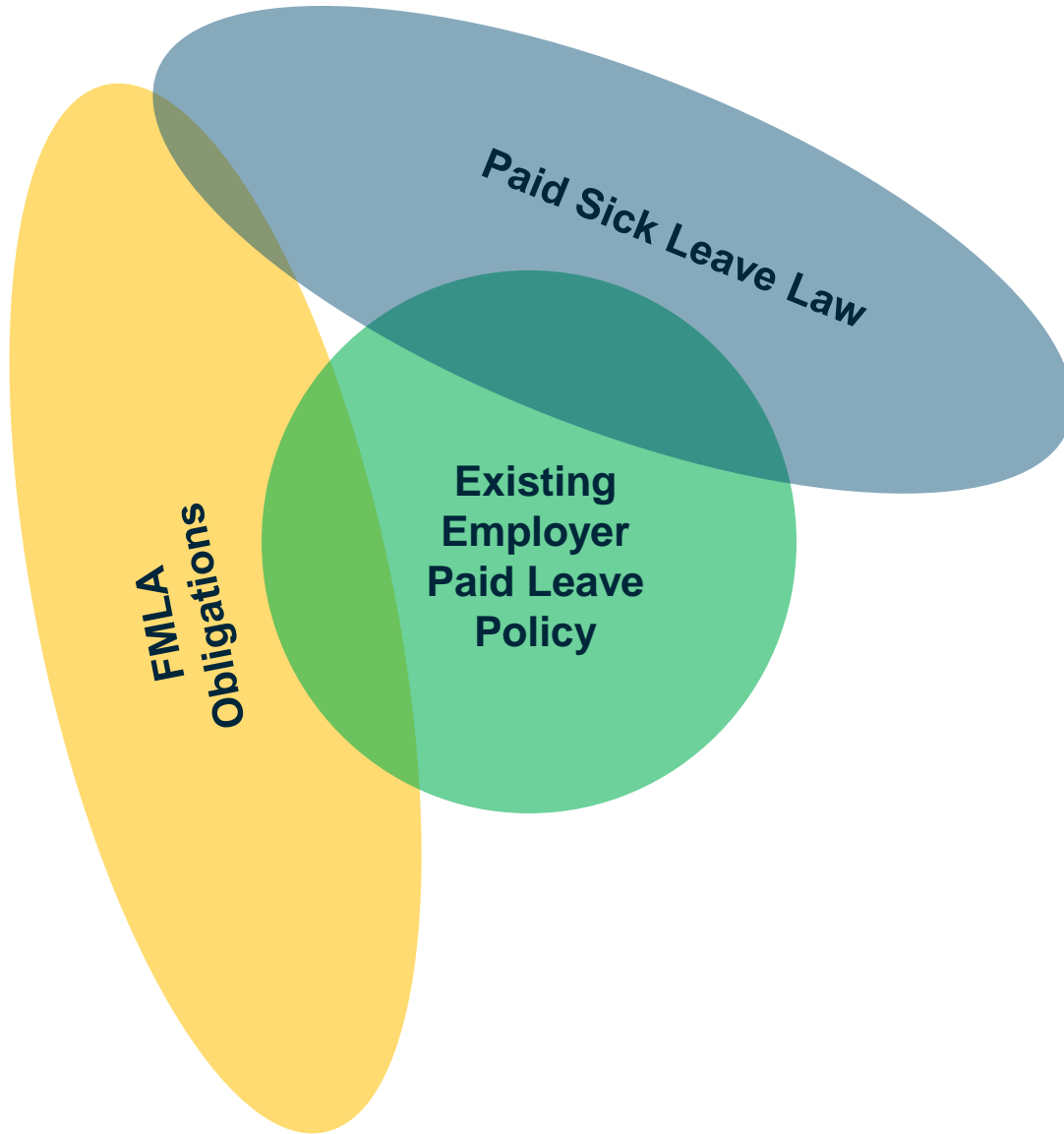


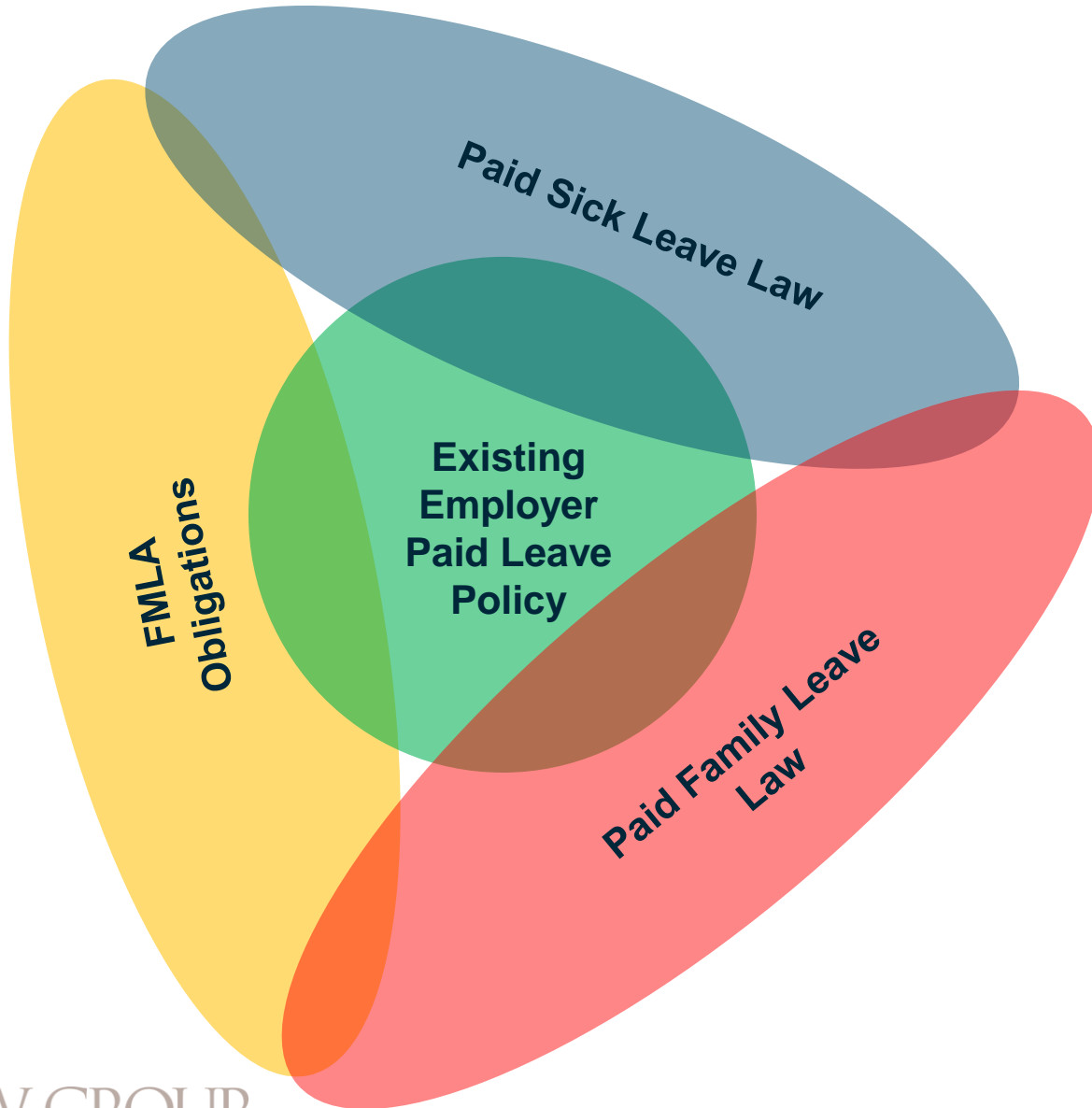
**Existing
Employer
Paid Leave
Policy**

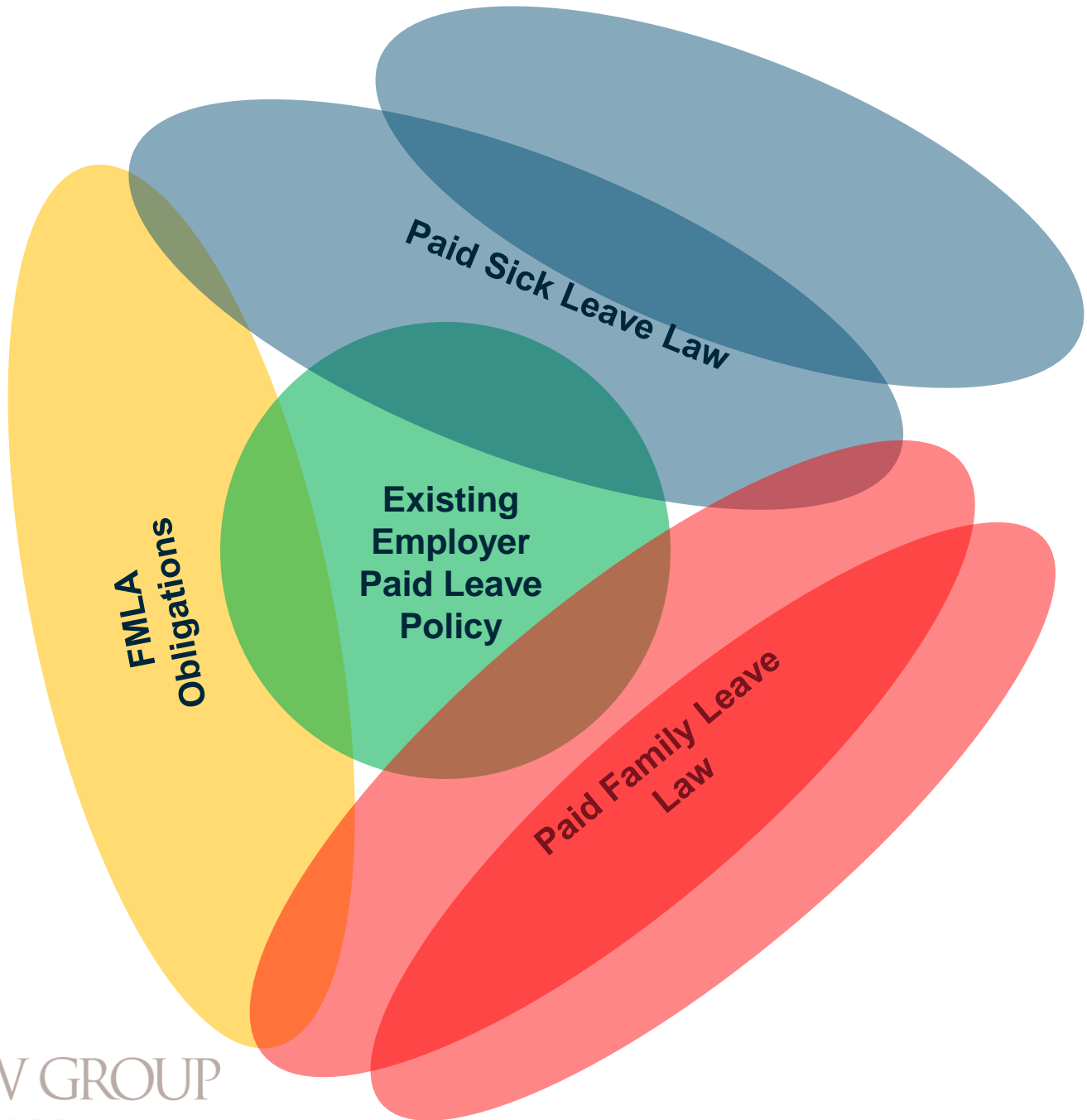


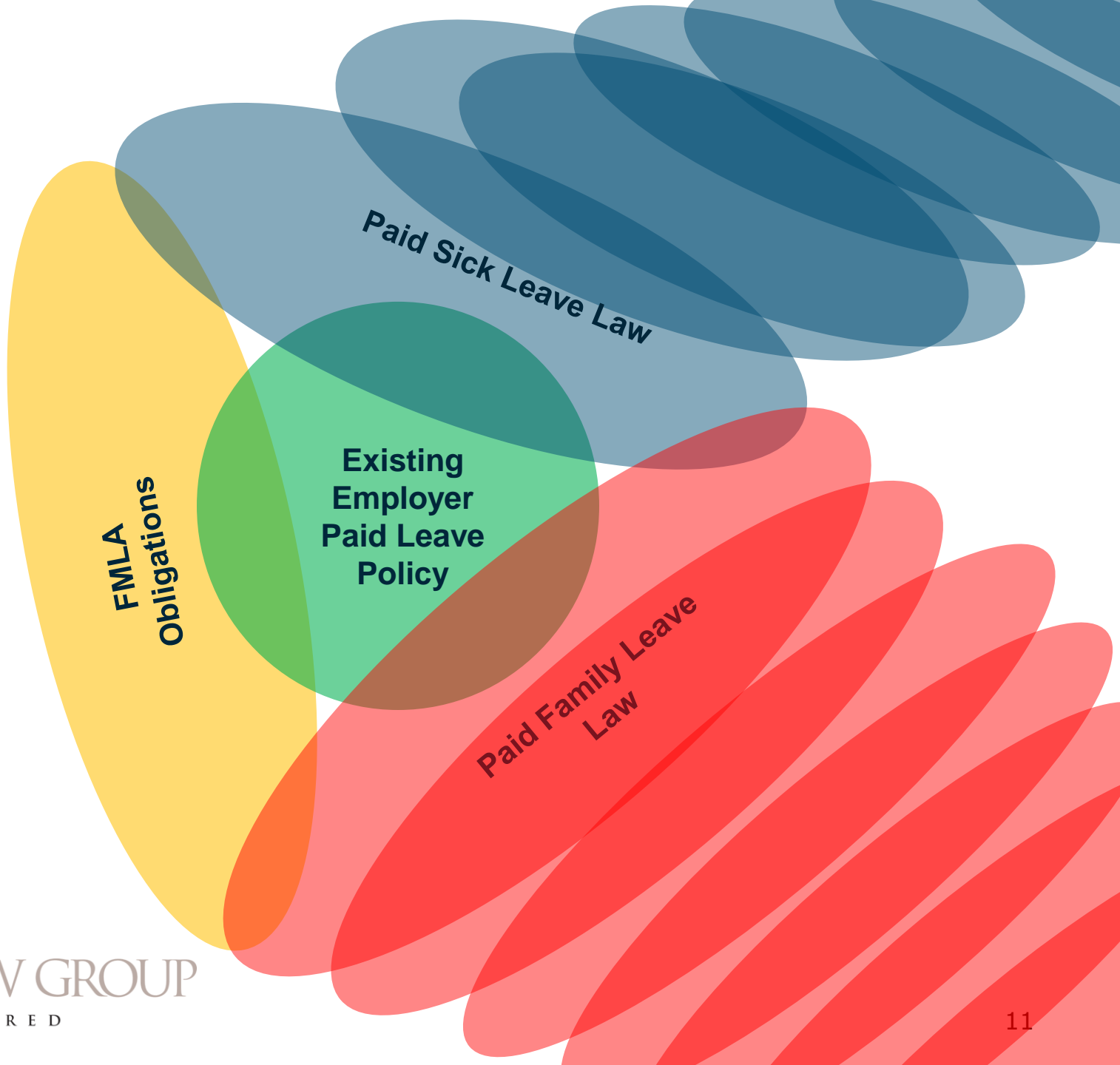
**FMLA
Obligations**

**Existing
Employer
Paid Leave
Policy**









Paid Sick Leave Laws

- Common Features:
 - Allows employee to take leave to recover from illness/injury or receive treatment
 - Allows employee to take leave to attend to spouse/relative's illness/injury
 - Allows employee to take leave to care for victim of domestic violence/sexual assault/stalking
- Specific requirements relating to accrual/annual carry-over/caps
- May require employee to provide notice if using, and make efforts to avoid scheduling treatment during work hours
- May have anti-retaliation protection

Paid Sick Leave Laws

- States with laws: CA, CT, DC, MA, OR, VT
- Per NCSL, paid sick leave bills introduced in seventeen other states in 2015
- 20+ municipalities have paid sick leave laws
 - e.g., Montgomery County, Maryland; Los Angeles; Newark; New York City; Oakland; Philadelphia; Pittsburgh; San Diego; San Francisco; Seattle
- Executive Order 13706
 - Requires certain entities that contract with Federal Government to provide employees with up to 7 days of paid sick leave annually, including for family care



Variances Between Laws

- Subject employers
- Covered employees
- When employees begin to accrue paid leave
- The rate at which leave can be accrued
- The maximum amount of leave that can be accrued
- Service requirements for employees before leave can be utilized
- Notice that must be provided to employees regarding their rights
- Carryover requirements at year-end for unused leave

Variations Between Laws (Cont'd)

- Permissible reasons for use of 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
- Use of leave to care for family members or loved ones, and if so, for whom
 - E.g., If leave can be used to care for children, how “child” is defined
- Application to collectively bargained employees
- Whether the law creates a private cause of action for employees
- Anti-retaliation provisions

Paid Sick Leave Laws- California

- Healthy Workplaces, Healthy Families Act of 2014
- Effective Date: July 1, 2015
- **Who's Covered:** California employees who work 30 or more days a year, after 90 days of employment
- **How is Leave Accrued:** 1 hour for every 30 hours worked
- **Cap on Accrued Leave:** 6 days/48 hours annually (employers not required to allow employees to take more than 3 days/24 hours annually)
- **Availability for care of loved ones:** Children; parents; grandchildren; grandparents; spouses; registered DPs; siblings

Paid Sick Leave Laws- Connecticut

- Connecticut Paid Sick Leave Law
- Effective Date: July 1, 2012
- **Who's Covered:** Certain "service workers" that work for certain employers with 50 or more employees, after 680 hours of employment
- **How is Leave Accrued:** 1 hour for every 40 hours worked
- **Cap on Accrued Leave:** 5 days/40 hours annually
- **Availability for care of loved ones:** Children; spouses

Paid Sick Leave Laws- District of Columbia

- Accrued Sick and Safe Leave Act of 2008
- Effective Date: November 13, 2008
- **Who's Covered:** Most employees employed within Washington DC, with certain exemptions, after 90 days of employment
- **How is Leave Accrued:** 1 hour for every 37 hours worked for employers with more than 100 employees (lesser accrual rates for smaller employers)
- **Cap on Accrued Leave:** 7 days/56 hours annually for employers with more than 100 employees (smaller cap for smaller employers)
- **Availability for care of loved ones:** Children; spouses; registered DPs; grandchildren; spouses of children; siblings; spouses of siblings; parents; parents of a spouse/DP; any person with whom the worker has a committed relationship and has shared a mutual residence for at least the preceding 12 months

Paid Sick Leave Laws- Massachusetts

- Massachusetts Earned Sick Time Law
- Effective Date: July 1, 2015
- **Who's Covered:** Most employees primarily employed within Massachusetts, with certain exemptions, after 90 days of employment (Employers with 10 or less employees only have to provide unpaid sick leave)
- **How is Leave Accrued:** 1 hour for every 30 hours worked
- **Cap on Accrued Leave:** 5 days/40 hours annually
- **Availability for care of loved ones:** Children; spouses; parents; parents of a spouse

Paid Sick Leave Laws- Oregon

- Oregon Sick Leave Law
- Effective Date: January 1, 2016
- **Who's Covered:** Most employees in Oregon, with certain exemptions, after 90 days of employment (Employers with less than 10 employees only have to provide unpaid sick leave)
- **How is Leave Accrued:** 1 hour for every 30 hours worked or 1 1/3 hours for every 40 hours worked
- **Cap on Accrued Leave:** 5 days/40 hours annually
- **Availability for care of loved ones:** Children; spouses; same-sex DPs; parents; parents of a spouse or same-sex DP; grandparents; grandchildren

Paid Sick Leave Laws- Vermont

- H. 187 (Enacted March 9, 2016)
- **Effective Date:** January 1, 2017 (but employees cannot use paid sick leave until January 1, 2018)
- **Who's Covered:** Most workers employed in Vermont for an average of no less than 18 hours per week during a year, with some exemptions (including employees who work less than 20 weeks per year)
- **How is Leave Accrued:** 1 hour for every 52 hours worked
- **Cap on Accrued Leave:** 3 days/24 hours annually until 12/31/08; 5 days/40 hours annually for subsequent years
- **Availability for care of loved ones:** Children; spouses; parents; parents of a spouse; grandparents; grandchildren; siblings

Paid Sick Leave Laws- Municipal Level

- There are many (and increasing), including:
 - Bloomfield, NJ
 - East Orange, NJ
 - Elizabeth, NJ
 - Emeryville, CA
 - Irvington, NJ
 - Jersey City, NJ
 - Newark, NJ
 - New York City, NY
 - Montclair, NJ
 - Montgomery County, MD
 - Oakland, CA
 - Passaic, NJ
 - Paterson, NJ
 - Philadelphia, PA
 - Pittsburgh, PA
 - San Francisco, CA
 - Seattle, WA
 - Spokane, WA
 - Tacoma, WA
 - Trenton, NJ

Paid Family Leave Laws

- Common Features:
 - Allows employee to bond with a new child immediately following birth/adoption
 - Allows employee to provide care for health condition of close relative/spouse
 - Employee-funded through mandatory payroll contributions and administered like (or sometimes in conjunction with) disability insurance through the state
- Compliance must be coordinated with FMLA obligations and/or state family medical leave act
 - Paid leave law may provide wage replacement but job protection may arise under a FML law

Paid Family Leave Laws

- States with such laws: CA, NJ, RI, and NY (enacted March 31, 2016). WA has enacted law but not implemented
- Per NCSL, paid family leave bills introduced in six other states in 2015. DC Council has proposed law that provides up to 16 weeks of paid family leave
- On April 5, 2016, San Francisco approved six weeks of fully paid leave for new parents

Paid Family Leave Laws- New York

- Enacted April 4, 2016 as part of New York's 2016-17 state budget
- **Takes effect on January 1, 2018**
- Funded through a \$1/employee weekly payroll deduction
- After 26 weeks of employment, employees will be eligible for partially paid family leave benefits, phased in over time
 - In 2018, benefits will cover 50% of employee's average weekly wage (capped at 50% of statewide average weekly wage) for up to 8 weeks
 - By 2021, when phase-in is complete, benefits will cover 67% of employee's average weekly wage (capped at 50% of statewide average weekly wage) for up to 12 weeks

Paid Family Leave Laws- New York

- What is family leave under New York law?
 - To participate in providing care (physical or psychological) for a family member of the employee made necessary by a serious health condition (as defined by the FMLA) of the family member
 - To bond with the employee's child during the first 12 months after birth or placement for adoption or foster care
 - To address any qualifying exigency (as defined by the FMLA) arising out of the fact that the employee's spouse, DP, child, or parent is on active duty or is being called to duty in the U.S. Armed Forces

Paid Family Leave Laws- California

- Effective as of 2004
- Provided through State Disability Insurance program (and funded through worker contributions)
- Provides benefits to eligible workers who have a loss of wages when they need leave to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered DP, or to bond with a new child
- Employee must be unable to do regular or customary work for at least eight days
- Serious health condition = an illness, injury, impairment, or physical or mental condition of a patient that involves inpatient care in a hospital, hospice, or residential medical care facility
- Employees receive 55% of wages for six weeks (on April 11, 2016, law enacted that will increase this percentage to 70% for those who make up to 33% of the California average weekly wage and 60% for those who make more than 33% of the California average weekly wage)

Paid Family Leave Laws- New Jersey

- Effective as of 2009
- Funded through worker contributions
- Provides benefits to eligible workers who have a loss of wages when they need leave to care for a seriously ill child, parent, spouse, registered DP, or registered civil union partner, or to bond with a new child
- Serious health condition = illness, injury, impairment, or physical or mental condition, which requires inpatient care in a hospital, hospice, or residential medical care facility or continuing medical treatment or continuing supervision by a health care provider
- Employees receive 2/3 of wages for six weeks

Paid Family Leave Laws- Rhode Island

- Effective as of 2014
- Temporary Caregiver Insurance is funded through worker contributions
- Provides benefits to eligible workers who have a loss of wages when they need leave to care for a seriously ill child, parent, spouse, registered DP, parent of a spouse, or grandparent, or to bond with a new child
- Employees receive 4.62% of quarterly wages up to a maximum of \$795.00 weekly for four weeks



Concerns for Employers

- Significant administrative burdens and legal costs tracking legal obligations
- Confusion on part of employees with regard to their specific rights
- Increase in litigation and enforcement actions by state agencies

Concerns for Employers

Example: Employer operating in metro NY area might have to track the following laws (in addition to unpaid leave laws and leave requirements dictated by collective bargaining agreements):

- Connecticut Paid Sick Leave Act
- New Jersey Temporary Disability Benefits Law (Family Leave Insurance)
- New York Paid Family Leave Act
- New York City's Earned Sick Time Act
- Nine different municipal sick leave ordinances enacted in various cities in NJ
- Executive Order 13706

Federal Legislative Activity

- **Healthy Families Act (S. 497, H.R. 932)**
 - Introduced on 2/12/15 by Sen. Murray (D-WA) and Rep. DeLauro (D-CT-3)
 - **Bills would require all businesses with 15 or more employees to offer up to 7 paid sick days a year**
 - Employees would earn 1 hour of sick time for every 30 hours worked beginning from first date of employment
 - Unused sick time would carry over (carryover could be limited to 7 days)
 - Leave could be used for employee medical needs, to care for a sick family member, or to address impact of domestic violence, stalking or sexual assault
 - Contains an anti-retaliation provision and gives employee right to sue employers that violate Act for damages or equitable relief
 - Would not preempt or supersede any state or local law that provides greater paid sick time or leave rights

Federal Legislative Activity

- **Family and Medical Insurance Leave (FAMILY) Act (S. 786, H.R. 1439)**
 - Introduced in March 2015 by Sen. Gillibrand (D-NY) and Rep. DeLauro (D-CT-3)
 - **Bills would provide workers with up 12 weeks of paid sick leave at 2/3 wage replacement rate**
 - Leave could be used for employee's serious health condition (including pregnancy and recovery from birth); caring for serious health condition of child, parent, spouse, or DP; birth or adoption of child
 - Benefits and administrative expenses would be paid for by employee and employer contributions
 - Would be administered through a new Office of Paid Family and Medical Leave within SSA
 - Contains an anti-retaliation provision and gives employee and Commissioner of SSA right to sue for damages or equitable relief if employer retaliates
 - Would not preempt or supersede any state or local law or collective bargaining agreement that provides greater paid family leave benefits
 - Sanders is a co-sponsor; Clinton has endorsed similar proposal

Employer Considerations

- **Legal**
 - Tracking laws that apply
 - Knowing the jurisdictions where you operate
 - If provided greater leave than required by law, legal constraints may not apply to “excess” benefits
 - Need to also take into account FMLA, ADA, tax, and wage and hour laws
- **Economic**
 - Cost of maintaining program
 - Meeting notice / recordkeeping requirements
 - Possible requirement to pay out unused leave
- **Employee Relations / Culture**
 - PTO policies as tool for attracting/recruiting talent
 - Morale issues
 - Likelihood of utilization by employee population
 - Collective bargaining / government contracting environment



E.O. 13706: Establishing Paid Sick Leave for Federal Contractors

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Covered Contracts

- Davis-Bacon Act (DBA) construction
- Service Contract Act (SCA)
 - Possibly including otherwise exempted contracts
- SCA-exempted concession contracts
- Contracts in connection with federal property or land and related to offering services

- Not Included:
 - Everything else



What is Obligation?

- Up to 56 hours paid leave
 - Accrues at rate of 1 hour leave per 30 hours paid
 - For exempt employees, treat as 40 hour week
- For these purposes:
 - physical or mental illness, injury, or medical condition
 - obtaining diagnosis, care, or preventive care from an HCP
 - caring for child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship
 - domestic violence, sexual assault, or stalking; counseling, seeking relocation, seeking assistance from a victim services organization, taking related legal action, or assisting an individual related to the employee in engaging in any of these activities.



Significant Issues

- Employers must provide employees written notification of their available PSL balance at various points, including at least monthly, any time an employee requests to use PSL, and upon separation of employment.
- Although the NPRM allows employers to frontload 56 hours of PSL each year in lieu of accrual, it also expressly states that frontloading does not remove an employer's year-end carryover obligations.



Significant Issues (Cont'd)

- Employers must comply with both “annual” and “point in time” PSL accrual caps.
- Employers cannot set an annual cap on the amount of PSL employees can use.
- If an employer chooses to cash out an employee’s accrued, unused PSL upon separation of employment, the employer still must reinstate the employee’s unused sick leave if the employee is rehired within 12 months of separation.



Significant Issues (Cont'd)

- Employees can use PSL for an expansive, unmanageable list of covered family members that goes far beyond comparable lists in existing PSL laws. Employers must comply with overbroad recordkeeping obligations.



Status of Paid Leave Obligation

- NPRM (Proposed Rule) comments closed on Tuesday
 - Nearly 30,000 comments
- Final Rule expected September 2016
- FAR Council action
- Application to “new” contracts after January 1, 2017

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