Guacamole Is Extra but the Norovirus Comes Free: Implementing Paid Sick Days for American Workers

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GUACAMOLE IS EXTRA BUT THE NOROVIRUS COMES FREE: IMPLEMENTING PAID SICK DAYS FOR AMERICAN WORKERS

Abstract: The 1993 Family and Medical Leave Act (“FMLA”) provides eligible workers with twelve weeks of unpaid leave. Because the FMLA excludes most short-term illnesses, workers suffering from the flu or similar illnesses still go to work while sick. This phenomenon, referred to as presenteeism, poses a risk to public health and reduces workplace productivity. Some states and cities have adopted paid sick time laws, but other states have adopted preemption laws prohibiting local paid sick time legislation. The Healthy Families Act (“HFA”), which proposes federally-mandated, employer-provided paid sick days for all employees in businesses of fifteen employees or more, would resolve this battle over paid sick days. Despite being repeatedly re-introduced in Congress over the last decade, the HFA has yet to gain sufficient political momentum to move beyond subcommittee. This Note argues that the HFA, the best means of reducing presenteeism in the workplace, should be re-worked to accommodate businesses’ concerns, including cost and employee abuse.

INTRODUCTION

In December 2012, a norovirus outbreak at a Golden Corral restaurant in Casper County, Wyoming caused 344 people to become ill.1 Sick employees who continued to work in the days following the outbreak perpetuated the spread of the illness.2 Each year, more than twenty million people suffer from

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the norovirus, one of the most common forms of foodborne-illness in restaurants.\(^3\) Food-service workers who go to work despite being sick are one of the leading causes of such outbreaks.\(^4\) Working while ill is referred to as presenteeism.\(^5\) Furthermore, the majority of these workers receive low wages and lack paid sick time.\(^6\) Consequently, the decision of either going to work while sick or forgoing pay altogether reinforces the public health risk to co-workers and to customers in such industries as food service.\(^7\)

Paid sick leave would help alleviate the public health risk that presenteeism causes.\(^8\) The United States, however, has not adopted any federal legislation mandating paid sick days.\(^9\) The 1993 Family and Medical Leave Act

\(^3\) Jessica Firger, *Most Norovirus Outbreaks Caused by Food Preparation Workers*, CBS NEWS (June 3, 2014), http://www.cbsnews.com/news/most-norovirus-outbreaks-caused-by-food-preparation-workers/ [https://perma.cc/GC85-D85K] (reporting that twenty million Americans suffer from norovirus caused by contaminated food or infected people); Tucker, *supra* note 1, at 1; see Timothy F. Jones & Frederick J. Angulo, *Eating in Restaurants: A Risk Factor for Foodborne Disease?*, 43 CLINICAL INFECTIONOUS DISEASES 1324, 1324 (2006) (reporting that approximately 50% of foodborne disease outbreaks occur in restaurants); see also *Sick Subway Employees Worked During Norovirus Outbreak*, FOOD SAFETY NEWS (July 3, 2012), http://www.foodsafetynews.com/2012/07/sick-subway-employees-went-to-work-during-norovirus-outbreak/#.VtTEH5MrLq0 [https://perma.cc/W8UK-V2UE] (reporting that four sick workers at a Subway restaurant in Indiana continued to work despite displaying symptoms of norovirus during an outbreak that infected ninety people).

\(^4\) Craig W. Hedberg et al., *Systematic Environmental Evaluations to Identify Food Safety Differences Between Outbreak and Nonoutbreak Restaurants*, 69 J. FOOD PROTECTION 2697, 2700 (2006) (explaining that infected workers are major contributors for norovirus outbreaks). The combination of sick employees and bare-hand interaction with non-cooked foods, like salad, are common contributors for norovirus. *Id.*; see also *Norovirus Outbreak Associated with Ill Food-Service Workers*, 56 MORBIDITY & MORTALITY WKLY. REP. 1212, 1212–13 (2007) (explaining that, because norovirus can be transmitted through both food and air, an instance in which a line cook vomited at a workstation in a Michigan restaurant increased the likelihood of norovirus transmission to patrons).


\(^6\) See REST. OPPORTUNITIES CTRS. UNITED, *SERVING WHILE SICK: HIGH RISKS & LOW BENEFITS FOR THE NATION’S RESTAURANT WORKFORCE, AND THEIR IMPACT ON THE CONSUMER* 11 (2010) (showing that almost 90% of restaurant workers do not have paid sick days); U.S. CONG. JOINT ECON. COMM., *EXPANDING ACCESS TO PAID SICK LEAVE: THE IMPACT OF THE HEALTHY FAMILIES ACT ON AMERICA’S WORKERS* 2–3 (2010) (reporting that only 27% of workers in the food industry have paid sick leave). Restaurant workers who do not receive paid sick days are far more likely to work while sick compared to those workers who do have paid sick days. See REST. OPPORTUNITIES CTRS. UNITED, *supra* at 23 (reporting that less than half of restaurant workers with paid sick days worked while sick whereas almost 70% of restaurant workers who lacked paid sick days worked while ill).

\(^7\) See U.S. DEP’T OF LABOR, *GET THE FACTS ON PAID SICK TIME* 3 (2015) (reporting that 45% of food service workers worked despite being ill because they needed their paycheck); see also L. Rand Carpenter et al., *Food Worker Experiences with and Beliefs About Working While Ill*, 76 J. FOOD PROTECTION 2146, 2153 (2013) (noting that close to half of food service workers considered missed wages as a significant factor for working while ill).

\(^8\) See U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 2 (pointing to H1N1 outbreak as an example of why the lack of paid sick leave poses a public health risk).

\(^9\) JODY HEYMANN ET AL., *CONTAGION NATION: A COMPARISON OF PAID SICK DAY POLICIES IN 22 COUNTRIES* 1 (2009). Notably, the United States is the only nation out of the top twenty richest
Implementing Paid Sick Leave for American Workers

("FMLA") is the only federal legislation that requires that employers provide any type of leave to American employees.\(^\text{10}\) Though the FMLA provides employees with twelve weeks of leave, the law does not cover short-term illnesses.\(^\text{11}\) Furthermore, leave granted under the FMLA is unpaid.\(^\text{12}\) As a result, even if the flu or gastrointestinal viruses were covered under the FMLA, many food-service workers could not afford to take advantage of this leave.\(^\text{13}\)

In response to this lack of federally-mandated paid sick leave, in 2005, Senator Ted Kennedy proposed the Healthy Families Act ("HFA").\(^\text{14}\) The purpose of the HFA was to provide sick leave to American workers to help them attend to their own personal illnesses as well as to the needs of their family.\(^\text{15}\) Leave under the act would include time off for short-term illnesses but could also be used to seek preventive primary care treatment or to attend to chronic conditions.\(^\text{16}\) This act allows employees to earn up to seven days of paid sick time per year, so long as they work in businesses of fifteen or more employees.\(^\text{17}\) The HFA has yet to gain enough traction to make it out of its subcommit-
President Obama advocated for better family-friendly work policies in his 2008 presidential campaign, and addressed this shortfall in his 2015 State of the Union address. More recently, he signed an executive order mandating paid sick leave for federal contractors.

Despite the lack of federal momentum regarding paid sick leave, some state and city legislatures have taken the initiative to enact paid sick day laws. These laws vary, but a common characteristic is that they mandate paid sick time for employees of certain size businesses and their dependents. In contrast, several states have adopted laws prohibiting cities and towns from enacting paid sick

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21 ARIZ. REV. STAT. ANN. § 23-371 (2016); CAL. LAB. CODE § 246 (West 2015); CONN. GEN. STAT. § 31-57s (2015); MASS. GEN. LAWS ch. 149 § 148(C) (2015); VT. STAT. ANN. tit. 21, § 4B (2016); S. 454 (Or. 2015) (enacted); REG. 44764 (Wash. 2017) (recording that Initiative 1433 requiring paid sick leave passed in the 2016 election and would be effective as of 2018); U.S. DEP’T OF LABOR, *supra* note 19, at 14. This increase in legislation reflects a rise in voter interest, as 88% of polled voters supported paid sick time in 2015. U.S. DEP’T OF LABOR, *supra* note 7, at 2.

22 ARIZ. REV. STAT. ANN. § 23-371; CAL. LAB. CODE § 246; CONN. GEN. STAT. § 31-57s; MASS. GEN. LAWS ch. 149 § 148(C); VT. STAT. ANN. tit. 21, § 4B; S. 454 (Or. 2015) (enacted); REG. 44764 (Wash. 2017).
This opposition reflects the political division regarding paid sick time. Advocates for paid sick time see benefits for both employees and employers in preventing presenteeism in the workplace, allowing employees to recover faster and boosting morale. Presenteeism decreases productivity for the employee and surrounding co-workers and imposes a costly burden on employers. Opponents, however, argue that government-implemented paid sick time is an intrusion on private business and a burdensome cost, especially at a time when many businesses are still in the process of recovering from the 2008 recession.

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Nevertheless, paid sick time is necessary for certain industries because of the potential risk to public health.\footnote{See U.S. CONG. JOINT ECON. COMM., supra note 6, at 1 (noting that 5.9 million workers in the food service industry, a crucial area for public health, need paid sick leave); U.S. DEP’T OF LABOR, supra note 19, at 9 (commenting on the public health benefits of paid sick leave laws).} As seen during the H1N1 pandemic in 2009, workers in the private sector who lacked paid sick time were more likely to spread infection to co-workers and customers than workers in the public sector who had paid sick time.\footnote{See Amy L. Major, An Exercise in Backwards Logic: How Expanding the Family and Medical Leave Act Can Enhance Business Continuity & Productivity During a Public Health Emergency, 27 J. CONTEMP. HEALTH L. & POL’Y 251, 258–61 (2011) (showing that the difference between the public sector versus the private sector’s reaction to H1N1 pandemic demonstrates that paid sick leave would have shortened the duration of the pandemic). Although roughly eighteen million workers took time off during the H1N1 pandemic to recover during infection, an estimated eight million continued to work while infected. Id. at 258.} Additionally, fifty percent of foodborne illnesses occur in restaurants and a common cause of those outbreaks is sick workers.\footnote{Reasons for presenteeism vary, but one of the major contributors is lack of paid sick days.\footnote{See The Cost of Being Sick, supra note 9, at 2 (statement of Sen. Christopher Dodd) (noting that “[o]nly one in four low-wage workers have paid sick days”); U.S. CONG. JOINT ECON. COMM., supra note 6, at 5 (noting that only 33% of low-wage workers receive paid sick leave compared to 81% of high-wage workers); see also Robin R. Runge, Redefining Leave from Work, 19 GEO. J. ON POVERTY L. & POL’T’Y 445, 445 (2012) (pointing out that low-wage workers are unable to take advantage of unpaid sick days). Given recent economic instability, workers are reluctant to do anything that would jeopardize their employment status or source of income. See Dina Bakst & Phoebe Taub-}
poverty line for a three-person household is $20,090.33 Yet, the mean annual wage for waiters and waitresses who usually do not have paid sick days is $23,020.34 The inability to forgo pay reinforces the public health risk to co-workers and customers.35

This Note argues that, in order to maintain a healthy working environment, minimize presenteeism, and align the United States with other developed countries, Congress must pass paid sick leave legislation.36 Only a federal act could address the widespread need of all workers in the private sector while streamlining requirements for hours and eligibility.37 Part I provides an overview of paid sick time laws in the United States and a comparison to other countries that have implemented guaranteed paid sick time.38 Part II studies both the proposed benefits and criticisms of paid sick time, and looks specifically at how paid sick time has worked both locally and globally.39 Finally, Part III argues that legislation is necessary to provide paid sick time to all workers in the private sector and recommends changes to the HFA to best implement this legislation.40

35 See The Cost of Being Sick, supra note 9, at 2 (statement of Sen. Christopher Dodd) (commenting on the lack of paid sick days among low-wage workers); U.S. CONG. JOINT ECON. COMM., supra note 6, at 1 (explaining how workers, particularly in the food industry, need paid sick days to alleviate public health risk).
36 See Furman & Stevenson, supra note 25 (articulating reasons for why Congress should pass paid sick time legislation, including improving workplace health and reducing presenteeism); see also supra notes 235–263 and accompanying text (advocating for Congress to pass paid sick time legislation).
37 See id. (noting that the current state and municipal legislation creates a patchwork of policies that leave many workers without any paid sick time).
38 See infra notes 41–100 and accompanying text.
39 See infra notes 101–223 and accompanying text.
40 See infra notes 224–279 and accompanying text.
I. THE STRUGGLE TO IMPLEMENT PAID SICK TIME LEGISLATION

This Part examines paid sick day policies, discussing both historical trends as well as current state and municipal legislation, and how the United States compares to other economically similar nations. Globally, the United States has fallen behind in providing paid sick leave of any form to workers, yet federal legislation that would effectuate paid sick days has never advanced beyond subcommittee. To fill the federal void, states have started to enact paid sick time laws. Section A looks at where the United States stands in comparison to other nations. Section B focuses on the federal route of legislation. Finally, section C explores state and municipal laws that have successfully implemented paid sick time, as well as the state laws prohibiting municipal legislation.

A. Paid Sick Leave from a Global Perspective

Compared to twenty-two of the richest nations in the world, the United States is the only country that does not provide workers with paid sick days or paid sick leave. The United States, Canada, and Japan are the only top-grossing nations that lack national laws for paid sick days that would be used for short-term illnesses such as the flu. Both Canada and Japan offer paid

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41 See infra notes 42–100 and accompanying text.
43 U.S. DEP’T OF LABOR, supra note 19, at 14.
44 See infra notes 47–56 and accompanying text.
45 See infra notes 57–81 and accompanying text.
46 See infra notes 82–100 and accompanying text.
47 HEYMANN ET AL., supra note 9, at 1. Most of these top-grossing countries differentiate between paid sick days and paid sick leave. See id. (noting that paid sick days cover short-term illnesses whereas paid sick leave covers long-term illnesses). Though many mandate that employers cover paid sick days that would encompass seasonal flu or other short-term illnesses, many also offer payment for critical long-term illnesses, such as cancer. See id. (providing global comparisons of paid sick time laws). Countries vary in how they provide for critical long-term illnesses, such as by mandating employers to cover employee pay, offering social insurance, or using a hybrid of the two options. Id. at 5–6. The United States does not address either, and the state-implemented legislation discussed throughout this Note only refers to paid sick days for short-term illnesses. Id. at 1.
48 Id. at 9. Though Canada does not have a national policy for paid sick days, it does not preclude provinces from enacting such policies. S. Jody Heymann et al., Paid Health and Family Leave: The Canadian Experience in the Global Context, 101 CAN. J. PUB. HEALTH S9, S12 (2010). Consequently, Quebec has instituted a paid sick day law that allows employees to take up to twenty-six weeks each year for sick days. See Leaves and Absences, Sickness or Accident, CNESST, http://www.cnt.gouv.qc.ca/en/leaves-and-absences/sickness-an-organ-or-tissue-donation-for-transplant-accident-and-family-obligations/index.html [https://perma.cc/2QFP-WZM3] (last visited Mar. 8, 2017) (explaining the paid sick day law in Quebec). The sick days are initially unpaid, but upon returning to work, the employee receives retroactive pay. Id.
sick leave for serious illnesses such as cancer, leaving the United States as the lone holdout against paid sick leave.\footnote{Heymann et al., supra note 9, at 9. Japan and Canada use social insurance generated from tax revenues to fund these paid sick leave policies. Id. at 5–6.} 

Germany and France’s laws provide helpful insight into different methods for providing paid sick time.\footnote{See id. at 1, 7 (comparing enacted paid sick time laws).} In Germany, under the Continuation of Pay Act, employees receive six weeks of employer-provided paid sick leave and employees receive one hundred percent of their regular pay for any absences.\footnote{Fed. Ministry of Labour & Soc. Affairs, Social Security at a Glance 39, 74 (2016); Heymann et al., supra note 9, at 6–7; see Liliane Jung, National Labour Law Profile: Federal Republic of Germany, Int’l Labour Org. (Apr. 2001), http://www.oit.org/infodir/information-resources/national-labour-law-profiles/WCMS_158899/lang—en/index.htm [https://perma.cc/CWA8-V75Z] (providing details regarding Germany’s labor laws). Employees are required to provide medical certification after three consecutive days of absences. Nicolas R. Ziebarth & Martin Karlsson, A Natural Experiment on Sick Pay Cuts, Sickness Absence, and Labor Costs, 94 J. Pub. Econ. 1108, 1110 (2010). A social insurance fund covers 70% of employee’s wages when the absence continues after six weeks. Heymann et al., supra note 9, at 7. At that time, the employee must provide additional medical documentation to justify their continued absence. Ziebarth & Karlsson, supra note 1109.} In 1996, the German government had tried to amend its policies to reduce the financial burden on employers, but the reform was so unpopular that a new German government returned the employee payout to the full amount.\footnote{Ziebarth & Karlsson, supra note 51, at 1109. After six weeks of missed work due to an illness, the employee receives 70% of his or her earnings from a sickness insurance fund rather than from his or her employer, for up to seventy-eight weeks. European Comm’n, Your Social Security Rights in Germany 14 (2013).} In 2008, Germany enacted the Law on Family Care Time that enables employees to take an additional ten days of unpaid leave in order to care for close relatives.\footnote{Hye Jin Rho et al., A Review of Sickness-related Leave in 22 High Human Development Index Countries 9 (2009).} 

In France, employees do not receive any pay for the first two days of absences but receive between fifty and ninety percent of their regular pay for the next thirty days of leave.\footnote{See Baker & McKenzie, Breaking New Ground in France: Labor Law Aspects 13 (2006) (noting that employees receive 90% of their wage, but that this percentage for replacement wage may decrease if paid by the social security system); French Social Security System: Health, Maternity, Paternity, Disability and Death Branch, Ctr. Des Liaisons Européennes & Internationales de Sécurité Sociale, http://www.cleiss.fr/docs/registres/registre_france/an_1.html [https://perma.cc/EZ37-NKB4] [hereinafter French Social Security System] (noting that employees receive 50% of their usual wage when received from social security funds).} France’s Health Insurance Funds and Social Security System cover employees’ wages when they miss work due to illness.\footnote{French Social Security System, supra note 54.} If a business is concerned about excessive absenteeism, the Medical Service of the Statutory Health Insurance monitors cases and conducts physical examinations of patients.\footnote{Ziebarth & Karlsson, supra note 51.}
The FMLA was the first federal act to address guaranteed leave. The FMLA mandates twelve weeks of unpaid leave for employees following the birth or adoption of a child or for attending to a serious personal or family medical illness. Though instrumental in expanding employee opportunities for leave, the leave is unpaid—one of the primary shortcomings of the FMLA—and is only obligatory for businesses employing fifty or more employees. Thus, many workers, particularly low-income workers, cannot afford to take advantage of any leave. Additionally, by limiting the medical qualifications for FMLA-covered leave to serious health conditions, the Senate intended to exclude short-term illnesses. Consequently, when suffering from...
a cold or the flu, many workers have to choose between staying home without pay or working while sick.\footnote{62}

In response to the deficiencies in the FMLA, Senator Ted Kennedy introduced the HFA in 2005.\footnote{63} The HFA intended to provide paid sick time to all employees of businesses with fifteen or more employees.\footnote{64} Workers could potentially earn up to seven days each year with unused accrued sick pay carrying over to subsequent years.\footnote{65} Unlike the FMLA, the HFA provides leave for short-term illnesses, not just serious health conditions.\footnote{66} This bill, reintroduced approximately every two years, has failed to gain enough traction to move beyond the subcommittee.\footnote{67}

In 2009, the H1N1 pandemic struck, and affected millions of American workers.\footnote{68} The Center for Disease Control (“CDC”) recommended that infected employees stay home to ensure faster recovery and prevent the spread of the infection to others.\footnote{69} Although many employees heeded the CDC’s advice,
others did not.\textsuperscript{70} The lack of paid sick time was one of the main reasons cited for presenteeism during the H1N1 pandemic.\textsuperscript{71}

In response to this medical emergency, Senator Christopher Dodd of Connecticut proposed the Pandemic Protection for Workers, Families, and Businesses Act (“Pandemic Protection Act”).\textsuperscript{72} This act would have allowed employees to use up to seven paid sick days a year if either the employee or the employee’s dependents contracted a contagious illness.\textsuperscript{73} The act, however, only covered contagious illnesses.\textsuperscript{74} Unfortunately, the act was proposed during the height of the economic recession.\textsuperscript{75} Imposing an additional burden on employers received criticism from business owners and some politicians.\textsuperscript{76} Consequently, the bill to establish this act did not pass and has not been re-introduced.\textsuperscript{77}

Because no federal legislation had been enacted mandating paid sick days for American workers in the private sector, in 2015, President Obama took steps to secure paid sick days for a limited working population.\textsuperscript{78} In April

\textsuperscript{70} See The Cost of Being Sick, supra note 9 (noting that families faced a choice between going to work while ill with H1N1, or sparing their workplace from further contagion but losing out on pay); Major, supra note 29, at 258–59 (noting that close to eight million people went to work despite being sick with H1N1).

\textsuperscript{71} See COUNCIL OF ECON. ADVISERS, supra note 10, at 17 (comparing public and private sector recovery to H1N1); Major, supra note 29, at 259–60 (arguing that lack of paid sick time and the risk of being fired caused presenteeism in the private sector).

\textsuperscript{72} Pandemic Protection for Workers, Families, and Businesses Act (“Pandemic Protection Act”), S. 2790, 111th Cong. (2009); Kitchen, supra note 19, at 255. This bill was also known as the Emergency Influenza Containment Act. See Michael Z. Green, Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action?, 42 CONN. L. REV. 1139, 1174–75 (2010) (noting that legislation such as the Emergency Influenza Containment Act should be popular among employers as a means to prevent presenteeism but has received criticism from businesses as a further government intrusion).

\textsuperscript{73} S. 2790, 111th Cong. § 3(2); Kitchen, supra note 19, at 255. The Act applied to all businesses with fifteen or more employees. S. 2790, 111th Cong. § 4(4)(A)(ii).

\textsuperscript{74} S. 2790, 111th Cong. §§ 4(2), 5(b) (covering illnesses like the flu, as defined by the Secretaries of Labor and Health and Human Services).

\textsuperscript{75} See Kitchen, supra note 19, at 255–56 (noting that the Pandemic Protection Act, proposed in 2009, did not survive its House of Representatives committee).


\textsuperscript{77} Kitchen, supra note 19, at 256.

\textsuperscript{78} See HEYMANN ET AL., supra note 9, at 12 (noting that because there is no unifying federal legislation mandating paid sick days, employees rely on “patchwork of employer policies and state and local legislation”). The HFA received some congressional support, as well as support from President Obama. See Office of the Press Secretary, White House, supra note 13 (noting that President Obama supported the HFA as it was still pending in the House and Senate); see also TOM W. SMITH & JIBUM KIM, PAID SICK DAYS: ATTITUDES AND EXPERIENCES 2 (2010) (showing that 89% of Dem-
2015, Labor Secretary Thomas Perez launched the Lead on Leave campaign, a national campaign to promote paid sick time policies. Additionally, President Obama issued an executive order that granted paid sick days to federal contractors. Although this order extended paid sick days to 300,000 workers, it did not address the roughly forty-four million workers in the private sector who are still only guaranteed unpaid leave through the FMLA.

C. Paid Sick Day Legislation at the State and Local Level

Unlike Congress’s struggle to pass effective federal legislation, cities and states have had better luck enacting effective laws for paid sick days. Cities have used their police power to enact these ordinances under the auspices of protecting health, safety, and welfare. San Francisco was the first city to pass

a paid sick time ordinance for employees in the private sector. This ordinance allows employees in businesses of ten or more employees to earn one hour of sick time for every thirty hours worked. Employees can take a sick day to care for themselves or their dependents. Washington, D.C. followed suit in 2008 with the Accrued Sick and Safe Leave Act. This act exempted independent contractors, students, and unpaid volunteers from coverage, and created brackets for varying sizes of employers. In total, at the time of this writing, eighteen municipalities have adopted ordinances mandating paid sick leave.

Notably, Milwaukee passed the Paid Sick Leave Ordinance through a voter referendum in 2008. The ordinance, providing employees the opportunity to earn one hour of paid sick leave for every thirty hours worked, received the support of 68.8% of voters. In 2011, in Metropolitan Milwaukee leave legislation, but it took over two years for the legislation to reach a vote, as City Council Speaker Christine Quinn repeatedly blocked the bill. Michael Howard Saul, Quinn Signs on to Paid Sick Leave, WALL STREET J. (Mar. 28, 2013), http://www.wsj.com/articles/SB10001424127887324000704578389031867416730 [https://perma.cc/9ZAY-RFU8].

See Sick Leave Ordinance, S.F., CAL., ADMINISTRATIVE CODE § 12W (2007) (the codification of San Francisco’s Sick Leave Ordinance); Kulow, supra note 18, at 99 (discussing San Francisco’s Sick Leave Ordinance).

S.F., CAL., ADMINISTRATIVE CODE § 12W.4. Upon execution of San Francisco’s ordinance, employers found that employees used an average of three sick days despite having the ability to use five days in smaller businesses and up to nine days in larger businesses. DRAGO & LOVELL, supra note 85, at 8.


WASH., D.C., CODE § 32-131.02(a). Employees in small businesses, defined as twenty-four or fewer, can earn up to three days of paid sick time, whereas employees in large businesses of over one hundred employees can earn up to seven days. Id. D.C.’s ordinance also enabled businesses to seek an exemption if the ordinance posed a financial hardship, but as of 2013, the exemption rules had not gone into effect. Id. § 32-131.14; see also YOLANDA BRANCHE, AUDIT OF THE ACCRUED SICK AND SAFE LEAVE ACT OF 2008, at 12 (2013) (discussing the hardship exemption). In comparison, Seattle’s Paid Sick and Safe Leave ordinance requires employers with as few as four employees to provide paid sick days. Seattle, Wash., Ordinance 124644 (2014).


Association of Commerce, Inc. v. City of Milwaukee, the Court of Appeals of Wisconsin upheld the ordinance, holding that, in spite of the existing alternative for unpaid leave, paid sick leave was a reasonable municipal action and would induce employees to take a sick day when necessary.92 Later that year, however, the Wisconsin legislature repealed the ordinance out of a concern for statewide uniformity.93 Wisconsin Governor Scott Walker believed that by giving businesses the ability to control paid leave policies, employers could avoid the problem of having piecemeal ordinances across the state.94 Ten other states have also stymied local reform efforts by enacting statewide legislation that preempts any municipal ordinances regarding paid leave.95

Presenting a sharp contrast to the states that have preempted local-level legislation, at the time of this writing, seven state legislatures had adopted paid

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92 Metro. Milwaukee Ass’n of Commerce, Inc., 798 N.W.2d at 310; see Watson, supra note 63, at 990 (noting that the Milwaukee ordinance was the only city provision that was challenged in court). In its challenge to Milwaukee’s ordinance, the Metropolitan Milwaukee Association of Commerce focused on the lack of factual findings and rational relationship to the city’s police power. Metro. Milwaukee Ass’n of Commerce, Inc., 798 N.W.2d at 303–07. The court, however, dismissed these claims because the city had presented materials factually related to the ordinance before it went to a vote and the ordinance itself had a rational relationship to the health of Milwaukee’s constituents. Id. at 303–04.

93 See Wis. STAT. § 103.10(1m) (2017) (“[L]egislature finds that the provision of family and medical leave that is uniform throughout the state is a matter of statewide concern and that the enactment of an ordinance by a city, village, town, or county that requires employers to provide employees with leave . . . would be logically inconsistent with . . . this section.”); Kulow, supra note 18, at 99–100 (noting that Wisconsin’s law not only nullified Milwaukee’s ordinance, but also prevented other Wisconsin municipalities from adopting similar ordinances).

94 See Georgia Pabst, supra note 91 (reporting that Governor Walker viewed paid sick days as a barrier for job creation and that employers need flexibility in order to employ people).

sick day laws. In 2012, Connecticut was the first state to provide paid sick leave to employees. Following Connecticut’s lead, California, Massachusetts, Oregon, Vermont, Arizona, and Washington have also enacted paid sick day laws. Some states have used voter referendums to pass paid sick day legislation. Other states are also considering paid sick day laws but have not yet acted.

II. BENEFITS AND CRITICISMS OF PAID SICK DAYS

One of the current debates regarding benefits for American workers is whether or not employers should provide paid sick leave. Ideally, paid sick days would be legislated at the federal level, but if this does not occur, the states themselves should fill the void. Regardless of who implements paid sick day legislation, lack of paid sick days poses a substantial health risk, particularly in the restaurant industry, as most restaurant workers do not have the ability to forgo pay.
This Part discusses the perceived benefits and costs of adopting paid sick day policies and how these perceptions have played out locally and globally.\(^{104}\) Section A considers the problems that presenteeism causes and the subsequent benefits that paid sick days would offer.\(^{105}\) Section B studies the potential costs that employers bear in having to provide paid sick days.\(^{106}\) Section C analyzes the implementation of Connecticut, Seattle, and Washington, D.C.’s paid sick day laws.\(^{107}\) Finally, section D looks at how Germany and France have used paid sick days.\(^{108}\)

### A. Reducing Presenteeism While Boosting Morale: Benefits of Paid Sick Day Policies

Lack of paid sick day laws affects both employers and employees.\(^{109}\) Presently, forty percent of American workers in the private sector lack paid sick days.\(^{110}\) Even though some private sector companies do advertise paid sick leave policies, some are known for firing employees who actually use those sick days.\(^{111}\) For employees, one of the contributing factors for presen-
teeism is having to forgo income because of personal or a family member’s illness.\(^{112}\) Whereas the costs of absenteeism, or when an employee is not at work, are easy to calculate, the costs of presenteeism are much more challenging to compute.\(^{113}\)

Working while sick impairs an employee’s productivity.\(^{114}\) Sick workers are simply not as effective or efficient as they are when healthy.\(^{115}\) Though absenteeism is better documented, presenteeism is now considered to cost employers two to three times more than absenteeism.\(^{116}\) Studies have estimated that employee presenteeism costs employers an annual $150 billion due to reduced productivity.\(^{117}\) Moreover, working while sick prolongs illness, resulting

\(^{112}\) U.S. CONG. JOINT ECON. COMM., supra note 6, at 1; Widera et al., supra note 26, at 1246. Other reasons contributing to presenteeism in the workplace include a demanding workload, time pressure, and lean staffing. Johns, supra note 5, at 527–28.

\(^{113}\) MAYO CLINIC HEALTH SOLS., THE TRUE COST OF POOR HEALTH 1 (2008) (observing costs of presenteeism on businesses); Walter F. Stewart et al., Lost Productive Work Time Costs from Health Conditions in the United States: Results from the American Productivity Audit, 45 J. OCCUPATIONAL & ENVTL. MED. 1234, 1243 (2003); see Tammy Prater & Kim Smith, Underlying Factors Contributing to Presenteeism and Absenteeism, 9 J. BUS. & ECON. RES. 1, 1, 7 (2011) (noting that absenteeism results in the total loss of an employee’s productivity and characterizing presenteeism as the “antithesis of absenteeism”); Alyssa B. Schultz & Dee W. Edington, Employee Health and Presenteeism: A Systematic Review, 17 J. OCCUPATIONAL REHABILITATION 547, 573 (2007) (noting that calculating the cost of presenteeism is difficult without any receipts or concrete costs). Absenteeism is easy to calculate because the employee is clearly not present and the employer loses a full day’s worth of productivity. Prater & Smith, supra at 7. One of the difficulties with accurately calculating costs due to presenteeism is the fact that many employees do not report when they have been unproductive. See Stewart et al., supra at 1243 (noting that few employers actually document when employees are sick at work).

\(^{114}\) See Johns, supra note 5, at 529 (discussing studies’ attempts to calculate the cost of presenteeism and estimating the average productivity loss due to presenteeism as $22 per day). Presenteeism affects both the quality and quantity of an employee’s work, as the employee struggles at a slower pace and may be prone to mistakes. Paul Hemp, Presenteeism: At Work—But Out of It, HARV. BUS. REV. (Oct. 2004), https://hbr.org/2004/10/presenteeism-at-work-but-out-of-it [https://perma.cc/4R7B-23YF].

\(^{115}\) Hemp, supra note 114.

\(^{116}\) MAYO CLINIC HEALTH SOLS., supra note 113, at 1. In general, lost productivity due to presenteeism stems from a health problem and does not include such personal time as browsing the Internet or taking long breaks. Swords, supra note 26, at 583. One example of a cost of presenteeism is that workers lose an average of two hours per week of productive time to respond to family or personal health problems. Stewart et al., supra note 113, at 1237.

\(^{117}\) Hemp, supra note 114; Widera et al., supra note 26, at 1245. The biggest contributors to presenteeism are chronic conditions, such as depression, migraine, and arthritis. Ron Z. Goetzel et al., Health, Absence, Disability, and Presenteeism Cost Estimates of Certain Physical and Mental Health Conditions Affecting U.S. Employers, 46 J. OCCUPATIONAL & ENVTL. MED. 398, 406 (2004); see Johns, supra note 5, at 529 (noting that Dow Chemical Company’s study of its own employees calculated that the average employee with a chronic health condition cost the company $6,721 because of presenteeism). Although having access to paid sick days may help workers suffering from chronic
in employees needing more time to recover.\textsuperscript{118} Although the guarantee of paid sick days may not completely eliminate presenteeism, especially for chronic conditions, it would give employees the opportunity to seek medical treatment and recover more quickly.\textsuperscript{119}

When workers contract infectious diseases, however, presenteeism not only impairs productivity but also poses a risk to public health.\textsuperscript{120} This is especially the case in occupations that require greater employee-to-customer interaction.\textsuperscript{121} Most workers in the hospitality and food industry, however—perhaps the most quintessentially customer-facing industry—lack paid sick days.\textsuperscript{122} Additionally, these workers tend to fall in the lowest income brackets.\textsuperscript{123} Consequently, almost half of the workers in the food industry reported working while ill.\textsuperscript{124} The resultant and unsurprising norovirus and salmonella outbreaks
are public relations nightmares for restaurants and create substantial health costs for the local community.125

Beyond the food industry, the H1N1 pandemic of 2009 further illustrates the deleterious effects that presenteeism can have on the American workforce.126 Between April 2009 and August 2009, eight million workers went to work despite experiencing H1N1 symptoms.127 Of that eight million, forty-four percent said that they would lose pay if they stayed home while infected and a quarter said that they would lose their job.128 Presenteeism perpetuated the spread of the disease and increased the length of recovery for some employees.129 By not offering paid sick days during this health emergency, employers imperiled their workforce, placed tremendous costs on healthcare, and negatively affected the productivity of workers.130 Offering paid sick days would decrease the health risk that presenteeism poses while also increasing worker productivity in the long-run.131

ing from vomiting, diarrhea, jaundice, hepatitis A, or salmonella from coming into work. Carpenter et al., supra note 7, at 2146.

125 See NAT’L P’SHP FOR WOMEN & FAMILIES, supra note 103, at 5 (noting that an outbreak of norovirus at a Chipotle restaurant in Kent, Ohio, that sickened over five hundred people cost the local community between $130,000 and $300,000). Despite offering paid sick days, a sick worker at a Chipotle in Boston caused a norovirus outbreak that sickened over 130 people. Ramkumar Iyer, Chipotle Reopens Boston Restaurant Linked to Norovirus Outbreak, REUTERS (Dec. 28, 2015), http://www.reuters.com/article/us-chipotle-mexican-ecoli-idUSKBN0UB1L820151228 [https://perma.cc/2FST-TTFV]; Peck, supra note 34; Stephanie Strom, Chipotle Meeting Outlines Food Safety to Workers and Message for Public, N.Y. TIMES (Feb. 8, 2016), https://www.nytimes.com/2016/02/09/business/chipotle-meeting-outlines-food-safety-to-workers-and-message-for-public.html?_r=0 [https://perma.cc/V7SW-HR2Z]. Although this outbreak was one of many incidents that impaired Chipotle’s stock, Chipotle was at least able to alleviate its public relations burden by demonstrating that it did in fact provide paid sick time and that employees should not have come to work while ill. Peck, supra note 34; Strom, supra.

126 See Major, supra note 29, at 258 (noting that presenteeism resulted in the spread of the H1N1 pandemic to an additional seven million workers). Seasonal flu is a typical workplace scourge, especially because the rate of flu vaccination is only 40% in the United States. STEFAN PICHLER & NICOLAS ZIEBARTH, THE PROS AND CONS OF SICK PAY SCHEMES: TESTING FOR CONTAGIOUS PRESENTEEISM AND SHIRKING BEHAVIOR 1 (2015).


128 NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, supra note 103, at 5; U.S. CONG. JOINT ECON. Comm., supra note 6, at 2.

129 COUNCIL OF ECON. ADVISERS, supra note 10, at 17; DRAGO & LOVELL, supra note 85, at 5. The pandemic persisted longer at workplaces without paid sick days than it did at workplaces with paid sick days. COUNCIL OF ECON. ADVISERS, supra note 10, at 17; NAT’L P’SHP FOR WOMEN & FAMILIES, supra note 103, at 4. One study found that because workers went to work despite being ill with H1N1, an additional five million people suffered. U.S. DEP’T OF LABOR, supra note 7, at 3.

130 DRAGO & LOVELL, supra note 85, at 5.

131 COUNCIL OF ECON. ADVISERS, supra note 10, at 17 (noting presenteeism’s impact on workplace health); Furman & Stevenson, supra note 25 (articulating benefits of paid sick leave); Hemp, supra note 114 (explaining the costs of presenteeism for both employees and businesses).
Though the costs of presenteeism substantially burden employers, lack of paid sick days is also detrimental to workers and their families.\textsuperscript{132} The direct cost to employees is that if they choose to stay home because of an illness, they lose a day’s worth of pay.\textsuperscript{133} For those hourly workers who live paycheck-to-paycheck, having to forgo one day of pay could cause missed rent or bill payments.\textsuperscript{134} Employees also face the possibility of losing their job altogether due to an unforeseen illness.\textsuperscript{135} Seventeen percent of American workers have either lost their job or been threatened with termination because they took an unexpected absence due to illness.\textsuperscript{136}

The burdens of insufficient leave are not evenly distributed across the American workforce.\textsuperscript{137} Of the 40\% of Americans who lack paid sick days, 67\% are in the bottom quartile of wage distribution, whereas 19\% are in the top quartile.\textsuperscript{138} In addition, lack of paid sick days reflects the historic role of the male breadwinner, a patriarchal value that is no longer the reality in the American workforce.\textsuperscript{139} Since the 1960s, women have increasingly entered the workforce both as second earners in families as well as single working mothers.\textsuperscript{140} Women hold most of the low-paying jobs that are unlikely to offer paid sick days, and they continue to be families’ primary caregivers.\textsuperscript{141} Paid sick

\textsuperscript{132} See LOVELL, supra note 103, at 5 (noting that low-income families bear the brunt of lack of paid sick days).

\textsuperscript{133} Id.

\textsuperscript{134} U.S. CONG. JOINT ECON. COMM., supra note 6, at 1, 5; see NAT’L P’SHIP FOR WOMEN & FAMILIES, supra note 119, at 1 (noting that losing pay for three and a half days could equal a family’s entire one-month grocery budget).

\textsuperscript{135} Heather D. Hill, Paid Sick Leave and Job Stability, 40 WORK & OCCUPATIONS 143, 145–47 (2013) (“[J]ob security . . . is considered a key dimension of job quality.”).

\textsuperscript{136} U.S. CONG. JOINT ECON. COMM., supra note 6, at 2; see COUNCIL OF ECON. ADVISERS, supra note 10, at 14 (noting that fear of unemployment increases the rate of presenteeism). Twenty-three percent of workers in the food industry reported suffering retaliatory measures, such as being fired, when they took a sick day. Fischer, supra note 95. One Subway restaurant worker who was not allowed to go home after vomiting on herself at work was fired for taking an ambulance from the restaurant to the hospital after she finished her shift. Id.

\textsuperscript{137} See NAT’L WOMEN’S LAW CTR., UNDERPAID AND OVERLOADED: WOMEN IN LOW-WAGE JOBS 31 (2014) (noting that only 21\% of workers in the lowest paying jobs benefit from paid sick days); U.S. CONG. JOINT ECON. COMM., supra note 6, at 5 (reporting that only 7.9 million low-income earning workers, or roughly 35\%, benefit from paid sick leave).

\textsuperscript{138} U.S. CONG. JOINT ECON. COMM., supra note 6, at 4–5.

\textsuperscript{139} Kitchen, supra note 19, at 217–18; see NAT’L WOMEN’S LAW CTR., supra note 137, at 3 (observing that, in spite of women’s increasing role as family breadwinners, women are still responsible for family caregiving).

\textsuperscript{140} See COUNCIL OF ECON. ADVISERS, supra note 10, at 5 (observing that women in the American workforce increased from half in 1970 to three-quarters in the 1990s); LOVELL, supra note 103, at 1 (noting that 64\% of women who have children younger than six years old are employed).

\textsuperscript{141} VICKY LOVELL, WOMEN AND PAID SICK DAYS: CRUCIAL FOR FAMILY WELL-BEING 1 (2007); NAT’L WOMEN’S LAW CTR., supra note 137, at 1 (noting that women hold two-thirds of low-wage jobs). Eighty percent of mothers have the responsibility of monitoring their children’s health. LOVELL, supra at 2; see also Stewart et al., supra note 113, at 1244 (pointing out that for female workers, a disproportionate share of lost productive time is due to family health rather than personal health).
leave, therefore, would help better align workplace legislation with the gender makeup of the modern American workforce.\textsuperscript{142}

Without the fear of losing pay or potentially one’s job, employees with paid sick days would have a better quality of life.\textsuperscript{143} By staying home for even one day, sick workers generally recover faster.\textsuperscript{144} Presenteeism prolongs illness and increases the risk that an infection will spread to others.\textsuperscript{145} For employers, guaranteed paid sick days would result in improved morale and possibly entice employees to stay longer with their employers.\textsuperscript{146} It would also create a level playing field for all employers, as many have already adopted paid sick day policies.\textsuperscript{147} Though mandating paid sick days would not eliminate all instances of presenteeism, the option to stay home while sick would improve the quality of life for employees who most need it.\textsuperscript{148}

\textit{B. Increased Costs and Unjustified Absenteeism: The Potential Employer Compliance Costs}

Despite significant support among American voters, the most forceful opposition to paid sick day policies comes from employers and corporate lobbyists.\textsuperscript{149} Some employers already provide employees with healthcare and other

\textsuperscript{142} See NAT’L WOMEN’S LAW CTR., supra note 137, at 31 (noting that working parents who have child-rearing responsibilities would benefit from paid sick days).

\textsuperscript{143} See U.S. CONG. JOINT ECON. COMM., supra note 6, at 1 (observing the value of paid sick days for both society and affected families); Hill, supra note 135, at 166 (noting that access to paid sick days would allow workers to decide whether or not they should stay home from work because of an illness). These workers would have the peace of mind that, if they needed to take a day to care for themselves or a child, they have that option. See Hill, supra note 135, at 144, 166 (discussing value of paid sick days as an employee benefit).

\textsuperscript{144} See DRAGO & LOVELL, supra note 85, at 5 (noting health benefits of paid sick days); U.S. DEP’T OF LABOR, supra note 7, at 1 (noting that paid sick days could enable workers to seek preventive care and avoid having to emergency services).

\textsuperscript{145} U.S. DEP’T OF LABOR, supra note 7, at 1; see DRAGO & LOVELL, supra note 85, at 5 (explaining the significance of paid sick days on employees’ health).

\textsuperscript{146} AMY RAUB ET AL., WORK INTERRUPTION: A GLOBAL PERSPECTIVE ON INCOME PROTECTIONS 5 (2015); U.S. DEP’T OF LABOR, supra note 7, at 1, 3; see DRAGO & LOVELL, supra note 85, at 5 (explaining that the benefits of paid sick leave include reduced stress, improved morale, and increased loyalty). But see MAXFORD NELESN, THE EFFECT OF MANDATORY PAID SICK LEAVE POLICIES: REVIEWING THE EVIDENCE 12 (2015) (arguing that, rather than reducing turnover rates by having mandatory paid sick leave, such mandates will remove the incentive for employees to stay with their employer, as all other employers also have paid sick leave).

\textsuperscript{147} See McGregor, supra note 76 (reporting that larger businesses had previously felt disadvantaged because they voluntarily provided paid sick time to employees whereas their competitors opted not to provide such benefits).

\textsuperscript{148} See U.S. CONG. JOINT ECON. COMM., supra note 6, at 1 (explaining that the HFA would benefit both society and affected families); Hill, supra note 135, at 166 (discussing how employee benefits may result in employee retention).

\textsuperscript{149} See U.S. CONG. JOINT ECON. COMM., supra note 6, at 2 (reporting that 86% of voters support universal paid sick leave); U.S. DEP’T OF LABOR, supra note 7, at 2 (noting that in a 2015 poll, 88% of voters supported paid sick time); Covert, supra note 95 (reporting that strong lobbies opposed to
benefits, and thus view paid sick days as an unnecessary additional expense. 150
Employers fear that paid sick day laws will impact their bottom line in several ways. 151
Employers fear having to hire additional full-time workers or temporary workers to cover unexpected employee absences. 152
They may also have to spend money to comply with the law, including paying for administrative mechanisms to track absences or upgrade payroll. 153
In order to cover these additional costs, employers surmise that they will be forced to take steps detrimental to their workers and consumers. 154
Some of these steps may negatively affect employees, including reduction in wages and replacement of manda-

150 See NELSEN, supra note 146, at 2, 4, 42 (discussing employers’ concerns). Small businesses in particular do not want to jeopardize their existence by having to provide an additional benefit. See Hutchins, supra note 76 (noting that businesses are still struggling to recover from the recession). Ultimately, employees being absent rather than being present at work while sick, employers lose an entire workday of productivity that has been estimated to cost the economy $117 billion. Blaire Brody, The High Cost of Taking a Sick Day, FISCAL TIMES (Jan. 10, 2013), http://www.thefiscaltimes.com/Articles/2013/01/10/The-High-Cost-of-Taking-a-Sick-Day [https://perma.cc/JM2B-393B]; see Claire Greenwell, Worker Illness and Injury Costs U.S. Employers $225.8 Billion Annually, CDC FOUND. (Jan. 18, 2015), https://www.cdcfoundation.org/pr/2015/worker-illness-and-injury-costs-uemployers-225-billion-annually [https://perma.cc/7QN8-NAPB] (reporting that absenteeism results in $225.8 billion in costs to American employers each year).


152 See EILEEN APPELBAUM ET AL., GOOD FOR BUSINESS? CONNECTICUT’S PAID SICK LEAVE LAW 11 (2014) (showing that Connecticut employers responded to employee absences largely through such cost-free methods as delaying work or trading employee shifts).

153 DRAGO & LOVELL, supra note 85, at 5.

154 See CTR. FOR EDUC. OF WOMEN, supra note 100, at 4 (noting that employers may offset paid sick leave costs with fewer hours for employees, lower wages, lay offs, or by raising prices that consumers pay); Michelle Hirsch, Paid Sick Leave: Costs Rise for Small Businesses, FISCAL TIMES (Mar. 14, 2012), http://www.thefiscaltimes.com/Articles/2012/03/14/Paid-Sick-Leave-Costs-Rise-for-Small-Businesses [https://perma.cc/STV8-WATX] (reporting that small businesses have criticized paid sick day legislation as fiscally detrimental); McGregor, supra note 76 (reporting that businesses are concerned that they will have to take countering measures, such as cutting jobs or reducing salaries, in order to provide paid sick time); see also SMITH & KIM, supra note 78, at 7 (citing seven possible arguments opposing paid sick leave: government intrusion on business and free enterprise, losing jobs overseas, employee abuse of the system, small businesses being hurt, employers making cutbacks, and businesses suffering in the current economy).
tory benefits with previously offered but non-mandatory benefits. Alternative, employers may pass on the cost to consumers by raising prices.

Employers also fear that workers will abuse paid sick leave. Specifically, employers believe that paid sick days will increase absenteeism in the workplace even when absence is not warranted. Paid sick days, perceived by employers as another form of entitled compensation, may entice workers to take off unnecessary days of work.

Finally, employers view mandatory paid sick days as a governmental intrusion on their operations. Employers believe that they, not the government, are in the best position to address workers’ needs. Companies with a national presence in particular may struggle to comply with the patchwork of municipal and state regulations. Furthermore, some policymakers in cities and states are concerned that small businesses will move in order to avoid compliance with paid sick time laws. Movement of businesses would harm local communities and exacerbate existing unemployment.

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155 Smith & Kim, supra note 78, at 7.
156 Nelsen, supra note 146, at 17, 42; see Ctr. for Educ. of Women, supra note 100, at 4 (showing that some opponents to paid sick days are concerned with rising labor costs that may lead to raised consumer prices).
158 Appelbaum et al., supra note 152, at 4; Sherk, supra note 157.
159 Hill, supra note 135, at 147. But see Runge, supra note 32, at 481–82 (observing that, regardless of legislation, the culture of the American workforce deters employees from taking time off from work).
160 See Smith & Kim, supra note 78, at 7 (listing government intrusion as one of seven criticisms of paid sick days); Kurtzleben, supra note 27 (explaining that business communities and chambers of commerce believe businesses, not the government, should determine such employment policies).
161 See Kurtzleben, supra note 27 (reporting that because paid sick days impose a cost on businesses, those businesses believe that they should be able to self-regulate their employees).
162 Ctr. for Educ. of Women, supra note 100, at 4. This is particularly the case where municipalities have taken the initiative to adopt sick leave initiatives. See Pabst, supra note 91 (“Patchwork government mandates stifle job creation and economic opportunity.”) (quoting Wisconsin Governor Scott Walker); see also Heymann et al., supra note 9, at 12 (explaining that having a varying assortment of regulations leaves gaps in coverage for employees).
163 See Main St. All. of Wash., Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-Year Anniversary of Seattle’s Paid Sick and Safe Leave Law 3 (2013) (explaining that D.C.’s audit regarding paid sick leave implementation did not indicate any business decisions to relocate).
C. Analysis of Enacted Policies in the United States

Since Senator Ted Kennedy first introduced the HFA in 2005, paid sick day laws have been hotly debated in the United States. The purpose of the HFA is to “ensure that all working Americans can address their own health needs and the health needs of their families by requiring employers to provide a minimum level of paid sick leave . . . .” The recession and a strong business-led opposition, however, have stymied these congressional efforts.

Though President Obama included paid sick leave as one of his campaign initiatives during the 2008 presidential election, it was not until 2015 that he took further action to promote paid sick leave. Starting in April 2015, Labor Secretary Thomas Perez traveled around the United States as part of the Leave on Leave campaign. To the extent that his executive authority would allow, President Obama also signed an executive order in September 2015 that mandated paid sick leave for anyone working on a federal contract.

To fill the void left by the FMLA, some cities and states took it upon themselves to adopt paid sick day laws. Connecticut was the first to adopt a

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166 S. 1085, 109th Cong. § 3(1).
167 See CTR. FOR EDUC. OF WOMEN, supra note 100, at 2 (noting that ALEC and the National Restaurant Association have led the opposition against paid sick days); Hirsch, supra note 154 (explaining that the recession has caused some employers to reduce paid sick leave for employees). From a political standpoint, paid sick leave in general has support from Democrats and Republicans alike. See SMITH & KIM, supra note 78, at 2 (showing that 89% of Democrats and 59% of Republicans support paid sick leave legislation). The National Restaurant Association, National Business Group on Health, National Federation of Independent Business, and U.S. Chamber of Commerce have been at the forefront of paid sick leave opposition. McGregor, supra note 76; see Kurtzleben, supra note 27 (quoting a U.S. Chamber of Commerce official stating that the organization would “wage ‘all-out war’ against paid-leave laws”).
168 See U.S. DEP’T OF LABOR, supra note 19, at 229–30 (explaining that part of President Obama’s Blueprint for Change Plan to Support Working Women and Families included encouraging states to adopt paid leave and requiring employers to provide paid sick leave); President Obama, supra note 19 (remarking that the chance to have paid sick days is necessary for American workers).
169 Eilperin, supra note 79. In addition to spreading awareness of paid leave initiatives, the Department of Labor also provided $1.25 million in grants to encourage states to consider adopting paid sick leave laws. Paid Leave Effort Gets $1.25M to Study Expansion in U.S., U.S. DEP’T OF LABOR (June 16, 2015), https://www.dol.gov/newsroom/releases/opa/opa20151196 [https://perma.cc/Z8QM-A9RD].
171 CTR. FOR EDUC. OF WOMEN, supra note 100, at 2; see also Paul A. Diller, Why Do Cities Innovate in Public Health? Implications of Scale and Structure, 91 WASH. U.L. REV. 1219, 1284–85 (2014) (arguing that cities provide a counter to the broken federal system in being able to act on behalf of the local community, especially in regards to public health regulations). San Francisco was the first to act, adopting its paid sick leave ordinance in 2007. DRAGO & LOVELL, supra note 85, at 1. Eighty-
statewide policy. Connecticut’s law allows workers to accrue five days of paid leave, but the law is severely limited in scope. Only businesses that employ fifty or more employees must comply. Furthermore, manufacturing and non-profit corporations are exempt. Consequently, only 200,000 to 400,000 of Connecticut’s 1.7 million workers benefit from the state law. Despite these limitations in coverage, workers who were previously uncovered in industries such as health, education, social services, hospitality, and retail benefited dramatically.

Because of the dramatic political division regarding this issue, results from studies have been skewed. Studies conducted by progressive publications tend to present the impact of these laws in a positive light. In contrast,
business-focused publications tend to negatively view the results of these studies. City auditors, however, have managed to conduct neutral and objective reports. City auditors in Washington, D.C., and Seattle looked at the impact of paid sick leave ordinances on their respective cities. Seattle’s city auditor found that most employers felt a small impact on business because of the ordinance. One of the concerns presented in opposition to Washington, D.C.’s paid sick leave ordinance was that such an ordinance would cause employers to relocate outside of the city to avoid having to comply with the mandate. The city auditor, however, found that there was no such shift in location following the enactment of the ordinance.

Despite the successful passage of paid sick leave laws in some states and cities, the effort to preempt and thereby eliminate municipal action has gained significant ground in others. In Wisconsin, Governor Scott Walker expressed

\textit{supra} note 146, at 24 (noting that the report’s inclusion of businesses who had previously offered paid leave was not a helpful statistic for measuring support of paid leave laws).


181 See Nelsen, \textit{supra} note 146, at 1 (observing that city auditors have generated paid sick leave reports in lieu of academic studies).

182 See Branche, \textit{supra} note 88, at 2 (noting that the purposes of the D.C. audit were to look at employers’ use of the law as well as the law’s effect on the economy, particularly in the private sector); Nelsen, \textit{supra} note 146, at 1, 19, 29 (commenting on the D.C. and Seattle auditor reports); Jennifer Romich et al., \textit{Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance} 79 (2014) (showing that a survey indicated that 70% of employers supported the ordinance).

183 See Romich et al., \textit{supra} note 182, at 78 (reporting that a majority of employers saw no effect on profitability and only a few described the financial impact as negligible). Relying on anecdotal evidence, the city auditor reported that costs arising from paid sick leave accounted for four tenths of one percent of total revenue for businesses. See id. at 29–30 (showing that one in six employers reported in survey that the Seattle ordinance hurt profitability but these costs were well below half of one percent of the total revenue).

184 Branche, \textit{supra} note 88, at 19.

185 \textit{Id.} (reporting that D.C.’s Accrued Sick and Safe Leave Act neither encouraged businesses to move out of the D.C. area nor discouraged businesses from entering the D.C. area). Since the auditor’s report was released, D.C.’s ordinance has expanded to include tipped restaurant and bar workers. COUNCIL OF ECON. ADVISERS, \textit{supra} note 10, at 21.

186 CTR. FOR EDUC. OF WOMEN, \textit{supra} note 100, at 2. State legislatures have proposed 105 preemption bills and eleven states have enacted preemption laws. \textit{Id.}
concern about the patchwork of regulations that he felt would be both difficult and expensive for employers to comply with. Groups such as the American Legislative Exchange Commission and the National Restaurant Association have capitalized on Wisconsin’s preemption law and have pushed for states to enact similarly prohibitive laws. Although these laws unify the state’s policy on paid sick days, they provide no remedy for employees. This is problematic because those employers who previously gave no paid sick time continue to offer nothing. Regardless of this opposition, the battle to implement paid sick leave laws continues at the state level with some states relying on voter referendums for approval.

D. Comparison to Other Countries

Because divisive opinion has skewed interpretation of the results of existing American paid sick time laws, comparison to other countries can provide a helpful look at how paid sick leave affects employment. Many of these countries have had guaranteed paid sick days for a substantial period of time. Globally, the use of sick leave varies in execution. For wage replacement, countries either have employers cover lost wages or the govern-

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187 Pabst, supra note 91; see Wis. Stat. § 103.10(1m) (2016) (“[T]he legislature finds that the provision of family and medical leave that is uniform throughout the state is a matter of statewide concern and that the enactment of an ordinance by a city . . . would be logically inconsistent . . . .”). Similarly, in signing its preemption bill, Florida Governor Rick Scott stated that the bill fostered “statewide uniformity, consistency, and predictability in Florida’s employer-employee relationships.” Zillman, supra note 95.

188 See Bottari, supra note 95 (reporting that ALEC first held a preemption meeting in 2011, during which the organization handed out copies of Wisconsin’s preemption law to state legislators); Fischer, supra note 95 (discussing ALEC’s efforts to promote preemption laws).

189 See U.S. DEP’T OF LABOR, supra note 19, at i (noting that the United States has adopted an attitude of “doing nothing” for employees by failing to enact paid sick leave laws); Zillman, supra note 95 (quoting Gordon Lafer) (“What gets said is, ‘We shouldn’t have this mish-mosh of different laws; we want a state standard, and the state standard should be nothing.’”).

190 See U.S. DEP’T OF LABOR, supra note 19, at i, 21 (arguing that working families bear the brunt of the cost of not having paid sick leave).


192 See Heymann et al., supra note 9, at 1 (comparing existing global paid sick time legislation); Raub et al., supra note 146, at 12 (noting that 170 countries guarantee some form of paid leave); Pichler & Ziebart, supra note 126, at 2 (explaining that almost every European country has some form of universal paid sick leave).

193 See Heymann et al., supra note 9, at 4–5 (discussing various countries’ paid sick time schemes). Because of the novelty of paid sick time laws in the United States, studies must rely on preliminary results. Nelsen, supra note 146, at 38.

194 Heymann et al., supra note 9, at 5.
ment provides social insurance or a combination of the two. Some countries offer multiple weeks of sick days a year, starting from the first day of illness, whereas others do not cover the first few days. Similarly, some countries replace one hundred percent of wages whereas others only replace fifty to seventy-five percent of wages.

Studies of these international laws demonstrate the fluctuations that occur in the employment setting. In times of economic instability, there is a noticeable reduction in the use of paid sick leave. Economic instability also causes shifts in overall support for paid sick leave policies. Demographically, women use paid sick days more frequently than men, lower income earners more frequently than high wage earners, and older employees more frequently than young employees. In terms of effectiveness, high expenditure on paid sick leave generally results in higher economic productivity.

In Germany, the Federal Holidays Act and Continuation of Pay Act allow employees to take up to six weeks of sick pay. Employees receive one hundred percent of their pay, but if they are sick for more than three consecutive

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195 See id. (noting that some countries, such as Belgium, Finland, Germany, and Australia, give employees 100% of lost wages, but other countries, such as Spain, France, Ireland, and the United Kingdom, only replace a portion of the employees’ lost wages because they do not cover the first few days of absence).

196 Id. at 8–9; see XENIA SCHEIL-ADLUNG & LYDIA SANDNER, THE CASE FOR PAID SICK LEAVE 9 (2010) (noting that some countries require waiting periods before employees receive wages missed due to illness).

197 SCHEIL-ADLUNG & SANDNER, supra note 196, at 8.

198 See id. at 11 (noting that paid sick day schemes vary globally in terms of regulations applied and worker eligibility).

199 See id. at 15 (arguing that paid sick days are strongly correlated to economic cycles); Claus D. Hansen & Johan H. Andersen, Going Ill to Work—What Personal Circumstances, Attitudes and Work-related Factors Are Associated with Sickness Presenteeism?, 67 SOC. SCI. & MED. 956, 958 (2008) (discussing relationship between job insecurity and presenteeism). This may cause an upsurge in presenteeism, as employees do not want to risk being laid off during a recession. See Hansen & Anderson, supra.

200 See Richard Milne, Finland Plans to Cut Holidays and Sick Pay to Revive Economy, FIN. TIMES (Sept. 8, 2015), http://www.ft.com/cms/s/0/6dbc6e67a-563c-11e5-97e9-7f0bf5e7177b.html#axzz3yB733qS [https://perma.cc/Z2LQ-FGHY] (reporting on Finland’s changes to its paid sick leave policies in response to economic problems). As a result of recent economic stagnation and high unemployment, the Finnish government is considering reducing paid sick days, allowing the first day to be unpaid and only covering 80% of wages. Id. Finnish labor costs are roughly a fifth higher than Germany’s. Id.

201 SCHEIL-ADLUNG & SANDNER, supra note 196, at 16; see Ahn & Yelowitz, supra note 180, at 1270 (noting that paid sick days are more significant for employees with poor health, sick children, or increased age).

202 SCHEIL-ADLUNG & SANDNER, supra note 196, at 18. At the same time, compared to other health care benefits, sick leave expenditures were the lowest and most affordable for twenty-seven European countries. Id. at 20.

203 FED. MINISTRY OF LABOUR & SOC. AFFAIRS, supra note 51, at 39; Ziebarth & Karlsson, supra note 51, at 1109; Jung, supra note 51. Employers cover the first six weeks, but after six weeks, social insurance covers the rest. HEYMANN ET AL., supra note 9, at 7.
days, they must provide a doctor’s note. With the most generous sick leave system, German employers spent approximately thirty billion dollars on sick leave payments in 1996.

Because of these significant costs, in 1996, the German government passed the Employment Protection Act, reducing the guaranteed pay to eighty percent. This reduction in guaranteed pay led to a 15% decrease in the absence rate, or two days less per year, and a 6.7% decrease in costs to employers. These reforms, however, were repealed in 1998 and guaranteed pay returned to 100% of an employee’s daily wage, where it continues to be. After those six weeks, if an employee continues to miss work due to an illness, the employer is relieved from further payment and instead a sickness insurance fund covers 70% of the employee’s earnings. In 2000, German employees took an average of sixteen and a half sick days per year, and in 2014, German employees took an average of eighteen sick days per year.

In France, employers do not have to pay for employees’ sick days. Instead, France’s Social Security System covers employees’ wages when they...
miss work due to illness. To qualify, employees must have paid a certain amount into the system or worked at least 150 hours in the first three months. Additionally, employees must provide a doctor’s note within forty-eight hours to justify their leave. Employees only receive payment after the third day of absence. For the first thirty days of leave, employees receive ninety percent instead of one hundred percent of their daily wage. In 2013, French employees on average took eight sick days per year. These laws provide a framework for how the United States should proceed with the HFA. Because France offers a generous number of vacation

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212 Id. These cash benefits come specifically from local Health Insurance Funds. Id. France also established an Alert Committee that oversees insurance expenditures. ORG. FOR ÉCON. CO-OPERATION & DEV., ECONOMIC SURVEYS: FRANCE 28 (2005). If it seems as if the expenditures will overrun within a year, the Committee is tasked with quickly finding countermeasures to either prevent or limit such overruns. Id.

213 *French Social Security System*, supra note 54. Of employees’ contributions to Social Security, 0.75% is designated for sickness pay, whereas 12.8% of employers’ contributions to Social Security is designated as sickness pay. BAKER & MCKENZIE, supra note 54, at 15–16. After six months of sick leave, employees must have worked at least 600 hours in the previous year to continue receiving cash benefits. *French Social Security System*, supra note 54.


215 *French Social Security System*, supra note 54. But see Catherine Pollak, *The Impact of a Sick Pay Waiting Period on Sick Leave Patterns*, 18 EUR. J. HEALTH ECON. 13, 13–14 (2015) (demonstrating that research suggests that delaying wages when employees are absent due to illness results in longer rather than shorter periods of absence). Employees also can take days off for sick family members, also known as compassionate leave. *French Social Security System*, supra note 54.

216 BAKER & MCKENZIE, supra note 54, at 13 (noting that the social security system may reduce this percentage of replacement wages). The amount of pay received for sick leave reduces to 66% after thirty days. Id. Despite these statutory limitations, most employees contract with employers to receive their full amount of wages. Id. at 13–14. At the same time, French laws regarding sick leave may be more restrictive than German laws because the French law mandates that workers receive thirty days of paid vacation per year, the most employee-friendly vacation policy in the world. REBECCA RAY & JOHN SCHMITT, NO-VACATION NATION USA—A COMPARISON OF LEAVE AND HOLIDAY IN OECD COUNTRIES 2 (2007). By contrast, the United States does not mandate any paid vacation and nearly one-fourth of American employees do not receive any paid vacation. Katie Johnston, *Nearly 1 in 4 US Workers Go Without Paid Time Off*, BOS. GLOBE (Aug. 14, 2014), https://www.bostonglobe.com/business/2014/08/13/one-few-countries-that-doesn-mandate-paid-vacation-time/eqodEqumohPyca5kt6hrZO/story.html [https://perma.cc/F7PQ-EPES].

217 SCHEIL-ADLUNG & SANDNER, supra note 196, at 11; *European Health Information Gateway: Absenteeism from Work Due to Illness, Days per Employee per Year*, supra note 210. When French workers use paid sick leave, their contracts are considered suspended. BAKER & MCKENZIE, supra note 54, at 13. This protects workers from retaliation, as employers cannot terminate an employee for using sick leave. Id.

218 See HEYMANN ET AL., supra note 9, at 1–2 (outlining how other countries have implemented paid sick time legislation); see also RAUB ET AL., supra note 146, at 17–19 (arguing that studies of other countries’ use of paid sick days demonstrates that such policies are economically feasible for businesses).
days, their employees may need fewer paid sick days.\textsuperscript{219} Additionally, the fact that French employees only receive ninety percent of their wage when absent as opposed to one hundred percent suggests that the reduced pay deters unwarranted absenteeism.\textsuperscript{220} By not offering pay for the first three days of absence and by requiring a doctor’s note to justify absence, however, France’s law would be less beneficial for employees suffering from short-term illnesses.\textsuperscript{221} In contrast, German employees take a significant number of paid sick days per year.\textsuperscript{222} Their generous sick leave policy, however, places a substantial burden on German employers.\textsuperscript{223}

III. HOW TO IMPLEMENT PAID SICK DAYS IN THE UNITED STATES

When enacted in 1993, the FMLA was instrumental in recognizing workers’ rights and providing leave.\textsuperscript{224} Because the leave guaranteed under the FMLA is unpaid, however, only the workers who can afford to forgo a paycheck actually benefit from the law.\textsuperscript{225} Lack of paid sick time disproport-

\textsuperscript{219} RAY & SCHMITT, supra note 216, at 9. The difficulty with using vacation days in lieu of paid sick days is that generally employers require sufficient notice prior to a vacation, but employees are unable to provide such notice when they need to attend to a short-term illness. See id. at 13 (noting that in the United Kingdom, employees must provide double the amount of time for notice as they intend to take off). Because low-wage workers lack both vacation days and paid leave, using vacation days when sick is not an option for workers in the United States. See generally JOAN C. WILLIAMS, TODAY’S SCHEDULES FOR TODAY’S WORKFORCE: HOURLY EMPLOYEES AND WORK-LIFE FIT (2011) (providing an overview of issues involving working mothers who lack both sick and vacation leave).

\textsuperscript{220} See BAKER & MCKENZIE, supra note 54, at 13 (noting that French employees only receive 90% of their missed wages due to illness); Ziebarth & Karlsson, supra note 51, at 1109 (noting that one of the reasons for the Kohl government’s reduction of paid leave coverage in the 1990s was to reduce abuse of the system). Finland’s plan to also reduce coverage of pay to 80% and to not cover the first day of absence reflects this concern that paid sick leave places a substantial burden on employers. Milne, supra note 200.

\textsuperscript{221} See French Social Security System, supra note 54 (noting that France’s benefits for paid sick leave are only paid starting on the fourth day of absence).

\textsuperscript{222} See SCHEIL-ADLUNG & SANDNER, supra note 196, at 11 (reporting that German employees take an average of sixteen and a half days for sickness).

\textsuperscript{223} See SCHÖN, supra note 207, at 1 n.2 (noting that the cost of paid sick leave amounted to approximately $45 billion for employers in 2013); Ziebarth & Karlsson, supra note 51, at 1110 (noting that the cost of the paid sick scheme in 1996 was roughly $30 billion, most of which fell on employers).


\textsuperscript{225} COUNCIL OF ECON. ADVISERS, supra note 10, at 3; see JACOB ALEX KLERMAN ET AL., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 162 (2014) (citing the inability to forgo a paycheck as the primary reason for working while sick). Additionally, the FMLA only guarantees unpaid leave when employees or their family members have a serious health condition. See WILLIAMS, supra note 219, at 42 (arguing that because of limitations in FMLA, only 24% of low-wage workers are able to take days off to care for a sick child without losing pay or using vacation days). There are further eligibility requirements such that only 60% of workers have access to unpaid leave under FMLA. COUNCIL OF ECON. ADVISERS, supra note 10, at 3.
tionately affects low-income workers, particularly women and minorities. 226
Lack of paid sick time is standard in such industries as food service and hospi-
tality that necessarily involve a higher rate of employee-to-customer contact. 227
Though mandating paid sick time at the federal level may not eradicate all in-
stances of presenteeism in the workplace, it will provide some financial protec-
tion for workers who otherwise risk spreading contagion to others. 228

The alternative that the opposition has proposed, and that some states have
implemented, is to do nothing other than what is guaranteed by the FMLA. 229
By adopting statewide preemption laws, these opposition states allow employ-
ers to decide how to treat their employees. 230 The problem with this approach
is that the majority of employers in critical industries, such as food service
where these laws are vital to public health, currently do not voluntarily provide
paid sick days and are not likely to do so without legislation requiring them to
do so. 231

226 See NAT’L WOMEN’S LAW CTR., supra note 137, at 31 (noting that women fill two-thirds of
low-wage jobs that are least likely to have access to paid sick leave); U.S. CONG. JOINT ECON.
COMM., supra note 6, at 5, 7 (reporting that only 33% of low-wage workers benefit from paid sick
leave but the HFA would help provide paid sick leave to low-wage, female, and minority workers).
227 See U.S. CONG. JOINT ECON. COMM., supra note 6, at 1 (noting that if passed, the HFA would
give an additional 5.9 million food industry employees access to paid sick days). In Seattle, prior to
adopting its paid sick leave ordinance, 98% of accommodation and food service employers did not
provide paid sick leave to all employees. MAIN ST. ALL. OF WASH., supra note 163, at 1. Nationwide,
three-quarters of hospitality and food service workers lack paid sick time. U.S. DEP’T OF LABOR,
supra note 7, at 2.
228 See U.S. DEP’T OF LABOR, supra note 7, at 1 (describing the benefits of paid sick time); see
also PICHLER & ZIEBARTH, supra note 126, at 38 (discussing using monetary incentives to reduce
contagious presenteeism).
229 See Zillman, supra note 95 (discussing some states’ adoption of preemption laws as a way to
promote uniformity and consistency for employers); see also Hutchins, supra note 76 (explaining the
fear that mandated paid sick leave will stifle small businesses and cause companies to relocate outside
of the state).
230 See CTR. FOR EDUC. OF WOMEN, supra note 100, at 2 (noting that eleven states have passed
preemption bills to block local paid sick day efforts); Zillman, supra note 95 (Missouri State Repre-
sentative Caleb Rowden stating that his proposed preemption bill was “intended to ‘protect small
businesses from overreaching and unbalanced regulation’”).
231 See U.S. DEP’T OF LABOR, supra note 7, at 2 (noting that despite the public health risk that
sick food workers pose, 75% of these workers lack paid sick days). Generally, smaller businesses do
not offer paid sick days to employees because of the associated costs. See Hirsch, supra note 154
(reporting that small businesses are concerned with having to cover the cost of paid sick days whereas
larger businesses are better equipped to absorb such costs); Laura Michaels, Hospitality Industry
Sounds Off on Paid Sick Leave, FOOD SERV. NEWS (Feb. 2016), http://www.foodservicenews.net/
(noting that the Minnesota Restaurant Association lobbied in favor of preemption legislation to help
restaurants avoid compliance with a third layer of labor regulations imposed by Minnesota’s paid sick
day ordinance); Brian Watt, New Paid Sick Leave Law Creates Challenges for Restaurants, KPCC
challenges-for-res/ [https://perma.cc/XHA9-63S5] (showing that small business owners are concerned
with having to cover the cost of an absent employee’s pay in addition to overtime for the worker who
works in place of the absent employee). Instances of pandemics such as H1N1 may be rare, but when
This Part argues that Congress should pass the HFA to remedy the shortcomings of the FMLA, and specifically to provide paid sick days to low-income workers in such industries as food service that are in particular need of a paid sick day law. Section A recommends re-tooling the HFA to address businesses’ concerns regarding costs and absenteeism to eventually pass the bill. Section B suggests the interim goal of having municipalities and states continue to adopt paid sick leave laws, thereby shedding light as to how Congress should proceed.

A. Long-Term Action: Retooling and Passing the HFA

Although the HFA has lingered in Congress since 2005, the bill has not moved past the subcommittee stage. The bill has considerable support among American voters and both political parties. The recession and a few especially outspoken voices, however, have dampened efforts to push the bill to a vote. With the current Republican-dominated Congress, the bill is unlikely to reach the House floor in the near future.

they do occur, they can be catastrophic for businesses and communities. See NAT’L P’SHP FOR WOMEN & FAMILIES, supra note 103, at 7 (noting that the H1N1 pandemic sickened approximately eight million workers who spread disease to an additional seven million workers). Unlike H1N1 pandemics, norovirus outbreaks are distressingly common. See Gould et al., supra note 121, at 1824 (noting that 48 million cases of foodborne illness happen annually, more than half of which originate in restaurants). One Center for Disease Control study found that nearly all norovirus infections and half of the salmonella infections in its survey resulted from food worker health and hygiene. Id.

232 See infra notes 235–279 and accompanying text.
233 See infra notes 235–263 and accompanying text.
234 See infra notes 264–279 and accompanying text.
236 See SMITH & KIM, supra note 78, at 1–2 (noting that 69% of Americans support paid sick days as an important right for workers; specifically, 85% of Democrats and 64% of Republicans consider paid sick days to be very important). President Obama’s 2015 State of the Union address sparked more congressional interest in the bill. See President Obama, supra note 19 (calling on both the states and Congress to enact paid sick time legislation); see also U.S. DEP’T OF LABOR, supra note 19, at 9 (commenting on President Obama’s remarks regarding paid sick time legislation).
237 See CTR. FOR EDUC. OF WOMEN, supra note 100, at 2 (noting that ALEC and the National Restaurant Association have led the charge against mandated paid sick day legislation); Hutchins, supra note 76 (reporting that small businesses are balk ing at mandated paid sick leave legislation because they are still struggling to recover from the recession).
238 See CTR. FOR EDUC. OF WOMEN, supra note 100, at 2 (blaming conservatives in Congress for thwarting federal paid sick leave legislation initiatives); see also Aliyah Frumin & Irin Carmon, 7 Lingering Concerns About Trump’s Family Leave Plan, NBC NEWS (Sept. 14, 2016), http://www.nbcnews.com/news/us-news/7-lingering-concerns-about-trump-s-family-leave-plan-f648331 [https://perma.cc/U5SC-FKNX] (noting that federal paid sick time legislation is unlikely with Republican-controlled legislative and executive branches). Although President Trump laid out a paid family leave policy for female workers during his election campaign, this policy only covered maternity leave and
Because of popular support for this bill and the growing number of women in the workforce, the HFA continues to be a promising piece of legislation. Combined with President Obama’s executive order, municipal and state legislation is paving the way for the HFA. As these local laws demonstrate some of the pitfalls of paid sick leave, Congress will have a better idea as to what should be included in the HFA.

The HFA in its current form proposes that workers in businesses that employ fifteen or more people can earn up to seven days of paid sick leave a year. Employees can start using earned paid sick time after sixty days of employment. If unused, earned paid sick time carries over into the following year, but the employer does not have to provide more than fifty-six hours of paid sick time within a year. An employer may request medical certification justifying the absence, but what the certificate entails is subject to limita-

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See U.S. DEP’T OF LABOR, supra note 19, at i (quoting former Secretary of Labor Thomas Perez saying that the enactment of universal paid leave is a matter of “when, not if”).


See NELSEN, supra note 146, at 1, 39 (presenting criticism of local paid sick day legislation). Results derived from these local laws will need to take the states’ business environment and employee demographics into account to accurately reflect use of paid sick days. See id. at 7 (noting that studies of paid sick days should focus on those businesses who did not previously offer paid sick leave); Hill, supra note 135, at 143 (noting that changes in the economic and demographic makeup of a workforce have affected how employers treat their employees).

H.R. 932, 114th Cong. §§ 4(5)(B), 5(a)(1). Limiting the affected pool of employers to those with fifteen or more employees may result in employers who are in the margins to lay off workers to ensure that they fall below the threshold. SALTSMAN, supra note 180, at 5. An employer at his or her discretion can provide more than fifty-six hours but not fewer. H.R. 932, 114th Cong. § 5(a)(1). This figure includes part-time workers who were previously uncovered by the FMLA. COUNCIL OF ECON. ADVISERS, supra note 10, at 3; see LOVELL, supra note 103, at 6, 13 (noting that almost no part-time workers have access to paid sick leave). Hiring temporary workers would be a significant burden for these smaller employers. See id. (observing that in 2013, larger businesses only chose to hire a temporary worker 1.4% of the time to cover an absent non-exempt employee).

H.R. 932, 114th Cong. § 5(a)(4). If the employee falls ill and needs a sick day before the sixty days have passed, the employer can choose to loan paid sick time to the employee. Id. § 5(a)(5)(A)–(B).
tions. In exchange, employers are required to provide certain information to employees, such as letting them know their rights under the act.

The act also includes anti-retaliatory measures to prevent employers from terminating an employee for using paid sick time. The employer can neither use the employee’s use of paid sick time as a negative factor with regards to promotion or scheduling hours nor require the employee to find a replacement for that day. If there is a violation of these rights, employees or the Secretary of Labor can pursue a civil action against employers.

Giving employers the ability to request medical documentation to justify an absence should curb most unjustified absenteeism. As an additional means to both lessen costs for employers and to reduce unwarranted absenteeism, the HFA can reduce the guaranteed payment amount to ninety percent of an employee’s daily wage when the employee is absent for an unexpected illness. This reduction in pay would acknowledge the burden on employers in having to cover for the absent employee. As observed in France, the slight

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245 Id. § 5(d)(2)(A)(i). The employer cannot request specific details that would violate the employee’s right to keep protected health information confidential. Id. § 5(d)(2)(D)(i). The absence can be for any physical or mental illness for the employee or a family member, or for obtaining preventive medical care, or as a result of domestic violence, sexual assault, or stalking. Id. § 5(b). Employees must give their employers as much notice regarding their absence as possible, but for most instances of needing paid sick leave beyond seeking preventive medical care, the employee will not be able to provide much notice. Id. § 5(d)(1).

246 Id. § 6(a)(1).

247 Id. § 7(a)–(b).

248 Id.

249 Id. § 8(a)(3)–(4).

250 See Ziebarth & Karlsson, supra note 51, at 110 (noting that Germany instituted a medical monitoring system to investigate and potentially curb excessive cases of absenteeism). Both Germany and France require a medical certificate from employees. Pichler & Ziebarth, supra note 126, at 16–17; French Social Security System, supra note 54.

251 See Ziebarth & Karlsson, supra note 51, at 1109 (noting that the decrease in Germany’s paid leave amount resulted in decreased absenteeism). As Germany’s 1996 reform demonstrated, reducing the amount of sick pay that workers receive reduces both costs and absenteeism. See Schönen, supra note 207, at 35; Ziebarth & Karlsson, supra note 51, at 1109; see also Pollak, supra note 215, at 14 (explaining that Sweden’s reduction in wage replacement resulted in fewer short-term absences). This may result in increased presenteeism, but if employees truly need a day off from work to recover from an illness, they will still receive most of their wage. See Metro. Milwaukee Ass’n of Commerce, Inc. v. City of Milwaukee, 798 N.W.2d 287, 310 (Wis. Ct. App. 2011) (considering that for paid as opposed to unpaid sick leave, it is “reasonable to conclude that paid sick leave will induce more employees to take time off work when necessary for their health and the health of their families”). Employers may voluntarily offer 100% of sick pay if they so choose, but if they are concerned about costs, this would be one way to reduce some pressure. See Baker & McKenzie, supra note 54, at 14 (noting that most employees subject to collective bargaining agreements in France are entitled to 100% of their replacement wage).

252 See Appelbaum et al., supra note 152, at 11 (explaining the added cost to employers from having to hire temporary workers to cover absent employees).
reduction in pay helps curb unwarranted absenteeism. Twenty-five percent, however, should be enough that employees are not financially unsettled from an unexpected illness and can still pay their bills while taking a day or two to recover. Twenty-five percent

If the employee is using a sick day to seek scheduled preventive care, however, then she should receive one hundred percent of her wages. This would encourage workers to seek preventive care with the hope of eliminating the future need for an unexpected sick day. At the same time, by giving employers notice of a planned doctor’s visit, the employer should be able to reduce the costs associated with covering for the employee’s absence.

Unlike the French model that does not cover the first three days of sick leave, the HFA should begin payment from the first day of sickness. First, the HFA purposefully covers short-term illnesses. As such, employees may only need a day or two to recover from an illness. Giving them the opportunity to recover at home will hopefully keep the recovery process from being prolonged. Second, if one of the aims of the HFA is to protect public health,

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253 See BAKER & MCKENZIE, supra note 54 (noting that French employees only receive 90% of their missed wages due to illness); Ziebarth & Karlsson, supra note 51 (explaining that the reason for Germany’s 1996 reduction in payout was to reduce abuse of the system).

254 See U.S. CONG. JOINT ECON. COMM., supra note 6, at 1 (noting that the risk of losing an entire paycheck causes some employees to come to work despite being ill).

255 See Office of the Press Secretary, White House, supra note 13 (noting the possibility of using paid sick days to seek preventive care); see also DRAGO & LOVELL, supra note 85, at 9–10 (reporting that one-third of surveyed employees from San Francisco reported using paid sick days to visit a doctor or dentist).

256 See U.S. DEP’T OF LABOR, supra note 7, at 1, 4 (noting that the purpose of paid sick time is to help employees recover from short-term illnesses and seek preventive medical care, and observing that giving paid sick time for preventive care may save an estimated $1.1 billion in medical costs by reducing the need for emergency room visits).

257 DRAGO & LOVELL, supra note 85, at 6; see WILLIAMS, supra note 219, at 19 (noting that some uses of paid sick time, such as doctor’s visits, can be scheduled in advance, but requiring too much notice can be detrimental to workers who have a sudden illness); see also APPELBAUM ET AL., supra note 152, at 11 (showing that 85% of employers in Connecticut reported using low-cost methods to cover employee absences, such as shifting other workers’ schedules or delaying that work until the sick employee returned).

258 French Social Security System, supra note 54; see also Pollak, supra note 215, at 13 (arguing that Sweden’s inclusion of waiting periods for employees, during which they do not receive pay despite absence due to illness, has not been an effective means of deterring absenteeism).

259 S. 1085, 109th Cong. § 2(2).

260 U.S. DEP’T OF LABOR, supra note 7, at 4; see also NAT’L P’SHIP FOR WOMEN & FAMILIES, supra note 103, at 12 (reporting that, on average, employees only use three and a half paid sick days); Runge, supra note 32, at 481–82 (noting that the culture of the American workforce deters employees from taking days off from work).

261 See DRAGO & LOVELL, supra note 85, at 5 (noting that paid sick days generally reduce illness recovery time); see also REST. OPPORTUNITIES CTRS. UNITED, supra note 6, at 12 (showing that, of restaurant workers surveyed in Maine, 31.8% reported having an illness for longer than would have been necessary if they had been able to take a sick day).
delaying pay would not be beneficial to this cause.\textsuperscript{262} In providing paid sick days from the start of an illness, employers, particularly in the food industry, can avoid or at least alleviate the public relations problems that arise from sick workers causing an infectious outbreak.\textsuperscript{263}

\textbf{B. Short-Term Action: Municipalities Adopting Paid Sick Day Ordinances and Studying Results}

As paid sick leave gains momentum across the United States, more states and cities should continue considering mandatory paid sick day laws, and ultimately enact them.\textsuperscript{264} Where proposed federal legislation can become stagnant, local government is in a better position to act on behalf of the community to adopt measures to protect public health.\textsuperscript{265} Although this ad hoc approach may make compliance difficult for national corporations with locations across the country, these laws are necessary for low-wage earners who are predominantly women and minorities.\textsuperscript{266} These workers need both guaranteed pay as well as protection against potential employer retaliation.\textsuperscript{267}

Many employers in the United States already offer some form of paid sick leave.\textsuperscript{268} Consequently, enacting paid sick day laws would not affect as many

\textsuperscript{262} See H.R. 932, 114th Cong. § 2(5) (noting that lack of paid sick days resulted in five million more people contracting H1N1 during the pandemic). Additionally, in industries that require frequent instances of customer contact, employers should benefit indirectly from these public health benefits. \textit{Drago} \& \textit{Lovell}, supra note 85, at 20.

\textsuperscript{263} See Peck, \textit{supra} note 34 (remarking that, in contrast to what most media outlets reported, Chipotle had already offered paid sick leave to employees prior to norovirus outbreaks).

\textsuperscript{264} See U.S. DEP’T OF LABOR, \textit{supra} note 19, at 9 (describing paid sick time momentum at the state and federal levels); Office of the Press Secretary, White House, \textit{supra} note 13 (showing that President Obama advised states and municipalities to adopt paid sick day laws).


\textsuperscript{266} See NAT’L WOMEN’S LAW CTR., \textit{supra} note 137, at 1 (noting that women comprise two-thirds of low-wage occupations); U.S. CONG. JOINT ECON. COMM., \textit{supra} note 6, at 1 (reporting that minorities would comprise one-third of employees now eligible under the HFA and women would comprise half of the employees eligible who were not previously covered); \textit{see also} Zillman, \textit{supra} note 95 (explaining that opponents of paid sick leave at the municipal level want to eliminate the “hodgepodge” of local laws). These low-income workers are unlikely to have any form of paid leave. \textit{Lovell}, \textit{supra} note 103, at 13. Paid leave is almost non-existent for part-time workers. \textit{Id.} at 6, 13.

\textsuperscript{267} See Labor Relations Div. of Constr. Indus. of Mass. v. Healey, No. 15-10116, slip op. at 1–2 (D. Mass. July 9, 2015) (noting that Massachusetts’s Earned Sick Time Law prevents employers from retaliating against employees who use earned sick time); \textit{Appelbaum et al.}, \textit{supra} note 152, at 10 (observing that Connecticut’s paid sick leave law included an anti-retaliatory measure to counteract “progressive discipline” systems that employers had implemented to curb absenteeism).

\textsuperscript{268} \textit{See} \textit{Appelbaum et al.}, \textit{supra} note 152, at 4 (showing that fewer businesses than expected reported difficulty in complying with Connecticut’s paid sick time law, largely because the majority of employers already offered some form of leave).
businesses as might be expected. More objective analysis is necessary to determine how the ordinances affect those businesses that did not previously offer paid sick leave. Such analysis will need to be conducted over a longer period of time, as the first years include temporary costs for setting up administrative compliance mechanisms. Only once these policies have been effectively executed and employees are aware of their availability will studies truly reflect the impact on businesses and the extent of costs to replace absent workers.

The downside of city-by-city implementation is the resulting patchwork of regulations. As the ordinances vary in scope, some cover a significant number of employees whereas others are limited to larger businesses. For example, in Oregon, small businesses that employ fewer than ten employees do not have to provide paid sick leave; in Portland, Oregon, however, small businesses are limited to six employees or less. Though variation makes compliance more difficult for national chains, these chains will be in the best

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269 See id. (remarking on the modest impact that Connecticut’s mandatory paid sick time law had on businesses). Enacting paid sick leave laws is likely to level the playing field for employers. See McGregor, supra note 76 (reporting that some larger businesses are happy with mandatory paid sick leave as their competitors are forced to provide paid sick leave as well). The downside of mandating universal access for paid sick leave for eligible workers is that employers can no longer use paid sick leave as an added incentive to work for their company. See NElsen, supra note 146, at 12 (arguing that universal paid sick days negate workers’ reasons for choosing a specific location to work).

270 NElsen, supra note 146, at 1, 15.

271 APPELBAUM ET AL., supra note 152, at 16; see also MAIN ST. ALL. OF WASH., supra note 163, at 3 (noting that data used for the study was preliminary as many workers were not yet able to use their paid sick time).

272 See NElsen, supra note 146, at 1, 38 (noting that academic studies regarding paid sick days and their effectiveness are preliminary at best). Concurrently, studies need to address how particular industries are affected, and ultimately whether presenteeism is actually reduced by application of these new laws. See id. at 2 (noting that a number of studies have reported that paid sick leave had no impact on presenteeism). These industries include accommodation and food service where the majority of workers currently do not have access to paid sick leave and a significant number of workers reported coming into work while sick because of the fear of losing pay or a job. U.S. DEP’T OF LABOR, supra note 7, at 3; see LOVELL, supra note 103, at 7 (noting that only 14% of workers in hospitality and the food industry have access to paid sick leave); Carpenter et al., supra note 7, at 2151 (noting that 60% of food workers surveyed reported coming to work while ill, and 49% of those reported loss of pay as the reason why). Some preliminary studies have indicated that rates of presenteeism have not changed in the wake of paid sick day laws, but it is unclear whether employees are aware of their rights. NElsen, supra note 146, at 2.

273 See HEYMANN ET AL., supra note 9, at 12 (noting that reliance on local regulations and employer policies for paid sick days results in gaps in employee coverage).

274 See COUNCIL OF ECON. ADVISERS, supra note 10, at 20 (showing that Connecticut law applies only to businesses with fifty or more employees); MAIN ST. ALL. OF WASH., supra note 163, at 1 (reporting that the Seattle ordinance covers businesses with as few as four employees).

275 S. 454, 78th Legislative Assembly (Or. 2015) (enacted); PORTLAND, OR., PROTECTED SICK LEAVE CODE ch. 9 (2013).
position to assess impact on locations that mandate paid sick leave versus locations that do not, and the subsequent costs and savings.²⁷⁶

Another concern with city-by-city implementation is that businesses will relocate to neighboring areas to avoid compliance.²⁷⁷ The Washington, D.C. audit proved that this has not been the case since enacting its ordinance in 2008.²⁷⁸ Having a national policy of universal paid sick leave, however, will rectify this concern.²⁷⁹

CONCLUSION

Guaranteeing paid sick leave would be instrumental in giving employees the ability to recover from an illness outside of the workplace. Similarly, it would provide incentive for workers to seek preventive care. As forty percent of employees in the private sector lack paid sick days and the vast majority of these are America’s poorest laborers, the HFA is necessary to both fill the void for those workers and streamline legislation for paid sick leave. Given the heated debate over this issue, the HFA has enough support to become a viable law but may need to be reworked if it ever hopes to be enacted. In order to achieve that goal, reducing the guaranteed pay when the absence is for an unexpected illness to ninety percent of an employee’s daily wage would reduce unwarranted absenteeism as well as alleviate the burden on employers. Employees would still receive most of their wage to pay bills, but they may be less inclined to take a sick day when they have no need for it.

ERIN GARRITY

²⁷⁶ See CTR. FOR EDUC. OF WOMEN, supra note 100, at 4 (showing that studies of California and Seattle’s implemented paid sick day laws illustrate savings for employers).
²⁷⁷ See NELSEN, supra note 146, at 19–20 (reporting that the D.C. Auditor’s survey explicitly focused on whether businesses would relocate if forced to comply with universal paid sick days).
²⁷⁸ BRANCHE, supra note 88, at 19.