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EMPLOYMENT ATTORNEYS

State Mandated Paid Family Leave Is On the Rise

The United States is often criticized as being the only industrialized nation that does not offer paid parental leave. While it is true that such a benefit is currently unavailable on a national level, a movement on the part of state and municipal governments to establish paid parental and/or family leave is beginning to fill that void. Similar to the recent spread of state and local paid sick leave laws that has swept the country in recent years, the passing of paid family leave laws is on the rise, with four states and several local governments marking the tally to date. Whether such legislation is a trend that will continue remains to be seen. Regardless, employers should be aware of and prepare for the changing landscape in this area.

President Clinton signed the Family and Medical Leave Act ("FMLA") into law in 1993 after 9 years in Congress and two presidential vetoes. The FMLA allows up to 12 weeks of ***unpaid*** family and medical leave under certain circumstances, including (among other things) the birth or placement of a child, to care for a sick family member or for certain qualifying exigencies relating to a spouse, domestic partner, child or parent who is serving on active military duty. An eligible employee may also take up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember in their family with a serious injury or illness. However, FMLA benefits are available only to those employed by a business with 50 or more employees within a 75-mile radius of the worksite. In addition, the law requires the employee to have worked for that employer for at least 12 months and for 1,250 hours within the prior 12 months.

Polls reflect bipartisan support among voters for the idea of paid parental leave in general. But significant debate exists, including the dispute over who would be eligible to receive such leave and how it will be funded.

Democrats introduced the Family and Medical Insurance Leave Act to Congress in 2015. The federal bill proposes 12 weeks of income replacement at 66% of a worker's monthly wages, up to a capped amount, for taking time off for "qualified caregiving," which is defined as those activities for which an employee would be eligible under the FMLA. The proposed law would apply to all workers in all companies, without regard to company size, length of service, or part time status. The program would be funded by both employer and employee contributions through a new 0.2% payroll tax, and administered through an independent trust within the Social Security Administration. The future of this bill, which has yet to pass out of any House or Senate committee, is unclear.

Other suggestions to establish a national paid family leave have included the offer of a tax credit to companies as incentive to offer paid leave. The Independent Women's Forum proposed the creation of "Personal Care Accounts", which would allow workers to save pre-tax income that could be tapped when they take leave for situations eligible under the FMLA.

Meanwhile, in the face of a federal stalemate, four states now have passed family leave laws.

In April 2016, New York joined California, New Jersey and Rhode Island to mandate paid family leave benefits through an amendment to its disability and worker compensation law. The New York law will be phased in over several years, starting in 2018 when employees will be entitled to 8 weeks of paid family leave for situations similar to those qualifying an employee under the FMLA. The benefit during the leave will be 50% of an employee's average weekly wage, capped at 50% of the statewide average weekly wage. By 2021, the leave will be increased to 12 weeks at 67% average of an employee's average weekly wage, not to exceed 67% of the state average weekly wage. The benefit will be funded by employee contributions only. Employers are not required to fund paid family leave benefits.

The New York law is more generous than those of California and New Jersey, both of which offer 6 weeks of wage replacement at, respectively, 55% and 66% of a worker's weekly wage, up to a cap. Following a recent amendment, beginning in 2018, California will increase that amount to 60%, and also will provide up to 70% wage replacement to workers who earn at or close to the minimum wage. The Rhode Island law offers 4 weeks for family care, and provides a benefit up to a current cap of $817 per week, depending on the worker's earnings. All three states fund

their programs through employee payroll taxes and are administered through their respective temporary disability programs.

Having a pre-existing temporary disability program to build upon appears to be key in those states passing paid leave legislation. In 2007, the state of Washington passed a paid family leave law to cover bonding with a new child. The law, which was to take effect in October 2009, was never implemented due to the absence of a funding mechanism. Subsequent legislation postponed implementation until a funding method is identified.

In December 2016, the Council of the District of Columbia passed the Universal Paid Leave Amendment Act of 2016. The legislation requires private employers to give employees 8 weeks off after the birth or adoption of a child, 6 weeks off to tend to sick relatives and 2 weeks off for personal illness (capped at a total of 8 weeks in any 52-week period). Eligible workers who earn an average weekly wage up to 150% of the District's minimum wage will receive benefits equal to 90% of their weekly wage. Employees who earn more than 150% of the minimum wage will also receive 50% of the employee's remaining weekly salary, capped at $1,000 a week (subject to indexing). The benefits are funded through a .62% payroll tax on employers, with payments to commence no later than March 2020. The bill awaits the signature of the mayor, who has expressed significant concerns over its cost and impact on businesses, and review by Congress.

Several municipalities, as well, have begun to embrace legislation requiring paid parental leave. San Francisco passed an ordinance to be gradually rolled out starting in January 2017. It requires covered employers to provide supplemental compensation, up to a cap, to employees receiving California Paid Family Leave benefits for purposes of bonding with a new child. The supplemental compensation, when combined with the state benefits, will allow the worker to receive 100% of his or her gross weekly wage for up to 6 weeks, an amount the employer can offset by requiring employees to use accrued vacation.

Other cities have offered paid leave to its public employees, following the lead of President Obama, who signed an executive order directing agencies to advance federal workers 6 weeks of paid sick leave to care for a newborn child or sick family member. And more states are moving in that direction. Legislation mandating paid leave is pending in several states, with many more states being pushed by family leave coalitions to consider paid leave.

Greater access to paid family leave was a priority for the Obama administration, which proposed funding incentives to help states and municipalities create paid leave programs. If such incentives continue under the current administration, the number of states considering paid leave legislation will likely increase. Employers should pay attention to the evolving leave laws in their local and state government to ensure they are up to date and compliant.