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The future of FMLA points to paid leave

The future of the Family and Medical Leave Act (FMLA) is taking shape before our eyes. Various local, state, and federal legislative proposals provide competing FMLA visions. The COVID-19 pandemic has highlighted the need to keep sick workers out of the workplace. In passing the Families First Coronavirus Response Act (FFCRA), Congress authorized limited paid leave for the rest of 2020. Benefits once given are difficult to retract. In all likelihood, some form of paid FMLA leave will survive the pandemic.

FMLA basics

The FMLA was the first piece of legislation signed by President Clinton in 1993. That original bill provided twelve weeks of unpaid leave to qualified employees of covered employers. Employers were covered if they employed 50 or more employees in a 75-mile radius. The law covered employees with one year on the job. To qualify for the leave, employees had to have worked at least 1,250 hours in the previous year.

Employees could take unpaid leave for their own serious health conditions or the birth or adoption of a child. They could also take leave to care for an immediate family member with a serious health condition. Employers could elect to substitute paid leave for unpaid leave. Leave could be taken on a continuous or intermittent basis.

FMLA evolution

The National Defense Authorization Act of 2008 introduced another type of leave to the FMLA. Military Caregiver Leave allowed immediate family members or designated next of kin to an injured servicemember to take unpaid leave. The servicemember had to have been injured or contracted the illness while on active duty. Employees may take up to 26 weeks a year

Any servicemember’s immediate family member could also take qualifying exigency leave. Qualifying exigency leave allows family members to deal with issues surrounding a servicemember's current or upcoming deployment. Like regular FMLA leave, this was capped at 12 weeks per year. Employers were not required to pay employees for any of these types of leave.

Shortcomings of unpaid leave

Lower-income workers have less access to paid leave than more affluent employees. A Bureau of Labor Statistics study revealed the disparity. It found that only 5% of workers with wages in the lowest quartile had access to paid leave. A Department of Health and Human Services (DHHS) study found that only 34% of workers paid below-median wages received paid leave. That is in comparison to 63% of above-median paid employees. Also, 54% of those low-wage workers received no pay during leave compared to 18% of higher earners. Even the large picture of FMLA usage is not rosy. The same survey found 40% of leave takers cut short their leave because they could not afford it.

The DHHS study noted long-term consequences for children whose mothers had to return to work sooner. Children were less likely to breastfeed. Longer maternity leave periods were associated with better long-term health and lower poverty rates. The study also noted that the U.S. is one of just six nations on earth that lacks mandated paid maternity leave. The others are Liberia, Papua New Guinea, Samoa, Sierra Leone, and

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Swaziland.

The move toward paid leave

In 2004, California enacted paid family leave. Patterned after unemployment compensation, leave is funded by an employee paid 1% payroll tax. Other states followed. Currently, eight states and the District of Columbia have paid family leave.

Funding for paid leave varies. Like California, paid leave in Rhode Island and Connecticut are funded by employee taxes. In New Jersey, New York, Washington, Massachusetts, and Oregon, both employers and employees contribute. Employers are solely responsible for funding the District of Columbia's program.

Several large cities have passed paid sick leave ordinances as well. Concerns over sick workers transmitting disease have been a consistent theme justifying municipal ordinances. The COVID-19 pandemic has reinforced that argument.

In 2014, President Obama issued Executive Order 13706 that require federal contractors to provide their employees with paid leave. In 2019, Congress added paid parental leave for federal employees to that year's NDAA. The Congressional Budget Office (CBO) puts the cost of paid parental leave for federal workers at $3.3 billion over five years. Paid leave advocates, however, estimated the move will save the government at least $50 million annually in turnover costs. Paid leave for federal employees takes effect on October 1, 2020.

In 2017, Congress passed a law that became codified into IRS Section 45s. The law provides employers with tax credits for offering paid FMLA leave to employees. It requires specific wording in the employer's FMLA policy. The employer's policy must be in place before the start of the tax year for employers to claim the credit. When passed, it was framed as a pilot project that would sunset at the end of 2019. Congress extended it to the end of 2020.

Then the pandemic hit

None of these initiatives envisioned the COVID-19 pandemic. Congress passed the Families First Coronavirus Response Act (FFCRA) in March. Employers may get tax credits on their withholding to offset paid leave wage and healthcare costs. At least until the program expires at the end of the year, America has government-sponsored paid leave.

The FFCRA leave, however, is narrowly tailored to address the COVID-19 pandemic. It is not a full paid sick leave program and does not cover parental leave for childbirth. For the first time, employers with fewer than 50 employees are required to provide leave. Small firms can opt-out of the program if they can demonstrate complying would "jeopardize the viability of the business."

COVID-19 has also exposed the rift between highly skilled workers and those at the bottom of the economic ladder. While many white-collar workers telecommute, low-paid "essential" workers risk exposure to the virus. First responders and medical personnel labor on the front lines as well. A class of homebound, but safe, workers sit protected while others risk illness because they have no choice. And, oh yes, it's an election year.

Moving into the future

The threads of change are moving together for paid leave. Previously minority views have hardened into accepted truths. Among them is that sick workers in the workplace pose a threat to the public as a whole. Allowing workers to recover without severe economic anxiety is preferable to widespread illness.

Another truth is that along with first responders and medical personnel, millions of low-wage workers provide very essential services. We now know that medical crises can materialize very quickly. Businesses and government may or may not be able to respond quickly. Essential workers are only now getting the protective equipment they need. Many will already have been infected.

At a minimum, the IRS section 45s, that provides employers tax credits for paid leave will be extended. Other proposals are out there, though. The Family Act, proposed by Sen. Kirsten Gillibrand (D-NY) and Rep. Rosa DeLauro (D-CT) would pay for the leave through a 0.1 percent tax on both employers and employees.

Pilot projects and plans that only apply to federal employees have a history of becoming law for all. The Civil Rights Act of 1957 provided limited protections against discrimination to federal workers, before Title VII of the Civil Rights Act of 1964 outlawed discrimination in private workplaces. The Rehabilitation Act of 1973 was designed to assist wounded and disabled veterans returning from Vietnam to get employment with the federal government and federal contractors. The Americans With Disabilities Act (ADA) provided disabled workers in the private workforce those same protections in 1990.

Economic realities, of course, will play a large role as well. Expanding federal parental leave was done at the height of a booming economy. How quickly the economy recovers from the pandemic will influence lawmakers, businesses, and voters as well.

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