

# 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.<sup>1</sup> Sick employees who continued to work in the days following the outbreak perpetuated the spread of the illness.<sup>2</sup> Each year, more than twenty million people suffer from

---

<sup>1</sup> Charlotte Tucker, *As Norovirus Outbreaks Grow, Health Departments Respond: Millions Infected Each Year with Virus*, NATION’S HEALTH, Mar. 2013, at 1; Dan Flynn, *Wyoming Norovirus Spread Mostly in Golden Corral*, FOOD SAFETY NEWS (Feb. 8, 2013), <http://www.foodsafetynews.com/2013/02/wyoming-norovirus-was-spread-inside-the-golden-coral/#.VtTAXJMrLq0> [<https://perma.cc/5XK8-7SQT>]; *Golden Corral Source of Casper Wyoming Norovirus Outbreak*, FOOD POISONING BULLETIN (Feb. 8, 2013), <https://foodpoisoningbulletin.com/2013/golden-coral-source-of-casper-wyoming-norovirus-outbreak/> [<https://perma.cc/M72E-9GFD>]. Of the 344 people who had norovirus, 282 cases were directly associated with the Golden Corral and 62 were indirectly associated. Flynn, *supra*. The norovirus is an acute gastrointestinal virus that causes inflammation of the intestines or stomach and results in stomach pain, nausea, and diarrhea. *About Norovirus*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/norovirus/about/overview.html> [<http://www.cdc.gov/norovirus/about/overview.html>] (last visited Feb. 28, 2016).

<sup>2</sup> Anthony Pollreis, *State Report: Golden Corral Norovirus Outbreak Likely “Restaurant Associated,”* K2 RADIO (Feb. 6, 2013), <http://k2radio.com/state-report-golden-coral-norovirus-outbreak-likely-restaurant-associated/> [<https://perma.cc/773N-8JMN>] (reporting that ill employees contributed to the norovirus outbreak); *Golden Corral Source of Casper Wyoming Norovirus Outbreak*, *supra* note 1.

the norovirus, one of the most common forms of foodborne-illness in restaurants.<sup>3</sup> Food-service workers who go to work despite being sick are one of the leading causes of such outbreaks.<sup>4</sup> Working while ill is referred to as presenteeism.<sup>5</sup> Furthermore, the majority of these workers receive low wages and lack paid sick time.<sup>6</sup> 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.<sup>7</sup>

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

---

<sup>3</sup> 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 INFECTIOUS 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).

<sup>4</sup> 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).

<sup>5</sup> Gary Johns, *Presenteeism in the Workplace: A Review and Research Agenda*, 31 J. ORGANIZATIONAL BEHAV. 519, 519 (2010).

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> 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).

<sup>9</sup> 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

("FMLA") is the only federal legislation that requires that employers provide any type of leave to American employees.<sup>10</sup> Though the FMLA provides employees with twelve weeks of leave, the law does not cover short-term illnesses.<sup>11</sup> Furthermore, leave granted under the FMLA is unpaid.<sup>12</sup> 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.<sup>13</sup>

In response to this lack of federally-mandated paid sick leave, in 2005, Senator Ted Kennedy proposed the Healthy Families Act ("HFA").<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> The HFA has yet to gain enough traction to make it out of its subcommit-

---

nations to not have any paid sick leave. *Id.*; *The Cost of Being Sick: H1N1 and Paid Sick Days: Hearing on H.R. 2460 Before the Subcomm. on Children and Families of the Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 8 (2009) [hereinafter *The Cost of Being Sick*] (statement of Rep. Rosa DeLauro) ("[U]nlike 145 other nations, including 19 of the 20 most economically competitive countries in the world[,] . . . the United States . . . does not guarantee a single paid sick day to workers.").

<sup>10</sup> Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(b)(2) (2012); COUNCIL OF ECON. ADVISERS, *THE ECONOMICS OF PAID AND UNPAID LEAVE* 3 (2014).

<sup>11</sup> See 29 U.S.C. § 2611(11) (defining "serious health condition" as requiring inpatient care or continuing treatment); see also 29 C.F.R. §§ 825.113(a), 825.200(a) (2013) (limiting illness eligibility for Family Medical Leave Act ("FMLA") leave to "an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider"); 29 C.F.R. § 825.113(d) (noting that the common cold, the flu, upset stomach, and other illnesses do not qualify as serious health conditions under the FMLA unless complications arise).

<sup>12</sup> 29 C.F.R. § 825.100(a); see Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 340 (2014) (noting that unpaid leave offered under the FMLA disproportionately affects lower economic classes and minorities).

<sup>13</sup> See 29 C.F.R. § 825.113(d) (requiring a serious condition beyond an ordinary flu or cold to qualify for FMLA leave); Office of the Press Secretary, White House, *Fact Sheet: White House Unveils New Steps to Strengthen Working Families Across America*, OBAMA WHITE HOUSE ARCHIVES (Jan. 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/14/fact-sheet-white-house-unveils-new-steps-strengthen-working-families-acr> [<https://perma.cc/UUW2-7J75>] (noting that most American workers are unable to take leave under FMLA because it is unpaid).

<sup>14</sup> Healthy Families Act, S. 1085, 109th Cong. (2005).

<sup>15</sup> *Id.* § 3(1).

<sup>16</sup> See *The Healthy Families Act: Safeguarding Americans' Livelihood, Families and Health with Paid Sick Days: Hearing on S. 1085 Before Comm. on Health, Educ., Labor, and Pensions*, 110th Cong. 1-3 (2007) [hereinafter *Healthy Families Act Hearing*] (statement of Sen. Edward Kennedy) (noting that the Healthy Families Act ("HFA") was meant to address both family needs as well as public health issues).

<sup>17</sup> Healthy Families Act, H.R. 932, 114th Cong. §§ 4(5)(B)(i), 5(a)(1) (2015) (the latest iteration of Healthy Families Act); S. 497, 114th Cong. §§ 4(5)(B)(i), 5(a)(1) (2015) (the identical bill in the Senate).

tee.<sup>18</sup> 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.<sup>19</sup> More recently, he signed an executive order mandating paid sick leave for federal contractors.<sup>20</sup>

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.<sup>21</sup> These laws vary, but a common characteristic is that they mandate paid sick time for employees of certain size businesses and their dependents.<sup>22</sup> In contrast, several states have adopted laws prohibiting cities and towns from enacting paid sick

---

<sup>18</sup> Marianne Delpo Kulow, *Legislating a Family-Friendly Workplace: Should It Be Done in the United States?*, 7 NW. J.L. & SOC. POL'Y 88, 98 (2012). Representative Rosa DeLauro has re-introduced the HFA every two to four years. See H.R. 932, 114th Cong.; H.R. 1286, 113th Cong. (2014); H.R. 2460, 111th Cong. (2009). As of April 29, 2015, the latest iteration of Representative DeLauro's bill had been referred to the Subcommittee on Health, Employment, Labor, and Pensions, but no further action has been taken. *All Actions: H.R. 932—114th Congress (2015–2016)*, CONGRESS, <https://www.congress.gov/bill/114th-congress/house-bill/932/actions> [<https://perma.cc/2JMU-VC56>] (last visited Mar. 8, 2017). Senator Patty Murray introduced the HFA in the Senate in February of 2015, but no further action has been taken on the bill since it was referred to the Committee on Health, Education, Labor, and Pensions. See *All Actions: S.497—114th Congress (2015–2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/497/all-actions> [<https://perma.cc/U3F3-SCVM>] (last visited Mar. 8, 2017).

<sup>19</sup> U.S. DEP'T OF LABOR, THE COST OF DOING NOTHING: THE PRICE WE ALL PAY WITHOUT PAID LEAVE POLICIES TO SUPPORT AMERICA'S 21ST CENTURY WORKING FAMILIES 9 (2015); Rona Kaufman Kitchen, *Off-Balance: Obama and the Work-Family Agenda*, 16 EMP. RTS & EMP. POL'Y J. 211, 229–30 (2012) (discussing how 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, *Remarks by the President in State of the Union Address*, OBAMA WHITE HOUSE ARCHIVES (Jan. 20, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [<https://perma.cc/7GBU-PCGL>]. Because forty-three million workers lack paid sick leave, American workers should have the chance to have paid sick leave because "it's the right thing to do." President Obama, *supra*.

<sup>20</sup> Executive Order 13706: Establishing Paid Sick Leave for Federal Contractors, 80 Fed. Reg. 54,697, 54,697 (Sept. 7, 2015). The Executive Order establishing paid sick leave for federal contractors provided employees with up to seven earned sick days per year. *Id.* Though this legislation helps roughly 300,000 federal employees, it only applies to the public sector, leaving roughly forty-four million workers, or 40% of workers in the private sector, without paid sick time. Office of the Press Secretary, White House, *Fact Sheet: Helping Middle-Class Families Get Ahead by Expanding Paid Sick Leave*, OBAMA WHITE HOUSE ARCHIVES (Sept. 7, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/07/fact-sheet-helping-middle-class-families-get-ahead-expanding-paid-sick> [<https://perma.cc/F3K8-NE9D>].

<sup>21</sup> 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.

<sup>22</sup> 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).

time laws.<sup>23</sup> This opposition reflects the political division regarding paid sick time.<sup>24</sup> 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.<sup>25</sup> Presenteeism decreases productivity for the employee and surrounding co-workers and imposes a costly burden on employers.<sup>26</sup> 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.<sup>27</sup>

<sup>23</sup> See Mark Koba, *Efforts to Pass Paid Sick Leave Laws Face Backlash*, CNBC (Nov. 30, 2013), <http://www.cnbc.com/2013/11/27/paid-sick-leave-laws-encounter-resistance.html> [https://perma.cc/6J65-KFZ9] (reporting on recent paid sick leave legislation). Georgia, Louisiana, Tennessee, Mississippi, Kansas, Indiana, Oklahoma, Alabama, Florida, and Wisconsin have all passed laws preempting local legislation. Michelle Seldin Silverman et al., *Paid Sick Leave Laws Enacted in U.S. State and Local Elections*, NAT'L L. REV. (Nov. 10, 2014), <http://www.natlawreview.com/article/paid-sick-leave-laws-enacted-us-state-and-local-elections> [https://perma.cc/G8VG-6483].

<sup>24</sup> See Koba, *supra* note 23 (reporting that businesses fear unwarranted use of absences if forced to provide paid sick days to workers). Paid sick day legislation generally receives support from Democrats but not from Republicans at both the federal and state level. See Josh Hicks, *Advocates Hope 2016 Could Be the Year to Pass Paid Sick Leave in Maryland*, WASH. POST (Jan. 2, 2016), [https://www.washingtonpost.com/local/md-politics/advocates-hope-2016-could-be-the-year-to-pass-paid-sick-leave-in-maryland/2016/01/02/24995fda-af3f-11e5-b820-eea4d64be2a1\\_story.html?utm\\_term=.e07a43fea6a6](https://www.washingtonpost.com/local/md-politics/advocates-hope-2016-could-be-the-year-to-pass-paid-sick-leave-in-maryland/2016/01/02/24995fda-af3f-11e5-b820-eea4d64be2a1_story.html?utm_term=.e07a43fea6a6) [https://perma.cc/G2EN-MEBG] (reporting on Democrats push for paid sick day legislation in Maryland); Yuki Noguchi, *Obama's Big Bid to Change Sick-Leave Laws May Hinge on Small Business*, NPR (Jan. 22, 2015), <http://www.npr.org/sections/health-shots/2015/01/22/379102675/obamas-big-bid-to-change-sick-leave-laws-may-hinge-on-small-business> [https://perma.cc/CKF7-HC8Q] (explaining that Republican recalcitrance has stymied federal paid sick day legislation). Republicans view paid sick day legislation as another government intrusion on what should be a business's decision. See Laura Clawson, *Paid Sick Leave Kept Building Momentum in 2016, but It's Going Nowhere in a Republican Congress*, DAILY KOS (Dec. 29, 2016), <http://www.dailykos.com/story/2016/12/29/1610700/-Paid-sick-leave-kept-building-momentum-in-2016-but-it-s-going-nowhere-in-a-Republican-Congress> [https://perma.cc/25Z9-9SHA] (discussing Republican opposition to paid sick day legislation).

<sup>25</sup> See *Metro. Milwaukee Ass'n of Commerce, Inc., v. City of Milwaukee*, 798 N.W.2d 287, 306–07 (Wis. Ct. App. 2011) (recognizing that paid sick days allow for a stable workforce); U.S. DEP'T OF LABOR, *supra* note 19, at 5 (reporting that some American workers who lack paid sick days struggle to maintain financial stability when they have to take an unpaid leave of absence); Jason Furman & Betsey Stevenson, *Why Our Economy Needs Paid Leave*, OBAMA WHITE HOUSE ARCHIVES (Jan. 15, 2015), <https://www.whitehouse.gov/blog/2015/01/15/heres-what-president-announced-today-about-paid-leave> [https://perma.cc/X8P5-DTKV] (noting that the benefits of paid sick leave include maintaining a healthier work environment, maintaining productivity, and cutting down worker turnover).

<sup>26</sup> Shane Swords, *Don't Let Them Eat Cake: Implementing a Government-Sponsored Wellness Program That Utilizes Tax Credits to Promote Healthy Behaviors*, 25 J. LEGAL MED. 579, 583 (2014). Studies have estimated that presenteeism costs employers in the United States roughly \$150 billion per year. Johns, *supra* note 5, at 522; Eric Widera et al., *Presenteeism: A Public Health Hazard*, 25 J. GEN. INTERNAL MED. 1244, 1246 (2010).

<sup>27</sup> See Peter Baker, *Obama Orders Federal Contractors to Provide Workers Paid Sick Leave*, N.Y. TIMES (Sept. 7, 2015), [http://www.nytimes.com/2015/09/08/us/politics/obama-to-require-federal-contractors-to-provide-paid-sick-leave.html?\\_r=0](http://www.nytimes.com/2015/09/08/us/politics/obama-to-require-federal-contractors-to-provide-paid-sick-leave.html?_r=0) [https://perma.cc/ZDJ2-SVBM] (reporting that one of the criticisms against President Obama's paid sick leave plan included that it burdened small businesses); see also Danielle Kurtzleben, *Lots of Other Countries Mandate Paid Leave. Why Not the U.S.?*, NPR (July 15, 2015), <http://www.npr.org/sections/itsallpolitics/2015/07/15/422957640/lots-of>

Nevertheless, paid sick time is necessary for certain industries because of the potential risk to public health.<sup>28</sup> 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.<sup>29</sup> Additionally, fifty percent of foodborne illnesses occur in restaurants and a common cause of those outbreaks is sick workers.<sup>30</sup>

Reasons for presenteeism vary, but one of the major contributors is lack of paid sick days.<sup>31</sup> Employees, particularly low-income earners, need to go to work every day to be able to afford basic necessities and provide for their families.<sup>32</sup> According to the 2015 Poverty Guidelines in the United States, the

---

other-countries-mandate-paid-leave-why-not-the-us [<https://perma.cc/VDS7-8V7W>] (explaining that business communities and chambers of commerce oppose mandated paid sick leave because it should be left for businesses to implement).

<sup>28</sup> 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).

<sup>29</sup> 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.

<sup>30</sup> Carpenter et al., *supra* note 7, at 2146; Jones & Angulo, *supra* note 3, at 1324. Food and Drug Administration regulations require food industry workers to stay home when they are ill. See 21 C.F.R. § 1250.35 (2016) (prohibiting anyone with a communicable disease from preparing, handling, or serving food). Given the sheer number of food industry workers and the requirement of self-reporting an illness, this regulation cannot be effectively enforced. See D.M. Norton et al., *Managerial Practices Regarding Workers Working While Ill*, 78 J. FOOD PROTECTION 187, 191, 194 (2014) (showing that because managers are less involved in enforcing FDA regulations, employees are not sufficiently complying with regulations).

<sup>31</sup> Major, *supra* note 29, at 259–60; see also REST. OPPORTUNITIES CTNS. UNITED, *supra* note 6, at 23 (reporting that almost 70% of restaurant workers who lacked paid sick days worked while ill); U.S. DEP'T OF LABOR, *supra* note 8, at 3 (reporting that 45% of surveyed food workers worked despite being ill because they needed their wages); Carpenter et al., *supra* note 7, at 2153 (reporting that half of food service workers considered forgoing pay to be a significant factor in determining whether to work while ill); Lynne Shallcross, *Survey: Half of Food Workers Go to Work Sick Because They Have To*, NPR (Oct. 19, 2015), <http://www.npr.org/sections/thesalt/2015/10/19/449213511/survey-half-of-food-workers-go-to-work-sick-because-they-have-to> [<https://perma.cc/CF5M-CNNC>] (discussing that 51% of restaurant workers reported that they go to work sick, 45% of whom did so because they could not forgo income). Healthcare workers in particular risk spreading contagion through presenteeism, but 12% of hospital workers and 22% percent of registered nurses do not have paid sick leave. Widera et al., *supra* note 26, at 1246.

<sup>32</sup> 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'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.<sup>33</sup> Yet, the mean annual wage for waiters and waitresses who usually do not have paid sick days is \$23,020.<sup>34</sup> The inability to forgo pay reinforces the public health risk to co-workers and customers.<sup>35</sup>

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.<sup>36</sup> Only a federal act could address the widespread need of all workers in the private sector while streamlining requirements for hours and eligibility.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

---

man, *From the Great Depression to the Great Recession: Advancing Women's Economic Security Through Tough Economic Times and Beyond*, 32 WOMEN'S RTS. L. REP. 25, 32 (2010) (observing that many workers view income as essential).

<sup>33</sup> Department of Health & Human Services, Annual Update of the HHS Poverty Guidelines, 80 Fed. Reg. 3,236, 3,237 (Jan. 22, 2015).

<sup>34</sup> See *Occupational Employment and Wages, May 2015*, BUREAU LAB. STATS., U.S. DEP'T LABOR, [https://www.bls.gov/oes/current/oes353031.htm#\(2\) \[https://perma.cc/S87Q-3SYF\]](https://www.bls.gov/oes/current/oes353031.htm#(2) [https://perma.cc/S87Q-3SYF]) (last visited Mar. 8, 2017). Some companies, like Chipotle, do provide their employees with paid sick days. Emily Peck, *Chipotle's Paid Sick Leave Has Nothing to Do with Its Food Safety Crisis*, HUFFINGTON POST (Jan. 21, 2016), [http://www.huffingtonpost.com/entry/chipotle-paid-sick-leave\\_us\\_56a11964e4b076aadcc582fa \[https://perma.cc/V8HZ-KWSU\]](http://www.huffingtonpost.com/entry/chipotle-paid-sick-leave_us_56a11964e4b076aadcc582fa [https://perma.cc/V8HZ-KWSU]). The majority of restaurants, however, do not. See REST. OPPORTUNITIES CTRS. UNITED, *supra* note 6, at 11 (reporting that nearly 90% of food service workers lacked paid sick days); Shallcross, *supra* note 31 (reporting that 51% of restaurant workers worked while ill). President Trump's former Secretary of Labor nominee, Andrew Puzder, had criticized paid sick leave policies, observing that they are damaging to the restaurant business. Noam Scheiber, *Trump's Labor Pick, Andrew Puzder, Is Critic of Minimum Wage Increases*, N.Y. TIMES (Dec. 8, 2016), [https://www.nytimes.com/2016/12/08/us/politics/andrew-puzder-labor-secretary-trump.html?\\_r=0 \[https://perma.cc/HE7V-2LVZ\]](https://www.nytimes.com/2016/12/08/us/politics/andrew-puzder-labor-secretary-trump.html?_r=0 [https://perma.cc/HE7V-2LVZ]).

<sup>35</sup> 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).

<sup>36</sup> 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).

<sup>37</sup> See *id.* (noting that the current state and municipal legislation creates a patchwork of policies that leave many workers without any paid sick time).

<sup>38</sup> See *infra* notes 41–100 and accompanying text.

<sup>39</sup> See *infra* notes 101–223 and accompanying text.

<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> To fill the federal void, states have started to enact paid sick time laws.<sup>43</sup> Section A looks at where the United States stands in comparison to other nations.<sup>44</sup> Section B focuses on the federal route of legislation.<sup>45</sup> Finally, section C explores state and municipal laws that have successfully implemented paid sick time, as well as the state laws prohibiting municipal legislation.<sup>46</sup>

### 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.<sup>47</sup> 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.<sup>48</sup> Both Canada and Japan offer paid

---

<sup>41</sup> See *infra* notes 42–100 and accompanying text.

<sup>42</sup> See H.R., 114th Cong. 932 §§ 4(5)(B)(i), 5(a)(1) (latest iteration of Healthy Families Act). See generally HEYMANN ET AL., *supra* note 9 (providing a comparison of other countries' paid sick leave policies).

<sup>43</sup> U.S. DEP'T OF LABOR, *supra* note 19, at 14.

<sup>44</sup> See *infra* notes 47–56 and accompanying text.

<sup>45</sup> See *infra* notes 57–81 and accompanying text.

<sup>46</sup> See *infra* notes 82–100 and accompanying text.

<sup>47</sup> 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.

<sup>48</sup> *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.<sup>49</sup>

Germany and France's laws provide helpful insight into different methods for providing paid sick time.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> France's Health Insurance Funds and Social Security System cover employees' wages when they miss work due to illness.<sup>55</sup> If a business is concerned about excessive absenteeism, the Medical Service of the Statutory Health Insurance monitors cases and conducts physical examinations of patients.<sup>56</sup>

---

<sup>49</sup> 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.

<sup>50</sup> *See id.* at 1, 7 (comparing enacted paid sick time laws).

<sup>51</sup> 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/ifpdial/information-resources/national-labour-law-profiles/WCMS\\_158899/lang=en/index.htm](http://www.oit.org/ifpdial/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* at 1110.

<sup>52</sup> 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).

<sup>53</sup> Hye Jin Rho et al., *A Review of Sickness-related Leave in 22 High Human Development Index Countries* 9 (2009).

<sup>54</sup> *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/regimes/regime\\_france/an\\_1.html](http://www.cleiss.fr/docs/regimes/regime_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).

<sup>55</sup> *French Social Security System*, *supra* note 54.

<sup>56</sup> Ziebarth & Karlsson, *supra* note 51.

### B. Paid Sick Days in Congress

The FMLA was the first federal act to address guaranteed leave.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> Thus, many workers, particularly low-income workers, cannot afford to take advantage of any leave.<sup>60</sup> Additionally, by limiting the medical qualifications for FMLA-covered leave to serious health conditions, the Senate intended to exclude short-term illnesses.<sup>61</sup> Consequently, when suffering from

---

<sup>57</sup> See 29 U.S.C. § 2601(b)(1) (noting that the purpose of the FMLA was to “balance the demands of the workplace with the needs of families”); see also Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1191 (2016) (arguing that the FMLA was a part of a gender revolution trend geared towards ending division-of-labor stereotyping); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 39–40, 42 (1994) (explaining that, in addition to state action on the issue, the FMLA was the first federal law to acknowledge that family events affect the workplace and need to be accommodated).

<sup>58</sup> 29 U.S.C. § 2612(a)(1); see 29 C.F.R. § 825.200(a) (limiting leave to twelve work weeks); see also Elizabeth A. Simmons, *The Family and Medical Leave Act: Well Meaning Legislation Meets the Strong Arm of the Constitution of the United States*, 17 J. CONTEMP. HEALTH L. & POL’Y 349, 350–52 (2000) (stating that the purpose of the FMLA was to require all employers to provide employees with conditional leave for personal and family medical emergencies, assuming that employees met certain criteria). Unpaid leave under the FMLA, however, is not universally accessible. See Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 19–20 (2004) (noting the difficult restrictions on eligibility built into the FMLA). To be eligible for any leave, employees must have worked a minimum of 1,250 hours for a business that employs fifty or more workers within a seventy-five mile radius. 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110(a); Grossman, *supra* at 20 n.7 (reporting that only 61.7% of American workers had access to unpaid leave under the FMLA in 2000). The minimum number of hours excludes most part-time employees. See 29 C.F.R. § 825.110(a)(2) (setting minimum number of hours at 1,250); see also Kimberly Hayes, *On the Clock Versus on the Books: The Appropriate Method for Counting Employees Under Title VII, the ADEA and Other Labor Laws*, 44 BUFF. L. REV. 963, 976–77 (1996) (observing that employers use part-time employees to skirt FMLA requirements).

<sup>59</sup> See 29 U.S.C. §§ 2611(4)(A)(i), 2612(c) (allowing for leave under the FMLA to be unpaid and setting affected business size to at least fifty employees); see also COUNCIL OF ECON. ADVISERS, *supra* note 10, at 3 (pointing out that the FMLA exempts number of employees such that only 60% of American workforce actually receives unpaid leave); Porter, *supra* note 12, at 340 (noting that the FMLA’s biggest criticism derives from fact that leave is unpaid).

<sup>60</sup> See COUNCIL OF ECON. ADVISERS, *supra* note 10, at 3 (noting that the combination of exemptions and the unpaid nature of leave under the FMLA diminishes the reality of leave); Office of the Press Secretary, White House, *supra* note 13 (explaining that because employers generally do not pay for employees’ leave under the FMLA, many employees cannot use leave even if eligible).

<sup>61</sup> See 29 C.F.R. § 825.113(d) (noting that the common cold, the flu, upset stomach, and other similar illnesses do not qualify as serious health conditions unless complications arise). In order to constitute a serious health condition, the employee or family member must suffer from a physical or mental condition that requires either inpatient care or treatment from a healthcare provider. 29 U.S.C. § 2611(11); 29 C.F.R. § 825.113(a). If an employee undertakes self-care through bed rest or over-the-

a cold or the flu, many workers have to choose between staying home without pay or working while sick.<sup>62</sup>

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

In 2009, the H1N1 pandemic struck, and affected millions of American workers.<sup>68</sup> 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.<sup>69</sup> Although many employees heeded the CDC’s advice,

---

counter medication, the employee’s leave is not covered under the FMLA. 29 C.F.R. § 825.113(c); see also Jessica Beckett-McWalter, *The Definition of “Serious Health Condition” Under the Family Medical Leave Act*, 55 HASTINGS L.J. 451, 464 (2003) (observing that circuit courts have split over whether illnesses that cause employees to miss fewer than three consecutive days can be considered serious).

<sup>62</sup> See Lenhoff & Withers, *supra* note 57, at 53 (pointing out that only those workers who can take leave without needing income will actually make use of the FMLA).

<sup>63</sup> See S. 1085, 109th Cong. § 3(1) (proposing that employers provide paid leave so that American workers can adequately take care of themselves and their family members); Rebecca Golubock Watson, *Defending Paid Sick Leave in New York City*, 19 J.L. & POL’Y 973, 978 (2011) (providing history of the HFA). The HFA would provide paid sick leave to another thirty million workers and would be particularly beneficial to low-income workers. U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 1; see also Runge, *supra* note 32, at 476 (characterizing the HFA as the best legislation for addressing low wage workers’ needs).

<sup>64</sup> S. 1085, 109th Cong. §§ 4(3)(B)(i)(I), 5(a)(1).

<sup>65</sup> *Id.* §§ 5(a)(1), 5(b)(2).

<sup>66</sup> See *Healthy Families Act Hearing*, *supra* note 16, at 1–3 (statement of Sen. Edward Kennedy) (noting that the HFA was meant to address both family needs as well as public health issues).

<sup>67</sup> See Kulow, *supra* note 18, at 98–99 (noting that the economy has contributed to HFA’s failure at the federal level); Ross Eisenbrey, *Organized Business’s Knee-Jerk Opposition to Paid Sick Days Legislation*, ECON. POL’Y INST. (May 10, 2012), <http://www.epi.org/blog/organized-business-knee-jerk-opposition/> [https://perma.cc/GBT7-3YV3] (noting that lobbyists on behalf of the business community continue to oppose paid sick day legislation, as they believe it should be left for businesses to grant).

<sup>68</sup> *The Cost of Being Sick*, *supra* note 9, at 1 (statement of Sen. Christopher Dodd). H1N1 infections killed 672 Americans, and 5.7 million Americans were affected in some way. *Id.*

<sup>69</sup> See U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 2 (reporting that the Center for Disease Control (“CDC”) attempted to institute “social-distancing” in businesses to limit the spread of H1N1). The CDC advised “social-distancing,” where workers would quarantine themselves at home for a full twenty-four hours after symptoms had disappeared. *Id.*; see also *The Cost of Being Sick*, *supra* note 9, at 2 (statement of Sen. Christopher Dodd) (noting that a worker who went to work while infected with H1N1 would be likely to infect 10% of his or her co-workers).

others did not.<sup>70</sup> The lack of paid sick time was one of the main reasons cited for presenteeism during the H1N1 pandemic.<sup>71</sup>

In response to this medical emergency, Senator Christopher Dodd of Connecticut proposed the Pandemic Protection for Workers, Families, and Businesses Act (“Pandemic Protection Act”).<sup>72</sup> 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.<sup>73</sup> The act, however, only covered contagious illnesses.<sup>74</sup> Unfortunately, the act was proposed during the height of the economic recession.<sup>75</sup> Imposing an additional burden on employers received criticism from business owners and some politicians.<sup>76</sup> Consequently, the bill to establish this act did not pass and has not been re-introduced.<sup>77</sup>

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.<sup>78</sup> In April

<sup>70</sup> 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).

<sup>71</sup> 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).

<sup>72</sup> 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).

<sup>73</sup> 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).

<sup>74</sup> 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).

<sup>75</sup> 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).

<sup>76</sup> Ryan Hutchins, *Senate Passes Paid Sick Leave Bill, Despite Republican Opposition*, POLITICO (Dec. 17, 2015), <http://www.capitalnewyork.com/article/new-jersey/2015/12/8586014/senate-passes-paid-sick-leave-bill-despite-republican-opposition> [https://perma.cc/YLS6-BUVT]; see also Jena McGregor, *Should Paid Sick Leave Be Mandated for All Employees?*, WASH. POST (Apr. 11, 2013), [https://www.washingtonpost.com/national/on-leadership/should-paid-sick-leave-be-mandated-for-all-employees/2013/04/11/16110570-a2aa-11e2-9c03-6952ff305f35\\_story.html](https://www.washingtonpost.com/national/on-leadership/should-paid-sick-leave-be-mandated-for-all-employees/2013/04/11/16110570-a2aa-11e2-9c03-6952ff305f35_story.html) [https://perma.cc/V3LN-ANTW] (reporting criticism of paid sick leave as imposing additional financial burdens on businesses).

<sup>77</sup> Kitchen, *supra* note 19, at 256.

<sup>78</sup> 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.<sup>79</sup> Additionally, President Obama issued an executive order that granted paid sick days to federal contractors.<sup>80</sup> 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.<sup>81</sup>

### *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.<sup>82</sup> Cities have used their police power to enact these ordinances under the auspices of protecting health, safety, and welfare.<sup>83</sup> San Francisco was the first city to pass

---

ocrats support paid sick day legislation compared to only 59% of Republicans); David Weigel, *Every Republican Running for President Votes Against Paid Sick Leave; It Passes Anyway*, BLOOMBERG (Mar. 26, 2015), <http://www.bloomberg.com/politics/articles/2015-03-26/every-republican-running-for-president-votes-against-paid-family-leave> [https://perma.cc/J62M-NUEF] (reporting that at the time of the vote, all Republican candidates for the 2016 presidential election voted against legislation that would have provided funds for increased employment benefits such as paid sick days).

<sup>79</sup> Juliet Eilperin, *Perez, Jarrett to Take Paid-Leave Show on the Road Starting April 1*, WASH. POST (Mar. 25, 2015), [https://www.washingtonpost.com/politics/2015/03/24/794ecc56-d25c-11e4-ab77-9646eea6a4c7\\_story.html](https://www.washingtonpost.com/politics/2015/03/24/794ecc56-d25c-11e4-ab77-9646eea6a4c7_story.html) [https://perma.cc/BA4T-HPJF].

<sup>80</sup> Executive Order 13706: Establishing Paid Sick Leave for Federal Contractors, 80 Fed. Reg. 54,697, 54,697 (Sept. 7, 2015); Office of the Press Secretary, White House, *supra* note 20. This executive order, however, will not go into effect until 2017. Executive Order 13706: Establishing Paid Sick Leave for Federal Contractors, 80 Fed. Reg. at 54,697; Office of the Press Secretary, White House, *supra* note 20; *see also* James S. Roberts, Jr., *The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343, 357 n.72 (1992) (noting that many federal contractors tend to only work with the federal government rather than seeking contracts in the private sector).

<sup>81</sup> Office of the Press Secretary, White House, *supra* note 20.

<sup>82</sup> U.S. DEP'T OF LABOR, *supra* note 19, at 14; *see* ARIZ. REV. STAT. ANN. § 23-371 (2016) (enacting Arizona's paid sick leave law); CAL. LAB. CODE § 246 (West 2015) (enacting California's paid sick leave law); MASS. GEN. LAWS ch. 149 § 148(C) (2015) (enacting Massachusetts' paid sick leave law); CONN. GEN. STAT. § 31-57s (2015) (enacting Connecticut's paid sick leave law); VT. STAT. ANN. tit. 21, § 4B (2016) (enacting Vermont's paid sick leave law); S. 454 (Or. 2015) (enacted) (enacting Oregon's paid sick leave law); REG. 44764 (Wash. 2017) (recording that ballot Initiative 1433 requiring paid sick leave for employees passed in 2016 election); *see also* Kulow, *supra* note 18, at 98–99 (observing that the focus has shifted to state legislation as the slowing economy has halted congressional momentum on paid sick leave).

<sup>83</sup> *See Metro. Milwaukee Ass'n of Commerce, Inc.*, 798 N.W.2d at 304, 306 (upholding Milwaukee's paid sick leave legislation as a valid exercise of the city's police powers); Jena McGregor, *New York Diners Relax. Paid Sick Leave Is Now the Law.*, WASH. POST (June 27, 2013), <https://www.washingtonpost.com/news/on-leadership/wp/2013/06/27/new-york-passes-paid-sick-leave-law-but-us-still-far-behind/> [https://perma.cc/JMY7-CFF7] (reporting on New York City's paid sick leave legislation); *see also* Watson, *supra* note 63, at 975 (explaining how cities using "home rule power" to create legislation regarding paid sick days as substantive and limited within municipality). State-delegated police power enables municipalities to regulate on behalf of the public interest. Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683, 707 (2001). New York City now has paid sick

a paid sick time ordinance for employees in the private sector.<sup>84</sup> This ordinance allows employees in businesses of ten or more employees to earn one hour of sick time for every thirty hours worked.<sup>85</sup> Employees can take a sick day to care for themselves or their dependents.<sup>86</sup> Washington, D.C. followed suit in 2008 with the Accrued Sick and Safe Leave Act.<sup>87</sup> This act exempted independent contractors, students, and unpaid volunteers from coverage, and created brackets for varying sizes of employers.<sup>88</sup> In total, at the time of this writing, eighteen municipalities have adopted ordinances mandating paid sick leave.<sup>89</sup>

Notably, Milwaukee passed the Paid Sick Leave Ordinance through a voter referendum in 2008.<sup>90</sup> 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.<sup>91</sup> 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].

<sup>84</sup> 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).

<sup>85</sup> S.F., CAL., ADMINISTRATIVE CODE § 12W.2–.3. San Francisco's ordinance enables 17% of previously uncovered employees to receive paid sick leave. ROBERT DRAGO & VICKY LOVELL, SAN FRANCISCO'S PAID SICK LEAVE ORDINANCE: OUTCOMES FOR EMPLOYERS AND EMPLOYEES 1 (2011).

<sup>86</sup> 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.

<sup>87</sup> See WASH., D.C., CODE § 32-131.02 (2014) (providing the provisions of Washington, D.C.'s paid sick leave); Kulow, *supra* note 18, at 99 (discussing Washington, D.C.'s paid sick leave ordinance).

<sup>88</sup> 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).

<sup>89</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE AND LOCAL ACTION ON PAID SICK DAYS 1 (2015).

<sup>90</sup> See *City of Milwaukee Fall General Election Results*, CITY OF MILWAUKEE, [http://city.milwaukee.gov/200824877/November42008.htm#\\_VILA7d-rSu5](http://city.milwaukee.gov/200824877/November42008.htm#_VILA7d-rSu5) [https://perma.cc/V4G8-RZFP] (last visited Mar. 8, 2017) (showing the results of the referendum vote); see Paid Sick Leave Ordinance, MILWAUKEE, WIS., ORDINANCES § 112 (2008) (legislation text).

<sup>91</sup> *City of Milwaukee Fall General Election Results*, *supra* note 90; Milwaukee Ordinance, 112 § 3(2); see also Georgia Pabst, *Walker Signs Law Pre-empting Sick Day Ordinance*, J. SENTINEL (May 5, 2011), <http://www.jsonline.com/news/milwaukee/121332629.html> [https://perma.cc/28L3-ZWQD].

*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.<sup>92</sup> Later that year, however, the Wisconsin legislature repealed the ordinance out of a concern for statewide uniformity.<sup>93</sup> 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.<sup>94</sup> Ten other states have also stymied local reform efforts by enacting statewide legislation that preempts any municipal ordinances regarding paid leave.<sup>95</sup>

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

---

<sup>92</sup> *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.

<sup>93</sup> 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).

<sup>94</sup> 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).

<sup>95</sup> Koba, *supra* note 23. These include Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Oklahoma, and Tennessee. Silverman et al., *supra* note 23; Claire Zillman, *The Paid Sick Leave Battle Continues, State by State*, FORTUNE (Feb. 11, 2015), <http://fortune.com/2015/02/11/paid-sick-leave-state-laws-bans/> [<https://perma.cc/H9JG-QC5K>]. Arizona, however, has adopted statewide paid sick day legislation. ARIZ. REV. STAT. ANN. § 23-371. Similar to Milwaukee, Wisconsin, Orange County in Florida adopted paid sick leave legislation at the county level, but statewide legislation prohibiting such municipal or county measures preempted Orange County's ordinance. NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 89, at 3. In addition to business owners, the American Legislative Exchange Council (“ALEC”) and National Restaurant Association have spearheaded these preemption efforts. Mary Bottari, *The “Other NRA,” the National Restaurant Association, Pushes Preemption of Paid Sick Days*, CTR. FOR MEDIA & DEMOCRACY'S PR WATCH (July 24, 2013), <http://www.prwatch.org/news/2013/07/12173/other-nra-national-restaurant-association-pushes-preemption-paid-sick-days> [<https://perma.cc/7NP2-FTMP>]; Bryce Covert, *Paid Sick Days Have Momentum—but the Opposition Might Have More*, NATION (Nov. 7, 2013), <http://www.thenation.com/article/paid-sick-days-have-momentum-opposition-might-have-more/> [<https://perma.cc/FS45-4SUK>]. In 2011, ALEC held a meeting in New Orleans to discuss a preemption strategy, during which they provided copies of Wisconsin's preemption bill to serve as a model for similar state overrides. Bottari, *supra*; Brendan Fischer, *Paid Sick Day Campaigns Gain Traction as ALEC Allies Push Back*, CTR. FOR MEDIA & DEMOCRACY'S PR WATCH (July 30, 2014), <http://www.prwatch.org/news/2014/07/12551/paid-sick-days-gain-momentum-as-alec-allies-push-back> [<https://perma.cc/N3HG-8KLT>].

sick day laws.<sup>96</sup> In 2012, Connecticut was the first state to provide paid sick leave to employees.<sup>97</sup> Following Connecticut's lead, California, Massachusetts, Oregon, Vermont, Arizona, and Washington have also enacted paid sick day laws.<sup>98</sup> Some states have used voter referendums to pass paid sick day legislation.<sup>99</sup> Other states are also considering paid sick day laws but have not yet acted.<sup>100</sup>

## 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.<sup>101</sup> Ideally, paid sick days would be legislated at the federal level, but if this does not occur, the states themselves should fill the void.<sup>102</sup> 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.<sup>103</sup>

---

<sup>96</sup> See ARIZ. REV. STAT. ANN. § 23-371 (Arizona's paid sick day law); CAL. LAB. CODE § 246 (California's paid sick day law); CONN. GEN. STAT. § 31-57r-w (Connecticut's paid sick day law); MASS. GEN. LAWS ch. 149 § 148(C) (Massachusetts' paid sick day law); VT. STAT. ANN. tit. 21, § 4B (Vermont's paid sick day law); S. 454 (Or. 2015) (enacting Oregon's paid sick day law); REG. 44764 (Wash. 2017) (Washington's paid sick day regulation); NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 89, at 1 (mapping paid sick day legislation); A BETTER BALANCE, OVERVIEW OF PAID SICK TIME LAWS IN THE UNITED STATES 1-3 (2016) (documenting paid sick day legislation in California, Connecticut, Massachusetts, Oregon, and Vermont). Montgomery County, Maryland, has adopted a countywide paid sick time law. A BETTER BALANCE, *supra* at 4.

<sup>97</sup> CONN. GEN. STAT. § 31-57r; Kulow, *supra* note 18, at 99. In Connecticut, eligible employees earn one hour for every forty hours worked, or five sick days total. CONN. GEN. STAT. § 31-57s(a).

<sup>98</sup> ARIZ. REV. STAT. ANN. § 23-371; CAL. LAB. CODE § 246; 2015; MASS. GEN. LAWS 149 § 148C(d)(1); VT. STAT. ANN. tit. 21, § 4B; S. 454(4)(1) (Or. 2015); REG. 44764 (Wash. 2017); see also A BETTER BALANCE, *supra* note 96, at 1-3 (providing details regarding those states' paid sick days laws). In California, Oregon, and Massachusetts, the employee can begin to take advantage of earned paid sick days after their ninetieth day of employment. CAL. LAB. CODE § 246(c); MASS. GEN. LAWS 149 § 148C(d)(1); S. 454(4)(1) (Or. 2015); see also A BETTER BALANCE, *supra* note 96, at 1-3 (providing an overview of those states' paid sick days regulations).

<sup>99</sup> ARIZ. REV. STAT. ANN. § 23-371; MASS. GEN. LAWS ch. 149 § 148C(d)(1); REG. 44764 (Wash. 2017).

<sup>100</sup> See CTR. FOR EDUC. OF WOMEN, POLICY BRIEF: PAID SICK DAYS PREEMPTION IN MICHIGAN 1, 3 (Univ. of Mich. 2015) (noting that both Michigan and South Carolina have active campaigns for paid sick days as well as preemption). Michigan demonstrates the ongoing battle between the paid sick day advocates and preemption advocates. *Id.* at 1-2. Proposed House Bill 4052, the "Local Government Labor Regulatory Limitation Act," would preempt local efforts to establish paid sick day ordinances. *Id.* at 1. House Bill 4167 and Senate Bill 101, both of which would adopt mandatory paid sick days statewide, were also introduced in Michigan's legislature in 2015. *Id.* at 2.

<sup>101</sup> See U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 1 (viewing paid sick leave as "a critical element of job security for American workers").

<sup>102</sup> See HEYMANN ET AL., *supra* note 9, at 12 (noting that ad hoc local laws and employer policies result in gaps of coverage that predominantly affect low-wage and part-time workers).

<sup>103</sup> VICKY LOVELL, NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON'T HAVE PAID SICK LEAVE 5, 7 (2003); NAT'L P'SHIP FOR WOMEN & FAMILIES, EVERYONE GETS SICK.



This Part discusses the perceived benefits and costs of adopting paid sick day policies and how these perceptions have played out locally and globally.<sup>104</sup> Section A considers the problems that presenteeism causes and the subsequent benefits that paid sick days would offer.<sup>105</sup> Section B studies the potential costs that employers bear in having to provide paid sick days.<sup>106</sup> Section C analyzes the implementation of Connecticut, Seattle, and Washington, D.C.'s paid sick day laws.<sup>107</sup> Finally, section D looks at how Germany and France have used paid sick days.<sup>108</sup>

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

Lack of paid sick day laws affects both employers and employees.<sup>109</sup> Presently, forty percent of American workers in the private sector lack paid sick days.<sup>110</sup> Even though some private sector companies do advertise paid sick leave policies, some are known for firing employees who actually use those sick days.<sup>111</sup> For employees, one of the contributing factors for presen-

---

NOT EVERYONE HAS TIME TO GET BETTER: A BRIEFING BOOK ON ESTABLISHING A PAID SICK DAYS STANDARD 5 (2011); U.S. Cong. Joint Econ. Comm., *supra* note 6, at 2–3; see *Norovirus Outbreak Associated with Ill Food-Service Workers*, *supra* note 4, at 1215 (“Approximately 50% of all norovirus outbreaks are linked to ill food-service workers.”). Only 27% of workers in the food industry have access to paid sick leave. U.S. Cong. Joint Econ. Comm., *supra* note 6, at 2–3. One in five restaurant workers reported coming to work despite vomiting or suffering diarrhea in 2010. NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* at 5. If enacted, the HFA would provide 6 million workers in the food industry with paid sick days, representing a 259% increase in coverage for food-service employees. U.S. Cong. Joint Econ. Comm., *supra* note 6, at 8.

<sup>104</sup> See *infra* notes 109–223 and accompanying text.

<sup>105</sup> See *infra* notes 109–148 and accompanying text.

<sup>106</sup> See *infra* notes 149–164 and accompanying text.

<sup>107</sup> See *infra* notes 165–191 and accompanying text.

<sup>108</sup> See *infra* notes 192–223 and accompanying text.

<sup>109</sup> See Johns, *supra* note 5, at 524–25 (discussing difficulties that the lack of paid sick days imposes on employees and employers).

<sup>110</sup> COUNCIL OF ECON. ADVISERS, *supra* note 10, at 4; U.S. DEP’T OF LABOR, *supra* note 7, at 2. Large-scale businesses hoping to attract top talent, such as Google and Microsoft, offer paid sick days to entice employees. Claire Cain Miller, *From Microsoft, a Novel Way to Mandate Sick Leave*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/26/upshot/26up-leave.html> (reporting on Microsoft’s move to require its contractors to also provide paid sick time). Some food businesses have also started to offer paid sick time. STARBUCKS, YOUR SPECIAL BLEND: REWARDING OUR PARTNERS 7 (2012); Peck, *supra* note 34.

<sup>111</sup> See Gillian Branstetter, *America’s Sick Leave Policies Fail Workers. Here’s How Netflix and Google Are Getting it Right*, DAILY DOT (Sept. 9, 2015), <http://www.dailydot.com/via/america-sick-leave-obama-executive-order/> [<https://perma.cc/8934-KHRT>] (reporting that companies such as AT&T, McDonald’s, Walmart, and Amazon, despite offering paid sick days, penalized employees for taking time off for illness). After receiving backlash from employees, McDonald’s now offers its employees up to ten paid sick days, and Walmart eliminated its one-day waiting period for sick days. See *Balance Work & Life*, MCDONALD’S, [http://corporate.mcdonalds.com/mcd/corporate\\_careers/benefits/highlights\\_of\\_what\\_we\\_offer/balance\\_work\\_and\\_life.html](http://corporate.mcdonalds.com/mcd/corporate_careers/benefits/highlights_of_what_we_offer/balance_work_and_life.html) [<https://perma.cc/7NEV-H2EL>] (last visited Mar. 8, 2017) (providing an overview of McDonald’s paid sick day policy); *More Than*

teeism is having to forgo income because of personal or a family member's illness.<sup>112</sup> 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.<sup>113</sup>

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

---

*One Million Walmart Associates to Receive Pay Increase in 2016*, WALTAM (Jan. 20, 2016), <http://news.walmart.com/news-archive/2016/01/20/more-than-one-million-walmart-associates-receive-pay-increase-in-2016> [<https://perma.cc/V69L-L6NS>] (Walmart announcing its decision to eliminate its one-day waiting period for sick days).

<sup>112</sup> U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 1; Wiedera 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.

<sup>113</sup> 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).

<sup>114</sup> 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>].

<sup>115</sup> Hemp, *supra* note 114.

<sup>116</sup> 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.

<sup>117</sup> Hemp, *supra* note 114; Wiedera 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.<sup>118</sup> 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.<sup>119</sup>

When workers contract infectious diseases, however, presenteeism not only impairs productivity but also poses a risk to public health.<sup>120</sup> This is especially the case in occupations that require greater employee-to-customer interaction.<sup>121</sup> Most workers in the hospitality and food industry, however—perhaps the most quintessentially customer-facing industry—lack paid sick days.<sup>122</sup> Additionally, these workers tend to fall in the lowest income brackets.<sup>123</sup> Consequently, almost half of the workers in the food industry reported working while ill.<sup>124</sup> The resultant and unsurprising norovirus and salmonella outbreaks

---

conditions to take days off to seek medical treatment, five days may not be enough for workers suffering chronic health problems. *See* DRAGO & LOVELL, *supra* note 85, at 9 (showing that, on average, employees suffering from chronic health conditions take one sick day more per year than employees who do not have chronic health conditions). Research regarding presenteeism from infectious diseases started in 2003 following the SARS outbreak. Johns, *supra* note 5, at 522.

<sup>118</sup> U.S. DEP'T OF LABOR, *supra* note 7, at 1; *see* DRAGO & LOVELL, *supra* note 85, at 5 (explaining paid sick days' effect on employees' health).

<sup>119</sup> *See* Johns, *supra* note 5, at 525 (explaining that attendance policies may result in employees returning to work too soon); *see also* NAT'L P'SHIP FOR WOMEN & FAMILIES, CONNECTICUT IS LEADING THE WAY TOWARD A NATIONAL PAID SICK DAYS STANDARD 1 (2015) (showing that "access to paid sick days would eliminate an estimated 1.3 million emergency room visits each year").

<sup>120</sup> U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 1. Thirty-seven percent of workers with paid sick days have gone to work while sick with a contagious illness versus 55% of workers without paid sick days. SMITH & KIM, *supra* note 78, at 6. Infected food workers cause 70% of foodborne norovirus outbreaks. U.S. DEP'T OF LABOR, *supra* note 7, at 3.

<sup>121</sup> *See* U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 5 (noting that millions of low-wage workers who lack paid sick leave have occupations that require significant interpersonal contact); Widera et al., *supra* note 26, at 1246 (explaining that health care workers pose substantial risk to patients when they work while sick with an infectious disease, but 22% of registered nurses do not have paid sick leave). Approximately forty-eight million cases of foodborne illness occur in the United States every year, more than half of which originate in a restaurant or deli. *See* L. Hannah Gould et al., *Contributing Factors in Restaurant-Associated Foodborne Disease Outbreaks*, *FoodNet Sites, 2006 and 2007*, 76 J. FOOD PROTECTION 1824, 1824 (2013).

<sup>122</sup> *See* NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 103, at 5 (explaining that 73% of food service workers do not have any paid sick days); U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 2–3 (showing that only 27% of food service workers benefit from paid sick leave).

<sup>123</sup> *See* U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 3, 8 (showing that food workers earn an average wage of \$20,000 each year).

<sup>124</sup> *See* REST. OPPORTUNITIES CTRS. UNITED, *supra* note 6, at 23 (showing in a survey that 68.5% of workers without paid sick leave in the food industry worked despite being ill); U.S. DEP'T OF LABOR, *supra* note 7, at 3 (noting that 45% of food service workers who worked while sick did so because they needed their wages); Carpenter et al., *supra* note 7, at 2153 (demonstrating that half of food workers considered possibility of losing income as a substantial reason for working while ill). The FDA has promulgated regulations to protect consumers in these situations. *See* 21 C.F.R. § 1250.35 (2016) (prohibiting food workers who are sick with communicable disease or gastrointestinal disturbance from interacting with food). Specifically, the FDA Food Code prohibits workers who are suffer-

are public relations nightmares for restaurants and create substantial health costs for the local community.<sup>125</sup>

Beyond the food industry, the H1N1 pandemic of 2009 further illustrates the deleterious effects that presenteeism can have on the American workforce.<sup>126</sup> Between April 2009 and August 2009, eight million workers went to work despite experiencing H1N1 symptoms.<sup>127</sup> 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.<sup>128</sup> Presenteeism perpetuated the spread of the disease and increased the length of recovery for some employees.<sup>129</sup> 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.<sup>130</sup> Offering paid sick days would decrease the health risk that presenteeism poses while also increasing worker productivity in the long-run.<sup>131</sup>

---

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

<sup>125</sup> See NAT'L P'SHIP 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://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*.

<sup>126</sup> 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).

<sup>127</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 103, at 4; Major, *supra* note 29; *The 2009 H1N1 Pandemic: Summary Highlights, April 2009–April 2010*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/h1n1flu/cdcresponse.htm> [<https://perma.cc/TE6D-B9QF>] (last visited Mar. 10, 2017).

<sup>128</sup> NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 103, at 5; U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 2.

<sup>129</sup> 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'SHIP 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.

<sup>130</sup> DRAGO & LOVELL, *supra* note 85, at 5.

<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> For those hourly workers who live paycheck-to-paycheck, having to forgo one day of pay could cause missed rent or bill payments.<sup>134</sup> Employees also face the possibility of losing their job altogether due to an unforeseen illness.<sup>135</sup> Seventeen percent of American workers have either lost their job or been threatened with termination because they took an unexpected absence due to illness.<sup>136</sup>

The burdens of insufficient leave are not evenly distributed across the American workforce.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> Since the 1960s, women have increasingly entered the workforce both as second earners in families as well as single working mothers.<sup>140</sup> Women hold most of the low-paying jobs that are unlikely to offer paid sick days, and they continue to be families' primary caregivers.<sup>141</sup> Paid sick

---

<sup>132</sup> See LOVELL, *supra* note 103, at 5 (noting that low-income families bear the brunt of lack of paid sick days).

<sup>133</sup> *Id.*

<sup>134</sup> 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).

<sup>135</sup> 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.”).

<sup>136</sup> 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.*

<sup>137</sup> 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).

<sup>138</sup> U.S. CONG. JOINT ECON. COMM., *supra* note 6, at 4–5.

<sup>139</sup> 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).

<sup>140</sup> 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).

<sup>141</sup> 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.<sup>142</sup>

Without the fear of losing pay or potentially one's job, employees with paid sick days would have a better quality of life.<sup>143</sup> By staying home for even one day, sick workers generally recover faster.<sup>144</sup> Presenteeism prolongs illness and increases the risk that an infection will spread to others.<sup>145</sup> For employers, guaranteed paid sick days would result in improved morale and possibly entice employees to stay longer with their employers.<sup>146</sup> It would also create a level playing field for all employers, as many have already adopted paid sick day policies.<sup>147</sup> 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.<sup>148</sup>

### *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.<sup>149</sup> Some employers already provide employees with healthcare and other

<sup>142</sup> 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).

<sup>143</sup> 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).

<sup>144</sup> 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).

<sup>145</sup> 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).

<sup>146</sup> AMY RAUB ET AL., WORK INTERRUPTED: 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 NELSEN, 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).

<sup>147</sup> 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).

<sup>148</sup> 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).

<sup>149</sup> 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.<sup>150</sup> Employers fear that paid sick day laws will impact their bottom line in several ways.<sup>151</sup> Employers fear having to hire additional full-time workers or temporary workers to cover unexpected employee absences.<sup>152</sup> They may also have to spend money to comply with the law, including paying for administrative mechanisms to track absences or upgrade payroll.<sup>153</sup> In order to cover these additional costs, employers surmise that they will be forced to take steps detrimental to their workers and consumers.<sup>154</sup> Some of these steps may negatively affect employees, including reduction in wages and replacement of manda-

---

paid sick days include the Chamber of Commerce, National Federation of Independent Business, and Restaurant Association).

<sup>150</sup> 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 Briody, *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-us-employers-225-billion-annually> [<https://perma.cc/7QN8-NAPB>] (reporting that absenteeism results in \$225.8 billion in costs to American employers each year).

<sup>151</sup> See Christopher Flavelle, *Sick Leave Doesn't Hurt Business, Says Business*, BLOOMBERG (Feb. 4, 2015), <http://www.bloombergview.com/articles/2015-02-04/sick-leave-doesn-t-hurt-business-says-business> (reporting that the first concern that employers raise in regards to paid sick days is how increased costs will affect their bottom line); Claudia Calderon Machicado, *The Business Case for Paid Leave and Paid Sick Days*, CTR. FOR AM. PROGRESS (Apr. 17, 2014), <https://www.americanprogress.org/issues/labor/news/2014/04/17/88243/the-business-case-for-paid-leave-and-paid-sick-days/> [<https://perma.cc/MY9X-CWK7>] (noting that opposition to paid sick leave is predominantly concerned with costs for businesses).

<sup>152</sup> 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).

<sup>153</sup> DRAGO & LOVELL, *supra* note 85, at 5.

<sup>154</sup> 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.<sup>155</sup> Alternatively, employers may pass on the cost to consumers by raising prices.<sup>156</sup>

Employers also fear that workers will abuse paid sick leave.<sup>157</sup> Specifically, employers believe that paid sick days will increase absenteeism in the workplace even when absence is not warranted.<sup>158</sup> Paid sick days, perceived by employers as another form of entitled compensation, may entice workers to take off unnecessary days of work.<sup>159</sup>

Finally, employers view mandatory paid sick days as a governmental intrusion on their operations.<sup>160</sup> Employers believe that they, not the government, are in the best position to address workers' needs.<sup>161</sup> Companies with a national presence in particular may struggle to comply with the patchwork of municipal and state regulations.<sup>162</sup> Furthermore, some policymakers in cities and states are concerned that small businesses will move in order to avoid compliance with paid sick time laws.<sup>163</sup> Movement of businesses would harm local communities and exacerbate existing unemployment.<sup>164</sup>

<sup>155</sup> SMITH & KIM, *supra* note 78, at 7.

<sup>156</sup> 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).

<sup>157</sup> APPELBAUM ET AL., *supra* note 152, at 4; SMITH & KIM, *supra* note 78, at 7; James Sher, *Congress Should Consider Alternatives to Mandatory Paid Sick Leave*, HERITAGE (May 15, 2007), <http://www.heritage.org/research/reports/2007/05/congress-should-consider-alternatives-to-mandatory-paid-sick-leave> [https://perma.cc/Z5AD-364T]; *see* *Substitution of Paid Leave*, GEO. UNIV. L. CTR.: WORKPLACE FLEXIBILITY 2010, Summer 2007, at 3 (explaining that there is potential concern for abuse of paid leave policies).

<sup>158</sup> APPELBAUM ET AL., *supra* note 152, at 4; Sher, *supra* note 157.

<sup>159</sup> 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).

<sup>160</sup> *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).

<sup>161</sup> *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).

<sup>162</sup> 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).

<sup>163</sup> *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).

<sup>164</sup> Stacy Mitchell, Co-Director, Inst. for Local Self-Reliance, Speech to the American Planning Association: The Impact of Chain Stores on Community (Apr. 18, 2000).



### 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.<sup>165</sup> 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 . . . .”<sup>166</sup> The recession and a strong business-led opposition, however, have stymied these congressional efforts.<sup>167</sup>

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.<sup>168</sup> Starting in April 2015, Labor Secretary Thomas Perez traveled around the United States as part of the Lead on Leave campaign.<sup>169</sup> 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.<sup>170</sup>

To fill the void left by the FMLA, some cities and states took it upon themselves to adopt paid sick day laws.<sup>171</sup> Connecticut was the first to adopt a

<sup>165</sup> S. 1085, 109th Cong. (2005); Rhonda Smith, *Debate Over Mandated Paid Sick Leave Heats up with State, Local Legislative Action*, BLOOMBERG (Mar. 10, 2014), <http://www.bna.com/debate-mandated-paid-n17179882701/> [<https://perma.cc/3LBT-HP45>].

<sup>166</sup> S. 1085, 109th Cong. § 3(1).

<sup>167</sup> 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”).

<sup>168</sup> 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).

<sup>169</sup> 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>].

<sup>170</sup> See Executive Order 13706: Establishing Paid Sick Leave for Federal Contractors, 80 Fed. Reg. 54,697, 54,697 (Sept. 7, 2015); White House, *supra* note 20. The Executive Order for federal contractors only extends paid sick leave to 300,000, a small percentage of the American workers without access to paid sick leave. White House, *supra* note 20.

<sup>171</sup> 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.<sup>172</sup> Connecticut's law allows workers to accrue five days of paid leave, but the law is severely limited in scope.<sup>173</sup> Only businesses that employ fifty or more employees must comply.<sup>174</sup> Furthermore, manufacturing and non-profit corporations are exempt.<sup>175</sup> Consequently, only 200,000 to 400,000 of Connecticut's 1.7 million workers benefit from the state law.<sup>176</sup> Despite these limitations in coverage, workers who were previously uncovered in industries such as health, education, social services, hospitality, and retail benefited dramatically.<sup>177</sup>

Because of the dramatic political division regarding this issue, results from studies have been skewed.<sup>178</sup> Studies conducted by progressive publications tend to present the impact of these laws in a positive light.<sup>179</sup> In contrast,

---

three percent of San Francisco employees already had some form of paid sick leave prior to the ordinance's enactment. *Id.*

<sup>172</sup> APPELBAUM ET AL., *supra* note 152, at 2; *see also House Passes Job-Killing Paid Sick Leave Mandate*, CONN. BUS. & INDUSTRY ASS'N (June 4, 2011), <http://www.cbiam.com/news/inside-the-capitol/house-passes-job-killing-paid-sick-leave-mandate/> [<https://perma.cc/3E23-BZJQ>] (arguing that Connecticut's paid sick leave law would cause higher unemployment as more businesses left for near-by states).

<sup>173</sup> CONN. GEN. STAT. § 31-57s (2015); *see* APPELBAUM ET AL., *supra* note 152, at 2 (noting that exclusions in Connecticut's law have enabled the impact of the law to be modest); Kulow, *supra* note 18, at 99 (noting that Connecticut was the first state to adopt paid sick days).

<sup>174</sup> CONN. GEN. STAT. § 31-57r(4).

<sup>175</sup> APPELBAUM ET AL., *supra* note 152, at 2; COUNCIL OF ECON. ADVISERS, *supra* note 10, at 20.

<sup>176</sup> APPELBAUM ET AL., *supra* note 152, at 3. At the time of enactment, 88% of employers already offered some form of paid sick time to employees. *Id.* at 7; Furman & Stevenson, *supra* note 25 (noting that Connecticut's law increased the percentage of workers with paid sick leave to an estimated 78%).

<sup>177</sup> APPELBAUM ET AL., *supra* note 152, at 7. Between one-half to two-thirds of employees in health, education, social services, hospitality, and retail gained paid sick leave because of the passage of Connecticut's law. *Id.* The law also disproportionately benefited part-time workers. *See* LOVELL, *supra* note 103, at 13 (noting that almost no part-time workers have access to paid sick leave). Also, the Connecticut law added an anti-retaliatory measure—employers could not fire an employee for using paid sick leave. APPELBAUM ET AL., *supra* note 152, at 3, 10. France has a similar measure in which using paid sick leave suspends an employee's contract—employees cannot be terminated for using their leave. BAKER & MCKENZIE, *supra* note 54, at 13.

<sup>178</sup> *See* NELSEN, *supra* note 146, at 2 (noting that advocates for paid sick leave are responsible for most studies on paid sick leave); Randy Lobasso, *How Paid Sick Leave Became a Major Issue for the Left*, PAC. STANDARD (Feb. 20, 2015), <http://www.psmag.com/politics-and-law/how-democrats-made-paid-sick-leave-a-priority> [<https://perma.cc/NQ3G-TMGN>] (pointing out that paid sick leave has harmed political careers and caused division within the Democratic Party). Additionally, given how new these laws are in the United States, the numbers that are available for analysis to determine their effectiveness are still preliminary. NELSEN, *supra* note 146, at 38. Such numbers may be inflated to account for temporary costs in setting up tracking mechanisms and the numbers may not consider employees who are not yet eligible for their paid sick days. APPELBAUM ET AL., *supra* note 152, at 16; MAIN ST. ALL. OF WASH., *supra* note 163, at 3–4.

<sup>179</sup> *See* NELSEN, *supra* note 146, at 4 (noting that business groups and free-market advocates focus on negative impacts on employers that universal paid sick days causes). For example, the Center for Economic Policy and Research's report on the impact of Connecticut's law found that 76% of surveyed employers were supportive of paid sick leave but this percentage may have exaggerated the degree of businesses' support for the law. APPELBAUM ET AL., *supra* note 152, at 17; *see* NELSEN,

business-focused publications tend to negatively view the results of these studies.<sup>180</sup> City auditors, however, have managed to conduct neutral and objective reports.<sup>181</sup> City auditors in Washington, D.C., and Seattle looked at the impact of paid sick leave ordinances on their respective cities.<sup>182</sup> Seattle's city auditor found that most employers felt a small impact on business because of the ordinance.<sup>183</sup> 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.<sup>184</sup> The city auditor, however, found that there was no such shift in location following the enactment of the ordinance.<sup>185</sup>

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.<sup>186</sup> In Wisconsin, Governor Scott Walker expressed

---

*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).

<sup>180</sup> See Lobasso, *supra* note 178 (discussing how conservatives reject paid sick leave because of government intrusion in private business). For example, the Employment Policies Institute's ("EPI") report on paid sick leave in Connecticut found that some employers had fired part-time workers to stay under the fifty-employee threshold and had reported that the law was not good for their business. MICHAEL SALTSMAN, PAID SICK LEAVE IN CONNECTICUT: A PILOT STUDY OF BUSINESSES' RESPONSES TO THE LAW 4–5, 7 (2013). Another conservative article found that Connecticut suffered a higher rate of unemployment as compared to other New England states that had not adopted paid sick leave laws. Thomas Ahn & Aaron Yelowitz, *The Short-Run Impacts of Connecticut's Paid Sick Leave Legislation*, 22 APPLIED ECON. LETTERS 1267, 1268–69 (2015). *But see D.C. Corporate Front Group Tries to Speak for Seattle—and Fails Miserably*, SEATTLE COALITION FOR A HEALTHY WORKFORCE (Aug. 23, 2013), <http://seattlehealthyworkforce.org/2013/08/23/d-c-corporate-front-group-tries-to-speak-for-seattle-and-fails-miserably/> [<https://perma.cc/4B5Y-V443>] (criticizing EPI's survey of Seattle's ordinance as a biased opinion survey without any supportive statistical data).

<sup>181</sup> See NELSEN, *supra* note 146, at 1 (observing that city auditors have generated paid sick leave reports in lieu of academic studies).

<sup>182</sup> See BRANCHE, *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, *supra* note 146, at 1, 19, 29 (commenting on the D.C. and Seattle auditor reports); JENNIFER ROMICH ET AL., 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).

<sup>183</sup> See ROMICH ET AL., *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).

<sup>184</sup> BRANCHE, *supra* note 88, at 19.

<sup>185</sup> *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, *supra* note 10, at 21.

<sup>186</sup> CTR. FOR EDUC. OF WOMEN, *supra* note 100, at 2. State legislatures have proposed 105 preemption bills and eleven states have enacted preemption laws. *Id.*

concern about the patchwork of regulations that he felt would be both difficult and expensive for employers to comply with.<sup>187</sup> 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.<sup>188</sup> Although these laws unify the state's policy on paid sick days, they provide no remedy for employees.<sup>189</sup> This is problematic because those employers who previously gave no paid sick time continue to offer nothing.<sup>190</sup> 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.<sup>191</sup>

#### *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.<sup>192</sup> Many of these countries have had guaranteed paid sick days for a substantial period of time.<sup>193</sup> Globally, the use of sick leave varies in execution.<sup>194</sup> For wage replacement, countries either have employers cover lost wages or the govern-

---

<sup>187</sup> 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.

<sup>188</sup> 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).

<sup>189</sup> 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.’”).

<sup>190</sup> 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).

<sup>191</sup> See ARIZ. REV. STAT. ANN. § 23-371 (2016) (Arizona law enacted through voter referendum); MASS. GEN. LAWS ch. 149 § 148C(d)(1) (2015) (Massachusetts law enacted through voter referendum); REG. 44764 (Wash. 2017) (Washington regulation enacted through voter referendum); CTR. FOR EDUC. OF WOMEN, *supra* note 100, at 1, 3 (noting that both supporters and opponents of paid sick days are active in Michigan and South Carolina).

<sup>192</sup> 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 & ZIEBARTH, *supra* note 126, at 2 (explaining that almost every European country has some form of universal paid sick leave).

<sup>193</sup> 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.

<sup>194</sup> HEYMANN ET AL., *supra* note 9, at 5.

ment provides social insurance or a combination of the two.<sup>195</sup> 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.<sup>196</sup> Similarly, some countries replace one hundred percent of wages whereas others only replace fifty to seventy-five percent of wages.<sup>197</sup>

Studies of these international laws demonstrate the fluctuations that occur in the employment setting.<sup>198</sup> In times of economic instability, there is a noticeable reduction in the use of paid sick leave.<sup>199</sup> Economic instability also causes shifts in overall support for paid sick leave policies.<sup>200</sup> 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.<sup>201</sup> In terms of effectiveness, high expenditure on paid sick leave generally results in higher economic productivity.<sup>202</sup>

In Germany, the Federal Holidays Act and Continuation of Pay Act allow employees to take up to six weeks of sick pay.<sup>203</sup> Employees receive one hundred percent of their pay, but if they are sick for more than three consecutive

<sup>195</sup> 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).

<sup>196</sup> *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).

<sup>197</sup> SCHEIL-ADLUNG & SANDNER, *supra* note 196, at 8.

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

<sup>199</sup> 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 & Andersen, *supra*.

<sup>200</sup> 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/0/6dbce67a-563c-11e5-97e9-7f0bf5e7177b.html#axzz3yfB733qS> [<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.*

<sup>201</sup> 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).

<sup>202</sup> 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.

<sup>203</sup> 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.<sup>204</sup> With the most generous sick leave system, German employers spent approximately thirty billion dollars on sick leave payments in 1996.<sup>205</sup>

Because of these significant costs, in 1996, the German government passed the Employment Protection Act, reducing the guaranteed pay to eighty percent.<sup>206</sup> 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.<sup>207</sup> These reforms, however, were repealed in 1998 and guaranteed pay returned to 100% of an employee's daily wage, where it continues to be.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup>

In France, employers do not have to pay for employees' sick days.<sup>211</sup> Instead, France's Social Security System covers employees' wages when they

<sup>204</sup> FED. MINISTRY OF LABOUR & SOC. AFFAIRS, *supra* note 51, at 74; SCHEIL-ADLUNG & SANDNER, *supra* note 196, at 9; Ziebarth & Karlsson, *supra* note 51, at 1110; see HEYMANN ET AL., *supra* note 9, at 8 (reporting that German employees receive their full wage when absent due to illness).

<sup>205</sup> Ziebarth & Karlsson, *supra* note 51, at 1110. Germany is considered the founding country for Bismarckian corporatism, meaning there is a social relationship between employers and the government to better protect workers. *Id.* Bismarck's Sickness Insurance Law of 1883 was the first paid sick leave law adopted in the world. Pichler & Ziebarth, *supra* note 126, at 2. Other countries that share a similar structure include Austria and the Scandinavian nations. René Böheim & Thomas Leoni, *Firms' Sickness Costs and Workers' Sickness Absences* 4, 7 (Nat'l Bureau of Econ. Research, Working Paper No. 20305, 2014).

<sup>206</sup> Ziebarth & Karlsson, *supra* note 51, at 1109–10.

<sup>207</sup> *Id.* at 1119–20; see MATTHIAS SCHÖN, UNEMPLOYMENT, SICK LEAVE, AND HEALTH 35 (2015) (noting that the reduction of paid sick leave to 80% reduces use of sick days, on average, by 20%). Rather than facing cuts in sick pay, employees could choose to reduce paid vacation days instead. Ziebarth & Karlsson, *supra* note 51, at 1110.

<sup>208</sup> FED. MINISTRY OF LABOUR & SOC. AFFAIRS, *supra* note 51, at 74; Ziebarth & Karlsson, *supra* note 51, at 1112 n.12; see PICHLER & ZIEBARTH, *supra* note 126, at 22 (explaining that 1998 Bill for Social Insurance Corrections and to Protect Employee Rights returned replacement wages to 100%). To reach an agreement over guaranteed pay, unions compromised with overtime hours instead. Ziebarth & Karlsson, *supra* note 51, at 1112 n.12. As of 2010, workers in Germany reported that they used sixteen and a half days of paid sick leave a year. SCHEIL-ADLUNG & SANDNER, *supra* note 196, at 11. Germany's sick leave law cost employers over \$40 billion and the social insurance system approximately \$7 billion in 2013. SCHÖN, *supra* note 207, at 1 n.2.

<sup>209</sup> EUROPEAN COMM'N, *supra* note 52, at 14.

<sup>210</sup> SCHEIL-ADLUNG & SANDNER, *supra* note 196, at 11; *European Health Information Gateway: Absenteeism from Work Due to Illness, Days per Employee per Year*, WORLD HEALTH ORG., [https://gateway.euro.who.int/en/indicators/hfa-indicators/hfa\\_411-2700-absenteeism-from-work-due-to-illness-days-per-employee-per-year/](https://gateway.euro.who.int/en/indicators/hfa-indicators/hfa_411-2700-absenteeism-from-work-due-to-illness-days-per-employee-per-year/) [https://perma.cc/9QH2-WTE9].

<sup>211</sup> See *French Social Security System*, *supra* note 54 (detailing France's Social Security program).

miss work due to illness.<sup>212</sup> To qualify, employees must have paid a certain amount into the system or worked at least 150 hours in the first three months.<sup>213</sup> Additionally, employees must provide a doctor's note within forty-eight hours to justify their leave.<sup>214</sup> Employees only receive payment after the third day of absence.<sup>215</sup> For the first thirty days of leave, employees receive ninety percent instead of one hundred percent of their daily wage.<sup>216</sup> In 2013, French employees on average took eight sick days per year.<sup>217</sup>

These laws provide a framework for how the United States should proceed with the HFA.<sup>218</sup> Because France offers a generous number of vacation

---

<sup>212</sup> *Id.* These cash benefits come specifically from local Health Insurance Funds. *Id.* France also established an Alert Committee that oversees insurance expenditures. ORG. FOR ECON. 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.*

<sup>213</sup> *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.

<sup>214</sup> *French Social Security System*, *supra* note 54; *Par Situation Médicale*, L'ASSURANCE MALADIE, <http://www.ameli.fr/assures/droits-et-demarches/par-situation-medicale/vous-etes-en-arret-de-travail-pour-maladie/vos-demarches-et-formalites.php> [<https://perma.cc/9U9S-LJSJ>] (last visited Mar. 13, 2017).

<sup>215</sup> *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.

<sup>216</sup> 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>].

<sup>217</sup> 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.*

<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup> In contrast, German employees take a significant number of paid sick days per year.<sup>222</sup> Their generous sick leave policy, however, places a substantial burden on German employers.<sup>223</sup>

### 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.<sup>224</sup> 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.<sup>225</sup> Lack of paid sick time dispropor-

---

<sup>219</sup> 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).

<sup>220</sup> *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.

<sup>221</sup> *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).

<sup>222</sup> *See* SCHEIL-ADLUNG & SANDNER, *supra* note 196, at 11 (reporting that German employees take an average of sixteen and a half days for sickness).

<sup>223</sup> *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).

<sup>224</sup> Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2012); COUNCIL OF ECON. ADVISERS, *supra* note 10, at 10.

<sup>225</sup> 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.<sup>226</sup> Lack of paid sick time is standard in such industries as food service and hospitality that necessarily involve a higher rate of employee-to-customer contact.<sup>227</sup> Though mandating paid sick time at the federal level may not eradicate all instances of presenteeism in the workplace, it will provide some financial protection for workers who otherwise risk spreading contagion to others.<sup>228</sup>

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.<sup>229</sup> By adopting statewide preemption laws, these opposition states allow employers to decide how to treat their employees.<sup>230</sup> 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.<sup>231</sup>

---

<sup>226</sup> 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).

<sup>227</sup> 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.

<sup>228</sup> 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).

<sup>229</sup> 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).

<sup>230</sup> 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 Representative Caleb Rowden stating that his proposed preemption bill was "intended to 'protect small businesses from overreaching and unbalanced regulation'").

<sup>231</sup> 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.foodserviceneeds.net/February-2016/Hospitality-Industry-Sounds-Off-on-Paid-Sick-Leave/> [<https://perma.cc/XRE9-XVYJ>] (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 (June 29, 2015), <http://www.scp.org/news/2015/06/29/52771/new-paid-sick-leave-law-creates-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.<sup>232</sup> Section A recommends re-tooling the HFA to address businesses' concerns regarding costs and absenteeism to eventually pass the bill.<sup>233</sup> 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.<sup>234</sup>

### *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.<sup>235</sup> The bill has considerable support among American voters and both political parties.<sup>236</sup> The recession and a few especially outspoken voices, however, have dampened efforts to push the bill to a vote.<sup>237</sup> With the current Republican-dominated Congress, the bill is unlikely to reach the House floor in the near future.<sup>238</sup>

---

they do occur, they can be catastrophic for businesses and communities. See NAT'L P'SHIP 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.*

<sup>232</sup> See *infra* notes 235–279 and accompanying text.

<sup>233</sup> See *infra* notes 235–263 and accompanying text.

<sup>234</sup> See *infra* notes 264–279 and accompanying text.

<sup>235</sup> See Healthy Families Act, H.R. 932, 114th Cong. (2015) (read and referred to subcommittee on Health, Employment, Labor, and Pensions on April 29, 2015); Healthy Families Act, S. 497, 114th Cong. (2015) (read and referred to the Committee on Health, Education, Labor, and Pensions on February 12, 2015); S. 1085, 109th Cong. (2005) (the original paid sick time proposal).

<sup>236</sup> 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).

<sup>237</sup> 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 balking at mandated paid sick leave legislation because they are still struggling to recover from the recession).

<sup>238</sup> 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-n648331> [<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.<sup>239</sup> Combined with President Obama's executive order, municipal and state legislation is paving the way for the HFA.<sup>240</sup> 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.<sup>241</sup>

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.<sup>242</sup> Employees can start using earned paid sick time after sixty days of employment.<sup>243</sup> 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.<sup>244</sup> An employer may request medical certification justifying the absence, but what the certificate entails is subject to limita-

---

not paid sick days. Josh Levs, *Paid Family Leave Could Be a Reality in Trump's America*, TIME (Nov. 14, 2016), <http://time.com/4570075/donald-trump-paid-family-leave/> [<https://perma.cc/NQ4L-H9TY>].

<sup>239</sup> 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").

<sup>240</sup> See Diller, *supra* note 171, at 1254–55 (noting that local government is generally better able to implement stricter public health regulations than the federal government). *But see* Laura Clawson, *Obama Gives 600,000 Workers Paid Sick Leave . . . but Trump Could Take It Away*, DAILY KOS (Sept. 29, 2016), <http://www.dailykos.com/story/2016/9/29/1575903/-Obama-gives-600-000-workers-paid-sick-leave-but-Trump-could-take-it-away> [<https://perma.cc/GM2P-PYLQ>] (noting that President Trump could undo President Obama's executive order).

<sup>241</sup> 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).

<sup>242</sup> 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). For businesses with fewer than fifteen employees, the employer can elect to give up to fifty-six hours of paid sick time to employees, but if not, the employer must provide no fewer than fifty-six hours of unpaid sick time. H.R. 932, 114th Cong. § 5(a)(3). This recognizes the fact that small businesses lack the necessary staff to be able to cover for absent workers. *See* APPELBAUM ET AL., *supra* note 152, at 11 (explaining that because Connecticut's law only applied to businesses with fifty or more employees, only a small percentage of employers had to apply costly measures to cover absent workers). 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).

<sup>243</sup> 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.*

<sup>244</sup> *Id.* § 5(a)(5)(A)–(B).

tions.<sup>245</sup> In exchange, employers are required to provide certain information to employees, such as letting them know their rights under the act.<sup>246</sup>

The act also includes anti-retaliatory measures to prevent employers from terminating an employee for using paid sick time.<sup>247</sup> 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.<sup>248</sup> If there is a violation of these rights, employees or the Secretary of Labor can pursue a civil action against employers.<sup>249</sup>

Giving employers the ability to request medical documentation to justify an absence should curb most unjustified absenteeism.<sup>250</sup> 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.<sup>251</sup> This reduction in pay would acknowledge the burden on employers in having to cover for the absent employee.<sup>252</sup> As observed in France, the slight

<sup>245</sup> *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).

<sup>246</sup> *Id.* § 6(a)(1).

<sup>247</sup> *Id.* § 7(a)–(b).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* § 8(a)(3)–(4).

<sup>250</sup> 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.

<sup>251</sup> 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 SCHÖN, *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).

<sup>252</sup> 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.<sup>253</sup> Ninety 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.<sup>254</sup>

If the employee is using a sick day to seek scheduled preventive care, however, then she should receive one hundred percent of her wages.<sup>255</sup> This would encourage workers to seek preventive care with the hope of eliminating the future need for an unexpected sick day.<sup>256</sup> 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.<sup>257</sup>

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.<sup>258</sup> First, the HFA purposefully covers short-term illnesses.<sup>259</sup> As such, employees may only need a day or two to recover from an illness.<sup>260</sup> Giving them the opportunity to recover at home will hopefully keep the recovery process from being prolonged.<sup>261</sup> Second, if one of the aims of the HFA is to protect public health,

---

<sup>253</sup> 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).

<sup>254</sup> 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).

<sup>255</sup> 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).

<sup>256</sup> 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).

<sup>257</sup> 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).

<sup>258</sup> *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).

<sup>259</sup> S. 1085, 109th Cong. § 2(2).

<sup>260</sup> 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).

<sup>261</sup> 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.<sup>262</sup> 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.<sup>263</sup>

### *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.<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> These workers need both guaranteed pay as well as protection against potential employer retaliation.<sup>267</sup>

Many employers in the United States already offer some form of paid sick leave.<sup>268</sup> Consequently, enacting paid sick day laws would not affect as many

<sup>262</sup> 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. DRAGO & LOVELL, *supra* note 85, at 20.

<sup>263</sup> See Peck, *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).

<sup>264</sup> See U.S. DEP'T OF LABOR, *supra* note 19, at 9 (describing paid sick time momentum at the state and federal levels); Office of the Press Secretary, White House, *supra* note 13 (showing that President Obama advised states and municipalities to adopt paid sick day laws).

<sup>265</sup> Diller, *supra* note 171, at 1284–85. Though not necessarily binding, voter referendums dull the impact of lobbyists and entrenched political parties while demonstrating the popular support for particular legislation. Bryan L. Page, *State of Emergency: Washington's Use of Emergency Clauses and the People's Right to Referendum*, 44 GONZ. L. REV. 219, 234–35 (2009).

<sup>266</sup> See NAT'L WOMEN'S LAW CTR., *supra* note 137, at 1 (noting that women comprise two-thirds of low-wage occupations); U.S. CONG. JOINT ECON. COMM., *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); see also Zillman, *supra* note 95 (explaining that opponents of paid sick leave at the municipal level want to eliminate the “hodge-podge” of local laws). These low-income workers are unlikely to have any form of paid leave. LOVELL, *supra* note 103, at 13. Paid leave is almost non-existent for part-time workers. *Id.* at 6, 13.

<sup>267</sup> 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); APPELBAUM ET AL., *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).

<sup>268</sup> See APPELBAUM ET AL., *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.<sup>269</sup> More objective analysis is necessary to determine how the ordinances affect those businesses that did not previously offer paid sick leave.<sup>270</sup> 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.<sup>271</sup> 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.<sup>272</sup>

The downside of city-by-city implementation is the resulting patchwork of regulations.<sup>273</sup> As the ordinances vary in scope, some cover a significant number of employees whereas others are limited to larger businesses.<sup>274</sup> 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.<sup>275</sup> Though variation makes compliance more difficult for national chains, these chains will be in the best

---

<sup>269</sup> 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).

<sup>270</sup> NELSEN, *supra* note 146, at 1, 15.

<sup>271</sup> 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).

<sup>272</sup> 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.

<sup>273</sup> 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).

<sup>274</sup> 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).

<sup>275</sup> 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.<sup>276</sup>

Another concern with city-by-city implementation is that businesses will relocate to neighboring areas to avoid compliance.<sup>277</sup> The Washington, D.C. audit proved that this has not been the case since enacting its ordinance in 2008.<sup>278</sup> Having a national policy of universal paid sick leave, however, will rectify this concern.<sup>279</sup>

## 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

---

<sup>276</sup> 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).

<sup>277</sup> 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).

<sup>278</sup> BRANCHE, *supra* note 88, at 19.

<sup>279</sup> See Sarah Rumpf, *Why Businesses Leave California*, NAT'L REV. (Nov. 12, 2015), <http://www.nationalreview.com/article/426974/businesses-leave-california-texas> [<https://perma.cc/2QKW-KLDR>] (noting that businesses are leaving California because of extensive regulations).