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September 14, 2020

Submitted via www.regulations.gov

Joan Harrigan-Farrelly
Deputy Director, Women's Bureau
U.S. Department of Labor
Room S-3002
200 Constitution Avenue NW
Washington, DC 20210

Re: Request for Information; Paid Leave (RIN 1290-ZA03)

Dear Deputy Director Harrigan-Farrelly:

Mercer welcomes the opportunity to provide comments responding to the Request for Information regarding paid leave published in the Federal Register on July 16, 2020, by the Women's Bureau of the U.S. Department of Labor (the "paid leave RFI"). We know firsthand through our extensive work with US employers how critically important paid leave programs are to helping employees balance the demands of parenting, health and family. Since the outbreak of the COVID-19 pandemic, these programs have also become a vital component of public health. We greatly appreciate the Department's focus on this issue and are glad to provide our observations and data.

Mercer is a global consulting leader helping clients around the world redefine the world of work, reshape retirement and investment outcomes, and unlock real health and wellbeing for their people. In the United States, Mercer provides consulting, brokering and actuarial services to nearly 5,000 health and benefit clients, including employers of all sizes, with varying employee demographics.

Private sector employers are a significant constituent in the provision of paid leave for employees in the US: in a 2018 survey of 423 employers[1], 61% offered a paid-time off plan (often intended to cover sick days as well as vacation) and 54% offered paid sick leave separate from vacation benefits. Further, a survey of 378 employers conducted this summer[2] found that 57% offer paid leave for child bonding (up from 40% in 2018) and 22% to care for a sick family member (up from 19% in 2018). Both Mercer and its clients are committed to improving job security, healthy communities, and work-life balance for US workers and their families. Paid leave is a key critical component of that effort, but one that is not without cost. While state programs can support businesses, these mandates also add significant complexity. A nationally uniform compliance standard would enhance many employers' ability to offer paid leave programs and lead to a more consistent approach.

Employer-provided paid leave

Employer-provided paid leave takes many forms, including paid vacation or paid time off (PTO), paid sick, disability or medical leave, paid parental or child bonding leave, paid caregiver leave and other paid time off policies targeted at very specific life events such as bereavement or jury duty. Mercer data demonstrates that most large employers find value in providing financial security to employees facing unpredictable and important life events like a serious health issue or the arrival of a new child. Short-term disability benefits were offered almost universally (96%) by the respondents to our 2018 survey, and as cited above, well over half (57%) now offer paid parental leave.

A valuable benefit

Robust paid leave benefits are a valuable recruiting and retention tool for employers, in some cases reducing overall employer costs. They also position the employer as committed to the health and wellbeing of the workforce and by extension, the community. For example:

- Paid leave benefits are a key part of the benefits package used to recruit new employees. As paid leave benefits become increasingly common, failing to offer them can make it difficult for employers to attract talent. This is especially true in industries with fierce competition for skilled talent, such as high tech.

- Paid leave benefits are an important tool for retaining employees and reducing turnover, and a variety of paid leave benefits is necessary to meet the needs of a diverse workforce. Younger

[1] 2018 Mercer Absence and Disability Management Survey.
[2] Mercer 10-minute survey on Parental and Caregiver Leave in the time of COVID-19, 2020. Unless otherwise noted, all the data in this letter comes from our 2020 and 2018 surveys.

employees tend to put a higher priority on paid parental leave benefits, whereas older employees at risk for chronic conditions value benefits that continue pay in the event of disability.

- Paid leave benefits can have a measurable, positive return. While offering paid leave has a cost, the savings the employer gets in the form of reduced employee turnover can exceed that cost. YouTube's CEO claims that after the company increased its parental leave benefit, turnover of female employees reduced by 50%, more than covering the cost of the added benefit.[3]

- Paid leave benefits feature prominently in published lists showcasing the best places for working parents (e.g., https://www.workingmother.com/best-companies). Offering robust paid leave benefits helps employers rate highly in these surveys, earning favorable press and publicity. Access to these "best places to work" lists also can enable employees to become vocal advocates for new or expanded paid leave benefits. Resource groups focused on supporting employees with disabilities or working mothers also raise awareness, praising employers with robust paid leave offerings and pressuring employers that need to expand paid leave benefits.

- Paid leave benefits play a key role in addressing the overall health of the employer's workforce by providing financial wellness and security. Investments in physical and mental health programs can only go so far if employees are not financially secure when unpredictable events — like serious health issues — threaten their income.

The precise value from offering paid leave benefits varies by employer size and industry. Understanding the impact of paid leave benefits on attracting and retaining talent, many employers review benchmark data and keenly watch their competitors when designing paid leave policies. Offering new or more generous benefits than competitors can be a differentiator in the war for talent.

Common features of employer-provided paid leave

Employers have long recognized the need to provide paid family and medical leave benefits. For twenty years, Mercer has been surveying employers' absence and disability management policies. Employers across the country participate, approximately one-third of which have between 100 and 1,000 employees, one-third have between 1,000 and 5,000 employees, and one-third have more than 5,000 employees. Over 400 employers in a variety of industries participated in the 2018 survey: 32% of respondents were in manufacturing, 22% in services, 14% in financial services, 10% in healthcare and fewer in each wholesale/retail and transportation/communication/utility. Mercer also conducts periodic

[3] Poppy Harlow, "Why YouTube's chief wants parents to take more time off," *CNNMoney*, Nov. 2, 2016. https://money.cnn.com/2016/11/02/technology/susan-wojcicki-parental-leave/index.html.

"spot surveys." Most recently, nearly 400 employers participated in a 2020 Mercer spot survey on parental and caregiver leave.

The survey findings demonstrate that most large employers (those with more than 100 employees) provide paid leave benefits to employees, and in most cases the employer-paid benefits far exceed the benefits required by state law. For example, Mercer survey data shows:

- 91% of employers provide short-term disability (STD) or salary continuation for an employee illnesses extending beyond one week
- Only 6% of employers do not offer a benefit beyond the state mandate for an employee's own serious health condition, disability or illness lasting longer than one week
- 60% of employers with a STD program allow employees to supplement with PTO or paid sick leave to achieve 100% salary replacement

Employees are increasingly demanding time to bond with children after birth, adoption or foster placement. Mercer survey data shows:

- 57% of employers offer paid leave to employees to bond or care for a new child
- 6 weeks is the median number of weeks of paid parental leave at 100% of pay provided to the birth parent

Paid leave for illness has become a growing requirement under state and municipal laws and regulations. Workers earn sick time based on their hours worked, enabling them to care for themselves when illness occurs. In most cases, sick time can also be used if an employee needs time off to care for a sick family member, too. Employers have independently recognized that employees need paid leave to serve as a caregiver to a parent, spouse, child or other relative. As the workforce ages, the need for time off to care for aging parents is growing. In response, even where not required by state law, employers have adjusted traditional paid leave programs so they can be used by employees to care for sick family members, or are offering paid caregiver leave benefits.

- Over 60% of employers provide PTO and over 85% of the PTO programs can be used for sick days
- Over 50% of employers provide paid sick leave, separate from vacation or PTO
- 22% of employers provide employees paid leave to care for a sick family member
- 6 weeks is the median amount of paid leave to care for a sick family member provided by employers
- 82% of employers providing paid sick leave allow employees to use the sick days to care for family members

Paid leave benefits offered by employers in the private sector are not limited to full-time employees. For example, Mercer survey data shows:

- Over a third of employers offering paid parental leave to full-time employees also offer the benefit to part-time employees
- 76% of employers offering vacation or PTO offer it to part-time employees
- 70% of employers offering paid sick leave offer it to part-time employees
- 57% of employers offering short-term disability, salary continuation, or an extended illness bank also offer the benefit to part-time employees

Employers construct paid leave programs that fit the needs of their workforce, resulting in some variation in programs. For example, Mercer survey data shows:

- 26 weeks is the median amount of paid family and medical leave among employers offering more leave than is required by law
- 48% of employers providing paid parental leave do not impose a waiting period, while 28% impose a waiting period of one year
- 53% of employers providing paid leave to care for a sick family member do not impose a waiting period, while 25% impose a waiting period of one year
- The annual allowance for paid sick leave varies from a low of 7 days of leave in the wholesale and retail industries to a high of 10 days of leave in the transportation, communication, and utilities industries
- 35% of employers allow employees to use paid sick leave immediately upon hire, while 27% allow use as the time accrues and 25% requires a waiting period before use
- 14% of employers allow unlimited carryover of unused paid sick days from one year to the next

The richness of those policies – meaning the amount of wage replacement and duration – may vary based on employee needs and employer budgets. But in most cases the benefits are employer-funded, unlike state-mandated paid medical and family leave benefits which are usually employee-funded in whole or in part. The employer funded benefits are also often more generous than the benefits under state programs. For example, according to Mercer survey data, employer-sponsored paid parental and caregiver leave benefits typically provide 100% of pay. In contrast, state-mandated paid disability and family leave benefits typically replace no more than two-thirds of pay for most employees.

Factors influencing utilization

A well-intentioned paid leave policy, whether it be voluntarily employer-provided or state-mandated, can still lack in effectiveness. It is Mercer's experience working with employers that a few key factors influence employee utilization of even the most generous paid leave program.

Plan design. The higher the percentage of pay the leave benefits replace, the more "affordable" leave becomes for the employee, increasing financial security and thereby increasing usage. For example, many STD plans start paying benefits at a high percentage of pay (100%) and then drop to a lower percentage (60%–70%) after a certain period of time (e.g., eight to 16 weeks). Companies often see an uptick in return-to-work activity when the benefit percentage drops.

Demographics. The morbidity rate for disability varies by age and demographics. For women of child-bearing age, pregnancy is typically the most common cause of disability. Aside from pregnancy, the probability of disability for both men and women increases with age. The need for paid family leave to bond with a new child or to care for a seriously ill family member may not differ much by gender. However, despite employer efforts to increase usage among male employees, female employees are more likely to use family leave benefits.

Communications. Blanket employee communications such as plan or policy descriptions posted to a company website or workplace bulletin board are important. But employees need to be informed of their paid leave benefits at the time the leave is needed. When an employee submits a request or claim for paid leave, the human resources personnel or benefit plan administrator typically informs the employee of all available benefits, including employer-sponsored benefits and any state mandated benefits. The better the communication about available benefits at the time of inquiry, the more likely the employee is to utilize them. According to Mercer's survey data, approximately two-thirds of employers outsource administration of their STD benefits, one-quarter outsource parental leave administration, and just under half outsource administration of mandated state leave benefits.

Employee engagement. Employers can embed paid leave into the company culture by leading by example with executive and other high-ranking employees utilizing paid leave benefits. When company leaders and managers publicly take advantage of paid leave, employees are more confident that using paid leave will not lead to any negative impact on their own position within the company. For example, Mark Zuckerberg, CEO of Facebook, made headlines in 2017 when he announced that he would be taking advantage of the company's paid parental leave benefit for two months. Examples of this type not only make employees feel that they can take paid leave, but also break down gender barriers by showing that both men and women can and should take parental or caregiving leave when eligible to do so.

Employer cost of providing paid leave

Employer-sponsored benefits like STD or medical leave, paid parental or child bonding leave, and paid caregiver leave can result in significant costs for employers. These costs include direct and indirect expenses that can vary among employers depending on workforce composition and the employer's geographic footprint.

Direct costs

The vast majority of employers with more than 100 employees provide a STD benefit. In general, Mercer's experience indicates employer-paid STD benefits that replace 60% of weekly wages cost employers between 0.50% and 0.75% of payroll. That cost to employers increases to 1% or 1.5% of payroll for weekly benefits that replace 100% of wages. The actual direct cost of STD for any specific employer will depend on a number of factors, including the plan design, the demographic makeup of covered employees and plan experience.

In recent years, paid parental and caregiver leave benefits have become more common. Mercer's recent survey found 57% of employers offer paid parental leave, and over one-fifth (22%) offer paid caregiver leave. In Mercer's experience, employer costs vary greatly, but these benefits typically cost between 0.2% and 0.5% of payroll. As with STD, actual employer costs for parental and caregiver leave will vary by design, demographics and benefit utilization.

Administration. Whether the employer or a third party administers paid leave benefits, the employer incurs the cost. The cost goes beyond simply tracking the time an employee takes for leave. Employers need to confirm that an employee's life event qualifies for leave (e.g., confirm employee meets the plan's definition of disability or the individual needing care meets the plan's definition of family member), continues to qualify for leave, and notifies his or her manager about the absence. Employers also need to ensure the paid leave program utilized complies with any statutory requirements (paid leave benefits or job protections) that may run concurrently with the leave. The employer must also identify opportunities for the employee to transition smoothly back to work at the conclusion of the paid leave. Administrative expenses will typically range from 8%–20% of total leave costs.

Outsourcing administration increasing. Mercer surveys have shown a steady increase in employers consolidating and outsourcing leave administration, across all employer sizes, for all types of paid leave benefits. The majority of employers (62%) are working towards centralized management of leave programs in one department. Less than half of employers administer parental leave and mandated state leave in-house and only one quarter of employers administer STD in-house.

Indirect costs

The benefit costs discussed above represent employers' direct costs for paying employees who are out on an approved leave along with associated administrative expenses. Employers may also incur additional indirect costs:

- If an employee is out on leave, the employer may need to hire another employee or pay overtime to other staff to cover the job responsibilities of the absent worker.
- If an employee out on leave is not replaced, the employer may lose revenue or incur other indirect costs. For example, if a retail employer does not replace an employee out on leave, wait times to checkout may increase, resulting in reduced sales if customers leave without making a purchase. If a manufacturing employer does not replace an absent employee, the percentage of products with defects may increase or production deadlines may encounter delays, indirectly increasing employer costs.
- When employees take on longer hours and/or more responsibilities to cover for absent co-workers, it takes a toll. According to a May 2019 study by the Integrated Benefits Institute,[4] nearly half of employees who experienced a co-worker's extended absence reported at least one associated personal or business consequence. One in five reported more than one consequence. Common personal consequences include increased stress or difficulty completing one's own work. The business impacts range from reduced productivity caused by employee burnout to higher turnover as employees leave to avoid additional work demands.

Of course, one way for an employer to avoid the indirect costs described above is to increase overall staffing levels. That approach would increase the employer's direct labor costs.

Cost variables

Costs vary among employers, largely depending on the composition of the workforce. Generally, hourly employees are more likely to need replacement during absences, especially extended leaves, than salaried employees. Salaried employees can more readily defer work until they return from leave or shift work to colleagues. Replacement labor costs are also likely to be higher for smaller employers than larger employers, since larger employers are better equipped to shift resources to cover the work of absent employees. The extended absence of just one employee on paid family or medical leave can result in significant indirect costs for a very small employer, since that single employee is a larger percentage of

[4] Brian Gifford, "What Really Happens When a Co-worker Takes Extended Leave?," Integrated Benefits Institute, May 2019. https://www.ibiweb.org/resource/impacts-of-co-workers-leaves/.

the workforce. Of course, costs will be the highest for employers that have a large portion of employees taking paid leave for extended periods of time.

Patchwork of state mandates increase employer costs

Currently, nine states (CA, CT, HI, MA, NJ, NY, OR, RI, WA), along with Washington, DC, and Puerto Rico, have enacted laws requiring paid leave for an employee's own serious health condition or disability and — with the exception of Hawaii and Puerto Rico — for qualifying family or caregiving reasons**.** Although the focus of the request for information and this comment is on paid family and medical leave programs, it should also be noted that 15 states (AZ, CA, CO, CT, ME, MD, MA, MI, NV, NJ, NY, OR, RI, VT, WA) and Washington, DC and over 20 cities and counties have enacted laws requiring employers to provide accrued paid leave to employees. This patchwork of state and local paid leave laws – both paid family and medical leave programs and accrued paid leave mandates – increases multi-jurisdictional employer administration costs and undermines employer efforts to create uniform paid leave benefits designed for the needs of their particular workforce.

Positive aspects of state mandated paid leave benefits. While most large employers provide some paid leave benefits, not all do, and the prevalence of paid leave benefits is far lower among small employers than large employers. For employees without employer-sponsored paid leave benefits, state-mandated leave programs may be the only paid disability and family leave benefits available. For employers with all of their employees in a single state, these state requirements provide a consistent, minimum level of paid leave benefits. Multistate employers may be able to utilize state-mandated benefits as a baseline, especially if the employer has a large portion of its employees in one of those states.

Variation among state programs increases complexity. State-mandated paid family and medical leave programs vary significantly from state to state. Differences are present in the funding structure, benefit duration, amount of wage replacement, permissible uses, eligibility criteria, and the definition of family member, among other elements. For example:

- Programs are funded by employee contributions or a combination of employer and employee contributions. In 2020, maximum funding requirements vary from 0.4% of wages (WA) to 1.3% of wages (RI).
- In some cases, the cost of state benefits exceed the cost of comparable employer-sponsored benefits.
- The available uses for state paid family and medical leave benefits vary widely. The most common element is to provide benefits for child bonding and the employee's or a family member's serious health condition. Variations arise in the opportunity to access benefits for organ or bone marrow donation, public health emergencies, and military exigencies.
- The duration of available leave varies significantly. The District of Columbia program provides two weeks of paid leave for an employee's serious health condition while California provides 52 weeks

of wage replacement. A number of state programs provide 12 weeks of paid family leave while Rhode Island provides only four and California provides eight.
- The definition of family member for purposes of state-mandated paid family leave often goes well beyond the federal Family and Medical Leave Act definition. Nearly every state program includes domestic partners, grandparents, grandchildren and siblings, while the most expansive definitions include any individual related by blood or any individual whose close association to the employee is akin to family. In contrast, 79% of employers providing paid family leave use the federal FMLA definition of family member to determine eligibility for an employer-sponsored paid family leave program.

For multistate employers, this variation creates a complex claim process for employees, especially in states that do not permit employers to establish private insured or self-insured plans. Employees are often confused about how to obtain benefits from the state and how the benefits coordinate with other programs, such as federal FMLA, employer-provided STD or other company benefits. By contrast, uniform employer-sponsored programs provide consistency in paid leave benefits, regardless of an employee's location.

The variations also result in an imbalance of benefits available to an employer's workforce depending on the jurisdiction in which they work. Employees in a state that does not have a mandatory leave program can feel shortchanged by their employer. Employers struggle to bring equilibrium to the benefits offered across multiple jurisdictions. Because of this complexity, more than a fourth of employers have established a leave policy expected to exceed state/local statutory requirements and more than one in 10 multi-state employers maintain a single national policy based on the most generous leave law with which the employer must comply.

The complexity of managing multiple state-mandated programs can create a disincentive for employers to experiment with new and innovate benefit designs targeting the needs of their workforce. For example, employers that want to offer more generous benefits in states like California or Washington must apply to the state administrative agency to have a leave plan approved and must maintain ongoing compliance with the state requirements. The increase in the prevalence and variation of state-mandated leave programs limits employers' ability to enhance and expand their own leave policies. Specific impediments include:

- Keeping current with any new mandates or updates to existing mandates to ensure employer policies remain current with the proper offsets, if any
- Monitoring ongoing costs associated with leave programs and the impact on productivity
- Training and communication of changes to employees and managers

- Ensuring all changes to the plan are effectively administered internally (i.e., legal, timekeeping, payroll updates) and with a third-party vendor (communications, leave management process, etc.).

Changing employer leave policies requires oversight and ongoing governance of the program that is even more complicated for employers also trying to coordinate with multiple state mandates.

Variation among state programs increases cost. The variations among programs make it difficult for multi-jurisdictional employers to keep up with each program's requirements and compliance demands. As the number of states with mandated benefits increases, each with their own unique design, employers' administrative and cost burdens increase. Although statutory benefits paid for – in full or in part by employee contributions – can offset employer-sponsored benefits and thereby reduce direct costs, employers have to devote significant resources to meet statutory administrative and compliance requirements, while ensuring efficient coordination of employer and state benefits. Employers need to remain current on updates to the state laws and rules, communicate changes to employees and train administrators and managers on any changes. Third-party vendors can coordinate and offset employer-provided benefits with state benefits, but only when state laws make such coordination possible. The integration of PTO, vacation and sick leave, FMLA leave and company STD are critical to the success of the paid leave programs. Expanded state leave policies are making that integration more difficult for employers and employees.

It's no surprise that nearly two-thirds of employers say they have seen an increase in resources required to handle statutory paid leave mandates in recent years. The majority of employers administer mandated state and local leave through either centralized in-house resources (41%) or outsourcing/co-souring (43%). Outsourcing/co-sourcing is more common among larger employers — 57% of employers with 5,000 or more employees use it. Nearly two-thirds of employers (65%) indicate that they track and comply with all applicable state and local rules. More than a third (38%) hire a third party to monitor and help comply with state and local rules.

National standard needed

The COVID-19 pandemic has highlighted the need for a uniform, nationwide approach to paid leave, and put a spotlight on the patchwork of state and local requirements that arise in the absence of a federal solution. Although the Families First Coronavirus Response Act (FFCRA) developed a nationwide emergency paid leave program for certain employers and employees, many state and local governments thought it did not go far enough. As a result, at least 10 states and over 15 municipal governments have passed emergency paid leave requirements or expanded current paid family and medical leave programs or accrued paid sick leave mandates. Employers, particularly multi-jurisdiction employers, are left struggling in a time of crises to understand the compliance requirements of a number of different laws while at the same time trying to provide for their workforce in a consistent and meaningful way. This crisis has exacerbated the struggle large employers face managing the patchwork of state and local paid leave requirements noted above.

A nationwide paid family and medical leave model would improve the current patchwork landscape and lead to a more consistent approach. A federal option that pre-empts state and local requirements could increase the prevalence and value of paid leave benefits, reduce costs and enhance employees' experience. Mercer survey data found that more than half of respondents (55%) supported or strongly supported a voluntary federal minimum standard for paid leave that would alleviate the need to comply with the patchwork of state programs. That number has surely risen with the increase in state-mandated programs. A voluntary federal standard would be welcome relief for employers that have been working to address their employees' need for paid leave benefits – and for those that have increased resources devoted to handling state and local leave administration. In 2018, only 7% responded that they would oppose or strongly oppose a voluntary federal minimum standard and the rest (38%) were neutral.

At the very least, federally required consistency across state paid family and medical leave programs would be a welcome change, helpful to both employers and employees. In particular, requiring that state programs allow insurers — rather than a state agency — to deliver mandated benefits would help multistate employers while doing no harm to smaller, single-state employers. Private insured plans in New York have a long record of effectively delivering state-mandated benefits without the need for a state administered plan. Consistency in statutory program design and benefit delivery would support employer efforts to offer new or expanded paid leave benefits across a multi-jurisdictional workforce. Absent a federal solution or improved consistency among state mandates, Mercer expects employers will continue to resist future state mandates as cost and complexity threatens to outpace value.

Conclusion

Mercer would like to thank the Women's Bureau for establishing a platform for an important conversation around paid leave for employees. In our ever-evolving discussions with our thousands of clients, we often hear that employers want to provide a uniform paid leave benefit to their employees across the country. We also hear that the complexity of the growing list of state-mandated paid family and medical leave programs and state and local accrued paid leave laws increases employer cost, creates benefit imbalance across the workforce, and confuses employees when they need to take paid leave. The request for information is a step in the right direction towards a federal policy that allows employers to voluntarily meet a federal standard and alleviate the need to comply with a myriad of different state and local standards. This would increase uniformity in paid leave benefits for an employer's workforce and reduce complexity and cost for employers.

We would welcome the opportunity to meet with you to discuss this important topic. If you have any questions or need further information, please contact Katharine Marshall (katharine.marshall@mercer.com).

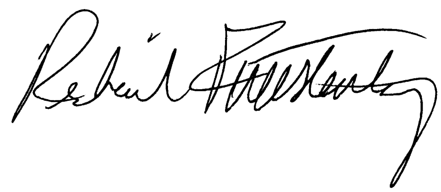
Sincerely,

Simon Camaj

Partner

Life, Absence and Disability National Practice Leader

Sincerely,



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Senior Partner