Practical Legislative Language for an Effective Paid Family Leave Program

Many employers offer generous paid family leave benefits to their employees. These employers recognize that providing paid leave benefits helps them attract and retain talented workers and that this in turn helps their businesses succeed.

And yet, administering this benefit can be a challenge as states, and even localities, pass conflicting paid family leave mandates with different benefit periods, different eligibility requirements, and different financing arrangements. In states that decide to pursue paid family leave legislation, specific legislative language addressing a number of critical issues will ensure that leave programs operate effectively, are consistent with other state and federal statutes, and do not act as a disincentive for employers to maintain existing paid family leave benefits. This language is modeled after existing state and federal laws.

I: Preemption

An effective state paid family leave program should set the standard for the state as a whole. However, a number of municipalities have passed, or considered, their own paid family leave ordinances. This creates a patchwork of conflicting laws that makes it very difficult to employers to comply. Any state paid family leave law should preempt local ordinances, providing employers with a single standard to meet. However, preemption language should not prevent local governments from passing leave mandates covering their own bona fide employees.

The legislative language below is modeled on an existing preemption law in Michigan.

> 1: It is the intent of the legislature to ensure uniformity in any paid leave program. As such, a local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution establishing any paid leave program. Any such existing program is subordinated to this statute.
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> 2: "Local governmental body" means any local government or its subdivision, including, but not limited to, a city, village, township, county, or educational institution; a local public authority, agency, board, commission, or other local governmental, quasi-governmental, or quasi-public body; or a public body that acts or purports to act in a commercial, business, economic development, or similar capacity for a local government or its subdivision.

3: The provisions of section 1 shall not prevent a local government body from establishing any leave program covering its own employees provided that such program is not construed to cover contractors or subcontractors working on behalf of the local government body.

II. Premiums

The state of California established its paid family leave program in 2004. Under state law, paid leave benefits are funded by a small payroll tax on employees. Washington State has a paid family leave law that, like California's, also funds the program through a payroll tax. The logic is simple: since employers have to deal with the absences that will result from employees taking paid leave, they should not have to fund the program as well.

The language below, which establishes the payroll tax, is taken from the Washington State statute. The effective date and particular state department that shall administer the program have been left blank, along with the exact premium rate to be applied.

1: Beginning January 1, 20xx, the department of xx shall assess for each individual in employment with an employer a premium based on the amount of the individual's wages subject to subsection 5 of this section.

2: Beginning January 1, 20xx, and ending December 31, 20xx, the premium rate shall be xx-tenths of one percent of the individual's wages subject to subsection 5 of this section.

3: An employer may deduct from the wages of each employee up to the full amount of the premium required.

4: An employer may elect, but is not required, to pay all or any portion of the employee's share of the premium for family leave

5: The commissioner of xx must annually set a maximum limit on the amount of wages that is subject to a premium assessment under this section that is equal to the maximum wages subject to taxation for social security as determined by the social security administration.

III. Leave Categories

The federal Family and Medical Leave Act (FMLA) includes a number of leave categories, defining the conditions and circumstances that make an employee eligible to

take leave. These categories are already familiar to employers around the country. Including these categories by reference in a state paid family leave statute will make compliance easier for employers and ensure that leave categories are consistent across state lines.

While this language has been lifted from the FMLA, the duration of leave is left to the discretion of the state legislature.

1. An eligible employee under this Act shall be able to claim xx workweeks of leave during any 12 month period for purposes consistent with those specified in the federal Family and Medical Leave Act.

IV. Collective Bargaining Agreements

This language is intended to ensure that collective bargaining agreements will not have to be pro-actively opened and renegotiated upon passage of a paid family leave bill, minimizing disruption in workplaces with union representation. Once the collective bargaining agreement reaches its natural end point, the provisions of the new state law will have to be included. This language is taken directly from the Washington State statute.

1. Nothing in this chapter requires any party to a collective bargaining agreement in existence on [date of passage], to reopen negotiations of the agreement or to apply any of the rights and responsibilities under this chapter unless and until the existing agreement is reopened or renegotiated by the parties or expires.

V. Coordination of Benefits

While it is the intent of a paid family leave bill to provide time off, that leave should be coordinated with other available leave programs so that employees do not double or triple dip. For example, leave should run concurrently with programs like the federal FMLA. The language below on coordination of benefits is modelled after legislation in New Jersey.

1. An employer may require that leave granted or payment made pursuant to this chapter be made concurrently or otherwise coordinated with the payment made or leave allowed under the terms of an employer's disability or family care leave policy or an applicable collective bargaining agreement. Any leave or paid benefits provided under an employer's policy or collective bargaining agreement that is used by the employee for a covered reason and is paid at the

same or higher rate than leave available under this chapter shall count against the allotment of leave available under this chapter. The employer shall give employees written notice of this requirement.

2. Leave taken under this chapter shall run concurrently with leave taken under the federal Family and Medical Leave Act of 1993 [or applicable state law]. Employees who take leave under this chapter while ineligible for leave under the Family and Medical Leave Act of 1993 may take leave under the Family and Medical Leave Act of 1993 in the same benefit year only to the extent they remain eligible for concurrent leaves under this chapter.

VI. Establishment of Private Plans

Many employers already provide paid family leave to their employees, and in some cases this leave is more generous than what state law would provide. Forcing these employers into a state program can create disincentives to maintain more generous benefits. Thus, existing paid family leave programs that are more generous than state requirements should receive an exemption under state law. The state agency responsible for administering a state paid leave program can provide periodic certification that a private plan meets all state requirements. The language below provides such an exemption and is taken from laws in New Jersey and Massachusetts.

1. Any covered employer may establish a private plan for the payment of disability or family leave benefits or both in lieu of the benefits of the State plan established herein. Approval of a private plan also relieves a covered employer from the requirements set forth in sections [INSERT] of the act.

2. Each such private plan shall be submitted to and approved by the [APPLICABLE STATE AGENCY] if it finds that:

   (a) all of the employees of the employer localized in the State and eligible for participation under the State plan are to be covered under the provisions of the private plan with respect to any disability or family leave commencing after the effective date of such plan, except as otherwise provided in this section; and

   (b) eligibility requirements for benefits are no more restrictive than as provided in this act for benefits payable by the State plan; and

   (c) the weekly benefits payable under such private plan for any week of disability or family leave are at least equal to the weekly benefit amount payable by the State plan, taking into consideration any coverage with respect

to concurrent employment by another employer, and the total number of weeks of disability or family leave for which benefits are payable under such private plan is at least equal to the total number of weeks for which benefits would have been payable by the State plan; and

(d) no greater amount is required to be paid by employees toward the cost of benefits than that prescribed by law as the amount of worker contribution to the State disability or paid family leave benefits fund for covered individuals under the State plan; and

(e) coverage is continued under the private plan while an employee remains a covered individual as defined in this act, but not following termination of employment to which the private plan relates.

3. Once a private plan is approved, it will go into effect on the effective date of this act if approved no later than [DATE] or as of the first day of the calendar quarter next following the approval, unless an earlier date is requested by the employer and approved by the [APPLICABLE STATE AGENCY].

4. Subject to the approval of the [APPLICABLE STATE AGENCY], any such private plan may still be approved as a private plan even if it excludes a class or classes of employees, except a class or classes determined by the age, sex or race of the employees, or by the wages paid such employees. Covered individuals so excluded shall be covered by the State plan and subject to the employee contribution required by law to be paid into the State disability benefits fund until such time as they qualify for coverage under the private plan.

5. Benefits under such a private plan may be provided by a contract of insurance issued by an insurer duly authorized and admitted to do business in this State, or by an agreement between the employer and a union or association representing his employees, or by a specific undertaking by the employer as a self-insurer. Subject to the insurance laws of this State, such a contract of insurance may be between the insurer and the employer; or may be between the insurer and two or more employers, acting for the purpose through a nominee, designee or trustee; or may be between the insurer and the union or association with which the employer has an agreement with respect thereto.

VII. Enforcement and Penalties

The federal Family and Medical Leave Act was passed in 1993, and employers are well versed in its enforcement and penalty structure. For states considering paid family

leave, it would ease compliance and establish certainty for employers if the enforcement and penalty structure were incorporated. The language below is taken straight from the FMLA.

SECTION xx: ENFORCEMENT.

(a) CIVIL ACTION BY EMPLOYEES.--

(1) LIABILITY.--Any employer who violates (this act) shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to xx weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section (this act) proves to the satisfaction of the court that the act or omission which violated (this act) was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation (of this act), such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) RIGHT OF ACTION -- An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a

public agency) in any court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) FEES AND COSTS -- The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) LIMITATIONS -- The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the (relevant state agency) in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the (relevant state agency) in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the (relevant state agency).

LIMITATION.--

(1) IN GENERAL -- An action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) WILLFUL VIOLATION -- In the case of such action brought for a willful violation, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.