



PeopleImages / Getty Images

Paid Family and Medical Leave and Employer Private Plans



CLASP
The Center for Law and Social Policy

**Chantel Boyens, Jack Smalligan
and Patricia Bailey**

July 2021

Note: Chantel Boyens is a principal policy associate, Jack Smalligan is a senior policy fellow, and Patricia Bailey is a visiting fellow at the Urban Institute.

Introduction

Access to paid and unpaid family and medical leave is growing in the United States. This growth is being fueled by the passage of state laws providing workers with new benefits and legal rights modeled after the Family and Medical Leave Act (FMLA), as well as by very modest growth in voluntary employer-provided benefits. As state programs expand, and interest in a universal federal policy grows, the interaction between publicly provided benefits and voluntary employer benefits raises several important policy questions. Most state paid family and medical leave insurance programs provide employers with an option to provide the state benefit through their own private plan alternative. However, states vary in their approach to approval and oversight of private plans and little is understood about their impact. For instance, do workers enjoy the same level of access to promised benefits and rights under private plans, particularly lower-wage and part-time workers, workers of color, and women? What benefits and drawbacks exist for employers who offer private plans? How do public benefits interact with commercial short-term disability insurance benefits? How can states' policies for approval and oversight of private plans affect outcomes for workers and businesses?

In this paper, we take a closer look at private plan options in the context of state-administered paid family and medical leave programs. We begin by reviewing the current market for private short-term disability insurance that is available in all states, including worker coverage and typical plans and services offered. We discuss options available to employers under state plans and factors that affect an employer's decision to use a private plan for some or all workers. We then describe the parameters states establish to approve and monitor private paid family and medical leave plans and discuss how state approaches interact with worker access and employer take-up of private plan options.

Paid Leave Coverage and the Private Insurance Market

Approximately 56 percent¹ of U.S. employees are eligible to take unpaid leave under the Family and Medical Leave Act of 1993 (FMLA).² However, only 21 percent of US workers have access to paid family leave through their employer and 40 percent of civilian workers have access to short-term disability insurance (SDI).³ Workers currently gain access to paid leave through voluntary employer-provided benefit plans or through a state-administered paid leave program.

At present, virtually no commercial market exists for paid parental and family caregiving leave. However, nine states and the District of Columbia have enacted paid family and medical leave programs, including three enacted in the last two years.⁴ As a result, approximately a quarter of the U.S. population now resides in a state with an enacted paid family and medical program.⁵ Of these 10 programs, seven are currently providing benefits to workers, including Rhode Island, California, New Jersey, New York, Washington, Massachusetts, and the District of Columbia.⁶ Connecticut, Oregon and Colorado will join them over the next three years.

The benefits provided by state paid family and medical leave programs include three primary types of leave: parental (or bonding) leave to care for a child after birth, adoption, or foster care placement; family caregiving leave to care for a close family member with a serious medical condition; and medical leave (or temporary disability insurance) to address one's own serious medical condition.

Among these three types of leave, paid medical leave is the most frequently used. It is also the most widely available type of leave, with many workers gaining access to medical leave in the form of short-term disability insurance (SDI). It is also the only type of leave for which a large commercial insurance market already exists for both employer-provided group coverage and individual coverage.

According to the Bureau of Labor Statistics (BLS) National Compensation Survey (NCS) data, the number of workers with access to SDI benefits has grown slowly over the last two decades, from 36 percent in 1999⁷ to 40 percent in 2020.⁸ Not captured in this data are workers who have access to paid medical leave through employer policies that allow workers to accumulate and carryover paid sick leave balances. BLS NCP reports that 78 percent of workers have paid sick leave (table 31) and 57 percent of employers allow some or all sick leave balances to be carried over (table 35).

Access to private paid family and medical leave is also spread unequally among workers. For workers in the lowest quartile of wages, only 19 percent have SDI benefits and only 9 percent have paid family leave benefits. For workers in the highest quartile of wages, 55 percent have SDI benefits and 32 percent have paid family benefits.

Access is also skewed by the size of employers. Of workers employed by businesses with 49 or fewer employees, 29 percent had SDI benefits and 14 percent had access to family leave benefits. At businesses with 500 or more employees, 53 percent of workers had SDI benefits and 29 percent had family leave benefits.

Commercial Short-Term Disability Insurance and Employer Self-Insurance in all 50 states

Among employers who provide SDI benefits, most do not require a separate employee contribution and, instead, choose to absorb the full cost of the benefit. BLS reports that only 15 percent of employers require an employee contribution to fund benefits (table 15). However, contribution requirements also vary widely by earnings level, with 28 percent of workers in the lowest quartile of wages required to contribute, compared to only 11 percent of workers in the highest quartile.

The International Foundation of Employee Benefit Plans conducts an annual survey that, while not nationally representative, sheds light on a large sample of corporations. It includes 677 companies. In 2018, among companies offering SDI benefits, most (54.3 percent) self-insure; a few (4.2 percent) self-insure (with commercial stop-loss insurance for excess costs); while the remaining 41.5 percent of the companies are fully insured through a commercial carrier. In contrast, for LDI, 88.3 percent of companies are fully insured through a commercial carrier.

According to Milliman, SDI firms had premiums of about \$5 billion in 2018. While significant, it is much less than the \$12 billion in premiums for the long-term disability insurance firms in 2018.⁹ In addition, SDI carriers also offer other services that are critical to employers, such as absence and leave management as well as overall benefit management. For example, the biggest player in the SDI industry, UNUM, had revenue from SDI premiums of \$824 million in 2019¹⁰ and overall revenue of \$12 billion.¹¹ Consequently, it is very difficult to understand the profitability of SDI in isolation, from simply looking at public financial records.

One generally available indicator is the “loss ratio” a company reports, which is simply a ratio of aggregate claims paid to aggregate premiums collected. In other words, a company with a high loss ratio is devoting a high proportion of premiums to pay benefits whereas a company with a low loss ratio is using more of the premiums for administrative expenses and potentially to retain as profits. However, as we explain in more detail below, the loss ratio alone does not necessarily indicate the profitability or efficiency of a company’s insurance products.

The loss ratio was first used for casualty insurance, such as auto and homeowners, where the renewal periods are short.¹² The National Association of Insurance Commissioners annually reports insurance policy experience for a wide range of insurance products. In 2019, 97 companies provided SDI insurance, 19 of those 97 companies made up 90 percent of the SDI

market, with \$6 billion in premiums and 30 million workers covered. Lincoln National Group, the second largest company, had the highest loss ratio of 83.2 percent while the American Fidelity Corporation, the nineteenth largest insurer, had a loss ratio of only 42.8 percent. On a weighted average, these 19 companies had a loss ratio of 70 percent. Overall, the 97 companies covered in NAIC's report had a loss ratio of 69 percent, premiums of \$6.6 billion that covered policies for 32.7 million workers.

Interestingly, New York State's (NYS) paid leave system may shed a little more light on the private SDI market generally across states. New York's program is unique among the states in that it relies on an employer mandate to provide PFML benefits. Employers must choose between the New York State Insurance Fund (SIF) and other private insurance carriers.¹³ In setting its rates, New York requires companies to have a minimum loss ratio of 60 percent. When the loss ratio falls below 60 percent, the company is required to refund the excess premiums collected.¹⁴ In contrast, the Affordable Care Act requires health insurance companies to have a medical loss ratio of 80 percent to 85 percent, with premiums rebated if the loss ratio is lower.¹⁵ While there is a marked difference in loss ratios, it is still difficult to fully discern ultimate profitability for either SDI or health insurance since administrative costs and other factors are not publicly available.

Two other factors that make it difficult to fully assess the profitability of the SDI market are the complexity and changing nature of products and services offered and the variability of state regulation. Insurance companies offer employers SDI policies; the choice of administrative services-only options for employers who self-insure; or a combination of the two. Insurance carriers often offer SDI in combination with LDI benefits and administration, worker's compensation insurance, and administration of FMLA and Americans with Disabilities Act employer requirements. The number of products and combinations makes it difficult to assess pricing and profits. A Society of Actuaries discussion of the SDI market in 2002 included a contention that 75 percent of the companies in the industry were losing money on the SDI benefit. However, the same actuaries found that the much larger LDI market is quite profitable, suggesting SDI may be a loss leader for other products and services offered by carriers.¹⁶

Regulation of private disability insurance is primarily left up to states. However, according to the National Association of Insurance Commissioners, while states may issue standards for SDI products, most use a "file and use" system of oversight. This system relies on carriers to offer products that meet state laws and regulations, but does not require review and approval before they can be sold to employers and used by individuals.¹⁷ This regulatory environment

means that some carriers could offer SDI benefits that exclude or limit payments in cases where an individual had a pre-existing condition. In contrast, states with paid leave programs require employers who choose to offer the state benefits through a private plan to submit their plans for prior approval. As we describe in more detail later, states conduct oversight and monitoring of private plans for paid leave to ensure that workers are offered the same or better benefits as those available directly from the state paid family and medical leave programs.

In addition to the availability of commercial SDI, many employers also choose to self-insure for benefits, including disability, paid family leave, and health insurance. Employers in states with publicly financed paid leave programs who choose to self-insure are often large, operate in multiple states or countries, and have sophisticated systems (either internal or external) for benefit and leave administration. Some employers may self-insure, but rely on an insurance carrier or third-party administrator to assist them in administering the benefit, leave-tracking, and complying with any state, local, and federal rules. Oversight of employer self-insurance programs for disability are handled at the state level as well.

State Paid Leave Programs and Private Insurance Options

A key design element of state PFML programs is whether they allow employers the option of providing the required state benefit to their employees through an approved “private plan” alternative (also referred to as a voluntary plan in California). Currently, seven out of the 10 publicly funded PFML programs allow private plans. The use of private plans in public PFML benefit programs raises important questions about whether workers will have the same access to leave and benefits as they would under the public program, particularly for lower-paid workers, workers of color, and workers with fewer employment protections. The availability of private plans also has consequences for highly-compensated workers, who already have access to greater benefits; for large multi-state employers; and the private market for short-term disability insurance and related services.

State PFML programs vary along many dimensions, such as length of leave, wage replacement level, and worker eligibility criteria, among many others. However, while each state’s program is different, most share the same basic structure for administering benefits. As shown in Table 1 below, all but two states have programs that can be characterized as state-administered social insurance programs, where the responsible state agency determines benefit eligibility

and issues payments. In these states, benefits are financed by premiums (payroll taxes) levied on either employers, employees, or both, and deposited into a state-administered fund.¹⁸

Table 1 - State Paid Leave Programs and Availability of Private Plan Options		
State	State-Administered Social Insurance Model?	Allow for Private Plan Options?
California	✓	✓
New Jersey	✓	✓
Rhode Island	✓	✗
New York	Employer Mandate (Funded)	✓
District of Columbia	✓	✗
Washington	✓	✓
Massachusetts	✓	✓
Connecticut	✓	✓
Oregon	✓	✓
Colorado	✓	✓

Notes: Family leave refers to both parental and family caregiving leave.

Unlike the other states, which allow employers to offer coverage for either medical leave or family leave, or both, California requires that private plans cover all types of benefits. Hawaii has a statewide unfunded paid medical leave mandate, but no paid family leave.

As shown in the table, states that have adopted social insurance models can be divided into two types:

1. those where paid leave benefits are administered solely by the state; and
2. those where the state administers the paid leave benefit unless an employer requests permission to provide the state benefit through a private plan.

In addition to states with traditional social insurance programs, New York has established a program that relies on an employer mandate that requires employers to provide paid family and medical leave insurance that meets standards set by the state. In addition, New York provides a state insurance fund option that competes with other private carriers to provide the required state benefit.¹⁹ Because of this and other key differences described below, we do not discuss New York's program in detail in this report.

New York's Paid Leave Model

Employers in New York are required to provide paid family leave and disability benefits coverage. Employers can comply with the requirement by either self-insuring; purchasing a policy from a private insurance carrier;²⁰ or purchasing a policy from the state's competitive fund via the New York State Insurance Fund (NYSIF).²¹ New York's model is unique among states and given the substantial role for private plans is especially relevant to our discussion. Unfortunately, while we can describe the features of the New York program, we do not have any research or data with which to compare the relative performance of New York's program with that of other states.

For disability insurance, New York's program is funded jointly by both the employer and employee. The employer is obligated to provide benefits and may deduct no more than 0.5 percent from employees' wages (but no more than 60 cents a week) to offset the cost of a plan. Covered employees are entitled to up to "26 weeks of disability during any 52 consecutive week period,"²² paid at 50 percent of their average weekly wage but capped at \$170 per week.²³

For family leave insurance, which began paying out benefits in 2018, the program is solely funded by employee payroll contributions set each year to match the cost of coverage.²⁴ For 2021, the employee contribution is 0.511 percent of an employee's gross wages each pay period, with a maximum annual contribution of \$385.34.²⁵ Covered employees will be entitled to up to 12 weeks of leave, paid at 67 percent of their average weekly wage, up to 67 percent of the New York State average weekly wage.²⁶ This results in a maximum weekly benefit amount of \$971.61 for 2021.²⁷

Employer Use of Private Plans in Paid Leave States

While most state PFML programs allow for employers to provide the state benefit through private plans, the number of approved private plans and covered workers varies widely. As shown in Table 2, as of 2018, 23 percent of eligible employees (821,684)^{28, 29} were covered by private plans in New Jersey, while only 3.4 percent of covered employees (636,156) were participating in a private plan (known as a voluntary plan) in California.³⁰ The total average number of covered employees participating in a private plan in California has declined slowly, from a peak of 4 percent (488,192) in 2009.³¹ In Washington, after their first year of paying benefits, 268 employers provided a private plan, of which 86 percent (231) covered both family and medical leave; 12 percent (32) cover medical leave exclusively; and 2 percent (5) only cover family caregiving.³²

Massachusetts is the newest program and has the largest number and proportion of workers covered by private plans. In 2020, roughly a third of covered workers (approximately 1,000,000) receive state benefits through an approved private plan.³³ It is unclear why there is a larger number of private plans; but a key factor may be that employers had an economic incentive to use private plans, since the law allowed businesses with existing plans to avoid paying the initial premiums levied before benefits began. Some employers may therefore decide to drop their plans in the future if the state fund proves less costly than their current plan.

Table 2 - Private Plans in States with Fully Implemented PFML Programs

	California	New Jersey	Washington	Massachusetts
Number of Private Plans	2,551	6,191	268	4,426
Number of Covered Employees	636,156	821,684	n/a	~1,000,000
Percentage of Covered Workers	3%	23%	n/a	33%

Note: Excludes New York since it uses a different benefit model.

A number of factors may influence employer behavior and the number of private plans in each state. These factors include cost; availability of commercial insurance; desire to provide better or consistent benefits to workers in different states; need for leave administration and compliance services; and state rules governing the approval of private plans. We discuss each

of these below.

Cost to Employers of Paid Leave Benefits

For employers, the decision over whether and how to provide required paid leave benefits are likely driven by cost considerations. However, it is first important to understand that the cost of paid family and medical leave benefits is modest relative to the cost of other employer-provided benefits, especially health insurance. In 2018, private industry employers provided benefits that averaged \$10.41 per hour, with health insurance representing \$2.58 per hour of those costs.³⁴ The BLS National Compensation Survey (NCS) tables do not readily show the cost for a family leave or SDI benefit. A special report by Kirsten Monaco with the BLS in 2014, however, found the cost of SDI benefits for those workers who received them was only \$0.15 per hour.³⁵ Hartman and Hayes estimate that medical leave benefits represent two-thirds of the cost of a comprehensive PFML benefit, or approximately \$0.23 per hour—a tiny portion of overall employer costs.³⁶ Consistent with these estimates, the Social Security actuaries estimate that the comprehensive, 12-week PFML benefit proposed in the FAMILY Act would cost 0.62 percent of payroll.³⁷ With cash compensation averaging \$24.36 per hour in 2019, this translates into roughly \$0.15 per hour.

For employers, this means the direct cost of paid leave benefits are modest. Employers also incur some additional costs while workers are on leave, such as health care spending.³⁸ How employers manage these costs will depend on the size of the firm; the nature of the business; employee wage levels; and the ease of hiring and training new workers. Large firms that can afford to have dedicated leave management staff or contracts with intermediaries will be more interested in self-administering a PFML benefit if it simplifies and improves their overall leave management process. Similarly, firms with high-wage workers, or workers who are hard to recruit or train, may have more incentive to self-administer, especially if they are using a generous benefit package to recruit and retain workers.

Commercial Insurance in Private Plans

For private insurance companies, premiums from private paid medical leave in the form of short-term disability insurance (SDI) is a significant, but modest, percentage of overall insurance revenue. Insurance companies also generate revenue by providing leave management services, which are also often provided by third party administrators, as discussed below. In 2019, for the five largest SDI providers, SDI premiums ranged from 7 percent to 0.4 percent of total revenue. Whether commercial carriers offer an insurance

product to meet a state's required paid leave benefit depends in large part on the cost of the state plan and whether a carrier can offer a competitive plan.

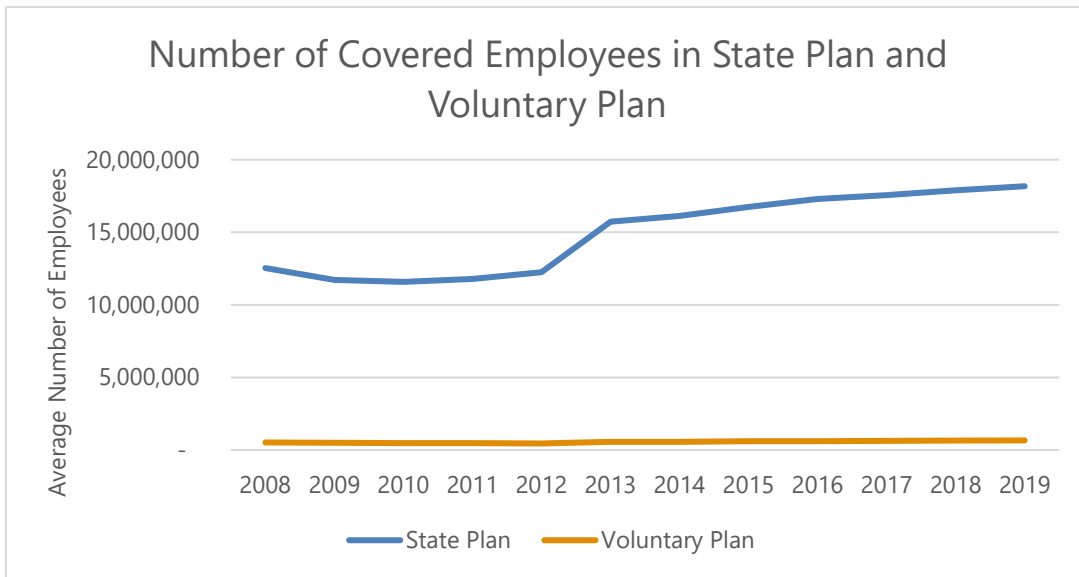
Another issue insurers consider is how SDI interacts with long-term disability insurance (LDI). Insurance companies providing SDI policies generally also offer LDI policies, a larger and more profitable industry. Effectively helping workers recover from long-term disabilities can reduce insurers' LDI costs. A significant Society of Actuaries report in 2008 used confidential industry data from the major LDI insurers and found a very wide range in actual to expected recovery rates across companies.³⁹ In other words, some companies were much more effective at helping newly disabled workers recover and return to work.

At the same time, research on how to help workers with on-the-job injuries has been evolving over the last several decades. Data shows the potential for cost savings for employers and insurers from return-to-work programs in the context of worker's compensation cases.⁴⁰ Our conversations with industry experts and review of industry marketing materials suggests that this research has influenced industry practices. Leave management companies are increasingly focused on reducing costs by improving recovery rates for workers who experience work-limiting disabilities. LDI benefits represent a much larger financial exposure for insurers than SDI benefits. The two benefits interact, however, since intervening earlier with workers through return-to-work programs while they are receiving SDI benefits can lead to reductions in LDI expenditures.⁴¹

Competitive Benefit Packages, Leave Administration, and Compliance with State and Local Laws

Employers may choose to offer a private plan if they are also seeking to provide more generous benefits to workers, offer consistent benefit packages across geographical locations, and help to administer their leave and benefits systems. Some employers already offer PFML benefits to their workers in order to remain competitive in the labor market. For highly compensated workers, these benefits often exceed state PFML benefits. This appears to be a potential motivating factor for employers with approved private plans. As shown below in Table 4, the average wage of workers covered in California private plans are significantly higher than those covered in the state program.

Table 3

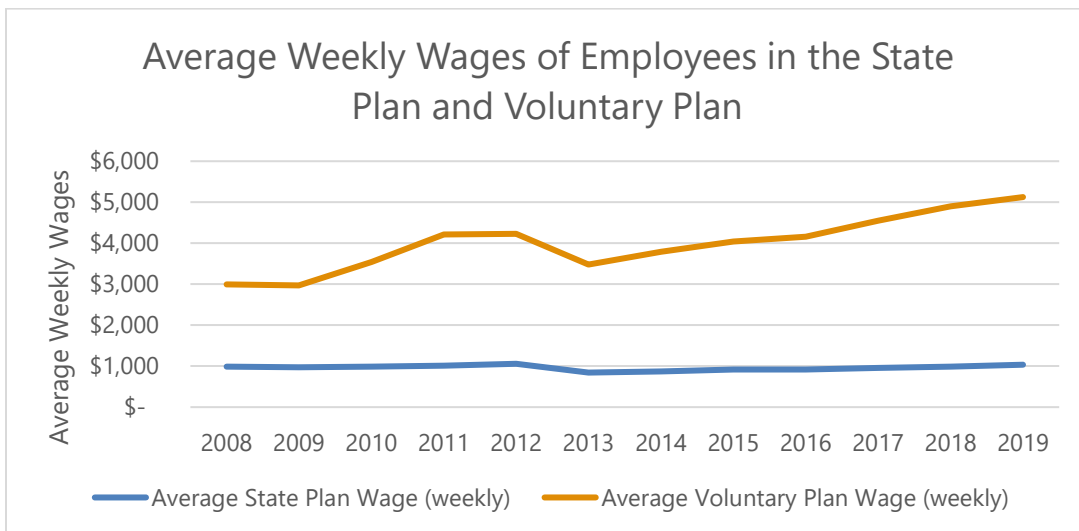


Source: Author's calculations based on data available from the California Employment Development Department for the Disability Insurance program only, does not include Paid Family Leave.

See https://edd.ca.gov/About_EDD/Archived_EDD_Legislative_Reports.htm

Note: California refers to an approved employer private plan that provides the state benefit to employees directly.

Table 4



Source: Author's calculations based on data available from the California Employment Development Department for the Disability Insurance program only, does not include Paid Family Leave.

See https://edd.ca.gov/About_EDD/Archived_EDD_Legislative_Reports.htm

Note: California refers to an approved employer private plan that provides the state benefit to employees directly.

In addition, as the number of new unpaid and paid leave laws at the state and local level have increased in recent years, particularly in response to COVID-19, employers may be incentivized to pursue private plans for two reasons. First, businesses operating in multiple states, including states with PFML programs, may pursue a private plan that meets or exceeds the state program in order to provide similar workers with the same benefits across all business locations. Second, the additional complexity involved in complying with multiple state, local, and federal leave laws may mean that employers find value in outsourcing the work of benefit and leave administration to third party administrators (TPAs) or insurance carriers.

Interestingly, the proliferation of competing mandates and laws sets employers' interests against those of TPAs and insurers. Additional complexity in paid leave laws raises compliance costs for employers, but introduce a business opportunity for TPAs and insurance carriers. TPAs and insurers market their ability to ensure compliance with federal and state laws; coordinate sick and vacation leave with other leave benefits; track health care expenditures; and provide a range of other services that can also generate significant revenue. A review of the online marketing materials of major TPAs indicates strong interest in providing employers services in states with new paid leave programs. For some insurance carriers operating in states with paid leave benefits, lost revenue from a reduction in SDI policies is likely to be offset by an increase in revenue from these services, though it is difficult to estimate to what degree.

Ease of Approval and Compliance Processes for Private Plans

Another factor that may affect whether an employer uses a private plan to administer state paid leave benefits is the state's overall approach to regulating and overseeing private plans. Each state develops its own set of rules and regulations governing plan approval and ongoing oversight and enforcement. While there are a lot of similarities between the states, the specific requirements vary along several dimensions. In addition to the written guidelines, states likely vary in their staffing and capacity to audit plans and enforce guidelines. From our interviews with states and insurance industry representatives, however, the approval and compliance regime used by the state was not mentioned as a major limiting factor in employers' decisions to use private plans. Instead, the other factors listed above—cost, compliance, and desire to provide an enhanced or consistent benefit package—were the largest drivers of employer behavior. This suggests that states have latitude to establish strong guardrails on the use of private plans for paid leave. In addition, employers are

motivated to offer private paid leave benefits to employees for competitive reasons. This suggests that state paid leave programs leave room for a robust SDI market to provide additional or more generous benefits, even if private options are not available in lieu of the state plan.

Ensuring Equity and Protecting Worker Access

As states lead the way in expanding worker access to PFML benefits, they must consider how public PFML benefits interact with existing employer benefits and commercial insurance coverage. All but two publicly financed programs (Rhode Island and the District of Columbia) have chosen to allow employers the option of providing benefits that are equivalent to or better than the state program via an approved private plan. The provision of a public benefit through a private plan raises many questions, including whether all covered workers are receiving the same level of benefits and access to leave. This is particularly important for low-wage workers, people of color, and women, all of whom experience greater barriers to accessing leave and discrimination in the workplace.

Concerns with private administration of a government benefit

There is little research and data specifically focused on the experience of workers who receive state PFML benefits through an approved private plan. However, research on related programs can provide some context and highlight possible risks to private administration of a government benefit. Both the long-term disability insurance (LTI) industry and the worker's compensation program provide cautionary lessons for how a worker can be disadvantaged by a poorly structured or regulated program. In both of these areas, government oversight is limited.

For LTI, claimants who bring complaints against insurers face a high bar for seeing their cases approved. In 1989, the U.S. Supreme Court held in the *Bruch* case under the Employee Retirement Income Security Act (ERISA) that a claimant must prove the long-term disability insurance company's actions were "arbitrary and capricious" in order for the worker to be entitled to redress—a difficult standard to prove.⁴² The U.S. General Accountability Office looked at the private disability industry in 2018 using data from the Department of Labor and found "disability cases dominate the ERISA litigation landscape today. An empirical study of ERISA employee benefits litigation from 2006 to 2010 concluded that cases involving long-term disability claims accounted for 64.5 percent of benefits litigation, whereas lawsuits involving health care plans and pension plans accounted for only 14.4 percent and 9.3 percent

respectively.”⁴³ This suggests many workers are dissatisfied with their treatment by private disability insurers.

In the case of worker’s compensation, which provides similar, but more extensive benefits than PFML programs, the federal oversight framework is weak. This leads some to view state programs as, at times, resembling a “race to the bottom.” In 2016, the Department of Labor published a detailed critique of the program and found

[d]espite the sizable cost of workers’ compensation, only a small portion of the overall costs of occupational injury and illness is borne by employers. Costs are instead shifted away from employers, often to workers, their families and communities. Other social benefit systems—including Social Security retirement benefits, Social Security Disability Insurance (SSDI), Medicare, and, most recently, health care provided under the Affordable Care Act—have expanded our social safety net, while the workers’ compensation safety net has been shrinking. There is growing evidence that costs of workplace-related disability are being transferred to other benefit programs, placing additional strains on these programs at a time when they are already under considerable stress.⁴⁴

Grabel and Berkes, for Propublica, provide compelling examples of employers and WC insurers denying employees benefits after workplace accidents or refusing to provide adequate compensation.⁴⁵ These cautionary lessons coexist with evidence that other aspects of the worker’s compensation system have, in recent years, made advances in helping workers recover from injuries and return to work.

Potential benefits of private administration

For workers who already receive generous leave benefits, private plans could provide important advantages, though the advantages mainly accrue to higher wage workers. Employer payroll systems may be able to deliver PFML benefits more quickly than a government agency. For example, employees may be able to access intermittent leave more easily through their employer’s human resources office. This is most likely to be true for higher-wage workers, especially those who are already contributing to their benefit, and among multi-state employers who are concerned with maintaining uniform compensation and benefits across their workforce. However, lower-wage workers who do not already have access to these benefits may be less likely to experience these potential benefits of private administration of PFML.

In addition, some employers already providing a voluntary SDI benefit may choose to absorb

the very modest cost of the state benefit. This is more likely the case among multi-state employers who are concerned with maintaining uniform compensation and benefits across their workforce.

Another potential advantage of private plans for PFML cited by industry groups is their ability to better assist workers with new illnesses and injuries in returning to work. As discussed earlier, evidence-based return-to-work (RTW) programs can provide important benefits to both employers and employees, by reducing the duration of leave; increasing employment rates and earnings; and preventing or delaying a new medical condition from leading to a long-term, work-limiting disability. Research by the Integrated Benefits Institute has shown that companies with established practices to help workers return to work had better outcomes for their workers than companies without programs or resources.⁴⁶

However, a poorly structured program can also be used to inappropriately apply pressure on employees to return to work before they have sufficiently recovered. While RTW services are not currently part of state paid leave programs, it is possible to introduce this feature. The authors have published a proposal to pair a federal PFML benefit with grants to states to develop, test, and expand RTW services using a tiered-evidence approach to funding.⁴⁷ This would allow states to develop programs suited to their needs and resources and to expand what works over time.

Lessons from the Social Security Disability Insurance program

The Social Security Disability Insurance Program (SSDI) program provides coverage for people with long-term or permanent disabilities. SSDI does not allow private employers to opt out of the program. Yet a substantial private market exists for supplemental LDI policies. BLS NCS reports that 34 percent of private industry workers have access to a long-term disability insurance benefit from their employer.⁴⁸ A “top off” LDI benefit can assist workers through two main mechanisms. For all workers, the LDI benefit can provide assistance earlier than SSDI. In addition, LDI policies generally provide a uniform wage replacement rate, compared to SSDI’s progressive benefit structure. Consequently, once a worker receiving LDI benefits becomes eligible for SSDI, it is the higher wage worker who primarily benefits. The substantial size of the LDI market, in spite of the SSDI’s existence, shows the industry interest in offering enhanced LDI benefits, which may include both more generous benefits for higher wage workers and quick access to benefits for all workers.

Another lesson from the Social Security program is that introducing different rules for

different workers creates additional administrative challenges. It can lead to perceptions of unfairness in the treatment of different groups of workers. In the paid leave context, this could arise when some workers in a state access public PFML benefits through employer private plans while others go directly to the state. Early in the creation of the Social Security program, Congress permitted some state and local governments to not participate in the program. This policy has introduced substantial administrative complexities since many workers will hold different jobs over the course of their careers, some covered by Social Security and some that are not. The Social Security Administration must spend time and money overseeing the alternative plans. The agency must also administer an adjustment to benefit levels to account for years when a worker was covered by an alternative pension program, which primarily affects state and local government employees. The benefit adjustment required to ensure benefits are equitable is not easily explained to workers and has led to perceptions of unfairness in the program.⁴⁹ While a short-term PFML benefit is substantially smaller than a long-term retirement benefit, similar concerns may arise, especially for workers who hold multiple jobs at one time and may be covered by both a private plan and a publicly administered plan.

Establishing Robust Protections for Workers in Private Plans

States that permit the use of private plans to provide state PFML benefits can build protections and safeguards for workers into their program during the initial plan approval process and through ongoing oversight and enforcement.

Initial Plan Approval

Employer private plans must be approved by the state. Each state's requirements and approval processes for private plans differ along various dimensions. A review of state guidelines finds that states require plans to address some or all of the following:

- Benefit levels, purposes, duration, and eligibility;
- Cost to employee;
- Timeliness of benefits;
- Equal rights and protections;

- Appeals processes;
- Notice requirements;
- Employee approval to seek a private plan; and
- Eligibility standards used to approve or deny claims.

Our review of state rules found that all states require benefits to be at least equivalent to the state-administered program and they cannot cost the employee more than participation in the state's program. California adds a slightly higher standard by requiring that benefits "must be equal to and have at least one benefit better than the benefits afforded" by the state's program.⁵⁰ All states allow private plans to provide better benefits than the state fund.

Each state provides guidelines to ensure that workers are guaranteed rights and protections under the private plan equal to those provided under the state plan. They also provide the right to appeal to the state administrative agency. These protections are especially important since they are integral to assuring that employees can request and take leave without fear of retaliation or job loss where such protections exist. Most also include language to prevent restrictions in eligibility during the claims determination process. However, few explicitly address employer responsibilities for notifying workers of their rights to benefits, or require employees to approve an employer's choice to offer a private plan.

Interestingly, some states, including California and Connecticut, have the discretion to ensure that private plans may not result in a substantial selection of risks adverse to the state's trust, nor otherwise significantly endanger the solvency of the fund.^{51,52} This clause allows the state agency to review applications for private plans not only on their own merits, but to assess how the plan will impact the state's program. The state agency can then make decisions according to what is best for the state's program. In theory, this requirement would prevent employers with low-cost employees from leaving the state fund, thereby leading to increased costs to the state. An in-depth review of state paid leave programs by Molly Weston-Williamson found that, "In practice, the state [California] initially primarily implemented this requirement by rejecting any voluntary plan where the workforce covered by the plan was less than 20 percent female, based on the general belief that women took disability leave more often than men."⁵³ However, it is unclear whether, or to what extent, this provision is currently being used in any state programs.

The requirement that employees vote on a private plan before it can be adopted is a

safeguard used in three states: California, Connecticut, and New Jersey. Employers in California must “obtain consent of a majority (51 percent) of its eligible employees.”⁵⁴ By contrast, Connecticut requires that employers ensure that their proposed private plan must “have been approved by a majority vote of the employer’s employees.”⁵⁵ This means that “at least 50 percent + 1 of the total number of employees working in Connecticut for the employer voted in favor the plan. It does not mean at least 50 percent + 1 of the number of employees who participated in the vote.”⁵⁶

Historically, New Jersey has required a majority of employees to agree to adopt a private plan if those employees are “to be required to contribute toward the cost of benefits.” However, recently enacted legislation narrows the application of this requirement to employees “who are subject to the provisions of a collective bargaining agreement.” As of 2019, New Jersey no longer requires employee consent or written election “[i]n the case of employees not subject to a collective bargaining agreement.”⁵⁷ This feature is important to establish a new private plan. Yet, for continuing oversight, it would be important to understand whether employers are required to call a new vote, and under what circumstances

Ongoing Oversight and Enforcement

Existing state paid leave laws also impose rules governing the oversight and enforcement of employer private plans for PFML benefits. The core elements of most state oversight regimes include requirements related to the following:

- Periodic audits;
- Reporting requirements;
- Penalties for non-compliance;
- Financial disclosures and assurances;
- Restrictions on use of excess funds; and
- Fees to reimburse state administrative costs.

Most states use these tools, though to varying degrees, and some impose additional rules. These elements are largely focused on ensuring that employers continue to meet the initial requirements for establishing a new plan and on upholding the fiduciary responsibilities involved in providing benefits and managing premiums collected from workers. For example, employers are generally required to notify the state if they make a change to benefits in a

private plan. And some states require premiums to be held in separate accounts or trusts. However, the effectiveness of these measures depends in large part on the staff and funding available to conduct rigorous oversight.

For purposes of assessing the impact of private plans on worker access to benefits relative to the state program, the specifics of reporting requirements and how states use the data they collect matters greatly. While plan documents may outline benefits that comply with state requirements, that does not reflect the actual experience of workers who file claims. Analysis of the actual claims experience and comparisons to the experience of similar individuals and groups in the state program must be undertaken to understand whether workers are being treated equitably.

To accomplish this type of analysis, appropriate reporting requirements must be in place, along with resources to conduct it, and remedies to address any problems it identifies. Conducting this type of analysis may be difficult given data limitations in state programs and private plan systems. For example, states must collect and analyze data on application, allowance, and denial rates for claims in order to determine whether workers are being treated comparably under both the public and private plans. In addition, the demographics of claimants need to be understood to allow for meaningful comparisons. It is unclear to what degree individual states currently require these details and, if they do, how they use the information to conduct oversight and inform overall program design. Some of the information collected by states may not be made public. However, the results of such analyses and the performance of the program are also important for both accountability and transparency. The authors are not aware of instances where states have conducted such an analysis and shared it publicly.

Two other design features of PFML programs can affect worker access and equity. These include the use of **experience rating** for medical leave claims and the use of **private contracting** to administer the core state program.

Experience rating is typically used in worker's compensation (WC) programs and private SDI plans, but it is also used in New Jersey's Temporary Disability Insurance program. Employers receive a rating based on how many claims are filed and approved, which is usually expressed as the amount of losses incurred by the insured party relative to other similarly insured parties. This information is used to price insurance, with premiums set higher for employers who experience more claims. WC programs use experience rating to incentivize employers to maintain safe workplaces and avoid causing injury and illness to employees. For employers,

this means that as the number of WC claims goes up, so does their cost of providing WC benefits.

However, in the context of PFML, there is no such connection between the workplace and the number of claims for paid medical leave. In fact, experience rating in this context would provide employers with an incentive to deny leave and discriminate in hiring against workers that are more likely to need leave provided under the law. For instance, employers may avoid hiring women of childbearing age if they are faced with experience rating, since they typically take more medical leave due to conditions related to pregnancy and delivery. This can be avoided by using community rating, where the state sets one cost rate for benefits that must be used for all workers, regardless of sex and other characteristics.

Contracting with a private firm or insurance carrier to administer state program benefits could also pose potential challenges in ensuring equitable benefits for workers. Contracting out with a third party to establish a new PFML program and administer benefits can be attractive to state governments who would otherwise be faced with the task of standing up a new program on their own, including creating new IT systems and hiring staff. However, contracting out administration of the benefits does not relieve the state of the work associated with setting the policies and rules governing the program. In addition, the state must still commit resources to overseeing and managing the contracts and on adjudicating appeals. It would be important to maintain rigorous oversight of a for-profit firm charged with administering a benefit program since they may have an incentive to reduce services to claimants in order to maximize profits. Structuring the contract to incentivize responsiveness to claimants, the public, and policymakers would be key. A publicly run program is more directly accountable to these stakeholders and doesn't have the potential conflict of interest.

Conclusion

State paid family and medical leave programs provide benefits that support financial stability and health for workers at critical junctures in their lives, such as the birth of a child, their own serious illness or that of a loved one. Ensuring full access to these benefits for all workers is a key priority for state programs. However, for workers who receive the state benefit through their employer's private plan, it is difficult to assess whether they have comparable access to leave and benefits, including rights to job protections when available. This is important because most state paid family and medical leave programs allow employers the option to provide equivalent or better benefits through their own private plans.

Little is known about the interaction between publicly provided benefits and private plans for paid family and medical leave, including whether and how access to benefits may be affected and the impact of public programs on the private disability insurance market. This is, in part, due to data limitations. Not much is known about worker claims and benefits in private plans since this data does not have to be reported publicly. In addition, data on the size and operation of the disability insurance market at the state level is not readily available.

However, we know at the national level that the growth of state paid leave programs has not prevented the overall private market for short-term disability insurance from continuing to grow. And while there has not been a rigorous evaluation of the best approaches to managing the interaction of public and private paid leave programs, some insights can be found from looking at the other benefit programs, such as workers' compensation and Social Security Disability Insurance. More specifically our research leads us to the following conclusions:

The short-term disability insurance industry has continued to grow even as state paid family and medical leave programs expanded. Employers choose to provide state benefits though their own private plan option at modest rates. This suggests that there is some displacement of private SDI benefits for public benefits. However, the SDI market is sizeable and continues to grow overall, including through sales of wrap-around services to employers who self-insure in a private plan. In addition, to the extent SDI coverage is driven by the need to attract and retain skilled workers at higher wages, we would expect a robust market for benefits above the state plan to continue, especially in states where benefits are modest both in duration and wage replacement level.

Employers who seek to self-administer public benefits are more likely to have a higher-

wage workforce. If California is indicative of the experience in other states, workers served by private plans are likely to be disproportionately high-earners. This has potential implications for workers and state trust funds. In terms of access to benefits, highly compensated workers who have enough power in the labor market to demand more generous benefits may also have a greater ability to take leave than many low-wage workers in positions with high-turnover rates. However, it is not clear that lower-paid workers in the same firm would enjoy similar access to benefits and leave. For the state paid leave trust funds, having more high-wage workers in private plans may increase costs for the state program since it erodes the revenue base.

Strong regulation of employer private plans is needed and does not deter highly motivated employers from offering private plans. Employer motivations for establishing private plans to cover state paid leave benefits are largely driven by considerations around cost, compliance, and a desire to provide enhanced and consistent benefit packages to employees across multiple locations. Many employers offer these benefits in order to remain competitive in the labor market for highly skilled workers. Of those who choose to offer a private plan option, a large number self-insure for benefits, with assistance from insurance carriers, third-party administrators, and other service providers to administer their programs. Others purchase commercial insurance products. Employers offering plans in paid leave states have demonstrated an ability to establish plans that comply with strong state regulations aimed at protecting workers.

Past experience with private SDI, LDI, and workers' compensation programs shows strong oversight of private plans for paid leave is needed to address concerns over access to benefits. Private SDI benefits are subject to frequent litigation, as are workers' compensation claims and LDI, sometimes revealing significant deficiencies in coverage and egregious examples of workers being denied adequate benefits in the face of serious workplace injuries. In addition, state regulation of SDI varies widely and does not prevent carriers from denying or limiting benefits on the basis of pre-existing conditions. Robust worker protections are needed to prevent similar problems in private plans and ensure parity with workers in the state program.

For states, permitting employers to self-administer may add more costs than savings. For states, permitting, approving, and monitoring private plans for state PFML benefits adds complexities that may not offset any cost savings associated with processing fewer state claims. Similarly, contracting out the administration of the state PFML benefits imposes additional costs on the state—associated with oversight and monitoring for compliance—that

may exceed any savings gained through private administration. In addition, if worker access is not prioritized, it could undermine core programmatic goals of supporting positive health and economic outcomes for workers and families and ensuring equitable access to benefits.

More data transparency and research is needed on how private plans serve workers, especially workers in low-wage jobs, to inform policymaking. Data doesn't exist in the public domain to let us quantify the impact of private plans on worker access to state PFML benefits and leave. States that seek to understand the impact of private plans on workers must collect and analyze detailed claims data and use the findings from that data to make decisions with regard to private plans. While individual states may be doing this, the data and findings should be shared with the public to inform broader policymaking at the state and federal levels.

Looking ahead, more states are considering adopting paid leave laws and support for a national, comprehensive paid family and medical leave program is growing. Given the remaining uncertainty around the impact of private plans on workers' access to benefits, policymakers should exercise caution in developing policies in this area. If private plan options are permitted, policymakers should consider the potential impact of private plans on workers' access to benefits and build on examples of robust oversight and monitoring used in the states. In addition, more research on private plans is needed to inform policy design. Expanding our understanding in this area will require greater access to state paid leave data and a broader exploration of potential research methods.

Endnotes

¹ Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys. December 30, 2020.

² Family and Medical Leave Act of 1993, Public L. No. 103-3, 107 Stat 6 (1993) (codified as amended at 29 U.S.C. §§ 2611-2654).

³ See <https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf> and <https://www.bls.gov/opub/btn/volume-4/pdf/disability-insurance-plans.pdf>

⁴ This list excludes Hawaii which also operates an unfunded family leave program and an employer-based temporary disability insurance program. For more information, see State of Hawaii, Wage Standards Division, "Frequently Asked Questions on the Hawaii Family Leave Law (HFLL)",

<https://labor.hawaii.gov/wsd/hawaii-family-leave/> and State of Hawaii, Disability Compensation Division, "About Temporary Disability Insurance," <https://labor.hawaii.gov/dcd/home/about-tdi/>.

⁵ Author's calculation based on Census Bureau data for 2019. See <https://www.census.gov/data/datasets/time-series/demo/popest/2010s-state-total.html>.

⁶ "Paid Family and Medical Leave (PFML) Benefits Timeline," 2021. <https://www.mass.gov/info-details/paid-family-and-medical-leave-pfml-benefits-timeline#january-1,-2021->.

⁷ <https://www.bls.gov/opub/btn/volume-4/pdf/disability-insurance-plans.pdf>.

⁸ <https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf>.

⁹ <http://assets.milliman.com/ektron/key-results-2018-disability-survey.pdf>.

¹⁰ https://www.naic.org/prod_serv/AHP-LR-20.pdf.

¹¹ Authors query of financial data on Morningstar on December 15, 2020.

¹² Margus, Paul, The Lowly Loss Ratio, Financial Reporter, Society of Actuaries, December 2007.

¹³ Molly Weston Williamson. 2017. Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance. Connecticut Public Interest Law Journal.

[https://heinonline.org/HOL/LandingPage?handle=hein.journals/cpilj17&div=5&id=&page=.](https://heinonline.org/HOL/LandingPage?handle=hein.journals/cpilj17&div=5&id=&page=)

¹⁴ One example in which New York State enforced the minimum loss ratio requirement is in for the Zurick American Insurance Company in 2013.

https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1304221.

¹⁵ See <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/Medical-Loss-Ratio>

¹⁶ See <https://www.soa.org/globalassets/assets/library/proceedings/record-of-the-society-of-actuaries/2000-09/2002/january/rsa02v28n293pd.pdf>

¹⁷ See https://www.naic.org/documents/consumer_state_reg_brief.pdf.

¹⁸ Publication. Meeting the Promise of Paid Leave: Best Practices in State Paid Leave Implementation. National Partnership for Women and Families. Accessed January 8, 2021.

¹⁹ Williamson, Molly Weston. 2017. "Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance." Connecticut Public Interest Law Journal 17 (1): 82. Accessed 2020. (page 8).

²⁰ See <http://www.wcb.ny.gov/content/main/DisabilityBenefits/Employer/introToLaw.jsp>.

²¹ See <http://www.wcb.ny.gov/content/main/DisabilityBenefits/Employer/introToLaw.jsp>.

²² NY Workers' Comp Law § Section 211.

²³ NY Workers' Comp Law § Section 211.

²⁴ NY Workers' Comp Law § Section 211.

²⁵ NY Workers' Comp Law § Section 211.

²⁶ NY Workers' Comp Law § Section 211.

²⁷ NY Workers' Comp Law § Section 211.

²⁸ See New Jersey's Temporary Disability Insurance Workload In 2018: Summary Report, page 3.

²⁹ See New Jersey's Family Leave Insurance Workload In 2018: Summary Report, page 3.

³⁰ See California EDD's May 2020 Disability Insurance (DI) Fund Forecast, page 6.

³¹ See California EDD's May 2011 Disability Insurance (DI) Fund Forecast, page 5.

³² See "Paid Family and Medical Leave Program Report to Legislature: December 2020" from Washington State, page 7.

³³ Estimates are based on data provided by staff of the Massachusetts Department of Family and Medical Leave during an interview conducted on January 28, 2021.

³⁴ See <https://www.bls.gov/opub/btn/volume-8/compensation-trends-into-the-21st-century.htm>. Note: While employer health insurance costs grew more rapidly than the cost of other benefits in the 1980 and early 2000s, the growth in costs between health insurance and other benefits trended more closely since 2011.

³⁵ See <https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm>

³⁶ See <https://onlinelibrary.wiley.com/doi/10.1111/coep.12526>.

³⁷ See https://www.ssa.gov/OACT/solvency/RDeLauro_20200228.pdf

³⁸ Zaidel, CS, Ethiraj RK, Berenji M, Gaspar FW. Health Care Expenditures and Length of Disability Across Medical Conditions. *J Occup Environ Med*. 2018 Jul;60(7):631-636.

³⁹ Society of Actuaries. 2008 Long Term Disability Experience Study Report.

<https://www.soa.org/globalassets/assets/files/research/exp-study/research-2008-ltd-study.pdf>

⁴⁰ Hunt, H. Allan and Marcus Dillender. 2017. Workers' Compensation: Analysis for Its Second Century. Kalamazoo, MI: W.E. Upjohn. Institute for Employment Research.

https://research.upjohn.org/up_press/244/

⁴¹ Brian Gifford and Skyler Parry, "The Value of Disability Return-to-Work Programs" (San Francisco, CA: Integrated Benefits Institute, 2016).

⁴² John Langbein, Trust Law as Regulatory Law, the Unum/Provident Scandal and the Judicial Review of Benefit Denials Under ERISA, *NorthWestern University Law Review*, Vol 101, No. 3, 2007

⁴³ General Accountability Office, April 2018, Social Security Disability Insurance. Information on Potential Implications of Expanding Private Disability Insurance. <https://www.gao.gov/products/GAO-18-248>

⁴⁴ U.S. Department of Labor. 2016. Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers? Washington, DC: U.S. Department of Labor. <https://www.dol.gov/asp/WorkersCompensationSystem/WorkersCompensationSystemReport.pdf> (accessed 9 11 2018).

⁴⁵ Michael Grabell and Howard Berkes, The demolition of Worker's Comp, *Propublica*, March 4, 2015.

<https://www.propublica.org/article/the-demolition-of-workers-compensation>.

⁴⁶ Gifford, Brian, and Skyler Parry. 2016. The Value of Disability Return-to-Work Programs. San Francisco, CA: Integrated Benefits Institute. References 109. <https://ibiweb.org/research-resources/detail/the-value-of-disability-return-to-work-programs>.

⁴⁷ See <https://www.urban.org/research/publication/two-proposals-strengthen-paid-leave-programs>.

⁴⁸ See <https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf>.

⁴⁹ <https://www.urban.org/research/publication/reforming-social-security-wep-exposes-weaknesses>

state-and-local-pensions.

⁵⁰ California Employment Development Department "Employer's Guide to Voluntary Plan Procedures," DE-2040 Rev.6, (October 2020), Accessed (01-08-2021). Page 2.

⁵¹ See California Unemployment Insurance Code (CUIC) § 3254(i)

⁵² See Conn. Legis. Serv. P.A. 19-25 (S.B. 1) §11(a)(1)(F).

⁵³ Williamson, Molly Weston. 2017. "Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance." Connecticut Public Interest Law Journal 17 (1): 82. Accessed 2020.

⁵⁴ California Employment Development Department "Employer's Guide to Voluntary Plan Procedures," DE-2040 Rev.6, (October 2020), Accessed (01-08-2021). Page 4.

⁵⁵ See Conn. Legis. Serv. P.A. 19-25 (S.B. 1) §11(a)(1)(G).

⁵⁶ Connecticut Paid Family & Medical Leave Insurance Authority's "Policy & Procedures For An Employer To Apply To Use A Private Plan To Meet Its Obligations Under The Connecticut Paid Leave Program" page 2.

⁵⁷ See NJ Stat § 43:21-33 (July 2020);

<https://www.myleavebenefits.nj.gov/labor/myleavebenefits/assets/pdfs/TDB%20Law%20July%202020.pdf>.