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The Therapist Can't See You Now: How Paid Sick Leave Policy Can Accommodate Mental Illness in the Workplace¹

I. INTRODUCTION

Restaurants have become the “poster child” for why employers should adopt paid sick leave.² Advocates suggest that employees without access to paid sick leave often show up to work ill due to their inability to sacrifice pay.³ Clever protest signs read, “No Boogers in my Burger” and “No Coughing in my Coffee.”⁴ Any rational customer would not appreciate the thought of a flu-ridden chef assembling their main course. However, the benefits of paid leave legislation and policies go beyond protecting cheeseburgers from flu germs.⁵ Just as employees with the flu require time off for medical attention, employees with mental illness require time to attend appointments and engage in preventative care. A staggering one in five adults in the United States have a mental health condition, and the depression rates among young adults is worsening.⁶

1. The author would like to thank Professor Danielle Weatherby, University of Arkansas School of Law, for her invaluable support and guidance with this paper.

2. Michael Saltsman, *Paid Sick Leave In Connecticut: A Pilot Study of Businesses' Responses to the Law*, EMPLOYMENT POLICIES INSTITUTE 1, 11 (2013) [hereinafter *Paid Sick Leave in Connecticut*].

3. THE ECONOMICS OF PAID AND UNPAID LEAVE, THE COUNCIL OF ECONOMIC ADVISORS 1, 1 (2014) [hereinafter ECONOMICS OF PAID AND UNPAID LEAVE], https://obamawhitehouse.archives.gov/sites/default/files/docs/leave_report_final.pdf [<https://perma.cc/7CQF-DNEL>] (last visited Nov. 1, 2018).

4. *Paid Sick Leave in Connecticut*, *supra* note 2, at 11.

5. *See, e.g.*, ECONOMICS OF PAID AND UNPAID LEAVE, *supra* note 3, at 16-18.

6. *The State of Mental Health in America*, MENTAL HEALTH AMERICA [hereinafter *State of Mental Health in America*], <http://www.mentalhealthamerica.net/issues/state-mental-health-america> [<https://perma.cc/5W2N-76WY>] (last visited Nov. 1, 2018).

Mental disorders impose “wide-ranging, long-lasting and enormous” economic consequences on individuals and workplaces.⁷ Research on mental health problems in the workplace “suggests that the personal toll on employees – and the financial cost to companies – could be eased if a greater proportion of workers who need treatment were able to receive it.”⁸ Access to paid sick leave to seek treatment can impact employee turnover, a major cost for employers that typically ranges between 10% and 30% of an employee’s annual salary.⁹ One recent study found that access to paid sick leave decreased the probability of job changes by 25%.¹⁰ Researchers suggest that providing paid sick leave is a way to promote job stability and empower workers to make decisions on how to balance their responsibilities.¹¹

Currently, there is no federal legislation mandating private sector employers to provide paid sick leave to employees.¹² Until federal legislation is passed, state legislatures should consider adopting a paid sick leave policy to improve the health and well-being of employees struggling with mental illness. The ideal paid sick leave structure would consider the type of industry and the size of the business. Until paid sick leave laws are passed, employers should consider voluntarily adopting paid

7. *Prevention of Mental Disorders*, WORLD HEALTH ORGANIZATION, http://apps.who.int/iris/bitstream/handle/10665/43027/924159215X_eng.pdf?sequence=1&isAllowed=y [https://perma.cc/P9G4-ZMQ6] (last visited Nov. 4, 2014).

8. *Mental Health Problems in the Workplace*, HARV. HEALTH PUBL’G: HARV. MED. SCH. (February, 2010), https://www.health.harvard.edu/newsletter_article/mental-health-problems-in-the-workplace [https://perma.cc/C6EM-CCD8].

9. JESSICA MILLI ET AL., *Paid Sick Days Benefit Employers, Workers, and the Economy*, INSTITUTE FOR WOMEN’S POLICY RESEARCH 1, 2 (2016) [hereinafter INSTITUTE FOR WOMEN’S POLICY RESEARCH], <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B361.pdf> [https://perma.cc/ZMB7-K8TD] (last visited Nov. 2, 2018).

10. Heather D. Hill, *Paid Sick Leave and Job Stability*, 40 WORK AND OCCUPATIONS 143, 166 (2013).

11. *Id.* Without basic workplace protections like paid sick and family leave, “women are often forced to choose between their family’s financial security and taking time off the care for themselves or a family member” *Job-Protected Safe Leave, Paid Sick Leave, and Paid Family Leave*, YWCA, https://www.ywca.org/wp-content/uploads/BRIEFING_PAPER_SICK_SAFE_FAMILY_LEAVE_FINAL.pdf [https://perma.cc/HP9B-7VTL] (last visited Nov 1, 2018).

12. JODY HEYMANN ET AL., *Contagion Nation: A Comparison of Paid Sick Day Policies in 22 Countries*, CENTER FOR ECONOMIC AND POLICY RESEARCH, 1, 12 (2009) [hereinafter *Contagion Nation*].

sick leave policies to attract, engage, and retain employees, and increase workplace productivity.

Part II of this comment describes the current global legal landscape of paid sick leave policies among countries with “highly competitive economies.”¹³ This portion of the comment then analyzes the status of paid sick leave legislation within the United States. Part III of this comment analyzes the potential impact of paid sick leave policies on workplace productivity and the overall health of employees and their families. Then, this section provides examples of Fortune 500 companies that have succeeded in voluntarily implementing paid sick leave policies. Part IV of this comment responds to potential counter-arguments against the adoption of paid sick leave legislation. Part V of this comment outlines how the Americans with Disabilities Act (“ADA”) and Family and Medical Leave Act (“FMLA”) provide accommodations for employees with mental impairments. This section illustrates how the implementation of paid sick leave can address the deficiencies of these laws in covering all forms of mental illness in the workplace. In conclusion, Part VI of this comment recommends strategies for legislators and employers to implement successful paid sick leave laws and policies.

II. CURRENT LEGAL LANDSCAPE OF PAID SICK LEAVE LEGISLATION

Paid sick leave is an employment benefit that provides pay and job security to employees who require time off work to recover from illness, to seek medical treatment and services, and to care for ill family members.¹⁴ An employee who attends work while ill will experience reduced productivity and an increased chance of work accidents.¹⁵ Similar to physical and physiological sicknesses such as the flu, mental illness can have a detrimental effect on productivity and safety in the workplace.

13. *Paid Sick Leave: Is it Feasible for National Economies to be Competitive While Guaranteeing It?* WORLD POLICY ANALYSIS CENTER (2016) [hereinafter “WORLD POLICY ANALYSIS CENTER”].

14. Patricia Stoddard-Dare et al., *Paid Sick Leave and Psychological Distress: An Analysis of U.S. Workers*, 88 AM. J. OF ORTHOPSYCHIATRY 1, 1 (2018) [hereinafter *Paid Sick Leave and Psychological Distress*].

15. WORLD POLICY ANALYSIS CENTER, *supra* note 13.

In many countries, paid sick leave allows workers with short-term and chronic conditions to obtain necessary treatment and improve their health without sacrificing wages or job security.¹⁶ However, for many workers in the United States, staying home to recover from an illness could result in loss of pay or employment.¹⁷ Current United States federal law does not mandate employers to provide any form of paid sick leave.¹⁸ Employees risk being fired when they miss work due to a short-term sickness or a long-term sickness such as cancer.¹⁹ The United States severely lags behind other countries with regard to the implementation of paid sick leave.²⁰ By 2006, 158 countries guaranteed this benefit to working adults.²¹ Figure 1 shows that nearly all the “highly competitive countries” guarantee some form of paid sick leave.²² In fact, “[a]mong the 12 low-unemployment OECD²³ countries, only the Republic of Korea does not guarantee paid sick leave.”²⁴

Highly competitive countries: Nearly all guarantee paid sick leave

Country	Benefit Available from First Day of Illness?	Minimum Duration of Paid Sick Leave	Wage Replacement Rate
Australia	Yes	2 years	100%, flat
Austria	Yes	62 weeks	50-100%
Belgium	No	52 weeks	60-100%
Canada	No	15 weeks	55%
Denmark	Yes	56 weeks*	100%
Finland	Yes	300 days**	25-100%
Germany	Yes	84 weeks***	70-100%
Japan	No	18 months	67%
Netherlands	Yes	104 weeks	70%
Norway	Yes	52 weeks	100%
Singapore	Yes	14 days	100%
Sweden	No	364 days	80%
Switzerland	Yes	3 weeks	100%
United Kingdom	No	28 weeks	flat rate
United States	No	N/A	N/A

16. *Id.*

17. *Id.*

18. *Contagion Nation*, *supra* note 12, at 1.

19. *Id.* “According to a 2010 poll, 16 percent of workers surveyed reported losing a job for missing work when they were sick or to care for an ill family member.” INSTITUTE FOR WOMEN’S POLICY RESEARCH, *supra* note 9, at 3.

20. *Contagion Nation*, *supra* note 12, at 1; *see also United States Lags World in Paid Sick Leave Days for Workers and Families*, CENTER FOR ECON. AND POLICY RESEARCH, <http://cepr.net/documents/publications/psd-summary.pdf> [https://perma.cc/V5HM-TXZE] (last visited Nov. 2, 2018).

21. Anke Schliwen et al., *The Administration and Financing of Paid Sick Leave*, 150 INT’L LABOUR REV. 43, 45 (2011) [hereinafter *Administration and Financing of Paid Sick Leave*].

22. WORLD POLICY ANALYSIS CENTER, *supra* note 13.

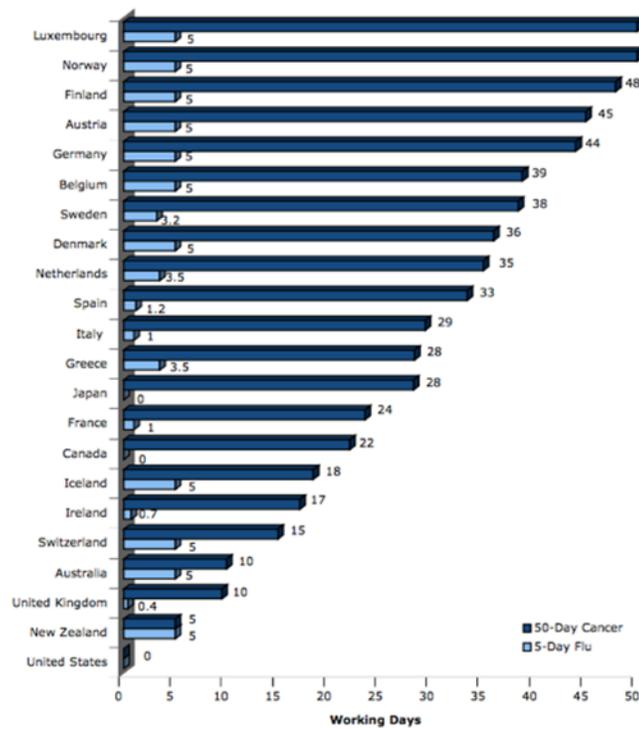
23. “OECD” is the acronym for Organisation for Economic Co-operation and Development. *About the OECD*, OECD, <http://www.oecd.org/about/> [https://perma.cc/PU28-8MB8] (last visited Nov. 2, 2018).

24. WORLD POLICY ANALYSIS CENTER, *supra* note 13.

Figure 1²⁵

The following eleven countries guarantee full wages to employees while recovering from a five-day illness: Australia, Austria, Belgium, Denmark, Finland, Germany, Iceland, Luxemburg, New Zealand, Norway, and Switzerland.²⁶ In a survey of twenty-two countries ranked high in terms of economic and human development, the United States is the only country that has no guaranteed paid sick leave for workers with a long-term illness such as cancer (see Figure 2).²⁷

Paid Sick Days and Leave in 22 Countries, Worker at Median Earnings
(Full-time equivalent working days)



25. *Id.*

26. *Contagion Nation*, *supra* note 12, at 1.

27. *Id.* at 1, 9.

Figure 2²⁸

Despite the international surge in paid sick leave law implementation and increased pressure from international organizations to enact these laws,²⁹ the United States federal government has taken few steps toward enacting nationwide paid sick leave legislation.³⁰ The FMLA provides up to twelve weeks of unpaid, job-protected leave for situations that require employees to take a longer time off work, such as childbirth or cancer.³¹ However, FMLA does not provide these benefits for short-term absences “due to acute health problems.”³²

In 2015, President Barack Obama signed an executive order designating paid sick leave to employees working on federal contracts and subcontracts.³³ These requirements were not extended to the private sector.³⁴ A proposal introduced in the House of Representatives in March 2017, known as the Healthy Families Act (H.R. 1516), would require certain employers employing fifteen or more employees to provide one hour of paid sick leave time for every thirty hours worked.³⁵ However, this bill has not progressed past the introduction phase.³⁶

Although federal legislation fails to mandate employers to provide any type of paid sick leave, state and municipal governments have increasingly addressed the need for increased regulation.³⁷ In 2012, Connecticut became the first state to require employers to provide paid sick leave.³⁸ Connecticut businesses with 50 or more employees are required to provide employees with one hour of paid sick leave for every forty hours

28. *Id.* at 10.

29. See WORLD POLICY ANALYSIS CENTER, *supra* note 13 (stating that the “International Labour Organization (ILO) recommends that workers receive a substantial proportion of their wages for the duration of paid sick leave.”).

30. See *Contagion Nation*, *supra* note 12, at 1.

31. *Paid Sick Leave and Psychological Distress*, *supra* note 14, at 1-2.

32. *Id.*

33. *The Paid Sick Leave Epidemic*, SBE 479.ORG [hereinafter *Paid Sick Leave Epidemic*], <https://sbe479.org/wp-content/uploads/2016/08/SBE479-paid-sick-leave.pdf> [<https://perma.cc/XHC7-9CZJ>] (last visited Nov. 2, 2018).

34. *Id.*; see also *Contagion Nation*, *supra* note 12, at 12 (stating that 39% of private-sector workers in the United States have no paid sick days or leave).

35. Healthy Families Act, H.R. 1516, 115th Cong. (2017).

36. *Id.*

37. See *Contagion Nation*, *supra* note 12, at 12–15.

38. *Paid Sick Leave in Connecticut*, *supra* note 2, at 3.

of work.³⁹ Since October 2016, “five states, the District of Columbia and more than 30 municipalities have passed paid sick leave laws affecting private employers, and the paid sick leave legal landscape continues to change rapidly.”⁴⁰ States that have enacted paid sick leave laws include Connecticut, Massachusetts, California, Oregon, and Vermont.⁴¹ On the other hand, some states have banned cities from passing paid sick leave legislation via “municipal preemption restriction[s].”⁴²

The greatest push for paid sick leave has occurred in municipalities.⁴³ In 2014, there were only five paid sick leave laws in effect in municipalities.⁴⁴ However, in 2017, nine municipalities passed paid sick leave ordinances, including Santa Monica, California; Spokane, Washington; Morristown, New Jersey; Minneapolis, Minnesota; Chicago, Illinois; St. Paul, Minnesota; Cook County, Illinois; Berkeley, California.⁴⁵ Today, approximately forty-three local laws and ordinances mandate employers to implement paid sick leave.⁴⁶

The coverage requirements for employers varies among jurisdictions.⁴⁷ Jurisdictions that require employers with only one employee to provide paid sick leave include California; the District of Columbia; Montgomery County, Maryland; Newark, New Jersey; San Francisco and San Diego, California; and Tacoma, Washington.⁴⁸ Contrarily, jurisdictions that only require employers with a specified number of employees to provide paid sick leave include “Connecticut (50+ employees); New York City, New York (5+ or one or more domestic worker[s]); Philadelphia, Pennsylvania (10+ and chain

39. *Id.* at 5.

40. *Paid Sick Leave Epidemic*, *supra* note 33, at 3.

41. *Id.*; See also *Paid Sick Leave Laws Interactive Map*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/paid-sick-leave-laws-by-state.aspx> [https://perma.cc/5AGW-Y9FK] (last visited Nov. 4, 2018).

42. *Paid Sick Leave Epidemic*, *supra* note 33, at 3.

43. *Id.*

44. Debbie Lamb, *Paid Sick Leave Laws Gain Ground Across Cities and States*, STERLING TALENT SOLUTIONS (Dec. 4, 2017), <https://www.sterlingtalentsolutions.com/blog/2017/12/paid-sick-leave-laws-gain-ground-across-cities-states/> [https://perma.cc/RV4A-WZ4L].

45. *Id.*

46. *Id.*

47. *Paid Sick Leave Epidemic*, *supra* note 33, at 4.

48. *Id.*

establishments); Portland, Oregon (6+ [employees]) and Seattle, Washington (5+ [employees]).”⁴⁹ Other considerations in various jurisdictions include the type of employee⁵⁰ and type of industry.⁵¹

Many of the paid sick leave laws in the United States include mental illness as an appropriate reason to use paid sick leave.⁵² Employees are typically allowed to take time to “diagnose, care for or treat his or her own [condition] or a covered family member’s mental or physical illness, injury or health condition, or to obtain a medical diagnosis or receive preventive medical care.”⁵³ For example, in 2012, Connecticut’s progressive paid sick leave law recognized the importance of including mental illness as an appropriate reason to use paid sick leave.⁵⁴ Not only can a service worker use paid sick leave for the medical diagnosis, treatment or preventative care of his or her own mental illness, but a service worker may also use paid sick leave for a child’s or spouse’s care or treatment of a mental illness.⁵⁵ The legislation also indicates that a service worker may use paid sick leave to seek psychological or other counseling for psychological injury or disability if the service worker is a victim of family violence or sexual abuse.⁵⁶ President Obama’s executive order mandating paid sick leave also identified mental illness as an appropriate reason to use paid sick leave.⁵⁷

49. *Id.*; “Employees in establishments with 1 to 49 workers or 50 to 99 workers received fewer paid sick [leave] days on average than employees in establishments with 100 workers or more.” *Number of Paid Sick Leave Days in 2015 Varies by Length of Service and Establishment Size*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/opub/ted/2016/number-of-paid-sick-leave-days-in-2015-varies-by-length-of-service-and-establishment-size.htm> [<https://perma.cc/UB56-8GY6>] (last visited Nov. 3, 2018).

50. *Paid Sick Leave Epidemic*, *supra* note 33, at 5.

51. *Id.*

52. *See e.g.*, CONN. GEN. STAT. §31-57r (2015); *see also State and Local Paid Leave Laws*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/paid-sick-leave> [<https://perma.cc/SWE5-83SF>] (last visited Nov. 3, 2018).

53. *Paid Sick Leave Epidemic*, *supra* note 33, at 7.

54. Jennifer Devine & Heidi Lane, *An Overview of the Paid Sick Leave Law*, CONN. DEP’T OF LABOR (2012), <https://www.ctdol.state.ct.us/wgwkstnd/12-15%20PSLfinal2011.pdf> [<https://perma.cc/F6RG-SY5J>] (last visited Nov. 3, 2018).

55. *Id.*

56. *Id.*

57. *See Pay & Leave Administration*, UNITED STATES OFFICE OF PERSONAL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact->

III. POTENTIAL IMPACT OF PAID SICK LEAVE POLICIES

A. IMPACT ON THE EMPLOYEE

Mental health directly affects an individual's quality of life.⁵⁸ Mental health impacts the ability to have healthy relationships, maintain physical health and well-being, and handle the uncertainty of life.⁵⁹ In the United States, one in five adults experience a mental illness in a given year, and nearly one in twenty-five (ten million) adults live with a serious mental illness.⁶⁰ Despite the increased awareness of mental health issues,⁶¹ the number of untreated mental health cases remain a "growing concern in the United States."⁶² In 2017, 56% of adults with a mental health disorder received no treatment.⁶³ Leaving mental health issues untreated can lead to a variety of negative consequences: worsening health issues, the development of long-term physical issues, decreased quality of

sheets/personal-sick-leave/ [https://perma.cc/42DY-3M8Y] (last visited Nov. 3, 2018) (stating that an employee may use sick leave when he or she "is incapacitated for the performance of duties by physical or mental illness . . .").

58. *Module 1: Introduction to Global Mental Health: Effects of Mental Health on Individuals and Populations*, UNITE FOR SIGHT, <http://www.uniteforsight.org/mental-health/module1> [https://perma.cc/B9PH-DTCD] (last visited Nov. 3, 2018).

59. See *What is Mental Health?*, MENTALHEALTH.GOV, <https://www.mentalhealth.gov/basics/what-is-mental-health> [https://perma.cc/4L67-DZ22] (last visited Nov. 3, 2018).

60. *Mental Health in America*, NAT'L ALLIANCE ON MENTAL HEALTH, <https://www.nami.org/NAMI/media/NAMI-Media/Infographics/GeneralMHFacts.pdf> [https://perma.cc/3BAK-TDPG] (last visited Nov. 4, 2018).

61. Kari Paul, *Workplaces are Finally Treating Mental Health Days as Sick Days, Even on Broadway*, MARKET WATCH (Apr. 21, 2018, 9:53 AM) [hereinafter *Workplaces are Finally Treating Mental Health Days as Sick Days*], <https://www.marketwatch.com/story/why-some-companies-are-treating-employee-mental-health-days-like-sick-days-2017-02-13> [https://perma.cc/TDD4-AFJY].

62. Milena Bimpong, *Untreated Mental Illnesses: The Causes and Effects*, PRINCETON PUB. HEALTH REV. (Apr. 30, 2017), <https://pphr.princeton.edu/2017/04/30/untreated-mental-illnesses-the-causes-and-effects/> [https://perma.cc/6UFQ-BL82].

63. *State of Mental Health in America*, *supra* note 6.

personal relationships, increased potential for incarceration, substance abuse, or suicide.⁶⁴

The health benefits of paid sick leave on the overall health and wellness of employees are significant.⁶⁵ Access to paid sick leave has been associated with “higher frequency of medical examinations, treatment and rehabilitation; greater ability to comply with doctors’ instructions; reduced duration of illness and less use of health-care resources due to the greater likelihood of receiving early treatment that can prevent complications and, therefore, additional medical care.”⁶⁶ Researchers have only recently shifted their focus to the impact of paid sick leave on mental health.⁶⁷ Emerging studies have revealed the “value of paid sick leave as an intervention to promote behavioral health.”⁶⁸

Preventative health care services can “prevent illness, allow for early diagnosis and treatment, and save lives.”⁶⁹ One of the most significant barriers to accessing such preventative care is lack of paid sick leave.⁷⁰ A recent study found that employees without guaranteed paid sick leave were “three times more likely to . . . go without needed care altogether compared to those with paid sick leave.”⁷¹ Paid sick leave allows employees with chronic mental health issues, such as depression, to seek the essential care they need without sacrificing job security or pay.⁷²

A lack of paid sick leave policies often places a heavy financial burden on the employee when illness strikes.⁷³ An employee without paid sick leave faces two choices when he or she experiences a mental illness: cope with the illness while

64. *The Negative Effects of Going Untreated for a Mental Disorder*, DESERT HOPE, <https://deserthopetreatment.com/co-occurring-disorders/going-untreated/> [<https://perma.cc/V87J-G67A>] (last visited Nov. 3, 2018).

65. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 43.

66. *Id.*

67. *See Paid Sick Leave and Psychological Distress*, *supra* note 14, at 1.

68. *Id.*

69. Karen Rosenberg, *Lack of Paid Sick Leave Reduces Use of Preventative Health Care Services*, 117 AM. J. NURSING 64, 64 (2017) [hereinafter *Lack of Paid Sick Leave Reduces Use of Preventative Health Care Services*].

70. *Id.*

71. WORLD POLICY ANALYSIS CENTER, *supra* note 13.

72. *Id.*

73. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 44.

trying to maintain work productivity, or take time off and forgo pay.⁷⁴ Employees dealing with this situation face “the direct and immediate cost of lost income and increased medical bills, as well as the indirect, longer-term risk of negative future labour market outcomes, including career stagnation or the possibility of being laid off or fired.”⁷⁵ By implementing paid sick leave policies and legislation, employers and legislators can improve the well-being of employees and their families by allowing them to seek the care they need.

B. IMPACT ON THE EMPLOYEE'S FAMILY

The composition of the workforce has experienced drastic change over the past fifty years. Women make up almost half of the workforce, spouses are sharing child-rearing responsibilities, and people are working and living longer.⁷⁶ Consequently, many of today's workers must balance work, childcare, eldercare, and other responsibilities. When paid sick leave is unavailable, many workers struggle to meet the mental healthcare needs of their loved ones.⁷⁷

Research demonstrates that access to paid sick leave improves the health and well-being of employees' family members, especially children.⁷⁸ Parents with paid sick leave benefits “are five times more likely to care for their sick children themselves.”⁷⁹ Mental wellness is an essential part of a child's overall health and contributes to the child's success in school, work, and society.⁸⁰ Children's mental health issues can have “long-term implications on the ability of children and youth to fulfill their potential as well as consequences for the health, education, labor and criminal justice systems of our society.”⁸¹

74. *Id.*

75. *Id.*

76. ECONOMICS OF PAID AND UNPAID LEAVE, *supra* note 3, at 3.

77. *Id.* at 9–10.

78. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 43–44.

79. *Id.*

80. *Children's Mental Health: Why is Children's Mental Health Important?*, AM. PSYCHOLOGICAL ASS'N [hereinafter *Children's Mental Health: Why is Children's Mental Health Important?*], <http://www.apa.org/pi/families/children-mental-health.aspx> [<https://perma.cc/26X4-2UBK>] (last visited Nov. 3, 2018).

81. *Id.*

The National Survey of Children's Health reported that "1 out of 7 U.S. children aged 2 to 8 years had a diagnosed mental, behavioral, or developmental disorder."⁸² Moreover, half of all chronic mental illnesses begin by the age of fourteen.⁸³

Access to the appropriate services and treatments can make a difference in the lives of the children with mental illnesses.⁸⁴ The Department of Health and Human Services estimates that only about 7% of children who require these services receive appropriate treatment from mental health professionals.⁸⁵ Parents that do not have the benefit of paid sick leave may lack the ability to take their children to receive proper care.⁸⁶ Resource-poor parents are especially likely to miss their children's necessary doctor or therapist appointments as they cannot sacrifice the loss of pay.⁸⁷

Paid sick leave also affects the ability of working adults to address the mental health needs of their elderly family members.⁸⁸ Research demonstrates that people tend to live longer and have fewer mental health problems when supported by a family member.⁸⁹ Social support for elderly family members also positively impacts their "use of health services, coping with disease, and recovery from major operations . . ."⁹⁰

Psychological stressors stemming from the balance of work, family, and health can interfere with workplace productivity and the overall mental well-being of employees.⁹¹ Employees faced with the conflict between work and family responsibilities often experience increased pressures and stress

82. *Children's Mental Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION [hereinafter *Children's Mental Health*], <https://www.cdc.gov/childrensmentalhealth/data.html> [https://perma.cc/ZX37-6CHT] (last visited Nov. 3, 2018).

83. *Mental Health by the Numbers*, NAT'L ALL. OF MENTAL ILLNESS, <https://www.nami.org/learn-more/mental-health-by-the-numbers> [https://perma.cc/4D35-PQUX] (last visited Nov. 3, 2018).

84. *Children's Mental Health*, *supra* note 82.

85. *Children's Mental Health: Why is Children's Mental Health Important?*, *supra* note 80.

86. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 44.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Paid Sick Leave and Psychological Distress*, *supra* note 14, at 1.

in the workplace.⁹² Paid sick leave policies could reduce this conflict by allowing employees to take the time needed to meet the mental healthcare needs of their family members. By allowing employees the opportunity to balance their family responsibilities, employers will likely witness increased productivity and efficiency in the workplace.⁹³

C. IMPACT ON THE EMPLOYER

Most individuals suffering from mental illness are part of the workforce.⁹⁴ Common mental disorders such as depression, anxiety, and obsessive-compulsive disorder have been identified as “risk factor[s] for future sick leave, and the recurrence is high.”⁹⁵ Mental health disorders also increase the risk of physical illness.⁹⁶ Employers incur considerable costs when employees with mental illness do not take the necessary time off to recuperate.⁹⁷ Stress from the conflict between work and family responsibilities can result in “[t]urnover of staff or loss of skilled workers; [e]xpenses on recruiting and training new staff; [and] [l]ower efficiency of work.”⁹⁸ An employee’s mental illness can disrupt management of the business unit, impact the morale of other employees, and increase costs of training replacement employees.⁹⁹ Decreased workplace productivity is

92. INT’L LABOUR ORG., COMBINING YOUR WORK AND FAMILY RESPONSIBILITIES [hereinafter COMBINING YOUR WORK AND FAMILY RESPONSIBILITIES], http://ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-moscow/documents/publication/wcms_312493.pdf [https://perma.cc/UGT8-ZSVH] (last visited Nov. 3, 2018).

93. *Id.*

94. For example, “it has been estimated that over 70% of people with major depression are actively employed.” Benjamin G. Druss et al., *Health and Disability Costs of Depressive Illness in a Major U.S. Corporation*, 157 AM. J. PSYCHIATRY 1274, 1274 (2000).

95. Christian Stahl & Elinor E. Stiwne, *Narratives of Sick Leave, Return to Work and Job Mobility for People with Common Mental Disorders in Sweden*, 24 J. OCCUPATIONAL REHAB. 543, 543 (2013).

96. Prevention of Mental Disorders: Effective Interventions and Policy Options, WORLD HEALTH ORGANIZATION 1, 13 (2004).

97. COMBINING YOUR WORK AND FAMILY RESPONSIBILITIES, *supra* note 92.

98. *Id.*

99. Marti Cardi, *Mental Health Not-So-Basics Under the ADA*, 1, 27, http://dmecc.org/wp-content/uploads/2013/02/Mental-Health-Not-So-Basics-Under-the-ADA_5.20.16.pdf [https://perma.cc/MGJ7-AAZE] (last visited Nov. 3, 2018).

one of the most significant costs to employers.¹⁰⁰ Anywhere from “one-fifth to three-fifths of the total dollars attributable to common health conditions faced by employers appear to be the result of on-the-job productivity losses.”¹⁰¹ Productivity loss estimates focus on the ability to concentrate, the need to repeat a job, working more slowly, and quality of performance.¹⁰² Depression, sadness, and mental illness were some of the top-ranked conditions associated with productivity loss.¹⁰³ For example, depression is highly associated with impaired functioning.¹⁰⁴ In 2001, a study estimated that \$4.5 billion Canadian dollars were attributable to work-related productivity losses due to depression.¹⁰⁵

Presenteeism, another significant cost to employers, refers to a person’s decision to attend work while ill.¹⁰⁶ Presenteeism is especially prevalent in individuals with mental disorders such as depression.¹⁰⁷ Depression is one of the most prevalent and costly health conditions for U.S. employers.¹⁰⁸ A study conducted in 2003 estimated that the average presenteeism loss among United States workers due to depression is about \$36 billion USD.¹⁰⁹ Of the top ten health conditions costing

100. *Id.* Utilizing depression as an example, researchers found that “major depression was estimated to cost \$6,000 in health-related and work-related costs per depressed worker and that \$4,200 of this amount was borne by employers.” Druss et al., *supra* note 94, at 1274.

101. Susan S. Lang, *Economists Coin New Word, ‘Presenteeism,’ to Describe Worker Slowdowns that Account for Up to 60 Percent of Employer Health Costs*, CORNELL CHRONICLE (Apr. 20, 2004), <http://news.cornell.edu/stories/2004/04/new-word-job-health-problem-presenteeism> [<https://perma.cc/36LR-2V3N>].

102. Paul Hemp, *Presenteeism: At Work–But Out of It*, HARVARD BUS. REV., <https://hbr.org/2004/10/presenteeism-at-work-but-out-of-it> [<https://perma.cc/UYU4-JRYB>] (last visited Nov. 3, 2018).

103. *Id.*; see also Ron Z. Goetzel et al., *Health, Absence, Disability, and Presenteeism Cost Estimates of Certain Physical and Mental Health Conditions Affecting U.S. Employers*, 46 J. OCCUPATIONAL AND ENVTL. MED. 398, 406 (2004).

104. Druss et al., *supra* note 94, at 1274.

105. Dewa et al., *Nature and Prevalence of Mental Illness in the Workplace*, 5 HEALTHCAREPAPERS 12, 14 (2004).

106. Gary Johns, *Presenteeism in the Workplace: A Review and Research Agenda*, 31 J. ORGANIZATIONAL BEHAVIOR 519, 519 (2010).

107. EUROPEAN COMMISSION, SICK PAY AND SICKNESS BENEFIT SCHEMES IN THE EUROPEAN UNION 5 (2016).

108. Goetzel et al., *supra* note 103, at 406.

109. Dewa et al., *supra* note 105, at 19.

employers the most direct medical expenses, presenteeism accounted for 61% of the total losses.¹¹⁰

Despite the lack of legislation mandating paid sick leave, several well-known corporations have gone beyond the law by voluntarily offering paid sick leave as part of a benefits package. For example, in 2015, Chipotle publicly announced the adoption of a policy allowing hourly workers access to paid sick leave.¹¹¹ McDonald's President, Steve Easter, implemented a paid sick leave policy and explained that "a motivated workforce leads to better customer service so . . . this initial step not only benefits [the] employees, it will improve the McDonald's restaurant experience."¹¹² Microsoft representatives noted that "the lack of paid time off disproportionately impacts low wage earners" and cited studies showing that "paid time off contributes to the health and well-being of workers and their families, increases productivity and lowers health care costs."¹¹³ Ben Cohen, one of the founders of the Ben & Jerry's ice cream company, went as far to say that a lack of access to paid sick leave is "criminal."¹¹⁴ Dr. Patricia Stoddard-Dare, a paid sick benefits researcher at the University of Cleveland, hopes to see more employers voluntarily choose to implement paid sick leave policies because it is in their "financial best interest to do so."¹¹⁵

110. Goetzel et al., *supra* note 103, at 406. "Aggregating medical, absence, STD, and average presenteeism costs, the conditions considered accounted for the following total expenditures, per eligible employee per year 1) hypertension (\$392), 2) heart disease (\$368), 3) depression/sadness/mental illness (\$348), 4) arthritis (\$327), 5) allergy (\$271), 6) diabetes (\$257), 7) migraine, headaches (\$214), 8) any cancer (\$144), 9) respiratory disorders (\$134), and 10) asthma (\$100)." *Id.* at 407.

111. *Paid Sick Leave Epidemic*, *supra* note 33, at 12; see also Emily Peck, *Chipotle's Hourly Workers are Getting Paid Sick Leave and Vacation*, HUFFPOST (Jun. 8, 2015, 3:03 PM), https://www.huffingtonpost.com/2015/06/08/chipotle-expands-benefits_n_7536222.html [<https://perma.cc/LLB5-AP8R>] (last updated Dec. 6, 2017).

112. *Paid Sick Leave Epidemic*, *supra* note 33, at 12.

113. *Id.*

114. Claudia C. Machicado, *The Business Case for Paid Leave and Paid Sick Days*, CENTER FOR AMERICAN PROGRESS (Apr. 17, 2014, 3:13 PM) [hereinafter *The Business Case*], <https://www.americanprogress.org/issues/economy/news/2014/04/17/88243/the-business-case-for-paid-leave-and-paid-sick-days/> [<https://perma.cc/SZH6-W5U8>].

115. Erin Schumaker, *Not Having Paid Sick Leave Can Have Dire Mental Health Consequences*, HUFFPOST (Sept. 20, 2017, 2:25 PM), https://www.huffingtonpost.com/entry/paid-sick-leave-mental-health_us_59c16c23e4b087fdf508b719 [<https://perma.cc/G2L6-ECGU>] (last updated Sept. 21, 2017).

IV. COUNTER-ARGUMENTS

Opponents of paid sick leave generally claim that paid sick leave policies will: (1) adversely impact business profitability,¹¹⁶ (2) diminish the United States' economic competitiveness,¹¹⁷ and (3) encourage abuse of the system.¹¹⁸

A. BUSINESS PROFITABILITY

The first argument against the implementation of paid sick leave involves the potential detrimental effects on wages, employment, and business profitability.¹¹⁹ A study of states that have recently adopted paid sick leave legislation concluded that these fears are “largely overblown.”¹²⁰ Studies have consistently found a relationship between paid sick leave policies and economic benefits for employers such as “improved employee productivity, reduced turnover and lower associated hiring and training costs as well as improved employee morale and loyalty.”¹²¹

Since the first paid sick leave law was enacted, several studies have analyzed the effects on employers.¹²² The evaluations found that the “overall impact on businesses was minimal.”¹²³ Jurisdictions that have adopted paid sick leave laws reported that businesses experienced “little or no additional costs” and “overwhelmingly support[ed] the provisions once fully implemented.”¹²⁴ Most of these employers reported that

116. Carrie H. Colla et al., *Early Effects of the San Francisco Paid Sick Leave Policy*, 140 AM. J. PUB. HEALTH 2453, 2453 (2014) [hereinafter *Early Effects*].

117. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 57.

118. *Abuse of Sick Leave an Alarming but Curable Trend*, GREENLEAF CENTER FOR SERVANT LEADERSHIP [hereinafter *Abuse of Sick Leave an Alarming but Curable Trend*], <https://www.greenleaf.org/winning-workplaces/workplace-resources/features/workplace-perspectives/abuse-of-sick-leave-an-alarming-but-curable-trend/> [https://perma.cc/6M2F-PCE3] (last visited Nov. 3, 2018).

119. *Early Effects*, *supra* note 116, at 2453.

120. *The Business Case*, *supra* note 114.

121. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 44.

122. INSTITUTE FOR WOMEN'S POLICY RESEARCH, *supra* note 9, at 1.

123. *Id.* at 3.

124. Douglas Hall, *Businesses and Workers Win with Earned Paid Sick Leave*, RI FUTURE.ORG (Jun. 24, 2017), <http://www.rifuture.org/businesses-and-workers-win-with-earned-paid-sick-leave/> [https://perma.cc/3SRM-WKBD].

the implementation of the paid sick leave was not difficult and had minimal effect on business operations.¹²⁵

After originally opposing the state's paid sick leave law, California's Chamber of Commerce reported that employers have not experienced the expected burden.¹²⁶ A survey of over 253 employers affected by California's paid sick leave policy revealed that over 90% experienced "no noticeable effect on profitability, turnover, and morale."¹²⁷ New Jersey reports revealed that the majority of businesses have experienced "no effect—and some have even reported positive effects—from employees taking family leave."¹²⁸

After Connecticut's paid sick leave law went into effect in 2012, about 47% percent of 251 companies surveyed said the legislation did not affect costs.¹²⁹ Only about 6.5% claimed that their costs increased by 5% or more after the law passed.¹³⁰ A study on the early effects of the San Francisco paid sick leave policy revealed that most of the firms did not report lower profits because of the mandate.¹³¹ San Francisco businesses overwhelmingly supported the ordinance and "[s]ix out of seven employers reported no adverse effects on profitability."¹³² Many small businesses have vocalized support for paid sick leave laws¹³³ and reported no difficulty complying with the laws.¹³⁴

The net benefit of paid sick leave, especially for employees with mental health, outweighs the possible reduction in other

125. INSTITUTE FOR WOMEN'S POLICY RESEARCH, *supra* note 9, at 1-2. For example, "about two thirds of Seattle employers reported that implementing the Paid Sick and Safe Time Ordinance was not very difficult, and 70 percent expressed support for the policy a year after implementation of the Ordinance. Similarly, a large majority of Connecticut employers surveyed in 2013 indicated that the Paid Sick Leave Law did not burden business operations." *Id.* at 4.

126. *The Business Case*, *supra* note 114.

127. ECONOMICS OF PAID AND UNPAID LEAVE, *supra* note 3, at 2.

128. *The Business Case*, *supra* note 114.

129. Associated Press, *Paid Sick Leave Laws? No Problem, Say Small-Business Owners*, INC. (Mar. 20, 2014), <https://www.inc.com/associated-press/paid-sick-time.html> [<https://perma.cc/GR5A-NGJR>].

130. *Id.*

131. *Early Effects*, *supra* note 116, at 2457.

132. INSTITUTE FOR WOMEN'S POLICY RESEARCH, *supra* note 9, at 4.

133. *The Business Case*, *supra* note 114.

134. *Id.*

employee benefits and added costs to consumers.¹³⁵ Researchers from Cleveland State University suggest that employers should consider the overall workplace costs associated with mental health symptoms because the consequential delays of forgoing needed medical care can result in more complicated and expensive health conditions among affected employees.¹³⁶

B. GLOBAL COMPETITIVENESS

The second major argument against paid sick leave contends that “worker protections lead[] to higher unemployment rates or lower competitiveness at the national level.”¹³⁷ Contrary to this assertion, research illustrates no relationship between duration of paid sick leave and gross domestic product (“GDP”), economic competitiveness, or unemployment rates.¹³⁸ Researchers suggest that paid sick leave policies may have minimal impact on national economic outcomes for the following reasons: the economic benefits from a healthier population outweigh the costs, employees experience “greater workforce attachment,” and potential abuse of the system is too “small and insufficient to affect the national economic measures.”¹³⁹

C. ABUSE OF SYSTEM

The third major argument suggests that employees will abuse the system by taking unnecessary time off.¹⁴⁰ Although abuse of the system is possible, “the percentage of workers who abuse the system by taking unnecessary time off is small and insufficient to affect national economic measures.”¹⁴¹

135. See *Insult to Injury: U.S. Workers Without Paid Sick Leave Suffer From Mental Distress*, CLEVELAND STATE UNIV. (Sept. 18, 2017, 2:26 PM), <https://www.csuohio.edu/news/insult-injury-us-workers-without-paid-sick-leave-suffer-from-mental-distress> [<https://perma.cc/QH97-VYWB>].

136. *Id.*

137. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 57.

138. *Id.*

139. *Id.*

140. *Abuse of Sick Leave an Alarming but Curable Trend*, *supra* note 118.

141. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 57.

Researchers also suggest that greater workforce attachment results from paid sick leave and encourages employees to only take the time that they need.¹⁴²

Research conducted after the first paid sick leave laws were first implemented shows that employees tend to use paid sick days more judiciously than previously contemplated.¹⁴³ A study of 1,194 employees in San Francisco reported that the employees used “fewer than half of the sick days available under the paid sick leave ordinance.”¹⁴⁴ Another study by the Center for Economic and Policy Research found that among 228 Connecticut employers surveyed, “86 percent reported no known cases of abuse more than a year after paid sick leave days was implemented.”¹⁴⁵

Legislators and employers can take measures to minimize abuse of paid sick leave policies, such as by requiring documentation. Any required documentation of the need for leave should be reasonable.¹⁴⁶ Most paid sick leave laws require employees to provide some advanced notice when the leave is foreseeable.¹⁴⁷ In the event of an emergency or unplanned situation, employees should give notice as soon as practicable.¹⁴⁸ Because the “as soon as practicable” standard is typically not defined, employers should review all the circumstances before making a determination.¹⁴⁹ Some state and local paid sick leave laws forbid employers from seeking documentation unless the employee takes leave for more than three consecutive days.¹⁵⁰

For longer leaves of absence, Swedish legislators require employees to obtain a medical certificate with a defined

142. *Id.*

143. INSTITUTE FOR WOMEN’S POLICY RESEARCH, *supra* note 9, at 4.

144. *Id.*

145. *Id.* “A report published by the City of Seattle auditor finds that more than nine in ten Seattle employers surveyed in 2012 had never reprimanded an employee for abusing paid sick days.” *Id.*

146. *8 Ways to Prevent Abuse of Leave Policies*, HR SOLUTIONS BLOG TEAM (Apr. 4, 2016) [hereinafter *8 Ways to Prevent Abuse of Leave Policies*], <https://sbshrs.adpinfo.com/blog/8-ways-to-prevent-abuse-of-leave-policies> [<https://perma.cc/VBX5-Z7EK>]. “In general, the sick leave laws consider seven or 10 days’ advance notice to be reasonable.” *Paid Sick Leave Epidemic*, *supra* note 33, at 9.

147. *8 Ways to Prevent Abuse of Leave Policies*, *supra* note 146.

148. *Id.*

149. *Id.*

150. *Id.*

diagnosis.¹⁵¹ Paid sick leave policy authors should keep in mind that unlike a permanent physical disability that remains consistent, mental health symptoms can trigger and recede without warning.¹⁵² The documentation requirement should strike a balance between the need for abuse prevention and unpredictability of health issues, such as mental illness.

As long as the contact is not too frequent or invasive, employers are generally allowed to call their employees on extended leave to check-in and inquire about their plans to return to work.¹⁵³ An employer may also prohibit an employee from engaging in other employment when he or she is on leave due to an inability to work.¹⁵⁴ Employers should “[t]rain supervisors on how to respond to leave requests, enforce leave policies, and report suspected abuse.”¹⁵⁵ Any investigations and meetings surrounding potential abuse should be documented and comply with applicable laws.¹⁵⁶ Before engaging in any disciplinary action, employers should consult with legal counsel.¹⁵⁷

V. LESSONS FROM FMLA AND ADA

The FMLA and ADA are federal laws that provide employees with access to some job-protected leave when a serious mental health condition arises.¹⁵⁸ However, these laws fail to fully address the need for preventative care and routine

151. *Sickness Benefit*, FORSAKRINGSKASSAN, https://www.forsakringskassan.se/wps/wcm/connect/b6ec6788-05a7-49b4-a365-559c316a9a54/4086_sjukpenning_FK_Fa_enGB.pdf?MOD=AJPERES [<https://perma.cc/4LHF-KQSY>] (last visited Nov. 3, 2018).

152. *Accommodating Mental Illness in the Workplace*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (Jun. 22, 2016), <https://newsletter.samhsa.gov/2016/06/22/mental-illness-in-the-workplace/> [<https://perma.cc/4CM3-L226>].

153. *8 Ways to Prevent Abuse of Leave Policies*, *supra* note 146.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Work-Leave, the ADA, and the FMLA*, ADA NAT’L NETWORK [hereinafter *Work-Leave, the ADA, and the FMLA*], <http://adata.org/factsheet/work-leave> [<https://perma.cc/E5H3-LMB2>] (last visited Nov. 3, 2018).

treatment plans necessary to target mental illness.¹⁵⁹ Despite their shortcomings, the FMLA and ADA provide key insights as to how paid sick leave laws can be structured.

A. FAMILY AND MEDICAL LEAVE ACT (“FMLA”)

Passed in 1993, the FMLA “made significant progress by requiring [employers to provide] unpaid leave for covered workers.”¹⁶⁰ The FMLA provides employees of public agencies, public and private schools, and companies with fifty or more employees with up to twelve weeks of unpaid, job-protected leave per year.¹⁶¹ Designed to “help employees balance their work and family responsibilities,” FMLA provides reasonable unpaid leave to employees who meet the requirements when they are unable to work because of a serious health condition or to care for an immediate family member with a serious health condition.¹⁶² However, the FMLA exempts many workers from coverage, including employees working part-time and employees working at private businesses with fewer than 50 employees.¹⁶³

Additionally, although the FMLA includes psychological care for a family member as a reason to take leave,¹⁶⁴ FMLA does not cover routine activities such as doctors’ appointments for the psychological health of an employee or his or her family members.¹⁶⁵ The World Health Organization asserts that “the

159. See, e.g., *Overly v. Covenant Transp., Inc.*, 178 Fed. Appx. 488, 494 (6th Cir. 2006).

160. ECONOMICS OF PAID AND UNPAID LEAVE, *supra* note 3, at 10.

161. *FMLA (Family & Medical Leave)*, UNITED STATES DEP’T OF LABOR, <https://www.dol.gov/general/topic/benefits-leave/fmla> [<https://perma.cc/6E2L-JE2L>] (last visited Nov. 3, 2018).

162. *Id.*

163. ECONOMICS OF PAID AND UNPAID LEAVE, *supra* note 3, at 10.

164. “The FMLA permits employees to receive leave to care for a ‘spouse . . . son, daughter, or parent’ facing ‘a serious health condition.’” Katherine Bailey, *The FMLA and Psychological Support: Courts Care About “Care” (and Employers Should, Too)* 115 MICH. L. REV. 1213, 1215 (2017). Congress did not “expressly define the scope of care or the specific means protected.” *Id.*

165. *Overly v. Covenant Transp., Inc.*, 178 Fed. Appx. 488, 494-96 (6th Cir. 2006) (stating that the “FMLA does not provide leave for every family emergency” but rather allows an employee to leave to care for a child suffering from a serious medical condition

only sustainable method for reducing the burden caused by these disorders is prevention.”¹⁶⁶ Structured programs, such as group therapy sessions, reduce high levels of depressive symptoms, prevent depressive episodes, and improve work productivity.¹⁶⁷ Access to paid sick leave would allow employees the opportunity to participate in these programs and improve mental well-being.

Despite the shortcomings of FMLA, this law can provide valuable administrative insight. To reduce potential hardship on employers, paid sick leave policies should consider the structure set forth by the FMLA. An employee has rights under FMLA if she “[has] worked at least 1,250 hours for the 12 months prior to the leave, work[s] in locations with at least 50 employees within 75 miles and ha[s] worked with the business for at least 12 months (which need not be consecutive).”¹⁶⁸ Adjusting the requirements for employees to qualify for paid sick leave based on employer size could lessen the potential burden on small businesses.¹⁶⁹ Although the FMLA may provide a valuable administrative template for structuring paid sick leave policies, paid sick leave policies should consider lessening the requirements for employees to qualify. Unlike the FMLA, which accommodates more serious health conditions and long-term leave, paid sick leave should address the need for employees to access routine and preventative mental health care. Employers and legislators should balance employer hardship and abuse prevention with employee healthcare needs.

B. AMERICANS WITH DISABILITIES ACT (“ADA”)

The ADA mandates that employers provide reasonable accommodation to employees with disabilities, defined as “a

and “routine activities do not qualify as ‘physical or psychological care’ under the FMLA”).

166. *Prevention of Mental Health Disorders: Effective Interventions and Policy Options*, WORLD HEALTH ORGANIZATION (2004) [hereinafter *Prevention of Mental Health Disorders*],

http://www.who.int/mental_health/evidence/en/prevention_of_mental_disorders_sr.pdf [https://perma.cc/YTC2-DVUR] (last visited Nov. 3, 2018).

167. *Id.*

168. *Work-Leave, the ADA, and the FMLA*, *supra* note 158.

169. *See infra* text accompanying notes 171-176.

physical or mental impairment that substantially limits one or more major life activities.”¹⁷⁰ Work-leave is one form of accommodation.¹⁷¹ Employers must grant work-leave to an employee qualified under this act as a form of reasonable accommodation unless doing so would cause them undue hardship.¹⁷² Undue hardship is assessed on a case-by-case basis and “depends on the financial resources of the employer or how much the accommodation disrupts job operations.”¹⁷³ There is no specified amount of work-leave an employer must grant the employee.¹⁷⁴ Modifying work hours to allow employees with mental impairments to attend psychiatrist or psychologist appointments is another example of a reasonable accommodation.¹⁷⁵ Employers can also provide self-paced flexible workloads to these employees under the ADA.¹⁷⁶

Accommodation is only extended to those with a mental impairment that “substantially limits” a major life activity.¹⁷⁷ Examples of “substantially limits” include regular, severe problems, such as high levels of hostility, social withdrawal, or failure to communicate.¹⁷⁸ Examples of mental impairments recognized by the ADA are major depression, bipolar disorder, anxiety disorder (including panic, obsessive compulsive, and post-traumatic stress disorders), schizophrenia, and personality disorder.¹⁷⁹

Unlike the ADA, paid sick leave would allow employees with mental illnesses that do not meet the threshold of a “mental

170. *Mental Health Conditions in the Workplace and the ADA*, NAT'L NETWORK, <https://adata.org/factsheet/health> [<https://perma.cc/ZK5S-649W>] (last visited Nov. 3, 2018).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Americans with Disabilities Act and Mental Illness*, OFFICE ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERV'S, <https://www.womenshealth.gov/mental-health/your-rights/americans-disability-act.html> [<https://perma.cc/X35W-BXMK>] (last visited Nov. 3, 2018).

176. *Id.*

177. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [*hereinafter EEOC Enforcement Guidance*], <https://www.eeoc.gov/policy/docs/psych.html> [<https://perma.cc/BV3V-SWXN>] (last visited Nov. 3, 2018).

178. *Id.*

179. *Id.*

impairment” under the ADA to seek necessary treatments. Employees may also seek preventative treatments and routine care with paid sick leave. Despite the ADA’s failure to address some of the most basic mental healthcare concerns of employees, this act has made significant progress in addressing mental health in the workplace.¹⁸⁰ Employers that cannot enact paid sick leave due to size or undue hardship can still implement policies that allow employees to access necessary mental health care by referring to the ADA recommendations for guidance.¹⁸¹ For example, employers can implement a version of the modified hours or flexible work load recommendations outlined in the ADA.¹⁸² Regardless of whether they have the resources to implement paid sick leave, employers can still take steps minimize the detrimental effects of mental health on the workplace.

VI. RECOMMENDATIONS FOR IMPLEMENTATION

Legislators and employers should consider several factors before crafting a paid sick leave law or policy: accrual, availability, increments of use, rate of pay, etc. The language of the sick leave policy should be carefully scrutinized to ensure correct implementation of intentions and goals. The FMLA and ADA provide valuable administrative considerations for legislators and employers who wish to implement paid sick leave policy.

Even if the sick leave policy is unpaid, the language of the policy should specifically include mental illness as an authorized use of the benefit. As seen in the Washington state paid sick leave law requirements, the terms “mental illness” or “mental disorder” should be utilized instead of including these illnesses in broad language such as “serious illness.”¹⁸³ Creating an effective mental health policy in the workplace involves

180. *Id.*

181. *Id.*

182. *EEOC Enforcement Guidance*, *supra* note 177.

183. *Employer Resource for Paid Sick Leave*, WASH. STATE DEP’T OF LABOR & INDUS.,

<https://www.lni.wa.gov/WorkplaceRights/LeaveBenefits/VacaySick/EmployerInfo.asp> [https://perma.cc/KWM4-RA8W] (last visited Nov. 3, 2018).

supporting employees at risk by effectively communicating available tools and resources.¹⁸⁴ This section provides further suggestions and considerations for legislators and employers.

A. SUGGESTIONS FOR LEGISLATORS

Federal law should provide individuals with guaranteed access to treatment for mental illness regardless of where one lives. The introduction of the Healthy Family Act¹⁸⁵ may result in the implementation of a national paid sick leave policy that specifically addresses mental illness. Until the federal government implements a national paid sick leave policy, state legislators should consider adopting paid sick leave legislation. According to the 2017 State of Mental Health in America Report, “[s]tate and local level policies have the biggest impact on access to mental health care.”¹⁸⁶

Critics argue that government-mandated paid sick leave disproportionately impacts small businesses.¹⁸⁷ To address this concern, many state and municipal paid sick leave laws consider the size of the employer and implement a tiered system.¹⁸⁸ For example, the District of Columbia and Seattle, Washington base paid sick leave accrual rates on the number of employees.¹⁸⁹ New York City law classifies employers into three categories: (1) employs 1 worker (must provide two days of paid sick leave), (2) employs 1-4 workers (must provide up to forty hours of unpaid leave), and (3) employs 5 or more workers (must provide up to forty hours of paid leave).¹⁹⁰ To qualify, these

184. *Mental Health Policies and Programmes in the Workplace*, WORLD HEALTH ORGANIZATION (2005), http://apps.who.int/iris/bitstream/handle/10665/43337/9241546794_eng.pdf?sequence=1 [https://perma.cc/9287-SG2X] (last visited Nov. 3, 2018).

185. Healthy Families Act, H.R. 1516, 115th Cong. (2017).

186. *State of Mental Health in America*, *supra* note 6.

187. Frayda Levin, *COMMENTARY: Paid Sick Leave Mandates for Business*, COURIER POST (Oct. 25, 2014, 12:05 AM), <http://www.courierpostonline.com/story/opinion/columnists/2014/10/25/commentary-paid-sick-leave-mandates-bad-business/17842303/> [https://perma.cc/7XF9-YALT].

188. *Paid Sick Leave Epidemic*, *supra* note 33, at 4-5.

189. *Id.* at 7.

190. *Paid Sick Leave: What Employers Need to Know*, NYC CONSUMER AFFAIRS, <https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-EmployerOnePager-English.pdf> [https://perma.cc/FF65-7CCA] (last visited Nov. 3, 2018).

employees must work more than eighty hours per calendar year.¹⁹¹

Legislators may also choose to include a minimum increment of time for leave. Jurisdictions are currently split as to ideal minimum increment.¹⁹² Employees in the District of Columbia may use sick time in one-hour increments, whereas employees in California must use sick time in two-hour increments.¹⁹³ Minneapolis, Minnesota; New York City, New York; and Chicago, Illinois require that employees use a minimum of four hours of sick leave.¹⁹⁴ Even though therapy sessions usually run about 50 minutes,¹⁹⁵ an employee might be forced to take a half day off.¹⁹⁶ Once again, legislators should strive to balance prevention of system abuse with the best interest of the employee.

B. SUGGESTIONS FOR EMPLOYERS

Employers residing in jurisdictions that do not require paid sick leave should consider proactively adopting paid sick leave policies to increase workplace productivity and retention. Businesses should customize the paid sick leave policy according to business needs by determining whether leave should be accrued or provided in a lump sum and whether to cap accrual.¹⁹⁷ Employers must determine a minimum leave increment if a paid sick leave law does not specify otherwise.¹⁹⁸

Even if an organization chooses not to adopt paid sick leave policies, leadership personnel can take further action to accommodate employees with mental health issues. Improved recognition and management of mental health disorders such as clinical depression and bipolar disorder “have important

191. *Id.*

192. *Paid Sick Leave Epidemic*, *supra* note 33, at 8.

193. *Id.*

194. *Id.*

195. Amanda Chan, *Going to Therapy for the First Time? Here's What to Expect*, HUFFPOST (Jan. 22, 2014, 8:37 AM), https://www.huffingtonpost.com/2014/01/22/first-time-at-therapy_n_4612858.html [<https://perma.cc/4FVW-5VBP>] (last updated Jan. 25, 2014).

196. *Paid Sick Leave Epidemic*, *supra* note 33, at 9.

197. *Id.* at 7.

198. *Id.* at 8-9

implications for averting expenditures and reducing cost[s].”¹⁹⁹ Prejudicial attitudes and anticipated or real acts of discrimination against people with mental disorders are two of the leading causes of the alarming percentage of people who fail to seek treatment.²⁰⁰ Employees are more hesitant to utilize counseling services if they believe that their careers will be affected.²⁰¹ By facilitating a workplace culture that is accepting and understanding,²⁰² employers can dismantle some of the stigma associated with mental health issues and encourage employees to seek help.²⁰³

Providing leadership personnel with the technical skills and education required to address mental illness in the workplace can ensure compliance with laws, recognition of early mental illness warning signs, appropriate support of employees, and creation of a safe work environment.²⁰⁴ Evaluating policies and procedures to ensure the accommodation of employees with mental illness may deter costly Equal Employment Opportunity Commission and ADA lawsuits.²⁰⁵ The implementation of paid sick leave policies will facilitate this compliance process and give employees the resources to improve their mental well-being.

VII. CONCLUSION

Mental disorders are a growing problem in modern society.²⁰⁶ Despite the vast number of Americans struggling with mental health issues, the United States lags behind other highly developed nations regarding paid sick leave laws to treat

199. RS McIntyre et al., *The Effect of Bipolar I Disorder and Major Depressive Disorder on Workforce Function*, 28 CHRONIC DISEASES IN CANADA 84, 84 (2008).

200. Sabine E. Hanisch et al., *The Effectiveness of Interventions Targeting the Stigma of Mental Illness at the Workplace: A Systematic Review*, 16 BMC PSYCHIATRY 1,1 (2016).

201. *Id.* at 2.

202. *Workplaces are Finally Treating Mental Health Days as Sick Days*, *supra* note 61.

203. *Id.*

204. Danielle Terveen, *Mental Illness Programs for the Workplace* 3, 5 (Dec. 14, 2015) (unpublished M.B.A. thesis, The College of St. Scholastica) (on file with ProQuest).

205. *Id.* at 6, 8-9.

206. *State of Mental Health in America*, *supra* note 6.

these illnesses.²⁰⁷ Paid sick leave policies prevent workers from having to choose between paying the bills and seeking preventative care or treatment.²⁰⁸ Contrary to the criticisms of paid sick leave policies, overwhelming research illustrates the benefits employers can gain by allowing employees to seek necessary mental health care treatments.²⁰⁹

State legislators should consider adopting a paid sick leave policy to improve the health and well-being of employees struggling with mental illness. Until legislation requiring paid sick leave is passed, employers should consider voluntarily adopting policies that allow employees access to paid sick leave. By allowing employees to take the time they need to attend appointments and engage in preventative care, employers can contribute to the health and well-being of employees, increase retention, and improve workplace productivity. It is time to start recognizing paid sick leave “as an important public health policy issue, not simply a workplace benefit.”²¹⁰

207. *Contagion Nation*, *supra* note 12, at 3.

208. *Administration and Financing of Paid Sick Leave*, *supra* note 21, at 44.

209. *See Prevention of Mental Health Disorders*, *supra* note 166, at 15.

210. *Lack of Paid Sick Leave Reduces Use of Preventative Health Care Services*, *supra* note 69, at 64.