



# Taking Leave

California's new paid family medical leave act could be copied in other states, opening the door for insurers to expand their leave administration services and develop new income replacement products.

by Meg Green

**K**eeping track of the hours employees worked used to be as simple as making sure the time clock was accurate when they punched in and out. That's not the case anymore, and employers who fail to follow state and federal guidelines could find themselves facing fines and expensive litigation.

As new regulations and laws continue to complicate the administration of employee time off, those with expertise in administering employee leaves—especially skilled disability insurers—stand to gain new business by sharing their knowledge with frustrated employers.

## New Rules

Employers must follow a complex web of state and federal laws that give employees job protection while they take time off for various family and medical situations. The federal Family Medical Leave Act, enacted in 1993, allows employees to take up to 12 weeks of unpaid time off from work each year to bond with a newborn or adopted child, care for a seriously ill family member, or recover

from their own serious health condition. While

the employees are out, their jobs are protected under the law. An estimated 4 million working family members have been able to use FMLA each year without putting their jobs or health insurance at risk, according to the National Partnership for Women & Families.

The FMLA applies to companies with 50 or more employees within a 75-mile radius, and to be eligible, employees must have worked at least 1,250 hours in the past 12 months.

In addition to managing the unpaid federal FMLA, employers also have to stay on top of additional state laws regulating time off for employees. Many states have gone beyond the FMLA to provide additional time off for employees for vari-

## Key Points

- There are 66 different leave laws in more than 30 states regarding employee time off.
- Employers found in violation of state and federal employment laws can face serious fines and violations.
- Only 10% of employers currently outsource Family Medical Leave Act administration.

ous reasons. (See "Rules Vary by State," page 30.)

Also, between 50% and 70% of employee medical leaves under FMLA's provision for employees to take time off for their own medical condition may also qualify for short-term disability leaves, according to UnumProvident Corp.

FMLA "has created quite a beast," said Kelly Brantman, director of FMLASource at ComPsych, a provider of employee assistance programs.

Administering FMLA correctly can be challenging. Congress didn't specify what medical conditions are eligible under the law, so there are conflicting ideas—and court opinions—about what qualifies. Complicating that issue, employers aren't allowed to inquire into the medical history of an



employee or employee's family member when evaluating whether a condition qualifies for FMLA leave.

It's up to employers to track FMLA leave, but the leaves can be taken intermittently, making it more difficult to monitor. About 62% of employers said they found tracking intermittent leave "very to extremely difficult," according to a study by the Society for Human Resource Management.

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One of the primary reasons administering FMLA leave is difficult is that federal regulations provide just the minimum requirements, Brantman said. "Each state is at liberty to provide additional, enhanced rights, and [many] states have some variation that extends additional benefits beyond the federal law," she said.

In fact, there are now 66 different leave laws in more than 30 states, said Rob Hecker, vice president of leave management for UnumProvident Corp., the largest writer of group short-term and long-term disability insurance, according to the 2003 JHA Group Disability Market Survey.

Most recently, California has enacted a paid family medical leave act. Funded by a payroll tax, the state-run temporary disability fund will now pay California employees partial pay for up to six weeks of time off if they need to care for a new child or seriously ill family member. The law applies to both newborns and adopted children, and both moms and dads are eligible.

#### Not Without Cost

While family medical leave programs are characterized as having a minimal cost to employers, the reality is if employees aren't on the job, the employer is losing productivity. Unscheduled employee absence can cost employers about 4.5% of payroll each year, according to Marsh USA and Mercer Human Resources Consulting.

One burden that's harder to quantify is the cost of administering the various leaves, especially for large national employers. About 17% of employees had used family leave in the past 12

months, according to the Society for Human Resource Management's survey of 375 human resources professionals. More than half of those did not schedule it in advance.

Many human resources experts are keeping a wary eye on California.

According to the Department of Labor, which administers FMLA, about 78% of employees who could take FMLA traditionally haven't because they couldn't afford to go without pay. So some are expecting a higher percentage of workers in California to take family medical leave now that they will receive partial pay for the time off.

Also, some expect other states to follow California's lead, said Liz Goldsmith, professor of family resource management at Florida State University. "Everybody will be watching. California is such a bellwether state, especially in progressive legislation," she said.

Three other states—New York, New Jersey and Hawaii—that also have a state-run temporary or short-term disability system have considered expanding coverage, said Lissa Bell, senior policy associate with the National Partnership for Women & Families, which lobbied in support of the California law. Expanding family medical leave coverage is sorely needed, she said.

Of those workers who opt to take the unpaid federal leave, one in 10 end up on public assistance, she said.

"We need a modern insurance system," Bell said. She said before California adopted the paid family medical leave act, the law it had in place for 40 years, "was a great law, but it was designed for a different era, a different family, a different



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Florida State University



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work force. Men used to be the breadwinners, and moms stayed home and were the family caretakers. We essentially have an old insurance system attached to a new family and labor system, and they don't sync at all. We need to modernize the program so it does what it was always meant to do."

California's paid family leave does not provide job protection, but workers' jobs might be protected under the federal FMLA or the California Family Rights Act, the California version of the federal law. The California paid family leave act applies to all employers covered by state disability insurance.

**The Risks**

Fines and penalties from the Department of Labor can be significant, but the real issue—and the real risk—is employers who terminate an employee with an attendance problem may realize too late that the employee was protected under FMLA or a state leave law, Hecker said. Both

the employer and managers can be liable for damages.

Employers are often confused by how paid-time-off policies should be coordinated with FMLA leaves. If employers don't manage their leave programs consistently, they can be subject to fines and lawsuits. Litigation costs can be \$100,000 to \$200,000 per claim, not including settlement costs, according to UnumProvident.

In one lawsuit that UnumProvident cited, a long-time employee alleged his former employer terminated him for using family medical leave to care for two ill parents. A federal jury ended up awarding \$11.7 million to the employee, consisting of \$10.8 million against the employer and \$900,000 individually against the two supervisors.

The Family Medical Leave Act has "made the whole employment practices issue that much more complicated, and it was already complicated," Hecker said.

Under the law, employees do not have to request FMLA leave. It's the employers' responsibility to identify potential FMLA leaves and determine if they qualify and to notify employees of their rights within two business days, according to UnumProvident.

**The Professionals**

What might amount to a headache

**Family Leave Acts**

**California's Paid Family Medical Leave Act:**

- Allows workers to take up to six weeks off with partial pay to:
  - Care for a seriously ill child, spouse, parent or registered domestic partner
  - Bond with new child due to birth, adoption or foster care placement
- Does not offer job protection, although workers could be covered by the federal Family Medical Leave Act.
- Workers are eligible regardless of how long they've been with current employer.
- One-week waiting period before claimants are eligible.
- Funded through an additional 0.8% payroll tax to state-run disability fund.
- Estimated annual cost per worker: \$25.20.
- Maximum contribution per worker: \$55.06.
- 100% employee funded.
- Weekly benefits ranged from \$50 to \$728 in 2004.
- Enacting legislation adopted in 2002.
- Program launched in 2004.
- Program administered by the Employee Development Department of California.

- In the first five months of the program (July through November 2004), EDD paid out \$108 million in benefits to 60,000 claimants.
- About 90% of the claims have been for bonding, and 88% of all claims have been filed by women.

Source: Employee Development Department of California

**Federal Family Medical Leave Act:**

- Guarantees covered employees 12 weeks of unpaid leave each year, with job protection, to:
  - Care for a newborn or newly-adopted child
  - Care for a seriously ill family member
  - Recover from their own serious illness
- Law applies to companies with 50 employees within a 75-mile radius
- To qualify, employees must have worked at least 1,250 hours in the past 12 months.
- 78% of workers who have needed the leave said they can't afford to take it.
- One in 10 workers who take FMLA leave wind up on public assistance.

Source: National Partnership for Women & Families; UnumProvident Corp.; Department of Labor

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There's no commercial insurer currently offering a product for income replacement for a worker to take time off to care for a family member.

—Lissa Bell,  
*National Partnership for Women & Families*

for employers has been a boon for companies that administer leaves of absence, including disability insurers.

UnumProvident has seen its leave management administration business grow tremendously in the past three to four years as more employers throw up their hands at trying to manage the various state and federal leave laws and hand over their administration to professionals.

"A big piece of that is the increasing complexity in the marketplace with these leave laws," Hecker said. "Plus with Sarbanes-Oxley and HIPAA, there's a whole mentality of being compliant and fear of what happens if you are not."

Some third-party providers are offering leave administration service as a stand-alone product, while others have teamed up with a disability writer to offer the coverage. UnumProvident and Hartford Life both

offer the leave administration services in-house, but only to their group disability customers.

In the past two or three years, Hartford Life, which is ranked second in group short-term and long-term disability sales premium according to JHA, has seen a two-to-three-fold increase in interest in its leave administration service, said Katie Dunnington, director of disability product management for Hartford Life. Hartford also has gained business since the California

paid family leave act was launched by offering to administer the disability leave for companies that opt out of the state-run program.

Employers may want to opt out of the state-run program for many reasons, Dunnington said, such as wanting to offer employees a more generous benefit than the one provided through the state. Also, it often makes sense for a multistate employer to have all of its employees treated the same, regardless of where they work.

"It makes the program more streamlined and easier to communicate with employees. They only have to make one call," she said. "Generally, we like to package it with other programs. California is particularly complex. We can administer federal medical leave act, state disability, paid family leave, pregnancy disability leave—all under one roof, and provide



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—Rob Hecker,  
*UnumProvident*

## Rules Vary by State

The federal Family Medical Leave Act provides employees with 12 weeks of unpaid leave each year to care for a newborn, a newly adopted child or a seriously ill family member, or to recover from their own serious health conditions.

Some states have gone further and forced employers to provide some additional type of leave:

- California has the country's most comprehensive paid family medical leave program. More than 13 million workers can receive partial wages (55% to 60% of wages) to take up to six weeks of leave a year to care for a newborn, newly adopted child or a seriously ill family member. Also, they can take up to 50 weeks of leave a year to recover from serious illness, including pregnancy or birth-related disability, under the state's disability insurance program.
- Five states (California, Hawaii, New Jersey, New York, Rhode Island) and Puerto Rico have a state-administered

temporary disability insurance system or require employers to offer temporary disability insurance. TDI provides partial wage replacement for workers who are temporarily disabled for medical reasons, including those related to pregnancy or birth. Generally, state-administered TDI benefits are funded through some combination of employee/employer shared payroll tax.

- Minnesota, Montana and New Mexico have laws or pilot initiatives establishing At-Home Infant Care programs, which provide eligible low-income working parents with some wage replacement if they stay home to provide care for newborns or newly adopted children.

- At least 26 states allow public employees to use sick leave to care for certain family members.

- Six states require private-sector employers to allow employees to use their sick leave to care for certain family members.

Source: National Partnership for Women & Families



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**THE STATE-RUN** temporary disability fund will now pay California employees partial wages for up to six weeks of time off if they need to care for a new child or seriously ill family member.

administrative services for all of those inter-related laws and regulations.”

**Potential for Growth**

The new family leave laws and regulations are opening the door for insurers to do more business in several areas, including offering comprehensive programs that include employee assistance programs, Dunnington said.

Employee assistance programs “round out a complement of things we can offer to an employer,” Dunnington said. “People dealing with family illness, their own illness, or needing to find child care ... EAP can help with that by taking on a burden for people who aren’t at work. It’s important to manage the leave and deal with the stress in the workplace.”

Whenever legislation changes, insurers react,

said Goldsmith of Florida State. “I know that insurers will be looking at these changes and adjusting accordingly. There’s always insurance available for a price,” she said.

Bell said to her knowledge, there’s no commercial insurer currently offering a product for income replacement for a worker to take time off to care for a family member. “It’s a new market. There’s no reason why they can’t sell that product. I would anticipate that this would be a product that a savvy insurer would be looking to provide,” Bell said.

UnumProvident has no current plans to expand its definition of disability for insurance purposes, Hecker said, but added the market to provide leave administration services to employers is under penetrated. Only 10% of employers currently outsource FMLA administration, according to a Mercer/Marsh Survey of

Employers’ Time Off and Disability Programs.

“There’s quite a bit of opportunity. It’s still a fairly new business,” Hecker said. “The way we view it is if you know what you’re doing, it’s a manageable risk. We have a team of employment attorneys that advise us when something is unusual. Most employers don’t have the size and scale to have that kind of administration.”



FMLA “has created quite a beast.”

—Kelly Brantman, ComPsych

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