

A Patchwork of Paid Leave: Are the Growing  
Number of State and Local Paid Sick Leave Laws  
Safe from ERISA Preemption?

Martin S. Stainthorp  
Chicago-Kent College of Law  
Expected Graduation Date: May 2021  
2638 W. Iowa, Unit 1F  
Chicago, IL 60622  
773-817-9244  
mstainthorp@kentlaw.iit.edu

## Introduction

The United States remains one of the few countries in the developed world that does not guarantee workers some national form of paid sick leave.<sup>1</sup> Consistent with that lack of adequate national policy, the federal government's recent legislative response to the COVID-19 pandemic, the Families First Coronavirus Response Act (FFCRA),<sup>2</sup> appears highly disjointed, limited and at best temporary: it applies only to work absences related to coronavirus, exempts many large employers, and expires at the end of 2020.<sup>3</sup>

State and local governments have stepped into the vacuum created by federal inaction. In the last several years, a significant and increasing number of states and municipalities have begun requiring employers to provide paid sick and/or paid family leave. As of May 2020, at least 14 states, 21 cities, and three counties had passed or enacted paid sick leave laws.<sup>4</sup> An additional eight states and the District of Columbia have instituted paid family leave programs.<sup>5</sup> The coronavirus pandemic is likely to accelerate this trend. In April 2020, undoubtedly influenced by the state's health crisis, New York enacted a paid sick leave law as part of its 2021 budget.<sup>6</sup>

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<sup>1</sup> Of the 193 countries in the world, 179 provide some form of paid sick leave to employees. *179 Countries Have Paid Sick Leave. Not the US*, PRI (March 13, 2020).

<sup>2</sup> Families First Coronavirus Response Act, PL 116-127, 134 Stat 178 (2020).

<sup>3</sup> U.S. Dep't of Labor, TEMPORARY RULE: PAID LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS ACT, <https://www.dol.gov/agencies/whd/ffcra> (last accessed April 6, 2020).

<sup>4</sup> *Paid Sick Leave Laws by State*, PAYCOR, [www.paycor.com/resource-center/state-paid-sick-leave-laws](http://www.paycor.com/resource-center/state-paid-sick-leave-laws) (last accessed May 14, 2020).

<sup>5</sup> The states are: California, Connecticut, New Jersey, New York, Massachusetts, Oregon, Rhode Island, Washington. *State Paid Family and Medical Leave Insurance Laws*, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES (Aug. 2019).

<sup>6</sup> SB 7506, § 196-b, Budget Bill, N.Y. State Assembly (signed into law April 3, 2020); New York became the 14th state to enact a paid sick leave law. The other states are: Arizona, California, Connecticut, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Oregon, Rhode Island, Vermont, Washington, *supra* note 4.

These laws vary in size, scope, and coverage but provide critical benefits for workers and their families. Nevertheless, the growing patchwork of paid sick leave and paid family leave laws across the country can present compliance challenges for employers, particularly those operating in different states and localities. For that reason, some of these laws have historically faced federal preemption challenges under the Employment Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (ERISA).

On the whole, the question of federal preemption of such laws remains an emerging and somewhat unsettled area of the law. This paper will present a basic primer on ERISA preemption and an overview of the history of preemption challenges to state and local paid sick leave laws, survey several laws passed or considered in recent years, and posit possible preemption challenges they may face.

## I. ERISA Preemption: A Primer and Historic Overview

As a matter of federal employee benefit policy, ERISA comprehensively regulates employee benefit plans maintained by employers, including health, disability, and other welfare benefits, and pension plans.<sup>7</sup> Section 514 of ERISA preempts “any and all State laws” that “relate to any employee benefit plan” described in the statute and not otherwise exempt.<sup>8</sup> For the first two decades after ERISA’s passage and beginning with its 1983 decision in *Shaw v. Delta Air Lines*,<sup>9</sup> the Supreme Court proceeded from a presumption of federal preemption and broadly interpreted this express preemption clause in the interest of furthering a congressional objective of creating nationally

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<sup>7</sup> Rebeccah Golubuck Watson, *Defending Paid Sick Leave in New York City*, 9 BROOK. L. J. OF L. & POL’Y., 972, 1000 (2011).

<sup>8</sup> ERISA § 514(a), 29 U.S.C. § 1144(a).

<sup>9</sup> *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

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uniform rules for employee benefit plans.<sup>10</sup> Under *Shaw*, a state law is considered to “relate to” to an ERISA plan if it “has a connection with or reference to such a plan.”<sup>11</sup>

In an abrupt shift in 1995 in *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, the Supreme Court announced a presumption against federal preemption<sup>12</sup> and declined to find preemption of state taxation laws that indirectly affected ERISA benefit plans. Post-*Travelers*, the Supreme Court set forth some criteria against which to test a state law for federal preemption. State laws have an impermissible connection to ERISA plans if they, among other things, mandate employee benefit structures<sup>14</sup> or interfere with nationally uniform plan administration.<sup>15</sup>

Recently, the Court appears to have returned to the broad scope of ERISA preemption in *Gobeille v. Liberty Mutual Insurance Company*.<sup>18</sup> That 2016 case concerned a challenge to a Vermont law requiring employers to make health care payment disclosures to a state agency. The Supreme Court found the law preempted as applied to ERISA plans because Vermont’s reporting requirements “intrude[d] upon ‘a central matter of plan administration’ and ‘interfere[d] with nationally uniform plan administration.’”<sup>19</sup>

The critical questions presented by state and local paid sick or family leave laws include whether the laws require the establishment of ERISA-covered plans or impact the national administration of benefit plans by creating a patchwork quilt of state or local

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<sup>10</sup> Alden J. Bianchi, *The Impact of ERISA on the Massachusetts Paid Family and Medical Leave Law*, MINTZ (Sept. 13, 2019), <https://www.mintz.com/insights-center/viewpoints/2226/2019-09-impact-erisa-massachusetts-paid-family-and-medical-leave>.

<sup>11</sup> *Shaw*, 463 U.S. at 97.

<sup>12</sup> *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 646 (1995).

<sup>14</sup> *Id.* at 654.

<sup>15</sup> *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 142 (2001).

<sup>18</sup> *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016).

<sup>19</sup> *Id.* at 945 (quoting *Egelhoff*, 532 U.S. at 148).

plans. Under these paid leave laws, employers must generally determine who is eligible for benefits, track how much paid leave has been accrued and taken, and monitor employee compliance with rules for taking paid leave. Laws such as these therefore clearly require an “ongoing administrative scheme” and it would seem as if the *Fort Halifax* exception from ERISA preemption (for one-time benefits that do not require an administrative scheme) would not apply.<sup>21</sup>

Complex ERISA preemption challenges of paid sick leave laws in light of these shifting principles will turn on the specific provisions of the state laws and local ordinances at issue.

## II. The “Payroll Practice” Exemption

Under a *Fort Halifax* analysis, ERISA would likely preempt state or local paid leave laws that impermissibly affect the administration of such plans, unless saved by the payroll practice exemption.

In a 1994 Advisory Letter, the U.S. Department of Labor (DOL) addressed the issue of whether an employer’s paid sick leave policy constituted a “plan” for purposes of ERISA.<sup>22</sup> Charged with interpreting ERISA through regulations and other guidance, the DOL concluded that, because the policy involved the payment of “an employee’s normal compensation during periods of absences due to illness, and because an employer paid such compensation out of its general assets,” the employer’s sick leave

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<sup>21</sup> *Ft. Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). The Supreme Court held that a Maine statute requiring employers to pay a one-time severance payment to employees in the event of closure did not constitute an ERISA “plan” because there was no “ongoing administrative scheme.” The absence of an ERISA-governed plan doomed the company’s preemption challenge.

<sup>22</sup> U.S. Dep’t of Labor, Advisory Op. 94-40A (Dec. 7, 1994). Advisory letters bind the parties only, but provide guidance to others.

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policy constituted a “payroll practice” rather than an “employee welfare benefit plan.”<sup>23</sup>

This “payroll practice” exemption from ERISA coverage is the most relevant exception to ERISA preemption for state and local laws that mandate employer-paid sick leave plans.<sup>24</sup> Since employers usually pay out sick, vacation, and other paid-time-off compensation through their general assets, these plans would generally be saved from preemption.<sup>25</sup>

Courts have nonetheless confronted the difficult issue of evaluating possible ERISA preemption where the employer has paid sick leave out of a separate trust fund, rather than the employer’s general assets. In *Alaska Airlines v. Oregon Bureau of Labor*, a 1997 case from the Ninth Circuit, the airline pre-funded a trust with assets used to pay sick leave benefits.<sup>26</sup> The airline paid sick leave benefits directly to employees and then sought reimbursement from the trust.<sup>27</sup> When two employees attempted to use sick leave during their parental leave, as allowed under an Oregon state law but not under the airline’s policy, the airline argued that ERISA preempted the state law.<sup>28</sup> The Ninth Circuit Court of Appeals deemed the airline’s policy a “payroll practice” rather than an employee welfare benefit plan regulated under ERISA, because the “system ha[d] more of the characteristics of an unfunded payment” as the airline was ultimately responsible for making payments.<sup>29</sup> The state law thus did not impact an ERISA-governed plan, and the Court rejected the airline’s preemption challenge.

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<sup>23</sup> *Id.*

<sup>24</sup> Amelia M. Klein, *Are Paid Sick Leave Policies Subject to ERISA?*, CFMA BUILDING PROFITS (May/June 2017), <http://directadvisors.com/wp-content/uploads/2018/03/Are-Paid-Sick-Leave-Policies-Subject-to-ERISA.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *Alaska Airlines, Inc. v. Oregon Bureau of Lab.*, 122 F.3d 812, 813 (9th Cir. 1997).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 814.

A similar issue was adjudicated in *Airline Pilots Association International v. United Airlines*, a 2014 California case. The airline argued that, since it funded its sick leave benefits through a separate trust, the sick leave scheme fell within the definition of an ERISA plan that should preempt a state law allowing employees to use sick leave to care for family members.<sup>30</sup> However, the court held that, under the rule from *Alaska Airlines*, in order for a separate fund for benefits to qualify for ERISA preemption, “that separate fund must be *actually liable* for the benefits.”<sup>31</sup> Since the airline held a reversionary interest in the trust’s funds, making them accessible to the airline’s creditors in the event of insolvency, “the risk of employees receiving their sick leave benefits was tied to the financial health of United, and not the trust.”<sup>32</sup> Therefore, ERISA did not preempt the state law.<sup>33</sup>

As seen here, even where an employer has established a trust out of which it pays sick leave benefits, courts have construed the “payroll practice” exemption relatively broadly. Most garden-variety paid sick leave laws would fall under this exemption, either because the employer pays sick leave out of its general assets as compensation or because the employer’s separate trust fund remains available to creditors; thus, the laws would withstand preemption.

### III. Other Types of Related Laws

While most standard paid sick leave laws have survived preemption challenges, the courts have sharply divided in cases involving other types of related state and local

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<sup>30</sup> *Airline Pilots Association International v. United Airlines*, Cal.Rptr.3d 467, 470 (2014).

<sup>31</sup> *Id.* at 475 (italics in original).

<sup>32</sup> Terry A. Long, Jr., *Government-Mandated Sick-Leave Plans Unlikely to be Preempted by ERISA*, EMPLOYEE BENEFIT ADVISER (Sept. 22, 2016), <https://www.employeebenefitadviser.com/opinion/government-mandated-sick-leave-plans-unlikely-to-be-preempted-by-eris>.

<sup>33</sup> *Id.*

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laws, most notably mandatory health care expenditure laws and state family and medical leave act laws.

#### A. Mandatory Health Care Expenditure Laws: Circuit Split

In the first decade of the 21<sup>st</sup> century, several states and municipalities worked to enact laws designed to shift some of the high costs of providing health care for uninsured workers on to private employers.<sup>34</sup> These “Play or Pay” or “Fair Share” laws varied, but generally required that certain employers either pay a certain amount toward private health care coverage for their employees or pay the equivalent amount to the respective government entity to defray health care costs.<sup>35</sup> Challenges to two of these laws reached their respective Courts of Appeal, with the circuits reaching divergent opinions on ERISA preemption.

In 2006, Maryland enacted the “Fair Share Act,” which required for-profit employers with 10,000 or more employees<sup>36</sup> to either spend at least eight percent of their payroll on “health insurance costs” or pay the difference into a state Medicaid fund.<sup>37</sup> A trade association then challenged the law on the basis of ERISA preemption in *Retail Industry Leaders Ass’n v. Fielder*.<sup>38</sup> The Fourth Circuit Court of Appeals agreed with the District Court that the law “effectively” required covered employers to restructure their employee health insurance plans, that such an impact on plans

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<sup>34</sup> Joshua Waldbeser, *Case Note: Golden Gate Restaurant Association V. City and County Of San Francisco: Setting the Stage for Supreme Court Review Of The Most Important Preemption Matter In the History Of ERISA*, 41 J. MARSHALL L. REV. 995 (Sept. 2008).

<sup>35</sup> *Id.*

<sup>36</sup> The law was dubbed the “Wal-Mart Bill” because Wal-Mart was the only employer in the state that would have been affected. Stephanie Armour, *Maryland First to Ok ‘Wal-Mart Bill,’ USA TODAY* (Jan. 13, 2006).

<sup>37</sup> Patricia A. Butler, *ERISA Implications for State Health Care Access Initiatives: Impact of the Maryland “Fair Share Act” Court Decision*, NATIONAL ACADEMY FOR STATE HEALTH POLICY (Nov. 2006), [https://nashp.org/wp-content/uploads/sites/default/files/ERISA\\_Implications.pdf](https://nashp.org/wp-content/uploads/sites/default/files/ERISA_Implications.pdf).

<sup>38</sup> *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180 (4th Cir. 2007).

conflicted with ERISA's goal of "uniform nationwide administration of plans," and that ERISA preempted the state law.<sup>39</sup>

The next year, the Ninth Circuit Court of Appeals reached the opposite conclusion in *Golden Gate Restaurant Association v. City and County Of San Francisco*.<sup>40</sup> That 2008 decision evaluated an ordinance<sup>41</sup> enacted by the city of San Francisco in 2006 that required certain employers to meet a set level of health care expenditures per covered employee or else pay the difference to the city.<sup>42</sup> Uninsured covered employees whose employers paid the city could then become eligible for the city's health care program.<sup>43</sup> The Ninth Circuit held that ERISA did not preempt the law because the law did not compel employers "to alter or establish ERISA plans rather than to make payments to the City."<sup>44</sup> The Court held that, unlike the Maryland law in *RILA*, the city's law offered employers a "meaningful alternative," because if they elected to pay the city their employees would receive "tangible benefits."<sup>45</sup>

Some predicted that the Supreme Court would inevitably resolve the tension between these two decisions and would likely affirm the Fourth Circuit's analysis in *RILA*.<sup>46</sup> The Supreme Court denied review in *Golden Gate*,<sup>47</sup> however, and the law remains in effect. The Supreme Court has never resolved the circuit split, and *Golden Gate* remains binding precedent in the Ninth Circuit. In recent litigation challenging a Seattle ordinance requiring large hotels and other related businesses to make health

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<sup>39</sup> *Id.* at 183.

<sup>40</sup> *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 546 F.3d 639, 642 (9th Cir. 2008).

<sup>41</sup> San Francisco Health Care Security Ordinance, S.F. ADMIN. CODE § 14 (2007).

<sup>42</sup> *Golden Gate*, 546 F.3d at 644.

<sup>43</sup> *Id.* at 645.

<sup>44</sup> *Id.* at 660.

<sup>45</sup> *Id.*

<sup>46</sup> Edward A. Zelinsky, *Employer Mandates and ERISA Preemption: A Critique of Golden Gate Restaurant Association v. San Francisco*, CARDOZO LEGAL STUDIES RESEARCH PAPER No. 246 (November 2009).

<sup>47</sup> John Wildermuth, *Healthy San Francisco Clears Last Legal Hurdle*, SAN FRANCISCO CHRONICLE (June 29, 2010).

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expenditures for certain employees,<sup>48</sup> the city moved to dismiss on the basis that, under *Golden Gate*, ERISA did not preempt its law.<sup>49</sup>

### B. State FMLA Laws: Would ERISA Preemption Impair Federal Law?

As Congress has failed to provide for paid family and medical leave since the passage of the Family and Medical Leave Act (FMLA), state FMLA laws have become increasingly common. As of 2020, 13 states and the District of Columbia had some form of a family leave law.<sup>50</sup> Because the FMLA allows states to set standards more expansive than the federal law, issues have arisen when provisions of these state laws conflict with terms of ERISA benefit plans. State laws that provide more generous terms for the substitution of unpaid leave with paid leave have been the primary source of such conflict.

Under the federal FMLA, employees can only substitute paid leave for unpaid leave if it conforms with the employer's normal leave policy.<sup>51</sup> However, under the Wisconsin FMLA, employees have a "right of substitution,"<sup>52</sup> i.e., they can substitute paid leave of any type provided by the employer for FMLA leave that would otherwise be unpaid.<sup>53</sup> Employers have challenged this substitution right under the Wisconsin FMLA as preempted by ERISA.<sup>54</sup>

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<sup>48</sup> Danielle Nicole Smith, *ERISA Doesn't Preempt Hotel Benefits Ordinance, Seattle Says*, LAW 360 (Feb. 21, 2020).

<sup>49</sup> *Id.*

<sup>50</sup> The states are: California, Connecticut, Hawaii, Maine, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin. *State Family and Medical Leave Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 2016), <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>.

<sup>51</sup> 29 U.S.C. § 2612(d)(2)(A), (B); 29 C.F.R. § 825.207.

<sup>52</sup> Alan E. Seneczko, *Is the Right to Substitute Paid Leave Under the Wisconsin FMLA Preempted by ERISA or Not?* WESSELS SHERMAN (October 2014), <https://www.wesselssherman.com/Articles/Is-the-Right-to-Substitute-Paid-Leave-Under-the-Wisconsin-FMLA-Preempted-by-ERISA-or-Not.shtml>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

The Wisconsin Supreme Court rejected this argument in *Aurora Medical Group v. Department of Workforce Development*.<sup>55</sup> That 2000 case involved a nurse who requested leave to adopt a child and sought to substitute the unpaid leave of absence with paid sick leave she had accrued under the employer's sick pay plan.<sup>56</sup> The employer denied the substitution because its plan only provided paid sick time to employees who were ill.<sup>57</sup> The nurse then filed a complaint that this denial violated her substitution right under the Wisconsin FMLA.<sup>58</sup> The employer argued that ERISA should preempt that Wisconsin FMLA provision.<sup>59</sup> The Wisconsin Supreme Court disagreed, finding no federal preemption, in part because the federal FMLA includes language encouraging and giving states authority to enact "greater family or medical leave rights than the rights established under this Act . . . ."<sup>60</sup> The Court concluded that "Congress did not intend for ERISA to pre-empt the Wisconsin FMLA's substitution provision because pre-emption would 'impair' the federal FMLA."<sup>61</sup>

Five years later, the DOL endorsed that view in an advisory letter concerning a Washington state law.<sup>62</sup> In Ad. Op. 2005-13A, the DOL opined that ERISA should not preempt leave substitution provisions in the Washington State Family Care Act.<sup>63</sup> Adopting the reasoning of the Wisconsin Supreme Court in *Aurora Medical Group*, the

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<sup>55</sup> *Aurora Med. Grp. v. Dep't of Workforce Dev., Equal Rights Div.*, 612 N.W.2d 646 (Wis. 2000).

<sup>56</sup> *Id.* at 650.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Aurora Med. Grp. v. Dep't of Workforce Dev.*, 236 Wis. 2d 1, 23-24 (Wis. 2000) (quoting 29 U.S.C. § 2651 (b) (2016)).

<sup>61</sup> *Id.*

<sup>62</sup> U.S. Dep't of Labor, Advisory Opinion 2005-13A (May 31, 2005).

<sup>63</sup> *Id.*

DOL found that preemption of the state law would “impair” the FMLA, “which expressly encourages more generous state family leave rights than the FMLA provides directly.”<sup>64</sup>

However, the Sixth Circuit Court of Appeals’ 2014 decision in *Sherfel v. Newsom* called into question the analysis in *Aurora Medical Group* and the DOL advisory letter.<sup>65</sup> The *Sherfel* case involved a similar scenario concerning the substitution provision in the Wisconsin FMLA. A Wisconsin-based employee with a new baby sought to substitute an unpaid leave of absence with paid short-term disability leave.<sup>66</sup> The employer denied the request because she did not qualify for disability benefits under the employer’s plan.<sup>67</sup> The employee filed a complaint and an administrative law judge ruled against the employer.<sup>68</sup> The employer then filed a federal lawsuit in Ohio (where it was headquartered), seeking a declaration that ERISA preempted the Wisconsin FMLA’s substitution provision.<sup>69</sup> The district court found for the employer and the Sixth Circuit affirmed.<sup>70</sup>

The Sixth Circuit held that ERISA preempted the substitution provision in the Wisconsin FMLA because the provision “related” to an ERISA plan: the state law mandated employee benefit structures, interfered with nationally uniform plan administration, and created an alternate enforcement mechanism for recovery of benefits.<sup>71</sup> The Court rejected the holding of the Wisconsin Supreme Court in *Aurora Medical Group* that preemption of the substitution provision would improperly “impair”

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<sup>64</sup> *Id.*

<sup>65</sup> *Sherfel v. Newsom*, 768 F.3d 561 (6th Cir. 2014).

<sup>66</sup> *Id.* at 566.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 566-567.

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the federal FMLA.<sup>72</sup> Because the federal FMLA did not mandate substitution of employer-provided leave benefits in the manner that the Wisconsin FMLA did, the Sixth Circuit failed to see how federal law would be impaired by the prohibition of conduct permitted by federal law.<sup>73</sup>

These divergent opinions leave the law in this area in a somewhat muddled state.<sup>74</sup> Wisconsin employers faced with this issue will have to decide whether to follow the state Supreme Court's decision in *Aurora Medical Group* or the Sixth Circuit's ruling in *Sherfel*.<sup>75</sup> And the question of whether ERISA's Federal Law Savings Clause saves these state FMLA laws so as to not "impair" the federal FMLA may become increasingly relevant as more and more states enact these types of laws.

#### IV. Analysis of New Laws: Are They Susceptible to ERISA Preemption Challenges?

##### A. Chicago & Cook County Sick Day Ordinances and Potential Illinois Law

The city of Chicago and Cook County,<sup>76</sup> Illinois, both enacted similar sick leave laws that took effect in 2017.<sup>77</sup> Both laws require businesses to provide paid sick days to employees.<sup>78</sup> Employees are eligible if they work at least 80 hours for the employer within any 120-day period.<sup>79</sup> For every 40 hours worked, employees accrue one hour of paid sick leave up to a maximum of 40 hours in a 12-month period, unless the employer

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<sup>72</sup> *Id.* at 569.

<sup>73</sup> Bianchi, *supra* note 10.

<sup>74</sup> Ryan H. Nelson, *Federalizing Direct Paid Leave*, 20.3 U. PENN. J. BUS. L. 623, 640 (October 2018).

<sup>75</sup> Seneczko, *supra* note 52.

<sup>76</sup> A substantial number of municipalities in Cook County voted to opt out of the ordinance. Jean Lotus, *About Half of Suburban Cook Towns Opt Out of County Minimum Wage*, COOK COUNTY CHRONICLE (June 20, 2017).

<sup>77</sup> Anagha Krishnan, *Chicago Paid Sick Leave Goes Into Effect: What Employers Need to Know*, WORKEST (July 5, 2017), <https://www.zenefits.com/workest/chicago-paid-sick-leave-goes-into-effect-what-employers-need-to-know/>.

<sup>78</sup> 1-24-045 Paid Sick Leave, MUNICIPAL CODE OF CHICAGO; Sec. 42-3. Earned Sick Leave, COOK COUNTY, ILLINOIS - CODE OF ORDINANCES.

<sup>79</sup> *Id.*

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sets a higher limit.<sup>80</sup> Employees can carry over half of their unused sick days to the next 12-month period, up to a maximum of 20 hours.<sup>81</sup> Under the Chicago ordinance, if employers are covered by the FMLA, employees have the ability to carry over additional hours to use for FMLA purposes.<sup>82</sup>

Illinois is also considering passage of a state-wide paid sick leave law. The Illinois Healthy Workplace Act, SB 471, passed by the Illinois Senate in May 2019, currently sits in the Rules Committee of the Illinois House of Representatives.<sup>83</sup> The law would allow all Illinois employees to earn and use up to five paid sick days per 12-month period.<sup>84</sup> Paid sick days would accrue at the rate of one hour for every 40 hours worked.<sup>85</sup> Unused days would carry over annually.<sup>86</sup>

These ordinances and the Illinois bill are essentially garden-variety paid sick day laws that would generally fall within the “payroll practice” exemption, as discussed above. This exemption would clearly apply if employers paid benefits from their general assets. Moreover, if a court follows *Alaska Airlines*,<sup>87</sup> the exemption would likely apply even if the employer set up a separate trust to pay benefits, as long as the employer was ultimately responsible for payments. However, if an employer set up a separate trust to pay benefits truly insulated from creditors and/or completely independent of the employer and wholly responsible for benefits, a court might conclude that the payroll

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<sup>80</sup> *Id.*

<sup>81</sup> *City of Chicago Paid Sick Leave*, COMPASS CONSULTING GROUP (2018), <https://decisionhr.com/wp-content/uploads/2018/07/City-of-Chicago-Paid-Sick-Leave.pdf>.

<sup>82</sup> *Id.*

<sup>83</sup> Stephanie Mills-Gallan & Sebastian Chilco, *Illinois Employers Are Due for a Check-Up: 2020 Paid Sick Leave Updates*, LITTLER (Jan. 28, 2020), <https://www.littler.com/publication-press/publication/illinois-employers-are-due-check-2020-paid-sick-leave-updates>.

<sup>84</sup> SB 471, 101<sup>st</sup> Gen. Assembly (Ill. 2019).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Alaska Airlines*, 122 F.3d at 813.

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practice regulation did not apply, that the fund and the administrative scheme of the policy comprised an employee welfare benefit plan, and that ERISA preempted the local ordinances or the proposed state law. Nonetheless, in both *Alaska Airlines* and *United Airlines*, courts have established a relatively high bar in order for employers to make this showing.<sup>89</sup>

## B. Massachusetts Paid Family Medical Leave Law

The Massachusetts Paid Family Medical Leave Law (PFML) took effect in 2019.<sup>90</sup> PFML establishes a system allowing employees working in Massachusetts to take up to 26 weeks of paid leave annually for medical or family reasons,<sup>91</sup> with benefits funded through a tax of up to 0.75% of employees' eligible wages.<sup>92</sup> Employers can either deduct this amount from employees' wages or subsidize these contributions<sup>93</sup> and then remit these funds to a state department responsible for paying out benefits.<sup>94</sup> These benefits will become available to workers starting on January 1, 2021.<sup>95</sup>

ERISA would likely not preempt the PFML tax provision because the employer is not contributing to a plan but rather contributing a tax to a state fund. The Supreme Court has held that state surcharges<sup>96</sup> or taxes<sup>97</sup> on employers that have only indirect effects on ERISA plans are not preempted. An employer could potentially argue that the tax here is similar to the mandatory health expenditure requirements that the Fourth

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<sup>89</sup> *Id.*; *United Airlines*, Cal.Rptr.3d at 470.

<sup>90</sup> Christina L. Lewis, *FAQs for businesses on the Massachusetts Paid Family Leave Law*, BOSTON BUSINESS JOURNAL (Sept. 13, 2019); Mass. Gen. Laws Ann. ch. 175M (West).

<sup>91</sup> *Paid Family Medical Leave Fact Sheet*, MASS.GOV, <https://www.mass.gov/info-details/paid-family-and-medical-leave-pfml-fact-sheet> (last accessed May 13, 2020).

<sup>92</sup> *Id.*

<sup>93</sup> Bianchi, *supra* note 10.

<sup>94</sup> *Id.*

<sup>95</sup> *Paid Family Medical Leave Fact Sheet*, *supra* note 91.

<sup>96</sup> *Travelers*, 514 U.S. at 646.

<sup>97</sup> *De Buono v. NYSA-ILA Med. and Clinical Services Fund*, 520 U.S. 806, 816 (1997).

Circuit found preempted in *RILA*. However, a key difference is that the *RILA* Court concluded that the “Fair Share Act” essentially forced employers into restructuring their ERISA plans in order to meet the minimum spending threshold because they would otherwise be paying the State and gaining nothing in return.<sup>98</sup> By contrast, the PFML tax provision appears to be more similar to the San Francisco ordinance upheld by the Ninth Circuit in *Golden Gate*<sup>99</sup> because the tax provides employees with a tangible benefit: eligibility for PFML benefits.

The PFML also includes a “private plan exemption” and the American Benefits Council has expressed concern that this provision raised possible ERISA preemption issues.<sup>100</sup> The exemption allows employers to opt out of the collection and contribution requirements if they can show that the benefits they provide are equal or greater than the benefits provided by PFML, and if the state approves the plan.<sup>101</sup> Under PFML regulations, the state retains considerable authority over these private plans, including the right to hear appeals of benefit denials, restrictions on the right to alter plan terms, and the right to withdraw approval of a private plan.<sup>102</sup> The American Benefits Council reasoned that a court could find private plans using separate funded agreements to provide benefits employee welfare benefit plans subject to ERISA,<sup>103</sup> so that ERISA would preempt the regulations since they “relate” to a plan.<sup>104</sup> The American Benefits Council therefore requested that the final regulations for PFML include an exemption for

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<sup>98</sup> *RILA*, 475 F.3d at 193.

<sup>99</sup> *Golden Gate*, 546 F.3d at 645.

<sup>100</sup> American Benefits Council letter, Re: Proposed Regulations on Massachusetts Paid Family and Medical Leave (May 23, 2019), <https://www.americanbenefitscouncil.org/pub/?id=2D59B556-1866-DAAC-99FB-D28EED952589>.

<sup>101</sup> Bianchi, *supra* note 10.

<sup>102</sup> American Benefits Council letter, *supra* note 100; 458 CMR 2.07(6), (7), (8): Department Of Family And Medical Leave, CODE OF MASSACHUSETTS REGULATIONS (June 28, 2019), <https://www.mass.gov/doc/458-cmr-200-department-of-family-and-medical-leave/download>.

<sup>103</sup> American Benefits Council letter, *supra* note 100.

<sup>104</sup> *Id.*

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an ERISA-covered plan.<sup>105</sup> However, the final regulations issued in June 2019 do not appear to contain any such exemption.<sup>106</sup>

C. New York Paid Family Leave Benefits Law: ERISA Exemption for Disability and Worker's Disability Compensation Laws

Considered one of the most comprehensive paid family leave programs in the country, the New York Paid Family Leave Benefits Law (PFL),<sup>107</sup> effective in 2018,<sup>108</sup> applies to all employers with employees working in the state of New York for at least 30 days in a calendar year.<sup>109</sup> PFL provides a benefit for employees who work in New York, regardless of where the employer is headquartered or where the employee lives.<sup>110</sup> Eligible employees<sup>111</sup> can take paid leaves to provide care for family members with a serious health condition, to bond with a newborn or a recently adopted or fostered child, or for any qualifying reason arising under the FMLA connected to military-related leave.<sup>112</sup> In 2018, employees on leave received up to 50% of the state's average weekly wage for up to eight weeks.<sup>113</sup> The benefit will gradually increase to 67% of the state's average weekly wage for up to 12 weeks by 2021.<sup>114</sup>

PFL provides for benefits through the state's existing Disability Benefits Law (DBL), part of the State's insurance laws.<sup>115</sup> Essentially, the PFL broadens the coverage

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<sup>105</sup> *Id.*

<sup>106</sup> 458 CMR 2.07, *supra* note 102.

<sup>107</sup> 12 CRR-NY 380-2.4.

<sup>108</sup> Autumn Noble & Caroline Nelsen, *New York Paid Family Leave: A Peek at the Most Comprehensive Paid Family Leave Program in the U.S.*, McGRATH NORTH (2017).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Full-time employees must work at least 20 hour per week for 26 consecutive weeks, and part-time workers must work at least 175 days within a 52-week consecutive period, to become eligible. Francis P. Alvarez, et al., *Final New York Paid Family Leave Regulations Released: What Employers Need to Know*, JACKSONLEWIS (July 20, 2017).

<sup>112</sup> Noble & Nelsen, *supra* note 108.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Alvarez, et al., *supra* note 111; N.Y. Workers' comp. Law § 200 (McKinney).

of the DBL to include paid family leave. Under the DBL, employers must provide disability benefits to employees for an off-the-job injury or illness.<sup>116</sup> Employers can obtain coverage through a state-authorized disability benefits insurance carrier or may seek authorization to self-insure.<sup>117</sup> Employers are permitted, but not required, to collect employee contributions to offset the cost of providing benefits.<sup>118</sup> Under the PFL, this employee contribution rate was capped at \$1.65/week for 2018.<sup>119</sup>

Since New York administers the 2018 PFL under its disability insurance law, the law would likely withstand an ERISA preemption challenge. The Supreme Court previously held in *Shaw v. Delta Airlines, Inc.* that ERISA Section § 4(b)(3) excludes from coverage under ERISA employee benefit plans “maintained solely for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws.”<sup>120</sup> Faced with a so-called “multi-benefit plan,” arguably containing both disability benefits and benefits that ERISA governed, the Court reasoned that, when it enacted ERISA, Congress would not have intended to preempt all state disability, worker’s compensation, or unemployment compensation laws, which fell into the states’ traditional spheres of influence.<sup>121</sup> To avoid the potential abuse by employers who would attempt to use ERISA preemption as a sword and thus create multi-benefit plans that incorporated disability benefit provisions, the *Shaw* Court concluded that “[a] State may require an employer to maintain a disability plan complying with state law as a separate administrative unit,” and “[s]uch a plan would be

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<sup>116</sup> *Disability Benefits*, WORKERS’ COMPENSATION BOARD, NEW YORK STATE, <http://www.wcb.ny.gov/content/main/DisabilityBenefits/Employer/introToLaw.jsp> (last accessed May 13, 2020).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Noble & Nelsen, *supra* note 108.

<sup>120</sup> *Shaw*, 463 U.S. at 106 (quoting ERISA Section § 4(b)(3)).

<sup>121</sup> *Id.* at 107.

exempt under § 4(b)(3).<sup>122</sup> The 2018 New York PFL does create a separate administrative unit and separate claims process and assigns any claim for job restoration to the New York worker's compensation appeal board.<sup>123</sup> Under the analysis in *Shaw*, the law should therefore remain exempt from ERISA preemption.

### Conclusion

The number of states and municipalities enacting paid sick and paid family leave laws will likely increase, particularly in response to the coronavirus pandemic. Even in the midst of a national health crisis, it remains highly unlikely that the federal government will pass legislation providing for comprehensive and long-term paid sick leave. The patchwork quilt of laws will continue to grow for the foreseeable future. While the majority of these laws will survive ERISA preemption challenges, some do contain provisions and features that will inspire employers, already strapped during the pandemic, to challenge these state and local laws as preempted by ERISA. Therefore, paid sick leave advocates, legislators, and employers should consider issues of ERISA preemption as they draft new legislation and ordinances against the backdrop of this still emerging and unsettled area of the law.

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<sup>122</sup> *Id.* at 108.

<sup>123</sup> *A Guide for Employers, New YORK STATE PAID FAMILY LEAVE (2019)*, <http://www.wcb.ny.gov/content/main/forms/PFLDocs/Downloadable/Employer/pfl-employer-presentation-2019.pdf>.