

MODEL STATE PAID FAMILY AND MEDICAL LEAVE STATUTE

Note: Drafting a new paid family and medical leave bill requires state-specific research, analysis of underlying state and/or local law and consideration of complex policy issues. We are available to do any necessary legal research and drafting, and to work with you to customize the below model.

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Section 1: Definitions

As used in this Act:

(1) “Application year” is the 12-month period beginning on the first day of the calendar week in which an individual files an application for family and medical leave insurance benefits.

(2) “Covered active duty” is as defined in Section 101(14) of the Family and Medical Leave Act, 29 U.S.C. 2611(14).

Issue for Advocates #1: Determining the Eligibility Standard; Covering Individuals Who are Not Currently Employed

(3) “Covered individual” is:

(a) Any person who: [Note: select one or more of the first three options below, and include the fourth option if allowing self-employed individuals to opt in.]

(i) Contributed [X dollars] to the paid leave system during the 12-month period prior to submitting an application; or

(ii) Worked for [X amount of time] for any employer during the 12-month period prior to submitting an application; or

- (iii) Earned [X dollars] from work during the 12-month period prior to submitting an application; or
- (iv) Is self-employed, elects coverage and meets the requirements of Section 13;
- (b) Meets the administrative requirements outlined in this Act and in regulations; and
- (c) Submits an application.

(4) “Covered servicemember” is as defined in Section 101(15) of the Family and Medical Leave Act, 29 U.S.C. 2611(15).

Issue for Advocates #2: Choosing the Department Responsible for Administering the Program

- (5) “Department” is the [X].
- (6) “Director” is the Director of the Department.

Issue for Advocates #3: Definition of Employee and Employer

- (7) “Employee” is as defined in [state wage and hour law].
- (8) “Employer” is as defined in [state law with the broadest possible definition of employer, or if no state law is usable, can use Fair Labor Standards Act, 29 U.S.C. 203(d).]
- (9) “Family and medical leave insurance benefits” are the benefits provided under the terms of this Act.

Issue for Advocates #4: Broader Definition of Family Members, Using Existing Legal Definitions, and Additional Options and Considerations

- (10) “Family member” is
 - (a) Regardless of age, a biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, a child to whom the covered individual stands in loco parentis, or a person to whom the covered individual stood in loco parentis when the person was a minor;
 - (b) A biological, adoptive or foster parent, stepparent or legal guardian of a covered individual or a covered individual’s spouse or domestic partner or a person who stood *in loco parentis* when the covered individual or the covered individual’s spouse or domestic partner was a minor child;

- (c) A person to whom the covered individual is legally married under the laws of any state, or a domestic partner of a covered individual [as defined under X state law or] as registered under the laws of any state or political subdivision;
- (d) A grandparent, grandchild or sibling (whether a biological, foster, adoptive or step relationship) of the covered individual or the covered individual's spouse or domestic partner; or
- (e) A designated person, which shall mean one additional person designated by a covered individual for whom the covered individual will provide care under this Act if the designated person has a serious health condition.

(11) “Health care provider” is any person licensed under Federal or [State] law to provide medical or emergency services, including but not limited to doctors, nurses and emergency room personnel, or certified midwives.

(12) “Next of kin” is as defined in Section 101(17) of the Family and Medical Leave Act, 29 U.S.C. 2611(17).

<p>Issue for Advocates #5: Including the Military FMLA Reasons</p>

- (13) “Qualifying exigency leave” is leave for the family member of a military member for the purposes specified in subsections (i) through (iv) of 29 C.F.R. 825.126(b)(3) and subsections (i) through (iv) of 29 C.F.R. 825.126(b)(8), as well as the following reasons:
- (a) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;
 - (b) To attend any official ceremony, program or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member;
 - (c) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;
 - (d) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards or preparing or updating a will or living trust;
 - (e) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits

while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status;

(f) To attend counseling provided by someone other than a healthcare provider, for oneself, for the military member, or for the biological, adopted or foster child, stepchild or legal ward of the military member, a child of the military member's domestic partner, or a child to whom the military member stands *in loco parentis*, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member;

(g) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment. Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

(h) To attend arrival ceremonies, reintegration briefings and events and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status;

(i) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements and attending funeral services;

(j) To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

(14) "Retaliatory personnel action" means denial of any right guaranteed under this Act including but not limited to any threat, discharge, suspension, demotion, reduction of hours, any other adverse action against an employee for the exercise of any right guaranteed herein, or reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of a family member of the employee to a federal, state or local agency. Retaliatory personnel actions shall also include interference with or punishment for in any manner participating in or assisting an investigation, proceeding or hearing under this Act.

Issue for Advocates #6: Definition of "Serious Health Condition"

(15) "Serious health condition" is an illness, injury, impairment, pregnancy, recovery from childbirth, or physical or mental condition that involves inpatient care in a hospital, hospice or residential medical care facility, or continuing treatment by a health care provider [OR "Serious health condition" is as defined at Section 101(11) of the Family and Medical Leave Act, 29 U.S.C. 2611(11) or the [state FMLA].]

Section 2: Eligibility for Benefits

Beginning [X days] following establishment of the Family and Medical Leave Insurance Program [note: X here must match the second X in Section 14(1) of this Act], family and medical leave insurance benefits are payable to an individual who:

- (1) Meets the definition of “covered individual” under Section 1(3) of this Act; and
- (2) Meets one of the following requirements:
 - (a) Because of birth, adoption or placement through foster care, is caring for a new child during the first year after the birth, adoption or placement of that child;
 - (b) Is caring for a family member with a serious health condition;
 - (c) Has a serious health condition (including pregnancy) that makes the covered individual unable to perform the functions of the position of such employee;
 - (d) Is caring for a covered servicemember who is the covered individual’s next of kin;
 - (e) Because of any “qualifying exigency leave” arising out of the fact that the family member of the covered individual is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces; or
 - (f) Any reason set forth in [the state FMLA].

Section 3: Duration of Benefits

Issue for Advocates #7 and #8: Duration of Leave; Allowing More than One Period of Leave in a Year for Different Purposes

- (1) (a) The maximum number of weeks during which family and medical leave insurance benefits are payable under Section 2(2)(c) in an application year is [X weeks].
(b) The maximum number of weeks during which family and medical leave insurance benefits are payable under Section 2(2)(a), (b), (d), or (e) in an application year is [X weeks].
(c) A covered individual is eligible for [X weeks] of leave under (a) of this subsection and also [X weeks] of leave under (b) of this subsection in an application year.

Issue for Advocates #9: Waiting Period

- (2) Family and medical leave insurance benefits are not payable for the first five calendar days in an application year that a covered individual meets the eligibility requirements of Section 2(1) and (2). This shall be known as the “waiting period” referred to in subsection (3) of this Section.

- (3) If the covered individual uses 10 or more days of family and medical leave insurance benefits in an application year, the covered individual shall be paid for the waiting period. The waiting period need only be served once every application year.
- (4) The first payment of benefits must be made to an individual within [X] weeks after the claim is filed and subsequent payments must be made [semimonthly] thereafter.

Section 4: Amount of Benefits

Issue for Advocates #10: Setting the Benefit Amount

- (1) The amount of family and medical leave insurance benefits shall be determined as follows:

[Choose one of the first three options below:]

- (a) The weekly benefit shall be [X%] of the covered individual's average weekly wages during the 12 months preceding submission of the application (or the average weekly wages during the time the covered individual worked if it was less than 12 months), up to a maximum of [X%] of the statewide average weekly wage. [OR]
- (b) The weekly benefit shall be [a sliding scale percentage of average weekly wages, with a higher percentage of wage replacement for low wage workers], up to a maximum of [X dollars]. [OR]
- (c) The weekly benefit shall be [X dollars] per week.
- (d) In no case shall the weekly benefit be less than [X dollars].

Issue for Advocates #11: Requiring a Minimum Amount of Leave

- (2) Family and medical leave insurance benefits are not payable for less than eight hours of family and medical leave taken in one work week.

Section 5: Contributions

- (1) Payroll contributions shall be authorized in order to finance the payment of benefits under the family and medical leave insurance program.

Issue for Advocates #12: Setting the Contribution Level and Determining Who Pays

- (2) Payroll contributions shall be paid by employers and employees in the ratio of [XX]

in an amount to be determined by the [state investment board or other state entity/official responsible for making investment or other financial decisions in the state] [OR specify contributions of X% of wages or X dollars for the program's first year]. In no case shall payroll contributions from an employee exceed [X dollars] total [or X% of wages, up to X dollars total] in any 12-month period. The [state investment board or other state entity/official above] shall be responsible for evaluating and determining on an annual basis the amount of payroll contributions and maximum employee contribution necessary to finance the family and medical leave insurance benefits program.

Section 6: Reduced Leave Schedule

Issue for Advocates #13: Reduced Leave Schedules

(1) A covered individual shall be entitled, at the option of the covered individual, to take paid family and medical leave on an intermittent or reduced leave schedule in which all of the leave authorized under this Act is not taken sequentially. Family and medical leave insurance benefits for intermittent or reduced leave schedules shall be prorated.

(2) The covered individual shall make a reasonable effort to schedule paid family and medical leave under this section so as not to unduly disrupt the operations of the employer. The covered individual shall provide the employer with prior notice of the schedule on which the covered individual will be taking the leave, to the extent practicable. Paid family and medical leave taken under this section shall not result in a reduction of the total amount of leave to which an employee is entitled beyond the amount of leave actually taken.

(3) Nothing in this section shall be construed to entitle a covered individual to more leave than required under Section 3 of this Act.

Section 7: Leave and Employment Protection

Issue for Advocates #14: Setting the Employer Size and Hours Worked Thresholds for Job Protection

(1) Any covered individual who exercises his or her right to family and medical leave insurance benefits or earns waiting period credits under Section 3(2) shall, upon the expiration of that leave, be entitled to be restored by the employer to the position held by the covered individual when the leave commenced, or to a position with equivalent seniority, status, employment benefits, pay and other terms and conditions of

employment including fringe benefits and service credits that the covered individual had been entitled to at the commencement of leave.

Issue for Advocates #15: Continuing Health Care Benefits while Receiving Family and Medical Leave Insurance Benefits

(2) During any leave taken pursuant to Section 2 of this Act, the employer shall maintain any health care benefits the covered individual had prior to taking such leave for the duration of the leave as if the covered individual had continued in employment continuously from the date he or she commenced the leave until the date the family and medical leave insurance benefits terminate; provided, however, that the covered individual shall continue to pay the covered individual's share of the cost of health benefits as required prior to the commencement of the leave.

(3) This section shall be enforced as provided in [X - Could be state FMLA, state civil rights law, or state unemployment law—or new enforcement language if necessary].

Section 8: Retaliatory Personnel Actions Prohibited

Issue for Advocates #16: Retaliation/Non-Discrimination Provision

(1) It shall be unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Act.

(2) An employer, temporary help company, employment agency, employee organization or other person shall not take retaliatory personnel action or otherwise discriminate against a person because he or she exercised rights protected under this Act. Such rights include but are not limited to the right to request, file for, apply for or use benefits provided for under this Act; communicate to the employer or any other person or entity an intent to file a claim, a complaint with the Department or courts, or an appeal, or has testified or is about to testify or has assisted in any investigation, hearing or proceeding under this Act, at any time, including during the waiting period and the period in which the person receives family and medical leave insurance benefits under this Act; inform any person about any employer's alleged violation of this Act; and the right to inform any person of his or her rights under this Act.

(3) It shall be unlawful for an employer's absence control policy to count paid family and medical leave taken under this Act as an absence that may lead to or result in discipline, discharge, demotion, suspension or any other adverse action.

(4) Protections of this section shall apply to any person who mistakenly but in good faith alleges violations of this Act.

(5) This section shall be enforced as provided in [X - Could be state FMLA, state civil rights law, or state unemployment law—or new enforcement language if necessary].

Section 9: Coordination of Benefits

Issues for Advocates #17 and #18: Employers' Own Programs or Programs Required through Collective Bargaining Agreements and the Issue of Opt Out; Coordinating Paid Leave with Unemployment Insurance Payments

- (1) (a) Leave taken with wage replacement under this Act that also qualifies as leave under the federal [or state] FMLA shall run concurrently with leave taken under the federal [or state] FMLA.
- (b) An employer may require that payment made pursuant to this Act be made concurrently or otherwise coordinated with payment made or leave allowed under the terms of disability or family care leave under a collective bargaining agreement or employer policy. The employer must give employees written notice of this requirement.
- (2) (a) This chapter does not diminish an employer's obligation to comply with any of the following that provide more generous leave:
- (i) a collective bargaining agreement;
 - (ii) an employer policy; or
 - (iii) any law.
- (b) An individual's right to leave under this Act may not be diminished by a collective bargaining agreement entered into or renewed, or an employer policy adopted or retained, after the effective date of this Act. Any agreement by an individual to waive his or her rights under this Act is void as against public policy.

Section 10: Notice

(1) Each employer shall provide written notice to each employee upon hiring and annually thereafter. An employer shall also provide written notice to an employee when the employee requests leave under this Act, or when the employer acquires knowledge that an employee's leave may be for a qualifying reason under Section 2(2) of this Act. Such notice shall include: (a) the employee's right to family and medical leave insurance benefits under this Act and the terms under which it may be used; (b) the amount of

family and medical leave insurance benefits; (c) the procedure for filing a claim for benefits; (d) the procedure for selecting a designated person as defined in this Act; (e) the right to job protection and benefits continuation under Section 7 of this Act; (f) that discrimination and retaliatory personnel actions against a person for requesting, applying for or using family and medical leave insurance benefits is prohibited under Section 8 of this Act; and (g) that the employee has a right to file a complaint for violations of this Act. An employer shall also display and maintain a poster in a conspicuous place accessible to employees at the employer's place of business that contains the information required by this section in English, [X, X,] and any language that is the first language spoken by at least X% of the employer's workforce, provided that such notice has been provided by the Department. The Director may adopt regulations to establish additional requirements concerning the means by which employers shall provide such notice.

(2) An employer may establish a uniform process for employees to select a "designated person" as defined in this Act within thirty days of the individual's date of hire. Thereafter, the employer must permit the employee to make or change such a designation, as applicable, on an annual basis. If an employer establishes a uniform process, the covered employee must make such a designation using the employer's process. If an employer does not establish such a uniform process, the employee may make such a designation when filing a claim for benefits.

(3) Employees shall provide notice to their employers as soon as practicable of their intention to take leave under this Act.

Section 11: Enforcement

Issue for Advocates #19: Determining the Method of Appeals from a Denial of Benefits and Enforcement of Rights Under the Law

- (1) The Director shall establish a system for appeals in the case of a denial of family and medical leave insurance benefits. In establishing such system, the Director may utilize any and all procedures and appeals mechanisms established under the [state unemployment compensation law].
- (2) Judicial review of any decision with respect to family and medical leave insurance benefits shall be permitted in a court of competent jurisdiction after a party aggrieved thereby has exhausted all administrative remedies established by the Director.
- (3) The Director shall implement procedures to ensure confidentiality of all information related to any claims filed or appeals taken to the maximum extent permitted by applicable laws.

Section 12: Erroneous Payments and Disqualification for Benefits

- (1) A covered individual is disqualified from family and medical leave insurance benefits for one year if the individual is determined by the Director to have willfully made a false statement or misrepresentation regarding a material fact, or willfully failed to report a material fact, to obtain benefits under this Act.
- (2) If family and medical leave insurance benefits are paid erroneously or as a result of willful misrepresentation, or if a claim for family and medical leave insurance benefits is rejected after benefits are paid, the Department may seek repayment of benefits from the recipient. The Director shall exercise his or her discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience.

Section 13: Elective Coverage

**Issue for Advocates #20 and #21: Coverage of the Self-Employed;
Coverage of Unionized and Public Workers**

- (1) A self-employed person, including a sole proprietor, partner or joint venturer, may elect coverage under this Act for an initial period of not less than three years. The self-employed person must file a notice of election in writing with the Director, as required by the Department. The election becomes effective on the date of filing the notice. As a condition of election, the self-employed person must agree to supply any information concerning income that the Department deems necessary.
- (2) A self-employed person who has elected coverage may withdraw from coverage within 30 days after the end of the three-year period of coverage, or at such other times as the Director may prescribe by rule, by filing written notice with the Director, such withdrawal to take effect not sooner than 30 days after filing the notice.

Section 14: Family and Medical Leave Insurance Program

**Issue for Advocates #22: Timeframe for Startup and Payment of
Benefits**

- (1) Within [X days] of the effective date of this Act, the Department shall establish and administer a family and medical leave insurance program and within [X months] following establishment of the program pay family and medical leave insurance benefits as specified in this Act.
- (2) The Department shall establish reasonable procedures and forms for filing claims for benefits under this Act and shall specify what supporting documentation is necessary to support a claim for benefits, including any documentation required from a health care provider for proof of a serious health condition.
- (3) The Department shall notify the employer within five business days of a claim being filed pursuant to this Act.
- (4) The Department shall use information sharing and integration technology to facilitate the disclosure of relevant information or records so long as an individual consents to the disclosure as required under state law.
- (5) Information contained in the files and records pertaining to an individual under this Act are confidential and not open to public inspection, other than to public employees in the performance of their official duties. However, the individual or an authorized representative of an individual may review the records or receive specific information from the records upon the presentation of the individual's signed authorization.
- (6) The Director shall adopt rules as necessary to implement this Act.

Section 15: Federal Income Tax

- (1) If the Internal Revenue Service determines that family and medical leave insurance benefits under this Act are subject to federal income tax, the Department must advise an individual filing a new claim for family and medical leave insurance benefits, at the time of filing such claim, that:
 - (a) The Internal Revenue Service has determined that benefits are subject to federal income tax;
 - (b) Requirements exist pertaining to estimated tax payments;
 - (c) The individual may elect to have federal income tax deducted and withheld from the individual's payment of benefits in the amount specified in the federal internal revenue code; and
 - (d) The individual is permitted to change a previously elected withholding status.
- (2) If the individual elects to have federal tax payments withheld, the Department shall deduct and withhold the amount specified in the Internal Revenue Code in a manner

consistent with [laws of the state], and amounts deducted and withheld from benefits must remain in the Family and Medical Leave Insurance Fund established in Section 16 of this Act until transferred to the federal taxing authority as a payment of income tax.

- (3) The Director shall follow all procedures specified by the Internal Revenue Service pertaining to the deducting and withholding of income tax.

Section 16: Family and Medical Leave Insurance Account Fund – Establishment and Investment

Issue for Advocates #23: Protecting Funds in the Account from Other Uses

- (1) The Family and Medical Leave Insurance Fund is created in the custody of the [X, such as the state financial officer]. Expenditures from the Fund may be used only for the purposes of the family and medical leave insurance benefits program. Only the Director of the Department or the Director's designee may authorize expenditures from the Fund.
- (2) Whenever, in the judgment of the [X, such as the state financial officer], there shall be in the Family and Medical Leave Insurance Fund an amount of funds in excess of that amount deemed by [X, such as the state financial officer] to be sufficient to meet the current expenditures properly payable there from, [X, such as the state financial officer] shall have full power to invest, reinvest, manage, contract, sell or exchange investments acquired with such excess funds in the manner prescribed by [state law].

Section 17: Reports

Beginning [X date], the Department shall report to the legislature by [September 1st] of each year on projected and actual program participation by Section 2(2) purpose, gender of beneficiary, premium rates, fund balances, outreach efforts, and, for leaves taken under Section 2(2)(b), family members for whom leave was taken to provide care.

Section 18: Public Education

Issue for Advocates #24: Public Education

The Department shall conduct a public education campaign to inform workers and employers regarding the availability of family and medical leave insurance benefits. The

Department may use [X%] of the funds collected for the family and medical leave insurance benefits program in a given year to pay for the public education program. Outreach information shall be available in English, [X, X,] and other languages spoken by more than [X%] of the state's population.

Section 19: Sharing Technology

The Department is encouraged to use state data collection and technology to the extent possible and to integrate the program with existing state policies.

Section 20: Severability

If any provision of this Act or its application to any person or circumstance is held invalid, the remainder of the Act or the application of the provision to other persons or circumstances is not affected.

Section 21: Effective Date

Issue for Advocates #25: Effective Date and CBAs

- (1) This statute shall take effect on [X date, as soon as possible].
- (2) All rules and regulations necessary for implementation of this statute shall be promulgated within 120 days after enactment.