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CONSTRUCTING 21ST CENTURY RIGHTS FOR A CHANGING WORKFORCE: A POLICY BRIEF SERIES

Brief 3: Inclusive Paid Sick Time Laws & the Nonstandard Workforce

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EXECUTIVE SUMMARY

The way we work is changing. Today, millions of people are working in ways that do not fit neatly within the traditional employer/employee framework. The experiences of these workers vary widely: some are choosing to work independently to have greater flexibility and control of their time, some are trying to start businesses that they hope will thrive, and many are simply taking the only work available to them. The rise of app-based "gig" hiring has only brought further attention to these emerging issues. Further complicating the picture are those whose employers misclassify them as independent contractors when by law they are entitled to the rights and protections of employees.

Yet even among those correctly identified as employees, the landscape is shifting. More and more people are in insecure employment situations, constantly moving in and out of increasingly tenuous positions. Too many wish for the reliability of full-time, long-term employment but must make do with cobbling together part-time, temporary, or otherwise unreliable jobs, over time or all at once. Among the workers who prefer to work part-time or in seasonal employment, the differential treatment of those workers in our laws and policies often makes that work poorly paid and poorly protected. Many low-income, immigrant, and otherwise vulnerable populations have been fighting for economic stability for decades but find themselves worse off than ever today. Within workplaces, the institutions and structures that have traditionally offered job security and opportunities to get ahead, decent wages and hours, health care, retirement security, and collective power are fading. The causes are varied: increasing reliance on contracting out work (including multiple levels of subcontracting), "just-in-time" scheduling, declining unionization, and lack of quality part-time work, to name just a few. The cumulative effect is one of increased instability and decreased opportunity even for employees.

Across this diverse picture, a consistent theme emerges: the laws that guarantee people basic rights were not designed with today's workforce in mind. Whether we describe it as the contingent workforce, precarious work, or some other title, for employees and the self-employed alike, making a living has become less reliable and more complicated. If the future of work is one where many Americans will be working in ways that differ from conventional arrangements and many more will be in increasingly unstable situations, everyone, regardless of how they are labeled, must have access to fundamental labor rights and protections. As work changes, law and policy must adapt as well, whether that means building new safeguards or adjusting existing structures so that all workers get what they need.

Against this backdrop, innovative policies like paid family and medical leave and paid sick time laws offer exciting opportunities to develop workplace standards that truly work for a changing workforce. Because these are emerging fields, these laws can be shaped from the beginning to reflect the changing nature of work and the workforce, rather than trying to retrofit 21st century needs onto 20th

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century structures. Following a groundswell of legislative action in recent years, cities and states across the country are implementing their own workplace leave laws. Many more look to join their ranks, offering essential security to those previously denied these critical rights. These leaders provide a laboratory to identify best practices not only for workplace leave laws, but for law and policy writ large by pioneering approaches that can serve as models in other areas.

In charting this exciting path forward, some key questions remain. This series of policy briefs identifies and analyzes these issues in order to lay the groundwork for a more robust discussion and better-informed policymaking. By doing so, we can move closer to the essential goal of progressive workplace policy: ensuring that *all* workers, no matter how they are categorized, have the rights and protections they need.

For each of the issues raised in this brief, we have highlighted the key considerations below:

Issue 1: Defining "Employee"
Cover all workers by using definitions of "employee" in paid sick time laws based on the broadest definitions of existing laws without exclusions, or create new employee definitions that have no exclusions.

Issue 2: The Accrual Method and Coverage of Part-time Workers
Allow workers to accrue paid sick time based on the number of hours worked to ensure fairness for part-time workers.

Issue 3: Coverage of Seasonal and Temporary Workers
To cover seasonal and temporary workers, be thoughtful about eligibility criteria and exclusions. Do not create carve outs based on a worker's type of work arrangement. Ensure that waiting periods are short so that temporary workers and those who change jobs a lot can still earn paid sick days and count the maximum possible hours worked toward accrual.

Issue 4: Staffing Agencies and Questions of Joint Employment
In cases of potential joint employment, such as those involving staffing agencies, clear rules are needed regarding who is considered the employer (or employers) and how employees can exercise their rights. Ideally, the agency and the client should be considered joint employers, since each exercises important elements of control over the employee's work and ability to use sick time.

Issue 5: Domestic Workers
To include domestic workers in paid sick time laws, avoid business size carve outs, address the challenges of accruing sick leave from multiple employers, find creative solutions for covering self-employed people, invest in outreach and education tailored to the unique challenges of one-on-one employment situations, and provide strong anti-retaliation protections and enforcement mechanisms.

Issue 6: Treatment of "Per diem" Workers
Do not exclude people like per diem workers who theoretically have the ability to turn work down. These workers are often penalized for doing so and have less control than employers claim.

Issue 7: The Construction Industry
While some construction workers have collective bargaining agreements that provide for paid sick time, policymakers should be careful about exempting construction workers because not all have paid sick time, even when they are in a union, and especially when they are not.

Issue 8: Covering Independent Contractors
Since no paid sick time laws include independent contractors, creative solutions are needed (and being tested) to ensure these workers can take paid sick time when they need it.

Issue 9: Retaliation
Workers must be able to exercise their rights and bring complaints when they cannot without the fear of being penalized. Strong anti-retaliation measures are key, especially for protecting low-wage workers.

Issue 10: Covering All Workers and Pushing Back Against Business Size Carve Outs
Business size carve outs create unfair, unnecessary exclusions for all workers and may disproportionately impact nonstandard workers. Sick time laws must ensure that all workers, regardless of employer size, have the right to earn and use sick time and that, for as many workers as possible, that time is paid.

Who are nonstandard workers?

Before we can propose meaningful policy solutions, we need a shared vocabulary. Different groups use terms like "nonstandard workers," along with those that are sometimes used as synonyms like "the contingent workforce," to mean different things. These divergent categorizations, in turn, make it difficult to come up with a consistent understanding.

For purposes of this series, we will use the term "nonstandard workers" to refer collectively to workers who are either often left out of existing legal labor protections or are especially likely to lack access to needed benefits without a legal right. Under this broad umbrella, we are especially interested in this brief in five distinct subgroups: temporary workers, seasonal workers, part-time workers, domestic workers, and the self-employed.

The first two of these subcategories are defined by the time-limited nature of their employment. Temporary workers are those who, by definition, have only temporary employment, with no promise or expectation of ongoing employment beyond a discrete period. This category includes workers who find work through temporary help agencies or other staffing agencies. Similarly, seasonal workers are those whose employment is limited to a particular time of year. For example, farmworkers may be hired only for a specific period of the growing season, while ski instructors may only work in the winter while lifeguards or camp counselors may only work in the summer.

Part-time workers, for purposes of this report, are defined as those who work fewer than 40 hours per week for a particular employer. We are concerned with both those who are working part-time but would prefer full-time work as well as the many workers, including many parents and those with other caregiving responsibilities, who want to be working part-time. For these workers, ensuring access to employment benefits is a key component to creating high quality part-time jobs and reducing the harmful differential treatment that part-time workers face as compared to full-time workers.

Domestic workers are those who work in the homes of others, such as nannies, house cleaners, and caregivers for the elderly. For our purposes, we include both domestic workers who work through agencies and those who work directly for the people in whose homes they work. We also include both those whose employment relationships are formal and those whose relationships are less formal or recognized, including those who work "off the books." Historically, domestic workers have shamefully been excluded from many labor laws, devaluing their work and cutting them off from vital legal protections.[1] While in recent years, progress has been made in ensuring access to basic rights for this workforce, especially through state and local domestic workers bills of rights, more remains to be done. We also recognize that including domestic workers on paper is not enough—to ensure that these workers are practically able to access the leave they need, policymakers must also take into account the unique realities of many

1 While not addressed in detail in this report, agricultural workers have suffered many of the same historical exclusions as domestic workers. Therefore, efforts to ensure coverage for nonstandard and vulnerable workers ought to keep this workforce in mind.

domestic employment relationships, including that they are often one-to-one employer-employee relationships.

For self-employed workers who are not categorized as employees, it is particularly difficult to guarantee benefits usually paid by an employer as employers do not consider those who contract for services as their responsibility with respect to benefits beyond their hourly payments. For purposes of this report, we will use the term "self-employed" to refer generally to people who receive income from work (as opposed to, for example, income from investments) *other* than income received as wages from an employer. Some of those included in this category identify as small business owners, who may even have employees of their own; others may see themselves primarily as workers. The self-employed include people at all levels of income who work with varying degrees of structure, from those piecing together work informally to those with their own corporations. As defined here, this category includes both those who rely exclusively on income from self-employment and those who receive self-employment income in addition to income from an employer or multiple employers.

We must also account for the needs of misclassified workers, who are treated by the entities with which they work as independent contractors, but legally ought to be considered employees. Misclassification has gained additional attention with the rise of platform or "gig economy" companies like Uber and Handy, but is also an issue in many established industries, like construction. The challenges of misclassification go beyond the scope of this brief, but policymakers must tackle these problems head on in designing effective solutions, to ensure that no one falls through the cracks.

It should be noted that, in many cases, these categories overlap. For example, a seasonal worker may work part-time, like a retail worker hired only for the busy holiday season. Similarly, while many domestic workers are correctly classified as employees, others may be misclassified and still others may truly qualify as self-employed. Moreover, nonstandard workers may have more than one job (including more than one nonstandard job), at one time or over the course of a year, or combine income from employment with self-employment income. As defined here, the category of nonstandard workers includes both those who rely exclusively on income from one or more forms of nonstandard work (including self-employment) and those who combine nonstandard work with more traditional employment.

In this policy brief, we recognize the diversity of experiences of the nonstandard workforce. The needs of a skilled professional taking on short-term work may be very different from those of a part-time fast food worker or a nanny working off the books, yet all three could be considered nonstandard workers under our framework. Policymakers should take into account this range of experiences and seek to build structures that will work for all workers, not just the most privileged or prominent subset. Moreover, within the broader category of nonstandard workers, the particular challenges of covering each subgroup should be considered and addressed.

In addition, it is important in any analysis to recognize the intersecting impacts of race, gender, and immigration status on the needs and experiences of nonstandard workers. Access to paid sick time is a gender justice issue and a racial justice issue, particularly for women of color. In a society in which women still bear a disproportionate share of the burden of caring for children and other loved ones, lack of access to paid leave falls especially heavily on women. Women make up a majority of part-time workers,[2] and nearly all domestic workers are women.[3] Black, Hispanic and Latino workers make up a disproportionately large share of temporary help agency employees.[4] Immigrant workers are present across all types of nonstandard work and make up an especially large proportion of domestic workers.[5] Yet we know that immigrant workers, particularly undocumented workers, are especially vulnerable in the workplace and may find it especially difficult to take needed leave, even with the strongest possible legal rights.

2 Cliff Zukin & Carl Van Horn, A Tale of Two Workforces: The Benefits and Burdens of Working Part Time, John J. Heldrich Center for Workforce Development at Rutgers University (June 2015), http://www.heldrich.rutgers.edu/sites/default/files/products/uploads/Work_Trends_June_2015.pdf.

3 National Domestic Workers Alliance et al., Home Economics: The Invisible and Unregulated World of Domestic Work (2017), page 41, http://www.idwfed.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment_1.

4 Black workers make up 25.9% of temporary help agency workers, nearly double the percentage of the population that is Black or African American (13.4%). Similarly, 25.4% of temporary help agency workers are Hispanic or Latino, while only 18.1% of the population is Hispanic or Latino. See Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements — May 2017," table 6, https://www.bls.gov/news.release/pdf/conemp.pdf; United States Census Bureau, "QuickFacts, Population Estimates" (July 1, 2017), https://www.census.gov/quickfacts/fact/table/US/PST045217.

5 National Domestic Workers Alliance et al., supra note 3.

Background: Paid Sick Time Laws

It comes as a shock to many high- and middle-income workers that until the paid sick time movement started fifteen years ago almost half of Americans in private sector jobs lacked a single day of paid sick time for themselves. Many more lacked time to care for their children or other family members when they were sick. Even more troubling, workers lost their jobs when they needed to stay home to care for their own health or that of a loved one.

The experiences of these workers paint a powerful picture: the cook who was fired from his restaurant job for staying home when he had the flu and who wept as he told his story at a public hearing, saying he would have been glad to bring in a doctor's note if only he could have kept his job; the airport worker fired for coming in late after taking his mother to a dialysis appointment; the young mother fired from her bank job when her child was rushed to the hospital and she called her supervisor to say she would have to take that afternoon off but promised to be there the next day. Workers facing illness or family emergencies not only lose pay but often their jobs when they lack legal protections that assure they can take time off when they need it.

Today, thanks to the tireless efforts of workers and advocates all over the country over the last fifteen years, the situation is different for many workers. Since 2006 when San Francisco became the first jurisdiction to pass a paid sick days law, 11 states,[6] 31 cities,[7] three counties,[8] and Washington D.C. have adopted paid sick days laws giving an additional 30 million American workers the right to paid sick time. New data from the U.S. Bureau of Labor Statistics shows that the passage of these laws has indeed made a difference. From March 2015 to March 2018, there was a 10-percentage point increase, from 61 percent to 71 percent, in the number of people working in the private sector who have paid sick days.[9]

6 Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont, and Washington.

7 Including the nation's largest cities: New York, Los Angeles, and Chicago.

8 Cook County, IL, Montgomery County, MD, and Westchester County, NY.

9 Bureau of Labor Statistics, "Number of paid sick leave days in 2015 varies by length of service and establishment size," TED: The Economics Daily (January 13, 2016), https://www.bls.gov/opub/ted/2016/number-of-paid-sick-leave-days-in-2015-varies-by-length-of-service-and-establishment-size.htm; Bureau of Labor Statistics, "Higher wage workers more likely than lower wage workers to have paid leave benefits in 2018," TED: The Economics Daily (August 3, 2018), https://www.bls.gov/opub/ted/2018/higher-wage-workers-more-likely-than-lower-wage-workers-to-have-paid-leave-benefits-in-2018.htm.

Paid sick time laws that have been passed are similar to one another in structure and coverage.[10] They are drafted so that workers earn paid sick time, accruing hours of sick leave based on hours worked (usually one hour of sick time for every 30 hours worked) up to a cap (the most common cap being 40 hours in a year although many laws provide higher caps for larger employers). The aim of these laws is to cover all employees although, as discussed below, smaller employers may be allowed to provide this time unpaid or there may be other exclusions, often due to attitudes about the nonstandard workforce that garner strong opposition to their coverage.

Under all paid sick time laws, sick time can be used when a worker or a family member faces illness, injury, or needs medical treatment or diagnosis (including preventive care such as doctor's appointments and mental health care). In nearly all sick time laws, this time can also be used when workers or their loved ones are victims of domestic or sexual violence and need to seek safety, for example through relocation, getting legal assistance, or seeking court orders. Some laws provide sick leave if there is a public health related closure of schools or workplaces. All laws provide that sick time may be taken for one's own health needs as well as those of family members. The definition of "family" is expansive in most laws, including many that cover "chosen family," loved ones to whom the worker may not have a legal or biological relationship.[11] All laws also contain

10 For more information on specific sick time laws, see A Better Balance's comparative chart at https://www.abetterbalance.org/resources/paid-sick-time-legislative-successes/.

11 Chosen family members are covered in Arizona, Michigan, New Jersey, and Rhode Island, as well as under local laws in Los Angeles, CA;

protections against retaliation for using or attempting to use paid sick time or complaining if sick time is denied.

These laws help ensure the people covered do not need to worry that they could lose their jobs or their wages if they get sick. The people covered by these laws are able to be there for their sick children to help them recover faster and prevent future health problems.[12] Without paid sick time, workers often have no choice but to go to work, infecting co-workers and spreading contagion in workplaces,[13] but with paid sick days, the effects of epidemics like the flu can be reduced.[14] Paid sick time has also been shown to reduce workplace accidents.[15] Furthermore, workers with sick time are more likely to seek preventive care, meaning communities with paid sick days laws benefit from less money spent on emergency care and a healthier workforce and healthier neighbors.[16]

Despite this good news, however, the majority of low-paid workers in the private sector still do not have paid sick days and the wage disparity in availability of this benefit is a textbook case of gross inequality: while 92% of the highest-wage workers (the top decile) have access to paid sick time, only 31% of the lowest-wage workers (the bottom decile) have such access.[17] Some of this is directly related to the link between nonstandard employment situations and low wages. Particularly troubling, only 39% of part-time workers have paid sick time.[18] Much of this is the direct result of so many states and localities—and the federal government—failing to act on this important issue.

Yet where paid sick days laws have passed, policymakers have worked to address those disparities and those working to enact new paid sick time laws should continue this fight. Any laws or policies enacted should include provisions that ensure that temporary, seasonal, and part-time workers are included and that domestic workers and other workers often overlooked in or excluded from labor laws are not carved out. At the same time, we need to think about ways to expand these laws to include workers in other nonstandard situations such as independent contractors who are excluded from most laws but often still need these benefits. A Better Balance has developed model bill language with the National Partnership for Women & Families that provides additional guidance addressing many of these issues—referred to as "our model" throughout.[19] This paper will explore the ways in which most paid sick time laws have tried to include all or most workers and put forth ideas for making those laws even broader to ensure that the growing nonstandard workforce is not left out.

Chicago and Cook County, IL; Saint Paul and Duluth, MN; New York City; and Austin and San Antonio, TX.

12 Parents who don't have paid sick time are nearly twice as likely as parents with paid sick time to send a sick child to school or daycare, and more than twice as likely to report taking their child or a family member to a hospital emergency room because they were unable to take time off work during their regular work hours. Tom W. Smith & Jibum Kim, Paid Sick Days: Attitudes and Experiences, National Opinion Research Center at the University of Chicago (June 2010), p. 6, http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-attitudes-and-experiences.pdf.

13 Access to paid sick leave reduces presenteeism (when employees show up to work sick) and reduces overall contagion. See Stefan Pichler & Nicholas Ziebarth, The Pros and Cons of Sick Pay Schemes (August 6, 2016), http://www.nber.org/papers/w22530; Human Impact Partners, A Health Impact Assessment of the Healthy Families Act of 2009, (June 11, 2009), http://go.nationalpartnership.org/site/DocServer/WF_PSD_HFA_HealthImpactAssessment_HIA_090611.pdf?docID=5101. For more information on how the lack of paid sick leave results in high rates of presenteeism in the food services industry specifically, see Restaurant Opportunities Centers United, Serving While Sick: High Risks & Low Benefits for the Nation's Restaurant Workforce, and Their Impact on the Consumer (September 30, 2010), http://rocunited.org/wp-content/uploads/2013/04/reports_serving-while-sick_full.pdf; Steven Sumner et al., Factors Associated with Food Workers Working while Experiencing Vomiting or Diarrhea, 74 J. of Food Protection 215 (2010), http://www.cdc.gov/nceh/ehs/ehsnet/Docs/JFP_ill_food_workers.pdf.

14 See Supriya Kumar et al., Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent-Based Model, 103 Am. J. of Pub. Health 1406 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3893051

15 See Abay Asfaw et al., Paid Sick Leave and Nonfatal Occupational Injuries, 102 Am. J. Pub. Health e59 (September 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3482022/.

16 Research demonstrates that people lacking paid sick days tend not to take time for preventive healthcare. See LeaAne DeRigne et al., Paid Sick Leave and Preventive Health Care Service Use Among U.S. Working Adults, 99 Preventive Medicine 58-62 (June 2017); Lucy Pepins et al., The Lack of Paid Sick Leave as a Barrier to Cancer Screening and Medical Care-Seeking: Results From the National Health Interview Survey, 12 BMC Public Health 520 (July 12, 2012), http://www.biomedcentral.com/content/pdf/1471-2458-12-520.pdf. Nationally, providing all workers with earned paid sick time would result in $1.1 billion in annual savings in hospital emergency department costs, including more than $500 million in savings to publicly funded health insurance programs such as Medicare, Medicaid, and SCHIP. Kevin Miller et al., Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits, Inst. for Women's Policy Research (November 2011), tables 5 and 6, http://www.iwpr.org/publications/pubs/paid-sick-days-and-health-cost-savings-from-reduced-emergency-department-visits.

17 Bureau of Labor Statistics, "Higher wage workers more likely than lower wage workers to have paid leave benefits in 2018," supra note 9.

18 Bureau of Labor Statistics, "Employee Benefits in the United States – March 2018," https://www.bls.gov/news.release/pdf/ebs2.pdf.

19 The model language is available on A Better Balance's website, "Model Paid Sick and Safe Time Act for Local and State Advocates," at https://www.abetterbalance.org/resources/model-earned-paid-sick-time-and-safe-time-statute/.

Issue 1: Defining "Employee"—Use of the Minimum Wage Definition

KEY CONSIDERATIONS: Cover all workers by using definitions of "employee" in paid sick time laws based on the broadest definitions of existing laws without exclusions, or create new employee definitions that have no exclusions.

The ideal paid sick time law will cover all workers because everyone gets sick or has family members who get sick. No matter the type of job situation or classification, the flu keeps people sidelined, pink eye keeps kids out of school, and preventive medical care is crucial for everyone's wellbeing. People working in small businesses or in nonstandard jobs—part-time, temporary, seasonal, or as contractors—and people traditionally excluded from labor laws like those who work as domestic workers and farmworkers are not exempt from illness. Because paid sick days laws are a relatively new guarantee for workers and because we know that the lowest income workers are most likely to lack this basic benefit, most laws strive to include as many employees as possible without regard to the kinds of businesses, sectors or work schedules those workers have. However, because paid sick time is a benefit paid by an employer to an employee, more work needs to be done to create policies that will cover those not classified as "employees" and therefore lacking an employer to supply this benefit. Those who have been traditionally classified as other than an employee—or misclassified in that way—experience this problem for many benefits besides paid sick time. Finding a solution would be generally helpful in improving health, wellbeing and economic security for those workers.[20]

The first issue when developing paid sick days laws—and the means to ensuring an inclusive law—is how to define "employee." When paid sick days laws were first proposed, arguments in favor made the case that just as all workers deserve a minimum wage, all workers also deserve a guaranteed minimum number of paid sick days in a year to enable them to care for themselves and their families. Minimum wage laws are among the most inclusive laws passed at the state and federal levels and tying paid sick days to minimum wage supported arguments for broad employee definitions with few exceptions. In addition, the minimum wage definitions are easily understandable (and often already familiar) to policymakers, employers, courts, and enforcement agencies. For that reason, almost all paid sick time laws passed used either federal or state minimum wage definitions of "employee" in determining who was covered under the paid sick time laws.

Yet this approach also has some drawbacks. Although the use of minimum wage definitions provides a broad definition of employee, there are certain baked-in exclusions in minimum wage laws that were repeated in the paid sick time laws when these definitions were used, including agricultural workers and, sometimes, domestic workers.

Therefore, policymakers should consider all their options, weighing the advantages and drawbacks of relying on existing definitions like those in minimum wage laws. One solution is to refer only to the broad section of the minimum wage law when defining "employee" for purposes of a paid sick time law without referring to the exclusions if they are in a separate section of the law. For example, the New York state minimum wage law has very broad definitions of both "employee" and "employer" for purposes of minimum wage.[21] Exclusions from the minimum wage law are in a separate section of the law. Therefore, defining "employee" and "employer" in the New York City paid sick time law by citation to the broad definition used in minimum wage with no reference to the provisions that list exclusions does not carry those exclusions into the paid sick time law.

Another solution is to create a new definition of "employee" for the paid sick time law without reference to any pre-existing law. For example, New Jersey defines "employee" for paid sick time purposes as "an individual engaged in service to an employer in the business of the employer for compensation" and defines "employer" as "any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company or other entity that employs employees in the State, including a temporary help service firm."[22] A definition like that does not automatically exclude workers left out of the minimum wage laws.

20 The question of covering self-employed workers, including independent contractors, is addressed in greater detail in Issue 8 below.

21 Section 190(2), (3) of the labor law. "Employee" is defined as "any person employed for hire by an employer in any employment" and "employer" is defined as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" although not a government agency, which we could not cover in New York City in any event due to state preemption with respect to those workers.

22 N.J. Stat. Ann. § 34:11D-1.

Issue 2: The Accrual Model and Coverage of Part-time Workers

KEY CONSIDERATIONS: Allow workers to accrue paid sick time based on the number of hours worked to ensure fairness for part-time workers.

There are approximately 26 million part-time workers in the United States, 65% of whom are women.[23] Traditionally part-time workers have often been excluded from employment benefits. While 70% of full-time workers have paid sick time, only 30% of workers who work between 20 and 34 hours a week have paid sick days and only 19% of those who work fewer than 20 hours a week have them.[24] Employers have often resisted including part-time workers in benefits. One of the great successes of the paid sick time laws being passed around the country is that part-time workers are included. Among the major contributors to that success has been the universal adoption of the accrual model for allocating paid sick time.

23 The Bureau of Labor Statistics defines part-time workers as those working fewer than 35 hours a week. See Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey" (last modified January 2018), https://www.bls.gov/cps/cpsaat08.htm.
24 Institute for Women's Policy Research, Paid Sick Days Access and Usage Rates Vary By Race/Ethnicity, Occupation, and Earnings, (February 2016), page 4, https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B356.pdf

The first enacted paid sick time law, which passed in San Francisco by ballot initiative in 2006 allowed workers to accrue paid sick time based on the number of hours worked. This was different from prior approaches (both in legislative proposals and in private plans) which had framed paid sick time in terms of "days" in a year, requiring pro-rating for part-time workers – and opening up the argument that some part-time workers should be carved out entirely. The method used in San Francisco ensured that there did not need to be any distinction between "part-time" and "full-time" workers—all those working deserved paid sick time and the number of hours they would get would depend on the number of hours worked.[25]

Today, *all* enacted paid sick time laws use the accrual method. Most paid sick time laws that have passed require one hour of sick leave to accrue for every 30 hours worked, up to a cap that varies by jurisdiction.[26] The universal adoption of the accrual method of determining sick time hours recognized that it was hourly workers who were most likely to lack paid sick time and needed the protection of the law. It also made the point that the hours of paid sick time that a worker got were earned. Most importantly, the intrinsic fairness of the method with respect to all workers seemed to stop cold the inclination to try to carve some part-time workers out of the law. In nearly all paid sick time laws, there is no minimum number of hours an employee must work to be covered. The two exceptions are Vermont, which excludes workers who work fewer than 18 hours a week, and Maryland, which excludes workers who work fewer than 12 hours a week. Paid sick time laws, like minimum wage laws, are good precedents for arguing all workers need basic benefits regardless of the number of hours they work in any given week.

25 The first proposed paid sick bills would have required employers to give a certain number of days of sick time to their full-time workers. These bills included pro rata days for some part-time workers. However, the use of "days" and the need to prorate what was given based on hours worked led to exclusions of part-time workers if they did not work a certain number of hours. Although these bills paved the way for the paid sick time movement, those particular proposals were never enacted.
26 Exceptions include: Connecticut, Washington State, Philadelphia, Chicago and Cook County, IL (one hour for every 40 hours worked); Duluth, MN (one hour for every 50 hours worked); Vermont (one hour for every 52 hours worked); and Washington, D.C. (tiered in the following way: one hour for every 87 hours worked if the business has fewer than 25 employees; one hour for every 43 hours worked if the business has 25-99 employees; one hour for every 37 hours worked if the business has more than 100 employees).

Issue 3: Coverage of Seasonal and Temporary Workers—Employment Duration and Start of Access

KEY CONSIDERATIONS: To cover seasonal and temporary workers, be thoughtful about eligibility criteria and exclusions. Do not create carve outs based on a worker's type of work arrangement. Ensure that waiting periods are short so that temporary workers and those who change jobs a lot can still earn paid sick days and count the maximum possible hours worked toward accrual.

Policymakers must also fight back against efforts to carve out specific groups of nonstandard workers altogether. In particular, there is oftenpush back from employers about covering seasonal and temporary workers. The most recent data shows that 1.4 million workers are paid by a temporary help agency—about 0.9 percent of total employment in the U.S.[27] In addition, some types of work are seasonal in nature and those workers are not necessarily employed year-round. However, coalitions fighting for paid sick days have stayed strong on this issue and only two of the laws passed carve these workers out. Vermont excludes workers who work for 20 or fewer weeks in a year in a job that is not supposed to last more than 20 weeks—a specific carve out of workers intentionally hired as temporary workers. Philadelphia carves out "seasonal" workers who are hired for a period of no more than 16 weeks and temporary workers hired for a term of less than 10 months. All other laws automatically include both temporary and seasonal workers. Here, the use of minimum wage definitions has been helpful as minimum wage laws generally apply to workers even if they are only hired for a temporary assignment and even if they work in a seasonal industry.

Despite these successes in creating definitions of who is covered that include temporary or seasonal workers under paid sick time laws, other provisions of these laws have had an inadvertent (or sometimes intentional) effect on these workers. For example, all paid sick time laws that have passed give workers the right to begin accruing paid sick time from the first day of employment. However, all these laws also allow employers to impose a waiting period—almost universally 90 days[28] —before the worker can use sick time.

This waiting period is consistent with what many employers say is a common probationary period before benefits begin for employees and therefore has been adopted with little debate by legislators. However, waiting periods have also been used to placate businesses and non-profits who argue their short-term employees should not be covered. Non-profits that run summer camps are especially concerned about sick leave for camp counselors, a concern mitigated by a 90-day waiting period on use.

Waiting periods also restrict the ability of workers who change jobs frequently, including disproportionate numbers of nonstandard workers, to qualify for and take the sick time they need. If a worker needs sick time during the waiting period, that worker is often out of luck. This problem is especially pronounced when waiting periods are longer than 90 days. The effect that a waiting period has on the growing temporary workforce should be considered in crafting laws going forward.

In addition, lawmakers should ensure that workers who are laid off and are then rehired by the same employer retain their sick time. Some retailers, for example, hire extra staff for Christmas, lay those workers off after Christmas but then rehire them for Easter. Our model paid sick time law includes a rehire provision, which has since been adopted in the majority of jurisdictions. That provision requires that if a worker is rehired within a certain amount of time after stopping work (varying from six months to a year) they are entitled to any paid sick time previously accrued and are entitled to use their sick time without serving another waiting period.

Similarly, to protect against imposing new waiting periods when employees go to work for different divisions of the same employer, our model law contains a provision that has been widely adopted that provides if a worker is transferred to a different division or location, the worker remains entitled to previously accrued sick time without having to serve another waiting period.[29] Many new paid sick time laws

27 Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements – May 2017," supra note 4.

28 Exceptions are New York City and New Jersey's state law, both of which use 120 days; Chicago and Cook County, Illinois, which use 180 days; and Connecticut, which uses 680 hours. The extreme outlier is Vermont which allows employers to restrict use until a worker has been employed for a year, which will severely restrict use of paid sick time by temporary and seasonal workers.

29 Model provision: "If an employee is transferred to a separate division, entity or location, but remains employed by the same employer, the employee is entitled to all earned paid sick time accrued at the prior division, entity or location and is entitled to use all earned paid sick time as provided in this section. When there is a separation from employment and the employee is rehired within # months of separation by the same employer, previously accrued earned paid sick time that had not been used shall be reinstated. Further, the employee shall be entitled to use accrued earned paid sick time and accrue additional earned paid sick time at the re-commencement of employment."

(again following our model) also require retention of accrued sick time and use without a new waiting period when a successor employer takes the place of the original employer.

Issue 4: Staffing Agencies and Questions of Joint Employment

KEY CONSIDERATIONS: In cases of potential joint employment, such as those involving staffing agencies, clear rules are needed regarding who is considered the employer (or employers) and how employees can exercise their rights. Ideally, the agency and the client should be considered joint employers, since each exercises important elements of control over the employee's work and ability to use sick time.

Workers who find work through temporary or other staffing agencies also face distinctive challenges. Staffing agencies feel their situation is unique and in many jurisdictions have sought to exclude their workers from coverage altogether. Advocates have successfully fought back against these efforts nearly everywhere. However, Maryland's sick time law excludes most workers hired through staffing agencies; Connecticut's law, which as described elsewhere in this brief is in many ways outdated and much narrower than all other sick time laws, effectively excludes all temporary workers.

Yet even in the vast majority of sick time laws where temporary workers including those who work through agencies are covered, challenges remain. For workers hired through temporary or staffing agencies, effectively exercising their rights may involve understanding the relationship between the staffing agency and the client and having enough information to determine who is primarily responsible for ensuring that laws related to their employment are followed. Where rights are violated, particularly in cases of retaliation, workers should have recourse against all relevant parties, but in some situations, one of those parties may be the better one to hold responsible given the facts. For example, a worker may have been employed by the staffing agency long enough to be past the waiting period for purposes of use of sick time, but not be past the waiting period in terms of their employment at a particular client. Similarly, workers who work for multiple clients sequentially for the same agency may have accrued time at one client that they would like to use at another. And in some jurisdictions, as described below, the agency responsible for enforcement of the paid sick time law may have designated one or the other employer as the primary employer.

Clear rules are needed regarding who is considered the employer (or employers) of these employees and how employees can exercise their rights in these situations. Ideally, the agency and the client should be considered joint employers of the employee, since each exercises important elements of control over the employee's work and ability to use sick time. As a practical matter, the employers should be able to allocate responsibility for fulfilling specific tasks between them; for example, if the agency cuts the employee's paychecks, it makes sense for the agency rather than the client to pay the employee for sick time. Contracts between the staffing agencies and placements should spell out the allocation of responsibility

for providing benefits and employees of the staffing agencies should be made aware of the arrangement. However, regardless of any such allocation, both employers should be considered fully liable for compliance with the law, incentivizing each employer to make sure the other is following the law. Laws and regulations should also clearly spell out how questions of accrual and waiting periods will be handled in these situations.

Most sick time laws do not specifically address these issues. As a result, in the majority of jurisdictions, it is not clear how these questions would be resolved in any specific worker's case—whether the staffing agency, the client, or both would be considered the employer(s) responsible for ensuring that the worker is provided with all relevant workplace rights. In these locations, further clarification is needed, whether by statute or regulation; existing general principles of employment law may also offer useful guidance but it would be important to make those principles clear with respect to how they apply to paid sick time and other benefits laws.

Only five jurisdictions (Oregon; San Francisco, CA; Cook County, IL; New York, NY; and Seattle, WA) explicitly provide for joint employment relationships and provide rules for how joint employment relationships should work with respect to paid sick time. In these places, both employers are responsible for compliance with the law, although Oregon designates a "primary employer" (generally the agency) as responsible for specific tasks. Other states and cities may also provide for these relationships in practice, though they have not codified them in their laws. For example, both California and Minneapolis, MN have indicated in the "Frequently Asked Questions" sections of their respective agency websites that two or more employers may be considered joint employers for purposes of their sick time laws.

Some other laws indicate that either the client or the staffing agency is considered the relevant employer, rather than both jointly. Three city sick time laws (Duluth, MN; Saint Paul, MN; Tacoma, WA) classify temporary employees staffed through agencies as the employees of the agency unless there is a contractual agreement stating otherwise, strongly suggesting that these employees are not usually considered employees of the clients. Conversely, the sick time laws in Washington, D.C. and Berkeley, CA specifically include those who employ workers through temporary or staffing agencies in the definition of employer, but are silent on whether the agencies themselves are also considered employers.

Issue 5: Domestic Workers

KEY CONSIDERATIONS: To include domestic workers in paid sick time laws, avoid business size carve outs, address the challenges of accruing sick leave from multiple employers, find creative solutions for covering self-employed people, invest in outreach and education tailored to the unique challenges of one-on-one employment situations, and provide strong anti-retaliation protections and enforcement mechanisms.

Historically, too many labor laws have shamefully excluded domestic workers, including nannies, housekeepers and home health care workers. Paid sick time laws have generally bucked this trend, except in places where policymakers have relied on a minimum wage definition that excludes domestic workers.

However, as discussed above, jurisdictions that exclude workers from *paid* sick time based on the size of their employer affect domestic workers who work directly for families or individuals. In New York City, the belief that domestic workers should have the right to paid sick time, even if there was a more general exclusion for employers with five or fewer employees from the requirement that time be paid, led to advocates' insistence that domestic workers be specifically covered without reference to the small business carve out for paid time. As a result, all domestic workers have the right to *paid* sick time in New York City, regardless of how many employees their employers have. Where the battle against business size exclusions for providing paid sick time is lost, such a specific "carve in" of domestic workers should be considered.

In addition, some domestic workers—especially house cleaners—work for multiple employers, so may have trouble accruing sick time. Others may be misclassified (or even correctly identified) as independent contractors (*addressed in Issue 9*). Even when they are covered, a major challenge with respect to coverage of domestic workers is ensuring that these workers know their rights and their employers understand their obligations. Due to the nature of domestic work, particularly outside of agencies, employer-employee relationships are often one-to-one, making outreach efforts very difficult. At the same time, employers of domestic workers do not think of themselves as businesses and therefore do not necessarily keep current

with new labor laws that are passed. Strategies for outreach and education for this workforce and their employers—including partnering with community-based and worker organizations—need to be developed and implemented to ensure this workforce can access benefits to which they are entitled.

Compounding these difficulties, domestic workers are often less able to exercise their rights than other workers. For a variety of reasons, the relationship between domestic employers and workers often has a different dynamic than other employment relationships. While some of these distinctive features can be positive for workers, others can be more fraught and leave workers feeling less able to exercise their rights. For example, domestic workers are often the only employee of their employer, making it impossible to file a complaint without being immediately identified as the source of that complaint. Even outside of a formal complaint process, domestic workers may feel less comfortable advocating for themselves with their employers for fear of disrupting the close but complex relationship or even being fired. In addition, domestic workers often rely on their single employer to be a reference for future work and worry that if they bring up concerns they will not get a positive reference, or even be blackballed for future work if they are perceived as challenging their employer. Because domestic workers are disproportionately likely to be immigrants, many (though certainly not all) of whom are undocumented, fear of negative immigration consequences or inability to get other work can compound these vulnerabilities.

While a comprehensive response to these challenges will require further consideration, some key elements are clear. Domestic workers need rock-solid protection against retaliation for using or attempting to use their rights, an area in which paid sick time laws have historically been very strong (*see Issue 10*). In addition, given the low likelihood of domestic workers filing complaints when their rights are violated, enforcement agencies should look for as many opportunities as possible to engage in proactive enforcement. This could include sharing resources with agencies looking to enforce other often-violated obligations, such as providing workers' compensation coverage or paying into unemployment insurance on behalf of domestic workers, as well as co-enforcement models that engage community organizations to help identify and address violations.

Issue 6: Treatment of "Per diem" Workers

KEY CONSIDERATIONS: Do not exclude people like per diem workers who theoretically have the ability to turn work down. These workers are often penalized for doing so and have less control than employers claim.

The health care industry has been particularly vocal in many jurisdictions about the need to exclude so-called "per diem" workers, particularly nurses. The argument put forward with respect to these workers is that they are on a list to be called when work is available and when called, can turn down work for any reason. Since there is no requirement that the worker come in to work even when called, the employer argues, if the worker happens to be sick when called, why should the employer need to pay them before moving on to the next worker on the list? And what if everyone called claims illness?

While advocates have successfully pushed back against calls to exclude these workers in most jurisdictions, the argument mentioned above and the lobbying power of health care providers have been successful in a few places. In Vermont, "per diem" or intermittent employees of health care or long-term care facilities are excluded. New Jersey excludes "per diem" health care workers, defined as any individual performing work for a hospital system on an as needed basis to replace or substitute for a temporarily absent hospital employee, and who works on a flexible or non-fixed schedule. In Philadelphia, professional health care workers who only work when indicating they are available and have no obligation to work are excluded.

In addition to per diem health care workers, other workers who have control of their schedules have also been excluded in other laws. For example, New York City excludes hourly speech, physical therapy, and occupational therapists if they create their own schedules and can turn down work.

Montgomery County, Maryland excludes all workers (not just health care workers) who do not have a regular work schedule, who contact the employer for work assignments that will be worked within 48 hours and have no obligation to call or work for the employer unless they work for a temporary staffing agency.

The exclusion of workers who are employees but who retain control over their schedules is a troubling trend for the nonstandard workforce. The vast majority of paid sick time laws do not exclude these workers and there has been no indication that this has caused any problems with enforcement. In addition, the level of control these workers exercise over their assignments is often exaggerated by employers. Many so-called per diem workers actually work in situations where they are penalized if they turn down assignments either by not being called again or by having their pay reduced. Workers who have the ability to turn down assignments should not be deprived of paid sick time when needed.

In particular, a broad based exclusion of workers who "control" their hours penalizes many low-wage workers who work in industries like retail and fast food where there has been growth of "on call" scheduling. Such scheduling requires a very large workforce to be available to work on very short notice if they receive a phone call or are required to call in. Because large swaths of the retail industry staff stores with this type of scheduling, it is especially important that there not be an exemption that would exclude workers whose typical schedule is uncertain because they have the technical ability to turn down work. To date, no paid sick time law completely excludes all workers who control their schedules or work "on call" but this trend should be carefully watched and any attempts to exclude those workers should be resisted.

Issue 7: The Construction Industry

KEY CONSIDERATIONS: While some construction workers have collective bargaining agreements that provide for paid sick time, policymakers should be careful about exempting construction workers because not all have paid sick time, even when they are in a union, and especially when they are not.

For many workers in the construction industry, especially unionized workers, benefits are delivered in a different way than in a traditional employer/employee relationship. Many construction collective bargaining agreements provide for benefits in certain structured ways out of a multi-employer fund. This works in construction because of the frequently short-term nature of much construction work resulting in workers working for a variety of employers in a given year.

The particular way in which the construction industry works has led to exemptions in some paid sick time laws. For example, some laws allow an opt-out from a paid sick time law if it is explicitly provided in the relevant collective bargaining agreements in the construction industry.[30] A few laws automatically exempt workers in construction covered by a collective bargaining agreement.[31]

Although an argument can be made for treating certain construction workers differently from other workers, it is very important to remember that non-unionized construction workers do not normally have the same benefits many unionized construction workers have. Non-unionized construction workers are often underpaid, misclassified, and exploited and should never be excluded from benefit laws.

Even among unionized construction workers, not all workers have access to multi-employer benefit plans. Oregon only provides an exemption for unionized construction workers if the employee is covered by a plan that provides for employment benefits through a multi-employer fund. That is an important protection if unionized construction employees are excluded from a paid sick time law.

30 California, Arizona, Maryland, Washington, D.C., all of the California local laws, and New York City.

31 New Jersey, Philadelphia (which exempts all union workers covered by a collective bargaining agreement) and Oregon (under certain circumstances).

Issue 8: Covering Independent Contractors

KEY CONSIDERATIONS: Since no paid sick time laws include independent contractors, creative solutions are needed (and being tested) to ensure these workers can take paid sick time when they need it.

To date, no paid sick time law includes independent contractors. These workers are usually specifically excluded either in minimum wage laws or in the paid sick time laws themselves. As already noted, it is difficult to impose requirements regarding employee benefits on employers with respect to those who work for them but who are not labeled "employees" because employers do not keep track of their hourly wages or include them in their employment policies, formal or informal. As discussed in our previous briefs, misclassification is a serious problem and many workers are misclassified as independent contractors when they are in fact employees. Both expanding the definition of employee to include those who work for an employer on a sporadic basis and ensuring that those who meet all the indicia of "employee" are classified as such would go a long way to ensuring more workers have access to employee benefits.

There are also a great many workers who are properly considered contract workers. The question is whether there is a way to include them in requirements imposed on employers with respect to basic benefits. We are at the beginning of exploring possibilities for coverage of those who work for an employer pursuant to a short-term contract and whom the employer does not control with respect to hours or supervision of work (the usual definition of a contractor).

One possibility is to require employers who use independent contractors to pay into a fund that all independent contractors could access if they needed sick time. Such requirements could be restricted to employers where independent contractors make up a certain percentage of their workforce or who have a certain number of independent contractors. One of the challenges would be determining who could access the fund, since many independent contractors are also employees of another employer. The amount of benefit entitlement could depend on the amount of work done as an independent contractor. In such a system, the amount paid in and the entitlement to benefits should probably be based on amount of earnings or payments from contract work rather than on number of hours worked (i.e., differently than the way sick time is calculated for employees). That is because although payments to independent contractors are supposed to be tracked for tax purposes, there is no requirement for tracking hours. Moreover, unless the payment arrangement is based on hours of work, independent contractors (and their clients) will often not know the number of hours worked.

There is a bill in Washington State, HB2812, that creates a portable benefit fund for independent contractors based on contributions by businesses who use contractors, defined as those who facilitate services by workers taxed under 1099 federal tax status or who are self-employed and opt in.[32] This fund focuses on workers' compensation, but would have the ability to be used for paid sick days as well.[33]

32 The full text of the bill is available online at http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Bills/2812.pdf. For commentary on the law's provisions, see Alastair Fitzpayne & Hilary Greenberg, "Portable Benefits Legislation Reintroduced in Washington State: Uber and SEIU Commit to Work Together," The Aspen Institute (February 23, 2018), https://www.aspeninstitute.org/blog-posts/wa-portable-benefits-bill-letter-2018/.

33 See Fitzpayne & Greenberg, supra note 32.

Such an idea could provide a vehicle for benefit delivery to these workers and at the same time take away some incentive for misclassification. This has not been enacted into law so remains a proposal.

Another model for delivering benefits to independent contractors is the Black Car Fund.[34] New York State established the Black Car Fund to provide workers' compensation benefits to independent contractors who drive for hire. Drivers are considered "employees of the fund" for purposes of this statute only, and therefore are entitled to the benefits. The funding comes from a surtax on passengers. Recently the Fund has said it will also offer certain health care benefits to its drivers. A similar model could be considered for providing paid sick days to independent contractors.[35]

Even more directly, New York City recently passed laws allowing the Taxi and Limousine Commission (TLC), which regulates all for-hire vehicles in the city, to impose minimum wage requirements on companies like Uber and Lyft. Because those rider services claim their drivers are not employees, general minimum wage laws do not apply to them. However, since the mission of the TLC is to regulate the entire industry, the New York City Council instructed them, as part of that mission, to impose certain requirements on the entities employing these drivers even if they are considered "independent contractors." Accordingly, the TLC recently issued rules requiring payments of approximately $17.22 per hour to all drivers.[36] This rate included a 6% supplement (equivalent to $0.90 per hour) to reflect the fact that, as purported independent contractors, drivers do not receive paid time off. The TLC decision followed a recommendation from economists James A. Parrott and Michael Reich in a report commissioned and relied upon by the TLC.[37]
In recommending the paid time off supplement, Parrott and Reich specifically noted that New York City law requires employers to provide paid sick time for most employees but drivers of for-hire vehicles are generally not covered. In other words, the paid time off premium included in the new rules was specifically designed, at least in part, to compensate drivers for not being covered by the New York City sick time law as an attempt to provide some alternative protection. It might be possible to replicate this model and it also might be possible to more generally use this model of a regulatory agency regulating an industry to impose minimum requirements for benefits as well as pay on those who employ workers in that industry whether labeled as employees or independent contractors.

Additionally, paid sick time laws could require employers who employ contractors for a given length of time—for example, six months—to provide those contractors with paid sick time in the same way other employees are given sick time. Again, this is not a solution that has yet been tried.

The National Domestic Worker Alliance is experimenting with a voluntary fund called Alia[38] that employers of domestic workers can voluntarily pay into and domestic workers can access for a variety of needs, including paid sick time.[39] The results of that experiment could provide a road map for a way to make benefits accessible to a broader swath of independent contractors, possibly including requiring participation by employers down the road.

Issue 9: Retaliation

> **KEY CONSIDERATIONS:** Workers must be able to exercise their rights and bring complaints when they cannot without the fear of being penalized. Strong anti-retaliation measures are key, especially for protecting low-wage workers.

All paid sick time laws contain strong protections against retaliation for all workers covered by the law. The fear of retaliation for using their rights is probably the single most common reason, other than lack of knowledge, that

34 See David Rolf, Shelby Clark, and Corrie Watterson Bryant, "Portable Benefits in the 21st Century," The Aspen Institute Future of Work Initiative (June 16, 2016), https://www.aspeninstitute.org/publications/portable-benefits-21st-century/.

35 Id.

36 See "About TLC," New York City Taxi and Limousine Commission, http://www.nyc.gov/html/tlc/html/about/about.shtml; "Notice of Promulgation," New York City Taxi and Limousine Commission, http://www.nyc.gov/html/tlc/downloads/pdf/driver_income_rules_12_04_2018.pdf.

37 James Parrott and Michael Reich, An Earnings Standard for New York City's App-Based Drivers: Economic Analysis and Policy Assessment, Center for New York City Affairs and Center on Wage and Employment Dynamics, (June 2018), http://www.centernyc.org/an-earnings-standard.

38 For more information, see Alia's website, https://www.ndwalabs.org/alia/, for additional information.

39 Miranda Katz, "How an App Could Give Some Gig Workers a Safety Net," Wired (July 9, 2018), https://www.wired.com/story/how-an-app-could-give-some-gig-workers-a-safety-net/.

workers do not use them. For the nonstandard workforce, where work is particularly precarious, protection against retaliation can be an especially important factor in whether rights and benefits available by law are used. In addition to clear anti-retaliation protections for using or attempting to use sick time, all paid sick time laws contain specific protections against retaliation for filing complaints or advising co-workers of their rights.

In defining retaliation, attempts have been made to think of all the ways that workers, particularly low-wage workers in certain sectors of the economy, can be retaliated against. Therefore, most paid sick time laws explicitly include in their definition of retaliation reduction of hours, which is the strongest retaliation weapon short of firing that employers have in sectors such as retail where so many workers are underemployed. Similarly, recognizing the greatest fears of much of the low-wage workforce, many laws specifically include reporting immigration status of the worker or the worker's family member to immigration authorities as prohibited retaliation.

Many employers fight against their workforce—particularly their low-wage workforce—using paid sick time or other forms of leave by giving "points" or "demerits" under so-called "absence control" policies. For this reason, many paid sick time laws specifically state that the application of absence control policies, at least with respect to the amount of paid sick time guaranteed under the law, is an illegal form of retaliation against workers. Moreover, even in laws that do not explicitly single out these policies, their application to workers taking protected sick time can and should be considered an illegal form of retaliation under broad general prohibitions. Some employers argue that if they do not take any action with respect to the protected sick time in the law and only punish workers for absences after they use their protected sick time, there is no violation. However, such a theory is a violation of the prohibition on use of absence control as retaliation if the use of protected sick time in any way led to an absence control violation. In effect, this punishes workers for the use of their protected sick time, despite purportedly applying only to non-protected time. Workers should not have protected sick time hours counted in any way against them through absence control policies.

Issue 10: Covering All Workers and Pushing Back Against Business Size Carve Outs

KEY CONSIDERATIONS: Business size carve outs create unfair, unnecessary exclusions for all workers and may disproportionately impact nonstandard workers. Sick time laws must ensure that all workers, regardless of employer size, have the right to earn and use sick time and that, for as many workers as possible, that time is paid.

One of the great battles for paid sick time advocates has been the fight against employer size carve outs, which totally exclude employees of employers below a certain size. This has a broad impact on access to this benefit as many workers, including many nonstandard workers in industries like retail and food service, as well as domestic workers, work in smaller businesses. Yet employees of smaller employers need sick time just as frequently as employees of larger businesses.

The large carve out of all employers with fewer than 50 employees from the Family and Medical Leave Act (FMLA) led to businesses arguing for similar exemptions in paid sick days laws. But the relatively small number of hours businesses are required to give for paid sick time (to date, most laws require only 40 hours and no law requires more than 72 hours in any jurisdiction) is very different from the 12 weeks of leave required under the FMLA. Moreover, the FMLA's carve out was the result of a political compromise and is itself deeply problematic, excluding many workers who should be able to benefit from job-protected leave but cannot because of the size of their employer.[40]

Arguments for a worker size carve out include that employers lacking a human resources department cannot deal with purportedly complicated legal requirements. Yet even the smallest businesses have to (and do) comply with many laws including minimum wage. Similarly, carve out advocates claim that it is too hard for small employers to cover the work while one person is out, but nearly all businesses can manage with the small number of hours paid sick days laws generally offer. Finally, carve

40 For more on the impacts of the FMLA's restrictive eligibility criteria on vulnerable workers, see A Better Balance's recent report, A Foundation and A Blueprint: Building the Workplace Leave Laws We Need After Twenty-Five Years of the Family & Medical Leave Act (February 2018), www.abetterbalance.org/resources/a-foundation-and-a-blueprint/.

out supporters claim smaller employers cannot afford to provide mandated benefits, yet the size of a business is not necessarily an indication of lack of profitability.

Despite these efforts, only Connecticut has a large business size carve out in their paid sick time law. Connecticut's was the first statewide paid sick time law, and is very narrow, restricting coverage to service sector workers with 50 or more employees. No other state's paid sick time law totally excludes workers based on the size of the business for which they work (or limits coverage on the basis of sector), although workers may be treated differently in terms of their entitlement under the law based on the size of their employer.

Some jurisdictions allow smaller employers to provide *unpaid* sick time. In these places, employees of smaller employers still have the right to take sick time and cannot be punished or retaliated against for using it, though they do not have the right to be paid. Among the state sick time laws, four allow smaller employers to provide unpaid time: Rhode Island (18 employees), Maryland (15 employees, except Montgomery County, which uses 5 employees), Massachusetts (11 employees), and Oregon (10 employees, except in Portland, which uses 5 employees). Just three local laws allow smaller employers to provide unpaid time: Philadelphia (10 employees), New York City (5 employees), and Minneapolis (5 employees). In some jurisdictions, small business considerations are reflected in differential number of hours of sick leave offered to workers depending on the size of their employer.

Nonstandard employees are often impacted by this differential treatment based on employer size. In the states and jurisdictions that include small businesses, the laws have been working well. In New York City, for example, employers surveyed, including small business employers, reported either no impact or a modest impact on costs or business operations.[41] Eighty-six percent of New York City's small and large employers surveyed expressed support for the law.[42] Policymakers should aim to be as inclusive as possible when designing their laws.

41 Eileen Appelbaum and Ruth Milkman, No Big Deal: The Impact of New York City's Paid Sick Days Law on Employers, Center for Economic Policy Research and the Murphy Institute (September 2016), http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf.
42 Id.

Conclusion

The relatively new but extremely robust paid sick time movement has given us many lessons learned for comprehensively covering all workers, including many who have traditionally been marginalized or completely left out of labor law requirements. These lessons can and should be applied to all benefits that come from employers to ensure that our laws guaranteeing needed worker benefits and supports include all workers even as the way in which we work in the U.S. changes.

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