

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

Brief 1: Paid Family and Medical Leave & Self-Employment

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EXECUTIVE SUMMARY

The way we work is changing and our laws must change with it. As workers increasingly find themselves in nonstandard, precarious, and insecure jobs, portable benefits—those that workers can take with them as they move from job to job or combine multiple sources of income—are increasingly essential. In the emerging future of work, portable benefits will be crucial to workers' economic security, to their job quality, and, ultimately, to their life quality. Paid family and medical leave laws, developed and refined through state experimentation, offer unique and innovative examples of exactly the kind of powerful portable benefits we need. Paid leave laws have pioneered new approaches to covering those workers who are all too often left out, including the self-employed. These state laws provide proven real-world models for how to meet the needs of the changing workforce.

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.

Even among those correctly classified as employees, more and more people are in insecure employment situations,

constantly moving in and out of increasingly tenuous positions. 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, 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.¹

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

¹ The needs of employees, as opposed to the self-employed, in a changing workplace will be addressed in subsequent policy briefs in this series.

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, including both reliable, portable benefits and strong labor standards.

Against this backdrop, innovative policies like paid leave laws offer exciting opportunities to develop workplace standards that truly work for a changing workforce. Because paid leave is an emerging field, 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 century structures. Responding to today's challenges, paid family and medical leave laws can provide

groundbreaking portable benefits, which workers can carry with them across jobs and which can form a model for meeting other needs. 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: Automatic versus Voluntary Coverage

All paid family and medical leave programs must offer access to coverage for self-employed workers. Making coverage automatic (as it is for employees) offers protection against the unexpected and has significant advantages from a social insurance perspective, while voluntary coverage offers greater flexibility for workers.

Issue 2: Structuring Opt-in Opportunities to Protect the Fund

If self-employed workers are allowed to opt in, rather than being covered automatically, steps must be taken to protect the social insurance fund. Policymakers should seek to balance the need to protect the fund against the need to offer a meaningful, affordable opportunity for self-employed workers to participate.

Issue 3: Who Pays (And How Much)?

In programs where employers and employees share costs, policymakers must consider what contribution would represent a fair share of costs for self-employed workers in relation to what employees and employers pay. In addition, policymakers should weigh whether entities that use self-employed workers should bear some of the costs.

Issue 4: Misclassification

Misclassified and potentially misclassified workers need meaningful opportunities to learn about benefits and well-publicized, user-friendly structures to apply for and receive them. To empower workers to come forward, they need ironclad legal rights against any and all forms of retaliation by their employers for exercising their rights.

Issue 5: Covering Workers with Multiple Sources of Income

Workers must be able to combine tenures or earnings from multiple jobs or sources of income, including self-employment, to meet eligibility requirements. In addition, benefits must fairly reflect earnings from multiple jobs or sources of income and previously covered workers should be able to receive benefits during unemployment.

Issue 6: Outreach & Education

Comprehensive outreach and education to self-employed workers, targeted for their specific needs and reflecting the diversity of their experience, is essential.

Who are the self-employed?

Before we can propose meaningful policy solutions, we need a shared vocabulary. Different groups use terms like “self-employed,” along with those that are sometimes used as synonyms like independent contractors or freelancers, to mean different things. These divergent categorizations, in turn, make it difficult to come up with a consistent understanding, much less an authoritative count on the number of self-employed people in the United States.

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.

In this policy brief, we recognize the diversity of experiences of the self-employed. The needs of someone who picks up work cleaning houses may be very different from those of an attorney starting a solo practice or an entrepreneur building a business, yet all three could be considered self-employed 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.

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.²

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² For more on misclassification, see Issue 4 below.

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.

To date, all comprehensive state paid family and medical leave laws are designed as social insurance programs. Social insurance programs, as opposed to pure employer mandates like minimum wage, offer intriguing opportunities to experiment with inclusion of self-employed workers. Since many of these programs are new or still being built, they provide policymakers the chance to not only incorporate self-employed workers (and others often excluded by existing systems), but actually design a system responsive to their needs in the first instance. With thoughtful policymaking, these new inclusive insurance systems may provide templates for legacy programs, like workers compensation or unemployment benefits, as well as for new and emerging programs to better adapt to the future (and present) of work.



Background: Existing Paid Family & Medical Leave Laws

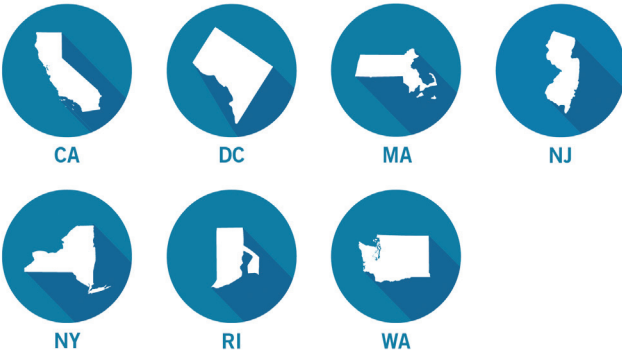
Since the middle of the last century, five states (California, New Jersey, Rhode Island, New York, and Hawaii) have provided a legal right to temporary disability insurance (TDI), which provides partial wage replacement to those unable to work due to an off-the-job illness or injury. In recent years, California, New Jersey, Rhode Island, and New York have expanded these programs to provide benefits to workers bonding with a new child or caring for a seriously ill loved one.³ In addition, Washington, D.C., Washington State, and Massachusetts have passed laws to create new insurance systems to provide benefits in these same situations starting in 2020 in D.C. and Washington State and in 2021 in Massachusetts. As noted above, though their exact structures vary, all existing comprehensive paid family and medical leave programs provide benefits through a social insurance model.

In each state with a paid family and medical leave law, almost all private sector (non-government) employees have an automatic legal right to coverage, including part-time, subcontracted, and otherwise vulnerable workers. These laws cover employees regardless of the size of their employer, meaning that even those who work for an employer with just one employee have the right to coverage. However, in general, they do not automatically cover self-employed workers.

These laws provide benefits in a few types of situations. Workers can receive medical leave benefits (sometimes

3 Hawaii's law continues to provide for TDI benefits, but has not been expanded to provide paid family leave benefits. Under the law, workers can receive TDI benefits for up to twenty-six weeks. Workers receive 58% of their own income through TDI, up to a cap. Hawaii's law does not provide a specific option for self-employed workers to opt in to coverage. Because Hawaii's law provides only disability benefits and not family leave benefits, it is not addressed in this policy brief.

STATES WITH PAID FAMILY & MEDICAL LEAVE LAWS:



called TDI benefits) when they are unable to work due to a serious off-the-job illness or injury. Family leave benefits are available to those taking leave from work to bond with a new child (including children newly placed for foster care or adoption) or to care for a family member with a serious health condition. New York, Washington State, Massachusetts, and California also provide (or will provide) paid family leave benefits to workers dealing with certain needs in connection with a family member's military deployment.

Programs vary in the number of weeks of benefits workers can receive. For their own medical needs, workers can receive benefits for fifty-two weeks in California, thirty weeks in Rhode Island, and twenty-six weeks in New York and New Jersey. Workers will be able to receive benefits for their own medical needs for twenty weeks in Massachusetts, twelve weeks in Washington State (with an additional two weeks for severe pregnancy complications), and two weeks in Washington, D.C. For paid family leave, California and New Jersey offer six weeks of benefits, while Rhode Island offers four weeks of benefits. New York currently offers ten weeks of paid family leave benefits and, when the program is fully phased in in 2021, will offer twelve weeks. Washington State and Massachusetts will each offer twelve weeks of paid family leave benefits,⁴ while Washington, D.C. will provide six weeks of benefits to care for a seriously ill or injured loved one and eight weeks of benefits to bond with a new child. Programs vary in the extent to which workers can combine family and medical leave benefits sequentially.

Benefits are calculated as a percentage of workers' income. In some programs, this is a flat percentage (ranging from 50% to about 67%) of workers' own income, while in others lower-income workers receive a higher percentage of their income (up to 90% for low-income workers).⁵

4 Massachusetts will provide up to twenty-six weeks of family leave benefits for military caregivers.

5 Workers receive a flat percentage of their average weekly wage in Rhode Island (approximately 60%) and New Jersey (approximately 67%). New York also uses a flat wage replacement rate, currently 50% for workers' own health needs and 55% for family leave, but will increase the rate over time for family leave until it reaches 67% in 2021. California uses a progressive wage replacement rate ranging from 60% to 70% for most workers, with lower-income workers receiving a higher percentage of their income. When their programs begin providing benefits, both Washington, D.C. and Washington State will provide workers with 90% of their income up to a threshold and 50% of their income above that threshold, though the exact inflection points vary. Massachusetts will offer a similar wage replacement rate, providing 80% of workers' income up to a threshold and 50% of their income above the threshold. As noted above, benefits are capped in all programs.

	CURRENTLY IN EFFECT				BEGINNING IN FUTURE YEARS		
	CA	NJ	NY	RI	DC	WA	MA
Self-employed workers can opt in	Yes	No	Yes	No	Yes	Yes	Yes
Number of weeks (own health)	52	26	26	30	2	12 14 with severe pregnancy complications	20
Number of weeks (family leave)	6	6	Current: 10 Fully phased in: 12	4	Family care: 6 Bonding: 8	12	12 26 for military caregiving
Wage replacement rate	60% to 70%, depending on income	67% (approx.)	Own health: 50% Family leave: Current: 55% Fully phased in: 67%	60% (approx.)	90% of income up to 40 times 150% of the D.C. minimum wage and 50% of income above that amount	90% of income up to 50% of the statewide average weekly wage and 50% of income above that amount	80% of income up to 50% of the statewide average weekly wage and 50% of income above that amount
Maximum weekly benefit (current)	\$1,252	\$650	Own health: \$170 Family leave: \$746.41	\$852	\$1,000	\$1,000	\$850

This chart offers a summary of key features of state paid family and medical leave laws. For more information on specific state laws, see A Better Balance’s comprehensive comparison chart at <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/>.

In every program, benefits are subject to a cap (a maximum weekly benefit); this cap is usually set as a percentage of the state’s average weekly wage, so that it adjusts each year in response to growth in wages.

While, as noted above, all programs require coverage for nearly all private sector employees, the situation is different for workers who are not employees—those who are self-employed, independent contractors, or freelancers. No implemented current program requires these workers to get (or pay for) coverage. New York and California allow self-employed workers to voluntarily opt in to coverage if they choose to and Washington State and the District of Columbia will allow self-employed workers to opt in as well. In Massachusetts, self-employed workers will generally have the option to opt in, though some self-employed workers who work in certain businesses that rely heavily on self-employed workers may be covered automatically. Currently, Rhode Island and New Jersey do not allow self-employed workers to opt in.

At least in theory, one of the major advantages of self-employment is greater control over one’s time. Yet this freedom is limited by the economic reality that, for the self-employed, not working means not getting paid. So when



a new child arrives or a health crisis strikes (along with the accompanying bills), each day of caregiving or self-care comes with a concrete cost. Participating in a paid family and medical leave social insurance benefit can alleviate some of this pressure, filling in for lost income and giving self-employed workers the opportunity to make the choices that are right for them and their families.

Issues to Address in Including Self-Employed Workers in Paid Family and Medical Leave Programs

Issue 1: Automatic versus Voluntary Coverage

KEY CONSIDERATIONS: All paid family and medical leave programs must offer access to coverage for self-employed workers. Making coverage automatic (as it is for employees) offers protection against the unexpected and has significant advantages from a social insurance perspective, while voluntary coverage offers greater flexibility for workers.

Existing state paid family and medical leave laws all cover nearly all private sector employees. This reflects a basic principle: for employees, paid family and medical leave coverage should be automatic and universal. By adopting paid leave laws, lawmakers make the decision that paid leave is a basic right that every employee should have, just like minimum wage or other labor standards.

Universal coverage of employees also plays an essential role in the sustainability of these programs. Social insurance systems such as paid leave laws work by allocating risk (and therefore cost) across a sufficiently large and diverse pool of people to make the program sustainable and



affordable. When the pool becomes either too small or too risky, because too few people participate or because too large a proportion of the overall pool will need benefits in a given timeframe, social insurance breaks down. Automatic coverage protects the solvency of the system by ensuring large numbers of people will participate, including many who will not draw benefits in a particular year.

In a changing economy, self-employed workers also deserve the opportunity to access the benefits they need. Yet given the differences between self-employed workers and employees, it is not necessarily the case that the two groups should be treated in exactly the same way. One of the major threshold issues policymakers looking to address the needs of the self-employed in any social insurance system must consider, therefore, is whether self-employed workers should be covered automatically (as employees are) or should be allowed to choose whether or not to participate.

Option A: Automatic Coverage

Policymakers could make coverage automatic for self-employed workers, just as it is for employees. Though no state paid leave law has yet taken this approach across the board, the leading federal paid family and medical leave proposal, the FAMILY Act,⁶ would require self-employed workers to participate, just as they do in Social Security (on which the FAMILY Act is based).

In Massachusetts, some self-employed workers in certain businesses may be covered automatically when that program is implemented. The law designates a business where self-employed workers make up more than 50% of the workforce as a “covered business entity.” Self-employed workers who work for covered business entities will be *required* to pay contributions to support the program, essentially as if they were employees. On this basis, it appears that these self-employed workers will be automatically covered.⁷

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⁶ H.R. 947/S. 337. For more information on the FAMILY Act, see A Better Balance’s overview at <https://www.abetterbalance.org/resources/at-a-glance-the-family-and-medical-insurance-leave-act/>.

⁷ Regulations will be needed to clarify this provision of Massachusetts’s law. Most self-employed workers will be covered only if they opt in.

There are important arguments in favor of automatic coverage for self-employed workers. Allowing some workers to choose whether to participate runs counter to the basic structure of social insurance and, over time, could threaten the viability of the program. With an opt-in system, some self-employed workers will not participate. By sheer numbers, this reduces the overall size of the pool. Moreover, allowing self-employed workers to choose whether to participate could make the pool riskier. If coverage is optional, those self-employed workers who anticipate using the program will be the most likely to choose to opt in—those with a serious health need (or a family member with a serious health need) or those who are planning to welcome a new child. In contrast, those who do not anticipate using the program will be much less likely to participate. This adverse selection will increase the relative proportion of people in the pool likely to need the benefit in a given year as compared to the proportion that will not use the benefit. Over time, a smaller or riskier pool means higher costs, which could eventually become so high as to make the program unsustainable.

Because employees join the pool automatically, the impact of allowing self-employed workers to choose whether to participate will be mitigated as long as employees significantly outnumber self-employed workers in the population. However, if the share of the population that is self-employed grows (and there are indications that this might happen), allowing these workers to decide whether or not to participate will have a commensurately larger effect on both the size and the riskiness of the pool. Policymakers evaluating these questions therefore must consider the actuarial impact of their choices not only based on current data, but also on realistic expectations for the future.

Beyond the impact on the insurance pool, a voluntary system could perpetuate discriminatory trends already present in our society. It is likely that more women than men will imagine themselves using the program and therefore opt in. This will reinforce existing highly gendered behavior patterns around leave-taking in a society in which women already bear a disproportionate share of the responsibility for childcare and other forms of caregiving. Similarly, although costs of participating in paid leave insurance programs are generally low, lower-income self-employed workers who truly need every dollar of their income today may be more likely to choose not to get coverage than their higher-income counterparts. Because



low-income workers are already getting by on less and are less likely to have savings they can rely on during a non-working period, this can mean that those who would benefit most from a social insurance benefit will be the least likely to have access to it. Automatic coverage avoids introducing these and other disparities.

In addition, one of the primary benefits of insurance is protection against the unexpected. While workers may hope and plan for the arrival of a child, pregnancies are often unexpected. Similarly, paid family and medical leave benefits also protect workers when unforeseen health situations arise—the shocking cancer diagnosis or the parent's surprise stroke. Precisely because these situations are unpredictable, people may assume they will not happen to them and therefore not get coverage from which they would have benefited. Automatic coverage would reduce these risks.

Option B: Voluntary Coverage

The primary alternative to mandatory coverage is to make coverage for the self-employed voluntary, allowing these workers to choose whether or not to opt in. This is the approach that all five paid leave jurisdictions (California, New York, Washington State, the District of Columbia, and Massachusetts) that allow coverage for the self-employed have generally taken.

The first and perhaps strongest argument for voluntary coverage is also the most pragmatic: for self-employed workers, having the option to be covered is better than being shut out altogether. Today, self-employed workers often struggle to access basic safety net protections. For example, self-employed workers are generally not covered by unemployment insurance. Even where commercial markets exist, as with disability insurance or health insurance, self-employed people may have difficulty finding affordable options. Providing the chance to opt in to

coverage through a social insurance system is a meaningful step forward for the ability of all workers to access the protections they need, regardless of how they are classified.

More broadly, workers may have chosen to become self-employed in order to give themselves more flexibility by moving outside the employer/employee system and its traditional constraints. For many, that choice could be a deeply personal one around which they have structured important parts of their life. To then require those workers to continue to participate in a structure they have chosen to leave is not a trivial decision. We also know that, while some workers choose freely to become self-employed, many do so under significant external pressures. In this context, allowing the self-employed to choose whether to participate in a paid leave insurance system can strike a needed balance between ensuring access to needed protections and providing flexibility to those who seek it.

As discussed in greater detail in Issue 5 below, workers may receive income from self-employment in addition to holding jobs as employees. In many cases, these workers may receive adequate protection from covering them through their jobs, without specifically addressing their self-employment income. This is particularly true for those whose self-employment income may be small or purely supplemental to income from employment. Voluntary coverage for self-employment income means increased flexibility for those combining multiple income streams, recognizing that workers may have different preferences in different situations.

Issue 2: Structuring Opt-in Opportunities to Protect the Fund

KEY CONSIDERATIONS: If self-employed workers are allowed to opt in, rather than being covered automatically, steps must be taken to protect the social insurance fund. Policymakers should seek to balance the need to protect the fund against the need to offer a meaningful, affordable opportunity for self-employed workers to participate.

Allowing self-employed workers to opt in, rather than requiring them to participate, raises an additional set of considerations. If there are no restrictions on their ability to move in and out of the fund, self-employed people could (in theory) wait to join the program until they know they



will use the benefit soon, then leave again once the need has passed. For example, if you knew you were expecting a child, you might opt in during the pregnancy, take benefits to bond with your child, then opt out again once you returned to work. This could allow self-employed workers to “game the system,” which could cumulatively have a negative effect on the solvency of the program as well as on the perception of fairness to all workers.

Different states have used different tools to mitigate this risk. One option is to require people to commit to stay in the program for a minimum amount of time. Washington State, Washington, D.C., and Massachusetts require that self-employed people who opt in to the system must initially commit to stay in the program for at least three years. Once workers are in the program, they may be able to renew for a shorter period of time; for example, in Washington State, a self-employed worker who has completed the initial three-year commitment can renew for a single year. This approach has the benefit of disincentivizing opportunistic opt-ins to the program without imposing major barriers, especially for workers who may need benefits relatively quickly but would be willing to commit to the program beyond that need.

Another option is to impose a waiting period, requiring self-employed workers to wait a certain amount of time after opting in before becoming eligible for benefits. This would encourage self-employed workers to participate early, so that they would not risk being excluded from benefits if their circumstances changed unexpectedly. For example, Massachusetts will require that self-employed people have been in the program for at least two calendar quarters

before they can access benefits. However, if the waiting period is too long, self-employed workers will be less likely to opt in and may, in effect, be shut out of the program. For example, New York requires self-employed workers who opt in to paid family leave coverage after a certain deadline to face a two-year waiting period, during which they must pay premiums but cannot receive benefits. This requirement is so onerous that few if any self-employed workers who miss the deadline will be willing to opt in. This problem is compounded by the fact that, due to a combination of technical difficulties and very limited outreach and education efforts, very few self-employed workers had a real opportunity to opt in before the deadline. Policymakers elsewhere should learn from this unfortunate example.

A third option, which could be used in combination with other tools, is limiting the period of time during which self-employed people can opt in. For example, the District of Columbia will give self-employed workers the opportunity to opt in once per year; under proposed regulations in Washington State, self-employed workers would be able to opt in effective at the start of a new calendar quarter. Here, an analogy to health insurance may be helpful: states can allow self-employed workers the opportunity to opt in within a certain window of time after a qualifying event (such as becoming self-employed) and during a certain annual or quarterly window (akin to open enrollment periods for health insurance), but not otherwise. Limiting the number of opportunities to opt in would encourage self-employed workers to carry coverage even when they do not have an immediate anticipated need for leave, to protect them in case such a need arises. Note that any such system would need to ensure that the available windows were both well publicized and open for a sufficient length of time to allow self-employed workers a meaningful opportunity to opt in. Failure to do so would result in many self-employed workers who might want to opt in being prevented from doing so.

Though they have not yet been put into practice in any state paid leave law, other options may also be available, either in combination with the tools states are already using or on their own. For example, a program might allow self-employed workers to opt in during a specific eligibility window at the same contribution rate as employees, but allow self-employed workers to opt in outside those windows if they paid a surcharge. Further exploration of other options and mechanisms is needed.

Policymakers looking to craft a program that allows self-employed workers the option to opt in should consider the full set of potential tools, including those not named here. In so doing, they should seek to balance the need to protect the fund against the need to offer a meaningful, affordable opportunity for self-employed workers to participate.

Issue 3: Who Pays (And How Much)?

KEY CONSIDERATIONS: In programs where employers and employees share costs, policymakers must consider what contribution would represent a fair share of costs for self-employed workers in relation to what employees and employers pay. In addition, policymakers should weigh whether entities that use self-employed workers should bear some of the costs.

At present, all state paid family and medical leave insurance programs are paid for through contributions from employers, employees, or both, generally structured as a percentage of wages up to cap.⁸ In programs that are fully funded by employee contributions, incorporating self-employed workers into this system is straightforward: paying the same amount as similarly situated employees covers the whole cost of their participation. However, where employers and employees share costs, the question of who pays becomes more complicated.

Enacted and proposed laws offer multiple potential solutions to this conundrum. The first, reflected in the FAMILY Act as well as paid leave laws in New York and Massachusetts, is to require self-employed workers to pay both the employer and employee contributions. As a result, the insurance fund will receive the same amount in total contributions for an employee and a self-employed worker who make the same amount of money. This is consistent with the way that self-employed workers are treated for purposes of Social Security taxes, reflecting the fact that the FAMILY Act's structure is based on Social Security. On the other hand, this approach requires that self-employed workers pay a greater share of their income than employees making the same amount (in order to cover the share that would be paid by employers).

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⁸ In Rhode Island and California, employees pay the full cost of the entire program. In New York, New Jersey, Washington State, and Massachusetts, employees pay the full cost of family leave coverage, but employers and employees share the cost of medical leave insurance/TDI. In Washington, D.C., due primarily to unusual legal issues that apply only to the District, employers pay the full cost of the program.



Washington State's paid family and medical leave program offers a second solution. Under the law, employees will bear the full cost of family leave coverage but employers and employees will share the cost of medical leave coverage.⁹ Self-employed workers who opt in to coverage will be responsible for the employee contributions for both medical leave and family leave (just as they would if they were employees). However, they will not have to pay the employer contribution to the cost of medical leave; instead, the fund will simply absorb that cost. This is consistent with the way that Washington treats small employers: employers with fewer than fifty employees will not have to pay the employer contribution for medical leave and the fund will absorb the cost (i.e. employees will not have to cover the employer contribution). In effect, Washington's approach treats the self-employed as if they are very small employers (a "company of one" consisting only of that person).

Massachusetts offers a third option, reflecting the two different ways self-employed workers may become covered under the law. Most self-employed workers in Massachusetts will be covered only if they opt in; those who opt in will need to pay the full cost of coverage, including the employer share. However, as discussed above, certain self-employed workers—those who work for employers, known as covered business entities, that rely heavily on self-employed workers—are treated differently. Self-employed workers who work for covered business entities will be required to pay the employee share of the contribution. However, the covered business entity will be required to pay the employer share of the contribution. In essence, these self-employed workers

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⁹ If they wish to, employers may choose to pay the full premium out of pocket, rather than withholding the authorized portion from employee paychecks. While Washington's law provides this option formally, other states may allow employers to cover the employee portion of costs informally.

will be treated like employees and the entities for which they work will be treated like employers.

Prior to the passage of Massachusetts's law, advocates had put forward a proposed ballot initiative to create a paid leave insurance system. While not enacted, the ballot initiative offered a fourth option for policymakers to consider. Under the terms of the ballot initiative, employers and employees would have shared the cost of the program. Self-employed workers who opted in would pay only the employee share, similar to what Washington State does. In an innovative new approach, however, entities that pay 1099 contractors would have had to pay contributions based on those payments, equivalent to what the entity would pay if they had an employee being paid the same amount. This requirement would apply regardless of whether a particular 1099 contractor opted in to the system. A goal of this system, as partially reflected in the alternate mechanism Massachusetts ultimately chose, would have been to shift the costs to businesses and other entities that use independent contractors in place of employees.

All of these options should be evaluated carefully by drafters of new proposals, as all have advantages and disadvantages. On the one hand, policymakers must ensure that any program is affordable for self-employed workers if they want these workers to have a real opportunity to participate. They must also consider what would be fair and equitable to these workers, especially in relation to similarly situated employees. On the other hand, policymakers must consider the overall health of the fund, particularly if self-employed workers are likely to become a larger share of the workforce over time.

It is also worth noting that, though all U.S. paid family and medical leave programs to date have been funded through some combination of employer and employee contributions, generally tied to payroll, this is not the only possible system for funding such programs. Benefits could be funded out of general government revenues, as some countries do, or out of some other funding source entirely.¹⁰ For example, if it were politically feasible to do so, policymakers could create a new dedicated funding stream not directly tied to covered workers' own income.

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¹⁰ For a further examination of alternative possible structures, see Sarah Jane Glynn, *Administering Paid Family and Medical Leave: Learning from International and Domestic Examples*, <https://www.americanprogress.org/issues/economy/reports/2015/11/19/125769/administering-paid-family-and-medical-leave/>.

Breaking the link between wage-based payments and program benefits would have some important advantages with regard to self-employed workers; if benefiting from the program did not come with a specific cost to workers, the reasons not to provide automatic coverage to these workers would dramatically decrease. However, there are political challenges to this approach. In addition, without a dedicated, specific funding source, a program would need consistent funding appropriations over time, which could be a risk to the sustainability of the program.

Issue 4: Misclassification

KEY CONSIDERATIONS: Misclassified and potentially misclassified workers need meaningful opportunities to learn about benefits and well-publicized, user-friendly structures to apply for and receive them. To empower workers to come forward, they need ironclad legal rights against any and all forms of retaliation by their employers for exercising their rights.

Policy solutions for reaching the self-employed must also address the needs of misclassified or potentially misclassified workers, who are treated by the entities with which they work as independent contractors, but who legally ought to be considered employees. Issues around misclassification have far-reaching impacts that go well beyond their effect on paid leave laws, but ensuring access to a social insurance benefit should not depend on how a worker is labeled.

As described above, universal, automatic coverage for employees is a core principle in paid leave laws, while the self-employed may need a more nuanced solution. Recognizing that misclassification is likely to be an ongoing issue, policymakers should take steps to ensure that no worker falls through the cracks due to classification ambiguity.

When workers have not been incorporated into the system due to being misclassified, they should

be able to receive the benefits to which they would otherwise be entitled. This requires providing meaningful opportunities for potentially misclassified workers to learn about benefits and the possibility they have been misclassified. This need is part of a broader necessity for outreach and education as discussed in Issue 6.

Once workers learn they may be entitled to benefits, they need well-publicized, user-friendly structures to apply for and receive them. This means more than providing an option on paper for misclassified workers (and others for whom employers have not complied with their legal obligations) to file for benefits. Claims processors must provide clear instructions for how these workers can seek and receive benefits, including how they can challenge an employer's erroneous classification. These processes must not place excessive burdens on workers and must provide flexible options for documenting earnings and establishing the nature of their employment relationship.

To empower workers to come forward, strong protections against retaliation by their employers are essential. Without ironclad legal rights against any and all forms of retaliation by their employers for exercising their rights, it is simply unrealistic to expect misclassified workers to take the risk of employer retribution in order to file a benefits claim. These protections must be coupled with serious, proactive enforcement with commensurately serious penalties for employers who attempt to evade their responsibilities



to provide paid leave through misclassification. The state, rather than workers themselves, should bear the responsibility in the first instance for identifying and preventing misclassification.

Finally, those who are ambiguously classified should be able to choose to pursue coverage as a self-employed person without harming any other legal claims regarding their status or risking their eligibility for benefits as an employee. Innovative policies should give workers more options, not fewer, and make it safe to exercise those options.

Issue 5: Covering Workers with Multiple Sources of Income

KEY CONSIDERATIONS: Workers must be able to combine tenures or earnings from multiple jobs or sources of income, including self-employment, to meet eligibility requirements. In addition, benefits must fairly reflect earnings from multiple jobs or sources of income and previously covered workers should be able to receive benefits during unemployment.



Even apart from any issue of misclassification, the categories of “employee” and “self-employed person” overlap. Across the income spectrum, those who hold full- or part-time jobs may simultaneously be receiving income from self-employment. This can cover a wide variety of types of work, including freelance writing assignments, consulting roles, picking up app-based tasks, running an Etsy shop, and more informal arrangements such as housecleaning, dog-walking, or babysitting. In some circumstances, a worker may hope to turn a “side hustle” into a primary source of income, while for others this additional income may be intended only as a supplement to income from employment. Moreover, even those without a formal employee role may combine multiple forms or sources of self-employment income.

Program design must account for this reality. Workers covered for both employment and self-employment should be able to receive benefits reflecting their total income. Where eligibility criteria are tied to reaching a minimum earnings threshold, as they are in several existing laws, workers should be able to use their self-employment income to meet those requirements. Subject to reasonable restrictions, workers receiving income for work from multiple sources, whether those sources are an employer or self-employment, should be able to choose to take leave with benefits from some forms of work while continuing to do other forms of work. Thoughtful, flexible program design in these areas can also help programs better meet the needs of workers who may be combining income from multiple jobs or moving among jobs.

Issue 6: Outreach & Education

KEY CONSIDERATIONS: Comprehensive outreach and education to self-employed workers, targeted for their specific needs and reflecting the diversity of their experience, is essential.

Effective outreach and education to ensure that workers know about and can use their rights remains an ongoing challenge across the board even for long established paid leave programs. This challenge can be especially tricky, however, for reaching self-employed workers, who may be difficult to identify. Therefore, new programs (and existing



programs seeking to cover this population) must formulate discrete, specific outreach plans for this population.

This outreach must make clear that self-employed workers are covered by the program or can choose to be covered by the program, as is applicable under a particular law. If the program is an opt-in for self-employed workers, the educational materials must make clear how and when workers can opt in, including providing timely information that allows workers the opportunity to act before any applicable deadlines.

Outreach and education must also reflect the diversity of experiences of the self-employed. For example, if an

implementing agency thinks of self-employed individuals primarily as “employers” (visualizing, perhaps, a small business owner with a physical storefront), outreach targeted at the self-employed may miss those who think of themselves primarily as workers (or employees), who may have many sources of 1099 income. An effective strategy therefore must include recognizing the self-employed as workers, while also providing support to those who think of themselves as business owners. In addition, as noted above in Issue 4, outreach and education efforts should address the problem of misclassification and empower workers to determine whether they are truly self-employed.

Conclusion

During the past several years we have seen a great deal of progress in the development of paid family and medical leave laws, with new states building upon the lessons of their predecessors and pioneers revisiting their laws to expand and improve protections. In this context, there is more work to be done to build a model paid family and medical leave program that truly serves self-employed

workers—and all workers, regardless of classification—including addressing the issues raised here. In so doing, we can set an example not only for paid leave benefits across the country but for innovative policymaking approaches that will rise to meet the challenges and the opportunities presented by the evolving nature of work in this country.



A Better Balance is a legal advocacy organization dedicated to promoting fairness in the workplace and helping workers care for their families without risking their economic security.

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