

# CONSTRUCTING 21<sup>ST</sup> CENTURY RIGHTS FOR A CHANGING WORKFORCE: A POLICY BRIEF SERIES

## Brief 2: Paid Family and Medical Leave & Nonstandard Employees

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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.<sup>1</sup> 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.

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<sup>1</sup> The needs of the self-employed in a changing workplace were addressed in the first policy brief in this series.

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. 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.

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, 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: Covering all employees**

Paid family and medical leave laws should cover as close as possible to all private sector employees. This *must* include covering employees regardless of their employer size and should also include avoiding industry exclusions. Where possible, these laws should also cover public sector employees.

**Issue 2: Employment duration and portability of benefits**

Policymakers may use employment duration (time in employment) requirements, earnings requirements, or a combination of both as eligibility criteria. The thresholds for these requirements should be as low as possible to ensure that nonstandard employees can qualify.

**Issue 3: Portability & covering workers with multiple sources of income**

Workers must be able to combine tenures or earnings from multiple jobs or source 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 4: Benefit level and access**

Wage replacement rates must be high enough for all workers, including low-income workers, to be able to afford to take leave, whether through a flat or progressive rate. At a minimum, this means providing at least two-thirds wage replacement for all workers.

**Issue 5: Job protection and nonstandard employees**

All paid family and medical leave laws should provide legal rights to job protection to all covered employees for all covered leaves.

**Issue 6: 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 7: Special considerations around domestic workers**

All domestic workers must be covered under all paid family and medical leave laws. Ensuring that domestic workers can actually use their rights will require targeted outreach and education to both workers and employers, as well as deliberate, proactive enforcement.

**Issue 8: Outreach and education**

Comprehensive outreach and education to both workers and employers is essential. Employers should also be required to provide both posted and personal notice to employees of their rights.

## 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 four distinct subgroups, whom we will collectively refer to as nonstandard *employees*: temporary workers, seasonal workers, part-time workers, and domestic workers. A fifth category of nonstandard workers, self-employed workers, was addressed in our prior brief.

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, farm workers 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. Many workers, including many parents and those with other caregiving responsibilities, want or need to be working part-time. For these workers, ensuring access to the paid leave and other supports they need 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. At the same time, some workers, known as involuntary part-time workers, are working part-time but would prefer to be working more hours or full time. For these workers, exclusion from leave policies due to working an insufficient number of hours is particularly cruel, adding insult to injury for workers struggling to get the hours they need to pay their bills.



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.<sup>2</sup> 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 domestic employment relationships, including that they are often one-to-one employer-employee relationships.

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.<sup>3</sup> Misclassification has gained additional attention with the rise of platform or “gig

<sup>2</sup> 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.

<sup>3</sup> For more on misclassification, see Issue 6 below.

	CURRENTLY IN EFFECT				BEGINNING IN FUTURE YEARS		
	CA	NJ	NY	RI	DC	WA	MA
Number of weeks (own health)	52	26	26	30	2	12 <i>14 with severe pregnancy complications</i>	20
Number of weeks (family leave)	6	6	Current: 10 Fully phased in: 12	4	Family care: 6 Bonding: 8	12	12 <i>26 for military caregiving</i>
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/>.

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.

We are also cognizant 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.

We are likewise cognizant of the intersecting impacts of race, gender, and immigration status on the needs and experiences of nonstandard workers. Access to paid family and medical leave is a gender justice issue and a racial justice issue, particularly for women for color.<sup>4</sup> In a society in which women still bear a disproportionate share of the burden for 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,<sup>5</sup> and

4 See National Partnership for Women & Families, *Paid Family and Medical Leave: A Racial Justice Issue—And Opportunity* (August 2018), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf>.

5 Cliff Zukin & Carl Van Horn, *A Tale of Two Workforces: The Benefits and Burdens of Working Part Time*, John J. Heldrich Ctr. for Workforce Dev., Rutgers Univ. 4 (June 2015) [http://www.heldrich.rutgers.edu/sites/default/files/products/uploads/Work\\_Trends\\_June\\_2015.pdf](http://www.heldrich.rutgers.edu/sites/default/files/products/uploads/Work_Trends_June_2015.pdf).

nearly all domestic workers are women.<sup>6</sup> Black, Hispanic and Latino workers make up a disproportionately large share of temporary help agency employees.<sup>7</sup> Immigrant workers are present across all types of nonstandard work and make up an especially large proportion of domestic workers.<sup>8</sup> Yet we know that immigrant workers, particularly undocumented workers, are especially vulnerable in the

6 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](http://www.idwfed.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment_1).

7 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 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, *Quick Facts, Population Estimates (July 1, 2017)*, <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

8 National Domestic Workers Alliance et al., *supra* note 5.

workplace and may find it especially difficult to take needed leave, even with the strongest possible legal rights.

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 and effective coverage of nonstandard workers. Since many of these programs are new or still being built, they provide policymakers the chance to not only incorporate nonstandard workers, 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.<sup>9</sup> 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.<sup>10</sup> These laws cover employees regardless of the size of their employer,

9 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.

10 The details of which employees are covered and when they become eligible for benefits are addressed in Issue 1 and Issue 2.

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 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,<sup>11</sup> 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

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<sup>11</sup> Massachusetts will provide up to twenty-six weeks of family leave benefits for military caregivers.

others lower-income workers receive a higher percentage of their income (up to 90% for low-income workers).<sup>12</sup> 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.

As noted above, by design, all state paid family and medical leave programs are broadly inclusive, covering nearly all private sector employees. However, ensuring that nonstandard employees are able to practically access these benefits requires specific attention to the distinctive needs this workforce. Moreover, as more states and, ultimately, the federal government look to enact their own paid leave laws, continued attention to the key policy levers identified in this brief is essential to preserve that essential inclusivity.

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<sup>12</sup> 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.

## Issues to Address in Including Nonstandard Employees in Paid Family and Medical Leave Programs

**KEY CONSIDERATIONS:** Paid family and medical leave laws should cover as close as possible to all private sector employees. This *must* include covering employees regardless of their employer size and should also include avoiding industry exclusions. Where possible, these laws should also cover public sector employees.

### Issue 1: Covering all employees

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. This reflects a basic principle: for employees, paid family and medical leave coverage should be automatic and universal. For this reason, all existing state paid family and medical

leave laws cover nearly all private sector employees in their respective states. Yet covering all employees is more complicated in practice than in theory. Policy makers working on paid leave laws should account for these complications and ensure that laws are as inclusive as possible.

Defining terms appropriately is one of the most important policy levers to ensure coverage. State laws must define terms like "employer," "employee," and sometimes "employment," which are threshold determinations as to which workers are covered. These terms should be defined as broadly as possible, to ensure that all employees are covered. Policy makers should avoid both obvious exclusions, like a minimum number of hours worked per week (excluding part-time workers), and more subtle restrictions. Where referencing existing definitions, such as those used in minimum wage or unemployment insurance statutes, are adopted, policymakers should carefully review

the standards to ensure that they do not inadvertently exclude nonstandard employees.

During many state campaigns, interest groups and legislators have floated the possibility of providing an exception for employers below a certain size. This idea may come from laws like the Family and Medical Leave Act (FMLA), a federal law providing the right to unpaid leave with job protection and related rights in connection with leave, which does not apply to employers with fewer than fifty employees. These requests derive from the speculative claim, generally made by paid leave opponents, that providing paid family and medical leave will be too burdensome for small businesses.

Today, no state paid family and medical leave law has an employer size carve-out of any kind. In other words, in each of the seven jurisdictions with comprehensive paid leave laws on the books, employees have the right to receive paid leave benefits without regard to the size of their employer, even if their employer has only one employee. It is essential that future policymakers follow the lead of pioneer states in this regard.

Paid family and medical leave laws are social insurance systems. Though the mechanics vary by state, in all states the programs work by combining small contributions from employers, employees, or both into an insurance system. When workers need family or medical leave, the insurance system pays their benefits. This means that employers do not have to pay workers' wages out of pocket when they are out on leave, making providing paid leave inexpensive to the employer. This feature may be especially important for small employers, who often cannot afford to pay for paid leave out of pocket and therefore are at a competitive disadvantage in hiring the best employees as compared to larger employers who can afford to do so.

In order for the system to function, however, there must reliably be sufficient numbers of employers and employees in the pool to spread the risk and therefore the cost. Carving out smaller employers shrinks the pool, making it harder for it to perform its essential function. Because employers may fluctuate in size over time, it is also administratively unrealistic for employers to come in and out of the system as they cross arbitrary size thresholds. These rules also risk creating cliff effects, incentivizing employers to avoid hiring needed employees—or outsource jobs—in order to stay under an artificial line.

More broadly, employer size carve-outs are unfair to workers. All workers deserve the right to the leave they

need, whether or not they happen to be employed by an employer with a particular headcount when that need (which may be unexpected) arises. Size carve-outs also compromise the portability of benefits, an especially important feature for nonstandard employees (*see Issue 2*). If employers below a certain size are excluded, a worker may have been paying into the system for years but, because the worker recently moved to a job with a smaller employer, be excluded from using benefits the worker has paid for.

In some cases, policymakers encounter requests to exempt specific industries from coverage. Industry carve-outs are harmful for the same reason as employer size carve-outs—they reduce the size of the insurance pool, interfere with portability, and are unfair to workers. They can also be especially harmful for nonstandard employees, as many of the industries where nonstandard work is common may be especially likely to seek exemptions. For example, many farm laborers, an industry excluded from coverage under New York's law and potentially subject to restricted eligibility under others, work seasonally. Domestic workers may also be especially vulnerable to requests for exemption, given their historic exclusion from many labor laws. To date, state paid family and medical leave laws have largely avoided creating industry exemptions.

## Issue 2: Employment duration and portability of benefits

**KEY CONSIDERATIONS:** Policymakers may use employment duration (time in employment) requirements, earnings requirements, or a combination of both as eligibility criteria. The thresholds for these requirements should be as low as possible to ensure that nonstandard employees can qualify.

As discussed above, one of the key elements of ensuring that nonstandard employees can receive paid family and medical leave benefits is including them in definitions of key terms—in other words, the initial “who” is covered by the law. Another important factor in making sure that these workers can actually benefit from these laws is setting achievable eligibility criteria—in other words, setting realistic rules for *when* someone becomes eligible for benefits. Drafters must carefully consider the consequences of these decisions for nonstandard employees and seek rules that will meet the needs of these workers. For example,

for the reasons described in greater detail in Issue 5, the federal Family and Medical Leave Act’s eligibility standards are far too restrictive and exclude too many nonstandard employees.

Like other employment-tied social insurance benefits, paid leave laws generally establish some minimum level of attachment to the workforce in order to qualify for benefits. Because existing programs are state-based, this includes establishing connection to the workforce in that particular state. The specific mechanisms policymakers choose—and the thresholds they set for those mechanisms—will determine how easy or difficult it is for workers, particularly nonstandard workers, to qualify.

One common tool is to set a minimum amount of money a worker must have earned in qualifying employment. These requirements are usually assessed over a specific time period known as the “base period” or “qualifying period.” This period is generally one year in length.<sup>13</sup> California has the most straightforward minimum earnings requirement, under which workers must earn at least \$300 from qualifying employment during the base period.

The other frequently used mechanism is to set a minimum amount of time a worker must have been employed or have worked. In New York, employees generally must have been employed by their employer for twenty-six consecutive weeks (about 6 months) to qualify for family leave benefits and for four consecutive weeks (about 1 month) to qualify for TDI benefits. Some part-time workers or those working reduced schedules are subject to an alternate eligibility rule, under which they must have worked for their employer for 175 days for family leave and for 25 days for TDI benefits. In Washington State, workers will need to have worked for a covered employer for at least 820 hours in the qualifying period to qualify, which works out to an average of just under 16 hours per week over the course of a 52-week qualifying period.<sup>14</sup>

Three states use hybrid approaches. In Rhode Island, employees must meet a set of interlocking minimum earnings requirements, one of which effectively requires that the employee have earned income in at least two quarters. In practice, this has a similar effect to a minimum employment duration requirement, since the employee must have been

<sup>13</sup> In many cases, workers may be able to combine their four best (highest earning) quarters over the past five quarters for purposes of the base year, providing some added flexibility to help workers qualify.

<sup>14</sup> As with earnings-based base periods, workers can combine their four best (highest hours worked) quarters over the past five quarters.



employed during at least two quarters.<sup>15</sup> In New Jersey, over the course of the year prior to the start of disability or leave, employees must either earn at least 20 times the minimum wage (currently \$177) per week in at least 20 weeks or earn at least 1,000 times the minimum wage (currently \$8,850) total. In Massachusetts, workers must have earned a minimum amount (currently \$4,700) during the base period and must meet an earnings requirement tied to the worker’s average earnings that, in effect, means the worker must have worked at least 15 weeks.

Washington, D.C. will take a unique approach. Unlike other programs, there will be no minimum earnings amount or minimum time in employment to qualify. However, because of the unusually long time period over which a worker’s average weekly wage is calculated, workers who have worked in the District for less than a year will receive a pro-rated benefit. For example, a worker who had worked in the District for six months would receive half the amount in weekly benefits that a worker making the same average amount per week who had worked in the District for a year would receive.

These different models come with different tradeoffs in terms of covering nonstandard workers. In any approach, the exact thresholds used matter as much or more than the focus of earnings or employment duration. Minimum

<sup>15</sup> Workers must earn at least 400 times the minimum wage during the base period (currently \$4,200) including at least one quarter during which they earned at least 200 times the minimum wage (currently \$2,100). In addition to these minimum earnings requirements, an employee must have earned income across the base period of at least 1.5 times the amount the employee earned during the employee’s highest earning quarter, meaning that the employee must have income in at least two quarters to qualify.

earnings requirements weigh especially heavily on low-income workers, who take longer to meet any particular fixed amount of earnings than higher earners, especially for workers with erratic earnings. Moreover, while all existing state paid leave program minimum earnings requirements are manageable, if the threshold were set too high, it could exclude some workers all together.

Conversely, while minimum employment duration requirements formally apply equally to workers at all income levels, workers who change jobs more frequently or lack steady employment have a harder time meeting these requirements. Temporary and seasonal workers, in particular, may struggle to meet these requirements, depending on how the rules (and their employment) are structured. When these requirements are framed in terms of hours worked, part-time workers take longer to qualify than full-time workers.

### Issue 3: Portability & covering workers with multiple sources of income

**KEY CONSIDERATIONS:** Workers must be able to combine tenures or earnings from multiple jobs or source 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.

Eligibility requirements are also a key piece of making benefits portable when workers change jobs. It is especially important for nonstandard employees that they be able to meet eligibility requirements by combining income and employment tenures at multiple jobs. For example, a temp worker may work for enough weeks or earn enough income over the course of the relevant period, but do so for many employers; if that worker cannot combine those jobs, the worker will not qualify for benefits. Similarly, low-income workers may be more likely to change jobs than other workers more generally, even with employment that is not formally set up as temporary. Without eligibility standards that promote portability, a worker who happens to change jobs shortly before a life event requiring leave could be excluded, even if that worker had a long tenure and qualified in their prior position. This type of portability can also be

particularly important in sectors where working by the job is common, such as construction. Today, nearly all paid family and medical leave programs provide some measure of portability through the ability to combine multiple jobs to meet these requirements, with the exception of the paid family leave component of New York's program.<sup>16</sup> New paid leave policies should be portable and ensure that workers with multiple sources of income have all of their work experiences fully included.

In addition to changing jobs, nonstandard employees may hold multiple jobs—including multiple nonstandard jobs—at once. Others may simultaneously be working as non-standard employees, whether full- or part-time, and be receiving income from self-employment. Workers covered for more than one job or for both employment and self-employment should be able to receive benefits reflecting their total income. 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. This is especially important as a matter of fairness where workers are paying into the program from multiple jobs.

Portability should not only extend to providing benefits during employment. Many nonstandard employees may go through periods of unemployment between periods of employment. For example, temporary workers may have gaps between engagements or seasonal workers may struggle to find sufficient work in the off-season. For these workers, it is important that they can still access benefits they previously qualified for if the need arises during a period of unemployment. The state paid leave programs currently providing benefits generally provide some benefits, though exact conditions vary, during unemployment for previously qualified workers;<sup>17</sup> the paid leave programs in Washington State, Washington, D.C., and Massachusetts, which have not yet been implemented, look likely to do the same, though more details will be needed in some cases.<sup>18</sup>

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<sup>16</sup> New York is unique among existing programs in using different eligibility criteria for the TDI and paid family leave components of its program. As a result, workers who previously qualified for TDI benefits can qualify immediately when starting work with a new, covered employer within four weeks of the end of their previous covered employment. However, for purposes of paid family leave, employees must complete the required amount of time in employment (26 weeks or 175 days worked) with each employer, regardless of whether that employee was previously eligible.

<sup>17</sup> New York provides TDI benefits to previously covered workers during unemployment, but does not provide paid family leave benefits during unemployment.

<sup>18</sup> Massachusetts's law explicitly provides for coverage during unemployment

## Issue 4: Benefit level and access

**KEY CONSIDERATIONS:** Wage replacement rates must be high enough for all workers, including low-income workers, to be able to afford to take leave, whether through a flat or progressive rate. At a minimum, this means providing at least two-thirds wage replacement for all workers.

All paid leave programs provide partial income replacement to workers taking leave. But “partial” income replacement could include a wide range of proportions of workers’ incomes. Therefore, determining exactly how much income a program will replace—known as the wage replacement rate—is one of the most important levers of paid leave program design. If the wage replacement rate is too low, workers will not be able to afford to take the leave they need. In practice, a rate that is too low is the same as providing no leave at all—even though, in most cases, workers are paying for some or all of the cost of providing the benefit.

While an inadequate benefit can affect all workers’ ability to take leave, low-income workers are especially vulnerable. Because low-income workers already use all or very nearly all of their income to pay their bills, these workers need as close to 100% of their income in benefits as possible to make leave-taking viable. Moreover, low-income workers are more likely than other workers to be living paycheck-to-paycheck without meaningful savings, making the benefit their only source of cash during a leave. For nonstandard employees who are low-income or who, including by the nature of their unreliable employment, have limited savings to fall back on, adequate wage replacement is a threshold issue in ensuring their ability to actually take the leave they need.

There are two main ways of setting the wage replacement rate. The first is to provide a flat percentage of workers’ earnings, regardless of income level. For example, the proposed FAMILY Act would provide two-thirds (approximately 67%) of workers’ average income per month. Flat rates that are consistent across the program are used in Rhode Island (approximately 60%) and New Jersey (approximately 67%). In New York, the wage replacement

rate for both TDI/medical leave and paid family leave benefits is currently 50%; this rate will go up over time for paid family leave (though not for TDI) until 2021, when it will reach a consistent 67%.

The other method is to provide progressive wage replacement, where lower-income workers receive a higher percentage of their income. In California, the wage replacement rate is a sliding scale from 60 to 70% of workers’ income, with lower-income workers receiving the highest percentage. All three programs that have been enacted but not yet implemented (D.C., Washington State, and Massachusetts) will also provide progressive wage replacement rates. In those programs, workers will receive a high percentage of their income (80%-90%, depending on the state) up to a threshold and 50% of their income above that threshold. This method means that the effective wage replacement rate for a particular worker depends on their income level, with those who are paid less than the threshold amount receiving the highest effective rate.

In D.C., the inflection point is set at 150% of what a full-time (40 hours per week) minimum wage worker makes per week. At the current D.C. minimum wage (\$13.25 per hour), this would make the inflection point \$795 per week. Massachusetts and Washington State use 50% of their respective state average weekly wage, which in each state is a defined technical term adapted from unemployment insurance. Currently, the state average weekly wage in Washington is \$1,190 and the state average weekly wage in Massachusetts is approximately \$1,338. This means that their inflection points, if they were calculated today, approximately \$595 (Washington) and \$669 (Massachusetts) per week.

Here, an example may help illustrate how this works. Using today’s numbers, a worker in Washington State who makes \$595 per week or less (or about \$30,940 per year) would receive the 90% of the worker’s *total* average weekly wage. In other words, that worker would have an effective wage replacement rate of 90%. In comparison, a worker who works 40 hours per week at Washington State’s median hourly wage (\$21.36 per hour)<sup>19</sup> makes about \$854.40 per week or about \$44,428.80 per year. To calculate that worker’s benefit, you first calculate 90% of the worker’s weekly income up to the inflection point (\$595.00), which works out to \$535.50. Then you calculate the worker’s income above the inflection point (\$854.40 minus \$595.00,

*for previously covered workers. Washington State and Washington, D.C.’s laws are also intended to provide benefits during unemployment to previously covered workers, but regulations will be needed to explicitly spell out details.*

<sup>19</sup> Bureau of Labor Statistics, May 2017 State Occupational Employment and Wage Estimates: Washington, [https://www.bls.gov/oes/current/oes\\_wa.htm](https://www.bls.gov/oes/current/oes_wa.htm).



## Issue 5: Job protection and nonstandard employees

**KEY CONSIDERATIONS:** All paid family and medical leave laws should provide legal rights to job protection to all covered employees for all covered leaves.

which equals \$259.40) and multiply that by 50%, which works out to \$129.70. Finally, you add the two together to get the worker's benefit rate of \$665.20. As a result, that worker has an effective wage replacement rate of 77.86%. Someone who earned more than that worker would have a lower effective wage replacement rate, while someone who earned less would have a higher effective wage replacement rate.

In all programs, the benefit is subject to a cap. In most states, this cap is set as a percentage of the state's average weekly wage, ranging from 50% to 100%. In dollar terms, these percentages currently translate into a range from \$637 per week on the low end (New Jersey) to \$1,173 per week on the high end (California). Generally speaking, the cap does not affect benefits for low-income workers, who are not paid enough to hit the cap; for these workers, the wage replacement rate is the more important lever. As a result, the maximum benefit level mostly affects middle and higher income workers; workers who hit the cap have a reduced effective wage replacement rate. However, if a cap is too low, low-income workers can also be affected. For example, while New York's cap for paid family leave benefits is set as a percentage of the state's average weekly wage, the cap for TDI/medical leave benefits has been fixed at \$170 per week since 1989. Because this amount has not kept pace with inflation and rising wages, today nearly all workers, except for those working part-time at or near minimum wage, hit this cap. In effect, this makes their wage replacement rate lower than the official rate and means that many workers cannot afford to take the time they need for their own health.

Fear of losing one's job is a constant reality for many employees, especially nonstandard employees whose job situation is, by its nature, tenuous. In some cases, like seasonal or temporary work, the work is inherently time limited. In others, the risk of being fired, whether for good reason or otherwise, looms large over the entire employment relationship. Yet these workers have often ended up in unreliable employment precisely because they are unable to find or keep more stable work and need the income to pay their bills. Policymakers should include job protection for all employees taking leave in their paid leave laws.

Against this backdrop, asking workers in already precarious employment situations to jeopardize their jobs by asking for or taking leave is unrealistic. This means that without a legal right to return to work after taking leave (and protection against other negative consequences), nonstandard employees will face a substantial, potentially insurmountable disincentive to using paid leave benefits—benefits that, in most cases, the employees themselves have paid for.

Yet, without specific legislative action, nonstandard employees may be especially likely to lack legal protection against job loss. The Family and Medical Leave Act (FMLA) provides covered employees with the right to *unpaid*, job-protected leave to deal with workers' own or a loved one's serious health needs, to bond with a new child, or to address the impact of military deployment. However, not all employees are covered by the FMLA—nationwide, an estimated 41% of employees are left out.<sup>20</sup> In order to be covered by the FMLA, an employee must meet three requirements: the employee must work for an employer with at least 50 employees, must have worked for that employer for at least 12 months, and must have worked at least 1,250 hours for that employer in the last 12 months.

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20 National Partnership for Women & Families, *A Look at the U.S. Department of Labor's 2012 Family and Medical Leave Act Employee and Worksite Surveys* (February 2013), <http://www.nationalpartnership.org/research-library/work-family/fmla/dol-fmla-survey-key-findings-2012.pdf>.

These requirements can hit nonstandard employees especially hard. Those who change jobs frequently or work time-limited jobs, like temporary workers and seasonal workers, are unlikely to have worked for a particular employer for a full year. Similarly, temporary, seasonal, and part-time workers, as well as others with erratic employment, often struggle to meet the 1,250 hours-worked requirement, which requires the equivalent of working an average of about 24 hours per week. This can be especially frustrating for involuntary part-time workers, who may be excluded from access to job protection under the FMLA for not having worked enough hours when they would have preferred to have been working full time or more hours. Many nonstandard employees may also work for employers with fewer than 50 employees.

Some states have their own laws providing a right to job protection, often with shorter required tenures before workers become eligible or lower numbers of hours-worked requirements. However, all have gaps in coverage that leave many nonstandard employees, even in states with their own unpaid leave laws, without the right to job protection.<sup>21</sup>

Because of these crucial gaps, it is possible that a worker who receives paid leave benefits guaranteed by law may be *legally* fired for taking the time needed to use those benefits. Even where some other law, such as the FMLA, may provide protection, understanding the relationship among multiple overlapping sets of laws providing interrelated rights is confusing to workers and employers alike. That confusion can, in turn, interfere with workers' ability to effectively understand and use their rights.

All paid family and medical leave laws, therefore, should provide legal rights to job protection to all covered employees for all covered leaves. Because in the legal status quo nonstandard employees are likely to lack these protections, this program element will be especially important for these workers.

Of the states with existing laws, only Massachusetts meets this standard. When benefits begin in 2021, all employees taking leave under the Massachusetts law will have the right to job protection for all medical leave or family leave taken under the law. New York and Rhode Island have gone the furthest of the implemented programs: both states provide job protection to all employees taking family leave under their respective laws, but do not guarantee job protection

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<sup>21</sup> For more information on state laws that have expanded job protection and other leave rights, see A Better Balance's report, *A Foundation and a Blueprint*, <https://www.abetterbalance.org/resources/a-foundation-and-a-blueprint/>.

to those receiving TDI benefits. Washington State will provide job protection as part of its paid family and medical leave program only to those workers who meet the same eligibility standards as the FMLA, meaning that nonstandard workers eligible for benefits will still largely be left out of job protection. California, New Jersey, and D.C. do not provide job protection as part of their paid leave laws.

## Issue 6: 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 nonstandard employees 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.<sup>22</sup>

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

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<sup>22</sup> For more information on the critical need for outreach and education, see Issue 8.

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.

As detailed in our prior brief in this series, paid leave programs must also provide opportunities for those who are truly self-employed to acquire coverage, whether that coverage is automatic or voluntary. This coverage will, by extension, also have important effects on the misclassified or potentially misclassified. Therefore, 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 7: Special considerations around domestic workers

**KEY CONSIDERATIONS:** All domestic workers must be covered under all paid family and medical leave laws. Ensuring that domestic workers can actually use their rights will require targeted outreach and education to both workers and employers, as well as deliberate, proactive enforcement.



Historically, domestic workers have all too often been excluded from important labor protections, for reasons deeply connected to both sexism and racism. Today, thanks to years of dedicated advocacy by the domestic worker movement, domestic workers have gained some much-needed protections, especially through state domestic workers' bills of rights. Yet distinctive challenges remain for this particularly vulnerable workforce, and must be addressed.

First and foremost, paid family and medical leave laws must ensure that all domestic workers are covered. Most existing laws cover domestic workers to the same extent that those workers are covered under unemployment insurance laws. Generally speaking, this means paid leave laws cover domestic workers if their employers spend a low minimum amount of money per year on domestic worker wages. The exception is New York where, as the result of a technical error in a law designed to expand protections for domestic workers, only domestic workers who work at least forty hours per week for a single employer currently have a legal right to paid family leave or TDI coverage. This should be remedied. Moving forward, drafters of new legislation should explicitly include domestic workers in the relevant definitions (*see Issue 1*) and should carefully vet all cross-referenced or borrowed definitions.

Beyond this threshold issue, there are important practical considerations. Domestic employers—especially individual households who are not used to acting as employers—may be less informed about their legal obligations than other employers. Indeed, many may not even think of themselves as employers. Therefore, additional education (*see Issue 8*) specifically targeted toward domestic employers to ensure they know about and have the assistance they

need to comply with their legal obligations is essential. By the same token, domestic workers may have less access to information about their rights than other workers and, without specific guidance, may wrongly assume that paid leave laws do not apply to them. Therefore domestic workers should also receive targeted outreach.

There are also unique enforcement and implementation challenges in the domestic employment context. Participation in a social insurance system generally requires that employers remit contributions to pay for the system, whether those contributions come from the employer, the employee, or both. Domestic employers may be less likely than other employers to comply with this requirement. In some cases, this may be due to legitimate ignorance of their responsibilities or difficulty in navigating the process. In others, particularly given the prevalence of “off the books” employment of domestic workers, employers may simply ignore or evade their responsibilities.

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 with 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.

Moreover, domestic employers usually cannot easily cover a leave by reassigning other employees or through overtime. Because so many domestic workers perform vital, continuous tasks, such as caring for children or assisting seriously ill or elderly adults, their roles cannot be left unfulfilled or postponed until their return. Ensuring that these workers are realistically able to take the leave they need, when their employers may legitimately find it difficult for them to be away, will require further attention and consideration.

While a comprehensive response to these challenges will require further consideration, some key elements are clear. Many of these are the same as those needed to protect misclassified workers (see Issue 6). It is especially important for domestic workers to provide strong safeguards such that workers are not penalized for their employer’s failure to follow the law and can access benefits regardless. Likewise, domestic workers need rock-solid protection against retaliation for using or attempting to use their rights. Finally, given the low likelihood of domestic workers filing complaint 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.

## Issue 8: Outreach and education

**KEY CONSIDERATIONS:** Comprehensive outreach and education to both workers and employers is essential. Employers should also be required to provide both posted and personal notice to employees of their rights.

The best-constructed paid leave system will only be effective if workers actually know about and can use their rights. Even in states with the longest-running paid family and medical leave programs, awareness remains low, especially among low-income workers, reducing use and effectiveness of the laws. Therefore, comprehensive outreach and education is essential. These efforts should include specific, targeted campaigns to reach nonstandard employees and ensure that they know their rights. For example, without clear, plain-language, multi-lingual, accessible information to the contrary, part-time or temporary workers may assume they are not covered, as these workers are so often left out of employer leave policies. Know-your-rights materials should also highlight and explain the portability of benefits for workers with multiple jobs or who change jobs frequently.

These campaigns should also seek to educate employers. They should specifically include information to ensure that employers recognize that nonstandard employees are



covered. This should include specific education about the relationship to other standards, particularly the FMLA; without explicit information to the contrary, employers may wrongly assume the same standards apply.

Employers are often most the important source of information about workplace rights. Studies have shown that workers expect to hear about their rights from their employers. Therefore, policymakers should also enact and enforce robust requirements for employers to provide notice to their employees. To begin, employers should be required to prominently display posted notices. Because posted notices are a common requirement in other workplace laws, workers may be used to looking for information in break

rooms or other posting locations. However, employees may also miss posted notices and in some nonstandard work arrangements, such as domestic workers, posting may be impractical. Therefore, employers should also be required to provide written notice to each employee personally at the start of employment, when the employer knows (or should know) that the employee may need leave, and at regular intervals (such as annually). This repeated notice is important given that workers may not pay attention to their rights until they are in situation where they may need them. Notice requirements should be backed with clear requirements for employers to keep records demonstrating compliance, as well as strong, enforceable penalties for failure to comply.

## 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 nonstandard

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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