

THE MEANING OF LEAVE: UNDERSTANDING WORKPLACE LEAVE RIGHTS

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While much work remains to be done, the United States is experiencing a period of rapid and unprecedented progress in expanding workplace leave rights, particularly at the state level. Yet our policy vocabulary has not kept pace. What we refer to as leave rights are actually at least six kinds of rights, which appear in different combinations across many types of laws. This Article identifies the six distinct leave rights and analyzes various kinds of existing leave laws under the six-right framework, in order to better understand the existing policy landscape and provide more nuanced tools for future policymaking.

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INTRODUCTION

The United States lags far behind the rest of the industrialized world—and in some ways, the world as a whole—in terms of workplace leave rights. As a country, we provide no national right to vacation time, to parental leave, or even to a day to recover from the flu. What passes for a national leave law, the Family and Medical Leave Act, provides no right to pay, pricing out many workers and excluding millions of people altogether.

We can and must do better to ensure that all American workers can take the time they need, when they need it. The last twenty-five years and especially the last ten years have marked a period of unprecedented progress in expanding workplace leave rights. Thanks to the efforts of advocates, lawmakers, and coalitions around the country, we have seen a phenomenal period of growth in leave rights at the local and state level. This vital work has, perhaps for the first time, placed real, comprehensive federal leave rights in sight.

These advances have not come without their challenges. Over time, experts have refined their recommendations for model policy, building from the lessons of pioneers towards better, more thoughtful policies in subsequent jurisdictions. Even as understanding has grown, policymakers enacting these laws have had to make tough choices and necessary compromises to keep moving forward, preventing the perfect from becoming the enemy of the good.

It is in this context that we have reached the need for a stronger vocabulary—a time to refine what it is we talk about when we talk about “leave.” While we use a variety of shorthand in ordinary parlance, treating terms with different connotations and legal resonances as interchangeable, our formal policy vernacular is not much more refined. What we refer to as leave rights are actually a constellation of related but distinct rights, mixed and matched across different laws and policy. By disaggregating and cataloguing these rights, this Article aims to move us toward a better, more nuanced understanding of workplace leave, identifying its building blocks so that we can use them better. To do so, Part I denotes the different types of leave laws under study. Next, Part II identifies six distinct types of leave rights, including the types of laws that do and do not contain each leave right. In Part III, the Article argues for the use of this six-right framework to analyze existing laws and proposed policies.

I.

THE UNIVERSE: LEAVE LAWS

To explore the world of workplace leave rights, we must first understand the universe of our study. There are a few familiar main categories of leave laws in the United States, along with a few less commonly cited examples that deserve our attention. Because federal law in this area is so limited, this Article will look primarily at state and, occasionally, local leave laws. Specifically, we will explore the following types of laws: the federal Family and Medical Leave Act and state laws like it; paid family and medical leave laws; paid sick time laws; specific pregnancy and parenting leave laws; jury duty leave laws; voting leave laws; crime victim and witness leave laws; domestic violence leave laws; military family leave laws; and military service member leave laws.

The first group includes the best-known and best-studied American leave law: the federal Family and Medical Leave Act (FMLA).¹ The FMLA gives covered employees the right to unpaid, job-protected time away from work in a range of situations.² For the federal FMLA, these are employees' or family members' serious health needs, bonding with a new child, or addressing the impacts of a loved one's military deployment.³ Ten states have similar laws, known as state FMLAs, providing similar rights in many of the same circumstances and some new ones.⁴

1. 29 U.S.C. §§ 2601–2654 (2012).

2. Note that these laws often have fairly restrictive eligibility criteria. For example, the federal FMLA applies only to those whose employers have at least fifty employees, who have been employed by that employer for at least twelve months, and who have worked for that employer at least 1,250 hours in the last year. 29 U.S.C. § 2611(2) (2012). State FMLAs generally use similar types of criteria, but their specific requirements vary widely. *See, e.g.*, D.C. CODE § 32-501(1) (2019) (requiring one year of employment and at least 1,000 hours worked in the last year); *id.* § 32-516(2) (limiting rights to employees of employers with at least twenty employees); HAW. REV. STAT. ANN. § 398-1 (LexisNexis 2019) (requiring only six months of employment with no minimum number of hours worked, but limiting rights to employees of employers with at least one hundred employees). For all laws in this study, specific eligibility criteria may apply, though the factors vary widely depending on the type of law.

3. 29 U.S.C. § 2612(a)(1) (2012).

4. *See infra* Statutory Appendix, Table 1.B. In addition, Colorado has a state law narrowly expanding the FMLA by extending protections to those caring for a seriously ill domestic partner or civil union partner. *See* COLO. REV. STAT. ANN. § 8-13.3-202 (West 2019) (definitions); *id.* § 8-13.3-203 (length/purposes). Because the Colorado law largely extends substantive protections by cross-reference to the FMLA, it is not analyzed here.

The second category can be described as paid family and medical leave laws. These laws are different than state FMLAs, which are generally described as *unpaid* leave laws. The defining feature of paid family and medical leave laws is that they provide a right to pay (in the form of partial wage replacement) in certain situations while one is not working through a social insurance system.⁵ Eight states and the District of Columbia have comprehensive paid family and medical leave laws, each of which provide a right to pay in at least three situations: one's own serious health needs or disability, a family member's serious health needs, and bonding with a new child.⁶ We can also include in this category a Hawaii law that provides benefits only for one's own disability, but not caregiving or bonding.⁷ In all of these laws, employers, employees, or both regularly pay small amounts into an insurance system; for employees, these payments usually come in the form of payroll deductions. When employees need benefits, they apply to and receive payment from the insurance system, rather than being paid by their employer.⁸ Notably, as described in greater detail below, while all of these laws provide a right to a monetary benefit, only some of them provide other rights that we usually think of as leave rights—for example, not all of these laws provide a legal right to get your job back following leave.

Paid sick time laws make up the third group. These laws, the first of which was passed in San Francisco in 2006,⁹ provide the right to short periods of time away from work when workers or their families are sick, injured, or seeking medical treatment (including mental

5. For more on these laws, see Molly Weston Williamson, *Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance*, 17 CONN. PUB. INT. L.J. 1 (2017).

6. See *infra* Statutory Appendix, Table 2.

7. See HAW. REV. STAT. ANN. §§ 392-1 to -101 (LexisNexis 2019). Hawaii is one of five states that have historically required temporary disability insurance (TDI) coverage, wage replacement benefits for workers who are unable to work due to an off-the-job illness or injury. The other four states have since expanded their laws to provide benefits in additional situations and are counted in the prior list, while Hawaii has not yet done so. For further information on TDI laws and their relationship to paid family and medical leave, see generally Williamson, *supra* note 5.

8. Depending on the state, this insurance system may involve a single state-run fund, commercial insurance, employer self-insurance, or some combination of the three. See generally *id.* (surveying the history and structure of state paid family and medical leave laws).

9. S.F., CAL., ADMIN. CODE §§ 12W.1-.16 (2019); see also SHERRY LEIWANT, MOLLY WESTON WILLIAMSON & JULIE KASHEN, A BETTER BALANCE, CONSTRUCTING 21ST CENTURY RIGHTS FOR A CHANGING WORKFORCE: INCLUSIVE PAID SICK TIME AND THE NON-STANDARD WORKFORCE 5 (2019), <https://www.abetterbalance.org/resources/report-constructing-21st-century-rights-for-a-changing-workforce-a-policy-brief-series-brief-3/>.

health and preventive care). Today, there are over thirty such laws across the country, including both state and municipal laws.¹⁰ Time off is earned through an accrual model, typically at a rate of one hour of sick time for every thirty hours worked, up to a cap, most commonly forty hours per year (or approximately five eight-hour days).¹¹ This time generally must be paid, though some laws allow some small employers to provide the time unpaid.¹² Most of these laws also include “safe time,” meaning that the time off can be used for non-medical needs like seeking legal advice or relocating to safety when workers or their families are victims of domestic violence or sexual assault.¹³

The fourth category includes standalone laws in just under a dozen states providing specific leave rights in connection with pregnancy, childbirth, or becoming a parent.¹⁴ These laws generally provide only unpaid leave, like the FMLA and its state counterparts, but otherwise vary substantially from one another.

Next, while less commonly discussed, many states have targeted laws providing leave for specific purposes connected with the justice system or other important civic functions. Every state except Montana provides some type of specific workplace protection for those serving jury duty.¹⁵ Federal law also offers a similar protection to federal ju-

10. *See infra* Statutory Appendix, Table 3. Michigan technically also has a paid sick time law on the books, but it was passed as a tactical move by a hostile state legislature in reaction to a proposed ballot initiative and later essentially eviscerated substantively. *See, e.g.*, David Eggert, *Michigan Legislature OKs Gutting Wage, Paid Sick Time Laws*, AP NEWS (Dec. 4, 2018), <https://apnews.com/c0f3286e8edb4cce8185013978a84d76> [<https://perma.cc/2MGH-XAXF>]. For these reasons it is not included in this analysis. Austin, Texas and Pittsburgh, Pennsylvania have also passed their own laws, *see* PITTSBURGH, PA. CODE §§ 626.01–.13 (2015); AUSTIN, TEX. CODE §§ 4-19-1 to -8 (2018), but they are currently enjoined by the courts and therefore are not included in this analysis. This analysis also does not consider local laws that have been wholly preempted by state law, such as the thirteen New Jersey city paid sick time laws. *See New Jersey Local Paid Sick Time Laws (Now Preempted)*, BETTER BALANCE, <https://www.abetterbalance.org/resources/new-jersey-local-paid-sick-time-laws-now-preempted/> (last updated Nov. 5, 2018) [<https://perma.cc/W3ZS-9B3X>].

11. *See, e.g.*, CAL. LAB. CODE § 246(b) (Deering 2019); MASS. ANN. LAWS ch. 149, § 148C(d) (LexisNexis 2019).

12. *See* LEIWANT, WILLIAMSON & KASHEN, *supra* note 9, at 1.

13. For a comprehensive chart comparing state and local paid sick time laws on a number of factors, including the availability of safe time, see A BETTER BALANCE, OVERVIEW OF PAID SICK TIME LAWS IN THE UNITED STATES (2019), <https://www.abetterbalance.org/paid-sick-time-laws/?export> [<https://perma.cc/YN8Z-28RA>].

14. *See infra* Statutory Appendix, Table 1.B.

15. *See infra* Statutory Appendix, Table 4.B. Montana is the only state in the country with a general-purpose wrongful discharge statute, MONT. CODE ANN. §§ 39-2-

rors, which can be analyzed alongside its state counterparts.¹⁶ Twenty-seven states provide leave in connection with voting.¹⁷ Thirty-three states provide leave rights in connection with trials to some combination of crime victims, their families, and witnesses.¹⁸ Though these laws provide rights in a broader set of situations than just in connection with criminal trials, by extension, we might also include laws that provide specific leave rights to victims of domestic violence in this category.¹⁹ Domestic violence leave laws predate the more recent introduction of safe time protections as part of laws that provide a right to paid sick time, and are generally unpaid.²⁰

Finally, there are at least two distinct types of leave laws relating to military service that merit consideration. The first are laws providing a right to workplace leave for military spouses or, in some cases, other family members in connection with their loved one's deployment or service, which are on the books in a dozen states.²¹ While some more general leave laws also include protections for the deployment-related needs of military families,²² the military family leave laws are standalone statutes with their own distinctive features.

Separately, there are also laws providing leave rights to service members who must take time away from a civilian job for their service. At the federal level, this includes the Uniformed Services Employment and Reemployment Rights Act (USERRA).²³ Though

901 to -915 (West 2019), meaning that employees could still be protected against termination due to jury service even without a dedicated statute.

16. 28 U.S.C. § 1875 (2012); *see infra* Statutory Appendix, Table 4.A.

17. *See infra* Statutory Appendix, Table 5.

18. *See infra* Statutory Appendix, Table 6.

19. *See infra* Statutory Appendix, Table 7. In addition, Miami-Dade County, Florida has a domestic violence leave law on the books, *see* MIAMI-DADE CTY., FLA. CODE §§ 11A-60 to -67 (1999), but because it is likely preempted by state law it is not included in this analysis.

20. *See* Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 700 (2008). Widiss, writing in 2008 prior to the passage of nearly all paid sick time laws, argues that domestic violence leave laws were passed in response to gaps in the FMLA's protections (the FMLA was enacted in 1993). *Id.*

21. *See infra* Statutory Appendix, Table 8.

22. Leave for a "qualifying exigency" arising out of a family member's military service was added to the federal FMLA in 2008. *See* 29 U.S.C. § 2612(a)(1)(E) (2012). This purpose is also included in Connecticut's state FMLA, CONN. GEN. STAT. § 31-511l(a)(2)(F) (2019), and in paid family and medical leave laws in California, Connecticut, Massachusetts, New York, and Washington State. *See* CAL. UNEMP. INS. CODE § 3303(a)(3) (West 2019); MASS. GEN. LAWS ANN. ch. 175M, § 2(a)(1)(ii) (West 2019); N.Y. WORKERS' COMP. LAW § 201(15)(c) (Mckinney 2019); WASH. REV. CODE ANN. § 50A.04.010(9)(c) (West 2019); 2019 Conn. Legis. Serv. 19-25 § 3(c)(1) (West) (cross-referencing CONN. GEN. STAT. § 31-511l(a)(2)).

23. 38 U.S.C. §§ 4301-4335 (2012).

technically enacted around the same time as the FMLA, USERRA is the current version of a series of federal laws dating back to World War II providing those who serve in the military with the right to return to work following their service.²⁴ In addition to USERRA, nearly all states have adopted their own laws governing leave rights for those serving in the military, particularly for National Guard and militia members.²⁵ Many of these laws bootstrap on the suite of substantive rights offered by federal law by extending USERRA protections to state service (service based on orders from a state governor, rather than the president), with or without adding in additional protections.²⁶

Collectively, these laws give us a diverse and robust body of data to analyze in identifying and categorizing the rights to leave provided by American law today. Among them, they contain a variety of combinations of six distinct but related rights. Once this shared vocabulary and set of categories is built in Part II, Part III will demonstrate how the same analysis can be applied to other types of laws and to new bills under consideration, enabling us to better understand the rights that workers have, those they still need, and how far proposed laws will go in providing those rights.

II.

THE SIX LEAVE RIGHTS

By identifying the range of laws under discussion, we can better explain what we mean when we say these laws provide a “right to leave.” This project is made both harder and more interesting by the fact that most of these laws do not fit neatly into a single bucket—instead, many if not most provide multiple related rights. When we know what the rights in question are, we can both better understand

24. See 20 C.F.R. § 1002.2 (2018) (“USERRA is the latest in a series of laws protecting veterans’ employment and reemployment rights going back to the Selective Training and Service Act of 1940.”).

25. See *infra* Statutory Appendix, Table 9.

26. For laws that simply extend USERRA rights, see ALA. CODE § 31-12-2(a) (2019); DEL. CODE ANN. tit. 20, § 905(b) (West 2019); MD. CODE ANN., PUB. SAFETY § 13-704 (West 2019); NEB. REV. STAT. ANN. § 55-161(1) (West 2019); OHIO REV. CODE ANN. § 5903.02(b) (West 2019); S.D. CODIFIED LAWS § 33a-2-9 (2019); W. VA. CODE ANN. § 15-1F-8 (West 2019). For laws that extend USERRA rights and also provide additional specific rights, see ARIZ. REV. STAT. ANN. § 26-168(D) (2019); ARK. CODE ANN. § 12-62-413(a) (2019); IDAHO CODE § 46-409(2) (2019) (state active duty); 330 ILL. COMP. STAT. 61/5-5 (West 2019); N.H. REV. STAT. ANN. § 110-C:1(II) (2019); 30 R.I. GEN. LAWS ANN. § 30-11-3(a) (West 2019) (training); TEX. GOV’T CODE ANN. § 437.213 (West 2019); VT. STAT. ANN. tit. 21, § 492(b) (2019).

existing laws and better evaluate proposed policies to ensure that workers get the protections they need. This Part will argue that there are six distinct types of leave rights: (1) the generic right to leave, (2) the right to reinstatement, (3) the right to pay, (4) the right to continuation of health insurance, (5) the right against retaliation, and (6) the right against interference.

A. *The Right to “Leave”*

The first right is perhaps the most obvious and most fundamental: the generic right to “leave” or “time off.” We define this as the right to be absent from work under specified conditions. Though other rights come with more specific protections, this right is the jumping off point for all such rights. Perhaps surprisingly, it is not enumerated in all laws in our analysis.²⁷

Though conventional analysis generally does not distinguish this right separately, it is at least conceptually useful to think of this right separately for a few reasons. First, this right to be away from work is an intuitive part of providing a right to leave; a layperson could be surprised to learn that a “leave” law did not include it. While a law may in effect convey the same protections without explicit language, a robust framework for evaluating leave laws and bills at least requires asking the question of whether such a right is present. Second, as discussed in greater detail later in this Article, the question of whether the right to leave is among those rights protected against interference and retaliation can be salient from an enforcement perspective. Third, in analyzing the generic right to leave, the key question is whether the law provides for a particular duration of leave—a maximum number of hours, weeks, or potentially years. This is important in its own right, as it sets the parameters of employees’ ability to be away from work. It also sets the terms for other leave rights and, in many cases, can indicate which other rights are likely to be present or absent.

This generic right to leave is generally found in most of the more familiar or prominent types of leave laws. For example, the FMLA states that “an eligible employee shall be entitled to a total of 12 work-weeks of leave during any 12-month period” for any of the protected purposes.²⁸ It is this provision, complemented and reinforced by the accompanying employment protections, that gives workers the specific right to be away from the workplace. State FMLAs generally

27. See, e.g., ARIZ. REV. STAT. ANN. § 21-236 (2019) (jury duty); GA. CODE ANN. § 34-1-3 (2019) (crime victim or witness).

28. 29 U.S.C. § 2612(a)(1) (2012).

provide a similar right to a fixed duration of leave, sometimes varying by purpose, ranging from two to sixteen weeks.²⁹

Sick time laws typically embed this right in the very definition of the term “sick time” or “sick days.” Some do so more explicitly than others. For example, Oregon’s sick time law defines “sick time” (the right to unpaid time for employees of smaller employers) in relevant part as “time during which an employee is permitted to be absent from work for a reason authorized by [the sick time law].”³⁰ Other sick time laws, like California’s, are less explicit but convey a similar impression, defining “paid sick days” as “time that is compensated at the same wage as the employee normally earns during regular work hours and is provided by an employer to an employee for the purposes described in [the statute.]”³¹ All sick time laws use an accrual model where employees earn sick time in relation to how much they work, typically at a rate of one hour of sick time for every thirty hours worked.³² Most commonly, this time is capped at a maximum of forty hours per year (five eight-hour days), though some laws provide the right to more or less time.³³

An explicit right to leave is universal among voting leave laws.³⁴ Most voting leave laws provide a specific amount of leave, most com-

29. See CONN. GEN. STAT. § 31-511l(a)(1) (2019); D.C. CODE § 32-502(a) (2019) (family); *id.* § 32-503(a) (medical); ME. REV. STAT. ANN. tit. 26, § 844 (2019); N.J. STAT. ANN. § 34:11B-4 (West 2019); OR. REV. STAT. ANN. § 659A.162 (West 2018); 28 R.I. GEN. LAWS § 28-48-2(a) (2019); WASH. REV. CODE ANN. § 49.78.220(1) (West 2019). California frames the right as a prohibition on employers, stating that “it shall be an unlawful employment practice for any employer . . . to refuse to grant a request by any [qualifying] employee . . . to take up to a total of 12 workweeks in any 12-month period for family care and medical leave.” CAL. GOV’T CODE § 12945.2(a) (West 2019). Wisconsin, which provides among the shortest leaves, states that “no employee may take more than 8 weeks of family leave,” WIS. STAT. ANN. § 103.10(3)(a)(3) (West 2019), and “[n]o employee may take more than 2 weeks of medical leave,” *id.* § 103.10(4). Connecticut provides the longest leave at sixteen weeks. CONN. GEN. STAT. § 31-511l(a) (2019). Oregon generally provides the right to twelve weeks of leave, but in certain combinations of purposes workers may be able to take up to twenty-four weeks total. OR. REV. STAT. ANN. § 659A.162 (West 2018).

30. OR. REV. STAT. ANN. § 653.601(7) (West 2018). Note that the law separately defines “paid sick time,” which applies only to employers with ten or more employees. *Id.* § 653.601(6).

31. CAL. LAB. CODE § 245.5(e) (West 2019).

32. *E.g.*, MASS. ANN. LAWS ch. 149, § 148C(d) (LexisNexis 2019).

33. *E.g.*, CHI., ILL., CODE § 1-24-045(b)(4) (2019) (forty hours); *see also, e.g.*, BERKELEY, CAL., CODE § 13.100.040(A)(3) (2016) (up to seventy-two hours for larger businesses); CAL. LAB. CODE § 246(b) (Deering 2019) (twenty-four hours).

34. ALA. CODE § 17-1-5 (2019); ALASKA STAT. ANN. § 15.56.100(a) (West 2019); ARIZ. REV. STAT. ANN. § 16-402(A) (2019); CAL. ELEC. CODE § 14000(a) (West 2019); COLO. REV. STAT. ANN. § 1-7-102(1) (West 2019); GA. CODE ANN. § 21-2-404 (West 2019); 10 ILL. COMP. STAT. ANN. 5/17-15 (West 2019); IOWA CODE ANN.

monly two³⁵ or three³⁶ hours.³⁷ Similarly, all military family leave laws provide a right to leave.³⁸ The duration of leave is limited under most of these laws, ranging from just one day to up to thirty days.³⁹ Most domestic violence leave laws provide a right to leave.⁴⁰ Durations vary substantially, from three days up to twelve weeks, in some cases varying depending on employer size.⁴¹

§ 49.109 (West 2019); KAN. STAT. ANN. § 25-418 (West 2019); KY. REV. STAT. ANN. § 118.035(2) (West 2019); MD. CODE ANN., ELEC. LAW § 10-315(a) (West 2019); MINN. STAT. ANN. § 204C.04(1) (West 2019); MO. ANN. STAT. § 115.639(1) (West 2019); NEB. REV. STAT. ANN. § 32-922 (West 2019); NEV. REV. STAT. ANN. § 293.463(1) (West 2019); N.M. STAT. ANN. § 1-12-42(A) (West 2019); N.Y. ELEC. LAW § 3-110(1) (McKinney 2019); OKLA. STAT. ANN. tit. 26, § 7-101 (West 2019); S.D. CODIFIED LAWS § 12-3-5 (2019); TENN. CODE ANN. § 2-1-106(a) (2019); TEX. ELEC. CODE ANN. § 276.004(a) (West 2019); UTAH CODE ANN. § 20A-3-103(1)(a) (LexisNexis 2019); W. VA. CODE ANN. § 3-1-42 (LexisNexis 2019); WIS. STAT. ANN. § 6.76(1) (West 2019); WYO. STAT. ANN. § 22-2-111(a) (2019).

35. COLO. REV. STAT. ANN. § 1-7-102(1) (West 2019); GA. CODE ANN. § 21-2-404 (West 2019); 10 ILL. COMP. STAT. ANN. 5/17-15 (West 2019); KAN. STAT. ANN. § 25-418 (West 2019); MD. CODE ANN., ELEC. LAW § 10-315(a) (West 2019); NEB. REV. STAT. ANN. § 32-922 (West 2019); N.M. STAT. ANN. § 1-12-42(A) (West 2019); N.Y. ELEC. LAW § 3-110(1) (McKinney 2019); S.D. CODIFIED LAWS § 12-3-5 (2019); UTAH CODE ANN. § 20A-3-103(1)(a) (LexisNexis 2019).

36. ARIZ. REV. STAT. ANN. § 16-402(A) (2019); IOWA CODE ANN. § 49.109 (West 2019); MO. ANN. STAT. § 115.639(1) (West 2019); TENN. CODE ANN. § 2-1-106(a) (2019); W. VA. CODE ANN. § 3-1-42 (LexisNexis 2019); WIS. STAT. ANN. § 6.76(1) (West 2019). Nevada's duration depends on the distance between the policy place and the employer's location, but no more than three hours. NEV. REV. STAT. ANN. § 293.463(1) (West 2019).

37. Alabama and Wyoming provide just one hour of leave, ALA. CODE § 17-1-5 (2019); WYO. STAT. ANN. § 22-2-111(a) (2019), while Kentucky provides up to four, KY. REV. STAT. ANN. § 118.035(2) (West 2019). California does not specify how long leave can be, but only two hours are paid. CAL. ELEC. CODE § 14000(b) (West 2019). Oklahoma generally limits leave time to two hours, unless the distance to the polling place is more than two hours, in which case it provides simply for sufficient time. OKLA. STAT. ANN. tit. 26, § 7-101 (West 2019). Three states provide a right to leave in connection with voting but do not specify a length of leave. ALASKA STAT. ANN. § 15.56.100(a) (West 2019); MINN. STAT. ANN. § 204C.04(1) (West 2019); OHIO REV. CODE ANN. § 3599.06 (LexisNexis 2019).

38. *See, e.g.*, IND. CODE ANN. § 22-2-13-11(a) (West 2019); NEB. REV. STAT. ANN. § 55-503(1)-(2) (LexisNexis 2019).

39. *See, e.g.*, MINN. STAT. ANN. § 181.948(2) (West 2019) (one day); N.Y. LAB. LAW § 202-i(2) (McKinney 2019) (ten days); 30 R.I. GEN LAWS § 30-33-3(a)-(b) (2019) (fifteen days for smaller employers and thirty days for larger employers).

40. *See* COLO. REV. STAT. § 24-34-402.7(1)(a) (2019); FLA. STAT. ANN. § 741.313(2)(a) (LexisNexis 2019); HAW. REV. STAT. ANN. § 378-72(a) (LexisNexis 2019); 820 ILL. COMP. STAT. ANN. 180/20(a)(1) (LexisNexis 2019); KAN. STAT. ANN. § 44-1132(d) (West 2019); ME. REV. STAT. ANN. tit 26, § 850(1) (2019); N.M. STAT. ANN. § 50-4A-3 (LexisNexis 2019); WASH. REV. CODE ANN. § 49.76.030 (LexisNexis 2019); PHILA., PA., CODE § 9-3202(1) (2016).

41. *See, e.g.*, COLO. REV. STAT. § 24-34-402.7(1)(a) (2019) (three days); 820 ILL. COMP. STAT. ANN. 180/20(a)(2) (LexisNexis 2019) (four, eight, or twelve weeks depending on employer size); KAN. STAT. ANN. § 44-1132(d) (West 2019) (eight days);

The general right to leave is common in pregnancy and parenting leave laws. In some cases, it is the only explicit leave right these laws provide.⁴² Even where these laws also provide other rights, pregnancy leave laws state that covered employees have the right to leave or a leave of absence,⁴³ which often may be unpaid,⁴⁴ or that it is unlawful for an employer to deny a leave.⁴⁵ In Kansas, regulations require that “[c]hildbearing must be considered by the employer to be a justification for a leave of absence for female employees for a reasonable period of time.”⁴⁶ Most laws provide a specific maximum duration for leave, at most four months,⁴⁷ though a few do not.⁴⁸

The service member context has some distinctive features. USERRA does not affirmatively provide a right to leave, but provides that “a person who is absent from a position of employment by reason of service in the uniformed services shall be deemed to be on furlough or leave of absence while performing such service”⁴⁹ Laws in many states, in addition to those that extend USERRA to state service, follow a similar model.⁵⁰ Yet roughly the same number offer either a specific right to take service member leave or prohibit employers from refusing to allow leave.⁵¹ Only a handful provide a specific limit to the

PHILA., PA., CODE § 9-3202(2) (2016) (four or eight weeks depending on employer size).

42. See IOWA CODE ANN. § 216.6(2)(e) (West 2019); KY. REV. STAT. ANN. § 337.015 (LexisNexis 2019); LA. STAT. ANN. § 23:342(2) (2019).

43. See MD. CODE ANN., LAB. & EMPL. § 3-1202(a) (LexisNexis 2019); MASS. GEN. LAWS ANN. ch. 149, § 105D(b) (West 2019); WASH. ADMIN. CODE § 162-30-020(4)(a) (2019); see also TENN. CODE ANN. § 4-21-408(a) (West 2019) (“Employees . . . may be absent from such employment for a period not to exceed four (4) months for adoption, pregnancy, childbirth and nursing an infant, where applicable, referred to as “leave” in this section.”).

44. See *infra* text accompanying notes 159–162.

45. See MONT. CODE ANN. § 49-2-310(2) (West 2019) (“It is unlawful for an employer or an employer’s agent to . . . refuse to grant to the employee a reasonable leave of absence for the pregnancy.”); see also CAL. GOV’T CODE § 12945(a)(1) (West 2019).

46. KAN. ADMIN. REGS. § 21-32-6(d) (2019).

47. See, e.g., CAL. GOV’T CODE § 12945(a)(1) (four months); IOWA CODE ANN. § 216.6(2)(e) (West 2019) (eight weeks); MD. CODE ANN., LAB. & EMPL. § 3-1202 (LexisNexis 2019) (six weeks).

48. See KAN. ADMIN. REGS. § 21-32-6(d) (2019) (“reasonable period of time”); WASH. ADMIN. CODE § 162-30-020(4)(a) (2019) (“for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth”).

49. 38 U.S.C. § 4316(b)(1) (2012).

50. See, e.g., GA. CODE ANN. § 38-2-280(e) (2019); MISS. CODE ANN. § 33-1-19 (West 2019).

51. See, e.g., ALASKA STAT. § 26.05.075(a) (2018) (“An employer shall grant a leave of absence”); ARIZ. REV. STAT. ANN. § 26-168(A) (2019) (“An employer shall not refuse to allow members of the national guard of this state or any other state or the United States armed forces reserves to take leaves of absence from employment

amount of time that an employee can take leave or be deemed to be on a leave of absence, nearly all of them laws that only provide a right to leave for training rather than active duty service.⁵² However, unusually, some service member leave laws delineate the amount of time available by setting a limit on the right to reinstatement; these laws also provide *much* longer durations of protected time than any others.⁵³ USERRA typically limits the right to reinstatement to five years, though this period can be extended for those who were unable to leave military service or who were ill or injured as a result of military service.⁵⁴ State laws that extend USERRA rights presumably also follow this timeline unless otherwise specified.⁵⁵

Yet not all laws included in our universe provide a clear right to leave in this sense. Only about a dozen of the fifty state jury duty leave laws provide a right to be away from work, though these rights are framed in various different ways;⁵⁶ these laws virtually never

. . . .”); HAW. REV. STAT. ANN. § 121-43(a) (LexisNexis 2019) (“Every employee of a private employer who is a member of the national guard shall be entitled to absent oneself from the employee’s employment duties”).

52. See, e.g., CAL. MIL. & VET. CODE § 394.5 (West 2019) (seventeen days); GA. CODE ANN. § 38-2-280(b) (2019) (six months); IDAHO CODE ANN. § 46-224 (West 2019) (fifteen days).

53. Outside the military service member context, even laws that provide comparatively extended leaves, such as FMLA-type laws and pregnancy and parenting leave laws, provide leaves of less than a year, generally only a limited number of weeks or months. See *supra* text accompanying notes 28–29, 47–48. Other types of laws that denote fixed durations of leave, like paid sick time laws and voting leave laws, provide even shorter periods of time. See *supra* text accompanying notes 31–37.

54. See 38 U.S.C. § 4312(a)(2), (c), (e)(2) (2012).

55. Two state service member leave laws explicitly provide for time limits on reinstatement that mirror USERRA’s. See LA. STAT. ANN. § 29:410(C) (2018); MICH. COMP. LAWS ANN. § 32.273(4) (West 2019).

56. Some of these rights are fairly straightforward. See ALA. CODE § 12-16-8(A) (2019) (“excused from his or her employment.”); 705 ILL. COMP. STAT. ANN. 305/4.1(a) (West 2019) (“shall be given time off from employment”); LA. STAT. ANN. § 23:965(B)(1) (2019) (“granted a leave of absence by his employer”); OR. REV. STAT. ANN. § 10.090(2) (West 2018) (“take leave”); TENN. CODE ANN. § 22-4-106(a)(1) (West 2019) (“excuse the employee from employment”); WASH. REV. CODE ANN. § 2.36.165(1) (West 2019) (“leave of absence”); W. VA. CODE ANN. § 52-1-21 (West 2019) (“excused from employment”); WIS. STAT. ANN. § 756.255 (West 2019) (“leave of absence”). Others are more nuanced or complex. Nebraska, for example, specifically refers to an excuse from shift work. NEB. REV. STAT. ANN. § 25-1640 (LexisNexis 2019). Oklahoma states that “[i]t shall be the decision of the employee whether to use paid leave or take leave without pay for absence from employment for jury duty.” OKLA. STAT. ANN. tit. 38, § 34(C) (West 2019). South Dakota refers to an employee away from work under the law as being on a “temporary leave of absence” without providing an explicit right to such leave, S.D. CODIFIED LAWS § 16-13-41.2 (2019), while Wyoming refers to an employee who is reinstated under the law as having been on a leave of absence without a clear affirmative right to leave, WYO.

specify a particular maximum duration.⁵⁷ An additional five states restrict how many hours or at what time of day an employee can be required to work while on jury duty.⁵⁸ Thirteen state jury duty laws, some of which overlap with those that provide an explicit right to leave, specify that employees are not required to use their accrued leave (such as sick or vacation time) in connection with jury duty, implicitly conferring a right to leave without using up that accrued bank.⁵⁹ Yet only a few crime victim or witness leave laws provide a specific right to leave and none specify a particular duration.⁶⁰

B. *The Right to Reinstatement*

The next right is the right to leave's logical counterpart: the right to come back, also known as the right to reinstatement or the right to restoration. Put another way, this is the right to be given one's job (or, potentially, a job) back upon returning from work. This right is also commonly described as job protection.⁶¹ It is this right that a lay per-

STAT. ANN. § 1-11-401(C) (2019). The federal jury duty leave law does not contain an explicit right to leave. *See* 28 U.S.C. § 1875 (2012).

57. The one exception is Louisiana, where at least the specific right to a "leave of absence" appears to be limited to one day. LA. STAT. ANN. § 23:965(B)(1) (2019).

58. CONN. GEN. STAT. ANN. § 51-247a(b) (West 2019); MD. CODE ANN., CTS. & JUD. PROC. § 8-501 (West 2019); MICH. COMP. LAWS ANN. § 600.1348 (West 2019); NEV. REV. STAT. ANN. § 6.190(3) (LexisNexis 2019); VA. CODE ANN. § 18.2-465.1 (2019).

59. ALA. CODE § 12-16-8(A) (2019); ARK. CODE ANN. § 16-31-106(a)(2) (2019); IND. CODE ANN. § 33-28-5-24.3(b) (LexisNexis 2019); LA. STAT. ANN. § 23:965(B)(1) (2019); MD. CODE ANN., CTS. & JUD. PROC. § 8-502 (West 2019); MISS. CODE ANN. § 13-5-35(2) (2019); NEB. REV. STAT. ANN. § 25-1640 (LexisNexis 2019); NEV. REV. STAT. ANN. § 6.190(3) (LexisNexis 2019); OHIO REV. CODE ANN. § 2313.19(B) (LexisNexis 2019); OKLA. STAT. ANN. tit. 38, § 34(B) (West 2019); OR. REV. STAT. ANN. § 10.090(2) (West 2018); UTAH CODE ANN. § 78B-1-116(2) (LexisNexis 2019); VA. CODE ANN. § 18.2-465.1 (2019). Conversely, California provides an explicit right to use accrued time. CAL. LAB. CODE § 230(i). *See infra* text accompanying notes 126–127.

60. *See, e.g.*, OR. REV. STAT. ANN. § 659A.192(2) (West 2018) ("[A] covered employer shall allow an eligible employee to *take leave from employment* to attend a criminal proceeding." (emphasis added)); *see also* ARIZ. REV. STAT. ANN. § 13-4439(A) (2019) ("to leave work"); MINN. STAT. ANN. § 611A.036(1) (West 2019) ("reasonable time off from work"); N.H. REV. STAT. ANN. § 275:62(I) (LexisNexis 2019) ("to leave work"); 12 R.I. GEN. LAWS ANN. § 12-28-13(a) (West 2019) ("to leave work"); Widiss, *supra* note 20, at 702 ("Generally speaking, the crime victim laws do not specify a certain number of days of job-guaranteed leave that an individual has a 'right' to take off . . .").

61. *See, e.g.*, Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War . . . and the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46, 49 (2009) ("The 'job-protected' provision means that an employee is entitled to return to the same or equivalent position . . .").

son might initially think of as essential to leave, since without it, the right to leave looks much like a right to quit.⁶²

The right to reinstatement is common in some types of leave laws and rarer or non-existent in others. Often, though not always, this split corresponds to leave duration: the longer the provided leave, the likelier you are to see an affirmative right to reinstatement. This is most clearly illustrated by military service member leave laws, which can give employees the right to return to work after absences of multiple years, by far the longest of any leave law addressed in this Article.⁶³ After such a long time away, it makes sense that service members' civilian former employers would no longer think of them as employees. For this reason, reinstatement is *the* core right in most military service member leave laws. This is exemplified by USERRA: the first "r" in its name stands for "reemployment" and providing this right is the law's stated purpose.⁶⁴ Explicit reinstatement rights are also found in most state service member leave laws.⁶⁵

62. For the importance of this right more generally, see Amy Olsen, *Family Leave Legislation: Ensuring Both Job Security and Family Values*, 35 SANTA CLARA L. REV. 983, 1011 (1995) ("Without a guarantee of reinstatement to the same position an employee had when she took leave, objectives of family leave laws cannot be achieved."). Scholars have noted the especially critical role this right plays in the FMLA. See Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 369 (2003) ("Because qualifying employees receive no pay, this guarantee [of restoration] is the principal benefit afforded under the statute."); Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 362 (2003) ("[T]he entitlement to job restoration is a critical part of the [FMLA] legislative scheme.").

63. For example, USERRA provides for a right to reinstatement for up to five years as a baseline, which can be extended for an additional two years in certain cases of illness or injury. See 38 U.S.C. § 4312(a)(2), (c), (e)(2) (2012). This duration presumably also attaches to laws that extend USERRA rights to state services. Some state laws also use the USERRA time frame. See LA. STAT. ANN. § 29:410(C) (2018) (general uniformed services); MICH. COMP. LAWS ANN. § 32.273(4) (West 2019). At least one state provides a right to reinstatement following military service that appears to be indefinite. See COLO. REV. STAT. § 28-3-610.5(1) (2018) (providing reinstatement from state active service "regardless of the length of such absence").

64. 38 U.S.C. § 4301(a)(2) (2012) (stating the law's goal is "to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by *providing for the prompt reemployment of such persons upon their completion of such service*") (emphasis added).

65. See ALASKA STAT. § 26.05.075(b) (2018); ARIZ. REV. STAT. ANN. § 26-168(B) (2019); CAL. MIL. & VET. CODE § 395.06(a) (Deering 2019); COLO. REV. STAT. § 28-3-609 (2018) (training); *id.* § 28-3-610.5(1)(a) (state active service); FLA. STAT. ANN. § 250.482(2) (West 2019); HAW. REV. STAT. ANN. § 121-43(a) (LexisNexis 2019); IDAHO CODE ANN. § 46-224 (West 2019) (training); IOWA CODE ANN. § 29A.43(1) (West 2019); KAN. STAT. ANN. § 48-517(a) (West 2019) (state active duty); KY. REV. STAT. ANN. § 38.238 (West 2019); LA. STAT. ANN. § 29:38(A) (2018) (state active

The next longest leaves are generally delineated in weeks, including the paid and unpaid family and medical leave laws. The FMLA provides such a reemployment right,⁶⁶ as do its state counterparts.⁶⁷ On the paid family and medical leave side, the family leave components of paid family and medical leave laws in New York and Rhode Island⁶⁸ and the paid family and medical leave laws in Massachusetts and Oregon⁶⁹ provide affirmative rights to reinstatement; Washington State's paid family and medical leave law provides such a right to some but not all employees covered by the law, essentially those who would already be covered under the FMLA.⁷⁰ Connecticut offers an interesting case. When the state's paid leave law was passed, the same

duty); *id.* § 29:410(A) (general uniformed services); MICH. COMP. LAWS ANN. § 32.273(1) (West 2019); MISS. CODE ANN. § 33-1-19 (West 2019); MONT. CODE ANN. § 10-1-1007(1) (West 2019); N.J. STAT. ANN. § 38:23C-20(A)(3) (West 2019); N.M. STAT. ANN. § 28-15-1(A) (West 2019); N.Y. MIL. LAW § 317(1)(c) (McKinney 2019); N.C. GEN. STAT. § 127A-202(a) (2018); OR. REV. STAT. ANN. § 659A.086(3) (West 2018); 51 PA. STAT. AND CONS. STAT. ANN. § 7304 (West 2019); 30 R.I. GEN. LAWS ANN. § 30-11-3(b) (West 2019) (National Guard training); *id.* § 30-11-7 (Reserve training); S.C. CODE ANN. § 25-1-2320 (2019); TEX. GOV'T CODE ANN. § 437.204(a) (West 2019); UTAH CODE ANN. § 39-1-36(2) (LexisNexis 2019); VT. STAT. ANN. tit. 21, § 491(a) (2019); VA. CODE ANN. § 44-93.3 (2019); WASH. REV. CODE ANN. § 73.16.033 (LexisNexis 2019); WIS. STAT. ANN. § 321.64(1)(a) (West 2019) (federal active duty); *id.* § 321.65(4)(a) (active state service); WYO. STAT. ANN. § 19-11-111(a) (2019). In addition, several states provide a right to reinstatement by virtue of extending USERRA protections to state service, even if they do not otherwise do so explicitly. *See* ALA. CODE § 31-12-2(a) (2019); ARK. CODE ANN. § 12-62-413(a) (2019); DEL. CODE ANN. tit. 20, § 905(b) (2019); IDAHO CODE § 46-409(2) (2019) (state active duty); 330 ILL. COMP. STAT. 61/5-5 (West 2019); MD. CODE ANN., PUB. SAFETY § 13-704 (West 2019); NEB. REV. STAT. ANN. § 55-161(1) (West 2019); N.H. REV. STAT. ANN. § 110-C:1(II) (2019); OHIO REV. CODE ANN. § 5903.02(B) (West 2019); S.D. CODIFIED LAWS § 33a-2-9 (2019); W. VA. CODE ANN. § 15-1F-8 (West 2019).

66. 29 U.S.C. § 2614(a) (2012).

67. *See* CONN. GEN. STAT. ANN. § 31-51nn(a) (West 2019); D.C. CODE § 32-505(d) (2019); HAW. REV. STAT. ANN. § 398-7(a) (LexisNexis 2019); ME. REV. STAT. ANN. tit. 26, § 845(1) (2019); N.J. STAT. ANN. 34:11B-7 (West 2019); OR. REV. STAT. ANN. § 659A.171(1) (West 2018); 28 R.I. GEN. LAWS ANN. § 28-48-3(a) (West 2019); WASH. REV. CODE ANN. § 49.78.280(1) (West 2019); WIS. STAT. ANN. § 103.10(8) (West 2019). California's Family Rights Act effectively provides a right to reinstatement, but frames it as a requirement on employers to promise restoration: "Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave." CAL. GOV'T CODE § 12945.2(a) (West 2019).

68. N.Y. WORKERS' COMP. LAW § 203-b (McKinney 2019); 28 R.I. GEN. LAWS ANN. § 28-41-35(f) (West 2019). Note that these rights do not apply to workers that received temporary disability benefits for their own health needs under these laws.

69. MASS. GEN. LAWS ANN. ch. 175M, § 2(e) (West 2019); H.B. 2005, 80th Leg. Assemb., Reg. Sess. § 10(1) (Or. 2019).

70. WASH. REV. CODE ANN. § 50A.04.025 (West 2019).

bill amended the state's existing FMLA to significantly expand the number of workers entitled to reinstatement (and other protections) under the state's FMLA, but did not provide a new standalone protection.⁷¹

Other categories are more mixed. Some, but not all, pregnancy and parenting leave laws provide a right to reinstatement;⁷² pregnancy and parenting leave laws that specify duration tend to do so in weeks or months.⁷³ Domestic violence leave laws vary significantly in the length of the leave offers, but the right to reinstatement is found more commonly among those that provide for comparatively long leaves.⁷⁴ Jury duty leave laws often do not specify a particular length of leave, but cover a purpose for which the duration of need can vary widely; a minority of these laws provide for reinstatement specifically.⁷⁵ However, both the federal jury duty leave law and a few of its state counterparts include provisions referring to reinstatement that could be

71. See CONN. GEN. STAT. ANN. § 31-51nn(a) (West 2019) (providing a right to reinstatement under the Connecticut FMLA); 2019 Conn. Legis. Serv. 19-25 § 17 (West) (amending CONN. GEN. STAT. ANN. § 31-51kk and defining "employee" and "employer" under the Connecticut FMLA).

72. See, e.g., CAL. GOV'T CODE § 12945(a)(1) (West 2019); MD. CODE ANN., LAB. & EMPL. § 3-1204(a) (West 2019); MASS. GEN. LAWS ANN. ch. 149, § 105D(b) (West 2019); MONT. CODE ANN. § 49-2-311 (West 2019); TENN. CODE ANN. § 4-21-408 (West 2019); KAN. ADMIN. REGS. § 21-32-6(d) (2019); WASH. ADMIN. CODE § 162-30-020(4)(c) (2019).

73. See, e.g., CAL. GOV'T CODE § 12945 (West 2019) (four months); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 2019) (eight weeks).

74. See HAW. REV. STAT. ANN. § 378-72(h) (LexisNexis 2019) (up to thirty days leave); 820 ILL. COMP. STAT. ANN. 180/20(e)(1) (LexisNexis 2019) (up to twelve weeks leave); PHILA., PA., CODE § 9-3206(1) (2016) (up to eight weeks); WASH. REV. CODE ANN. § 49.76.050(2) (West 2019) (providing for "reasonable leave" without further specifying).

75. See ARIZ. REV. STAT. ANN. § 21-236(C) (2019); 705 ILL. COMP. STAT. ANN. 305/4.1(d) (West 2019); KAN. STAT. ANN. § 43-173(c) (West 2019); WYO. STAT. ANN. § 1-11-401(c) (2019). Jury duty leave laws in North Carolina, Tennessee and Washington provide for reinstatement as a remedy to a violation, but do not explicitly provide for it as an affirmative right. See N.C. GEN. STAT. ANN. § 9-32(b) (West 2018); TENN. CODE ANN. § 22-4-106(d)(2)(A) (West 2019); WASH. REV. CODE ANN. § 2.36.165 (West 2019). Texas's jury duty leave law provides a right written in language that looks like a remedy, but is titled a "right to reemployment," while also providing a separate reinstatement remedy. TEX. CIV. PRAC. & REM. CODE ANN. § 122.001(b) (West 2019) ("An employee who is discharged, threatened with discharge, intimidated, or coerced in violation of this section is entitled to return to the same employment that the employee held when summoned for jury service . . ."). Pennsylvania's jury duty leave law does not provide an explicit right to reinstatement, but a provision that allows an employee who does not qualify for protection under the law to request to be excused from jury duty also refers to the rights provided by the law as "reemployment." 42 PA. STAT. AND CONS. STAT. ANN. § 4563(e) (West 2019) ("Any individual not entitled to reemployment under subsection (a) shall, upon request to the court, be excused from jury service.").

read in multiple ways.⁷⁶ A little over half of military family leave laws, which vary substantially in length, include a specific right to reinstatement.⁷⁷

In contrast, laws that provide a right to days or hours of leave essentially never provide a right to reinstatement.⁷⁸ Consider that, outside of the leave context, it is common for an employee to be away from work for hours or days, simply because they are not scheduled for that time or the workplace may be closed. After all, employees do not generally work twenty-four hours a day, seven days a week. An employee who is absent for such a short period—a few hours or days—likely does not think of themselves as having left employment and therefore does not see themselves as *needing* to be reinstated; the default, in that case, is to still be in continuing employment. In other words, for shorter-term leaves, *loss* of employment is the exception, rather than rule, potentially implicating the right against retaliation discussed in greater detail below.

To this point, paid sick time laws provide leave rights in terms of hours, limited to forty hours (five eight-hour days) per year in most

76. The federal jury duty leave law refers to reinstatement only in terms of the rights of “[a]ny individual who is reinstated to a position of employment *in accordance with the provisions of this section . . .*” 28 U.S.C. § 1875(c) (2012) (emphasis added). This could be interpreted in one of two ways. In the first, narrower reading, this language could be read to mean only that reinstatement is an available *remedy* for a person whose other rights under the law (for example, someone fired in retaliation for jury service) are violated. If subsection (c) were read this way, the law would not provide an affirmative right to reinstatement, leaving workers only with the other protections available under the law. Alternatively, this language could be read to provide a broader right to reinstatement for workers who take jury duty leave. The subsection also goes on to state the terms under which such a person shall be restored, including that the person “shall be considered as having been on furlough or leave of absence *during his period of jury service . . .*” 28 U.S.C. § 1875(c) (2012) (emphasis added). The reference to the period of jury service, rather than period following an illegal retaliatory act, supports the second reading. The case law on the federal jury duty leave law is surprisingly sparse and has not specifically addressed this question. A few states use parallel language that raises the same questions, which is presumably modeled on the federal language. *See* 705 ILL. COMP. STAT. ANN. 305/4.1(d) (West 2019); KAN. STAT. ANN. § 43-173(c) (West 2019); WYO. STAT. ANN. § 1-11-401(c) (2019).

77. 820 ILL. COMP. STAT. ANN. 151/15(a) (West 2019); IND. CODE ANN. § 22-2-13-13(a) (West 2019); ME. REV. STAT. ANN. tit. 26, § 814(5) (2019); NEB. REV. STAT. ANN. § 55-504(1) (West 2019); OHIO REV. CODE ANN. § 5906.02(B) (West 2019); OR. REV. STAT. ANN. § 659A.093(1) (West 2018); 30 R.I. GEN. LAWS ANN. § 30-33-4(a) (West 2019); WASH. REV. CODE ANN. § 49.77.030(2)(a) (West 2019).

78. For example, as discussed in greater detail below, paid sick time laws and voting leave laws do not provide explicit rights to reinstatement.

cases; no paid sick time laws provide a right to reinstatement.⁷⁹ Voting leave laws provide even less time, just a few hours, and never include reinstatement rights.⁸⁰ While crime victim and witness leave laws generally do not specify duration, they also never contain a right to reinstatement.⁸¹

1. *What Qualifies as Reinstatement?*

In order to determine whether a right to reinstatement has been violated, one needs to know what qualifies as being reinstated. In some cases, this determination will be easy. If an employee is denied any and all employment with the employer following leave (or is explicitly terminated), that employee clearly was not reinstated. But in other cases, where an employee is given or offered *some* position, this question becomes more complex. There, we need some metric by which to judge whether the position offered is sufficient to meet the employer's obligation to reinstate the employee. Exploring the solutions existing policies have used to solve this problem helps flesh out the dimensions of the right to restoration.

At the core of this question is the task of setting a baseline against which a proposed position of employment should be judged. There are two main ways of looking at this question. The first is to compare the employee's post-leave position to the one the employee held pre-leave. In this framework, taking leave can be thought of as pressing pause on one's job at the time of taking leave, then restarting at the same place once one resumed working, just as one could with a video on one's streaming service of choice. In essence, this approach seeks to restore the pre-leave status quo—emphasizing the “re” in reinstatement. In this view, employees are treated as if they had not

79. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 23-373 to -374 (2019) (delineating employee rights to paid sick time); MASS. GEN. LAWS ANN. ch. 149, § 148C (LexisNexis 2019) (same).

80. *See, e.g.*, COLO. REV. STAT. ANN. § 1-7-102 (West 2019) (authorizing leave for up to two hours but not providing a right to reinstatement); IOWA CODE ANN. § 49.109 (West 2019) (authorizing leave for up to three hours but not providing a right to reinstatement).

81. *See, e.g.*, MINN. STAT. ANN. § 611A.036 (West 2019) (authorizing “reasonable time off from work” but not providing a right to reinstatement); N.H. REV. STAT. ANN. § 275:62 (LexisNexis 2019) (requiring that employers allow employees “to leave work” without a specific maximum duration but not providing a right to reinstatement). Note that many crime victim and witness leave laws are quite narrow, providing *only* a limited right against retaliation and no other explicit leave rights. *See, e.g.*, GA. CODE ANN. § 34-1-3 (2019); N.D. CENT. CODE ANN. § 27-09.1-17 (West 2019); WYO. STAT. ANN. § 1-40-209(a) (West 2019).

taken leave by acting as if no time has passed and the period of their leave never occurred. We can call this the “pause approach.”

The second is to compare the employee’s post-leave position to the position the employee *would* have been in had the employee continued to work during the leave. In this view, fair treatment of employees means not acting as if the period of leave had never occurred, but rather as if the employee had not taken leave during it—in other words, as if the clock had kept running. For this reason, we will call this the “running clock” approach.

The pause approach is used nearly universally. The FMLA offers an illustrative example of this approach, requiring as a baseline that returning employees “be restored by the employer to the position of employment held by the employee when the leave commenced.”⁸² Among laws that provide a right to reinstatement, provisions adopting the pause method by reference to the pre-leave position occur across state FMLAs,⁸³ state paid family and medical leave laws,⁸⁴ domestic violence leave laws,⁸⁵ jury duty leave laws,⁸⁶ and pregnancy and parenting leave laws.⁸⁷

82. 29 U.S.C. § 2614(a)(1)(a) (2012).

83. *See, e.g.*, HAW. REV. STAT. ANN. § 398-7(a) (LexisNexis 2019); ME. REV. STAT. ANN. tit. 26, § 845(1) (2019).

84. *See* MASS. GEN. LAWS ANN. ch. 175M, § 2(e) (West 2019); N.Y. WORKERS’ COMP. LAW § 203-b (McKinney 2019); 28 R.I. GEN. LAWS ANN. § 28-41-35(f) (West 2019); WASH. REV. CODE ANN. § 50A.04.025(1)(a) (West 2019).

85. *See, e.g.*, HAW. REV. STAT. ANN. § 378-72(h) (LexisNexis 2019) (“Upon return from leave under this section, the employee shall return to the employee’s original job or to a position of comparable status and pay . . .”); *see also* 820 ILL. COMP. STAT. ANN. 180/20(e)(1) (LexisNexis 2019) (“the position of employment held by the employee when the leave commenced”); PHILA., PA., CODE § 9-3206(1) (2016) (same); WASH. REV. CODE ANN. § 49.76.050(2) (West 2019) (same).

86. South Dakota does not mention any particular position, but states that the employee is “entitled to the same job status, pay, and seniority as he had prior to performing jury duty.” S.D. CODIFIED LAWS § 16-13-41.2 (2019). Three states and the federal jury duty leave law refer to restoring an employee to “his position of employment without loss of seniority,” which seems most logically to mean the position the employee already held (i.e., the pre-leave position) rather than the position the employee *would* have held had he not been on leave. 28 U.S.C. § 1875(c) (2012); 705 ILL. COMP. STAT. ANN. 305/4.1(d) (West 2019); KAN. STAT. ANN. § 43-173(c) (West 2019); WYO. STAT. ANN. § 1-11-401(c) (2019). Arizona’s provision, as noted below, is unusual in the alternative it provides but still sets the baseline as “the employee’s previous position . . .” ARIZ. REV. STAT. ANN. § 21-236(C) (2019).

87. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 149, § 105D(b) (West 2019) (“The employee shall be restored to the employee’s previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, *as of the date of the leave.*”) (emphasis added); MINN. STAT. ANN. § 181.942(1)(a) (West 2019) (“the employee’s former position”); KAN. ADMIN. REGS. § 21-32-6(d) (2019) (“her original job”). California’s law states simply that employees have the right to

In practice, it may not always be possible to place the employee in the exact position the employee held prior to leave; most obviously, the employer may have filled that position in the interim. Recognizing this reality, pause method reinstatement provisions generally allow for an employee to be, as the FMLA outlines, “restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.”⁸⁸ Other pause method laws generally follow suit in providing this alternate option for coverage.⁸⁹ Note that, under this method, employees generally do not have the right to continue to accrue seniority while on leave—their rising seniority is also paused.⁹⁰

In comparison, the running clock approach is rare and is used essentially exclusively in the context of military service. Most prominently, this approach is used in USERRA⁹¹ and many, though not all, state service member leave laws.⁹² In this approach, the baseline is, as

“return to work,” CAL. GOV’T CODE § 12945(a)(1) (West 2019), implying but not stating a return to the same work performed prior to leave.

88. 29 U.S.C. § 2614(a)(1)(b) (2012); 29 C.F.R. § 825.215 (2018) (“An equivalent position is one that is *virtually identical* to the employee’s former position in terms of pay, benefits and working conditions, including privileges, perquisites and status.”) (emphasis added).

89. Some of these laws use language very similar to the FMLA. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51nn(a)(2) (West 2019); 820 ILL. COMP. STAT. ANN. 180/20(e)(1) (LexisNexis 2019). Others use synonyms to achieve a similar result. N.Y. WORKERS’ COMP. LAW § 203-b (McKinney 2019) (“a comparable position with comparable employment benefits, pay and other terms and conditions of employment”); MASS. GEN. LAWS ANN. ch. 149, § 105D(b) (West 2019) (“a similar[] position with the same status, pay, length of service credit and seniority”). *But see* Olsen, *supra* note 62, at 1012 (arguing that the distinction between terms like “equivalent” and “comparable” may be salient).

90. *See, e.g.*, 29 U.S.C. § 2614(a)(3)(a) (2012).

91. *See* 38 U.S.C. § 4313(a) (2012).

92. *See* ALASKA STAT. § 26.05.075(b) (2019); FLA. STAT. ANN. § 250.482(2) (West 2019); HAW. REV. STAT. ANN. § 121-43(b)(2) (LexisNexis 2019); IDAHO CODE ANN. § 46-224 (West 2019) (training); KAN. STAT. ANN. § 48-517(c) (West 2019) (state active duty); KY. REV. STAT. ANN. § 38.238 (West 2019); LA. STAT. ANN. § 29:38(c) (2018) (state active duty); *id.* § 29:410(L) (general uniformed services); MICH. COMP. LAWS ANN. § 32.273(1) (West 2019); MONT. CODE ANN. § 10-1-1007(1) (West 2019); 51 PA. STAT. AND CONS. STAT. ANN. § 7305 (West 2019); UTAH CODE ANN. § 39-1-36(2) (LexisNexis 2019); VT. STAT. ANN. tit. 21, § 491(a) (2019); WIS. STAT. ANN. § 321.64(1)(a) (West 2019) (federal active duty); *id.* § 321.65(4)(a) (active state service); WYO. STAT. ANN. § 19-11-111(p) (2019). Any state service member leave law that extends USERRA rights should also be included in this list. In addition, Washington State’s statute, which takes a clear position textually, has been interpreted to require a running clock approach. *See* 1961-62 Wash. Att’y Gen. Op. No. 65, 1961 WL 62899 (Sept. 27, 1961) (concluding that a returning service member is entitled to seniority credits for period of military service); 1961-62 Wash. Att’y Gen. Op. No. 55, 1961 WL 62889 (Aug. 14, 1961) (concluding that a returning service member is entitled to salary step increases as if his employment had not been interrupted due to

USERRA phrases it, “the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform[.]”⁹³ This position is known as the “escalator position.”⁹⁴ State service member leave laws using this approach are sometimes less clear in their wording, but ultimately require that the employee must be restored to a position carrying the status and seniority the employee would have had if the employee continued to work during the absence.⁹⁵

We can compare the two approaches in a few different ways. One dimension is that of fairness. At a minimum, the pause approach imposes costs on taking leave as opposed to not taking leave and continuing to work. Taking leave means not earning seniority and other benefits the employee might have counted on, which can have lasting consequences. To a restored employee who misses out on a promotion that came open while the employee was on leave or who falls behind compared to peers because the employee did not accrue seniority while on leave, the running clock may seem more just.⁹⁶

military service). Many other military service member leave laws use the pause method. *See* ARIZ. REV. STAT. ANN. § 26-168(B) (2019); CAL. MIL. & VET. CODE § 395.06(a) (Deering 2019); IOWA CODE ANN. § 29A.43(1) (West 2019); MISS. CODE ANN. § 33-1-19 (West 2019); N.J. STAT. ANN. § 38:23C-20(a)(3) (West 2019); N.M. STAT. ANN. § 28-15-1(A) (West 2019); N.Y. MIL. LAW § 317(1)(c) (McKinney 2019); N.C. GEN. STAT. § 127A-202 (2018); 30 R.I. GEN. LAWS § 30-11-3(a) (West 2019) (National Guard training); *id.* § 30-11-7 (Reserve training); S.C. CODE ANN. § 25-1-2320 (2019); TEX. GOV'T CODE ANN. § 437.204(a) (West 2019); VA. CODE ANN. § 44-93.3 (2019).

93. 38 U.S.C. § 4313(a)(1)(A), (2)(A) (2012).

94. 20 C.F.R. § 1002.191 (2018).

95. *See, e.g.*, ALASKA STAT. § 26.05.075(b) (2019) (“[T]he employee is entitled to return . . . at the pay, seniority, and benefit level the employee would have had if the employee had not been absent as a result of that active service.”); FLA. STAT. ANN. § 250.482(2)(c) (West 2019) (entitling an employee to “[a]ny additional seniority that the member would have attained at his or her place of employment if he or she had remained continuously employed and the rights and benefits that inure to the member as a result of such seniority”); HAW. REV. STAT. ANN. § 121-43(b)(2) (LexisNexis 2019) (entitling an employee to “such status in the person’s employment as the person would have enjoyed if such person had continued in such employment continuously”); KY. REV. STAT. ANN. § 38.238 (West 2019) (“with the seniority, status, pay or any other rights or benefits he or she would have had if he or she had not been absent”). In some cases, state laws seem to see the employee’s prior position as the baseline but then specify that the employee shall be entitled to continued accrual of seniority during leave, i.e. the escalator position. *See, e.g.*, IDAHO CODE ANN. § 46-224 (West 2019) (“[An employee] shall be entitled to be restored to his *previous* or similar position with the same status, pay and seniority. Such seniority shall continue to accrue during such period of absence . . .”) (emphasis added).

96. *See* Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER

Yet the leave-taking employee is not the only person to consider. The decision to award a particular position or status to one person may mean fewer opportunities for another. Treating leave-takers as if they had worked through the leave means, in effect, treating people who actually worked different lengths of time the same and those who actually worked the same amount of time differently from one another. In other words, it is not self-evident to whom we ought to consider leave-takers “similarly situated.” Employers, likewise, may have strong feelings about practices that require crediting employees for time not actually worked, which often have concrete financial impacts.

The fairness dimension becomes even more complex when we introduce broader equity concerns, particularly around what society owes to different groups. The fact that the running clock has, thus far, been used essentially only on the grounds of military service reflects one answer: policymakers seem to have concluded that we owe those who serve a greater degree of protection than those who take leave for other reasons. USERRA was passed in an era of all-volunteer military service, with an eye towards preserving the civilian jobs of National Guard and Reserve service members, but its predecessor statutes like the Vietnam-era Veterans Reemployment Rights Act were designed when many serving were draftees, towards whom we might wish to offer even greater deference.⁹⁷ Other needs for leave implicate gender equity concerns: the use of the pause method imposes costs on the taking of leave for recovery from childbirth, caring for newborn and newly adopted children, and caring for seriously ill loved ones, all of which are in practice likely to weigh especially heavily on women.

Practical considerations must also weigh in. Under the pause approach, the baseline position is one that the employee in fact already held and therefore was presumably, at least at one point, qualified for and able to perform that job’s duties. The escalator position used in the running clock approach, in contrast, is by definition senior to the employee’s actual prior position and thus may well be more advanced than any position the employee has previously held. The employee might not actually be qualified or able to perform this position, particularly immediately upon their return. USERRA solves this problem by allowing an employee to be reinstated to the employee’s prior position

& L. 429, 455 (2007) (arguing denial of the right to accrue seniority while on leave “hurts those workers at all income levels who rely on seniority for pay increases”).

97. See 20 C.F.R. § 1002.2 (2018) (summarizing the history of past veterans’ employment statutes); see also Andrew P. Sparks, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act*, 61 HASTINGS L.J. 773, 776–778 (2010) (tracing history of veterans’ employment protections).

“only if the person is not qualified to perform the duties of [the escalator position] after reasonable efforts by the employer to qualify the person.”⁹⁸ In other words, USERRA, the archetypal running clock, makes the pause approach the fallback where the running clock is inappropriate or impractical, somewhat collapsing this distinction.

Leaving aside questions of qualification, the pause approach offers the advantage of certainty: we know what position the employee held prior to leave because the employee actually held it. Identifying the relevant position for a running clock approach, in contrast, involves constructing an ahistorical counterfactual, particularly as the length of leave gets longer. The USERRA regulations specify employees are entitled to “the job position that he or she would have attained *with reasonable certainty* if not for the absence due to uniformed service.”⁹⁹ Yet in practice determining what that position is will always involve some room for disagreement.

Neither the pause nor the running clock approach is universally better than the other; both come with meaningful tradeoffs. As a result, policymakers looking to enact new leave laws ought to consider both, rather than merely defaulting to the more familiar pause method, and determine what best suits the goals of proposed legislation.

2. *Variations on the Right to Reinstatement*

A handful of crime victim/witness leave laws and jury duty leave laws offer an intriguing variant on the right to reinstatement. These laws, to varying degrees of explicitness and protection, state that the employee shall be treated as if the employee were still working or in employment during the absence, but do so without reference to reinstatement in the relevant provision.¹⁰⁰

For example, Vermont’s witness leave law states that employees “shall be considered in the service of their employer . . . for purposes of determining seniority, fringe benefits, credit toward vacations, and other rights, privileges, and benefits of employment.”¹⁰¹ The practical result is similar to the USERRA running clock—employees end up

98. 38 U.S.C. § 4313(a)(1)(B), (2)(B) (2012).

99. 20 C.F.R. § 1002.191 (2018) (emphasis added).

100. See S.D. CODIFIED LAWS § 16-13-41.2 (2019); VT. STAT. ANN. tit. 21, § 499(a)–(b) (West 2019); WIS. STAT. ANN. § 756.255 (West 2019). Wisconsin’s law subsequently refers to reinstatement, but does so only in the context of remedies for a violation of the law. See WIS. STAT. ANN. § 756.255 (West 2019) (“An employer who discharges or disciplines an employee in violation of this section . . . may be required to make full restitution to the aggrieved employee, including reinstatement and back pay.”).

101. VT. STAT. ANN. tit. 21, § 499(b) (West 2019).

where they would have been if they had continued to work during the absence—though the conceptual framing is different. In this approach, employees do not need to be reinstated because they have, in effect, never left. Vermont’s jury duty leave law follows the same model.¹⁰²

Wisconsin’s jury duty leave law does the same, but only “[f]or the purpose of determining seniority or pay advancement.”¹⁰³ South Dakota’s jury duty leave law provides that the employee “shall retain and be entitled to the same job status, pay, and seniority as he had prior to performing jury duty” without specifying a right to be reinstated, though it does refer to a “temporary leave of absence.”¹⁰⁴

3. *Determining the Scope of the Right to Reinstatement*

In evaluating the right to reinstatement, we should also consider the scope of the protected right. Depending on the particular law at issue, this right may be broadly construed or may be narrowed by exceptions and limitations. As described below, laws that use a running clock are more likely to offer especially broad reinstatement rights, while some (though not all) pause approach laws have been written or interpreted more narrowly. However, this can likely be explained by the fact that the pause approach is simply much more common than the running clock approach, occurring across both more laws and more types of law. Moreover, it is unsurprising that policy-makers might wish to be especially protective of those whose absence was due to military service, which is essentially the only context in which the running clock is used.

In the military service member context, the right to reinstatement has been expanded to provide protections well beyond when an employee is reinstated. USERRA provides a safe harbor provision, which requires that for either 180 days or one year after the employee is reinstated, depending on length of service, that employee “shall not be discharged from such employment, except for cause.”¹⁰⁵ Many state military service member leave laws provide similar safe harbor rules.¹⁰⁶ The safe harbor provision supercharges the right to reinstatement, turning it into a reversal of the American presumption of at-will

102. *Id.* § 499(a).

103. WIS. STAT. ANN. § 756.255 (West 2019) (“For the purpose of determining seniority or pay advancement, the status of the employee shall be considered uninterrupted by the jury service.”).

104. S.D. CODIFIED LAWS § 16-13-41.2 (2019).

105. 38 U.S.C. § 4316(c) (2012); 20 C.F.R. § 1002.248 (2018) (“What constitutes cause for discharge under USERRA?”).

106. Most safe harbors are for one year. *See, e.g.*, FLA. STAT. ANN. § 250.482(2)(d) (West 2019); GA. CODE ANN. § 38-2-280(e) (2019); HAW. REV. STAT. ANN. § 121-

employment for a fairly lengthy period of time. While no non-military leave law has yet adopted a similar safe harbor rule,¹⁰⁷ it is an option available to policymakers who wish to provide maximally protective leave rights, perhaps for a shorter period of time.¹⁰⁸

More commonly, this right may be narrowed. For example, the FMLA includes an exception that allows employers to legally deny reinstatement to certain highly paid employees.¹⁰⁹ To qualify for the exception, the employer must meet rigorous procedural requirements¹¹⁰ and show that denying reinstatement “is necessary to prevent substantial and grievous economic injury to the operations of the employer.”¹¹¹ A few state FMLAs have very similar exceptions, which are known as “key employee” exceptions.¹¹² At least two other laws provide exceptions to the right to reinstatement for specific employees whose roles would be difficult to fill temporarily.¹¹³ Others more generally allow employers not to reinstate employees based on some concept of harm to or burden on the employer.¹¹⁴ Obviously, the more

43(b)(1) (LexisNexis 2019). Wisconsin follows the USERRA rule based on length of service. WIS. STAT. ANN. § 321.65(5)(c) (West 2019).

107. A USERRA-style safe harbor is different from, but shares similarities with, a rebuttable presumption of retaliation for adverse actions within a certain period of time from the use of a protected leave right. *See infra* text accompanying note 269.

108. Intriguingly, one author proposed amending the FMLA “to include a 180 day mandatory time period during which a returning mother’s position is guaranteed,” and based this proposal on California landlord/tenant law without reference to or apparent knowledge of USERRA’s seemingly more direct analogy. Victoria R. Riede, *Employer Discrimination on the Basis of Pregnancy: Righting the Power Imbalance*, 27 GOLDEN GATE U. L. REV. 223, 225, 247–49 (1997).

109. 29 U.S.C. § 2614(b)(2) (2012) (“An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.”).

110. *Id.* § 2614(b)(1)(B) (requiring notice to employee); 29 C.F.R. § 825.219 (2018) (elaborating on the procedural rights of employee potentially subject to this exception).

111. 29 U.S.C. § 2614(b)(1)(a) (2012); *see* 29 C.F.R. § 825.218 (2018) (defining “substantial and grievous economic injury”).

112. CAL. GOV’T CODE § 12945.2(2) (West 2019); D.C. CODE § 32-505(f)(1) (2019); WASH. REV. CODE ANN. § 49.78.280(2) (West 2019). New Jersey’s state FMLA includes a key employee exception to the right to leave, rather than to the right to reinstatement. *See* N.J. STAT. ANN. 34:11B-4(h) (West 2019).

113. The District of Columbia’s FMLA provides an exception to reinstatement for employees whose work is necessary to complete a contract, where the employer cannot temporarily replace the employee and would suffer “substantial economic injury” from failing to complete the contract. D.C. CODE § 32-505(f)(2) (2019). Tennessee’s pregnancy, parental, and nursing leave law exempts employers from having to restore employees whose positions are so unusual that they cannot be filled temporarily. TENN. CODE ANN. § 4-21-408(c)(2) (West 2019).

114. These exceptions are especially common among military service member and pregnancy and parenting leave laws. They are often phrased in terms of reinstatement

exceptions there are (and the broader those exception are), the more limited and less reliable the employee's right to reinstatement becomes.

We should be especially conscious of restrictions or qualifications on the right to reinstatement that introduce employer motivation into the analysis. This question often comes up where an employer claims that the employee would not have had a job at the time reinstatement is requested, without regard to whether the employee took leave. This is simplest where an employee would have been subject to a class-wide layoff during their leave, something that some laws provide as a specific exception to the right to reinstatement.¹¹⁵ Yet in other circumstances, leave laws have, either by their text or as interpreted, provided an exception to reinstatement (or a defense against a claim for failure to reinstate) where an employer's actions were motivated by or justified by reasons unrelated to the employee's exercise of leave rights.¹¹⁶

being impossible or unreasonable, *see, e.g.*, MONT. CODE ANN. § 49-2-311 (West 2019); WYO. STAT. ANN. § 19-11-111(d)(i) (2019), or imposing an undue hardship on the business, *see, e.g.*, FLA. STAT. ANN. § 250.482(2)(b)(2) (West 2019); *see also, e.g.*, MD. CODE ANN., LAB. & EMPL. § 3-1204(a) (West 2019) (providing an exception to the reinstatement right where doing so would cause the employer "substantial and grievous economic injury"); MONT. CODE ANN. § 10-1-1007(2)(e)(iv) (West 2019) ("[T]he employer's circumstances have changed so significantly that the member's continued employment with the employer cannot reasonably be expected.").

115. In the running clock approach, employees not only receive the benefit of positive changes that would have occurred in their employment had they continued working, but also incur the effects of negative changes like layoffs. *See* 20 C.F.R. § 1002.194 (2018). The effect can be similar in pause approaches, where employees who would have been subject to a layoff but for their leave are often not entitled to be reinstated. *See, e.g.*, HAW. REV. STAT. ANN. § 398-7(a) (LexisNexis 2019); N.J. STAT. ANN. § 34:11B-7 (West 2019); 20 C.F.R. § 1002.194 (2018); 29 C.F.R. § 825.126(a)(1) (2018).

116. Textual exceptions of this nature can be seen most explicitly in Maine's state FMLA and in several military family leave laws. *See* ME. REV. STAT. ANN. tit. 26, § 845(1) (2019) (right to reinstatement "does not apply if the employer proves that the employee was not restored as provided in this subsection because of conditions unrelated to the employee's exercise of rights under" the law); *see also, e.g.*, 820 ILL. COMP. STAT. ANN. 151/15(a) (West 2019) ("This Section does not apply if the employer proves that the employee was not restored as provided in this Section because of conditions unrelated to the employee's exercise of rights under this Act."); IND. CODE ANN. § 22-2-13-13(b) (West 2019) (same); NEB. REV. STAT. ANN. § 55-504(1) (West 2019) (same). On the interpretive side, the Seventh Circuit in *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1018 (7th Cir. 2000), held that an employee's obligation to establish the right to a benefit under the FMLA requires the employee to rebut employer evidence that the employee would have been discharged even without FMLA leave. However, *Rice* has been criticized by both courts and scholars. *See, e.g.*, *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963-64 (10th Cir. 2002) (explicitly rejecting *Rice* burden shifting); Malin, *supra* note 62, at 354-55; Arnow-Richman, *supra* note 62, at 371.

This line of analysis is dangerous because it conceptually conflates the affirmative right to reinstatement with the negative right not to be retaliated against.¹¹⁷ An employer's motivations are or should be irrelevant to the right to reinstatement—the right is violated when the employee is not reinstated, period. The right against retaliation, on the other hand, is entirely about the employer's intent—an employer's actions, no matter how objectively adverse, violate this right only where the employer takes them *because* of some protected action.

We can see an illustrative example of this problem in the FMLA context. While the FMLA provides a facially robust right to reinstatement, it also includes that the law does not entitle an employee to “any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.”¹¹⁸ This seemingly anodyne statement has been interpreted to qualify the right to reinstatement, particularly in light of interpreting regulations, by making relevant whether an employee would have lost his or her job without taking leave (i.e. for unrelated or non-retaliatory reasons). This interpretation has in effect brought the question of employer intent into actions to enforce the affirmative right to reinstatement,¹¹⁹ though courts are split on who bears the ultimate burden of proof once an employer raises such a claim.¹²⁰ At a minimum, this experience demonstrates that policymakers ought to act cautiously and thoughtfully, with an eye towards enforcement, in establishing the right to reinstatement as a separate but no less important protection than the right against retaliation.

117. The right against retaliation is discussed in greater detail in Section II.E, *infra*.

118. 29 U.S.C. § 2614(a)(3)(b) (2012).

119. See Amy Stutzke, *Reinstatement Claims Under the Family and Medical Leave Act of 1993: Leaving Behind the Inter-Circuit Chaos and Instating a Suitable Proof Structure*, 48 N.Y.L. SCH. L. REV. 577, 585–86 (2004) (“Yet situations where an employer interferes with an employee’s substantive right to reinstatement by denying it often do involve subtle questions of motive.”).

120. See *Sunrise Express, Inc.*, 209 F.3d at 1018 (holding that the employee’s obligation to establish the right to a benefit under the FMLA requires the employee to rebut employer evidence that employee would have been discharged even without FMLA leave); *Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d at 963–64 (explicitly rejecting *Rice* burden shifting); Arnow-Richman, *supra* note 62, at 369 (“[T]he right to reinstatement is qualified . . . The interpretative regulations explain that the employer may deny reinstatement to an employee on FMLA leave if that employee would have been terminated or her job eliminated had she continued working.”); Malin, *supra* note 62, at 354–55 (criticizing *Rice*).

C. *The Right to Pay*

The next type of leave right is the right to pay, otherwise known as wage replacement. A law that provides a right to pay provides a legally protected right to a monetary benefit—cash in your pocket or bank account while you are not working. The question of pay is one of the key fault lines among leave laws, so much so that the laws that do not provide a right to pay are often described specifically as unpaid leave laws.¹²¹ Generally speaking, laws that provide a right to pay do so explicitly, since silence or ambiguity may be read as providing only the right to unpaid leave.

In evaluating the right to pay, one should consider the role of accrued paid leave, such as vacation, sick time, or other paid time off. Some laws give employees an affirmative right to use their accrued paid time off while taking leave, including in situations where the employee might not otherwise be able to use that type of paid leave.¹²² For those who have accrued leave, this can, in effect, create a makeshift right to pay. From the employee's perspective, this is notably less beneficial than a standalone right to pay for two main reasons. First, it assists only those who have accrued leave available to begin with, leaving out those with very limited or no paid time off, particularly low-income workers.¹²³ Second, substituting accrued leave means that in order to be paid, employees must use up paid leave they may wish to save or use for another purpose. This can weigh especially hard on those in certain common leave circumstances: for example, a new parent who wants to save sick time for baby's checkups rather than using it for bonding leave. Nevertheless, affirmatively allowing workers to use their accrued paid leave does offer some protection, including re-

121. See, e.g., Marianne DelPo Kulow, *Legislating a Family-Friendly Workplace: Should It Be Done in the United States?*, 7 NW. J. L. & SOC. POL'Y 88, 115 n.34 (2012); Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL'Y 445, 460 (2012).

122. See 38 U.S.C. § 4316(d) (2012) (USERRA); CAL. LAB. CODE § 230(i) (West 2019) (jury duty leave); *id.* § 230.1(e) (domestic violence leave); CONN. GEN. STAT. ANN. § 31-511(c)(1) (West 2019) (state FMLA); FLA. STAT. ANN. § 250.482(2)(d) (West 2019) (military service member leave); HAW. REV. STAT. ANN. § 398-4(b) (LexisNexis 2019) (state FMLA); IND. CODE ANN. § 22-2-13-11(d) (West 2019) (military family leave); LA. STAT. ANN. § 29:406(B) (2019) (military service member leave); N.H. REV. STAT. ANN. § 275:62(IV) (2019) (crime victim leave); OR. REV. STAT. ANN. § 659A.174(2) (West 2018) (state FMLA); *id.* § 659A.093(4) (military family leave); VA. CODE ANN. § 44-93.2 (2019) (military service member leave); WASH. REV. CODE ANN. § 49.77.030(5) (West 2019) (military family leave); WIS. STAT. ANN. § 103.10(5)(b) (West 2019) (state FMLA).

123. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employee Benefits in the United States—March 2019, at 16 tbl.6 (Sept. 19, 2019), <https://www.bls.gov/news.release/pdf/eb2.pdf>.

moving restrictions that employers might otherwise place on the use of accrued paid time. In the absence of an explicit right to the contrary, employees' ability to use accrued leave may be subject to whatever restrictions their employer ordinarily imposes on the use of such leave.¹²⁴

The right to *choose* to use accrued paid leave is also notably different from allowing employers to *require* employees to use their accrued paid leave, a practice authorized by some leave laws.¹²⁵ This approach carries all of the drawbacks of allowing employees to use their paid leave, with the added negative feature of depriving them of the flexibility to decide how to use their accrued time or to save it for a later date.¹²⁶ For this reason, while some leave laws explicitly allow employers to require employees to use their accrued paid leave, others specifically state that employees cannot be required to do so.¹²⁷

Bearing this consideration in mind, we can categorize laws into those that provide a right to pay and those that do not. As the name indicates, paid family and medical leave laws all provide a right to pay.¹²⁸ All do so through a social insurance structure and replace only

124. This may be true even where statutory text is insufficiently specific. For example, the FMLA states that “[a]n eligible employee may elect . . . to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee” 29 U.S.C. § 2612(d)(2)(A) (2012). However, the regulations specify that “[a]n employee’s ability to substitute accrued paid leave is determined by the terms and conditions of the employer’s normal leave policy.” 29 C.F.R. § 825.207(a) (2018). Other than under the laws discussed in this Article, such as paid sick time laws, employees in the United States generally do not have a right to accrue paid leave. For example, employees in the United States have no statutory right to vacation time. *See* REBECCA RAY & JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, NO-VACATION NATION 1 (2007), <http://cepr.net/documents/publications/2007-05-no-vacation-nation.pdf>. This means that, unless the employee has a relevant contractual right (such as under a collective bargaining agreement), employers have broad discretion to impose conditions or restrictions on the use of accrued leave, since they were not legally obligated to provide such leave in the first place.

125. *See, e.g.*, 29 U.S.C. § 2612(d)(2) (2012) (federal FMLA); FLA. STAT. ANN. § 741.313(4)(b) (LexisNexis 2019) (domestic violence leave); OHIO REV. CODE ANN. § 5906.02(A)(5) (West 2019) (military family leave).

126. *See* Palazzari, *supra* note 96, at 454 (arguing that allowing employers to require use of accrued time off under the FMLA reduces the value of the benefit to workers who already have substantial accrued time).

127. *See, e.g.*, 38 U.S.C. § 4316(d) (2012) (USERRA); 330 ILL. COMP. STAT. ANN. 61/1-10 (West 2019) (military service member leave); IND. CODE ANN. § 33-28-5-24.3(b) (LexisNexis 2019) (jury duty leave); MD. CODE ANN., LAB & EMPL. § 3-803(c) (LexisNexis 2019) (military family leave); VA. CODE ANN. § 18.2-465.1 (2019) (crime witness leave).

128. *See* CAL. UNEMP. INS. CODE § 2655 (West 2019); D.C. CODE ANN. § 32-541.04 (West 2019); HAW. REV. STAT. ANN. § 392-22 (LexisNexis 2019); MASS. ANN. LAWS ch. 175M, § 3(b) (LexisNexis 2019); N.J. STAT. ANN. § 43:21-40 (West 2019); N.Y. WORKER’S COMP LAW § 204(2) (McKinney 2019); 28 R.I. GEN. LAWS ANN. § 28-41-

a percentage of workers' income, though in some cases this percentage is quite high, up to a cap.¹²⁹

Paid sick time laws also all provide a right to pay,¹³⁰ though a minority allow smaller employers to provide only unpaid leave.¹³¹ Interestingly, voting leave laws almost all provide some form of a right to pay, though conditions may apply.¹³² Outside of paid family and medical leave laws, leave laws that provide a right to pay nearly all do

5 (West 2019); WASH. REV. CODE ANN. § 50A.04.020(4) (West 2019); 2019 Conn. Legis. Serv. 19-25 § 3(c)(2) (West); H.B. 2005, 80th Leg. Assemb., Reg. Sess. § 7 (Or. 2019).

129. See sources cited *supra* note 128.

130. ARIZ. REV. STAT. § 23-371(D) (LexisNexis 2019); BERKELEY, CAL., CODE § 13.100.040(A)(6) (2016); CAL. LAB. CODE § 245.5(e) (West 2019); CHI., ILL., CODE § 1-24-010 (2019); CONN. GEN. STAT. ANN. § 31-57s(d) (West 2019); COOK COUNTY, ILL., CODE § 42-2 (2016); D.C. CODE § 32-531.02(a) (2019); EMERYVILLE, CAL., CODE § 5-37.03(b)(1) (2019); L.A., CAL., CODE § 187.04(A) (2016); MASS. GEN. LAWS ANN. ch. 149, § 148C(d)(4) (LexisNexis 2019); MD. CODE ANN., LAB. & EMPL. § 3-1304(a)(1)(i) (LexisNexis 2019); MINNEAPOLIS, MINN., CODE § 40.220(g) (2019); MONTGOMERY COUNTY, MD. CODE § 27-76(b) (2019); N.J. STAT. ANN. § 34:11D-2(c) (West 2019); N.Y.C., N.Y., ADMIN. CODE § 20-913(a)(1) (2017); OAKLAND, CAL., CODE § 5.92.030(B) (2019); OR. REV. STAT. ANN. § 653.606(1)(a) (West 2018); PHILA., PA., CODE § 9-4104(1)(a) (2016); 28 R.I. GEN. LAWS ANN. § 28-57-5(a) (West 2019); SAN ANTONIO, TEX., CODE § 15-272(a) (2018); SAN DIEGO, CAL., CODE § 39.0104 (2016); SAINT PAUL, MINN., CODE § 233.04(d) (2019); S.F., CAL., ADMIN. CODE § 12W.3(h)(4) (2019); SANTA MONICA, CAL., CODE § 4.62.025(d) (2016); SEATTLE, WASH., CODE § 14.16.025(A) (2019); TACOMA, WASH., CODE § 18.10.020(A) (2018); VT. STAT. ANN. tit. 21, § 482(d)(1) (2019); WASH. REV. CODE ANN. § 49.46.210(i) (LexisNexis 2019); Duluth, Minn., Ordinance 10,571 (May 30, 2018) (to be codified at DULUTH, MINN., LEGIS. CODE § 29E-4(d)).

131. See MD. CODE ANN., LAB. & EMPL. § 3-1304(a)(1)(ii) (LexisNexis 2019); MASS. GEN. LAWS ANN. ch. 149, § 148C(d)(6) (West 2019); MINNEAPOLIS, MINN., CODE § 40.220(h) (2019); N.Y.C., NY., ADMIN. CODE § 20-913(a)(2) (2017); OR. REV. STAT. ANN. § 653.606(1)(b) (West 2018); PHILA., PA., CODE § 9-4104(1)(b) (2016). Rhode Island in effect does the same, though through a somewhat different phrasing. See 28 R.I. GEN. LAWS ANN. § 28-57-4(c) (West 2019).

132. See ALASKA STAT. ANN. § 15.56.100(a) (West 2019); ARIZ. REV. STAT. ANN. § 16-402(A) (2019); CAL. ELEC. CODE § 14000(b) (West 2019); COLO. REV. STAT. ANN. § 1-7-102(1) (West 2019); 10 ILL. COMP. STAT. ANN. 5/17-15 (West 2019); IOWA CODE ANN. § 49.109 (West 2019); KAN. STAT. ANN. § 25-418 (West 2019); MD. CODE ANN., ELEC. LAW § 10-315(b) (West 2019); MINN. STAT. ANN. § 204C.04(1) (West 2019); MO. ANN. STAT. § 115.639(1) (West 2019); NEB. REV. STAT. ANN. § 32-922 (West 2019); NEV. REV. STAT. ANN. § 293.463(2) (West 2019); N.Y. ELEC. LAW § 3-110(1) (McKinney 2019); OKLA. STAT. ANN. tit. 26, § 7-101 (West 2019); S.D. CODIFIED LAWS § 12-3-5 (2019); TENN. CODE ANN. § 2-1-106(b) (2019); TEX. ELEC. CODE ANN. § 276.004(a)(2), (c) (West 2019); UTAH CODE ANN. § 20A-3-103(d) (LexisNexis 2019); W. VA. CODE ANN. § 3-1-42 (LexisNexis 2019); WYO. STAT. ANN. § 22-2-111(a) (2019). *But see, e.g.*, WIS. STAT. ANN. § 6.76(2) (West 2019) (explicitly allowing for unpaid leave).

so at full pay, rather than partial pay, and do so through direct requirements on employers rather than social insurance systems.¹³³

In contrast, the FMLA and its state counterparts explicitly do not require that leave be provided with pay.¹³⁴ For this reason, they are often described as providing a right to unpaid leave.¹³⁵ Under a few state FMLAs, employees have a specific affirmative right to use their accrued paid leave during this period under certain circumstances.¹³⁶ In contrast, the federal FMLA allows employers to *require* the use of various forms of accrued paid leave, while providing only a limited right for employees to *choose* to use accrued paid leave.¹³⁷

Jury duty leave laws vary widely. The federal jury duty leave law does not provide an explicit right to pay, but there is some ambiguity regarding how it should be interpreted.¹³⁸ At least seven states and the

133. See, e.g., COLO. REV. STAT. ANN. § 1-7-102(1) (West 2019) (“Eligible electors who are employed and paid by the hour shall receive their regular hourly wage for the period of their absence, not to exceed two hours.”); MD. CODE ANN., ELEC. LAW § 10-315(b) (West 2019) (“The employer shall pay the employee for the 2 hours absence from work.”); MD. CODE ANN., LAB. & EMPL. § 3-1304(a)(1)(i) (LexisNexis 2019) (“[A]n employer that employs 15 or more employees shall provide an employee with earned sick and safe leave that is paid at the same wage rate as the employee normally earns.”); N.J. STAT. ANN. § 34:11D-2(c) (West 2019) (“The employer shall pay the employee for earned sick leave at the same rate of pay with the same benefits as the employee normally earns, except that the pay rate shall not be less than the minimum wage . . .”).

134. See 29 U.S.C. § 2612(c) (2012); see also, e.g., CONN. GEN. STAT. ANN. § 31-511(d) (West 2019); 28 R.I. GEN. LAWS § 28-48-2(b) (2019).

135. Note that while these laws do not provide a legal *right* to pay, employers can and often do provide pay while on leave, either on their own or through an outside benefit like a short-term disability insurance policy. See, e.g., JACOB ALEX KLERMAN, KELLY DALEY & ALYSSA POZNIAK, ABT ASSOCS. INC., FAMILY & MEDICAL LEAVE IN 2012: TECHNICAL REPORT 92, <https://www.dol.gov/asp/evaluation/fmla/fmla-2012-technical-report.pdf> (last modified Apr. 18, 2014) [<https://perma.cc/FFR7-UY2D>].

136. See CONN. GEN. STAT. ANN. § 31-511(c)(1) (West 2019); HAW. REV. STAT. ANN. § 398-4(b) (West 2019); OR. REV. STAT. ANN. § 659A.174(2) (West 2018); WIS. STAT. ANN. § 103.10(5)(b) (West 2019).

137. 29 U.S.C. § 2612(d)(2) (2012); 29 C.F.R. § 825.207 (2018). California’s law both allows employees to elect to use accrued leave and allows employers to require use. CAL. GOV’T CODE § 12945.2(e) (West 2019).

138. There is almost no case law on this point, just a scattered handful of district court decisions that are each at least twenty-five years old. At least one district court has found that the statute does not create a right to pay, at least for hourly workers. See *Lucas v. Matlack, Inc.*, 851 F. Supp. 225, 228–29 (N.D.W. Va. 1993) (“[T]he Court does not conclude that the statute requires an employer to pay an employee full wages while that employee is away from work because of jury duty service.”). Two other courts ordered specific employers to pay jurors during their service, but did so based on finding that failure to pay was a prohibited form of coercion under the specific facts of those cases. *United States ex rel. Madonia v. Coral Springs P’ship, Ltd.*, 731 F. Supp. 1054, 1056 (S.D. Fla. 1990) (“What has been shown here is intimidation of the juror because she is unsure whether she will be paid. In fact, she has now been

District of Columbia provide some sort of right to pay through the employer, though generally subject to limitations in terms of duration, amount, and/or eligibility.¹³⁹ An additional three states may also provide a right to pay of some kind, though the law is less clear.¹⁴⁰ Only California provides an explicit right to use accrued paid leave for jury duty,¹⁴¹ while fourteen states specifically provide that employees cannot be required to use their accrued paid leave while on jury duty.¹⁴² On the other hand, seven states explicitly provide that leave can be

told she will not be paid after being told prior to jury selection she would be paid.”); *United States v. Adamita*, 701 F. Supp. 85, 87 (S.D.N.Y. 1988) (“[T]he Court concludes that to permit the employer to deviate from its previous policy [of providing pay] now, after the juror has been selected, would constitute an interference with the service of this juror and the conduct of this trial.”). A third district court required an employer to pay a particular employee in a very brief and fairly cursory decision. *See United States v. Cooper*, No. 89 CR 580, 1991 WL 38763, at *1 (N.D. Ill. Feb. 28, 1991). A few other cases, building on one another, have stated in passing dicta that the statute conveys an obligation to provide full pay, but without offering specific reasoning. *See Jones v. Marriott Corp.*, 609 F. Supp. 577, 579 (D.D.C. 1985) (“Marriott had a duty to ensure that plaintiff was aware that she could report for jury duty without fear of reprisal and with full pay.”); *see also Jeffreys v. My Friend’s Place, Inc.*, 719 F. Supp. 639, 645 (M.D. Tenn. 1989) (citing *Jones*, 609 F. Supp. at 579); *Rogers v. Comprehensive Rehab. Assocs., Inc.*, 808 F. Supp. 493, 498 (D.S.C. 1992) (first citing *Jeffreys*, 719 F. Supp. at 644–45; then citing *Jones*, 609 F. Supp. at 579). Despite this confusing set of cases, the federal courts website states that “[y]our employer may continue your salary during all or part of your jury service, but federal law does not require an employer to do so.” *Juror Pay*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-pay> (last visited July 21, 2019).

139. *See* ALA. CODE § 12-16-8(c) (2019); COLO. REV. STAT. ANN. § 13-71-126 (West 2019); CONN. GEN. STAT. ANN. § 51-247a(e) (West 2019); D.C. CODE ANN. § 15-718(c) (West 2019); MASS. ANN. LAWS ch. 234A, § 48 (LexisNexis 2019); NEB. REV. STAT. ANN. § 25-1640 (LexisNexis 2019); N.Y. JUD. LAW § 519 (Consol. 2019); TENN. CODE ANN. § 22-4-106(b) (West 2019).

140. Georgia’s statute does not provide for a right to pay, but a 1989 attorney general’s opinion suggests that it may be considered an unlawful penalty to not pay someone for time spent on jury duty. *See* 1989 Ga. Att’y Gen. Op. No. 129, 1989 Ga. AG LEXIS 78 (Nov. 13, 1989). Louisiana’s law provides that employees cannot lose wages during a “leave of absence” for jury service, but limits penalties to a single day. LA. STAT. ANN. § 23:965(B) (2019). Vermont’s law does not provide an explicit right to pay, but might be construed to provide one given that employees are still considered to be in service of their employers while on jury duty. VT. STAT. ANN. tit. 21, § 499(a) (West 2019).

141. CAL. LAB. CODE § 230(i) (West 2019).

142. ALA. CODE § 12-16-8(b) (2019); ARK. CODE ANN. § 16-31-106(a)(2) (2019); IND. CODE ANN. § 33-28-5-24.3(b) (LexisNexis 2019); LA. STAT. ANN. § 23:965(B)(1) (2019); MD. CODE ANN., CTS. & JUD. PROC. § 8-502 (West 2019); MISS. CODE ANN. § 13-5-35(2) (2019); MO. ANN. STAT. § 494.460(3) (West 2019); NEB. REV. STAT. ANN. § 25-1640 (LexisNexis 2019); NEV. REV. STAT. ANN. § 6.190(3) (LexisNexis 2019); OHIO REV. CODE ANN. § 2313.19(B) (LexisNexis 2019); OKLA. STAT. ANN. tit. 38, § 34(B) (West 2019); OR. REV. STAT. ANN. § 10.090(2) (West 2018); UTAH CODE ANN. § 78B-1-116(2) (LexisNexis 2019); VA. CODE ANN. § 18.2-465.1 (2019).

unpaid, though one (Oklahoma) excepts employees who choose to use accrued paid leave and another (Rhode Island) excepts those with a contrary contract or collective bargaining agreement.¹⁴³ The remaining laws are silent on this question. Among laws that are either silent on pay or speak only to the question of accrued leave, at least five have been formally interpreted as not providing a right to pay through case law¹⁴⁴ or attorney general opinions,¹⁴⁵ while several others have been construed as not providing a right to pay in less authoritative sources, such as court website FAQs.¹⁴⁶ In at least one state, the jury

143. See ALASKA STAT. § 09.20.037 (2018); ARIZ. REV. STAT. ANN. § 21-236(B) (2019); 705 ILL. COMP. STAT. ANN. 305/4.1(g) (West 2019); OKLA. STAT. ANN. tit. 38, § 34(C) (West 2019); 42 PA. STAT. AND CONS. STAT. ANN. § 4563(a) (West 2019); 9 R.I. GEN. LAWS § 9-9-28 (2019); S.D. CODIFIED LAWS § 16-13-41.2 (2019).

144. In Arkansas, the original proposed language explicitly included loss of pay as a prohibited penalty for serving on a jury, but the language was deleted. The Arkansas Supreme Court held that the deletion of this language meant that an employee was *not* entitled to pay. *Frolic Footwear, Inc. v. State*, 683 S.W.2d 611, 612 (Ark. 1985). A Florida appellate court held that an employer's failure to pay an employee while the employee was serving on a jury was not a basis for a contempt holding. *Patierno v. State*, 391 So. 2d 391, 392 (Fla. Dist. Ct. App. 1980). The opinion noted that the lower court "recognized that there was no statutory requirement in Florida that an employer continue an employee's salary during jury service," though it reversed the lower court's decision finding contempt notwithstanding that recognition. *Id.* Ultimately, the appellate court stated, presumably reflecting the conclusion that the statute did not confer a right to pay from employers, that "[a] juror's right to compensation . . . is purely statutory and a matter of legislative and not judicial prerogative." *Id.* at 393 (internal citations omitted).

145. A Virginia attorney general's opinion explicitly concluded that the jury duty leave law "does not require an employer to pay an employee, whether salaried or nonsalaried, for those days missed because the employee was summoned to court as a witness or as a juror." 1989 Va. Att'y Gen. Op. No. 160 (Jan. 5, 1989). This decision relied in part on a prior attorney general's opinion, which highlighted the removal from the statute of previously used language specifically referring to being deprived of pay. *Id.* (citing 1981-1982 Att'y Gen. Ann. Rep. 136). An Oregon attorney general's opinion recognized that, unless required to do so by an existing employer policy, "the statute does not require an employer to pay an employee's [sic] wages during jury service." Or. Att'y Gen. Op. No. OP-6164, 1987 WL 278283 (Dec. 18, 1987). A North Dakota attorney general's opinion found that a failure to pay an employee for the period of absence due to jury duty was not a prohibited penalty under the law. See N.D. Att'y Gen. Op. No. 92-02 (Jan. 10, 1992). However, as discussed above, a Georgia attorney general's opinion construed a statute that did not explicitly require pay to at least potentially require pay (in order to avoid creating a prohibited penalty). See 1989 Ga. Att'y Gen. Op. No. 129, 1989 Ga. AG LEXIS 78.

146. See, e.g., *Jury Service Frequently Asked Questions*, HAW. ST. JUDICIARY, https://www.courts.state.hi.us/general_information/jury/jury_service_faqs#Q30 (last visited Aug. 5, 2019) ("There is no Hawai'i law that requires employers to pay employees while serving jury duty."); *Jury Service*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/iowa-courts/jury-service#EmployerPayMeToServe> (last visited Aug. 5, 2019) ("[T]here is no Iowa law that requires employers to pay employees while serving jury duty."); see also N.C. JUDICIAL BRANCH, THE EMPLOYER'S GUIDE TO JURY SERVICE 5, <https://www.nccourts.gov/assets/documents/publications/EmployersGuidetoJury>

summons itself states that employers are not required to pay for time spent on jury duty, despite the statute not speaking explicitly on the question.¹⁴⁷ However, note that many states have some system for providing compensation to jurors, albeit often very limited amounts, out of state resources.¹⁴⁸

Among crime victim and witness leave laws, only Wisconsin's provides a general explicit right to pay.¹⁴⁹ At least seven states explicitly state that this time does not need to be paid.¹⁵⁰ Oregon allows employees to elect to use accrued paid leave,¹⁵¹ while New Hampshire allows employees to elect or employers to require employees to use any accrued paid leave.¹⁵² Virginia explicitly states that employees are not required to use their accrued sick or vacation time.¹⁵³ The remaining crime victim and witness leave laws do not explicitly speak to the question of pay,¹⁵⁴ likely meaning that employers may provide the time unpaid, particularly in light of how silence has been interpreted under other types of leave laws.¹⁵⁵

Service.pdf?Qvcv1kngAjH6WpalldOnNKxEpgXLQEdi (last visited Oct. 12, 2019) ("State law does not require private employers to pay employees for absences caused by jury service.").

147. NMRA, FORM 4-602A. JUROR SUMMONS, N.M. R CIV Form 4-602A ("Employers are not required by law to pay employees for time spent in jury service.").

148. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4514 (2019); HAW. REV. STAT. ANN. § 612-8 (LexisNexis 2019). In some cases, access to these schemes may exclude those who are compensated by their employers. *See, e.g.*, FLA. STAT. ANN. § 40.24(3)(a) (West 2019).

149. *See* WIS. STAT. ANN. § 103.87 (West 2019) ("[T]he employer shall not decrease or withhold the employee's pay for any time lost resulting from compliance with the subpoena.").

150. *See* ALASKA STAT. § 12.61.107(d) (2018); ARIZ. REV. STAT. ANN. § 13-4439(C) (2019); N.H. REV. STAT. ANN. § 275:62(III) (LexisNexis 2019); N.Y. PENAL LAW § 215.14(1) (Consol. 2019); OR. REV. STAT. ANN. § 659A.198(1) (West 2018); 18 PA. STAT. AND CONS. STAT. ANN. § 4957(a) (West 2019); 12 R.I. GEN. LAWS § 12-28-13(c) (2019). In addition, Iowa's statute states that employers shall not "take action to reduce an employee's wages or benefits *for actual time worked*," implying that reductions for time not worked (i.e. while absent from work) would not necessarily be considered a prohibited form of retaliation. IOWA CODE ANN. § 915.23(1) (West 2019).

151. OR. REV. STAT. ANN. § 659A.198(2) (West 2018). Note that Oregon otherwise explicitly provides that leave does not need to be paid. *Id.* § 659A.198(1).

152. N.H. REV. STAT. ANN. § 275:62(IV) (LexisNexis 2019).

153. VA. CODE ANN. § 18.2-465.1 (2019).

154. *See, e.g.*, ALA. CODE § 15-23-81 (2019); COLO. REV. STAT. ANN. § 24-4.1-303(8) (West 2019); DEL. CODE ANN. tit. 11, § 9409 (West 2019); MASS. GEN. LAWS. ch. 258B, § 3(1) (West 2019).

155. *See* N.D. Att'y Gen. Op. 92-02 (Jan. 10, 1992) (concluding that refusal to provide pay for the period of absence under a law covering both witness and jurors was not a prohibited penalty); *see also supra* notes 144–147 and accompanying text.

Domestic violence victim leave laws almost all explicitly state that leave time can be unpaid.¹⁵⁶ California and Philadelphia provide employees with the right to use accrued paid leave if they choose,¹⁵⁷ while Colorado, Florida, and Hawaii require employees to use up their accrued paid leave either prior to or while taking leave under the law.¹⁵⁸

No pregnancy or parental bonding leave law provides a standalone right to pay. Four states provide a right to use at least some kinds of accrued paid leave.¹⁵⁹ Five states require that leaves under the law be treated the same as those employers treat other temporary disabilities, meaning that employees are entitled to be paid for pregnancy or bonding leaves under these laws only if their specific employer provides pay for other temporary disabilities (upon which employer practices vary widely), though the laws vary in level of specificity.¹⁶⁰ Four explicitly provide that leave can be without pay.¹⁶¹ Kentucky's adoption leave law, which is very brief, says nothing specific regarding pay;¹⁶² presumably, this law allows leave to be unpaid.

156. COLO. REV. STAT. § 24-34-402.7(1)(a) (2019); FLA. STAT. ANN. § 741.313(2)(a) (West 2019); HAW. REV. STAT. ANN. § 378-72(h) (LexisNexis 2019); 820 ILL. COMP. STAT. ANN. 180/20(a)(1) (LexisNexis 2019); KAN. STAT. ANN. § 44-1132(d) (West 2019); ME. REV. STAT. ANN. tit 26, § 850(1) (2019); N.M. STAT. ANN. § 50-4A-2(B) (LexisNexis 2019); PHILA., PA., CODE § 9-3202(1) (2016); WASH. REV. CODE ANN. § 49.76.030 (LexisNexis 2019).

157. CAL. LAB. CODE §§ 230(i), 230.1(e) (West 2019); PHILA., PA., CODE § 9-3208 (2016).

158. COLO. REV. STAT. § 24-34-402.7(2)(b) (2019); FLA. STAT. ANN. § 741.313(4)(b) (West 2019); HAW. REV. STAT. ANN. § 378-73 (LexisNexis 2019).

159. Maryland gives employees the right to use any type of accrued paid leave, though it also allows employers to require the use of accrued paid leave. MD. CODE ANN., LAB. & EMPL. § 3-1202(c) (LexisNexis 2019). California and Louisiana limit this right to only vacation leave, CAL. GOV'T CODE § 12945(a)(1) (Deering 2019); LA. STAT. ANN. § 23:342(2)(b) (2019), while Minnesota limits it to vacation or "other appropriate" types of paid leave, MINN. STAT. ANN. § 181.9412(3) (LexisNexis 2019).

160. Three states specifically require that leaves under the law be treated the same as other temporary disability leaves with regards to pay. IOWA CODE ANN. § 216.6(2)(c) (West 2019); KAN. ADMIN. REGS. § 21-32-6(b) (2019); WASH. ADMIN. CODE § 162-30-020 (2019). Montana's law states that a pregnant worker cannot be denied compensation owed under a temporary disability or leave policy. MONT. CODE ANN. § 49-2-310(3) (West 2019). Louisiana requires pregnancy leaves under the law to be treated the same as other temporary disabilities in terms of "benefits and or privileges of employment" but does not specifically mention pay. LA. STAT. ANN. § 23:342 (2019).

161. MD. CODE ANN., LAB. & EMPL. § 3-1202(a) (LexisNexis 2019); MASS. GEN. LAWS ANN. 149 § 105D(b) (West 2019); MINN. STAT. ANN. § 181.9412(3) (West 2019); TENN. CODE ANN. § 4-21-408(c)(1) (West 2019).

162. KY. REV. STAT. ANN. § 337.015 (LexisNexis 2019).

All but one of the military family leave laws explicitly state that leave can be unpaid.¹⁶³ Three states give employees the right to use their accrued paid leave during this period if they choose.¹⁶⁴ Five states allow employers to require employees to exhaust paid leave prior to or during the covered period,¹⁶⁵ while Maryland explicitly prohibits employers from requiring employees to use their accrued leave.¹⁶⁶

Laws covering military service members offer an interesting case, since by definition the leave is taken to engage in other (paid) employment. USERRA states that employees have the right to use their accrued paid leave and cannot be required to use it, but does not otherwise speak to pay.¹⁶⁷ No state service member leave law provides an affirmative right to pay. Several state laws, particularly those that deal with leave for training, explicitly provide that leave is or can be unpaid.¹⁶⁸ Intriguingly, a few state leave laws authorize or give employers permission to provide pay if they wish to, either in full or to make up the difference between a service member's service pay and

163. See CAL. MIL. & VET. CODE § 395.10(a) (West 2019); 820 ILL. COMP. STAT. ANN. 151/10(a) (West 2019); IND. CODE ANN. § 22-2-13-11(a) (West 2019); ME. REV. STAT. ANN. tit. 26, § 814(2) (2019); MINN. STAT. ANN. § 181.947(2) (West 2019) (service member's injury or death); *id.* § 181.948(2) (send-off ceremony); NEB. REV. STAT. ANN. § 55-503(1)-(2) (LexisNexis 2019); N.Y. LAB. LAW § 202-i(2) (McKinney 2019); OHIO REV. CODE ANN. § 5906.02(B) (West 2019); OR. REV. STAT. ANN. § 659A.093(1) (West 2018); 30 R.I. GEN. LAWS § 30-33-3(a) (2019); WASH. REV. CODE ANN. § 49.77.030(1) (West 2019).

164. IND. CODE ANN. § 22-2-13-11(d) (West 2019); OR. REV. STAT. ANN. § 659A.093(4) (West 2018); WASH. REV. CODE ANN. § 49.77.030(5) (West 2019).

165. Three states require employees to exhaust accrued leave other than sick time or disability. 820 ILL. COMP. STAT. ANN. 151/10(d) (West 2019); OHIO REV. CODE ANN. § 5906.02(A)(5) (West 2019); 30 R.I. GEN. LAWS § 30-33-3(d) (2019). Minnesota allows the period of military family leave to be reduced by any period of paid leave, MINN. STAT. ANN. § 181.947(2) (West 2019), while Indiana allows the employer to require use of accrued leave during the covered period, IND. CODE ANN. § 22-2-13-11(d) (West 2019).

166. MD. CODE ANN., LAB & EMPL. § 3-803(c) (LexisNexis 2019).

167. 38 U.S.C. § 4316(d) (2012). Employees who choose to use accrued paid leave in these situations would presumably receive that pay in addition to their military compensation.

168. See COLO. REV. STAT. § 28-3-609 (2019) (training); IDAHO CODE ANN. § 46-224 (West 2019) (training); KY. REV. STAT. ANN. § 38.238 (West 2019); MISS. CODE ANN. § 33-1-19 (West 2019); N.C. GEN. STAT. ANN. § 127A-202.1(d) (West 2018); OR. REV. STAT. ANN. § 659A.086(4) (West 2018); 30 R.I. GEN. LAWS ANN. § 30-11-3(a) (West 2019) (National Guard training); *id.* § 30-11-7 (Reserve training); VT. STAT. ANN. tit. 21, § 491(a) (2019); VA. CODE ANN. § 44-93.2 (2019); WIS. STAT. ANN. § 321.64(2) (West 2019) (federal active duty).

civilian income.¹⁶⁹ Only three laws provide an explicit right to use accrued paid leave,¹⁷⁰ while five other laws state that employees cannot be required to use their accrued paid leave.¹⁷¹ At least one additional law has been interpreted to prohibit requiring use of accrued paid leave.¹⁷²

D. *The Right to Continuation of Health Insurance*

The next right is the right to continuation of health insurance. For better or worse, in the United States the provision of health insurance is still closely tied to employment.¹⁷³ If you stop working for the employer who provides your health insurance, even temporarily, you risk losing your coverage. Yet many of the circumstances requiring workers to take leave are exactly the times where they need health coverage the most, such as dealing with their own or a family member's illness or welcoming a new child. For these reasons, the right to continuation of employer-provided health insurance is an important tool for ensuring workers can take the leave they need.

169. LA. STAT. ANN. § 29:405(A)(1) (2019) (general uniformed services); OKLA. STAT. ANN. tit. 72, § 48.1 (West 2019) (difference between military and civilian pay only); WYO. STAT. ANN. § 19-11-106(a) (West 2019).

170. FLA. STAT. ANN. § 250.482(2)(d) (West 2019); LA. STAT. ANN. § 29:406(B) (2019) (general uniformed services); VA. CODE ANN. § 44-93.2 (2019).

171. FLA. STAT. ANN. § 250.482(2)(d) (West 2019); 330 ILL. COMP. STAT. ANN. 61/1-10 (West 2019); MONT. CODE ANN. § 10-1-1006(2) (West 2019); VA. CODE ANN. § 44-93.2 (2019); WYO. STAT. ANN. § 19-11-107(b) (2019).

172. See 63 Cal. Att'y Gen. Op. No. 483, 1980 WL 96869 (June 10, 1980) ("Our review of the law leads us to conclude that employers, public and private, are obligated to excuse members of the National Guard to attend such drills with unpaid leaves of absence, and may not require the employee to use his or her own free time, compensating overtime or *vacation time*." (emphasis added)).

173. Employer-provided coverage is the most common type of health insurance coverage in the United States, covering fifty-six percent of the population during some or all of calendar year 2017. EDWARD R. BERCHICK, EMILY HOOD & JESSICA C. BARNETT, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2017, at 1 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-264.pdf>. An additional 4.8% of the population is covered by military coverage, including coverage provided to current service members and their families as a result of that employment. *Id.* at 2. See also, e.g., Aaron E. Carroll, *The Real Reason the U.S. Has Employer-Sponsored Health Insurance*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html> ("The basic structure of the American health care system [is one] in which most people have private insurance through their jobs . . ."). Employer contributions to employee health insurance coverage are not considered taxable income under state and federal tax law, in effect representing a major tax subsidy. See MATTHEW RAE, GARY CLAXTON, NIRMITA PANCHAL & LARRY LEVITT, KAISER FAMILY FOUND., TAX SUBSIDIES FOR PRIVATE HEALTH INSURANCE 1-2 (2014), <http://files.kff.org/attachment/tax-subsidies-for-private-health-insurance-issue-brief> [<https://perma.cc/4Z26-2N9T>].

Employers who provide health insurance also usually subsidize the cost of coverage by paying part of the premium, in most cases paying at least half of the premium.¹⁷⁴ For employees, especially those taking unpaid leave, the loss of this subsidy can represent a substantial increase in costs;¹⁷⁵ a right to continuation of coverage that does not include the right to continuation of employer contributions is thus substantially less valuable. Therefore, the question of whether employers are obligated to continue paying their share of premiums is critical in understanding and evaluating any right to continuation of health insurance coverage.

There is greater variation within types of leave regarding this right, both in its availability and its terms, than nearly any other right, with few categories showing clear trends or allowing for easy summary. As with the right to reinstatement, those laws that provide for longer durations of leave are more likely to provide for continued health insurance coverage, though this is not a hard and fast rule.¹⁷⁶

The FMLA provides an explicit right to continuation of coverage under the same conditions as when the employee is working, meaning that employers must continue paying their share of costs.¹⁷⁷ However, employees who do not return to work following leave may be required to pay back any premiums paid by the employer, unless they did not return to work due to their health or circumstances outside their con-

174. Among employees that receive health insurance through their employers, about four-fifths are in a plan where their employer pays for at least half the premium for both single coverage (coverage for just the employee) and family coverage. KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS: 2018 ANNUAL SURVEY 88 (2018), <http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2018> [<https://perma.cc/5BBL-KTRT>]. In some cases, this contribution can be even larger: for about twelve percent of covered workers, employers pay the full cost (100%) of the premium for single coverage. *Id.*

175. In 2018, the average annual per-employee employer contribution to employee health insurance premiums was \$5,711 for single coverage and \$14,069 for family coverage. *Id.* at 85–86.

176. For example, FMLA-type laws generally provide comparatively long leaves (several weeks) and most, though not all, provide some type of right to continuation of health insurance. *See, e.g.*, 29 U.S.C. § 2614(c) (2012); OR. REV. STAT. ANN. § 659A.171(5)(b) (West 2018); WASH. REV. CODE ANN. § 49.78.290 (West 2019). On the other hand, no voting leave laws, which typically provide only a few hours of leave, provide a specific right to continuation of health insurance. *See, e.g.*, ALA. CODE § 17-1-5 (2019); GA. CODE ANN. § 21-2-404 (West 2019). Yet many pregnancy and parenting leave laws, which provide leave lengths more similar to FMLA-type laws, either do not require continuation of health insurance or only do so where the employer continues health insurance for other employees on leave. *See* LA. STAT. ANN. § 23:341(B)(2) (2019); MASS. GEN. LAWS ANN. 149 § 105D(b) (West 2019); TENN. CODE ANN. § 4-21-408(c)(1) (West 2019); KAN. ADMIN. REGS. § 21-32-6(b) (2019). There is also substantial variation within types of laws.

177. *See* 29 U.S.C. § 2614(c) (2012); 29 C.F.R. § 825.209 (2018).

trol.¹⁷⁸ Most state FMLAs also provide some right to continuation of health insurance, but the details vary substantially. California and Oregon follow the FMLA, requiring coverage on the same terms as when employees are working with a payback provision;¹⁷⁹ New Jersey and the District of Columbia provide a right to continuation on the same terms without a payback provision.¹⁸⁰ Rhode Island and Wisconsin guarantee continuation of coverage with a twist: instead of having a payback provision, employees must pay the employer up front or set aside money in escrow to cover the employer's share of premiums, but can recover this money upon returning from leave.¹⁸¹ Washington State and Maine provide the right to continuation of coverage, but generally only at the employee's expense.¹⁸²

Among the state *paid* family and medical leave laws, half require continuation of health insurance (including continuation of employer's share of premiums) for at least some employees covered by the paid leave law.¹⁸³ Specifically, Massachusetts and Oregon require continuation of health insurance for all covered employees,¹⁸⁴ while New York and Rhode Island require continuation of health insurance for all covered employees receiving paid family leave benefits, but not for those receiving temporary disability insurance benefits.¹⁸⁵ Washington State requires continuation of health insurance benefits only for those covered by the FMLA.¹⁸⁶

USERRA allows employees to continue coverage for up to twenty-four months, rather than the full five years covered for restoration.¹⁸⁷ Employers must continue to contribute if the absence is less than thirty-one days, but for longer absences employees pay the full

178. 29 U.S.C. § 2614(c)(2) (2012).

179. CAL. GOV'T CODE § 12945.2(f) (West 2019); OR. REV. STAT. ANN. § 659A.171(5)(b) (West 2018) (requiring continued coverage); *id.* § 659A.171(6) (payback).

180. D.C. CODE § 32-505 (2019); N.J. STAT. ANN. 34:11B-8 (West 2019).

181. *See* 28 R.I. GEN. LAWS ANN. § 28-48-3(c) (West 2019); WIS. STAT. ANN. § 103.10(9)(c) (West 2019).

182. ME. REV. STAT. ANN. tit. 26, § 845(2) (2019); WASH. REV. CODE ANN. § 49.78.290 (West 2019).

183. Among these laws, the right to continuation of health insurance corresponds with the right to reinstatement. California, Connecticut, New Jersey, the District of Columbia, and Hawaii do not require continuation of health insurance benefits as part of their paid leave laws.

184. MASS. GEN. LAWS ANN. ch. 175M, § 2(f) (West 2019); H.B. 2005, 80th Leg. Assemb., Reg. Sess. § 10(2) (Or. 2019).

185. N.Y. WORKERS' COMP. LAW § 203-c (McKinney 2019); 28 R.I. GEN. LAWS ANN. § 28-41-35(g) (West 2019).

186. WASH. REV. CODE ANN. § 50A.35.020 (West 2019).

187. *See* 38 U.S.C. § 4317(a)(1) (2012).

costs of coverage.¹⁸⁸ State service member leave laws are all over the map. Two explicitly require continued coverage with employees paying only their share of the premiums, regardless of duration.¹⁸⁹ Vermont requires continued coverage including continued employer contributions for absences of up to thirty days, like USERRA, but for absences of longer than thirty days, the state of Vermont will cover the employer's share if the employer does not.¹⁹⁰ Wisconsin mirrors USERRA more directly, but limits the total right to coverage to eighteen months.¹⁹¹ Eight states provide, either with regard to benefits generally or health insurance specifically, that employers must treat service members the same as other employees on leave.¹⁹² The remaining state service member leave laws do not provide a clear right to continuation of health insurance.¹⁹³

Of the twelve states with standalone military family leave laws, eight provide some type of right to continuation of health insurance. Two require that employers continue their share of premiums,¹⁹⁴ while six only require that employers allow continuation at the employee's expense.¹⁹⁵

Pregnancy and parental leave laws are mixed. Just two provide a right to continuation of health insurance including the cost of employer premiums.¹⁹⁶ Minnesota's maternity leave law requires employers to "continue to make coverage available" but explicitly does

188. *See* 38 U.S.C. § 4317(a)(2) (2012); 20 C.F.R. § 1002.166 (2018).

189. MONT. CODE ANN. § 10-1-1007(2)(C)(i)(b) (West 2019); WYO. STAT. ANN. § 19-11-109(b) (West 2019).

190. VT. STAT. ANN. tit. 21, § 492(c)(2) (2019).

191. WIS. STAT. ANN. § 321.65(6)(a)–(b) (West 2019).

192. GA. CODE ANN. § 38-2-280(e) (2019); HAW. REV. STAT. ANN. § 121-43(b)(1) (West 2019); KAN. STAT. ANN. § 48-517(b) (West 2019) (state active duty); MICH. COMP. LAWS ANN. § 32.273(3) (West 2019); N.J. STAT. ANN. § 38:23C-20(d) (West 2019); N.M. STAT. ANN. § 28-15-2 (West 2019); N.Y. MIL. LAW § 317(4) (McKinney 2019); WIS. STAT. ANN. § 321.64(2) (West 2019).

193. Oregon provides that employers "may" continue coverage. OR. REV. STAT. ANN. § 659A.086(5)(b) (West 2018). A few states provide ambiguous references to retaining rights to employee benefits. *See* COLO. REV. STAT. § 28-3-610.5(1)(b) (2019); IOWA CODE ANN. § 29A.43(1) (West 2019); LA. STAT. ANN. § 29:38(B) (2018); TEX. GOV'T CODE ANN. § 437.204(a) (West 2019). There is no clear case law or other guidance interpreting the service member laws that are wholly silent on this question.

194. OHIO REV. CODE ANN. § 5906.02(B) (West 2019); OR. REV. STAT. ANN. § 659A.093(1) (West 2018) (cross-referencing OR. REV. STAT. ANN. § 659A.171).

195. 820 ILL. COMP. STAT. ANN. 151/15(b) (West 2019); IND. CODE ANN. § 22-2-13-14 (West 2019); ME. REV. STAT. ANN. tit. 26, § 814(6) (2019); NEB. REV. STAT. ANN. § 55-504(2) (West 2019); 30 R.I. GEN. LAWS ANN. § 30-33-4(b) (West 2019); WASH. REV. CODE ANN. § 49.77.030(2)(b) (West 2019).

196. CAL. GOV'T CODE § 12945(a)(2)(A) (Deering 2019); MD. CODE ANN., LAB. & EMPL. § 3-1205(a) (West 2019).

not require employers “to pay the costs of the insurance or health care while the employee is on leave of absence.”¹⁹⁷ Three laws set a non-discrimination rule, stating that employers only must continue coverage where they do so for other employees taking leaves of absence or with temporary disabilities.¹⁹⁸ Louisiana goes beyond not requiring continuation to explicitly state that the pregnancy leave law does not obligate employers to provide health insurance covering pregnancy—not only during leave, but in general.¹⁹⁹

Only a minority of paid sick time laws mention health insurance specifically. Just one, Vermont’s law, provides a standalone affirmative right to continuation of coverage; this right includes a right to continue employer premiums.²⁰⁰ Five local sick time laws specifically include continuation of health insurance in the definition of sick time, meaning that employers do not meet the law’s requirements unless the sick time includes continued health coverage.²⁰¹ Two additional local laws similarly refer to benefits generically as part of the definition of sick time, without specifically referencing health coverage.²⁰²

Among the remaining types of leave laws, specific protections for health insurance become even rarer. Four out of eleven domestic violence leave laws provide for continuation of health insurance.²⁰³ Three do so explicitly on the same terms as while the employee is working,²⁰⁴ while New Mexico states only that employers cannot withhold health insurance coverage without specifying whether employers or employees bear the employer share of premiums.²⁰⁵

197. MINN. STAT. ANN. § 181.941(4) (West 2019).

198. MASS. GEN. LAWS ANN. 149 § 105D(d) (West 2019); TENN. CODE ANN. § 4-21-408(c)(1) (West 2019); KAN. ADMIN. REGS. § 21-32-6(b) (2019).

199. LA. STAT. ANN. § 23:341(B)(2) (2019).

200. VT. STAT. ANN. tit. 21, § 482(d)(2) (2019).

201. *See, e.g.*, COOK COUNTY, ILL., CODE § 42-2 (2016) (“*Earned Sick Leave* means time . . . with the same benefits, *including health care benefits*, that the Covered Employee regularly earns during hours worked.” (emphasis added)); *see also* CHI., ILL., CODE § 1-24-010 (2019); PHILA., PA., CODE § 9-4103(11) (2016); SEATTLE, WASH., CODE § 14.16.010 (2019); TACOMA, WASH., CODE § 18.10.010(S) (2018).

202. MINNEAPOLIS, MINN., CODE § 40.220(g) (2019); MONTGOMERY COUNTY, MD., CODE § 3-1302(a) (2019).

203. 820 ILL. COMP. STAT. ANN. 180/20(e)(2) (LexisNexis 2019); N.M. STAT. ANN. § 50-4A-5 (West 2019); PHILA., PA., CODE § 9-3206(2) (2016); WASH. REV. CODE ANN. § 49.76.050(4) (West 2019).

204. 820 ILL. COMP. STAT. ANN. 180/20(e)(2) (LexisNexis 2019); PHILA., PA., CODE § 9-3206(2) (2016); WASH. REV. CODE ANN. § 49.76.050(4) (West 2019).

205. N.M. STAT. ANN. § 50-4A-5 (West 2019) (“To the extent permitted by law, an employer shall not withhold pay, health coverage insurance or another benefit that has accrued to the employee when an employee takes domestic abuse leave.”).

Only a handful of state jury duty leave laws appear to provide any specific rights in relation to health insurance. Oregon requires continuation of health insurance by regulation.²⁰⁶ Though they do not specifically reference leave, Maine states that employees cannot lose health insurance coverage due to jury service,²⁰⁷ while Louisiana and Massachusetts similarly state employees can't lose "benefits" generally as a result of jury service.²⁰⁸ Three states and the federal jury duty leave law require continuation of health insurance for employees on jury duty only if other employees who are on leave or furloughed can continue their coverage.²⁰⁹ In Vermont, employees serving on juries are still considered to be in their employer's service and therefore entitled to "benefits of employment," presumably including any employer-provided health insurance, during the relevant period.²¹⁰

No crime victim or witness leave laws specifically mention health insurance coverage. Vermont follows the same rule as for jury service, presumably continuing coverage in practice.²¹¹ No voting leave laws provide such protection, which makes sense in light of the very brief duration at issue.

E. The Right Not to Be Retaliated Against

The first four rights described above are affirmative rights, entitling employees to take a specific action (or have their employer take a specific action). The right against retaliation, in contrast, is a negative right: employees have the right *not* to have their employers take specific actions. Specifically, the right against retaliation means employers cannot take adverse actions against employees—most obviously, employees cannot be fired—because the employees engaged in protected activity.²¹² This right is distinguished from related protections by its causation requirement: by definition, an act can only be retali-

206. Note that the regulation applies only to employers who employ ten or more people. OR. ADMIN. R. 839-005-0135 (2018).

207. ME. REV. STAT. ANN. tit. 14, § 1218 (2019).

208. LA. STAT. ANN. § 23:965(B)(1) (2019); MASS. GEN. LAWS ANN. ch. 234A, § 61 (West 2019).

209. 28 U.S.C. § 1875(c) (2012); 705 ILL. COMP. STAT. ANN. 305/4.1(d) (West 2019); KAN. STAT. ANN. § 43-173(c) (West 2019); WYO. STAT. ANN. § 1-11-401(c) (2019). These provisions are all part of the ambiguous reinstatement language discussed in greater detail at note 76, *supra*.

210. VT. STAT. ANN. tit. 21, § 499(a) (West 2019).

211. *Id.* § 499(b).

212. The question of which activities are protected under particular laws is discussed in greater detail in Section II.E.1, *infra*.

tory if the employer's action was caused, in whole or in part, by the exercise of a protected right.²¹³

Depending on the statute, this protection can take a few different forms. It may include the word retaliate²¹⁴ or terms that achieve the same effect, like stating employers cannot "discharge, fine, suspend, expel, discipline or in any other manner discriminate"²¹⁵ against employees who exercise their rights. Most leave laws with retaliation rights prohibit all forms of retaliation or adverse actions,²¹⁶ though a few prohibit only specific actions (generally termination).²¹⁷

The right not to be retaliated against can be found in some form across nearly all types of leave laws. As discussed in greater detail below, the FMLA has been interpreted to provide protection against retaliation.²¹⁸ State FMLAs generally provide a right not to be retaliated against, though their scopes vary.²¹⁹ Essentially all paid sick time laws include a prohibition on retaliation.²²⁰ Anti-retaliation protec-

213. *See, e.g.*, *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 508 (6th Cir. 2006) ("[R]etaliation claims impose liability on employers that act against employees specifically because those employees invoked their FMLA rights." (citation omitted)).

214. *See, e.g.*, CAL. MIL. & VET. CODE § 395.10(c) (West 2019); FLA. STAT. ANN. § 741.313(5)(b) (LexisNexis 2019); WASH. REV. CODE ANN. § 49.46.210(4) (LexisNexis 2019).

215. ME. REV. STAT. ANN. tit. 26, § 847(2) (2019); *see also, e.g.*, GA. CODE ANN. § 34-1-3(a) (2019) ("It shall be unlawful for any employer or the agent of such employer to discharge, discipline, or otherwise penalize an employee because the employee is absent from his or her employment . . ."); N.C. GEN. STAT. § 50B-5.5(a) (2018) ("No employer shall discharge, demote, deny a promotion, or discipline an employee because the employee took reasonable time off from work . . .").

216. *See, e.g.*, BERKELEY, CAL., CODE § 13.100.070(A) (2016) ("It shall be unlawful for an Employer or any other party to discriminate in any manner or take any adverse action (including action relating to any term, condition or privilege of employment) against any person in retaliation for exercising rights protected under this Chapter.").

217. *See* FLA. STAT. ANN. § 92.57 (West 2019); MD. CODE ANN., CRIM. PROC. § 11-102(b) (2019); OR. REV. STAT. ANN. § 659A.086(2) (West 2018); TENN. CODE ANN. § 58-1-604 (2019).

218. *See* 29 C.F.R. § 825.220(c) (2018) ("The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights.").

219. The Oregon Family Leave Act is the only state FMLA to include the word retaliation. OR. REV. STAT. ANN. § 659A.183(2) (West 2018). Others provide a similar right not to be subject to adverse actions because of the exercise of a protected right using other language. *See* CAL. GOV'T CODE § 12945.2(l) (West 2019); CONN. GEN. STAT. ANN. § 31-51(a)(2), (b) (West 2019); D.C. CODE ANN. § 32-507(b) (West 2019); HAW. REV. STAT. ANN. § 398-8(b)-(c) (West 2019); ME. REV. STAT. ANN. tit. 26, § 847(2)-(3) (2019); N.J. STAT. ANN. 34:11B-9(b)-(c) (West 2019); 28 R.I. GEN. LAWS ANN. § 28-48-5(b)-(c) (West 2019); WASH. REV. CODE ANN. § 49.78.300(1)(b), (2) (LexisNexis 2019); WIS. STAT. ANN. § 103.10(11)(b)-(c) (West 2019).

220. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-374(B) (2019); MD. CODE ANN., LAB. & EMPL. § 3-1309(c) (LexisNexis 2019); SAN DIEGO, CAL., CODE § 39.0111 (2016).

tions are nearly universal in crime victim and witness leave laws and are generally at the heart of such laws, in some laws representing the only protected right.²²¹ Jury duty leave laws likewise almost all contain anti-retaliation protections, in some cases as the only or primary protected right in laws that do not enumerate a specific right to leave or any of the other rights identified in this Article.²²² About two-thirds of voting leave laws contain explicit anti-retaliation language.²²³ Many domestic violence leave laws also contain rights against retaliation.²²⁴ Six out of ten state paid family and medical leave laws include some form of anti-retaliation provision.²²⁵ Many military service member leave laws include anti-retaliation language, though the scope varies significantly.²²⁶ A little over half of military family leave laws

221. *See, e.g.*, ALA. CODE § 15-23-81 (2019); GA. CODE ANN. § 34-1-3(a) (2019); MINN. STAT. ANN. § 611A.036(3) (West 2019); VA. CODE ANN. § 18.2-465.1 (2019). *But see* OR. REV. STAT. ANN. § 659A.192 (West 2018) (no explicit anti-retaliation language). As noted below, these laws vary in what the protected activity is.

222. *See, e.g.*, 28 U.S.C. § 1875(a) (2012); ALASKA STAT. § 09.20.037 (2019); ARIZ. REV. STAT. ANN. § 21-236(B) (2019); NEB. REV. STAT. ANN. § 25-1640 (LexisNexis 2019); N.C. GEN. STAT. ANN. § 9-32(a) (West 2018). *But see* W. VA. CODE ANN. § 52-1-21 (West 2019) (no explicit anti-retaliation language). As with crime victim and witness leave, the protected activity varies.

223. *See* ARIZ. REV. STAT. ANN. § 16-402(A) (2019); COLO. REV. STAT. ANN. § 1-7-102(1) (West 2019); 10 ILL. COMP. STAT. ANN. 5/17-15 (West 2019); IOWA CODE ANN. § 49.109 (West 2019); KAN. STAT. ANN. § 25-418 (West 2019); KY. REV. STAT. ANN. § 118.035(3) (West 2019); MO. ANN. STAT. § 115.639(1) (West 2019); NEB. REV. STAT. ANN. § 32-922 (West 2019); NEV. REV. STAT. ANN. § 293.463(2) (West 2019); N.M. STAT. ANN. § 1-12-42(A) (West 2019); OHIO REV. CODE ANN. § 3599.06 (LexisNexis 2019); OKLA. STAT. ANN. tit. 26, § 7-101 (West 2019); S.D. CODIFIED LAWS § 12-3-5 (2019); TENN. CODE ANN. § 2-1-106(b) (2019); TEX. ELEC. CODE ANN. § 276.004(a)(2) (West 2019); W. VA. CODE ANN. § 3-1-42 (LexisNexis 2019); WIS. STAT. ANN. § 6.76(2) (West 2019). The remaining voting leave laws do not contain explicit anti-retaliation provisions.

224. CAL. LAB. CODE § 230(c) (West 2019); COLO. REV. STAT. § 24-34-402.7(1)(a) (2019); FLA. STAT. ANN. § 741.313(5)(b) (LexisNexis 2019); 820 ILL. COMP. STAT. ANN. 180/20(f)(1)(B) (LexisNexis 2019); KAN. STAT. ANN. § 44-1132(a) (West 2019); N.M. STAT. ANN. § 50-4A-3 (LexisNexis 2019); N.C. GEN. STAT. § 50B-5.5(a) (2018); *id.* § 95-270(a); PHILA., PA., CODE § 9-3207(1)(b) (2016); WASH. REV. CODE ANN. § 49.76.120 (LexisNexis 2019).

225. D.C. CODE § 32-541.10(b) (2019); MASS. ANN. LAWS ch. 175M, § 9 (LexisNexis 2019); N.Y. WORKERS' COMP. LAW § 203-a (Consol. 2019); WASH. REV. CODE ANN. § 50A.04.085 (LexisNexis 2019); H.B. 2005, 80th Leg. Assemb., Reg. Sess. §§ 10(4), 11(c) (Or. 2019). New Jersey's law was recently amended to add new anti-retaliation protections, the scope of which may be fleshed out by subsequent regulations. A.B. 3975, 218th Leg. (N.J. 2019). The statute creating Connecticut's paid family and medical leave program also significantly expanded coverage under the Connecticut FMLA, *see* sources cited *supra* note 71. The Connecticut FMLA also prohibits retaliation. CONN. GEN. STAT. ANN. § 31-51pp(a)(2), (b) (West 2019).

226. ARK. CODE ANN. § 12-62-413(a) (2019); CAL. MIL. & VET. CODE § 394(d) (Deering 2019); HAW. REV. STAT. ANN. § 121-43(b)(3) (LexisNexis 2019); IOWA CODE ANN. § 29A.43(1) (West 2019); KY. REV. STAT. ANN. § 38.460 (LexisNexis

include an anti-retaliation protection.²²⁷ A few pregnancy leave laws also include this right.²²⁸

1. *The Scope of the Right Against Retaliation: Identifying the Protected Action(s)*

Knowing that a law includes a right against retaliation offers only a partial picture. To understand what rights these provisions offer to employees, we must know what employee actions are protected from retaliation. In large part, this analysis boils down to whether the act of taking leave, in the sense of being absent from the workplace, is protected. If it is, then an employer clearly violates the law by taking a prohibited action against an employee because that employee was not at work or took time off; if leave is not a protected right, this scope of protection is murkier. Leave taking can be designated as a protected act either by explicit reference to leave or some synonym²²⁹ or by

2019); LA. STAT. ANN. § 29:38.1 (2018) (state active duty); *id.* § 29:404 (general uniformed services); MICH. COMP. LAWS ANN. § 32.272 (West 2019); MISS. CODE ANN. § 33-1-15 (2019); NEV. REV. STAT. ANN. § 412.139(1) (West 2019); N.Y. MIL. LAW § 252 (Consol. 2019); N.C. GEN. STAT. ANN. § 127A-202.1(b) (West 2018); OKLA. STAT. tit. 44, § 208 (2019); 51 PA. STAT. AND CONS. STAT. ANN. § 7309(a) (West 2019); 30 R.I. GEN. LAWS § 30-11-2 (West 2019); TEX. GOV'T CODE ANN. § 437.204(a); UTAH CODE ANN. § 39-1-36(3) (West 2019); VA. CODE ANN. § 44-93.4(A) (West 2018); WIS. STAT. ANN. § 321.65(7)(c) (state active service) (West 2019); MONT. CODE ANN. § 10-1-1005 (2019); VT. STAT. ANN. tit. 21, § 491(c) (2019); WASH. REV. CODE § 73.16.032(2) (2018); WYO. STAT. ANN. § 19-11-104(c) (2019); FLA. STAT. ANN. § 250.482(1) (West 2019); KAN. STAT. ANN. § 48-222 (West 2019) (muster and camp of instruction); N.H. REV. STAT. ANN. § 110-B:65(II) (2019).

227. ARIZ. REV. STAT. ANN. § 26-167(A) (2019); CAL. MIL. & VET. CODE § 395.10(c) (West 2019); CONN. GEN. STAT. ANN. § 27-33a(b) (West 2019); 820 ILL. COMP. STAT. 151/25(b) (2019); ME. REV. STAT. ANN. tit. 26, § 814(7)(b) (2019); NEB. REV. STAT. ANN. § 55-506(2) (West 2019); N.Y. LAB. LAW § 202-i(3) (McKinney 2019); OR. REV. STAT. ANN. §§ 659A.086(2), .096(2) (West 2018); 30 R.I. GEN. LAWS ANN. § 30-33-5(b) (2019); TENN. CODE ANN. § 58-1-604 (2019); WASH. REV. CODE ANN. § 49.77.030(4) (West 2019) (cross-referencing WASH. REV. CODE ANN. § 49.78.300).

228. *See* MD. CODE ANN., LAB. & EMPL. § 3-1209(a) (West 2019); MINN. STAT. ANN. § 181.941(3) (West 2019). Kansas's pregnancy leave law has a very narrow and heavily cabined protection against retaliation. KAN. ADMIN. REGS. § 21-32-6(c) (2019) ("Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such termination is discriminatory if it has a disparate impact on employees of one sex and is not justified by business necessity.").

229. *See, e.g.*, KY. REV. STAT. ANN. § 118.035(3) (West 2019) ("No person shall be penalized for taking a *reasonable time off* to vote . . ." (emphasis added)); N.H. REV. STAT. ANN. § 275:62(II) (LexisNexis 2019) ("An employer shall not discharge an employee who is a victim of a crime because the employee exercises his or her *right to leave work* pursuant to this subdivision." (emphasis added)).

prohibiting retaliation for an inclusive category, like “exercis[ing] any right provided under this act.”²³⁰

In one of these two ways, taking leave is always a protected act under sick time laws²³¹ and among those that prohibit retaliation for domestic violence leave laws,²³² voting leave laws,²³³ and all but one military family leave law.²³⁴ These laws therefore offer the most universal protections against retaliation for the act of taking leave.

Other types of laws are more mixed. Among laws that prohibit retaliation, leave is a specifically protected act in about half of state FMLAs,²³⁵ two of four pregnancy and parenting leave laws,²³⁶ three of six state paid family and medical leave laws,²³⁷ about a third of crime victim leave laws,²³⁸ and about a fifth of state service member leave laws²³⁹ and jury duty leave laws.²⁴⁰

230. NEB. REV. STAT. ANN. § 55-506(2) (West 2019); *see also, e.g.*, CONN. GEN. STAT. ANN. § 31-51pp(a)(2) (West 2019).

231. *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 3-1309(c) (LexisNexis 2019); OR. REV. STAT. ANN. § 653.641(2) (West 2018); SAINT PAUL, MINN., CODE § 233.06(b) (2019).

232. *See, e.g.*, COLO. REV. STAT. § 24-34-402.7(1)(a) (2019); 820 ILL. COMP. STAT. ANN. 180/20(f)(1)(B) (LexisNexis 2019).

233. *See, e.g.*, NEV. REV. STAT. ANN. § 293.463(2) (West 2019); N.M. STAT. ANN. § 1-12-42(A) (West 2019); TEX. ELEC. CODE ANN. § 276.004(a)(2) (West 2019).

234. *See, e.g.*, CAL. MIL. & VET. CODE § 395.10(c) (West 2019); N.Y. LAB. LAW § 202-i(3) (McKinney 2019). *But see* WASH. REV. CODE ANN. § 49.77.030(4) (West 2019) (cross-referencing WASH. REV. CODE ANN. § 49.78.300).

235. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 847(2)–(3) (2019); OR. REV. STAT. ANN. § 659A.183(2) (West 2018).

236. *See* MD. CODE ANN., LAB. & EMPL. § 3-1209(a) (West 2019); MINN. STAT. ANN. § 181.941(3) (West 2019).

237. Massachusetts’s law broadly prohibits retaliation “for exercising any right to which such employee is entitled under this chapter” MASS. GEN. LAWS ANN. ch. 175M, § 9(a) (LexisNexis 2019). Oregon’s law broadly makes it “an unlawful employment practice to discriminate against an eligible employee who has invoked any provision” of the law. H.B. 2005, 80th Leg. Assemb., Reg. Sess. § 10(2) (Or. 2019). Oregon’s law also contains a second, narrower anti-retaliation provision. *Id.* § 11(c). The title of one section of New York’s law states that “retaliatory action for family leave [is] prohibited,” N.Y. WORKERS’ COMP. LAW § 203-b (McKinney 2019), without specifying further. Though Connecticut’s paid family and medical leave law does not include new standalone employment protections, *see* sources cited *supra* note 71, the statute creating Connecticut’s paid family and medical leave program also significantly expanded coverage under the Connecticut FMLA. The Connecticut FMLA prohibits retaliation. CONN. GEN. STAT. ANN. § 31-51pp(a)(2), (b) (West 2019).

238. *See, e.g.*, GA. CODE ANN. § 34-1-3(a) (2019); MINN. STAT. ANN. § 611A.036(3) (West 2019); N.Y. PENAL LAW § 215.14(1) (Consol. 2019).

239. *See, e.g.*, ARIZ. REV. STAT. ANN. § 26-167(A) (2019); FLA. STAT. ANN. § 250.482(1) (West 2019); WYO. STAT. ANN. § 19-11-104(c) (2019).

240. *See, e.g.*, OKLA. STAT. ANN. tit. 38, § 34(C) (West 2019); TENN. CODE ANN. § 22-4-106(d) (West 2019); VA. CODE ANN. § 18.2-465.1 (2019). The federal jury

What would it mean to have a leave law that prohibited retaliation but did not make leave-taking a protected right? There are a few major categories. First, the law could protect against retaliation only for the purpose or action that the leave was taken for, rather than for being absent from the workplace. This occurs in most jury duty²⁴¹ and crime victim leave laws,²⁴² as well as many military service member leave laws.²⁴³ For example, this is fairly typical language from a jury duty law: “[a]n employer shall not deprive an employee of employment, or threaten or otherwise coerce the employee with respect thereto, because the employee receives a summons, responds thereto, serves as a juror or attends Court for prospective jury service.”²⁴⁴ While many of these protected actions may, in practice, require an employee to be absent from work, at least on paper that absence itself is not protected from retaliation. For laws that provide a right to some monetary benefit, like state paid family and medical leave laws, we can also include laws that prohibit retaliation for the act of filing for or receiving benefits in this category.²⁴⁵

In other cases, laws might protect against retaliation only for taking enforcement or whistleblower actions, like filing a complaint for a violation of the law or serving as a witness. For example, Wisconsin’s

duty leave law’s anti-retaliation provision does not specifically refer to leave. *See* 28 U.S.C. § 1875(a) (2012).

241. *See, e.g.*, COLO. REV. STAT. ANN. § 13-71-134(1) (West 2019); IDAHO CODE ANN. § 2-218(1) (West 2019); NEV. REV. STAT. ANN. § 6.190(1) (LexisNexis 2019).

242. *See, e.g.*, ALASKA STAT. § 12.61.107(a) (2019); N.D. CENT. CODE ANN. § 27-09.1-17 (West 2019).

243. *See, e.g.*, MICH. COMP. LAWS ANN. § 32.272 (West 2019) (“An employer . . . shall not discharge any person from employment because of being or performing his or her duty as an officer or enlisted member of the military or naval forces of this state or any other state”); NEV. REV. STAT. ANN. § 412.139(1) (West 2019).

244. DEL. CODE ANN. tit. 10, § 4515(a) (West 2019). Crime victim laws often use similar language, protecting against retaliation for a number of non-leave acts in relation to a criminal proceeding. For example, Ohio’s crime victim law states:

No employer of a victim shall discharge, discipline, or otherwise retaliate against the victim, a member of the victim’s family, or a victim’s representative for participating, at the prosecutor’s request, in preparation for a criminal or delinquency proceeding or for attendance, pursuant to a subpoena, at a criminal or delinquency proceeding if the attendance is reasonably necessary to protect the interests of the victim.

OHIO REV. CODE ANN. § 2930.18 (LexisNexis 2019).

245. *See, e.g.*, D.C. CODE ANN. § 32-541.10(b)(2)(D) (West 2019); N.Y. WORKERS’ COMP. LAW § 120 (McKinney 2019). One recent article highlighted this distinction with regard to anti-retaliation provisions in the proposed FAMILY Act, a leading federal paid family and medical leave bill. Catherine Albiston & Lindsey Trimble O’Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 55–56 (2016) (“The Act protects workers from being fired *for applying for benefits*, but it does not explicitly state that workers cannot be fired *for taking family leave*.”).

service member leave law for active state service contains only the following anti-retaliation language: “An employer may not discharge or otherwise discriminate against any person for filing a complaint or attempting to enforce a right provided under this section or for testifying or assisting in any action or proceeding to enforce a right provided under this section.”²⁴⁶ Depending on how broadly the phrase “attempting to enforce” is read, that provision might offer protection only to someone who was retaliated against for engaging in a specific enforcement process (like a complaint or hearing), rather than someone who faced retaliation because they took leave. Some state FMLAs, mirroring language from the FMLA that will be discussed in greater detail below, contain similar language, often also prohibiting adverse actions for “opposing any practice made unlawful” by the law, without specifically protecting leave.²⁴⁷

Other provisions blur the line between prohibiting adverse actions based on protected *actions* by an employee and those based on the employee having a particular protected *status* or identity, particularly where the language of discrimination rather than retaliation is used. Most states, either in the same statute as providing explicit leave protections or elsewhere in state law, prohibit discrimination or taking adverse actions against someone because they are a member of the military.²⁴⁸ Similarly, employees who need leave because of pregnancy or for a health need in connection with a disability may be protected against discrimination on the basis of that *status*, without necessarily being protected against retaliation for the *action* of taking leave in connection with that need.²⁴⁹

2. *Theory and Practice: Interpreting the Scope of the Protection*

At a minimum, having an anti-retaliation provision that does not explicitly protect leave creates a risk that employees will not be able to bring effective actions for retaliation.²⁵⁰ Where leave itself is not

246. WIS. STAT. ANN. § 321.65(7)(c) (West 2019).

247. HAW. REV. STAT. ANN. § 398-8(b)–(c) (LexisNexis 2019); *see also* N.J. STAT. ANN. 34:11B-9(b)–(c) (West 2019); WASH. REV. CODE ANN. § 49.78.300(1)–(2) (LexisNexis 2019); WIS. STAT. ANN. § 103.10(11)(b)–(c) (West 2019).

248. *See, e.g.*, OKLA. STAT. ANN. tit. 44, § 208 (West 2019); UTAH CODE ANN. § 39-1-36(3) (LexisNexis 2019).

249. Federal law prohibits discrimination on the basis of disability under the Americans with Disabilities Act, 42 U.S.C. § 12112 (2012), and on the basis of pregnancy under the Pregnancy Discrimination Act, *id.* § 2000e-2(a) (prohibiting employment discrimination on the basis of sex); *id.* § 2000e(k) (defining “on the basis of sex” to include pregnancy). State and local laws may also provide additional protections.

250. The practical impact of this distinction would turn in part on other rights the relevant law may provide. For example, if the law in question provided an affirmative

the protected action, an employee who was fired or punished after being absent would need to show an additional inferential step from the employer's prohibited action (the punishment) to their protected action (for example, serving on a jury). This also creates room for an employer to argue that their actions were not motivated by retaliation for a protected action, but rather by a legitimate business need (having employees at work) not connected to the protected action, since the absence itself was not protected.²⁵¹

As to how big that risk is in practice, there are conflicting experiences in different contexts. On the one hand, consider the FMLA. The word "retaliation" does not appear in the statute's text and the most obviously relevant provision offers what appears to be very narrow protection for enforcement actions: "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."²⁵² Yet the regulations, drawing upon a separate but related provision of the statute,²⁵³ prohibit retaliation broadly: "The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights."²⁵⁴ This leaves open the question of whether, without the separate prohibition on interference upon which the regulations rely, the FMLA prohibition on *retaliation* would have been found to exist in any robust form. In any event, retaliation for exercising FMLA rights, including the right to leave, is now a well-established cause of action.²⁵⁵

right to reinstatement, the employee would still be protected against losing their job during the period of leave (because they have an independent right to be restored to their job), but would not necessarily be protected against non-termination forms of retaliation for use of leave.

251. *See, e.g.*, *Rockwood Park Jewish Ctr. Inc.*, 1998 WL 991171, at *1 (N.Y. Workers' Comp. Bd. Dec. 8, 1998) (holding, under a law where leave was not a protected act, that firing an employee because the employer "needed someone to do the work on a reliable and steady [basis]" was not a prohibited form of retaliation).

252. 29 U.S.C. § 2615(a)(2) (2012).

253. 29 U.S.C. § 2615(a)(1) (2012).

254. 29 C.F.R. § 825.220(c) (2018).

255. *See, e.g.*, *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 301 (3d Cir. 2012) (recognizing the statute does not directly prohibit retaliation for exercising rights but pointing to a regulation "as mandating this result"); *Lovland v. Emp'rs Mut. Cas. Co.*, 674 F.3d 806, 810–11 (8th Cir. 2012) ("These provisions do not explicitly prohibit retaliation against an employee for exercising FMLA rights. But this court, like our sister circuits, has consistently held that the statute prohibits retaliation against an employee who exercises her FMLA rights."); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001) (concluding that while "the anti-retaliation or anti-discrimination provisions" do not prohibit retaliation for use of FMLA leave, such action is covered under the interference provision).

On the other hand, compare the FMLA with the example of New York's workers' compensation and temporary disability law. New York Workers' Compensation Law section 120 is primarily a workers' compensation provision, though it also cross-applies by statute to temporary disability benefits (and, since 2016, paid family leave benefits).²⁵⁶ Prior to enactment of the paid family leave law, this section read, in relevant part, as follows:

It shall be unlawful for any employer or his or her duly authorized agent to discharge or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer, or because he or she has testified or is about to testify in a proceeding under this chapter²⁵⁷

Like the FMLA, the scope of protected employee activities is narrowly circumscribed, covering only one who "claimed or attempted to claim compensation," meaning workers' compensation or disability benefits, or one who "has testified or is about to testify in a proceeding under this chapter" ²⁵⁸ In other words, by its text, the protected actions are only claiming benefits and testifying (or planning to testify) in a proceeding.

Unlike the FMLA, this provision has historically been interpreted narrowly. Most significantly, in *Johnson v. Moog*,²⁵⁹ the N.Y. Appellate Division, Third Department noted that (among other requirements) employees bringing section 120 claims bear the burden of establishing "a causal nexus between the employee's activities *in obtaining compensation* and the employer's conduct against the employee."²⁶⁰ The key is that obtaining compensation—seeking monetary benefits—is the protected action. Being away from the workplace while receiving those benefits is not. Therefore, the *Johnson* court elaborated that, without evidence of illegal retaliation for seeking benefits, "even an employee who is terminated because of lengthy absence from work as a result of injury, whether sustained on or off the job, is not a victim of discrimination within the scope and

256. See N.Y. WORKERS' COMP. LAW § 241 (McKinney 2019) ("The provisions of section one hundred twenty of this chapter shall be applicable as fully as if set forth in this article [of disability benefits law and paid family leave benefits law].").

257. *Id.* § 120. Though less relevant for these purposes, the statute goes on to further cabin claims by allowing claims only where "no other valid reason is shown to exist for such action by the employer"—seemingly excluding mixed-motive claims. *Id.*

258. *Id.*

259. *Johnson v. Moog, Inc.*, 494 N.Y.S.2d 152 (N.Y. App. Div. 1985).

260. *Id.* at 154 (emphasis added).

meaning of Workers' Compensation Law §§ 120 and 241.”²⁶¹ In other words, as the court explicitly stated, “[t]he statutes do not serve as a job security clause”²⁶²—i.e. do not provide job protection or protect the right to leave.

The divergent examples of the FMLA and New York's section 120 suggest that, at a minimum, policymakers should not take for granted that a prohibition on retaliation for a narrow list of activities will be interpreted broadly to protect actions not included in that list. Instead, drafters should take care to ensure that the actions they intend to protect are specifically elaborated, as illustrated by the contrasting examples of two paid family and medical leave laws enacted within a year of one another. In the enactment of New York's paid family leave law, for example, lawmakers conscious of the legacy of *Johnson* both created new statutory rights (like the right to reinstatement) and changed the language of section 120 in order to classify a failure to reinstate as a prohibited form of retaliation.²⁶³ The D.C. Council took the opposite tack in drafting their paid family and medical leave law, which included adding a limited anti-retaliation provision prohibiting retaliation only for filing for benefits or taking enforcement actions (albeit one that also included anti-interference language).²⁶⁴ To make clear their intent, the District of Columbia drafters also explicitly stated in the statute that the paid family and medical leave law did not create any new rights to job protection and should not be interpreted to do so.²⁶⁵

3. *Proving Retaliation*

One final consideration with the right to retaliation is the question of proof, particularly when it comes to showing that an employer took the prohibited act *because* the employee took some protected act. In some cases, this could involve direct evidence. At the most extreme (though uncommon), this could include an employer's explicit statement that an employee was or would be fired for requesting or taking leave.²⁶⁶ Where there is no direct evidence available, employees must

261. *Id.*

262. *Id.*

263. See N.Y. WORKERS' COMP. LAW § 120 (McKinney 2019); *id.* §§ 203-a, -b.

264. D.C. CODE § 32-541.10 (2019).

265. *Id.* § 32-541.07(c) (“Nothing in this subchapter shall be construed to provide job protection to any eligible individual beyond that to which an individual is entitled under D.C. FMLA.”).

266. See, e.g., *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 708 (6th Cir. 2008) (holding that employer's alleged statement that if an employee took FMLA leave there would not be a job waiting for him, if true, “constitutes direct evidence that [the

rely on circumstantial or indirect evidence to make their case.²⁶⁷ For instance, the close connection in time between the employee's use of leave or another protected right and the adverse action may be the best evidence.²⁶⁸

Building on this standard approach, many sick time laws (and one paid family and medical leave law) provide an automatic presumption that an adverse action taken within a certain amount of time (usually ninety days) after a protected action was retaliatory.²⁶⁹ Employers can rebut this presumption by providing evidence that the action in question was not retaliatory. For example, Arizona's sick time law provides that this presumption "may be rebutted by clear and convincing evidence that such action was taken for other permissible reasons."²⁷⁰ Massachusetts's paid family and medical leave law is even more specific:

Such presumption shall be rebutted only by clear and convincing evidence that such employer's action was not retaliation against the employee and that the employer had sufficient independent justification for taking such action and would have in fact taken such action in the same manner and at the same time the action was taken, regardless of the employee's use of leave, restoration to a

employee's] termination was motivated by unlawful, discriminatory animus"); *Stewart v. Wells Fargo Bank, Nat'l Ass'n*, No. 5:15-CV-00988-MHH, 2017 WL 977412, at *5 (N.D. Ala. Mar. 14, 2017) ("Mr. Kincaid's e-mail constitutes direct evidence of retaliation. Mr. Kincaid's statement that 'I believe we need to move forward on termination' because 'Debby submit[ted] a request for medical leave' does more than merely suggest a discriminatory motive. It is a blatant remark.").

267. *See, e.g.*, *Pagel v. TIN Inc.*, 695 F.3d 622, 631 (7th Cir. 2012) ("The convincing mosaic of circumstantial evidence may include suspicious timing, ambiguous statements from which a retaliatory intent can be drawn, evidence of similar employees being treated differently, or evidence that the employer offered a pretextual reason for the termination.").

268. *See, e.g.*, *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998) ("[C]lose temporal proximity between two events may give rise to an inference of causal connection.").

269. For sick time laws providing such a presumption with regard to the use of leave, see ARIZ. REV. STAT. ANN. § 23-364(B) (2019); BERKELEY, CAL., CODE § 13.100.070(A) (2016); D.C. CODE ANN. § 32-531.08(d) (West 2019); SAN DIEGO, CAL., CODE § 39.0111 (2016); SANTA MONICA, CAL., CODE § 4.62.070(b) (2016). Other sick time laws provide a similar presumption, but attach it only to filing a complaint or similar enforcement actions rather than taking leave. CAL. LAB. CODE § 246.5(c)(2) (West 2019); N.J. STAT. ANN. § 34:11D-4(b) (West 2019); S.F., CAL., CODE § 12W.7 (2019); SEATTLE, WASH., CODE § 14.16.055(D) (2019). Massachusetts's paid family and medical leave law provides a six-month rebuttable presumption from either use of leave or various enforcement-related actions. MASS. GEN. LAWS ANN. ch. 175M, § 9(c) (West 2019).

270. ARIZ. REV. STAT. ANN. § 23-364(B) (2019).

position or participation in proceedings or inquiries as described in this subsection.²⁷¹

Other laws are less specific regarding how this presumption can be rebutted; because these types of provisions are relatively new, case law will still be needed to flesh out these requirements.²⁷² However, until and unless the employer provides the needed evidence, employees will have the benefit of assumed causation (i.e. the presumption of retaliation), easing the difficulty of bringing an action based on retaliation.

F. *The Right Not to Be Interfered With*

Finally, there is the right not to have one's rights interfered with—in other words, the right to be able to use one's leave rights without obstacle. We include in this category protections that use the word “interfere” as well as those that use synonyms like “deny” or “restrain.” This right, at its core, is a right *not* to have an employer prevent you from using your other rights or limit your ability to do so. For example, an employer might interfere with one's right to take leave—be away from the workplace—if the employer simply denied an employee's request to take leave.

Like the right against retaliation, the right against interference is a negative right. The right is framed as a *prohibition* on the employer taking particular actions. Also like the right against retaliation, the scope of this right turns on what underlying affirmative rights are protected. Therefore, in analyzing the availability of a prohibition on interference, the key question is what actions and rights are employers prohibited from interfering with or denying—in particular, as with retaliation, whether the list of protected rights includes taking leave.

The FMLA, offering a fairly typical formulation, states that “[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.”²⁷³ This right has been further fleshed out in regulations.²⁷⁴ Most state FMLAs also prohibit interference with leave rights or rights under their laws generally.²⁷⁵

271. MASS. GEN. LAWS ANN. ch. 175M, § 9(c) (LexisNexis 2019).

272. See, e.g., CAL. LAB. CODE § 246.5(c)(2) (West 2019); D.C. CODE ANN. § 32-531.08(d) (West 2019); N.J. STAT. ANN. § 34:11D-4(b) (West 2019).

273. 29 U.S.C.A. § 2615(a)(1) (2012).

274. See 29 C.F.R. § 825.220 (2018).

275. See, e.g., CONN. GEN. STAT. ANN. § 31-51pp(a)(1) (West 2019); HAW. REV. STAT. ANN. § 398-8(a) (West 2019); WIS. STAT. ANN. § 103.10(11)(a) (West 2019); see also OR. REV. STAT. ANN. § 659A.183(1) (West 2018) (making it illegal to “[d]eny family leave to which an eligible employee is entitled”).

Prohibitions on interference with leave rights are also common, though not universal, among sick time laws.²⁷⁶ Similarly, rights against interference with leave rights are found in many military family leave laws²⁷⁷ and some domestic violence leave laws²⁷⁸ and pregnancy and parenting leave laws.²⁷⁹

In other types of leave laws, broad anti-interference rights that protect leave use are much rarer. For example, among state service member laws, one prohibits employers from refusing a leave of absence for the protected purpose²⁸⁰ and one prohibits employers from imposing additional conditions on military leave.²⁸¹ Interference provisions that do not protect leave explicitly are more common than those specifically referencing leave among state service member laws: two laws prohibit employers from refusing permission to attend particular required military service,²⁸² and others more generally prohibit employer acts that could obstruct service or similar non-leave acts.²⁸³ In practice, these relatively specific prohibitions on employer actions may offer similar protections to explicit leave protections, given that allowing or not allowing an employee to take time away from work is the most likely way an employer would affect an employee's ability to serve.

276. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-374(A) (2019); MD. CODE ANN., LAB. & EEMPL. § 3-1309(b) (LexisNexis 2019); MINNEAPOLIS, MINN., CODE § 40.240(a) (2019). California offers a somewhat narrower protection, stating as part of what more generally reads as a prohibition on retaliation: "An employer shall not deny an employee the right to use accrued sick days . . ." CAL. LAB. CODE § 246.5(c)(1) (West 2019).

277. *See, e.g.*, IND. CODE ANN. § 22-2-13-15 (West 2019); ME. REV. STAT. ANN. tit. 26, § 814(7)(a) (2019); NEB. REV. STAT. ANN. § 55-506(1) (West 2019); *see also* OR. REV. STAT. ANN. § 659A.096(1) (West 2018) (making it illegal to "[d]eny military family leave to an employee who is entitled to such leave").

278. *See* COLO. REV. STAT. § 24-34-402.7(3)(a) (2019); 820 ILL. COMP. STAT. ANN. 180/20(f)(1)(A) (LexisNexis 2019); N.M. STAT. ANN. § 50-4A-3 (LexisNexis 2019); PHILA., PA., CODE § 9-3207(1)(a) (2016).

279. California is the only state that uses the term interference. CAL. GOV'T CODE § 12945(a)(4) (Deering 2019). Yet other states make it illegal for an employer to "refuse" a leave, providing at least a limited right against interference with the right to leave. *See, e.g.*, IOWA CODE ANN. § 216.6(2)(e) (West 2019) ("shall not refuse to grant"); LA. STAT. ANN. § 23:342(2) (2019) ("refuse to allow").

280. ARIZ. REV. STAT. ANN. § 26-168(A) (2019).

281. 330 ILL. COMP. STAT. ANN. 61/5-5(2) (West 2019).

282. KAN. STAT. ANN. § 48-222 (West 2019); OKLA. STAT. ANN. tit. 44, § 71 (West 2019).

283. *See, e.g.*, IOWA CODE ANN. § 29A.43(1) (West 2019) ("An employer, or agent of an employer, shall not . . . hinder or prevent the officer or enlisted person or member of the civil air patrol from performing any military service or civil air patrol duty the person is called upon to perform by proper authority.").

Only one voting leave law explicitly prohibits interference with leave rights,²⁸⁴ while one other prohibits employers from refusing an employee the protected right.²⁸⁵ Five state paid family and medical leave laws prohibit interference with rights under their laws, but those rights are limited by the availability of substantive rights under those laws.²⁸⁶ A few jury duty leave laws prohibit employers from interfering with jury service, but do not mention leave specifically.²⁸⁷ Only one crime victim law prohibits interference.²⁸⁸

The right against interference can become especially salient in an enforcement context, because an interference action can be a means to enforce other rights. This is exemplified by the FMLA. The statute's enforcement provision provides a private right of action for violations of § 2615, which includes the interference provision, but not for violations of other sections, such as § 2612 (containing the right to twelve

284. MINN. STAT. ANN. § 204C.04(1) (West 2019)

285. 10 ILL. COMP. STAT. ANN. 5/17-15 (West 2019).

286. Massachusetts prohibits a broad range of actions "with the purpose of interfering with the exercise of any right to which such employee is entitled under this chapter" as part of its anti-retaliation provision. MASS. GEN. LAWS ANN. ch. 175M, § 9(a) (LexisNexis 2019). Oregon makes it illegal to "[d]eny leave or interfere with any other right to which an eligible employee is entitled" under the law. H.B. 2005, 80th Leg. Assemb., Reg. Sess. § 11(b) (Or. 2019). Washington State, which provides rights to reinstatement and continuation of health insurance to some but not all employees protected under its law, broadly prohibits interference with rights under the law, WASH. REV. CODE ANN. § 50A.04.085(1)(a) (LexisNexis 2019). The District of Columbia's law also prohibits interference, D.C. CODE § 32-541.10(a) (2019), but explicitly states that its paid leave law does not provide job protection, *id.* § 32-541.07(c). Connecticut's paid family and medical leave law does not create a new standalone right against interference; however, as noted above, *see* note 71, *supra*, the statute creating Connecticut's paid family and medical leave program also significantly expanded coverage under the Connecticut FMLA. The Connecticut FMLA prohibits interference. CONN. GEN. STAT. ANN. § 31-51pp(a)(1) (West 2019).

287. COLO. REV. STAT. ANN. § 13-71-134(1) (West 2019) ("An employer shall make no demands upon any employed juror which will substantially interfere with the effective performance of juror service."); MASS. GEN. LAWS ANN. ch. 234A, § 61 (West 2019) ("An employer shall not . . . do any other intentional act which will substantially interfere with the availability, effectiveness, attentiveness, or peace of mind of the employee during the performance of his juror service."); *see also* ARIZ. REV. STAT. ANN. § 21-236(B) (2019) ("An employer shall not refuse to permit an employee to serve as a juror.").

288. *See* ALASKA STAT. ANN. § 12.61.010(6) (West 2019) (stating that crime victims have "the right to cooperate with the criminal justice process . . . without interference in any form by the employer of the victim of crime"). In addition, Indiana's law states that a person who engages in various adverse actions against an employee "because the employee has received or responded to a subpoena in a criminal proceeding commits interference with witness service." IND. CODE ANN. § 35-44.1-2-12 (West 2019). Despite the use of the term interference, the language of the provision is better described as prohibiting retaliation than interference in the way those terms are used in this Article.

weeks of leave) or § 2614 (containing the right to reinstatement and to continuation of health insurance).²⁸⁹ As a result, in practice, employees must enforce their affirmative rights under the law by way of an interference action.²⁹⁰ An interference action is distinct from the other recognized cause of action under the FMLA, retaliation, because it does not (or should not) require proof of an employer's intent.²⁹¹ Instead, the interference action turns solely on the denial of a substantive protected right, like the right to reinstatement or the right to leave.²⁹²

III.

USING THE LEAVE RIGHTS FRAMEWORK TO EVALUATE LAW AND POLICY

Identifying the distinct but related rights at play in providing leave is an important first step towards a more robust framework to analyze workplace leave rights. The next step, then, is applying that framework. This can be done both by analyzing the rights provided by existing law—across the board and as to individual workers' particular situations—and in evaluating proposed policy solutions.

This Article has already categorized many existing leave laws. Yet with the benefit of this more detailed set of tools, we can introduce other types of laws to the conversation that may provide important leave rights. Consider laws that provide a right to

289. See 29 U.S.C. § 2617(a) (2012).

290. See, e.g., *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1122 (9th Cir. 2001) (noting that Congress prohibited interference to implement the objective of creating new substantive rights to leave); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998); Kate Webber, *Families Are More Popular Than Feminism: Exploring the Greater Judicial Success of Family and Medical Leave Laws*, 32 COLUM. J. GENDER & L. 145, 153 (2016) ("An interference claim is a denial of benefits claim that allows an employee to sue if the employer fails to provide the statutorily guaranteed leave.").

291. See, e.g., *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 507 (6th Cir. 2006) ("The employer's intent is not a relevant part of the entitlement inquiry under § 2615." (citation omitted)); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960 (10th Cir. 2002) (stating that in an interference action "a deprivation of this right is a violation regardless of the employer's intent"). But see Sandra F. Sperino, *Litigating the FMLA in the Shadow of Title VII*, 8 FLA. INT'L U. L. REV. 501, 508–10 (2013) (arguing that at least some courts have blurred the lines through use of burden shifting in interference actions).

292. See, e.g., *Hodgens*, 144 F.3d at 159. As explained in *Hodgens*,

The issue is simply whether the employer provided its employee the entitlements set forth in the FMLA—for example, a twelve-week leave or reinstatement after taking a medical leave. Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer.

Id.

accommodations, such as for people with disabilities,²⁹³ in connection with pregnancy,²⁹⁴ or when employees or their families are dealing with domestic violence.²⁹⁵ The federal Americans with Disabilities Act (ADA)²⁹⁶ offers one particularly well-examined example. Though the word “leave” appears nowhere in the text of the ADA, it is well established that under certain circumstances, a period of leave can be a type of accommodation to which employees are entitled.²⁹⁷ The ADA can, therefore, provide at least one type of leave right—the generic right to be away from the workplace.

However, rather than following an explicit statutory rule regarding length of leave, under the ADA courts must engage in a fact-specific inquiry as to whether a particular length of leave is a reasonable accommodation under the circumstances and the question of how much leave can be allowed has drawn debate among courts.²⁹⁸ This ambiguity makes the right to leave at least less certain under the ADA

293. See, e.g., CAL. GOV'T CODE § 12940(m)(1) (West 2019); N.Y. EXEC. LAW § 296(3) (McKinney 2019).

294. See, e.g., NEV. REV. STAT. ANN. §§ 613.4353–.4383 (West 2019); W. VA. CODE ANN. §§ 5-11B-1 to -7 (West 2019).

295. See, e.g., OR. REV. STAT. ANN. § 659A.290(1)(a) (West 2018).

296. 42 U.S.C. § 12101 (2012).

297. See, e.g., *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (“Unpaid medical leave may be a reasonable accommodation under the ADA.”); *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1110 (10th Cir. 1999) (“An allowance of time for medical care or treatment may constitute a reasonable accommodation.” (quoting *Rascon v. U.S. W. Commc’s, Inc.*, 143 F.3d 1324, 1333–34 (10th Cir. 1998))); Eric C. Surette, Annotation, *Employee’s Unpaid Leave as Reasonable Accommodation Under Americans with Disabilities Act of 1990*, 42 U.S.C.A. §§ *et seq.*, 8 A.L.R. Fed. 3d Art. 2 (2016) (“The general rule is that unpaid medical leave may be a reasonable accommodation under the proper circumstances although an unpaid leave of absence for an indefinite duration is not a reasonable accommodation.”).

298. For example, in *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018), the Seventh Circuit held that “a long-term leave of absence cannot be a reasonable accommodation” under the ADA. In the case, the “long term” leave in question was for a period of a few months, a length the Seventh Circuit concluded was in the exclusive domain of the FMLA. *Id.* Other courts have determined what leave durations are likely *not* reasonable accommodations, without setting clear rules as to what the maximum permissible length would be, though this area is still unsettled. See, e.g., *Walsh v. United Parcel Serv.*, 201 F.3d 718, 727 (6th Cir. 2000) (“This suggests that it would be very unlikely for a request for medical leave exceeding a year and a half in length to be reasonable.”); *Corder v. Lucent Techs. Inc.*, 162 F.3d 924, 928 (7th Cir. 1998) (“[N]othing in the ADA requires an employer to give an employee indefinite leaves of absence.”). *But see* *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1439 (N.D. Cal. 1996), *aff’d sub nom.* *Norris v. Sysco Corp.*, 191 F.3d 1043 (9th Cir. 1999) (“Upon reflection, we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a ‘reasonable accommodation’ under the ADA.”); *Cehrs v. Ne. Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) (“We find the above analysis [in *Norris*] persuasive.”).

than under laws providing a specific duration. Similarly, factoring into the reasonableness analysis, employers are not required to provide accommodations under the ADA that would constitute an undue hardship to the employer, further cabining the right to leave.²⁹⁹

We can also evaluate whether accommodation laws provide other leave rights. For instance, with regard to the right to pay and the ADA, EEOC guidance specifies that reasonable “accommodations could include . . . providing additional unpaid leave for necessary treatment,”³⁰⁰ suggesting that pay is at least not an essential element of leave under the ADA. The point is not to classify a particular law as bad or good, but rather that knowing which leave rights (and to what extent) the law provides enables us to evaluate whether that leave meets the needs of a particular employee or of employees in general.

Similarly, we can consider the extent to which workers’ compensation laws provide leave rights. Most prominently, state workers’ compensation laws provide wage replacement benefits for employees who are temporarily totally disabled, meaning those who, for some period of time, have totally stopped working due to their injury or illness but who are expected to be able to work again at some point in the future.³⁰¹ This constitutes a right to pay, similar to that offered by state paid family and medical leave laws, particularly those built on temporary disability insurance (a close cousin to this type of workers’ compensation benefit).³⁰²

By examining the particular protections offered by a given state’s workers’ compensation law, we can also determine whether the law offers other leave rights and, if so, evaluate their strength. For instance, many state workers’ compensation laws offer anti-retaliation protections.³⁰³ Yet, in many if not most cases, these provisions do not specify leave as a protected act, instead prohibiting retaliation only where it is caused by a worker accessing monetary benefits or participating in an enforcement action.³⁰⁴ As a result, these provisions do not specifically protect the right to leave and thus offer at best limited

299. 42 U.S.C. § 12112(b)(5)(A) (2012).

300. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. § 1630.2(o) (2018).

301. *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 9-621 (LexisNexis 2019); UTAH CODE ANN. § 34A-2-410 (LexisNexis 2019). Note that, in this context, the term “disabled” is used as a term of art with a specific legal meaning.

302. For further discussion of the relationship between workers’ compensation law and temporary disability insurance, see Williamson, *supra* note 5, at 31–35.

303. *See, e.g.*, OKLA. STAT. ANN. tit. 85A, § 7 (West 2019); WASH. REV. CODE ANN. § 51.48.025 (LexisNexis 2019).

304. *See, e.g.*, ALA. CODE § 25-5-11.1 (LexisNexis 2019); TEX. LAB. CODE ANN. § 451.001 (West 2019).

protections to employees facing adverse actions as a result of taking time off to recover from workplace injuries.³⁰⁵ Using the tools laid out in this Article, we could take a particular workers' compensation statute through each of the remaining four rights and determine whether and to what extent it provides each right. By doing so, we could better understand what rights workers already have and which they may still need.

Yet statute-level analysis is not the only use for this framework. When it comes to an individual, such as in a direct services context, we can and must look across multiple laws to determine what rights that person has in a particular situation. In some cases, though any one statute may provide only some of the protections the person needs, the various local, state, and federal statutes covering that person may collectively provide all the needed protections. This is especially likely to come up where a worker has the right to pay under one law (such as a state paid family and medical leave law or even workers' compensation) and other leave rights, such as the right to reinstatement or continuation of health insurance, under another (such as the FMLA or one of its state counterparts). In that scenario, the worker ultimately has a robust set of protections, but appropriately advising that person requires understanding the full picture rather than myopically focusing on a single statute. When we speak of individuals, therefore, we must look at the leave rights they have in a given situation holistically.

This is not to say that all roads to protected rights are equal. As compared to providing the complete suite of rights—or all those rights that are needed in a particular situation—through a single law, relying on a combination of laws has significant drawbacks. First, even where a particular *worker* is covered by multiple statutes, not all of that person's leave needs may be covered or covered to the same extent, creating gaps. This has been especially highlighted in California, which has several different yet potentially relevant laws.³⁰⁶

Consider Mary, who needs leave to cover for her seriously ill spouse. Mary is covered by both the California Family Rights Act (CFRA),³⁰⁷ the state's equivalent of the FMLA,³⁰⁸ and California's

305. See *supra* text accompanying notes 256–262.

306. See Sara Cohen, *Have Your Cake and Eat It Too: How Paid Maternity Leave in the United States Could End the Choice Between Career & Motherhood*, 36 WOMEN'S RTS. L. REP. 1, 2 (2014) (“California’s system is problematic, in part, because of its inability to offer job protection and paid leave through one uniform law.”).

307. CAL. GOV'T CODE § 12945.2 (West 2019).

308. Like the FMLA, the CFRA provides a right to up to twelve weeks of unpaid leave to covered employees in order to address one's own or a family member's serious health needs or bond with a new child. *Id.*

paid family and medical leave law.³⁰⁹ CFRA will provide her with several important leave rights—the right to be away from work, the right to reinstatement, the right to continuation of health insurance, protection against retaliation—but not pay.³¹⁰ Conversely, the paid family leave program will provide her with pay, but not the other rights.³¹¹

However, the two laws are not precisely synced up: for example, if Mary needs nine weeks of leave to care for her spouse, she will exhaust her right to pay after six weeks³¹² even though her other rights will continue for up to twelve weeks.³¹³ If Mary instead needed leave for her own serious health needs, which rendered her unable to work for multiple months, she would encounter the reverse problem. Under the state's paid family and medical leave law (temporary disability insurance), she would have the right to pay for up to fifty-two weeks, but her CFRA rights (including those that protect her job) would run out after twelve weeks.³¹⁴ Because CFRA and the paid family and medical leave law are independent of one another, if Mary's need for leave goes beyond twelve weeks, she could end up in a situation where she continues to receive pay for the whole time but does not have a right to return to work following her leave. Therefore, even though Mary is covered by laws that provide multiple leave rights, she still faces significant gaps.

Moreover, successfully using those rights requires that Mary understand and be able to navigate at least two different statutes, with different eligibility criteria, different rules for use, and different durations. Even in a best-case scenario, with access to reliable, understandable information and resources, that is a heavy burden to place on any worker; for low-income workers, immigrant workers, and others who are especially vulnerable in the workplace, that burden weighs even heavier. Compounding the problem, Mary's employer may well be—in good faith or otherwise—confused or misinformed about which rights apply to her situation, making it even more difficult for her to use the rights she actually has.

Second and more pressingly, not all people are covered by all laws. Imagine Mark, an employee with similar needs to Mary. CFRA

309. CAL. UNEMP. INS. CODE §§ 2601–3306 (Deering 2019).

310. See CAL. GOV'T CODE § 12945.2(a) (West 2019) (leave and reinstatement); *id.* § 12945.2(f) (health insurance); *id.* § 12945.2(l) (retaliation).

311. See, e.g., CAL. UNEMP. INS. CODE § 2655 (Deering 2019) (specifying benefit level).

312. See *id.* § 3301(d).

313. See CAL. GOV'T CODE § 12945.2(a) (West 2019).

314. See CAL. UNEMP. INS. CODE § 2653 (Deering 2019).

and the California paid family and medical leave law have very different eligibility criteria, meaning that people may be covered by one law and not by the other.³¹⁵ If Mark worked for a small employer (for instance, one with only ten employees) or had been at his employer for less than a year, he could be covered by the paid family and medical leave program—entitled to the right to pay—but would not be covered by CFRA, meaning his job and other rights would not be protected.³¹⁶ Conversely, if Mark worked in many public sector jobs, for example for a city government, he could be covered by CFRA (which includes public sector workers) but not the paid family and medical leave program (which excludes most public sector workers), giving him one set of leave rights but no right to pay.³¹⁷ While Mark is hypothetical, his experience is not—many employees experience exactly these types of gaps, particularly between pay and other leave rights. Simply put, where there is any daylight between the law providing one needed right and the law providing others, some people will inevitably fall through those cracks.

With those lessons in mind, we can also analyze new policy proposals to determine which rights they do and do not provide and evaluate them accordingly. For example, thanks to many years of hard work, many states are now looking to enact their own paid family and medical leave laws, including successful campaigns in 2019 in Connecticut and Oregon.³¹⁸ While federal legislation may still be farther away, its prospects for passage are now much less distant than they once seemed.³¹⁹ In both these scenarios, keeping in mind the six leave rights and the important questions to ask about each will enable advocates and policymakers to make better, more informed choices about the legal protections they include to achieve their goals. This will

315. To be eligible for coverage under CFRA, an employee must work for an employer with at least fifty employees, CAL. GOV'T CODE § 12945.2(b) (West 2019), with whom the employee has been employed for at least one year and for whom the employee has worked at least 1,250 hours in the last twelve months, *id.* § 12945.2(a). An employee is eligible for benefits under California's paid leave law when that employee has earned at least \$300 in wages from covered employers. CAL. UNEMP. INS. CODE § 2652 (Deering 2019).

316. Compare CAL. UNEMP. INS. CODE § 2652 (Deering 2019) (paid leave benefits eligibility), with CAL. GOV'T CODE § 12945.2(a)-(b) (West 2019) (CFRA eligibility).

317. Compare CAL. GOV'T CODE § 12945.2(c)(2)(B) (West 2019) (covering public sector employees for CFRA), with CAL. UNEMP. INS. CODE § 2606(a) (Deering 2019) (excluding most public sector employees from coverage for paid leave benefits).

318. See 2019 Conn. Legis. Serv. 19-25 (West); H.B. 2005, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

319. See, e.g., Maya Salam, *Could the U.S. Get Paid Family Leave? It's Looking Better than Ever*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/paid-family-leave.html>.

sometimes require making hard choices in the face of political realities, but we are all better off when those are at least informed choices. We can do better than simply saying we support “leave.” We can concretely, collectively determine what we mean by leave, and write—and pass—laws that provide it.

Similarly, as the way we work changes, we can think critically about what leave rights workers need now, especially those operating outside the traditional employer/employee framework. This Article has, for the most part, focused on employees, rather than the broader category of workers, reflecting the fact that until very recently workplace leave laws have been limited to employees, both legally and conceptually. But the conversation about leave and the specific rights that workers in different situations need cannot and should not stop there. For the truly self-employed, including freelancers and independent contractors working with real autonomy and control over their time, the right to leave—to be absent from the workplace—may be unnecessary and even irrelevant. But these workers may still need and benefit from other leave rights, like the right to pay. For this reason, many state paid family and medical leave programs are starting to provide the option for self-employed workers to opt into coverage through their social insurance systems.³²⁰ For workers operating in the greyer areas, like those working through app-based platforms or other parts of the “gig economy,” who may have less control over their work, other rights may be more relevant and necessary.³²¹ Fully addressing these questions—and the related broader questions around worker classification—is beyond the scope of this Article. Yet at a minimum, disaggregating the rights we are talking about can better inform the conversation.

CONCLUSION

The United States has a long way to go in guaranteeing all workers the leave rights they need. Yet in light of years of rapid progress and exciting prospects on the horizon, there has never been a more appropriate time to examine and explore what a true, comprehensive leave guarantee would look like. Understanding the different leave

320. For a more detailed discussion of coverage of the self-employed under paid family and medical leave laws, see generally MOLLY WESTON WILLIAMSON, SHERRY LEIWANT, & JULIE KASHEN, *A BETTER BALANCE, CONSTRUCTING 21ST CENTURY RIGHTS FOR A CHANGING WORKPLACE: PAID FAMILY AND MEDICAL LEAVE & SELF-EMPLOYMENT* (2019), <https://www.abetterbalance.org/resources/report-constructing-21st-century-rights-for-a-changing-workforce-a-policy-brief-series/>.

321. *See id.* at 11–12.

rights, including their differences and their dimensions, gives lawyers and policymakers a richer toolkit to understand the rights workers have now and pursue the rights they need tomorrow. Perhaps by doing so, we can, as a country, move beyond talking about leave and into actually taking it.

STATUTORY APPENDIX

TABLE 1. FMLA-TYPE LAWS

A. Federal Law	
29 U.S.C. §§ 2601–2654 (2012)	
B. State Laws	
1	CAL. GOV'T CODE § 12945.2 (West 2019)
2	CONN. GEN. STAT. ANN. §§ 31-51kk to -51qq (West 2019)
3	D.C. CODE §§ 32-501 to -517 (2019)
4	HAW. REV. STAT. ANN. §§ 398-1 to -11 (LexisNexis 2019)
5	ME. REV. STAT. ANN. tit. 26, §§ 843–848 (2019)
6	N.J. STAT. ANN. §§ 34:11b-1 to -16 (West 2019)
7	OR. REV. STAT. ANN. §§ 659A.150–.186 (West 2018)
8	28 R.I. GEN. LAWS §§ 28-48-1 to -12 (2019)
9	WASH. REV. CODE ANN. §§ 49.78.020–.904 (West 2019)
10	WIS. STAT. ANN. § 103.10 (West 2019)

TABLE 2. PAID FAMILY AND MEDICAL LEAVE LAWS

1	CAL. UNEMP. INS. CODE §§ 2601–3306 (West 2019)
2	2019 Conn. Legis. Serv. 19-25 (West)
3	D.C. CODE §§ 32-541.01–.12 (2019)
4	MASS. GEN. LAWS ANN. ch. 175M, §§ 1–11 (West 2019)
5	N.J. STAT. ANN. §§ 43:21-25 to -31 (West 2019)
6	H.B. 2005, 80th Leg. Assemb., Reg. Sess. (Or. 2019)
7	N.Y. WORKERS' COMP. LAW §§ 200–242 (Consol. 2019)
8	28 R.I. GEN. LAWS §§ 28-40-1 to -18 (2019)
9	WASH. REV. CODE ANN. §§ 50A.04.005–.900 (West 2019)

TABLE 3. PAID SICK TIME LAWS

A. State Laws	
1	ARIZ. REV. STAT. ANN. §§ 23-371 to -381 (2019)
2	CAL. LAB. CODE §§ 245–249 (Deering 2019)
3	CONN. GEN. STAT. ANN. §§ 31-57r to -57x (West 2019)
4	D.C. CODE §§ 32-531.01–.16 (2019)
5	MASS. GEN. LAWS ANN. ch. 149, §§ 148C–148D (West 2019)
6	MD. CODE ANN., LAB. & EMPL. §§ 3-1301 to -1311 (LexisNexis 2019)
7	N.J. STAT. ANN. §§ 34:11D-1 to -11 (West 2019)
8	OR. REV. STAT. ANN. §§ 653.601–.661 (West 2018)
9	28 R.I. GEN. LAWS § 28-57-1 to -15 (2019)
10	VT. STAT. ANN. tit. 21, §§ 481–487 (2019)
11	WASH. REV. CODE ANN. §§ 49.46.200–.210 (West 2019)
B. California Local Laws	
1	BERKELEY, CAL., CODE §§ 13.100.010–.120 (2016)
2	EMERYVILLE, CAL., CODE §§ 5-37.01–.09 (2019)
3	L.A., CAL., CODE §§ 187.00–.12 (2016)
4	OAKLAND, CAL., CODE §§ 5.92.010–.050 (2019)
5	SAN DIEGO, CAL., CODE §§ 39.0101–.0116 (2016)
6	S.F., CAL., ADMIN. CODE §§ 12W.1–.16 (2019)
7	SANTA MONICA, CAL., CODE §§ 4.62.25 (2016)
C. Other Local Laws	
1	COOK COUNTY, ILL., CODE §§ 42-1 to -10 (2016)
2	CHI., ILL., CODE § 1-24-045 (2019)
3	MONTGOMERY COUNTY, MD., CODE §§ 27-76 to -82 (2019)
4	Duluth, Minn., Ordinance 10,571 (May 30, 2018) (to be codified at DULUTH, MINN., LEGIS. CODE ch. 29E)
5	MINNEAPOLIS, MINN., CODE §§ 40.10–.90 (2019)
6	SAINT PAUL, MINN., LEGIS. CODE §§ 233.01–.21 (2019)
7	N.Y.C., N.Y., ADMIN. CODE §§ 20-911 to -924 (2017)
8	WESTCHESTER COUNTY, N.Y., CODE §§ 700.01–.18 (2019)
9	PHILA., PA., CODE §§ 9-4101 to -4116 (2016)
10	SAN ANTONIO, TEX., CODE §§ 15-269 to -280 (2018)
11	SEATTLE, WASH., CODE §§ 14.16.010–.130 (2019)
12	TACOMA, WASH., CODE §§ 18.10.010–.100 (2018)

TABLE 4. JURY DUTY LEAVE LAWS

A. Federal Law	
28 U.S.C. § 1875(c) (2012)	
B. State Laws	
1	ALA. CODE § 12-16-8 (2019)
2	ALASKA STAT. § 09.20.037 (2019)
3	ARIZ. REV. STAT. ANN. § 21-236 (2019)
4	ARK. CODE ANN. § 16-31-106 (2019)
5	CAL. LABOR CODE § 230 (Deering 2019)
6	COLO. REV. STAT. §§ 13-71-126, -134 (2019)
7	CONN. GEN. STAT. ANN. §§ 51-247, -247a (West 2019)
8	DEL. CODE ANN. tit. 10, § 4515 (2019)
9	D.C. CODE § 11-1913 (2019)
10	FLA. STAT. ANN. § 40.271 (LexisNexis 2019)
11	GA. CODE ANN. § 34-1-3 (2019)
12	HAW. REV. STAT. ANN. § 612-25 (LexisNexis 2019)
13	IDAHO CODE ANN. § 2-218 (West 2019)
14	705 ILL. COMP. STAT. ANN. 305/4.1 (West 2019)
15	IND. CODE ANN. § 33-28-5-24.3 (LexisNexis 2019)
16	IOWA CODE ANN. § 607A.45 (West 2019)
17	KAN. STAT. ANN. § 43-173 (West 2019)
18	KY. REV. STAT. ANN. § 29A.160 (LexisNexis 2019)
19	LA. STAT. ANN. § 23:965 (2019)
20	ME. REV. STAT. ANN. tit. 14, § 1218 (2019)
21	MD. CODE ANN., CTS. & JUD. PROC. § 8-501 (West 2019)
22	MASS. GEN. LAWS ANN. ch. 234A, § 61 (West 2019)
23	MICH. COMP. LAWS ANN. § 600.1348 (West 2019)
24	MINN. STAT. ANN. § 593.50 (West 2019)
25	MISS. CODE ANN. § 13-5-35 (2019)
26	MO. ANN. STAT. § 494.460 (West 2019)
27	NEB. REV. STAT. ANN. § 25-1640 (LexisNexis 2019)
28	NEV. REV. STAT. ANN. § 6.190 (LexisNexis 2019)
29	N.H. REV. STAT. ANN. § 500-A:14 (2019)
30	N.J. STAT. ANN. § 2B:20-17 (West 2019)
31	N.M. STAT. ANN. § 38-5-18 (LexisNexis 2019)
32	N.Y. JUD. LAW § 519 (Consol. 2019)

33	N.C. GEN. STAT. § 9-32 (2018)
34	N.D. CENT. CODE § 27-09.1-17 (2019)
35	OHIO REV. CODE ANN. § 2313.19 (LexisNexis 2019)
36	OKLA. STAT. ANN. tit. 38, § 34 (West 2019)
37	OR. REV. STAT. ANN. § 10.090 (West 2018)
38	42 PA. STAT. AND CONS. STAT. ANN. § 4563 (West 2019)
39	9 R.I. GEN. LAWS § 9-9-28 (2019)
40	S.C. CODE ANN. § 41-1-70 (2019)
41	S.D. CODIFIED LAWS §§ 16-13-41.1 to -41.2 (2019)
42	TENN. CODE ANN. § 22-4-106 (2019)
43	TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (West 2019)
44	UTAH CODE ANN. § 78B-1-116 (LexisNexis 2019)
45	VT. STAT. ANN. tit. 21, § 499(a) (2019)
46	VA. CODE ANN. § 18.2-465.1 (2018)
47	WASH. REV. CODE ANN. § 2.36.165 (West 2019)
48	W. VA. CODE ANN. § 52-1-21 (2019)
49	WIS. STAT. ANN. § 756.255 (West 2019)
50	WYO. STAT. ANN. § 1-11-401 (2019)

TABLE 5. VOTING LEAVE LAWS

1	ALA. CODE § 17-1-5 (2019)
2	ALASKA STAT. § 15.56.100(a) (2019)
3	ARIZ. REV. STAT. ANN. § 16-402 (2019)
4	ARK. CODE ANN. § 7-1-102 (2019)
5	CAL. ELEC. CODE § 14000 (West 2019)
6	COLO. REV. STAT. § 1-7-102 (2019)
7	GA. CODE ANN. § 21-2-404 (2019)
8	10 ILL. COMP. STAT. ANN. 5/17-15 (West 2019)
9	IOWA CODE ANN. § 49.109 (West 2019)
10	KAN. STAT. ANN. § 25-418 (West 2019)
11	KY. REV. STAT. ANN. § 118.035(2)–(3) (West 2019)
12	MD. CODE ANN., ELEC. LAW § 10-315 (West 2019)
13	MINN. STAT. ANN. § 204C.04 (West 2019)
14	MO. ANN. STAT. § 115.639 (West 2019)
15	NEB. REV. STAT. ANN. § 32-922 (West 2019)
16	NEV. REV. STAT. ANN. § 293.463 (West 2019)
17	N.M. STAT. ANN. § 1-12-42 (West 2019)
18	N.Y. ELEC. LAW § 3-110 (McKinney 2019)
19	OHIO REV. CODE ANN. § 3599.06 (LexisNexis 2019)
20	OKLA. STAT. ANN. tit. 26, § 7-101 (West 2019)
21	S.D. CODIFIED LAWS § 12-3-5 (2019)
22	TENN. CODE ANN. § 2-1-106 (2019)
23	TEX. ELEC. CODE ANN. § 276.004 (West 2019)
24	UTAH CODE ANN. § 20A-3-103 (LexisNexis 2019)
25	W. VA. CODE ANN. § 3-1-42 (LexisNexis 2019)
26	WIS. STAT. ANN. § 6.76 (West 2019)
27	WYO. STAT. ANN. § 22-2-111 (2019)

TABLE 6. CRIME VICTIM OR WITNESS LEAVE LAWS

1	ALA. CODE § 15-23-81 (2019)
2	ALASKA STAT. § 12.61.107 (2019)
3	ARIZ. REV. STAT. ANN. § 13-4439 (2019)
4	ARK. CODE ANN. § 16-90-1105 (2019)
5	COLO. REV. STAT. ANN. § 24-4.1-303(8) (West 2019)
6	CONN. GEN. STAT. ANN. § 54-85b (West 2019)
7	DEL. CODE ANN. tit. 11, § 9409 (2019)
8	FLA. STAT. ANN. § 92.57 (West 2019)
9	GA. CODE ANN. § 34-1-3(a) (2019)
10	HAW. REV. STAT. ANN. § 621-10.5 (LexisNexis 2019)
11	IND. CODE ANN. § 35-44.1-2-12 (West 2019)
12	IOWA CODE ANN. § 915.23 (West 2019)
13	MD. CODE ANN., CRIM. PROC. § 11-102 (2019)
14	MASS. GEN. LAWS ANN. ch. 258B, § 3(l) (West 2019)
15	MICH. COMP. LAWS ANN. § 780.790 (West 2019)
16	MINN. STAT. ANN. § 611A.036 (West 2019)
17	MISS. CODE ANN. § 99-43-45 (2019)
18	MO. ANN. STAT. § 595.209.1(14) (West 2019)
19	MONT. CODE ANN. § 46-24-205 (West 2019)
20	NEV. REV. STAT. ANN. § 50.070 (West 2019)
21	N.H. REV. STAT. ANN. § 275:62 (2019)
22	N.Y. PENAL LAW § 215.14 (Consol. 2019)
23	N.D. CENT. CODE § 27-09.1-17 (2019)
24	OHIO REV. CODE ANN. § 2930.18 (LexisNexis 2019)
25	OR. REV. STAT. ANN. § 659A.192 (West 2018)
26	18 PA. STAT. AND CONS. STAT. ANN. § 4957 (West 2019)
27	12 R.I. GEN. LAWS § 12-28-13 (2019)
28	S.C. CODE ANN. § 16-3-1550 (2019)
29	UTAH CODE ANN. § 78B-1-132 (West 2019)
30	VT. STAT. ANN. tit. 13, § 5313 (2019); VT. STAT. ANN. tit. 21, § 499 (2019)
31	VA. CODE ANN. § 18.2-465.1 (2018)
32	WIS. STAT. ANN. § 103.87 (West 2019)
33	WYO. STAT. ANN. § 1-40-209 (2019)

TABLE 7. DOMESTIC VIOLENCE LEAVE LAWS

A. State Laws	
1	CAL. LAB. CODE § 230(c)–(d) (West 2019); CAL. LAB. CODE § 230.1 (West 2019)
2	COLO. REV. STAT. § 24-34-402.7 (2019)
3	FLA. STAT. ANN. § 741.313 (LexisNexis 2019)
4	HAW. REV. STAT. ANN. § 378-72 (LexisNexis 2019)
5	820 ILL. COMP. STAT. ANN. 180/20 (LexisNexis 2019)
6	KAN. STAT. ANN. § 44-1132 (West 2019)
7	ME. REV. STAT. ANN. tit. 26, § 850(1) (2019)
8	N.M. STAT. ANN. §§ 50-4A-1 to -8 (LexisNexis 2019)
9	N.C. GEN. STAT. § 50B-5.5 (2018); N.C. GEN. STAT. § 95-270(a) (2018)
10	WASH. REV. CODE ANN. §§ 49.76.010–900 (LexisNexis 2019)
B. Local Law	
	PHILA., PA., CODE § 9-3202(1) (2016)

TABLE 8. MILITARY FAMILY LEAVE LAWS

1	CAL. MIL. & VET. CODE § 395.10 (West 2019)
2	820 ILL. COMP. STAT. ANN. §§ 151/5–151/99 (LexisNexis 2019)
3	IND. CODE ANN. §§ 22-2-13-1 to -16 (West 2019)
4	ME. REV. STAT. ANN. tit. 26, § 814 (2019)
5	MD. CODE ANN., LAB. & EMPL. § 3-803 (LexisNexis 2019)
6	MINN. STAT. ANN. §§ 181.947–.948 (West 2019)
7	NEB. REV. STAT. ANN. §§ 55-501 to -507 (West 2019)
8	N.Y. LAB. LAW § 202-i (McKinney 2019)
9	OHIO REV. CODE ANN. §§ 5906.01–.99 (West 2019)
10	OR. REV. STAT. ANN. §§ 659A.090–.099 (West 2018)
11	30 R.I. GEN. LAWS §§ 30-33-1 to -6 (2019)
12	WASH. REV. CODE ANN. §§ 49.77.010–900 (West 2019)

TABLE 9. MILITARY SERVICE MEMBER LEAVE LAWS

A. Federal Law	
38 U.S.C. §§ 4301–4335 (2012)	
B. State Laws	
1	ALA. CODE §§ 31-12-1 to -10 (2019)
2	ALASKA STAT. § 26.05.075 (2019)
3	ARIZ. REV. STAT. ANN. §§ 26-167 to -168 (2019)
4	ARK. CODE ANN. § 12-62-413 (2019)
5	CAL. MIL. & VET. CODE §§ 394.5, 395.06 (West 2019)
6	COLO. REV. STAT. §§ 28-3-609 to -610 (2019)
7	CONN. GEN. STAT. ANN. § 27-33a (West 2019)
8	DEL. CODE ANN. tit. 20, § 905(b) (2019)
9	FLA. STAT. ANN. § 250.482 (West 2019)
10	GA. CODE ANN. § 38-2-280 (2019)
11	HAW. REV. STAT. ANN. § 121-43 (LexisNexis 2019)
12	IDAHO CODE §§ 46-224 to -225, -407, -409(2) (2019)
13	330 ILL. COMP. STAT. ANN. 61/1-1–61/40-5 (West 2019)
14	IOWA CODE ANN. § 29A.43 (West 2019)
15	KAN. STAT. ANN. §§ 48-222, -517 (West 2019)
16	KY. REV. STAT. ANN. § 38.238 (West 2019)
17	LA. STAT. ANN. §§ 29:38, :410 (2018)
18	MD. CODE ANN., PUB. SAFETY § 13-704 (West 2019)
19	MASS. GEN. LAWS ANN. ch. 33, § 13 (West 2019)
20	MICH. COMP. LAWS ANN. §§ 32.371–32.274 (West 2019)
21	MINN. STAT. ANN. § 192.34 (West 2019)
22	MISS. CODE ANN. § 33-1-19 (2019)
23	MO. ANN. STAT. § 41.730 (West 2019)
24	MONT. CODE ANN. §§ 10-1-1001 to -1027 (West 2019)
25	NEB. REV. STAT. ANN. § 55-161 (West 2019)
26	NEV. REV. STAT. ANN. §§ 412.139, .606 (LexisNexis 2019)
27	N.H. REV. STAT. ANN. § 110-C:1 (2019)
28	N.J. STAT. ANN. § 38:23C-20 (West 2019)
29	N.M. STAT. ANN. § 28-15-1 (2019)
30	N.Y. MIL. LAW § 317 (McKinney 2019)
31	N.C. GEN. STAT. §§ 127A-201 to -209 (2018)
32	OHIO REV. CODE ANN. § 5903.02(B) (West 2019)

33	OKLA. STAT. ANN. tit. 44, §§ 71, 208 (West 2019)
34	OR. REV. STAT. ANN. § 659A.086 (West 2018)
35	51 PA. STAT. AND CONS. STAT. ANN. §§ 7301–19 (West 2019)
36	30 R.I. GEN. LAWS § 30-11-3 (2019)
37	S.C. CODE ANN. § 25-1-2320 (2019)
38	S.D. CODIFIED LAWS § 33A-2-9 (2019)
39	TENN. CODE ANN. § 58-1-604 (2019)
40	TEX. GOV'T CODE ANN. §§ 437.204, .213 (West 2019)
41	UTAH CODE ANN. § 39-1-36 (LexisNexis 2019)
42	VT. STAT. ANN. tit. 21, §§ 491–93 (2019)
43	VA. CODE ANN. §§ 44-93.2 to -93.4 (2019)
44	WASH. REV. CODE ANN. §§ 73.16.034–.035 (West 2019)
45	W. VA. CODE ANN. § 15-1F-8 (West 2019)
46	WIS. STAT. ANN. §§ 321.64–.65 (West 2019)
47	WYO. STAT. ANN. §§ 19-11-102 to -125 (2019)