

# PAID SICK LEAVE: DECONSTRUCTING THE PATCHWORK TO DEVELOP A WAY FORWARD

| MAY 2019 |

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HR Policy Association is the lead public policy organization of chief human resource officers representing the largest employers doing business in the United States and globally. The Association brings these executives together not simply to discuss how human resource practices and policies should be improved, but also to create a vision for successful HR strategies and pursue initiatives that promote job growth, employment security and competitiveness. Senior corporate officers participate in the Association to leverage the combined power of the membership as a positive influence to improve public policy, increase returns on human capital, and advance the human resource profession.

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The WPI provides timely alerts and updates on federal, state and local legislative, regulatory and judicial developments that affect employers. In addition, WPI can help employers shape workplace policy in a variety of ways. The WPI provides timely alerts and updates on federal, state and local legislative, regulatory and judicial developments that affect employers. In addition, WPI can help employers shape workplace policy in a variety of ways.

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# I. Introduction

For years a local outlier, paid sick leave laws have now proliferated across the United States. The laws impact employers of all sizes, regardless of whether their operations are in only one state, in multiple states, or nationwide. It is increasingly challenging for companies in multiple jurisdictions to develop policies that comply universally – or even with just two laws. Without fail, and despite some overlap, each paid sick leave law seems to contain at least one provision that can impede the establishment of uniform practices.

While the number and scope of these laws has expanded, paid sick leave provisions often appear to be drafted in a vacuum without consideration of how they interact with pre-existing laws. Moreover, for employers, parallel developments, e.g., paid family leave laws, impose an additional layer of complexity to an already significant list of legal and administrative challenges.

Particularly for large companies with a geographically dispersed workforce, the laws' variations make administering benefits consistently for all employees very challenging. Moreover, companies would prefer to devote administrative time and costs to developing new ways to provide value to employees instead of having to fashion multiple paid leave benefit programs. Large companies strive to build a common culture. "Agile organizations create a cohesive community with a common culture."<sup>1</sup> If employees have varying benefits and experiences, this goal is undermined.

When employees can easily understand a benefits program, it works best. "Benefits can be confusing and they require incredibly clear communication. When benefits information is easy to understand and framed within an employee's reality, they see the personal value of a benefits experience."<sup>2</sup> If multiple sets of rules govern how and when employees can take leave, employee confusion increases.

America's largest employers have long recognized the value paid leave benefits provide employees who want work-life balance. Providing such flexibility is an essential recruitment tool that creates an engaged workforce. Accordingly, most large employers offer robust paid leave benefits that exceed federal, state, or local requirements.

This paper examines what paid sick leave is and charts its transition from the exception to the rule. It highlights major compliance challenges these incongruous laws create for private-sector employers,<sup>3</sup> identifies issues for lawmakers and enforcement officials to consider when drafting and enforcing laws, and discusses possible fixes for reducing discrepancies and enhancing administrative ease without sacrificing employee access to paid leave. Finally, we explore the viability of a federal solution.

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1 Wouter Aghina, Aaron De Smet, Gerald Lackey, Michael Lurie, and Monica Murarka, *The five trademarks of agile organizations*, McKinsey & Company (Jan. 2018), <https://www.mckinsey.com/business-functions/organization/our-insights/the-five-trademarks-of-agile-organizations>.

2 *Work Redefined: A New Age of Benefits, MetLife's 15th Annual U.S. Employee Benefit Trends Study*, MetLife (2017), [https://benefittrends.metlife.com/media/1382/2017-ebts-report\\_0320\\_exp0518\\_v2.pdf](https://benefittrends.metlife.com/media/1382/2017-ebts-report_0320_exp0518_v2.pdf).

3 This paper's exclusive focus is generally-applicable paid sick leave laws. Additional requirements that apply to certain federal government contractors, and to employers in specific industries, are outside its scope. Although this paper includes scattered referenced to these laws, to incorporate them throughout unnecessarily complicates an already-convoluted discussion, given their potentially limited application and excessively unique requirements. In addition, the information herein is generally current as of April 1, 2019.

## II. WHAT IS PAID SICK LEAVE?

Originally, paid sick leave was more closely aligned with its name and purpose: paid leave an employee could use for a mental or physical illness, injury, or condition. However, over time the term evolved. Currently, almost all paid sick leave laws permit absences if an employee or family member is a victim of domestic violence or a sexual offense, *i.e.*, “safe” leave. Many laws allow employees to use leave for other reasons that often – but not always – have a “sick” or “safe” characteristic, including but not limited to, *e.g.*, child’s school, and/or child’s or family member’s place of care due to a public health emergency; maternity or paternity leave; bone marrow or organ donation; school conference or meeting; or care for a service dog.

The paid sick leave universe is constantly expanding, not only in terms of the number of laws, but also the reasons for which leave can be used. When an employee is absent, an employer may potentially need to check off countless boxes on their compliance checklist. Depending on the jurisdiction, employers may need to cross-check their paid sick leave obligations against a laundry list of unpaid leave and accommodation laws – just to name a few – to ensure all standards are satisfied, and, more recently, may need to examine whether an employee will receive other benefits, like paid parental leave and paid family leave.

### A. Differentiating Paid Sick Leave and Paid Family Leave

The increase in paid family leave laws at the state and local level has made leave management and compliance more difficult. At the time of publication, there are paid family leave laws in six states, the District of Columbia, and one city.<sup>4</sup> Although the reasons employees may use leave overlap at times, paid sick leave and paid family leave laws are different, and the differences can outnumber the similarities. Importantly, many paid family leave laws do not provide job-protected leave. More often, paid family leave merely provides a wage replacement benefit. However, like leave taken pursuant to the federal Family and Medical Leave Act (FMLA), an employee has a legal right to use paid sick leave and cannot suffer adverse consequences for requesting or using leave.

Another difference is how leave is funded under existing laws. Paid sick leave is paid directly by an employer to an employee from an employer’s general assets. Conversely, paid family leave is funded either jointly by employee and employer payroll deductions or solely by employers as a payroll tax. These funds are typically transmitted to the state, and the state pays out paid family leave benefits to qualified individuals.

Finally, paid family leave is not as prevalent as paid sick leave. Outside a complementary law in San Francisco, California, paid family leave exists only at the state level, whereas paid sick leave requirements may exist at the local, state, or, for certain government contractors, federal level.

## III. PATCHWORK PROBLEMS

At the time of publication, 11 states and the District of Columbia have a generally-applicable paid sick leave law.<sup>5</sup> Moreover, more than 20 paid sick leave ordinances have passed in localities across the country, including in numerous cities and counties – some in places with a statewide requirement – and some that cover certain

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4 Laws exist in California, Massachusetts, New Jersey, New York, Rhode Island, Washington State, the District of Columbia, and a complementary law exists in San Francisco, California.

5 Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont, and Washington State have statewide paid sick leave laws.

industries only.<sup>6</sup> Regardless of geographic location, federal government contractors subject to Executive Order 13706 have a paid sick leave obligation. Exhibit A contains a map that identifies potential paid sick leave jurisdictions.

The patchwork of paid sick leave requirements presents numerous challenges for employers, but this paper examines two particular issues that demonstrate how non-uniform the laws are: 1) employee coverage requirements; and 2) compliance methods.

## A. General Employee Coverage Requirements, Issues and Options

The absence of a uniform definition of “employee” for leave purposes flummoxes the business community. Moving toward a more standardized test for determining which individuals qualify as covered employees would simplify administration and enable employers to provide employees uniform leave benefits. The thornier issue is what that standard should be.

### 1. Mandating a Connection to the Jurisdiction and/or Minimum Length of Employment

Some state and local laws apply a primary place of employment test by extending coverage to employees who are physically present to perform their work in the jurisdiction. These standards can be particularly helpful when an employee lives outside the jurisdiction in which he or she works, or works in multiple jurisdictions. The laws may differ, however, when it comes to whether, or how much time, an employee must work in the jurisdiction. (For example, a law could require an employee to work 50% or more of the time in a jurisdiction.)<sup>7</sup> Similarly, some jurisdictions might exclude from the definition of employee an individual whose primary work location is not in that jurisdiction.<sup>8</sup>

Meanwhile, other laws contain an overall length-of-service requirement. For example, two laws require an employee to work for an employer for 30 days or more in a year.<sup>9</sup> Several laws connect coverage to a specific annual hours-worked threshold.<sup>10</sup> Although some laws require employees to work considerable weekly hours to be covered,<sup>11</sup> others contain a less burdensome requirement, e.g., two hours in a week.<sup>12</sup>

A length-of-service or hours worked requirement makes practical sense because there should be a meaningful connection between the employee, the jurisdiction, the employer, and the applicable law. However, the more

6 In California, there are generally-applicable laws in Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica, as well as laws specific to the hotel industry in Long Beach and Los Angeles. Santa Monica also has a law that applies to the hotel industry, but it was enacted simultaneously with, and incorporates, the generally-applicable law’s standards. This situation differs from Los Angeles, where the two laws were enacted at different times and standards are not incorporated. In Maryland, Montgomery County has its own law, which predates the statewide requirement. Washington State has generally-applicable local laws in Seattle and Tacoma, in addition to a law in SeaTac that applies to the transportation and hospitality industries. In five states, only local paid sick and safe time (PSST) laws exist. In Illinois, Chicago and Cook County have laws. In Minnesota, there are laws in Duluth, Minneapolis, and Saint Paul. New York State has two laws in New York City and Westchester County. In Pennsylvania, there is a law in Philadelphia. Pittsburgh enacted a law that never took effect due to a lawsuit challenging the city’s authority to enact the law, which is currently at the state supreme court. Although ordinances have been enacted in Austin and San Antonio, Texas, a lawsuit challenging the Austin law is underway and the law has been enjoined from taking effect while the case is ongoing.

7 District of Columbia; Massachusetts; Duluth, Minnesota; and Rhode Island.

8 Michigan.

9 California; and Los Angeles, California.

10 In Minneapolis and Saint Paul, Minnesota, and Austin and San Antonio, Texas, “at least” 80 hours must be worked in the city in a year; “more than” 80 hours must be worked in New York City and Westchester County, New York, and Tacoma, Washington. In Chicago and Cook County, Illinois, at least 80 hours must be worked in the jurisdiction during any 120-day period. Yet other cities may use lower thresholds, e.g., San Francisco, California requires employees to work for 56 or more hours, and Philadelphia, Pennsylvania requires working at least 40 hours, in a year.

11 For example, Michigan’s law does not apply to individuals that worked on average fewer than 25 hours per week during the preceding calendar year. In Vermont, to be covered, employees must average no fewer than 18 hours per week during a year. Like Michigan, Maryland and Montgomery County frame the issue as an exception, excluding from coverage an employee who regularly works fewer than 12 hours a week, or regularly works eight hours or less each week, respectively.

12 Two-hours-in-a-week requirements exist in Berkeley, Emeryville, Los Angeles, Oakland, San Diego, and Santa Monica, California. Although all laws contain a two-hour requirement, the phrasing of the requirements may differ. For example, Berkeley and Emeryville use “in a calendar week,” Los Angeles and Oakland use “in a particular week,” and San Diego uses “in one or more calendar weeks.” In Chicago and Cook County, Illinois, the two hours must be worked in a two-week period; however, employees who satisfy the “2 in 2” standard may fail to work sufficient hours to meet the laws’ 80 hours of work in a 120-day period requirement.

difficult question is which standard to adopt, if any. If no existing test in a state or local law is used as the standard, how to establish a coverage baseline will be hotly debated by policymakers. Consider a couple of examples:

- If the standard requires working enough annual hours to hit the annual accrual cap (assuming one exists), most part-time employees will be excluded. For example, if a 1:30 accrual rate (*i.e.*, one hour of paid leave accrued for every 30 hours worked) and 40-hour annual accrual cap applies, an employee must annually work 1,200 hours, so any employee working 23 or fewer hours per week would be excluded. If a less generous accrual rate and/or more generous accrual cap applies, the exclusion rate will increase.
- If the standard is working enough annual hours to accrue at least one day's worth of leave, it is possible employees with a comparatively limited connection to an employer or jurisdiction may be covered. For example, if a 1:30 accrual rate applies, the minimum hours worked threshold would be 240 hours per year (based on an eight-hour day), so any employee working a little more than four-and-a-half hours per week would be covered.

## 2. Relying on Definitions from Existing Statutory Schemes

In addition to these options, the definition of who qualifies as an employee for leave purposes could be adopted from an existing statutory scheme. For example, some laws use the definition of employee included in their minimum wage and/or overtime law to determine paid sick leave coverage.<sup>13</sup> A similar approach might have appeal because, for years, companies have dealt with coverage issues under these laws. Moreover, in many places there is a history of case law and agency guidance employers can consult.

At the very least, the end product should appear more reasoned than random and should be readily understandable to all parties involved. A standard can set reasonable coverage requirements, based on practical considerations, and still produce an inclusive law that furthers the legislative objective of increasing access to paid leave to those without, or with limited, benefits. For example, it is not unreasonable to require that, in exchange for receiving payment to not work, individuals demonstrate a connection to the jurisdiction and work more than a *de minimis* amount.

## B. Compliance Challenges for Multistate Employers Devising Paid Sick and Safe Time Policies

After determining whether a state and/or local paid sick and safe time (PSST) law applies to their employees, employers must determine how to comply with the law. Most jurisdictions permit employers to use existing paid leave benefits to comply with a law if the benefits meet certain conditions. Otherwise, employers must provide leave, via a frontloading or accrual-based system. Each approach has benefits and downsides, discussed below, that are in no small part influenced by how the laws are structured.

### 1. Use of Existing, Voluntary Employer Policies to Comply

At the outset, it is important to remember that most private sector workers, especially unionized workers and those that work for large employers, have access to paid leave.<sup>14</sup> Many employers willingly offer paid time off for various purposes as a benefit for their employees.

According to the Bureau of Labor Statistics (BLS), in private industry, many workers have access to paid time off benefits, including paid sick leave.<sup>15</sup>

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<sup>13</sup> Arizona; Rhode Island; and Washington State.

<sup>14</sup> For example, as of March 2018, 87% of private sector workers in companies with 500 or more workers have access to paid sick leave. Press Release, U.S. Bureau of Labor Statistics, [Employee Benefits in the United States](#) (July 20, 2018).

<sup>15</sup> U.S. Bureau of Labor Statistics, [National Compensation Survey](#) (Dec. 2017).



Paid Time Off Benefit	Non-Union Worker Access	Union Worker Access
Paid sick leave	69%	82%
Paid family leave	15%	15%
Paid personal leave	42%	57%
Paid vacation	76%	89%
Personal leave, sick leave, or paid family leave	72%	87%
Personal leave, sick leave, paid family leave, or vacation	81%	92%

Because of the prevalence of employer leave options, nearly every paid sick leave law provides that existing paid time off policies – e.g., vacation, paid time off (PTO), sick pay, or a combination thereof – can be used to satisfy paid sick leave obligations.<sup>16</sup> Officials in these jurisdictions recognize their focus should be businesses that do not provide any paid leave benefit, not those that voluntarily offer such benefits.

#### **A. Varying Standards for Evaluating Whether Existing Policies Sufficiently Comply with PSST Requirements**

Despite the large number of workers who have access to paid leave, the standards for determining whether an existing employer paid leave policy can be used to comply with state and local PSST laws are not uniform.

One factor commonly used to assess whether an employer’s existing policy sufficiently complies with a paid sick leave law is the policy’s leave accrual rate. Unfortunately, most laws offer little guidance on how compliance can be demonstrated. If strict adherence to the law’s accrual rate schedule (e.g., 1 hour of leave per 30 hours worked) is required, many companies may fall short because they do not base benefits on hours worked. Instead, a set amount of leave is regularly distributed, with the amount potentially varying by position, seniority, full-time or part-time status.

Moreover, pursuant to a corporate policy, employees may technically under-accrue leave time (when compared to the law’s requirement) in some periods but over-accrue in others. If this scenario regularly and consistently occurs – e.g., under-accrual, then over-accrual, then under-accrual, etc. – lawmakers and enforcement officials should have little concern. The examination should appropriately focus on whether employees can accrue more leave hours *overall* than what the law requires. As a practical matter, and consistent with legislative intent, a more generous leave amount should offset concerns about a less generous rate.

#### **B. Common Sense, and Public Policy Goals, Should Govern How Compliance Is Evaluated**

The amount of paid leave offered by an employer often exceeds what a paid sick leave law requires. Paid sick leave laws should not discourage employers from providing more generous benefits, and companies should not face negative repercussions for going above and beyond their legal duties.<sup>17</sup> One balanced approach, for example, is to allow an employer to designate a portion of a more generous existing leave bank as leave that carries paid sick leave protections, while excluding from the law’s protections the amount that exceeds what the law requires.<sup>18</sup> All in all, examining a leave plan’s overall benefit scheme is a more meaningful gauge of an employer’s compliance.

<sup>16</sup> Santa Monica, California is the sole jurisdiction that requires employers to provide a standalone paid sick leave benefit.

<sup>17</sup> For example, in Tacoma, Washington, potentially all PTO is considered protected time off under the law. Albeit subject to change, a proposed New Jersey regulation appears to take a similar position.

<sup>18</sup> For example, Arizona; Massachusetts; Oregon; and Washington State.

In addition, lawmakers should be careful to avoid unintended consequences by subjecting employer policies to heightened scrutiny. At many companies, employee feedback influences the type, and amount, of paid leave benefits offered. When a law as drafted or interpreted focuses too intensely on how a paid leave policy may deviate – even only slightly or temporarily – from its strict framework, the ability to deliver a benefit package that responds to workforce requests may be hindered. Companies are not requesting the ability to exclude themselves from select requirements; they seek simply a fair and equitable reading of whether and how their voluntarily provided, pre-existing leave benefits satisfy the spirit – if not the letter – of the law.

Hyper-vigilance by lawmakers and agencies in this area can have broad ramifications. Companies are rewarded for previously not providing any paid leave benefits because they are held to a lower standard. Meanwhile, a disincentive applies to businesses that chose to voluntarily provide paid leave benefits before a legal obligation exists. Applying unnecessary scrutiny to generous leave policies could result in either the overall amount being reduced or a leave bank restructuring, e.g., a popular PTO program could be replaced with standalone paid sick leave and vacation banks.

Such leave bank restructuring can negatively impact employees. Under a dual-bank system, employees have less freedom to decide how they want to use paid leave benefits because each type of leave can be used only for its expressly stated purpose, e.g., an employee cannot use sick leave to go on vacation or to take a personal day. Paid sick leave has no value unless used during employment and no state or local PSST law requires that unused paid sick leave be paid out when employment ends. On the other hand, there are states where vacation or PTO must be cashed out. As a result, employees in a dual-bank framework may be unable to take full advantage of their benefits.

## 2. Frontloading

For employers that do not rely on their own paid sick leave policies for compliance, the various state and local PSST laws typically permit employers to use either a frontloading and/or accrual-based system. Frontloading allows employers to annually provide a specific number of leave hours. Under a traditional frontloading system, employers need not carry over unused leave hours into the following year or track accrual.

### A. Frontloading Benefits Employers and Employees

For employers, a frontloading system promotes administrative ease. However, not all laws permit frontloading.<sup>19</sup> Therefore, employers subject to multiple laws may be unable to develop a universal approach to a fundamental administrative issue: how benefits are provided. Moreover, some jurisdictions allow frontloading to a degree, but not in a way that simplifies administration or incentivizes employers to provide employees leave earlier than they would be entitled leave to under an accrual-based system.<sup>20</sup> Of jurisdictions that allow frontloading, some insert additional requirements that make it challenging for an employer to administer.<sup>21</sup>

When frontloading is not an option, it will take longer for employees to earn an equivalent leave amount. If employees learn their counterparts in other jurisdictions are provided the same benefits but sooner, an employee relations issue could arise.

19 Traditional frontloading is not permitted in Berkeley for employers with 25 or more employees, Oakland, and San Francisco, California; Westchester County, New York (notwithstanding the ordinance's silence on this issue, the enforcement agency could interpret the law to possibly permit the practice, as other agencies have); or Washington State (including Seattle and Tacoma).

20 For example, Los Angeles, California requires an annual 48-hour frontload, but requires unused leave to carry-over, followed by a new 48-hour frontload; if the current-year frontload amount plus the carry-over amount exceed 72 hours, the surplus amount can be eliminated. In New Jersey, up to 40 hours of unused frontloaded leave must either carry over or be cashed out at 100% of its value.

21 In Minneapolis and Saint Paul, Minnesota, a 48-hour frontload is required the first year, and subsequent years require an 80-hour frontload. In Chicago, Illinois, if an employer is covered by the FMLA and the employee is FMLA-eligible, a 40-hour frontload is required the first year, and in other years a 60-hour frontload must occur.

## B. Practical Considerations Should Guide Frontloading Standards

Although frontloading has advantages for employers and employees, some state and local requirements as to the timing of the distribution create challenges for employers. For example, most laws require a frontload distribution to occur the first day of each year, or on the first day of employment for any employee whose job begins later into a year. However, because new employees do not yet have a track record of reliability, some employers may be reluctant to provide untested individuals with a year's worth of paid leave when employment begins.

On the other hand, some jurisdictions permit distribution to occur on a day other than an employee's first day of work during the first year.<sup>22</sup> Providing similar flexibility through a delayed timeframe could help alleviate employer concerns and encourage more employers to use frontloading. Additionally, given that some laws permit an employer to institute a waiting period during which new employees cannot use leave, a restricted new employee is unharmed by non-access to an unusable amount of leave.

Yet employers may be dissuaded from adopting a frontloading approach based on enforcement agencies' narrow interpretation of other frontloading requirements as well. Some officials, for example, interpret the law to forbid frontloading anything but a specific number of leave hours.<sup>23</sup> Employers may be particularly frustrated when the same agency permits reduced frontloading when a law takes effect mid-year,<sup>24</sup> or permits mid-year, but not part-time, pro-rating.<sup>25</sup> While not all laws are unaccommodating, this issue adds another layer of complexity for employers that are searching for simplicity and consistency.<sup>26</sup>

## 3. Accrual-Based Paid Sick and Safe Time Systems

While frontloading is not a universal option, all paid sick leave laws permit employers to comply via an accrual-based system under which an employee incrementally accrues leave. However, how these systems operate varies widely, so compliance with one state or local law does not assure compliance with another. Even if a company is subject to only one system across multiple jurisdictions, additional complications can arise.

### A. An Array of Accrual-Based Approaches Exists

A quick review of accrual systems demonstrates the difficulty for employers attempting to craft a broadly-compliant policy. Under a *hard cap system*, annual caps can be placed on leave accrual, carry-over, and use.<sup>27</sup> A law will either explicitly or implicitly permit an overall accrual cap because of how annual accrual and carry-over caps work together. Hard cap systems can provide greater certainty and promote administrative ease; plus, the math can be easier to understand.

Under a *maximum bank system*, up to a certain amount of leave can be accrued, at which point no additional leave accrues until leave is used. The accrual cap also functions as the annual carry-over cap. However, maximum bank jurisdictions approach use caps differently. Laws that contain an annual use cap provide less uncertainty concerning leave that can be accrued annually than those regulations that limit use to the amount of accrued hours in a leave bank. In other words, in maximum bank systems, if leave hours are regularly used, an employee can continually accrue leave. In addition to less certainty, maximum bank systems may be viewed as less administratively efficient.

Under a *bank reduction system*, annual accrual and use caps do not exist. The only certain terms are carry-over caps, *i.e.*, at year-end an employer can limit how many leave hours transfer to the following year. Unless an employer places no limits on accrual, carry-over, and use, bank reduction systems are administratively burdensome. Moreover, the burden may be compounded by a law's recordkeeping or paystub requirement.

22 California; Chicago and Cook County, Illinois; Duluth, Minneapolis, and Saint Paul, Minnesota; and Oregon.

23 For example, San Diego and Santa Monica, California; and New York City, New York.

24 For example, Los Angeles, California.

25 For example, Minneapolis, Minnesota.

26 For example, Cook County, Illinois, Michigan, and Oregon allow employers to pro-rate the frontload amount for employees that start employment after a year has begun.

27 The term "carry-over" refers to an employee's ability to retain accrued leave hours into a subsequent year.

Under some laws, standards will vary based on whether an employer and employee are covered by the federal Family and Medical Leave Act. If not covered, a *cap and cut system* is used. If covered, a *cap and trade system* controls. Under either, administratively complex carry-over calculations must occur:

- Under a *cap and cut system*, a 40-hour annual accrual cap can be imposed. At year-end, up to 20 accrued, unused leave hours can be carried into the next year.
- Under a *cap and trade system*, a 40-hour annual accrual cap can be imposed. At the end of an employee's first year, up to 20 accrued, unused leave hours can be carried into the next year as "ordinance-protected leave" – leave that can be used for reasons specified in the law – and the remaining hours transfer over as "FMLA-protected leave" – leave that can be used for reasons specified in the FMLA. At the end of an employee's second or subsequent year, the 20-hour carry-over maximum for ordinance-protected leave applies, but the amount of FMLA-protected leave increase to up to 40 hours, meaning an employee could carry over up to 60 hours into year three, four, etc.

A 40-hour annual use cap can be used in a *cap and cut system*, and a 60-hour use cap can be used in a *cap and trade system*.

### **B. This Maze of Statutory Requirements Has Produced Incongruity**

It is clear that compliance with one of the above systems does not guarantee compliance with another. For example, consider the dilemmas that can arise in the annual accrual context:

- A *hard cap system* approach may technically violate a *maximum bank system* standard because a limit is set on how much leave can be accrued, which can vary depending on how much leave an employee uses.
- A *maximum bank system* approach may technically violate a *hard cap system* standard because possibly an employee may not accrue any leave.
- A *hard cap or maximum bank system* approach may technically violate *bank reduction system* standards, which contain no limiting mechanisms.

A uniform accrual-based system standard would decrease compliance difficulties. Without a move toward commonality for these and related issues, compliance challenges will persist.

### **C. Variety Among the Most Basic Terms: Accrual Rates**

In addition to the differences among the overarching types of accrual systems noted above, there is also a wide variety of statutory requirements regarding accrual rates. Indeed, there is a spectrum of accrual rates. The most common is 1:30,<sup>28</sup> *i.e.*, an employee accrues one leave hour for every 30 hours worked; next in popularity is 1:40.<sup>29</sup> However, other accrual rates include 1:35, 1:37, 1:43, 1:50, 1:52, and 1:87.<sup>30</sup>

If leave accrual must be connected to hours worked, moving toward an agreed-upon standard would ease administrative burdens. Albeit more associated with wage and hour law, 40 hours might be appropriate as the denominator and the maximum number on which accrual is based. Under this standard, an employee could accrue up to one leave hour per week of work. Though some may contend this disadvantages employees that work more than 40 hours per week, many laws use this approach for exempt administrative, executive, and professional employees.<sup>31</sup>

28 This is the accrual rate in Arizona, California (including Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica), Maryland (including Montgomery County), Massachusetts, Minneapolis and Saint Paul, Minnesota, New Jersey, New York City and Westchester County, New York, Oregon, Austin and San Antonio, Texas, and Seattle, Washington (for employers with 250 or more full-time-equivalent employees).

29 This is the accrual rate in Connecticut, Chicago and Cook County, Illinois, Philadelphia, Pennsylvania, Washington State (including Tacoma and Seattle (for employers with 1 to 249 full-time-equivalent employees)).

30 1:35 is the accrual rate in Michigan and Rhode Island. 1:37 and 1:43 are the accrual rates in the District of Columbia for, respectively, employers with 100 or more employees, and employers with 25 to 99 employees and/or employers of tipped restaurant or bar employees. 1:50 is the accrual rate in Duluth, Minnesota. 1:52 is the accrual rate in Vermont. 1:87 is the accrual rate in the District of Columbia for employers with 24 or fewer employees.

31 For example, all state laws that cover these exempt employees – Arizona, California, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, and Vermont – and the District of Columbia use a similar approach.

### **D. Additional Disparities Concerning How and When Leave Is Accrued**

A related issue for which there is no consensus is whether leave accrues fractionally or in whole-hour units. The laws vary concerning whether an employee accrues a proportionate amount of one leave hour based on hours worked or accrues one leave hour after working a specific number of hours. Moreover, many jurisdictions do not address this issue in a statute, regulation, or even an FAQ, leaving employers guessing at what standard applies. For example, say a 1:30 accrual rate exists. If an employee works 40 hours during the relevant period, one-and-one-third hours are accrued if fractional accrual applies, compared to one hour if whole-hour unit accrual is the standard (the second leave hour would not accrue until the employee worked another 20 hours).

Arguments can be made for or against either approach. With fractional accrual, employees can accrue leave faster, while whole-hour unit accrual makes tracking and reporting accrued hours simpler. Though uniformity concerning the issue would help all parties, a more important, connected issue for employers is when leave is actually “accrued.”

Almost all state and local PSST laws are silent on when leave accrual calculations must occur.<sup>32</sup> The most logical time is when calculating other wages and benefits, *e.g.*, at the end of a pay period. However, as rational as that sounds – particularly to human resources and payroll professionals – these common-sense provisions are noticeably absent from paid sick leave laws. The laws should curtail this uncertainty. Designating a time when leave accrual must be calculated and specifying that leave is not accrued and available for use until the calculation occurs, would increase a company’s ability to effectively manage, and decrease workplace disputes surrounding absences.

### **E. Consistent, Clear, and Flexible Requirements Would Further Public Policy and Benefit Stakeholders**

Clarity on when benefits are calculated would ensure employees and employers know how much leave is available at the time a leave request is submitted. If an employee has no accrued leave, or an insufficient amount of leave to cover the absence, all parties will be aware of the shortfall when the request is made and will understand that the law will not protect all or a portion of the absence. Conversely, if company records accurately reflect the then-current amount of available leave, rogue supervisor decisions can be reduced.

Enhanced clarity – and flexibility – on these and other issues can streamline administration of paid leave benefits for employers while furthering legislative and policy goals. There is no rational reason, for example, that employers should not be offered the option to provide leave on a basis other than on a one-leave-hour-for-X-hours-worked basis. Before paid sick leave laws, it was not commonplace for employers to base the amount of paid leave benefits provided on a specific number of hours an employee worked. Rather, a specific amount of leave would be distributed on a recurring basis (weekly, each pay period, monthly, or annually). The paid sick leave laws in California, Massachusetts, and Rhode Island permit such alternative distribution schemes, and other state and local laws should follow suit.<sup>33</sup>

Compliance would also be more straightforward if the terms for accrual, carry-over, and/or use caps were consistent, *e.g.*, if they were all 40 hours. However, the caps in some jurisdictions are not related and create confusion. For example, in Maryland, 40 hours is the annual accrual cap and carry-over cap, but 64 hours is the annual use cap and overall accrual cap. In Duluth, Minnesota, the annual accrual cap is 64 hours, but 40 hours is the carry-over cap and annual use cap.

As a practical matter, programs that are easier for employers to manage and for employees to understand will function with greater success. Most employers are eager to comply with all their legal obligations, including paid sick leave duties, and appreciate that such benefits are important to their workforce. The complex and unyielding thicket of paid sick leave laws nonetheless hinders employers’ ongoing, good-faith efforts to grasp and implement these laws.

<sup>32</sup> Exceptions include the District of Columbia, Minneapolis, Minnesota, and Vermont.

<sup>33</sup> California requires employees receive a specific amount of leave by a certain date. Massachusetts and Rhode Island require that, based on how many hours they work on average, employees receive a specific amount of leave each month; the distributed amount and number of distributions vary.

## C. Coverage of Unionized Workforces

Given that a primary goal of paid sick leave laws is for employees without access to a paid-time-off benefit to gain access thereto, some might argue that unionized employees need not be a law's primary beneficiary because they already have access to such benefits. Although employers can use existing paid leave benefits to comply with most state and local paid sick leave laws under certain conditions, federal labor law may limit their ability to use existing benefits under a collective bargaining agreement (CBA) for compliance, a dilemma that legislators should consider when deciding whether their legislation should cover unionized workforces.

### 1. Excluding Unionized Workforces from Coverage (Even Temporarily)

Numerous state and local paid leave laws offer no exclusion for unionized employees.<sup>34</sup> This inflexible position arguably fails to advance the paid sick leave law's primary goal, as it is unnecessary and may lead to confusion and time-consuming administrative wrinkles. In lieu thereof, and the very least, lawmakers should consider excluding from paid sick leave provisions any employees covered by a collective bargaining agreement entered into before, or on the date, a new law takes effect until the CBA expires.

On the other hand, other state and local paid leave laws contain certain exclusions for some unionized employees.<sup>35</sup> Some laws contain stronger exceptions than others, as they generally do not apply to employees covered by a CBA that is in effect.<sup>36</sup> In certain jurisdictions, there are wholesale exceptions for certain CBA-covered construction industry employees.<sup>37</sup> While at least one law extends the exception to include employees covered by an expired CBA,<sup>38</sup> other laws are less forgiving.<sup>39</sup>

### 2. Permitting Unionized Workforces to Waive Coverage Requirements

Even if exclusion is not automatic, CBA-covered employees should be allowed to waive all or part of a paid sick leave law's requirements if the waiver is in "clear and unambiguous terms." Numerous state and local laws permit such a waiver.<sup>40</sup> When drafting CBA exceptions, legislators should be mindful that priorities other than those they identify may have greater intrinsic value to employees. Accordingly, imposing numerous restrictions could narrow, instead of expand, the scope of bargaining, thus impacting the parties' ability to successfully negotiate a mutually beneficial outcome.

Given the high percentage of unionized employees with access to paid leave benefits, and the ability of such employees through their representatives to bargain for fewer, greater, or different paid leave benefits, legislators' time and energy could be better spent.

## IV. HOW WE GOT HERE (OR DID NOT GET HERE): POLITICIANS, PROPONENTS & PREEMPTION

Paid sick leave requirements have been enacted in three ways: 1) through the legislative process; 2) via a ballot measure; or 3) for federal government contractors, by executive action. The legislative process has produced the most laws, and executive action the fewest (one).

<sup>34</sup> Los Angeles and San Diego, California; Duluth, Minneapolis, and Saint Paul, Minnesota; Rhode Island; and Austin and San Antonio, Texas.

<sup>35</sup> Arizona; Connecticut; Chicago and Cook County, Illinois; Montgomery County, Maryland; Michigan; New Jersey; New York City and Westchester County, New York; and Vermont. Maryland's law contains a similar provision, but the CBA had to be in effect months before the law took effect.

<sup>36</sup> Michigan; and Philadelphia, Pennsylvania.

<sup>37</sup> Chicago and Cook County, Illinois; and New Jersey.

<sup>38</sup> Philadelphia, Pennsylvania.

<sup>39</sup> Maryland's exception does not recognize "any extensions, options to extend, or renewals of the term of the original agreement."

<sup>40</sup> Arizona; Berkeley, Emeryville, Oakland, San Francisco, and Santa Monica, California; Chicago and Cook County, Illinois; and New Jersey.



Although voters have enacted fewer laws than elected representatives, the success of ballot measures is unparalleled. Ballot measures have greater potential to produce laws that are one-sided or lean heavily toward a certain perspective. They create a “my way or the highway” situation. Aside from a one-time “yes” or “no” vote, there is no input from interested parties. Other than a voter guide’s brief “pro” or “con” argument the ballot initiative is generally not debated. Unlike the scrutiny bills receive during the legislative process, ballot measures undergo no, or limited, legal, fiscal, and/or administrative burden analysis. Although an enforcement agency may be involved after the fact, its ability to craft a regulatory fix may be hamstrung by the measure’s text. Relatedly, during a specified period after a voter-approved law takes effect, legislative amendments may be prohibited.

Bills enacted via the legislative process should produce a more balanced final product, in theory. However, if one party controls both state houses and the governor’s mansion or a supermajority in both houses sufficient to override a gubernatorial veto, the outcome may reflect one side’s stance. Additionally, practical-application deficiencies may permeate purported “fix” bills. Paid sick “perfection” is impossible, but hurrying toward consensus at the expense of common sense devalues the utility of compromise provisions. When new laws are considered, legislators should solicit input from knowledgeable individuals, companies, and organizations with subject-matter familiarity, including participants from both the employee and employer communities. Changes that result from less-informed feedback have less benefit.

Notably, not all jurisdictions have embraced paid sick leave ordinances adopted at the local level. At the time of publication, nearly half the states have enacted laws to wholly or partly prohibit local paid sick leave ordinances (Exhibit A). Most preemption statutes have been anticipatory, *i.e.*, enacted before a local paid sick leave law existed. The remaining laws have been reactionary. Generally, reactionary preemption statutes are divided into three types: 1) “repeal and replace;” 2) “partial and prospective;” and 3) “repeal and resist.” For repeal and replace, a new state paid sick leave law is enacted, and it preempts existing and future local laws on the same subject. For partial and prospective, a new state law preempts only future local laws. For repeal and resist, existing and future local laws are preempted without creating a new statewide leave law.

## V. IS THERE A FEDERAL SOLUTION?

For many, the natural solution seems to be a federal law. While this may seem like a simple answer, it is not necessarily a simple solution.

### A. Politics Can Impede Progress

The two most recent administrations demonstrate that a political-party trifecta in our nation’s capital does not guarantee non-stop legislative accomplishment. If a one-party majority is incapable of pushing through legislation, better results should not be expected when parties split control of Congress and generally are at loggerheads. Even if both sides stepped back to consider how a compromise might present a mutual “win,” elected officials should anticipate general opposition to a paid sick leave mandate from the business community in places without a statewide or local paid sick leave law, which is more than two-thirds of the states (34 of 50, or 68%).<sup>41</sup>

### B. Federal Preemption Is Not Common in Employment Law

For a truly federal solution, existing state and local laws would need to be eliminated and future laws prohibited. Although some federal laws like the Employee Retirement Income Security Act contain a provision preempting state and local laws, many federal labor and employment laws do not. For example, numerous states have their own version of the federal Family and Medical Leave Act, and states, counties, and cities may have a counterpart to Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Fair Labor Standards Act. Each

<sup>41</sup> In states with only a local law, opposition will come from businesses in other parts of the state without such a requirement. And, of course, criticism will be offered concerning the legislation as originally introduced, amended (proposed or adopted), and finalized.

non-preemptive federal law mentioned above contains a “savings clause” that expressly allows state and localities to adopt their own, more generous laws. To date, federal legislative attempts to preempt paid sick leave laws have been unsuccessful.

### **C. Preemption May Not Be a Panacea: Potential Post-Preemption Problems**

Even if preemption were to succeed in connection with a theoretical federal sick leave law, lawmakers would need to address certain lingering questions, including what happens to leave that accrued before the federal law took effect. To date, there is no definitive guidance on that issue. Additionally, there is always the possibility that, like any piece of legislation, a federal paid sick leave law could be amended to repeal the preemption provision and enable states to recreate the maze of laws employers are currently struggling to comply with.

Presumably, the U.S. Department of Labor would be designated to implement and enforce any such federal law. Unfortunately, in recent years, the Department has not always been consistent in: 1) interpreting the laws it enforces; or 2) advancing efficient rulemaking. Without clarity and consistency, businesses and workers would be unsure about how any leave law applies, leaving it to the courts to resolve disputes.

Eventually private lawsuits may be filed throughout the country, which could result in judicial disharmony. District court judges may very well interpret the law differently. While an appeals court may resolve some disputes, as case law develops so will circuit-court splits and potential elevation of related issues to the U.S. Supreme Court.

### **D. Towards A More Perfect Union**

Nonetheless, although a federal law may not be without imperfection, it may be a more perfect solution for minimizing paid sick leave disharmony. There is a difference between a provision that judges interpret differently and a provision legislators implement differently. With one law, statutory language remains the same, and any differing judicial interpretations of that text can be addressed by higher courts, rulemaking, or amendment.

Moreover, a federal law would not necessarily have to cover every aspect of paid leave. For example, it could leave the amount of leave required up to the individual jurisdictions while establishing a uniform standard for how the leave is administered.

## **VI. TRANSITIONING FROM IDEA TO IMPLEMENTATION**

Although paid sick leave laws are varied and complex, steps can be taken before, during, and after the legislative process that should produce a more workable framework.

### **A. Pre-Planning Is Key to Crafting A More Complete and Understandable Law**

The pre-planning stage should be allocated more, or at least some, time. A study group comprising representatives from both employer and employee advocates (and perhaps other stakeholders) could be empaneled. Addressing challenges and hashing out differences before a proposal is put before a legislative body should produce a more fully-formed and informed proposal. Moreover, a study group’s involvement should not be confined to the pre-planning stage. Its participation should extend through the legislative process to address questions, concerns, and practical impacts of any suggested changes.

Legislation, rather than regulation, should be the focus. A more complete law should leave fewer gray areas. A more robust, thorough statute will not only reduce the burden on enforcement agencies, but it will provide stakeholders greater clarity.

Lawmakers must provide enough time between a law’s enactment and operative date. Not all policies and practices are light switches that can be easily turned on or off. Employers need time to prepare. Consultation with third parties – such as payroll providers, third-party administrators, and legal counsel – is often required. When



setting a law's start date, legislators should be mindful of the time, energy, and resources it takes for companies – especially those with a sizable and geographically diverse workforce – to implement, review, revise, and roll-out policies and practices, as well as train and educate their workforce thereon.

One way to provide employers with consistent compliance expectations would be selecting a consistent start date for new laws (e.g., January 1). Currently, paid sick leave start dates are scattered across the calendar. Although not all employers provide benefits on a calendar-year basis, using the calendar year would produce a modicum of consistency.

## **B. Select – and Fund – The Right Enforcement Agency**

Lawmakers should delegate enforcement responsibility to a knowledgeable agency. Subject-matter expertise cannot be downloaded. Enforcement officials must be capable of hitting the ground running. Forcing officials to learn on the job helps neither employees, nor employers.

In addition, general government revenue should fund the enforcement agency. State revenues will increase if a paid sick leave law is enacted because more wages will be paid, thereby increasing funds redirected to the government through payroll or income taxes. Funding should not be based on assumed non-compliance and revenues from employer penalties, such that an enforcement agency will be forced to self-fund via its law enforcement powers. Legislators should endeavor to avoid a scenario where an agency has the incentive to seek and collect the maximum penalty available to fund its operations.

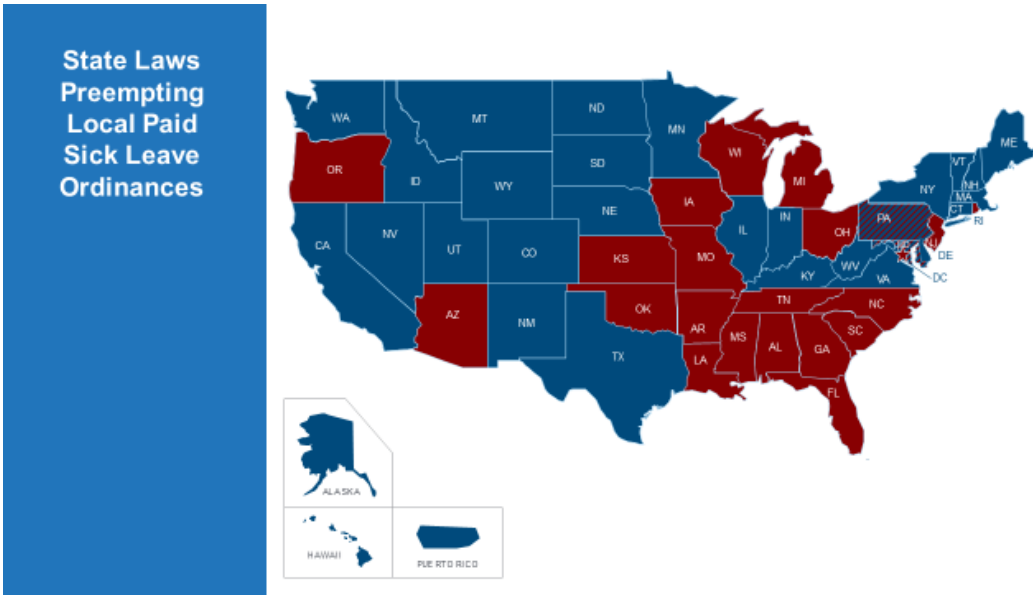
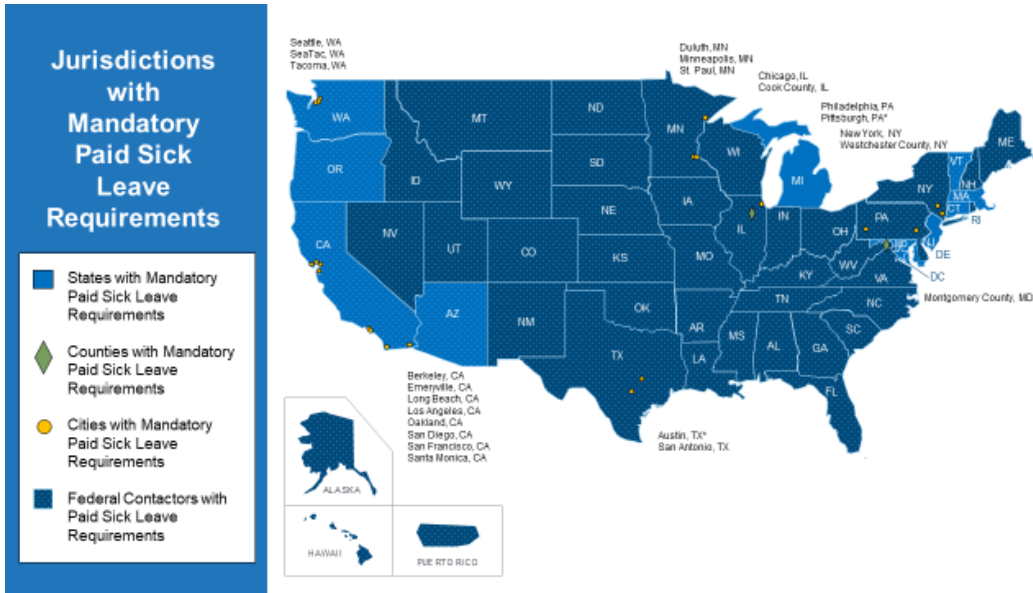
An agency's primary role should be education; enforcement and collecting penalties should be secondary. For at least non-willful violations, during an initial period after a law is operative – e.g., six months, one year – an agency should forego assessing penalties and damages in favor of educating employers and bringing them into compliance to prevent future issues.

Agency communications with stakeholders must be effective and public. Employees that work, or employers that operate, in a jurisdiction may be unaware agency developments have occurred. An agency must have a public-facing website with links to the law, rules, posters, FAQs and/or other guidance documents. Stakeholders should be provided an option to subscribe to receive agency updates via email. This opportunity is particularly valuable to companies whose legal, human resources, payroll, or management teams are located outside the jurisdiction.

## **VII. MOVING TOWARD A FAIR AND COMMON-SENSE APPROACH**

Paid sick leave laws share a common goal – ensuring employees have access to paid leave. Companies that already provide employees paid leave do not seek to thwart this objective or avoid leave obligations. Instead, employers want what the current patchwork of paid sick leave laws lack: a common pathway to compliance and the ability to provide a uniform set of leave benefits. Absent one nationwide defined framework, state and local lawmakers should strive to harmonize their laws, which will promote administrative ease and remove compliance roadblocks. Although uniformity may not be possible because paid sick leave statutes may interact with myriad other laws that not all jurisdictions have, the task should not be viewed as an all or nothing proposition. To the greatest extent possible, paid sick leave laws should mirror each other while complementing laws within their jurisdiction. The odds of success increase when considerable time, energy, and expertise are devoted to drafting, discussing, and deploying new laws or amendments. Taking these steps would help dismantle the complex patchwork of paid sick leave laws and develop a way forward.

## Appendix A<sup>42</sup>



42 **For the first slide:** In California, industry-specific laws exist in Long Beach (Hotels) and Los Angeles (Hotels & Airport Workers – in addition to the general law). SeaTac, Washington’s law applies to the hospitality and transportation industries. Austin, Texas’s law is enjoined during ongoing litigation and has not taken effect. Pittsburgh, Pennsylvania’s law was held invalid before it took effect, but the issue is on appeal at the state supreme court. San Antonio, Texas’s law is not scheduled to take effect until August 1, 2019, and Duluth, Minnesota’s law will not take effect until January 1, 2020.

**For the second slide:** Although state preemption laws may be “on the books,” the validity of some laws has been challenged, sometimes successfully, as in Ohio. Moreover, there may be ongoing legal challenges to preemption statutes, as in Pennsylvania.



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