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Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance

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INTRODUCTION

In the United States, an illness or injury lasting more than a few days can be not only physically but financially devastating. Federal law does not guarantee paid time off for one's own serious but temporary health condition; Social Security disability only covers the longest lasting and most serious ailments. In all but a handful of states, state law provides no right to extended paid time off for a serious health need except those covered by workers' compensation, meaning that off-the-job conditions, including medical recovery from childbirth, are not covered.

But what about that handful of states? Beginning in the 1940s, five states[1] adopted and implemented what are known as temporary disability insurance (TDI) laws, providing a right to wage replacement for non-occupational illnesses or injuries. For decades, these laws have provided critical income to workers temporarily medically unable to do their jobs. In recent years, four of these laws have been expanded to meet workers' financial needs in two other critical circumstances: caring for a relative with

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[1] Puerto Rico also adopted a TDI law in 1968. Washington State, not included in this count, adopted a TDI law in 1949 that was repealed by referendum before it went into effect. *See infra* Part II.B.

a serious health condition and bonding with a new child. In each state, the pre-existing TDI structure was crucial in the passage of these paid family leave benefits.

In contrast, states without existing TDI laws have struggled to enact paid family leave—only two jurisdictions have passed such laws and neither has yet been implemented. Nor has any new state adopted a standalone TDI or other non-occupational medical leave benefit in almost fifty years. In the absence of an enacted federal solution, this gap has left lawmakers and advocates across the country looking for new models to continue the paid family and medical leave momentum beyond the legacy TDI states, all but one of which have already expanded their laws.

The TDI states have more to teach. This Article brings together and to light the largely forgotten histories of the state TDI laws, showing five unique but interrelated trajectories with distinctive results for each state's program. This examination reveals not a monolith, but a menu of options from which new states might choose. Moreover, the unusual model of New York, the most recent of the TDI states to enact paid family leave, reveals an unexpected opportunity to build upon existing structures: the use of state workers' compensation laws.

I. THE NEED FOR PAID FAMILY AND MEDICAL LEAVE

For most Americans, an illness or injury lasting more than a few days can mean a financial crisis. One third of American workers lack access to even *one* day of paid sick time[2] and even those with sick time generally receive only a handful of days per year, insufficient to address an acute or chronic condition.[3] Only 38% of American workers have access to short-term disability insurance, which provides wage replacement for workers unable to work due to a serious illness or injury, through their employers.[4]

Even more troublingly, just 14% of workers currently have access to paid family leave.[5] This term "paid family leave" generally encompasses two major purposes. The first, often termed "bonding leave," covers time off to bond with a new child (usually including a child newly placed for foster care or adoption). The second covers time off to care for a seriously ill or injured relative. In some cases, the term also encompasses a third type of leave to address certain military family needs.

Medical problems are a leading cause of personal bankruptcy in this country, due in part to the impacts of loss of income and loss of health

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[2] BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2016, at table 32 (Sept. 2016), *available at* https://www.bls.gov/ncs/ebs/benefits/2016/ebbl0059.pdf.

[3] *See id.* at table 34; *id.* at table 35.

[4] *Id.* at table 16.

[5] *Id.* at table 32.

insurance.[6] In a study of home foreclosures, nearly half of respondents indicated that the foreclosure was due at least in part to medical problems, with 27% specifically referencing lost work due to their medical needs.[7] Because disabling illnesses or injuries also make workers ineligible for unemployment benefits, the lack of access to paid leave pushes many low-income workers onto public benefits.[8]

The United States is the only developed country in the world,[9] and one of only two countries in the world of any level of development, to provide no national paid maternity leave benefit.[10] The consequences are devastating. Lack of access to paid leave makes women more likely to drop out of the work force or to be pushed into lower-paying jobs.[11] For birth mothers, insufficient leave time is associated with increased rates of postpartum depression.[12] These issues are especially acute for lower-income women, who are less likely to receive paid leave and more likely to lose their jobs during or after pregnancy.[13]

Fathers who take longer leaves experience greater ongoing engagement in the lives of their children[14] and increased satisfaction in their interactions with their children.[15] For both economic and social reasons, fathers are less likely to leave that is unpaid.[16] Because access to paid paternity leave is

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[6] *See* David U. Himmelstein, Deborah Thorne, Elizabeth Warren & Steffie Woolhandler, *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. OF MED. 742, 742 (2009); *see also* Alena Allen, *State-Mandated Disability Insurance as Salve to the Consumer Bankruptcy Imbroglio*, 2011 BYU L. REV. 1327, 1327 (2011).

[7] Christopher Tarver Robertson, Richard Egelhof & Michael Hoke, *Get Sick, Get Out: The Medical Causes of Home Mortgage Foreclosures*, 18 HEALTH MATRIX 65, 68 (2008); *see also* Rona Kaufman Kitchen, *Off-Balance: Obama and the Work-Family Agenda*, 16 EMP. RTS. & EMP. POL'Y J. 211, 249-50 (2012).

[8] *See* Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, LAW & CONTEMP. PROBS. 285, 311-12 (Winter 2010).

[9] *See Key characteristics of parental leave systems*, OECD, http://www.oecd.org/els/soc/PF2_1_ Parental_leave_systems.pdf (last updated Mar. 15, 2017).

[10] The International Labor Organization reports that the United States and Papua New Guinea are the only countries without paid maternity leave. INTERNATIONAL LABOUR ORGANIZATION, MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD 16 (2014), *available at* http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/ mwcms_242615.pdf.

[11] 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, 9 (2014).

[12] Pinka Chatterji & Sara Markowitz, *Family Leave After Childbirth and the Mental Health of New Mothers*, 15 J. MENTAL HEALTH POL'Y & ECON. 15, 61-76 (2012).

[13] June Carbone & Naomi Cahn, *The Gender/Class Divide: Reproduction, Privilege, and the Workplace*, 8 FLA. INT'L U. L. REV. 287, 297 (2013).

[14] Maria del Carmen Huerta et al., *Fathers' Leave, Fathers' Involvement and Child Development: Are They Related? Evidence from Four OECD Countries* (OECD Soc., Emp't and Migration Working Papers No. 140, 2013).

[15] Linda Haas & C. Philip Hwang, *The Impact of Taking Parental Leave on Fathers' Participation In Childcare And Relationships With Children: Lessons from Sweden*, COMMUNITY, WORK & FAMILY, 11:1, 85-104 (2008).

[16] *See* Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in A "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 402-03 nn.216-17 (2003); Beth A. Burkstrand-Reid,

crucial for encouraging mothers and fathers to share care responsibilities and break down gender stereotypes,[17] the absence of paid paternity leave is a substantial gender equity issue.

Lack of access to leave for mothers *or* fathers also has profound, lasting negative impacts on children. Babies whose mothers return to work less than twelve weeks after birth are less likely to receive well baby checkups, less likely to get important vaccinations, and more likely to develop behavioral problems.[18] Mothers who take at least twelve weeks of leave are also more likely to breastfeed,[19] which has health and developmental benefits for children, as well as physical and mental health benefits for nursing mothers.[20] Experts including the American Academy of Pediatrics recommend that even healthy, full-term infants should not be placed in day care before they are twelve weeks old for health reasons.[21]

Moreover, the number of Americans providing care for a seriously ill relative is significant and growing. Almost a third of U.S. households currently provide care for an adult with a serious illness or disability, and as the population ages these numbers will only increase.[22] Given the particular limitations of our social safety net, this care is mostly provided by family members.[23] With an aging population, the need for leave to care for an adult relative is only growing: one AARP study found that nearly one in five workers between the ages of 45 and 74 had taken time off work to care for an adult family member.[24] This problem is especially acute for the "sandwich generation," workers caring for their aging parents and their own children at the same time.[25]

Dirty Harry Meets Dirty Diapers: Masculinities, At-Home Fathers, And Making the Law Work for Families, 22 TEX. J. WOMEN & L. 1, 35-36 (2012).

[17] *See* JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 117, 145 (2003); Lindsay R. B. Dickerson, *"Your Wife Should Handle It": The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429, 448 (2005).

[18] Lawrence M. Berger, Jennifer Hill & Jane Waldfogel, *Maternity Leave, Early Maternal Employment and Child Health and Development in the US*, 115 ECON. J.L., Feb. 2005, F29, F45 (2005).

[19] *Id.*

[20] *See, e.g.*, American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 496-97 (2005) (summarizing research on benefits of breastfeeding).

[21] AMERICAN ACADEMY OF PEDIATRICS, AMERICAN PUBLIC HEALTH ASSOCIATION & NATIONAL RESOURCE CENTER FOR HEALTH AND SAFETY IN CHILD CARE AND EARLY EDUCATION, CARING FOR OUR CHILDREN: NATIONAL HEALTH AND SAFETY PERFORMANCE STANDARDS; GUIDELINES FOR EARLY CARE AND EDUCATION PROGRAMS, THIRD EDITION 7 (2011).

[22] Catherine Albiston & Lindsey Trimble O'Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 16 (2016).

[23] *Id.*

[24] Lynn Feinberg, *Keeping Up with the Times: Supporting Family Caregivers with Workplace Leave Policies*, AARP PUBLIC POLICY INSTITUTE (June 2013), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/fmla-insight-keeping-up-with-time-AARP-ppi-ltc.pdf; *see also* K. Nicole Harms, *Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's New Paid Family Leave Law*, 10 WM. & MARY J. WOMEN & L. 69 (2003) (showing an impact of paid leave on eldercare).

[25] *See, e.g.*, SANDRA R. LEVITSKY, CARING FOR OUR OWN: WHY THERE IS NO POLITICAL DEMAND

The ranks of those caring for adult loved ones include an estimated 5.5 million military caregivers—people caring for a loved one who became ill or injured through military service.[26] Providing this critically needed care places a heavy burden on military caregivers, who suffer profound physical[27] and mental health[28] consequences from the strains of caregiving and often forego seeking care for their own health needs.[29] Providing care to injured and ill veterans and servicemembers takes a profound and sustained toll on caregivers' labor force participation, a toll that is especially pronounced for those providing care for those who served after September 11, 2001 ("post-9/11 caregivers"). While civilian caregivers reported missing an average of approximately one day of work per month, post-9/11 caregivers report missing an average of 3.5 days of work per month.[30] Almost half of post-9/11 caregivers report having taken unpaid time off work or stopping work temporarily due to caregiving needs, nearly double the still-significant rates reported by civilian and pre-9/11 caregivers.[31] Most pressingly, more than a quarter (28%) of post-9/11 caregivers report quitting work entirely due to the impacts of caregiving.[32]

The only major federal law in this area, the Family and Medical Leave Act of 1993 (FMLA),[33] does not go nearly far enough. The law guarantees up to twelve weeks of unpaid leave,[34] with the right to reinstatement (job protection)[35] and continued health insurance.[36] When originally passed, the FMLA allowed leave to be taken to bond with a new child (including a child newly placed for adoption or foster care), recover from a worker's own serious health condition, or to care for certain family members with serious health conditions.[37] In 2008, as part of the National Defense Authorization

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FOR NEW AMERICAN SOCIAL WELFARE RIGHTS 39 (2014).

[26] RAJEEV RAMCHAND ET AL., HIDDEN HEROES: AMERICA'S MILITARY CAREGIVERS 29 (2014), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR499/RAND_RR499.pdf.

[27] *Id.* at 70–72.

[28] *Id.* at 75–81.

[29] *Id.* at 72–73.

[30] *Id.* at xvii–xix.

[31] 48.4% of post-9/11 caregivers took unpaid time off from work or temporarily stopped working, as compared to 24.8% of pre-9/11 caregivers and 24.9% of civilian caregivers. *Id.* at 106.

[32] RAMCHAND ET AL., *supra* note 26, at 160.

[33] Family and Medical Leave Act of 1993, Public L. No. 103-3, 107 Stat 6 (1993) (codified as amended at 29 U.S.C. §§ 2611-2654).

[34] 29 U.S.C. § 2612 (2009).

[35] 29 U.S.C. § 2614(a).

[36] 29 U.S.C. § 2614(c).

[37] *See* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 102, 107 Stat 6 (1993); *see also* 29 U.S.C. § 2612(a)(1)(A) ("Because of the birth of a son or daughter of the employee and in order to care for such son or daughter."); 29 U.S.C. § 2612(a)(1)(B) ("Because of the placement of a son or daughter with the employee for adoption or foster care."); 29 U.S.C. § 2612(a)(1)(C) ("In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition."); 29 U.S.C. § 2612(a)(1)(D) ("Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.").

Act, Congress additionally authorized leave for a "qualifying exigency" arising out of a family member's active duty military service.[38] The same act also extended the amount of time available to care for a family member injured in the course of military service to twenty-six weeks.[39]

The FMLA suffers from two particularly significant limitations.[40] First, it requires only *unpaid* leave. For workers living paycheck-to-paycheck, unpaid leave is simply out of reach.[41] In one 2012 survey, almost half of FMLA-eligible workers who needed time off but did not take it attributed their decision to lack of pay.[42] Among those who took some leave, half reported they cut needed leave short for financial reasons.[43] Leave a person cannot afford to take is the functional equivalent of no leave at all.

Second, the FMLA leaves out the most vulnerable workers altogether. In order to be eligible for leave under the FMLA, a worker must work for an employer with at least fifty employees within a seventy-five-mile radius of the worker's worksite,[44] must have been employed by that employer for at least twelve months,[45] and must have worked for that employer at least 1,250 hours in the last twelve months.[46] Cumulatively, these requirements mean that more than 40% of American workers are not covered by the FMLA.[47] Those excluded are disproportionately lower income and less educated

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[38] Public L. No. 110-181, § 585, 122 Stat 3 (2008) (codified at 29 U.S.C. § 2612(a)(1)(E)) ("Because of any qualifying exigency . . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces . . . .").

[39] *Id.*

[40] The FMLA also suffers from other limitations. For example, the FMLA only allows family care leave to be taken to care an employee's parent, child (son or daughter), or spouse. 29 U.S.C. § 2612 (a)(1)(B). This means that employees cannot ordinarily take FMLA-protected leave to care for a seriously ill or injured sibling, grandparent, grandchild, parent-in-law, aunt, uncle, cousin, non-spouse domestic partner (even a registered domestic partner) or any other loved one. Moreover, the term "son or daughter" is defined to include only those under the age of 18 or those "incapable or self-care because of a mental or physical disability," meaning that employees ordinarily cannot take FMLA-protected leave to care for their adult children. 29 U.S.C. § 2611(12).

[41] *See* Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement A Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 383-87 (1996); Amanda Pesonen, *Encouraging Work-Family Balance to Correct Gender Imbalance: A Comparison of the Family and Medical Leave Act and the Iceland Act on Maternity/Paternity and Parental Leave*, 37 HOUS. J. INT'L L. 157, 168 (2015).

[42] NAT'L P'SHIP FOR WOMEN & FAMILIES, A LOOK AT THE U.S. DEPARTMENT OF LABOR'S 2012 FAMILY AND MEDICAL LEAVE ACT EMPLOYEE AND WORKSITE SURVEYS 2 (2013), *available at* http://go.nationalpartnership.org/site/DocServer/DOL_FMLA_Survey_2012_Key_Findings.pdf?docID=11862.

[43] *Id.*

[44] 29 U.S.C. § 2611(2)(B).

[45] 29 U.S.C. § 2611(2)(A)(i).

[46] 29 U.S.C. § 2611(2)(A)(ii).

[47] Helene Jorgensen & Eileen Appelbaum, *Expanding Federal Family and Medical Leave Coverage: Who Benefits from Changes in Eligibility Requirements*, CTR. FOR ECON. & POL'Y RES. 3 (2014), *available at* http://cepr.net/documents/fmla-eligibility-2014-01.pdf; *see also* Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1 (2007) (general critique of the FMLA's impact on low-income workers).

workers.[48] The FMLA, therefore, represents an important but incomplete protection.

II. The TDI Trajectory: Three Models

Though paid family leave has enjoyed the most attention in recent times, medical leave has the much longer history as a policy proposal. Variously styled as "cash sickness benefits," "compulsory disability insurance," "disability benefits" or "temporary disability insurance," laws to provide wage replacement for non-occupational serious illness and injuries have been contemplated at the state and national level for over a hundred years.[49] A model bill including such benefits was introduced in three state legislatures in 1915 and twelve state legislatures in 1917.[50] Interest waxed and waned over the next two decades, including ultimately fruitless discussion in the 1930s of a federal program.[51]

In the 1940s, an era of general emphasis on economic security,[52] five states adopted TDI laws in rapid succession, though one was repealed by referendum. A final state joined the list in the late 1960s. Though contemporary scholarship often describes these laws as a unit,[53] they vary quite significantly in their basic structures, which in almost all states was a major factor in the debates over passage. As the recent example of the D.C. Universal Paid Leave Act shows,[54] these structural issues remain salient today.

Though all state TDI laws use social insurance models—legal requirements to provide a benefit, generally achieved through the pooling of resources to spread out costs—the exact structures of the programs differ. The laws can be broken into three major structural categories.[55] The first is a monopolistic state fund, where all covered workers must be covered

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[48] Joregensen & Appelbaum, *supra* note 47, at 6.

[49] Grant M. Osborn, *The Historical Background of State Compulsory Disability Insurance*, 1 REV. OF INS. STUD., No. 1, 15 (1954).

[50] GRANT M. OSBORN, COMPULSORY TEMPORARY DISABILITY INSURANCE IN THE UNITED STATES 47 (1958).

[51] *Id.* at 48–49.

[52] *Legislative Medicine for the Sick Worker*, 2 STAN. L. REV. 345, 346 (1950).

[53] *See, e.g.*, Kerry Anne Hoffman, *The Work/Family Balance: New York's Struggle to Harmonize Domestic and Employment Spheres*, 16 CARDOZO J.L. & GENDER 93, 105–06 (2009); Grill, *supra* note 41, at 392-93; Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 463 (2007). *But see* Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 45 (2002) (noting structural differences among the programs).

[54] The case of the new D.C. law is discussed in greater detail in Part *infra* III.

[55] *See* N.Y. DEPT. OF LABOR, STUDIES IN DISABILITY INSURANCE 77 (1949) (describing potential models as "exclusive state fund" (RI), "contracting out" (CA, NJ), "employer liability," and "employer liability with competitive state fund."); *Insurance Against Temporary Disability: A Blueprint for State Action*, 60 YALE L.J. 647 (1951) [hereinafter "Blueprint"] (breaking then-extant TDI laws into "exclusive state fund" (RI), employer liability with competitive state fund (NY), and "contracting out" (CA, NJ)).

through a single, state-run fund. Only Rhode Island and, surprisingly, the newly enacted D.C. law fall into this category.

The second is a default state fund, which makes use of the state fund the norm but allows employers and/or employees to choose to use private insurance or self-insurance under certain circumstances. Both California and New Jersey use this model. The states differ in the strength of their default: California makes it comparatively more difficult to use methods other than the state fund, while New Jersey makes it comparatively easier. Washington State, the most recent entrant, has adopted a paid family and medical leave law following this model.

As the historical exploration will show, the Rhode Island, California, and New Jersey models were all heavily influenced by and intertwined with their respective state's unemployment insurance laws. Because, as discussed in greater detail later in this Article, unemployment insurance in the United States developed in top-down manner, state unemployment laws were all structured in essentially the same manner. The two types of state fund models for TDI—monopolistic and default—reflected this shared structure.

The third is an employer insurance mandate, where employers are required to provide for benefits through either the purchase of insurance or self-insuring by setting aside assets (and generally gaining state approval). In New York, the mandate is backed by both the option of purchasing from a competitive state fund and a strong enforcement mechanism to ensure all employers provide the required coverage. Hawaii, in contrast, has no competitive state fund to act as an insurer of last resort and does not provide the same level of enforcement.

The employer insurance mandate represented a break not only from the centrality of the state fund, but also from the overarching influence of existing unemployment structures. Instead, New York, the first state to reject the state fund approach, looked to its workers' compensation system as an alternative basis. This was due in part to historical factors that made the unemployment model less appealing there than in prior states.

The distinctions among the legacy programs and new laws reflect particular historical pressures and opportunities that can better enlighten paid leave advocates moving forward. As more and more states look to establish their own social insurance systems to cover some combination of family and medical leaves, these differences are ever more salient in providing new entrants with varied, customizable models that can best suit their own policy and political needs.

A. Monopolistic State Fund: Rhode Island

Rhode Island was the first state to adopt a TDI law in 1942[56] and began

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[56] 1942 R.I. Laws, Ch. 1200; *see also Legislative Medicine*, *supra* note 52, at 345–46; N.Y. DEPT.

paying out benefits on April 1, 1943.[57] While other states took years between the initial contemplation of a bill and final passage, Rhode Island passed TDI coverage in the first year a bill was formally introduced, with mere days passing between the first Senate action and the governor's signature.[58]

According to popular, though likely exaggerated,[59] understanding, one woman's experience spurred the state legislature to action:

> The story involves an applicant who had filed a valid claim for Unemployment Compensation. . . . As the applicant was crossing the street immediately after filing the claim she fell and suffered a fracture. The fall automatically cancelled any unemployment benefits since, manifestly, availability for work and a fractured leg are incompatible.[60]

As the story dramatized, workers are eligible for unemployment benefits only when they are able and available to work.[61] Rhode Island attempted to fill this gap by creating a new program that provides unemployment-like benefits to those *un*able to work, i.e. temporary disability insurance.

Thus, in the drafters' minds, temporary disability insurance was essentially a special case of unemployment; as the statute put it, the benefits were "compensation for . . . wage losses due to unemployment caused by sickness."[62] It is therefore unsurprising that, in crafting the first state TDI law, Rhode Island's lawmakers relied heavily on the state's existing unemployment insurance law. The impact of that reliance can be seen throughout the program.

Like unemployment insurance, Rhode Island's law established a monopolistic state fund, meaning that all covered workers must receive benefits through the state fund, as opposed to allowing employers or

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OF LABOR, *supra* note 55, at 3.

[57] STATE ADVISORY COUNCIL, DIVISION OF EMPLOYMENT SECURITY, COMMONWEALTH OF MASSACHUSETTS, REPORT ON SICKNESS BENEFITS 9 (1946) [hereinafter "MASS. REPORT"]; *Recent Developments in Rhode Island Cash Sickness Benefits*, 63 MONTHLY LAB. REV. Vol. 1 21, 21 (July 1946) [hereinafter *R.I. Cash Sickness*].

[58] NATHAN SINAI, FOR THE DISABLED SICK: DISABILITY COMPENSATION 17 (1949); *see also* THOMAS H. BRIDE & FREDRIC L. WALSH, *The Rhode Island Program . . . Temporary Disability Insurance* in COMPULSORY TEMPORARY DISABILITY INSURANCE PROGRAMS: FIVE PAPERS DESCRIBING STATUTORY CASH SICKNESS DISABILITY PROGRAMS, 1 (1958).

[59] SINAI, *supra* note 58, at 17 ("Obviously, one such incident does not produce an immediate legislative response to any demand for social legislation."). A 1958 paper by top officials at the Rhode Island Department of Employment Security refers to the story's role as "a legend," but states "the woman's story gained wide circulation and is reported to have been a factor in passage of the Cash Sickness legislation." BRIDE & WALSH, *supra* note 58, at 1–2.

[60] SINAI, *supra* note 58, at 17; *see also* BRIDE & WALSH, *supra* note 58, at 1 (describing the same incident).

[61] *See, e.g.*, Gen. Laws of R.I. § 28-44-12(a).

[62] 1942 R.I. Laws, Ch. 1200, § 2(1) (emphasis added).

employees to choose private insurance or self-insurance.[63] To this end, the state established the "Cash Sickness Compensation Fund," [64] later renamed the "Rhode Island Temporary Disability Insurance Fund."[65]

The most significant influence of the past unemployment insurance system, however, came through its impact on funding. Since the passage of the Federal Unemployment Tax Act (FUTA), most states have funded their unemployment insurance systems exclusively through the employer tax required by federal law.[66] Nine states, however, also imposed a tax on employees.[67] Once the economy improved, lowering unemployment rates and increasing reserves in state unemployment funds, all but four states repealed their employee contributions: Alabama, California, New Jersey, and Rhode Island.[68]

With the coffers of these remaining states similarly flush, advocates argued that employee contributions were no longer necessary to pay for unemployment insurance and should be diverted to pay for state disability insurance programs.[69] In Rhode Island, their advocacy worked: the program was funded by replacing two-thirds of the existing employee contribution to the unemployment fund with an equivalent contribution to the disability fund.[70] This funding mechanism likely accounted for the lack of political opposition that allowed for swift passage: employers did not object because the program was employee-paid, while the reduction in the unemployment tax meant workers gained a new benefit at no additional cost.[71] Thus, the legacy of Rhode Island's distinctive choices around unemployment insurance shaped the eventual passage of that state's temporary disability law.

In its early years, Rhode Island's state disability fund was in dire shape

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[63] *See, e.g.*, N.Y. DEP'T. OF LABOR, *supra* note 55, at 77; OSBORN, *supra* note 50, at 53; STEFAN A. RIESENFELD, TEMPORARY DISABILITY INSURANCE 28 (1969).

[64] 1942 R.I. Pub. Laws 108 ("Rhode Island Cash Sickness Compensation Fund"), codified as amended at 28 R.I. GEN. LAWS § 28-39-4.

[65] *See* 1951 R.I. Pub. Laws 542 (changing all references to "cash sickness compensation" to "temporary disability insurance").

[66] *See* MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SEC.: RETHINKING AM. SOC. INS. 74 (1999) ("For reasons both of politics and constitutional law, the unemployment insurance program was structured as a national tax on employers who fund their employees' unemployment benefits. This tax, however, is waived for any employer whose state imposes a similar unemployment tax and establishes an unemployment insurance benefits program that conforms to the broad contours of the federal statute."). The structure and history of unemployment insurance are discussed in greater detail in Part IV.A, *infra*.

[67] Those states were Alabama, California, Indiana, Kentucky, Louisiana, Massachusetts, New Hampshire, New Jersey, and Rhode Island. Osborn, *supra* note 49, at 15.

[68] *Id.*

[69] *Id.* at 15–16.

[70] N.Y. DEP'T. OF LABOR, *supra* note 55, at 3; OSBORN, *supra* note 50, at 17.

[71] OSBORN, *supra* note 50, at 17; *see also* N.Y. DEP'T. OF LABOR, *supra* note 55, at 3; SINAI, *supra* note 58, at 18.

financially.[72] Between the start of 1944 and June 1946, costs exceeded revenues by almost $1.5 million.[73] The program's high expenses were seen as the result of excessive generosity in benefits, particularly in covering pregnancy and recovery from childbirth[74] and allowing simultaneous collection of workers' compensation benefits.[75] To address these issues, the state passed a series of amendments to the law in 1946, including restrictions on pregnancy-related benefits and limits on benefit duplication with workers' compensation.[76] The state also raised the TDI employee contribution from 1% to 1.5% of wages, replacing the final third of the former employee UI contribution.[77]

The other major move to bolster the financial strength of the Rhode Island TDI fund further reinforced the ties to unemployment insurance. In 1947, Congress passed the Knowland Amendment, which allowed states that had, at any point, had employee contributions to unemployment insurance to transfer an amount equivalent to those contributions from their unemployment fund into a TDI fund.[78] This allowed Rhode Island to transfer close to $30 million into the state disability fund over two years, immediately bolstering its financial health at a time of great difficulty.[79] While these funds did not become available until after the program's structure was already in place, their appearance reduced incentives to change

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[72] OSBORN, *supra* note 50, at 140 ("By 1946 it had become clear that drastic changes in the disability law were necessary to avoid financial collapse."); *R.I. Cash Sickness*, *supra* note 57, at 23.

[73] SINAI, *supra* note 58, at 31.

[74] The peculiar, contested history of coverage of pregnancy-related disabilities and recovery from childbirth under TDI programs is a topic worthy of its own article. In the Rhode Island program's early years, pregnancy benefits made up a substantial portion of all benefits paid out, in part because World War II greatly increased the proportion of women in the workforce. *See* N.Y DEP'T. OF LABOR, *supra* note 56, at 4; OSBORN, *supra* note 50, at 115. Rhode Island's experience with its initial generous coverage was generally seen as a cautionary tale and, as a result, successor TDI states either explicitly excluded conditions related to pregnancy and childbirth from coverage or severely limited benefits. *See, e.g.*, OSBORN, *supra* note 50, at 116. All TDI states eventually added coverage for pregnancy-related disabilities and recovery from childbirth.

[75] SINAI, *supra* note 58, at 26–28.

[76] N.Y DEP'T. OF LABOR, *supra* note 56, at 4.

[77] *R.I. Cash Sickness*, *supra* note 57, at 23–24.

[78] Public L. No. 79-719, Ch. 951, 60 Stat. 978, § 416, previously codified at 26 U.S.C. § 1603(a)(1)("Provided, That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration[.]"); *see also* FED. SEC. AGENCY, TEMP. DISABILITY INS.: PROBLEMS IN FORMULATING A PROGRAM ADMINISTERED BY A STATE EMP'T SEC. AGENCY 5 (1949) [hereinafter, PROBLEMS]; Osborn, *supra* note 49, at 16;

[79] *See* N.Y DEP'T. OF LABOR, *supra* note 56, at 5 (sources differ on whether the total amount withdrawn was $28 million); PROBLEMS, *supra* note 78, at 49; s*ee* OSBORN, *supra* note 50, at 142–43 (other sources state that the total amount withdrawn was $29 million); SINAI, *supra* note 58, at 31. The discrepancy is likely the result of the sources assessing the relevant fund assets at slightly different points in time.

the program's structure at a time when the law appeared to be in flux.[80]

The influence of unemployment insurance was not limited to the funding and structure of the program. TDI and unemployment were jointly administered by the Unemployment Compensation Board.[81] They covered the same workers and used the same records.[82] In fact, virtually all definitions in the TDI law explicitly referenced the unemployment statute.[83] Originally, the programs used the same benefits scale,[84] though the two were decoupled a few years later.[85] Because administrative expenses for unemployment were (and are) covered through federal grants restricted to that purpose,[86] Rhode Island authorized specific funding for TDI administrative costs[87] and explicitly disclaimed the use of any UI grant funds, unless (as the statute optimistically suggested) Congress explicitly authorized such use.[88] This meant that the state paid directly for any additional or marginal administrative costs added by TDI.[89]

The basic structures of the program remain as they were originally established in 1942. Many of the details, however, have changed, usually to make the program more generous. The original law set an effective maximum of 20.25 weeks of benefits;[90] today, workers can receive up to thirty weeks of benefits.[91] While the 1942 act created a tiered set of benefits

[80] *See, e.g.*, MASS. REPORT, *supra* note 57, at 10 ("It is obvious that much of the Rhode Island experience has been trial and error. Although change has been resisted by conflicting interests within the State, a permanent system may develop in time.").

[81] 942 R.I. Pub. Laws 108 ("'Board' means the Rhode Island unemployment compensation board, or its authorized representative."); N.Y. DEP'T. OF LABOR, *supra* note 56, at 5; *Blueprint*, *supra* note 55, at 667. In 1949, the legislature abolished the Unemployment Compensation Board and placed both programs under the authority of the Department of Employment Security. BRIDE & WALSH, *supra* note 58, at 6.

[82] *See* 1942 R.I. Pub. Laws 168 ("'Employer' means any employing unit which is an employer under the unemployment compensation act, as amended."); *see also* OSBORN, *supra* note 50, at 53; *Blueprint*, *supra* note 55, at 667.

[83] 1942 R.I. Pub. Laws 168 ("'Employment' is hereby declared to have the same definition as contained in the unemployment compensation act, as amended."); *id.* at 169 ("'Base period' is hereby declared to have the same definition as contained in the unemployment compensation act, as amended."); *see also id.* at 168 ("Employing unit"); *id.* at 169 ("Employment office"); *id.* ("Benefit year"); *id.* ("Wages"); *id.* at 170 ("Week"); *id.* ("Calendar quarter").

[84] N.Y. DEP'T. OF LABOR, *supra* note 56, at 3.

[85] *Id.* at 5; SINAI, *supra* note 58, at 21.

[86] *See* PROBLEMS, *supra* note 78, at 17 ("[T]he costs of [unemployment] administration are met by Federal grants under title III of the Social Security Act . . . and title III grants cannot be used to meet administrative costs of temporary disability insurance.").

[87] 1942 R.I. Pub. Laws 191–92.

[88] *Id.* at 192.

[89] This was apparently consistent with federal interpretation of limits placed by FUTA. *See* Monroe Newman, *Issues in Temporary Disability Insurance*, 24 J. INS. 61, 64 (1957).

[90] The statute limited the duration of benefits based on the amount of "benefit credits" available based on a workers' wages, which yielded a maximum of 20.25 times the weekly benefit rate for any particular wage range. *See* 1942 R.I. Pub. Laws 174.

[91] Technically, the law sets a monetary rather than chronological limit, stating that "that no individual shall be paid total benefits in any benefit year which exceed thirty (30) times his or her weekly

correlated to wages,[92] covered workers now receive approximately 60% of their average weekly wages.[93] The maximum benefit in 1942 was $18.00 per week.[94] The maximum benefit is now set annually at 85% of the statewide average weekly wage,[95] which for 2017 translates into a maximum benefit of $817 per week.[96] This represents a substantial increase in real money terms: $18.00 in 1942 had the same buying power as $280.84 in 2017.[97] The law originally required a one-week unpaid waiting period before benefits became payable,[98] but the legislature removed it in 2012.[99] As discussed in greater detail later in Part III, Rhode Island expanded its law to provide paid family leave in 2014.[100]

B. Default State Funds with Private Options

The next two states to adopt TDI laws, California and New Jersey, self-consciously looked to Rhode Island as a model. These programs were also shaped by the influence of unemployment insurance, both in their own states and indirectly through the influence of Rhode Island's TDI law. Both ultimately adopted tweaked versions of the state fund model, wherein the state fund was a default but private options were allowed under certain conditions. The states varied in the relative strengths of this default: California made it harder to opt for non-state fund options, while New Jersey made it easier.

1. California

On March 5, 1946, California's governor approved the nation's second TDI statute.[101] Unlike its predecessor's experience, California's process was winding: unsuccessful proposals were brought forward in 1941, 1943, 1945, and 1946, with an especially close vote in 1945.[102] The state also convened

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benefit rate." 28 R.I. Gen. Laws § 28-41-7.

[92] 1942 R.I. Pub. Laws 177.

[93] Formally, the weekly benefit rate is equal to 4.62% of a workers' quarterly wages in the highest earning base quarter. 28 R.I. GEN. LAWS § 28-41-5(a)(1). Assuming thirteen weeks in a quarter, 4.62% of quarterly wages works out to just over 60% of average weekly wages during that quarter. Workers may also be entitled to a dependents' allowance. *Id.* § 28-41-5(b).

[94] 1942 R.I. Pub. Laws 177.

[95] 28 R.I. GEN. LAWS § 28-41-5(a)(1).

[96] *2017 U.I. and TDI Quick Reference*, R.I. DEP'T. OF LAB. & TRAINING, http://www.dlt.ri.gov/lmi/news/quickref.htm.

[97] Bureau of Labor Statistics, *CPI Inflation Calculator*, https://data.bls.gov/cgi-bin/cpicalc.pl (Calculations made using the Bureau of Labor Statistics CPI Inflation Calculator).

[98] 1942 R.I. Pub. Laws 179.

[99] 2012 R.I. Pub. Laws 395.

[100] *See infra* Part III..

[101] 1946 Cal. Stat. 101.

[102] Osborn, *supra* note 49, at 17–18; *see also* SINAI, *supra* note 58, at 46 (describing California's six-year process as the "familiar pattern" for such laws).

special legislative committees in 1942 and 1944.[103]

In the spring of 1945, the State Senate Interim Committee on Unemployment Insurance recommended the adoption of TDI benefits, to be operated in connection with unemployment insurance.[104] Because California, like Rhode Island, was part of the handful of states with an employee contribution for unemployment insurance, the committee recommended replacing this contribution with an equivalent employee payment for disability benefits.[105] The committee's report framed the problem as a gap in unemployment insurance coverage[106] and recommended following the Rhode Island model but with several modifications to reduce costs.[107]

In 1946, the state convened a special legislative session for the purpose for passing a TDI law,[108] with the governor urging the correction of what he described as a problem in the unemployment law.[109] The original 1946 bill would have created a Rhode Island-style monopolistic state fund.[110] This bill was supported by the governor and labor but drew opposition from employer groups and insurers, who opposed any form of compulsory disability insurance.[111] However, once it became clear that some form of disability law would pass, opponents put forth an amendment that would allow private insurance to compete with the state fund.[112] Despite provoking some labor opposition,[113] the compromise bill including the private insurance option passed easily.[114]

The resulting system looked similar to the Rhode Island model, but with some key differences. The most important of these differences was the structural change embedded in the last-minute compromise. Like its predecessor, the California statute created a state disability fund ("Unemployment Compensation Disability Fund").[115] Under the law,

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[103] SINAI, *supra* note 58, at 46.

[104] *Cash Disability Benefits in California*, 63 MONTHLY LABOR REV. 21, 21 (1946) [hereinafter, *Cash Disability*].

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] OSBORN, *supra* note 50, at 54; *see also Cash Disability*, *supra* note 104, at 23.

[109] Governor Earl Warren sent a message to legislators, specifically urging the passage of legislation to "eliminate the provisions of our Unemployment Insurance Act which now prevent compensation payments to workers whose unemployment results from illness or injury." SINAI, *supra* note 58, at i (reproducing statement in full).

[110] OSBORN, *supra* note 50, at 54; SINAI, *supra* note 58, at 49.

[111] OSBORN, *supra* note 50, at 55.

[112] *Id.* at 55; *see also* SINAI, *supra* note 58, at 49 ("[T]he proposed revisions served as an acceptance of the principle of compulsory insurance and asked, in exchange, that no state monopoly be created.").

[113] Though both the AFL and CIO had backed the original bill, only the AFL backed the amended measure while the CIO opposed it for not creating a state-fund-only system. OSBORN, *supra* note 50, at 55; SINAI, *supra* note 58, at 49–50.

[114] OSBORN, *supra* note 50, at 55; SINAI, *supra* note 58, at 49–50.

[115] 1946 Cal. Stat. 105.

employees were required to contribute to this fund[116] and receive coverage through it unless they or their employer received approval for a "voluntary plan."[117] This made the state fund the default option but, unlike in Rhode Island, not the only option.[118]

The approval conditions for voluntary plans were strict. Most significantly, the proponents of a voluntary plan needed to show that "[t]he rights afforded to the covered employees are *greater* than those provided…" by the state plan.[119] In addition, the statute required that the voluntary plan "not result in a substantial selection of risks adverse to the Disability Fund."[120] In practice, the state initially primarily implemented this requirement by rejecting any voluntary plan where the workforce covered by the plan was less than 20% female, based on the general belief that women took disability leave more often than men.[121] Employers could not unilaterally choose a voluntary plan, since the state was only authorized to approve voluntary plans that had the consent of both the employer[122] and a majority of employees.[123] This procedural safeguard reinforced the state plan as the default option, to be varied from only when specific procedural and substantive criteria were met. Voluntary plans could consist of private insurance policies[124] or becoming an approved self-insurer by setting aside assets and gaining permission from the state.[125]

Apart from this significant change, California largely followed the pattern set by Rhode Island and built its TDI law on the base of its existing unemployment system.[126] The California law's stated purpose was "to establish a system of unemployment compensation disability benefit payments" and the act itself amended the state's existing Unemployment Insurance Act.[127]

Because California also retained an employee contribution to

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[116] *Id.* at 108–09.

[117] *See id.* at 109–11.

[118] *See* PROBLEMS, *supra* note 78, at 36; *Blueprint*, *supra* note 55, at 668; *see also* RIESENFELD, *supra* note 63, at 6.

[119] 1946 Cal. Stat. 109; *see also* RIESENFELD, *supra* note 63, at 6; *Cash Disability*, *supra* note 104, at 241; Pat Merrick, *California's Disability Insurance System*, 304 INS. L. J. 371, 376 (1948).

[120] 1946 Cal. Stat. 109–10; *see also* N.Y. DEP'T. OF LABOR, *supra* note 55, at 88; RIESENFELD, *supra* note 63, at 6; *Cash Disability*, *supra* note 104, at 241.

[121] *See* N.Y. DEP'T. OF LABOR, *supra* note 55, at 14.

[122] *See* 1946 Cal. Stat. 109

[123] *See id.*

[124] *Id.*

[125] *See* 1946 Cal. Stat. 110.

[126] SINAI, *supra* note 58, at 50–51 ("Thus it became a part of the general pattern of organization and administration established by the older system, Unemployment Compensation."); *see also* Herbert M. Wilson, *The California Program . . . Temporary Disability Insurance*, *in* COMPULSORY TEMPORARY DISABILITY INSURANCE PROGRAMS: FIVE PAPERS DESCRIBING STATUTORY CASH SICKNESS DISABILITY PROGRAMS, at 17 (1958) ("The California Unemployment Insurance Code provides two systems of protection against wage loss by involuntarily unemployed wage earners.").

[127] 1946 Cal. Stat. 101; *see also* Merrick, *supra* note 119, at 371; OSBORN, *supra* note 49, at 18.

unemployment insurance into the post-war period,[128] the second TDI state was able to use the same fortuitous mechanism as the first to fund its program, replacing its previous employee contribution (1% of covered wages) to unemployment insurance with an equivalent contribution to support disability benefits.[129] If a voluntary plan was used, employers could withhold up to the same percentage of employee wages to pay for the voluntary plan or could choose to cover all or some of the costs themselves.[130] Employees covered by a voluntary plan were excused from contributing to the state fund.[131]

California also benefitted from the Knowland Amendment,[132] which the 1946 California statute clearly anticipated despite predating the federal change by a year. California's TDI statute stated that if federal authorities were to authorize the use of previously remitted employee contributions to pay for disability insurance benefits, the enforcing agency was authorized to withdraw such funds and deposit them in the Disability Fund.[133] The act further provided that, in the event that the federal government so authorized and the agency so deposited, benefits would become payable earlier than the statute otherwise provided.[134]

In 1947, California Senator William Knowland successfully proposed his namesake amendment, presumably as a result of his home state's new legislation.[135] California Representative Jerry Voorhis also spoke in favor of

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128 *See, e.g.*, OSBORN, *supra* note 50, at 51.

129 *See* N.Y. DEPT. OF LABOR, *supra* note 55, at 10; Merrick, *supra* note 119, at 372; *Cash Disability*, *supra* note 104, at 236, 240.

130 1946 Cal. Stat. 110 ("An employer may, but need not, assume all or part of the cost of the plan, and may deduct from the wages of an employee covered by the plan . . . an amount not in excess of that which would be required by Section 44 [the state plan contribution] if the employee were not covered by the plan."); *see also* MASS. REPORT, *supra* note 57, at 10; *Cash Disability*, *supra* note 104, at 241.

131 *See, e.g.*, Merrick, *supra* note 119, at 378–79.

132 *See Legislative Medicine*, *supra* note 52, at 347 ("[The Knowland Amendment] may have had some effect on California, whose plan, though adopted prior to the enactment of the federal statute, expressly provided for the use of funds which might be released from the trust fund.").

133 1946 Cal. Stat. 108.

134 The provision states, in relevant part:

> [I]f it is determined by the Social Security Board or other higher authority that the worker contributions collected under this act during the calendar years 1944 and 1945, and heretofore deposited or invested in the obligations of the Unemployment Trust Fund of the United States of America . . . may be withdrawn and expended for the purposes of this article without conflicting with any provisions or conditions of the Federal Unemployment Tax Act or Title 3 of the Social Security Act . . . then, and in that event such amounts as determined by the commission and not in excess of such worker contribution shall be requisitioned from the Unemployment Trust Fund and deposited in the Disability Fund and benefits shall become payable on and after 90 days from such determination . . . .

Id.

135 *See* SINAI, *supra* note 58, at 51 ("Apparently it was this proviso in the Act that was behind the legislation introduced by Senator Knowland (California) and approved by Congress, to permit states to transfer the employee contributions from Unemployment Trust Funds to Disability Funds.").

the Amendment on the House floor, saying, "several States in the Union have passed disability insurance laws. California is one of them. I believe those States ought to be able to recover their own tax money so that they may make those disability payments . . . ."[136] Both within the state and outside of it, the passage of the Knowland Amendment was attributed to California's influence.[137]

Once the Knowland Amendment went into effect, California transferred a token amount ($200,000) of its prior employee unemployment contributions in order to trigger the earlier effective date.[138] As a result, the state began paying out disability benefits on December 1, 1946.[139] This left the state with a considerable cushion of over $120 million for potential future transfers.[140]

Beyond financing, the California law also imitated unemployment insurance in other ways. The TDI statute, which was placed within the Unemployment Act, cross-applied all relevant provisions of the state's unemployment statute except as specifically provided.[141] The two programs were administered by the same agency,[142] covered the same workers, and used the same records.[143] This coordination was credited with reducing administrative costs, though, as in Rhode Island, the state had to pay additional costs for temporary disability insurance added to the federally-granted costs of unemployment insurance.[144]

At least initially, unemployment insurance and TDI also provided benefits at the same rates and for the same duration.[145] Statutory amendments in 1951 partially decoupled the programs, making the

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[136] H.R. DOC., p. 9907 (1946). Legislative history on the Amendment, which was part of a larger package of legislation, is sparse; Voorhis's comment appears to have been the only recorded floor statement on the Amendment specifically.

[137] Pat Merrick, then the head of the agency administering California's law, wrote that "California sought and obtained federal legislation in order to start its operations early, which will also enable some other states to use certain of their existing social security funds on deposit in the Federal Treasury as reserves for disability insurance, if they enact such laws." Merrick, *supra* note 119, at 371. A 1947 report by the New Jersey Commission on Post-War Economic Welfare, describe in greater detail, similarly credited California. *See infra* SUPPLEMENT TO THE FOURTH REPORT OF THE STATE COMMISSION ON POST-WAR ECONOMIC WELFARE, CASH SICKNESS BENEFITS, NEW JERSEY 5 (1947) [hereinafter, N.J. SUPPLEMENT] ("It was, in fact, as the instance of California that the above amendment to the Federal law was adopted by Congress.").

[138] Merrick, *supra* note 119, at 373; *see also* OSBORN, *supra* note 50, at 144; SINAI, *supra* note 58, at 75; PROBLEMS, *supra* note 78, at 49.

[139] OSBORN, *supra* note 50, at 55.

[140] *Id.* at 144.

[141] 1946 Cal. Stat. 102.

[142] *See* Wilson, *supra* note 126, at 19; *see also* RIESENFELD, *supra* note 63, at 6.

[143] N.Y. DEPT. OF LABOR, *supra* note 55, at 10; OSBORN, *supra* note 50, at 63; Margaret M. Dahm, *Temporary Disability Insurance: The California Program*, SOCIAL SEC. BULLETIN 15 (Feb. 1953), *available at* https://www.ssa.gov/policy/docs/ssb/v16n2/v16n2p15.pdf.

[144] Dahm, *supra* note 143, at 16; *see also* 1946 Cal. Stat. 7.

[145] PROBLEMS, *supra* note 78, at 4; Merrick, *supra* note 119, at 371-72.

maximum weekly benefit for TDI temporarily higher than the maximum weekly benefit for unemployment.[146]

California's TDI law remains in place today, using the same structure it had at its enactment. However, over the intervening decades, other factors have changed. Originally, benefits lasted for a maximum of 23.4 weeks; this was soon raised to 26 weeks, presumably to match unemployment insurance.[147] Today, the program allows workers to receive benefits for up to 52 weeks.[148] Similarly, the maximum benefit was originally $20 per week,[149] but is now set by a formula to approximately equal 100% of the statewide average weekly wage.[150] For 2017, this maximum is $1,173 per week.[151] In real dollar terms, this is a substantial increase: $20.00 in 1946 dollars is equivalent to $269.18 in 2017 dollars.[152] The wage replacement rate is currently set at 55% of a worker's average weekly wage.[153] In 2018 it will increase to between 60% and 70% of a worker's average weekly wage depending on the workers' income level (with lower-wage workers receiving a higher percentage).[154]

Two changes over time stand out. First, California became the first state to add paid family leave benefits to its temporary disability insurance program through legislation enacted in 2002.[155] Benefits became payable on July 1, 2004.[156] Second, the use of voluntary plans in practice has

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[146] Dahm, *supra* note 143, at 17.

[147] *See* SINAI, *supra* note 58, at 55; *see also* Dahm, *supra* note 143, at 17.

[148] Technically, "the maximum amount of benefits payable to an individual during any one disability benefit period shall be 52 times his or her weekly benefit amount . . . ." CAL. UNEMP. INS. CODE § 2653 (1984).

[149] *Cash Disability*, *supra* note 104, at 236; *see also* SINAI, *supra* note 58, at 55.

[150] The statute provides that benefits "not exceed[] the maximum workers' compensation temporary disability indemnity weekly benefit amount." CAL. UNEMP. INS. CODE § 2655. The workers' compensation statute does not technically set a maximum benefit, but does set a maximum wage on which the benefit can be calculated. In 2006, this maximum wage was set at $1,260 or 1.5 times the state average weekly wage, whichever is higher. CAL. LAB. CODE § 4453(a)(10). After 2006, the statute provides that this maximum wage "shall be increased by an amount equal to the percentage increase in the state average weekly wage as compared to the prior year." *Id.* Workers' compensation benefits for temporary total disability are equal to 2/3 of a worker's average weekly wage. CAL. LAB. CODE § 4653. If the maximum wage were exactly 1.5 times the statewide average weekly wage, that would make the maximum workers' compensation temporary disability insurance benefit equal to the statewide average weekly wage. However, because technically the maximum wage is set based on percentage change in the statewide average weekly wage rather than the statewide average weekly wage itself, these amounts are sometimes off by a few dollars. For example, for 2017, the statewide average weekly wage is $1,164.51, about $9 less than the maximum TDI benefit. Workers' Compensation Benefits, STATE OF CAL. DEP'T OF INDUS. RELATIONS, http://www.dir.ca.gov/dwc/workerscompensationbenefits.htm.

[151] EMP'T DEV. DEP'T, STATE OF CAL., DISABILITY INS. (DI) AND PAID FAMILY LEAVE (PFL) WEEKLY BENEFIT AMOUNTS, http://www.edd.ca.gov/pdf_pub_ctr/de2588.pdf.

[152] Calculations made using the Bureau of Labor Statistics CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl.

[153] CAL. UNEMP. INS. CODE § 2655(d)(1) (2017).

[154] CAL. UNEMP. INS. CODE § 2655(d)(2) (2017).

[155] CAL. UNEMP. INS. CODE § 3300 (2002).

[156] *Id.*

significantly declined over time.

In the program's early years, voluntary plans played a significant role in the provision of insurance in the state. In the late 1940s and early 1950s, around one third of workers were covered by voluntary plans, with some sources putting coverage as high as half of covered workers by 1951.[157] In 1958, 43% of workers were covered through voluntary plans.[158]

By the 1960s, the share of workers covered by voluntary plans had declined significantly. From 1963 to 1967, the percentage of workers covered by voluntary plans fluctuated between a low of 6.9% in 1965 and a high of 7.9% in 1967. The majority of these workers (between 5.8% and 6.5%) were covered through employer self-insurance rather than private commercial insurance.[159] Today, the use of voluntary plans has diminished even further. As of the most recently available data (2014), just 3.4% of covered workers were covered through a voluntary plan[160] and reports from other recent years show similar percentages.[161]

The cause of this precipitous decline is not immediately clear, though the history suggests a few potential explanations. Early heavy reliance on private insurance may have been a carryover from the coverage voluntarily provided by some employers prior to the enactment of the state law that faded out in significance over time. There is some evidence that a substantial portion of the earliest workers to be covered by voluntary plans had been covered by an employer plan prior to the law's passage.[162]

Alternatively, increasingly generous state plan benefits may have raised

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157 Merrick cites voluntary coverage as February 1948 at "some thirty-one percent of the total potential coverage[,]" with 9,609 plans covering 716,000 workers. Merrick, *supra* note 119, at 381. Another source puts coverage for all of 1948 at 33-36% of total coverage. N.Y. DEPT. OF LABOR, *supra* note 55, at 15. Sources published in 1949 and 1951, respectively, both put the number at around one third. *See* SINAI, *supra* note 58, at 80; Robert M. Tilove, *The New York Disability Benefits System—I. An Appraisal of the New York Disability Benefits Law*, 4 INDUS. & LAB. REL. REV. 415, 416 1950-1951 (1951). A Social Security Bulletin article published in February 1953 states that as of June 1951, "[voluntary] plans covered almost half the workers subject to the law." Dahm, *supra* note 143, at 16.

158 Wilson, *supra* note 126, at 20.

159 RIESENFELD, *supra* note 63, at 14.

160 In 2014, 564,235 workers were covered by voluntary plans out of a total of 16,703, 142, or 3.378%. EMP'T DEV. DEP'T, STATE OF CAL., DISABILITY INS.(DI) FUND FORECAST 5 MAY 2016, http://www.edd.ca.gov/About_EDD/pdf/edddiforecastmay16.pdf.

161 In 2013, 546,871 workers were covered by voluntary plans out of a total of 16,287,308, or about 3.357%. EMP'T DEV. DEP'T, STATE OF CAL., DISABILITY INS. (DI) FUND FORECAST 5 MAY 2015, http://www.edd.ca.gov/About_EDD/pdf/edddiforecastmay15.pdf; *see also* DEBRA FITZPATRICK, PAID FAMILY & MEDICAL LEAVE INSURANCE: OPTIONS FOR DESIGNING AND IMPLEMENTING A MINNESOTA PROGRAM 21 (2016), *available at* https://mn.gov/deed/assets/paid-family-medical_tcm1045-186560.pdf (analyzing the 2014 forecasted data). In 2011, 3.9% of workers were covered by voluntary plans. FISCAL POLICY INST., REFORM OF N.Y.'S TEMP. DISABILITY INS. PROGRAM AND PROVISION OF FAMILY LEAVE INS.: ESTIMATED COSTS OF PROPOSED LEGIS.: TECHNICAL SUPPLEMENT 4 (2014), http://fiscalpolicy.org/wp-content/uploads/2014/06/Reform-of-NY-TDI-and-FLI-Technical-Supplement.pdf.

162 *See* SINAI, *supra* note 58, at 79 ("It is of interest that among the first 500,000 employees covered by the voluntary plans, 34 percent had been in some type of previous plan.").

the cost of providing benefits "greater than" the state plan. In evaluating the strength of this explanation, comparisons of the changes in the program in the two relevant intervals may be helpful. The maximum weekly benefit went from $25 in 1948[163] to $87 in 1969,[164] rising relatively steadily over that period[165] through revisions of the statutory benefit table.[166] These changes increased purchasing power of the maximum benefit by 43.6%: $25 in 1948 dollars is equivalent to $38.07 in 1969 dollars.[167] This could have made voluntary plans more costly and therefore less attractive, particularly given that the cost of participation in the state plan as a percentage of employee wages remained constant over this time.[168]

However, the changes between the 1960s and the current period were even more significant. In the interim, the maximum number of weeks of coverage doubled to 52.[169] The maximum weekly benefit increased by 48.5% in real terms between 1969 and today: $87 in 1969 dollars is equivalent to $598.63 in 2017 dollars,[170] while the current maximum is $1,173 per week.[171] As discussed above, use of voluntary plans continued to decline over this second interval, though somewhat less dramatically. The employee contribution rate for the state plan has actually declined slightly over this period, despite the addition of new benefits.[172]

A third explanation is that the addition of paid family leave benefits may explain some portion of the decline in voluntary plans between the late 1960s and today, particularly given that no private insurance product currently exists for family leave benefits.[173] Because California, unlike New

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163 OSBORN, *supra* note 50, at 104. This was an increase from the initial maximum of $20. Id.; *see also Cash Disability*, *supra* note 104, at 236

[164] RIESENFELD, *supra* note 63, at 8.

[165] The maximum benefit went up to $30 in 1952, $35 in 1954, and $40 in 1955. OSBORN, *supra* note 50, at 104. The maximum benefit was $70 from 1961 to 1963 and $80 from 1963 to 1965. RIESENFELD, *supra* note 63, at 9.

[166] *See* RIESENFELD, *supra* note 63, at 8. California did not adjust the self-adjusting formula based on the maximum workers' compensation temporary disability benefit and, by extension, the statewide average weekly wage, until later.

[167] To compare to the initial maximum benefit rate, $20 in 1947 dollars is equivalent to $32.91 in 1969 dollars. Calculations made using the Bureau of Labor Statistics CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl. (Enter 20 in first box under "CPI Inflation Calculator", as well as the month and year in the respective drop down boxes).

[168] The required contribution was 1% at the program's initiation, *see, e.g.*, *Cash Disability*, *supra* note 104, at 236, and remained at 1% as of 1969, *see* RIESENFELD, *supra* note 63, at 10.

[169] *Compare id.* at 9 (1969); *with* CAL. UNEMP. INS. CODE § 2653 (2017).

[170] Calculations made using the Bureau of Labor Statistics CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl.

[171] EMP'T DEV. DEP'T, *supra* note 151.

[172] The current disability insurance tax rate, which covers both disability insurance and family leave benefits, is 0.9%. *What are State Payroll Taxes?*, EMP'T DEV. DEP'T, STATE OF CAL., http://www.edd.ca.gov/Payroll_Taxes/What_Are_State_Payroll_Taxes.htm.

[173] As discussed in Part III, *infra*, this may soon change.

Jersey,[174] funds both TDI and paid family leave benefits through a single employee payroll deduction, it is not possible to opt for voluntary coverage for one benefit and use the state plan for the other.[175] However, given that the vast majority of voluntary plans already used self-insurance rather than commercial insurance as of the late 1960s, the impact of this factor is likely to be limited.

2. New Jersey

In 1948, New Jersey became the third TDI state.[176] The origins of the program can be traced back to 1943, when the state appointed a Commission on Postwar Economic Welfare to study wage loss from non-occupational illness and/or disability.[177] The Commission's report, issued on April 9, 1946, was sharply critical of existing models.[178] The report pronounced the Rhode Island system "decidedly unsatisfactory" and suggested that its state fund would soon become insolvent.[179] The authors enumerated additional considerations weighing against the use of a monopolistic state fund, including the need for flexibility, a desire to avoid interfering in the employment relationship, and the fear that the state program would inadvertently set a ceiling on benefits.[180] The Commission was equally skeptical of California's system (at that time enacted but not yet implemented), writing "[s]uch provisions for a mixed plan seem to offer more of a pious hope than an administrative objective."[181]

Though the state legislature had clearly expressed its preference for a Rhode-Island-style "system of unemployment sickness compensation benefits,"[182] the Commission went in a dramatically different direction. The

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[174] *See infra* Part II.B.2.

[175] *See* CAL. UNEMP. INS. CODE § 984 (2003).

[176] *See* N.J. STAT. ANN. § 43:21-25.

[177] OSBORN, *supra* note 49, at 18

[178] FOURTH REPORT OF THE STATE COMMISSION ON POST-WAR ECONOMIC WELFARE, CASH SICKNESS BENEFITS, NEW JERSEY, at vii (1946) [hereinafter, N.J. COMMISSION], https://archive.org/details/CashSicknessBenefits.

[179] *Id.* at 11. This report predated the various measures to shore up the financial health of the Rhode Island fund described in Part II.A, *supra*.

[180] *Id.* at 14.

[181] *Id.*

[182] N.J. COMMISSION, *supra* note 178, at vii (quoting resolution). On February 14, 1946, lawmakers passed Assembly Concurrent Resolution No.3, calling for the enactment of a Rhode-Island-style program. *See id.*; *see also* SINAI, *supra* note 58, at 88. The resolution charged the Commission "to make a study of the establishment of an 'Unemployment Sickness Compensation Fund' and a system of unemployment sickness compensation benefits in this State in, or substantially in, the form prescribed in the proposed act of the Legislature annexed hereto," (i.e. a monopolistic state fund) or "in such other form as said commission may determine to be for the best interests of the State . . . ." N.J. COMMISSION, *supra* note 178, at vii (quoting resolution). However, when the legislature issued this resolution, the Commission was already years into its work, having conducted hearings in 1944 and, in May 1945, having informed the legislature it would "report separately." FRANK T. JUDGE, THE NEW JERSEY PROGRAM ... TEMPORARY DISABILITY INSURANCE, IN COMPULSORY TEMPORARY DISABILITY

report described its preferred model as a "publicly *supervised* program," as opposed to the legislature's "publicly *operated* system."[183] Under this proposal, employers could meet their obligations by demonstrating financial responsibility to the state, purchasing private insurance, or setting aside money in a trust.[184] No state fund of any kind would play a role, except for a special fund to cover disability during unemployment.[185] The program would be funded by a combination of employee and employer contributions.[186] The proposal pleased no one in New Jersey[187] and no legislation passed in 1946.[188] However, the divergent path of the proposed 1946 Commission report foreshadowed, and may have influenced, later enacted proposals in other states.

In response, the governor asked the Commission to consider a non-exclusive state fund, similar to California's system. In addition to concerns raised by labor and fears over the ability of the private market to meet the need for coverage, he specifically cited the ability to use the $183 million available to New Jersey under then-new federal law, the Knowland Amendment, to fund the program.[189] By this point, California's law had also gone into effect, giving specific experience for the Commission to look to.[190]

In response, the Commission issued a new report, styled as a supplement to its 1946 report, on March 31, 1947.[191] The report notes the "dominating weight of the three factors outlined by the Governor…." The Commission changed course and proposed "a combination of the private plan and the public plan . . . ."[192] Specifically, the Commission recommended a default

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INSURANCE PROGRAMS: FIVE PAPERS DESCRIBING STATUTORY CASH SICKNESS DISABILITY PROGRAMS (1958), at 35. The Commission issued its report less than two months after the issuance of the resolution, suggesting that the resolution may have come too late in the process to shape the Commission's major conclusions.

[183] *Id.* at vii; *see also* SINAI, *supra* note 58, at 88.

[184] N.J. COMMISSION, *supra* note 178, at 17.

[185] *Id.* at 15.

[186] *Id.*

[187] Labor favored a monopolistic fund and opposed the program for its over-reliance on private insurance. Osborn, *supra* note 49, at 19; Employer groups and insurers continued to argue the problem could be solved through voluntary provision, though if pushed preferred a publicly supervised plan to a state-run one. SINAI, *supra* note 58, at 88; The proposal did draw a favorable review from a similar commission in Massachusetts for its preservation of "freedom of choice." MASS. REPORT, *supra* note 57, at 10.

[188] OSBORN, *supra* note 50, at 56.

[189] N.J. SUPPLEMENT, *supra* note 137, at 2 (quoting statement from Governor Alfred E. Driscoll); *see also* N.Y. DEP'T. OF LAB., *supra* note 55, at 35.

[190] *See* SINAI, *supra* note 58, at 90; Osborn, *supra* note 49, at 19.

[191] N.J. SUPPLEMENT, *supra* note 137.

[192] *Id.* at 2; The Commission, which "oppose[d] the federalization of the unemployment compensation system" due to the loss of control of the state's accumulated financial reserves saw the opportunity to reclaim funds from federal control as an additional reason to revisit their recommendation. *Id.*

state fund with option to choose private coverage.[193] Though its proposal was clearly similar to the California model, the Commission never mentioned the parallels.[194]

After encountering some obstacles[195] and some position shifting among the major players,[196] New Jersey passed a temporary disability insurance law that largely tracked the 1947 Commission proposal on June 1, 1948.[197] Benefits began on January 1, 1949.[198] The resulting program, like California's, combined a state fund with the opportunity to opt for alternate coverage, termed "private plans."[199] These plans could consist of private insurance, self-insurance, or an agreement with a union.[200]

The 1948 law was not, however, an exact copy of its California counterpart. To begin, the text of the New Jersey law placed more emphasis on the role of private plans than California's did. The law discussed private plans before the state plan[201] and the entitlement to state fund benefits was framed as a fallback option for those without private plans.[202] While the effect (making participation in the state fund the default for those who did not affirmatively choose a private plan) was the same, the positioning sent some signals about the relationship the laws' respective drafters envisioned between state and private provision.

Nor were the differences merely aesthetic. New Jersey's conditions for private plans were also easier to satisfy than California's requirements for voluntary plans in at least three important ways.[203] First, a private plan need

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[193] *See, e.g.*, *id.* at 12.

[194] Perhaps out of embarrassment over their earlier out-of-hand rejection of the California model it now clearly, if only implicitly, sought to emulate, the Commission's only reference to the California design is in the quoted section of the charge from the governor. *Id.* at 1.

[195] In 1947, bills were proposed reflecting the Commission's new approach, competing with a bill to enact a totally private system, but the legislature adjourned without acting on either despite a special session to address the issue. N.Y. DEP'T. OF LAB., *supra* note 55, at 35; SINAI, *supra* note 58, at 90; JUDGE, *supra* note 182, at 35.

[196] Employer groups now supported a publicly supervised program of requiring private insurance (like the 1946 Commission proposal). Labor, on the other hand, was willing to accept a California-type plan with a default state fund but allowing the use of private insurance (like the 1947 Commission proposal). OSBORN, *supra* note 50, at 57; SINAI, *supra* note 58, at 90.

[197] *See* 1948 N.J. Laws, ch. 110.

[198] *Id.* § 4; *see also, e.g.*, OSBORN, *supra* note 50, at 56.

[199] *See* N.Y. DEP'T. OF LAB., *supra* note 55, at 35; OSBORN, *supra* note 50, at 56; SINAI, *supra* note 58, at 90; *Blueprint*, *supra* note 55, at 669.

[200] 1948 N.J. Laws, ch. 110, § 8.

[201] Private plans are outlined in Article II of the law, *see id.* §§ 8-12, while the state plan is discussed in Article III, *see id.* §§ 13-14. *See also* SINAI, *supra* note 58, at 99 (noting the ordering).

[202] The provision states "Any covered individual who on the date of the commencement of a period of disability is not entitled to disability benefits under an approved private plan shall be entitled to disability benefits as provided in this article, referred to in this act as the State plan." 1948 N.J. Laws, ch. 110, § 13.

[203] *See* PROBLEMS, *supra* note 78, at 36-37.

only provide benefits *as* generous as the state plan, not more generous.[204] Second, New Jersey's law contained no explicit provision to protect the state fund against adverse selection equivalent to California's protective wording.[205] Third, New Jersey's law only required the consent of a majority of employees to adopt a private plan "if employees are required to contribute to the cost of the private plan . . . ."[206] Taken together, these differences made it easier for a New Jersey private plan to gain approval than a California voluntary plan.

Another innovation of the New Jersey model may have also indirectly made private plans more attractive. As mentioned above, New Jersey was also among the last states to have an employee contribution to unemployment insurance, a factor proponents cited in arguing for the use of a state fund.[207] Out of the prior 1% tax, New Jersey redirected 0.75% to pay for the new TDI program.[208] New Jersey also initially moved $50 million into the disability fund under the Knowland Amendment, with additional funds being moved each year.[209] This made New Jersey the first state to shape its program in *response* to the Amendment.[210]

Diverging from its predecessors, New Jersey was the first state to require employers to contribute to the cost of the program.[211] This was politically possible in part because of yet another legacy of the state's unemployment insurance system. The introduction of the employer contribution for TDI coincided with liberalizing of experience rating for employer contributions to unemployment insurance, such that the two balanced out for many employers.[212] The employer contribution for TDI was set at 0.25% of wages initially, but became subject to experience rating based on the employer's use of the disability fund thereafter.[213] This aspect of the program was

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[204] *Compare* 1948 N.J. Laws, ch. 110, § 8(c) ("[T]he weekly benefits payable under such a plan . . . are at least equal to the weekly benefit amount payable by the State plan . . . and the total number of weeks of disability for which benefits are under such plan is at least equal to the total number of weeks for which benefits would have payable by the State plan."), *with* 1946 CA Laws, ch. 81, § 451(a) ("The rights afforded to all covered employees are greater than those provided for in Part 2 of this article.").

[205] *See* SINAI, *supra* note 58, at 97-98. The statute did provide that a private plan could "exclude a class or classes of employees" only if "it does not appear to the commission that such exclusion will result in a substantial selection of risk adverse to the State plan." 1948 N.J. Laws, ch. 110, § 8(f); *see also* SINAI, *supra* note 58, at 97-98 (noting that this requirement "has no bearing upon any plan that covers all of the employees working for an employer").

[206] 1948 N.J. Laws, ch. 110, § 8(f).

[207] *See, e.g.*, Osborn, *supra* note 49, at 16.

[208] *See* SINAI, *supra* note 58, at 94.

[209] JUDGE, *supra* note 182, at 39.

[210] *See Legislative Medicine*, *supra* note 52, at 346-47.

[211] *See* 1948 N.J. Laws, ch. 110, § 22 ("There shall be deposited and credited to the fund the amount of worker and employer contributions provided under [the law.]").

[212] N.Y. DEP'T. OF LAB., *supra* note 55, at 37; The Chamber of Commerce estimated that, on net, this change may have saved employers $25 million. SINAI, *supra* note 58, at 95; The 1946 Commission report had recommended a similar move. N.J. COMM'N, *supra* note 182, at ix.

[213] *See* JUDGE, *supra* note 182, at 39.

controversial from the beginning, both because it increased the risk of hiring discrimination and because of fears of incentivizing adverse selection against the state fund.[214]

Where workers were covered under an approved private plan, employers could withhold employee contributions up to the amount allowed under the state plan to pay for private coverage.[215] Use of a private plan also excused both employers and employees from making contributions to the state fund.[216] This meant that if employers could find private coverage for less than they would pay for the experience-rated state plan, they could reduce their own out-of-pocket costs, creating an incentive to seek out alternate coverage. As noted above, New Jersey (unlike California) only required majority employee consent for a private plan if employees were required to consent to the plan's cost. Therefore, a sufficiently motivated employer (or one who had found a sufficiently inexpensive private plan) could essentially buy their way out of this procedural obstacle to opting out of the state plan.

Cumulatively, all of these changes meant that New Jersey created a weaker default of use of the state fund than California: the barriers to exit were lower and the incentives to use them higher. From the beginning, this translated into proportionately higher use of private plans in New Jersey than in California. In the first quarter of 1949, private plans, mostly consisting of commercial insurance, were approved for 50% of covered New Jersey workers.[217] Private plans consistently covered at least half of New Jersey's workers into the late 1950s. Usage topped out at 71.6% of workers covered by private plans in the second quarter of 1952.[218] The overwhelming majority of these plans used private insurance, with almost no employers self-insuring.[219]

As with its predecessors, New Jersey's program was heavily modeled on and tied to the state's unemployment insurance program. Administration of the two programs was coordinated, first through the state Unemployment Compensation Board and later through its successor, the Division of Employment Security in the Department of Labor and Training.[220] The programs also covered the same workers and used the same records.[221] The statute set out its own benefit scale,[222] which was modeled on the

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[214] *See* N.Y. DEP'T. OF LAB., *supra* note 55, at 37; *Blueprint*, *supra* note 55, at 665.

[215] *See* 1948 N.J. Laws, ch. 110, § 8.

[216] *Id.*

[217] *See* SINAI, *supra* note 58, at 99. 79% of private plans purchased insurance, 16% self-insured, and the remainder made agreements with labor unions. *Id.* at 100.

[218] JUDGE, *supra* note 182, at 37.

[219] *See id.* at 45. 85% of private plans used commercial insurance, with only 1% self-insuring; the remainder were covered by union agreements.

[220] *See* 1948 N.J. Laws, ch. 110, § 3(c); PROBLEMS, *supra* note 78, at 5; RIESENFELD, *supra* note 63; *Blueprint*, *supra* note 55, at 669.

[221] *See, e.g.*, OSBORN, *supra* note 50, at 63; JUDGE, *supra* note 182, at 37.

[222] 1948 N.J. Laws, ch. 110, § 16.

unemployment scale.[223] As with unemployment benefits, TDI benefits were available for a maximum of twenty-six weeks.[224]

New Jersey's program has evolved over time in a manner similar to the other states. When the law was passed, the maximum weekly benefit was set by statute at $22.[225] Today, the maximum benefit is adjusted annually to 53% of the statewide average weekly wage.[226] For 2017, the maximum weekly benefit was $633.[227] For comparison, $22 in 1948 is equivalent to $227.38 in 2017 dollars.[228] Similarly, when the program began, the wage replacement rate was approximately 59% of a worker's average weekly wage.[229] Workers now receive two-thirds of their average weekly wage.[230] The original statute also included a one-week unpaid waiting period before benefits became payable.[231] Effective in 1968, the law was amended to make the first week payable if the worker is subsequently eligible for benefits for at least three consecutive weeks thereafter.[232] As in the other two states, New Jersey has expanded its law to provide paid family leave benefits.[233]

As in California, usage of private plans has declined over time, though the trajectories were somewhat different. By 1959, nearly 60% of New Jersey employees were covered through private plans.[234] Private plan usage declined through the 1960s, but as late as 1967 just under half of all employees were covered by private plans in New Jersey.[235] The most recent available data (2014) show just 20.6% of employees are now covered under

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[223] N.Y. DEP'T. OF LAB., *supra* note 55, at 36.

[224] This restriction was included in two different places, in different forms. *See* 1948 N.J. Laws, ch. 110, § 15(a) ("[N]o benefits shall be payable under the State plan to any person . . . for more than twenty-six weeks with respect to any one period of disability . . . ."); *id.* § 14 (limiting benefits payments to twenty-six times the worker's weekly benefit amount). Both provisions are still in effect. *See* N.J. Stat. § 43:21-39(b)(1) ("for more than 26 weeks with respect to any one period of disability of the individual"); N.J. Stat. § 43:21-39 ("26 times his weekly benefit amount").

[225] 1948 N.J. Laws, ch. 110, § 16 ("The weekly benefit amount . . . shall not be more than twenty-two dollars ($22.00) . . .").

[226] N.J. Stat. § 43:21-40.

[227] *Calculating Benefit Amounts*, N.J. DEPT. OF LAB. & WORKFORCE DEV., http://lwd.dol.state.nj.us/labor/tdi/worker/state/sp_calculating_bene_amounts.html.

[228] Calculations made using the Bureau of Labor Statistics CPI Inflation Calculator, *supra* note 167, https://data.bls.gov/cgi-bin/cpicalc.pl.

[229] Formally, the benefit level was 1/22 of the worker's quarterly wage during the highest earning eligible base quarter. 1948 N.J. Laws, ch. 110, § 16.

[230] N.J. Stat. § 43:21-40.

[231] *See* 1948 N.J. Laws, ch. 110, § 15(a) ("[N]o benefits shall be payable under the State plan to any person . . . for the first seven consecutive days of each period of disability . . . .").

[232] *See* N.J. Stat. § 43:21-38.

[233] *See infra* Part III.

[234] RIESENFELD, *supra* note 63, at 20.

[235] At that time, 52.9% of covered workers were covered by the state plan, meaning 47.1% of workers were covered by private plans. *Id.* at 50. Intriguingly, the overwhelming majority of employers (84.2%) used the state plan at that time, but because large employers disproportionately used private plans the number of workers covered by such plans remained high. *Id.*

private plans.[236] This represents a slight increase from 2012, when just 17.9% of employees were covered under private plans.[237]

In general, the same potentially explanatory factors for the decline in usage of private plans in California may apply to New Jersey. However, New Jersey's contribution structure allows for the same employee to be covered by a private plan for TDI but be covered by the state plan for paid family leave. Though about 20% of New Jersey employee are still covered by private plans for TDI, private plan usage for paid family leave is nearly non-existent at less than half of one percent of worker coverage.[238]

C. Employer Insurance Mandates

The passage of New Jersey's law marked the end of an era in the development of TDI laws defined by the first three state's unusual employee unemployment contributions. By 1948, only one other state, Alabama, was still collecting an employee contribution to unemployment insurance.[239] This distinctive feature undoubtedly smoothed the path to passage for these states, allowing the creation of a new program without any effective new cost to employees. All post-New Jersey states would need to identify and enact new sources of ongoing funding. [240]

Nor would any other states take advantage of the Knowland Amendment. Six other states had a prior employee contribution to unemployment that could have entitled them to use those funds for a disability program.[241] Despite efforts in some of these states,[242] none enacted such a program.[243] Thus, the cash infusions that had saved a faltering Rhode

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[236] FITZPATRICK, *supra* note 160, at 21.

[237] FISCAL POLICY INST., *supra* note 160, at 4.

[238] In 2014, just 0.3% of workers were covered through a private plan for paid family leave. FITZPATRICK, *supra* note 160, at 21.

[239] *See* Merrick, *supra* note 119, at 373.

[240] *See* Tilove, *supra* note 157, at 415 (comparing the "relatively painless process" of diverting employee UI contributions with New York's need to impose a new cost).

[241] Alabama, Indiana, Kentucky, Louisiana, Massachusetts, and New Hampshire also had employee contributions at one point. *See* Osborn, *supra* note 49, at 15 n.1.

[242] In 1941, a study commission in New Hampshire called for the passage of a state TDI law, to be administered by the unemployment compensation system and paid for by reinstating the employee contribution repealed in 1937. *See* COMM'N ON DISABILITY BENEFITS, REP. TO HIS EXCELLENCY ROBERT O. BLOOD, GOVERNOR OF N.H. 27, 33-34 (1941). Bills were put forward in 1943, 1944, and 1947, but none passed. N.Y. DEP'T. OF LAB., *supra* note 55, at 43. In 1946, a similar group in Massachusetts recommended the adoption of "a privately operated plan under state supervision, with the establishment of minimum standards which would preserve present plans in operation throughout the State. . . ." MASS. REP., *supra* note 57, at 12. Five different bills, with a variety of methods of providing benefits, were proposed in 1947, but none were called to a vote. N.Y. DEP'T. OF LAB., *supra* note 55, at 42.

[243] Technically, no post-New Jersey state has done so yet. The Knowland Amendment remains good law. *See* 42 U.S.C. § 503(5) (2012); 26 U.S.C. § 3304(4)(A) (2012); 26 U.S.C. § 3306(f) (2012). Two of the potential beneficiary states, Massachusetts and New Hampshire, currently have active campaigns to pass paid family and medical leave laws, but neither has thus far included such a provision in their bills.

Island system, been presaged in California's legislation, and directly shaped the structure of New Jersey's program would not be forthcoming for other states.

The states that came after therefore needed to forge their own paths as to funding, which, in turn, may have freed them to look beyond the prescriptive unemployment insurance model centered on a state fund. The two final states to implement TDI laws, New York and Hawaii, created their programs without central state funds, instead providing employers with a variety of options to meet their obligations. The results not only looked quite different from their predecessors, but also from one another.

On March 21, 1949 Washington became the fourth state to pass a TDI law,[244] set to go into effect on June 9, 1949.[245] However, shortly after the law was passed, it was subjected to a referendum petition, which suspended the effective date pending the outcome of a November 7, 1950 popular vote.[246] Opponents of the bill prevailed and the law never went into effect.[247]

The repealed Washington law would have created a default state fund system allowing for the use of private plans, to be operated in conjunction with the state unemployment insurance system.[248] Private plans would need to provide rights "as great as those provided under the state plan"[249] (similar to New Jersey) and "not result in a substantial selection of risks adverse to…" the state fund[250] (similar to California). The program would have been funded with an employee contribution initially set at 1% of wages.[251] The state was directed to "conduct a study concerning the desirability of experience rating."[252]

Because Washington had not been among the states with a prior employee unemployment insurance contribution, this contribution was a new cost to employees[253] and became the focus of those who opposed the law. As one scholar summarized, "[t]he opposition, comprised primarily of insurance companies and employer groups . . . used many billboard, newspaper ads, and premium notice enclosures emphasizing the additional wage deduction which passage of the bill would entail."[254] Though certainly

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[244] 1949 Was. Laws,, ch. 236 § 9; *see also* SINAI, *supra* note 58, at 5 n. 12.

[245] *State Sickness Insurance Systems: New York and Washington*, 69 MONTHLY LAB. REV. No. 1, 37, 38 (1949) [hereinafter *State Sickness*].

[246] *See id.* at 37, n. 2.

[247] *See* OSBORN, *supra* note 50, at 59.

[248] *See* 1949 Was. Laws, ch. 236, § 9 (establishing state fund); *id.* §§ 26-30 (private plans); *id.* § 7 (connecting disability compensation with unemployment insurance).

[249] *Id.* § 28(a).

[250] *Id.* § 28(f).

[251] *Id.* § 22.

[252] *Id.* § 23.

[253] *Legislative Medicine for the Sick Worker*, *supra* note 52, at 357.

[254] OSBORN, *supra* note 50, at 59 n.21.

not the only factor in the law's defeat, [255] the law's funding was at least a major weakness. Thus, the Washington experience dramatized the challenges facing new states seeking to enact TDI laws without the funding advantages enjoyed by the first three states to do so.

1. New York

In light of the Washington false start, New York was technically the fifth state to enact a TDI law on April 13, 1949.[256] Benefits began on July 1, 1950.[257] This law was the culmination of decades of efforts: the state first proposed a compulsory disability insurance law in 1913 and the legislature considered, but ultimately rejected, a combined disability and medical insurance law in 1920.[258] Interest re-ignited in the late 1930s and the state Department of Labor put together a series of four studies on the topic.[259]

The state legislature tasked the New York State Joint Legislative Committee on Industrial and Labor Conditions with examining the issue.[260] The committee's hearings produced familiar patterns of preferences regarding the program's structure. Some labor groups were committed to an exclusive state fund,[261] while others were more willing to consider proposals involving some role for private insurance.[262] Employer groups were conceptually opposed to compulsory coverage of any kind,[263] but agreed that if such legislation must be created it ought to include a role for private insurance and self-insurance.[264] Some insurers and insurer groups opposed compulsory insurance,[265] while others took no position on the question.[266] All insurers, unsurprisingly, agreed that any law should preserve the role of

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[255] Key labor groups opposed the program at the referendum stage and the campaign backing it was significantly underfunded. *Id.*

[256] Laws of N.Y. 1949, ch. 600; *see also* OSBORN, *supra* note 50, at 57.

[257] Laws of N.Y. 1949, ch. 600, § 205(9).

[258] OSBORN, *supra* note 50, at 57.

[259] The studies were published in book form as *Studies in Disability Insurance* shortly after the law's passage. N.Y. DEPT. OF LABOR, *supra* note 55, at iii.

[260] OSBORN, *supra* note 50, at 57.

[261] *See Disability Insurance: Hearing Before New York State Joint Legislative Committee on Labor and Industrial Conditions* 16 (N.Y. 1948) [hereinafter *Hearing*] (testimony of Hyman H. Bookbinder, appearing on behalf of Louis Hollander, President of the New York State CIO); *id.* at 39-43, 58 (testimony of Wilbur Daniels, I.L.G.W.U.).

[262] *Id.* at 205, 208-09 (testimony of Harold C. Hanover, New York State Federation of Labor); *id.* at 37 (testimony of Henry Foner, Joint Board of Fur Dressers and Dyers Unions).

[263] *Id.* at 66 (testimony of Martin F. Hilfinger, Associated Industries of New York State); *id.* at 157 (testimony of Mr. Purvis, New York Machine Toll Safety Group).

[264] *Id.* at 128 (testimony of William Zucker, Commerce and Industry Association of New York); *id.* at 161 (testimony of James J. Regan, Self Insurers' Association); *see also id.* at 103 (Hilfinger); *id.* at 158 (Purvis).

[265] *Id.* at 164 (testimony of Richard C. Wagner, Association of Casualty and Surety Companies); *id.* at 197 (testimony of E.H. O'Connor, Insurance Economic Society of Chicago).

[266] *Id.* at 257 (testimony of Charles A. Siegfried, Metropolitan Life Insurance Company); *id.* at 111 (testimony of Albert Pike, Life Insurance Association of America).

private coverage.[267]

The debate was heavily driven by the reality that, unlike prior TDI states, New York had no employee contribution to unemployment insurance and thus funding the program would require the imposition of a new cost.[268] Moreover, because New York had never had such a contribution, it was not eligible to transfer money under the Knowland Act and would instead need to accumulate its own reserves.[269]

This produced a wide variety of opinions on how the program should be funded, which were closely entangled with differing structural preferences. Mirroring the split over program structure, some labor groups wanted employers to cover the whole cost,[270] while others supported an employee contribution.[271] Some employer groups wanted a fully employee-funded program,[272] while others suggested employers and employees share costs.[273] Insurers argued that it was in the long run interests of the program for employers and employees to share the cost.[274]

The resulting bill, submitted in 1949, required employers to provide coverage, but allowed private carriers to compete on equal footing with a competitive state fund. Costs would be shared between employers and employees.[275] The bill drew mixed reactions from labor[276] and employer[277] groups on grounds of both structure and funding, with insurers largely remaining silent.[278] Supporters won the day and the bill passed.[279]

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[267] *Id.* at 113 (Pike); *id.* at 165 (Wagner); *id.* at 254 (Siegfried); *id.* at 197 (O'Connor); *see also id.* at 180 (testimony of Michael J. Murphy, Association of New York State Mutual Casualty Companies)

[268] *See id.* at 190-91 (O'Connor); *see also id.* at 33 (exchange between Saul Kaplan, Counsel to Assembly Minority Leader Irwin Steingut, and Committee Chairman Lee B. Mailler); *id.* at 58 (comments of Kaplan); Tilove, *supra* note 157, at 416.

[269] *See Hearing*, *supra* note 261, at 199-00 (exchange among Mailler, O'Connor, and Karel Ficek).

[270] *Id.* at 16 (Bookbinder); *id.* at 13 (Bookbinder); *id.* at 40 (Daniels). These groups were largely aligned with the CIO, which supported an exclusive state fund.

[271] *Id.* at 203-04 (Hanover). Hanover represented the State Federation of Labor, which was more open to a role for private insurance than its CIO counterparts.

[272] *Id.* at 159 (Purvis).

[273] *Id.* at 129 (Zucker).

[274] *Id.* at 250 (Siegfried); *id.* at 259 (testimony of Morton D. Miller, Equitable Life Insurance Association of the United States).

[275] OSBORN, *supra* note 50, at 57.

[276] The State Federation of Labor backed the bill, assuming it could improve the bill through amendments later; the CIO opposed the bill because employers did not bear its cost alone. *Id.*

[277] The mostly upstate Associated Industries opposed, while the New York City-heavy Commerce and Industry Association supported the bill. Tilove, *supra* note 157, at 416. Associated Industries had testified especially fervently against any effort at compulsory disability insurance, decrying such measures as "going straight across the red line of socialism…" *Hearing*, *supra* note 261, at 82 (Hilfinger). The Commerce and Industry Association had taken a much more moderate stance and specifically voiced approval for some level of employer cost-sharing. *See id.* at 128-34 (Zucker).

[278] Insurers, who saw some sort of disability law as inevitable, did not oppose the bill. Tilove, *supra* note 157, at 416.

[279] Lois MacDonald, *The New York Disability Benefits Law*, 24 N.Y.U. L.Q. REV. 1093, 1093 (1949).

New York's law looked notably different than its predecessors. It required that employers "provide disability benefits to [their] employees" through one or more of a set of approved mechanisms, including purchasing insurance from the state, purchasing private insurance, and becoming an approved self-insurer.[280] Employers had to make an affirmative choice of how to provide the benefit because the law did not provide a default option.[281] This structure had much in common with the 1946 New Jersey Commission proposal, of which the New York law's drafters were well aware.[282]

Purchasing insurance from the state required insurance from the State Insurance Fund (SIF),[283] established in 1913 to serve as the insurer of last resort for workers' compensation insurance in the state.[284] The disability law gave SIF the additional task of providing disability coverage.[285]

Entities like SIF are known as competitive state funds because they compete with private insurers on equal terms, rather than being advantaged as the default option. SIF coverage was not automatic and instead applied only to those employers who had affirmatively contracted for it.[286] Though created under state mandate and subject to some specific state controls, SIF operated for most purposes like a commercial insurer.[287] This included the right to set its own rates (as commercial insurers could) in response to market forces rather than being obligated to provide coverage in exchange for a statutorily-fixed percentage of wages like the monopolistic or default state funds. Similarly, while New Jersey and California required consent from a majority of employees for employers to adopt a private plan, at least if they were required to contribute to the plan's cost, New York's law imposed no such requirement. This meant that SIF enjoyed no procedural advantage over private carriers.

The inclusion of SIF in the structure of the law addressed a concern repeatedly raised in the lead up to the law: how to ensure that all employers,

[280] Laws of N.Y. 1949, ch. 600, § 211 (codified as amended at N.Y. Workers' Comp. Law § 211).

[281] *See* OSBORN, *supra* note 50, at 58; Tilove, *supra* note 157, at 416-17.

[282] *See Hearing*, *supra* note 261, at 165 (Wagner); *id.* at 248 (Siegfried).

[283] Laws of N.Y. 1949, ch. 600, § 201(3) (codified at N.Y. Workers' Comp. Law § 201(3)).

[284] *See* N.Y. Workers' Comp. Law § 76 ("Creation of state fund"); *see also* OSBORN, *supra* note 50, at 148.

[285] Laws of N.Y. 1949, ch. 600, § 2(76) (codified as amended at N.Y. Workers' Comp. Law § 76).

[286] *See* OSBORN, *supra* note 50, at 148.

[287] Angela R. Parisi, *The New York Program . . . Disability Benefits Law*, *in* COMPULSORY TEMPORARY DISABILITY INSURANCE PROGRAMS: FIVE PAPERS DESCRIBING STATUTORY CASH SICKNESS DISABILITY PROGRAMS 47 (1958). For workers' compensation coverage, SIF is required to set its premiums "at the lowest possible rates consistent with the maintenance of a solvent fund and of reasonable reserves and surplus." N.Y. Workers' Comp. Law § 89(1). However, this provision does not cross-apply to TDI premiums. *See id.*

now required to provide coverage, could acquire it.[288] This was just one of many influences of a previously untapped source: the state's workers' compensation law (then styled as workmen's compensation). As proponents of such an approach noted, an employer mandate with or without a competitive state fund was already a well-established workers' compensation structure. As of yet untested in the realm of disability insurance.[289] The 1947 New Jersey Commission supplemental report had even contemplated the idea of "legislation analogous to the Workmen's Compensation Act" that would require employers to provide coverage up to certain minimum standards, subsidized by employee payroll deductions.[290] Indeed, New York used just such a model for its own workers' compensation system.[291] For these reasons, New York's drafters appear to have intentionally emulated workers' compensation,[292] rather than looking to unemployment insurance.

This move should not seem strange: the wage replacement aspects of workers' compensation offered a natural complement to TDI at least as intuitive as the complementarity with unemployment. Indeed, with the exception of the early (and financially troubled) years of Rhode Island's system, all of the legacy TDI laws were distinctively drawn to complement rather than overlap with workers' compensation wage replacement—thus the categorical limitation of benefits to *off-the-job* illnesses and injuries.[293] Put another way, it is equally accurate to describe a TDI program as "workers' compensation wage replacement for *non*-occupational illnesses and injuries" as it is to call it "unemployment insurance for people who *are not* able and available to work." By building upon workers' compensation, New York was able to draw upon a system that had already been effectively providing a very similar benefit for years, without the federal law constraints of unemployment insurance.

Moreover, workers' compensation, unlike unemployment insurance, had specific experience in evaluating the veracity of workers' medical claims as a basis for allocating benefits. As the then-Chair of the Workmens' Compensation Board noted in one hearing, the medical evaluation needed for approving TDI benefits was essentially a much-simplified form of the

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[288] *See Hearing*, *supra* note 261, at 180 (exchange between Mailler and Murphy); *see also Blueprint*, *supra* note 55, at 668. Insurers proposed, as an alternate solution, the creation of an assigned risk plan. *See Hearing*, *supra* note 261, at 116 (Pike); *id.* at 168 (Wagner).

[289] *Id.* at 250 (Siegfried); *see also id.* at 158 (Purvis); *id.* at 166 (Wagner).

[290] N.J. SUPPLEMENT, *supra* note 189, at 8.

[291] N.Y. Workers' Comp. Law § 50.

[292] In one exchange, Saul Kaplan, Counsel to the Assembly Minority Leader, asked a labor representative "Would you be opposed following *the same procedures as in Workmen's Compensation* of having either private carriers or self-insurers provided they comply with the minimum standards set up by the appropriate department?" *Hearing*, *supra* note 261, at 37 (emphasis added). *See also Blueprint*, *supra* note 55, at 668 (asserting New York's law modeled on workers' compensation).

[293] *See* Allen, *supra* note 6, at 1356.

evaluation needed for the existing workmen's compensation benefit.[294] Thus, this system offered a unique expertise not present in unemployment insurance.

Following this path, the New York TDI law amended the state's workmen's compensation law.[295] New York also placed administrative authority for the law with the Workmen's Compensation Board.[296] Though some suggested personnel based reasons for that decision, the absence of a past employee contribution for unemployment insurance removed a key incentive to administer the program jointly with unemployment insurance.[297]

Again following the workers' compensation model, the New York TDI law built in two types of safeguards to ensure that covered workers would receive the benefits to which they were entitled. First, the law established a "special fund" to pay out benefits to those whose employers unlawfully failed to provide coverage.[298] The special fund for disability benefits, which also provided benefits for disabilities arising during unemployment,[299] was accumulated through temporary employee payroll deduction[300] and maintained through sporadic assessments on insurance carriers.[301]

Second, the New York law established (and continues to maintain) a serious and escalating set of penalties for employers who failed to maintain coverage. Failure to carry insurance is a misdemeanor criminal offense, punishable by both a fine and up to a year in prison.[302] Corporate officers of an employer were personally liable for violations.[303] This closely followed the equivalent provision in the New York workmen's compensation law.[304] In addition, an employer who fails to provide for benefits was subject to a penalty payable to the state of up to 0.5% of the employer's weekly payroll

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[294] *See Hearing*, *supra* note 261, at 217-18 (Donlon).

[295] Laws of N.Y. 1949, ch. 600. Except where explicitly referring to historic statutes, this Article will use the modern term "workers' compensation" in preference to the earlier "workmen's compensation."

[296] *Id.* § 201(1) (codified at N.Y. Workers' Comp. Law § 201(1)) ("'Board' means the workmen's compensation board…").

[297] OSBORN, *supra* note 50, at 148.

[298] *See* Laws of N.Y. 1949, ch. 600 § 214 (creating special fund); *id.* § 213 (authorizing payments out of the fund to workers with non-compliant employers).

[299] *Id.* § 207 (codified as amended at N.Y. Workers' Comp. § 207). Workers who become disabled within four weeks of the end of their employment are covered under the policy of their prior employers, with the special fund only covering benefits for disabilities arising after that point. *Id.* § 203 (codified as amended at N.Y. Workers' Comp. § 203).

[300] *Id.* § 214(1) (codified as amended at N.Y. Workers' Comp. Law § 214(1)).

[301] *Id.* § 214(2) (codified as amended at N.Y. Workers' Comp. Law § 214(2)).

[302] *Id.* § 220(1) (codified as amended at N.Y. Workers' Comp. Law § 220(1)).

[303] *Id.*

[304] *See* Laws of N.Y. 1922, ch. 615, § 52 ("Failure to secure the payment of compensation shall constitute a misdemeanor, punishable by a fine of not more than five hundred dollars or imprisonment for not more than one year, or both.").

for the entire period of the violation, plus an additional monetary penalty.[305] If an employer illegally failed to carry coverage and an employee filed a claim against the special fund, the state could seek reimbursement for the benefits paid out or 1% of the employer's payroll during the period of non-compliance, whichever is greater, in addition to the 0.5% penalty.[306]

Unlike some of the predecessor TDI laws, the New York law set its own terms for what employees were covered, without reference to any existing law.[307] The result was somewhat closer to the state's unemployment insurance law than its workers' compensation law.[308] Though the two maintain separate sets of definitions, since the early 1980s amendments to workers' compensation coverage have often been paired with similar amendments to TDI coverage.[309]

The law intended to create cost sharing between employers and employees. Employers could withhold 0.5% of employee wages to pay for the program, up to a maximum of thirty cents per week.[310] Employers were responsible for any cost of coverage beyond the employee withholding.[311] Drafters believed that the total cost would be 1% of wages, so requiring employees to cover 0.5% would result in an even split between employees and employers.[312] This cost sharing structure almost exactly tracked the proposal made by the 1946 New Jersey Commission report, under which employees would pay 0.5% of their wages up to $46 per week (for a maximum of twenty-three cents per week) and employers would cover the remainder.[313] The imitation was likely intentional, as this aspect of the Commission proposal was specifically cited by researchers at the New York Department of Labor in one of their pre-passage reports.[314]

As with other states, the basic structure of New York's law remains in place, though other features have changed. The law originally provided for a maximum of thirteen weeks of benefits;[315] today, employees can receive

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[305] Laws of N.Y. 1949, ch. 600 § 220(2) (codified as amended at N.Y. Workers' Comp. Law § 220(2)). The penalty was originally $250, *id.*, but was raised to $500 in 1979, Laws of N.Y. ch. 626, §§ 1-2.

[306] Laws of N.Y. 1949, ch. 600 § 213 (codified as amended at N.Y. Workers' Comp. Law § 213(1)).

[307] *See Id.* §§ 201-03.

[308] *See* OSBORN, *supra* note 50, at 81.

[309] *See, e.g.*, Laws of N.Y. 1983, ch. 256 (adding exclusions for one-person corporations to both laws); Laws of N.Y. 1992, ch. 668 (adding coverage for models to both laws); *see also* Laws of N.Y. 1986, ch. 903 (real estate brokers); Laws of N.Y. 2002, ch. 574 (insurance agents); Laws of N.Y. 2006, ch. 572 (media sales representatives).

[310] Laws of N.Y. 1949, ch. 600, § 209(3) (codified as amended at N.Y. Workers' Comp. Law § 209(3)(a)). In 1983, the maximum weekly employee contribution was raised to sixty cents. Laws of N.Y., ch. 415, § 23.

[311] 1949 N.Y. Laws 1379 (codified as amended at N.Y. WORKERS' COMP. LAW § 210(3)).

[312] OSBORN, *supra* note 50, at 131-132; *see also id.* at 80.

[313] N.J. COMMISSION, *supra* note 178 at 17.

[314] N.Y. DEPT. OF LABOR, *supra* note 55, at 35.

[315] 1949 N.Y. Laws 1374.

up to twenty-six weeks of benefits.[316] While the wage replacement rate has remained consistent at one-half (50%) of the employee's average weekly wage,[317] the maximum weekly benefit has been raised twelve times from its original level of $26.[318]Unlike peer states New York still sets its maximum TDI benefit through a fixed dollar amount written into the statute, which has remained frozen at $170 per week since 1989.[319] When the most recent change was enacted, it represented a moderate growth in purchasing power: $26 in 1949 dollars is equivalent to $135.46 in 1989 dollars. However, inflation has so eroded the value of the benefit over the intervening quarter-century that its purchasing power is now lower than it was at the law's enactment: $26 in 1949 dollars is equivalent to $265.37 in 2017 dollars.[320] New York is the latest TDI state to enact a paid family leave law, which was passed in 2016 and will begin paying benefits in 2018.[321]

2. Hawaii

The passage of New York's law in 1949 capped off an exceptionally productive period of time in the history of TDI laws, with five states passing such law in seven years. At the peak period of interest, sixteen states considered disability insurance laws in one year.[322] Contemporary observers expected the wave to continue. For example, in 1950, the chief technical advisor to the Social Security Administration remarked "On the basis of works- men's compensation experience, it might be expected that all States would have disability insurance laws by 1980! I believe, however, that the actual trend will be somewhat more rapid." [323] Such confident predictions would not come to pass.

Instead, no further U.S. state passed such a law for nearly two

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[316] N.Y. WORKERS' COMP. LAW § 205(1 (McKinney 2016); *see also* 1956 N.Y. Laws 1620-21 (raising maximum length of benefits to twenty weeks); 1958 N.Y. Laws 1457 (raising maximum length of benefits to twenty-six weeks).

[317] 1949 N.Y. Laws 1374, *with* N.Y. WORKERS' COMP. LAW § 205(2)(b) (McKinney 2016).

[318] *See* 1949 N.Y. Laws 1374 ($20); 1953 N.Y. Laws 633-34 ($30); 1954 N.Y. Laws 2097 ($33); 1956 N.Y. Laws 1620 ($40); 1957 N.Y. Laws 2097 ($45); 1960 N.Y. Laws 2127 ($50); 1965 N.Y. Laws 1169 ($55); 1968 N.Y. Laws 2561 ($65); 1970 N.Y. Laws 1634-35 ($75); 1974 N.Y. Laws 1553 ($95); 1983 N.Y. Laws 1949 ($135, then $145); 1989 N.Y. Laws 59 ($170).

[319] N.Y. WORKERS' COMP. LAW § 204(2)(b) (McKinney 2016) ("[I]n no case shall such benefit exceed one hundred seventy dollars . . . .").

[320] Bureau of Labor Statistics CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl. (last visited Oct. 14th, 2017).

[321] *See infra* Part III.

[322] OSBORN, *supra* note 50, at 59.

[323] Wilbur J. Cohen, *New Developments in Employee Disability Programs*, 17 AMER. ASS'N OF UNIV. TEACHERS OF INS. 29 (1950).

decades,[324] until Hawaii in 1969.[325] Two years prior, the state legislature commissioned a study on the topic.[326] The resulting study, authored by University of California Professor Stefan A. Riesenfeld, was published in February 1969.[327] After reviewing the existing TDI laws and conditions in Hawaii, Riesenfeld recommended the adoption of a default state fund with the ability to use private coverage, similar to the California and New Jersey approaches.[328]

The law the state enacted a few months later on June 30, 1969 looked very different than the one Riesenfeld proposed. Of the existing TDI laws Hawaii's was most similar to New York's, allowing employers to choose among several options to provide coverage.[329] Employers could satisfy their obligations through private insurance and what amounted to multiple forms of self-insurance.[330]

The law did not include a state fund of any kind, making Hawaii the first and only state not provide any state option.[331] Unlike New York, Hawaii's workers' compensation system did not include a competitive state fund at that time its TDI law was passed, so the inclusion of one in the TDI system would have required newly establishing the fund.[332] Instead, the statute authorized (but did not require) the insurance commissioner to create an assigned risk plan to allocate employers otherwise unable to acquire coverage among commercial insurers.[333] Under an assigned risk plan (or assigned risk pool), a state requires private insurers participate in a system providing insurance to applicants who would not otherwise be able to acquire insurance.[334]

Like New York, Hawaii established a special fund to pay for benefits for workers who become disabled, while unemployed or whose employers failed to comply.[335] However, unlike New York, the statute included no mechanism by which employers who failed to comply became directly liable

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[324] *New Temporary Disability Insurance Law in Hawaii*, SOCIAL SECURITY BULLETIN 29 (Oct. 1969) [hereinafter *SSB Hawaii*]. Puerto Rico enacted its own TDI law in 1968. 1968 P.R. LAWS; *see also* RIESENFELD, *supra* note 63, at 32. Given the unusual status of Puerto Rico, a full evaluation of this provision is beyond the scope of this Article, but worthy of future research.

[325] 1969 Haw. Sess. Laws 187-205.

[326] RIESENFELD, *supra* note 63, at 1.

[327] *Id.* at ii.

[328] *Id.* at 111, 114. The report included a complete model bill. *Id.* at 133-171.

[329] 1969 Haw. Sess. Laws 194-95 (codified as amended at Haw. Rev. Stat. § 392-41).

[330] *Id.*

[331] *New Hawaii Temporary Insurance Law: A Further Explanation*, SOCIAL SECURITY BULLETIN 26 [hereinafter *Further Explanation*].

[332] Hawaii created a competitive state fund for workers' compensation in 1996, but has not extended coverage to TDI. *See infra* Part IV.B.

[333] 1969 Haw. Sess. Laws 196-97.

[334] *See, e.g.*, 44 C.J.S. Insurance § 85 (2017) ("[A]n assigned risk plan . . . assigns a particular insurance company to provide insurance to an applicant.").

[335] *Id.* §§ 40-46.

to their employees, or by which the state could seek reimbursement (much less additional penalties) from employers whose employees received benefits out of the state fund in such a manner.

The largely unfamiliar structure of the Hawaii program was confusing even to experts in the field. The *Social Security Bulletin* published a short article in October 1969 summarizing the new law, as it had done for predecessor states.[336] The article described the special fund, as if it were a default state fund.[337] Shortly thereafter, the *Bulletin* published a follow up article to correct the error, highlighting how distinctive the Hawaii approach was.[338]

Nor did Hawaii include the aggressive measures New York's law provided to ensure employers maintained meaningful coverage. While New York's law required self-insurers to set aside a bond in an amount determined by the state as security,[339] Hawaii provided the option for self-insurers to simply demonstrate financial ability without providing a bond.[340] In place of New York's escalating series of civil penalties and possible jail time, Hawaii provided only a fine of the greater of $25 per day or $1 per employee per day during the period where the employer failed to maintain coverage.[341] This penalty was supplemented by the discretionary ability of the enforcing agency to ask the state attorney general or any county attorney to seek an injunction to prevent the employer from carrying on its business.[342] These provisions, along with the absence of penalties when workers were forced to seek benefit from the special fund, provide much less robust incentives for employers to comply with the law than the New York system.

The program was, and is, administered by Hawaii's Department of Labor and Industry.[343] However, echoes of both unemployment insurance and workers' compensation were found in the original design. The law covered all workers covered by the state unemployment insurance system, except that it added some additional TDI coverage for agricultural workers.[344] The maximum benefit could not exceed the maximum workers'

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336 *SSB Hawaii*, *supra* note 324.

337 *Id.* at 29 ("All benefits are to be paid from the special fund except that employers may substitute a private insurance plan (including self-insurance) if they furnish benefits at least as favorable as those under the publicly operate program.").

338 *Further Explanation, supra* note 331, at 36 ("The Hawaii law is thus unlike the temporary disability insurance laws in operation in the four other States in that there is no State-operated fund that provides the insurance protection.").

339 1949 N.Y. Laws 1379 (codified as amended at N.Y. Workers' Comp. Law § 211(3)).

340 1969 Haw. Sess. Laws 195 (codified as amended at Haw. Rev. Stat. § 392-41(3)).

341 1969 Haw. Sess. Laws 199 (codified as amended at Haw. Rev. Stat. § 392-47).

342 *Id.*

343 1969 Haw. Sess. Laws 188.

344 *SSB Hawaii*, *supra* note 324, at 29.

compensation benefit for total disability.[345]

Hawaii's program is still structured the same way today. Perhaps because of its comparatively recent passage, the other features of the Hawaii law have changed less than in peer states. When the law was originally passed workers were entitled to receive 55% of their average weekly wage;[346] workers can now receive 58% of their average weekly wages.[347] The formula for setting the maximum weekly benefit, which today amounts to approximately 70% of the statewide average weekly wage, has not substantively changed since the law's passage.[348] The program has always provided a maximum of twenty-six weeks of benefits[349] and retains a seven-day unpaid waiting period.[350] Unlike its peers, Hawaii has not added paid family leave benefits.

III. THE PAID FAMILY LEAVE ERA

Though it may not have been clear at the time, the passage of Hawaii's law marked the last successful effort to pass a state TDI law.[351] As a result, the state paid leave landscape in the United States remained essentially frozen. However, two new developments have brought major changes: expansion of state TDI laws to include paid family leave benefits and, much more recently, the passage of laws to create entirely new benefits programs encompassing both family and medical leave.

A. Building on TDI

In recent years, the state TDI systems saw renewed interest as their respective states have looked to build upon them to provide new types of benefits known as paid family leave.[352] California was the first to enact such

345 1969 Haw. Sess. Laws 193 (codified as amended at Haw. Rev. Stat. § 392-22(4)).

346 1969 Haw. Sess. Laws 192.

347 HAW. REV. STAT. § 392-22(2).

348 1969 Haw. Sess. Laws 192-93 (codified at HAW. REV. STAT. § 392-22(3)). The provision provides that if a worker's average weekly wages exceed the result of multiplying 1/52 of the state average annual wage (i.e. the state average weekly wage) by 1.21, the excess wages will not be included in calculating the benefit. *Id.* At a wage replacement rate of 55%, that translates into a maximum benefit approximately equal to 66.55% of the state average weekly wage; at a wage replacement rate of 58%, that translates into a maximum benefit approximately equal to 70.18% of the state average weekly wage.

349 1969 Haw. Sess. Laws 193 (codified at HAW. REV. STAT. § 392-23).

350 1969 Haw. Sess. Laws 193 (codified at HAW. REV. STAT.§ 392-24).

351 Why no other states succeeded in passing such laws is a topic worthy of further research. As discussed in Part II, *supra*, the absence of the politically useful tactic of funding TDI by redirecting employee unemployment insurance contributions likely increased the difficulty of enacting TDI laws in other states, but the experiences of New York and Hawaii show this obstacle was not inherently insurmountable.

352 *See, e.g.*, Hoffman, *supra* note 53, at 105-106 ("The Temporary Disability Insurance Program is attractive because some form of it already exists in several states, allowing those states to expand their Temporary Disability Insurance without having to implement a new program."); Anne Wells, *Paid Family Leave: Striking A Balance Between the Needs of Employees and Employers*, 77 S. CAL. L. REV. 1067, 1097-1099 (2004) (describing advantages of TDI-based family leave systems).

a law in 2002,[353] followed by New Jersey in 2008,[354] Rhode Island in 2013,[355] and New York in 2016.[356] Using their existing benefit provision structures, these states now provide (or will soon provide) up to three new categories of benefits.

First, all four states provide leave for workers to bond with a new child. The statutory provisions are universally gender neutral, allowing mothers and fathers equal access to bonding leave.[357] All allow leave benefits to be used for a newly born child or a child newly placed for adoption.[358] All except New Jersey allow leave to bond with a child newly placed for foster care.[359]

Second, all four states also offer leave to care for a relative with a "serious health condition."[360] Each state uses a definition of this term, either closely modeled on or identical to the definition of the term in the FMLA.[361] The laws vary in terms of family members for whom leave can be taken. All four states allow leave to be taken to care for a worker's parent, spouse, domestic partner, or child.[362] In every state except New Jersey, the definition of child includes worker's adult children.[363] Grandparents are covered in every state except New Jersey;[364] grandchildren are covered in California

[353] 2002 Cal. Stat. 5579-89; *see also* Albiston & Trimble O'Connor, *supra* note 22, at 25; Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J.L. & FEMINISM 185, 223-24 (2009).

[354] 2008 N.J. Laws 76-127.

[355] 2013 R.I. Pub. Laws 39-921.

[356] N.Y. WORKERS' COMP. L. §203 (McKinney 2016).

[357] CAL. UNEMP. INS. CODE § 3302(e)(1) (2013); N.J. REV. STAT. § 43:21-27(o)(2) (2015); N.Y. WORKERS' COMP. LAW § 201(5) (McKinney 2016); 28 R.I. GEN. LAWS § 28-41-35(a)(1) (2013).

[358] *Id.*

[359] *Compare* CAL. UNEMP. INS. CODE § 3302(e)(1)(2013); N.Y. WORKERS' COMP. LAW § 201(15)(b) (McKinney 2016); 28 R.I. GEN. LAWS § 28-41-35(a)(1)(2013); *with* N.J. REV. STAT. § 43:21-27(o)(2)(2015).

[360] CAL. UNEMP. INS. CODE § 3302(e)(2)(2013); N.J. REV. STAT. § 43:21-27(o)(1)(2015); N.Y. WORKERS' COMP. LAW § 201(15)(a)(McKinney 2016); 28 R.I. GEN. LAWS § 28-41-35(a)(2)(2013).

[361] *Compare* CAL. UNEMP. INS. CODE § 3302(k)(2013); N.J. REV. STAT. § 43:21-27(s)(2015); N.Y. WORKERS' COMP. LAW § 201(18)(McKinney 2016); 28 R.I. GEN. LAWS § 28-41-34(11)(2013), *with* 29 U.S.C. § 2611(11)(2012).

[362] CAL. UNEMP. INS. CODE § 3302(f)(2013); N.J. REV. STAT. § 43:21-27(n)(2015); N.Y. WORKERS' COMP. LAW § 201(20) (McKinney 2016); 28 R.I. GEN. LAWS § 28-41-35(a)(2) (2013). Domestic partner includes only registered domestic partners in every state except New York, which has a more expansive definition. *See* N.Y. WORKERS' COMP. LAW § 201(17) (McKinney 2016); N.Y. WORKERS' COMP. LAW § 4(1) (Mcinney 2016).

[363] New Jersey only allows leave to be taken for a child under the age of 19 or a child "19 years of age or older but incapable of self-care because of mental or physical impairment." N.J. REV. STAT. § 43:21-27(k) (2015).

[364] *Compare* CAL. UNEMP. INS. CODE § 3302(f) (2013); N.Y. WORKERS' COMP. LAW § 201(20) (McKinney 2016); 28 R.I. GEN. LAWS § 28-41-35(a)(2) (2013), *with* N.J. Stat. § 43:21-27(n) (2015).

and New York.[365] Rhode Island and New York cover parents-in-law.[366] Siblings are covered only in California.[367]

In addition, the New York law, explicitly following the provision added to the FMLA in 2008,[368] will offer leave for "qualifying exigencies" associated with a close relative's active duty military service.[369] This provision is not currently included in California, New Jersey, or Rhode Island.

Though they largely provide leave benefits for the same purposes, the paid family leave laws vary from one another in other respects. Rhode Island offers the shortest leave, at a maximum of four weeks per year,[370] while New Jersey and California each offer up to six weeks.[371] New York's law will provide up to eight weeks of leave beginning in 2018, phasing up to twelve weeks when the program is fully implemented in 2021.[372] In each state, these benefits can be "stacked" with TDI benefits under appropriate circumstances, such as recovery from childbirth followed by paid family leave to bond with a new child.

California, New Jersey, and Rhode Island each offer paid family leave benefits at the same wage replacement rate and cap as their respective TDI programs.[373] New York's law sets wage replacement for paid family leave separately from TDI. In 2018, workers will receive 50% of their average weekly wage up to a cap set at 50% of the statewide average. In 2021 when the program is fully phased in, workers will receive 67% of their average weekly wage up to a cap of 67% of the statewide average weekly wage.[374] New York TDI benefits were unchanged by the 2016 law.[375]

Rhode Island and New York offer job protection (a legal right to reinstatement following leave) for workers taking paid family leave, though neither state extends this protection to workers taking TDI.[376] These states also require that employers who provide health insurance to their workers must continue that insurance on the same terms during paid family leave,

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[365] CAL. UNEMP. INS. CODE § 3302(f); N.Y. WORKERS' COMP. LAW § 201(20).

[366] Rhode Island covers parents-in-law explicitly, 28 R.I. GEN. LAWS § 28-41-35(a)(2) (2013), while New York includes them in the definition of parent, N.Y. WORKERS' COMP. LAW § 201(19) (McKinney 2016).

[367] CAL. UNEMP. INS. CODE § 3302(f) (2013).

[368] Pub. L. No. 111-84, October 28, 2009, 123 Stat 2190, § Div. A, Title V, § 565(a)(codified in relevant part at 29 U.S.C. § 2612(a)(1)(E)) (2012).

[369] N.Y. WORKERS' COMP. LAW § 201(15)(c) (McKinney 2016). Qualifying exigency leave can only be used for a worker's spouse, domestic partner, parent (including parent-in-law), or child. *Id.*

[370] 28 R.I. GEN. LAWS § 28-41-35(d)(1) (2013).

[371] CAL. UNEMP. INS. CODE § 3301(d) (2013); N.J. REV. STAT. § 43:21-38 (2015).

[372] N.Y. WORKERS' COMP. LAW § 204(a) (McKinney 2015).

[373] CAL. UNEMP. INS. CODE § 3301(b) (2004); N.J. REV. STAT. § 43:21-38 (2017); R.I. GEN. LAWS § 28-41-41(5) (YEAR).

[374] N.Y. WORKERS' COMP. LAW § 204(2)(a) (2016).

[375] *See id.* § 204(2)(b).

[376] *Id.* § 203-b; R.I. GEN. LAWS § 28-41-35(f) (2016).

paralleling the FMLA.[377] In other states (and for TDI in all states), workers are only legally guaranteed the right to reinstatement after taking leave and continuation of health insurance during leave only, if they have such a right under the FMLA or some other law.

Under all four state laws, paid family leave benefits are paid for entirely by employees. In Rhode Island and California, where TDI is also fully employee paid, this was accomplished by increasing the size of the existing payroll deduction, such that workers pay a single percentage for both benefits.[378] In New Jersey, a separate percentage contribution, set by a statutory formula, is assessed on wages up to the same taxable wage base used for TDI.[379]

In New York, employees will provide a contribution to pay for paid family leave, in addition to any amount they contribute for TDI.[380] The New York Department of Financial Services (DFS), pursuant to its statutory authority,[381] has set the maximum employee contribution at 0.126% of wages up to the state average weekly wage, or a weekly maximum of $1.65 per week for 2018.[382] DFS also set the legally permissible insurance premium for all carriers (private carriers and NYSIF) at 0.126% of wages up to the state average weekly wage,[383] using its power to set community rates for paid family leave insurance.[384] In effect, this combined use of regulatory powers guarantees that employers will be able to acquire coverage at a fixed price that is precisely equal to the amount they are authorized to withhold from employees.

B. New Entrants: The District of Columbia and Washington State

More recently and more radically, the District of Columbia and Washington State both enacted paid leave laws that will provide benefits for workers own serious health needs, as well as for family leave in 2017. Because neither jurisdiction had a pre-existing TDI program, their passage

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[377] N.Y. WORKERS' COMP. LAW § 203-c (2016); R.I. GEN. LAWS § 28-41-35(g) (2016); *see also* 29 U.S.C. § 2614(c) (2012).

[378] *See* CAL. UNEMP. INS. CODE § 984 (2004); R.I. GEN. LAWS § 28-40-1(b)(1)-(2) (2016).

[379] N.J. REV. STAT.§ 43:21-7(d)(1)(G)(ii) (2017).

[380] N.Y. WORKERS' COMP. LAW § 209(3)(b) (2016).

[381] *Id.*

[382] N.Y. DEPT. OF FIN. SERVS., DECISION ON PREMIUM RATE FOR FAMILY LEAVE BENEFITS AND MAXIMUM EMPLOYEE CONTRIBUTION FOR COVERAGE BEGINNING JANUARY 1, 2018 (June 1, 2017), http://www.dfs.ny.gov/insurance/r_other/dec_prem_rate_flb_06012017.pdf

[383] *Id.*

[384] The paid family leave state required DFS, in consultation with the Worker' Compensation Board, to issue regulations before June 1, 2017 determining whether family leave insurance policies (explicitly including those issued by SIF) would be subject to experience rating or community rating. N.Y. INS. LAW § 4235(n)(1) (2016). If the state chose community rating, the statute further provided that DFS would "establish the rates for any community rated family leave benefit coverage" annually. *Id.* In regulations finalized in May 2017, DFS elected to apply community rating, rather than experience rating. N.Y. COMP. CODES R. & REGS. INS. DEP'T. 11 § 363.3(b) (2017).

represents an important milestone, in the evolution of paid leave and may touch off a new prolific period equivalent to the 1940s, with many other states seeking to join their ranks.

1. Washington, D.C.

On April 28, 2017, the District of Columbia Universal Paid Leave Act (UPLA) officially became law.[385] Benefits are scheduled start on July 1, 2020.[386] The law will provide benefits through a monopolistic state fund,[387] paid for entirely through employer contributions.[388]

This represents the first new true state fund to be created since New Jersey's in 1948 and the first monopolistic state fund since Rhode Island's in 1942. The exact method for provision of benefits was hotly debated up to the last moment: a rival bill backed by business interests would have required employers to provide benefits out of pocket with a limited subsidy, with no insurance mechanism.[389] In the final day of debate at the D.C. Council, the vast majority of the discussion focused on the differences between these approaches.[390]

The UPLA will allow workers to take up to eight weeks of leave to bond with a new child,[391] up to six weeks of leave to care for a seriously ill family member,[392] and up to two weeks of leave to attend to their own serious health needs,[393] up to a cumulative maximum of eight weeks of leave per year.[394] Family care leave will be available to care for a worker's seriously ill child,

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[385] *See* Council of the D. C., Universal Paid Leave Act of 2015, B21-0415, http://lims.dccouncil.us/Legislation/B21-0415?FromSearchResults=true.

[386] Universal Paid Leave Act of 2015, Bill No. 21-415, § 104(h) (2015) (amended 2016) Amendment in the Nature of a Substitute (Mendelson), http://lims.dccouncil.us/Download/34613/B21-0415-Amendment-in-the-Nature-of-Substitute-Mendelson---12-19-1684.pdf [hereinafter UPLA].

[387] Here, the term state fund is used to refer to the fact that the fund is government run.

[388] UPLA § 103 (2016). D.C.'s law stands alone among TDI and paid family leave laws as the only solely *employer*-funded programs. This is a direct result of its non-state status. Under the home rule powers delegated to the District by Congress, the D.C. Council cannot "[i]mpose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District." D.C. CODE § 1-206.02(a)(5) (2017). This creates substantial barriers to using employee contributions to fund the program given the extremely high proportion of those working in D.C. who commute from Maryland or Virginia.

[389] *See* Council of the D.C. 21-415, Council Period 22 (D.C. 2016). Amendment in the Nature of a Substitute (Evans and Cheh), http://lims.dccouncil.us/Download/34613/B21-0415-Amendment-in-the-Nature-of-Substitute-Evans-and-Cheh---12-19-1695.pdf.

[390] *See* Peter Jamison, *D.C. Council votes for expansive paid family and medical leave for private-sector workers*, WASHINGTON POST (Dec. 20, 2016), https://www.washingtonpost.com/local/dc-politics/council-votes-down-radical-restructuring-of-paid-leave/2016/12/20/8a508618-c6cd-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.31dc6d31af9e.

[391] UPLA, *supra* note 386, § 101 (2017).

[392] *Id.* § 101(12).

[393] *Id.* § 101(14).

[394] *Id.* § 104(d).

parent, parent-in-law, spouse, grandparent, sibling, or domestic partner.[395] The law provides some protection against retaliation for taking benefits, but does not provide job protection.[396]

Benefits under UPLA will be provided under a progressive formula. Workers will receive 90% of their weekly wages up to 150% of forty times the D.C. minimum wage, plus 50% of their weekly wages above that threshold.[397] In July 2020, when benefits are scheduled to go into effect, the D.C. minimum wage will be $15.00 per hour.[398] Thus, workers will receive 90% of their weekly wages up to $900, plus 50% of their weekly wages above $900. Benefits will be capped at $1,000 per week,[399] to increase each year with inflation.[400]

However, shortly after Mayor Muriel Bowser allowed the bill to become law without her signature, D.C. Council Chairman Phil Mendelson announced that the Council would revisit the law.[401] Mendelson indicated that the proposed change would address funding and could include the use of private insurance.[402] To that effect, several council members, including Chairman Mendelson himself, have filed bills that would alter the program's structure, although none have yet been called for a vote, much less enacted.[403] Particularly in light of the lead up to the UPLA's passage, the D.C. experience demonstrates that program structure remains a major issue in the design of these programs, just as it was in the 1940s.

2. Washington State

Washington State has enjoyed a unique history of foiled innovation when it comes to paid leave. In 2007, the Evergreen State enacted a law that would have provided paid parental leave benefits years before any other state

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[395] *Id.* § 101(7).

[396] *Id.* § 110. It would be unlawful to retaliate against a worker for a number of acts, including because the worker "[r]equests, applies for, or uses paid leave benefits," *id.* § 110(b)(2), but taking leave itself is not a protected act under the law. *Id.* § 110(b).

[397] UPLA § 104(g)(1)-(2) (2017).

[398] D.C. CODE § 32-1003(5)(A)(v) (2017).

[399] UPLA, *supra* note 386, § 104(g)(5) (2017).

[400] *Id.* § 104(g)(6).

[401] *See* Peter Jamison, *Bowing to business unrest, D.C. Council will revisit paid-leave law, chairman says*, WASHINGTON POST (Feb. 17, 2017), https://www.washingtonpost.com/local/dc-politics/bowing-to-business-unrest-dc-council-will-revisit-paid-leave-law-chairman-says/2017/02/17/5fd5bdba-f538-11e6-b9c9-e83fce42fb61_story.html?utm_term=.e5e505297e8a.

[402] *Id.*

[403] *See, e.g.*, Council of the D.C., Paid Leave Compensation Act of 2017, B22-0130, Council Period 22, http://lims.dccouncil.us/Legislation/B22-0130?FromSearchResults=true; Council of the D.C., Universal Paid Leave Pay Structure Amendment Act, B22-0334, Council Period 22 (D.C. 2017), http://lims.dccouncil.us/Legislation/B22-0334?FromSearchResults=true; Council of the D.C., Large Employer Paid-Leave Compensation Act of 2017, B22-0302, Council Period 22 (D.C. 2017), http://lims.dccouncil.us/Legislation/B22-0302?FromSearchResults=true.

except California.[404] However, the legislation stated that benefits would begin only after "the legislature has specifically appropriated funding and enacted an implementation date for benefits . . . ."[405] Because the state never enacted a funding mechanism, the program never went into effect, providing another false start decades after Washington's TDI law was rescinded by referendum. That unlucky streak ended on July 5, 2017, when Washington Governor Jay Inslee signed into law a new and comprehensive paid family and medical leave law.[406] Benefits are scheduled to start on January 1, 2020.[407]

As with Washington, D.C., the final stages of enacting Washington State's paid leave law involved competing proposals. Republican State Senator Joe Fain was the lead sponsor of one proposal, SB 5149,[408] while Democratic Representative June Robinson was the lead sponsor of the other, HB 1116.[409] The final enacted text represents a carefully negotiated compromise between the two plans,[410] though one that ultimately more closely resembles the House proposal than the Senate bill.

Intriguingly, the program's structure does not follow the model used by either the House or Senate bills, meaning that this key choice must have been made during the final negotiations. While both SB 5149 and HB 1116 had proposed monopolistic state funds,[411] the enacted law merely establishes a state fund as the default.[412] The state will allow the use of a "voluntary plan" for family leave, medical leave, or both.[413] Among other conditions, an approved voluntary plan must provide benefits "at least equivalent to the benefits the employees are entitled to as part of the state's family and medical leave program . . . ."[414]

Washington will provide medical leave benefits for employees' own

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[404] WASH. REV. CODE § 49.86.005 (2017).

[405] *Id.* § 49.86.030.

[406] S.B. 5975, 65th Leg., 3rd Spec. Sess. (Wash. 2017) [hereinafter Washington Law].

[407] *Id.* § 6(1).

[408] S.B. 5149, 65th Leg., 3rd Spec. Sess. (Wash. 2017).

[409] H.B. 1116, 65th Leg., 3rd Spec. Sess. (Wash. 2017).

[410] Associated Press, *Family-leave measure passed by Washington Legislature*, SEATTLE TIMES (July 1, 2017), http://www.seattletimes.com/seattle-news/politics/washington-legislature-passes-paid-family-leave-measure/.

[411] *See* S.B. 5149 (2017), § 9, http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Bills/5149.pdf (requiring contributions); *id.*, § 35, (establishing "family leave insurance account"); H.B. 1116 (2017), § 13, http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Bills/1116-S.pdf (requiring contributions); *id.* § 20 (establishing "family and medical leave insurance account").

[412] *See* S.B. 5975, 65th Leg., 3rd Spec. Sess.§ 8(8)(a) (Wash. 2017) (requiring employers to remit premiums to the state).

[413] *Id.* § 14(1). This model, in broad strokes, tracks the structure of the repealed Washington State TDI law, described in Part II, *supra*, though there is no evidence that the legislators drafting the final legislation were thinking of or even aware of the existence of the prior law.

[414] *Id.* § 14(5)(a).

serious health conditions[415] for up to twelve weeks.[416] Employees who experience serious pregnancy-related complications will be eligible for an additional two weeks of benefits.[417] Family leave will be available for up to twelve weeks.[418] Family and medical leave benefits can be combined up to a cumulative sixteen weeks (or eighteen weeks for those receiving the extended pregnancy-related medical leave).[419]

Workers will be able to take family leave to bond with a newly born or newly placed child, to care for a family member with a serious health condition, or to address a qualifying exigency connected to a family member's military service.[420] Both family care leave and qualifying exigency leave will be available for an employee's child, grandchild, grandparent, parent (including a parent-in-law), sibling, spouse, or registered domestic partner.[421]

Similar to the way New York and New Jersey fund their programs, Washington separates funding for family leave and medical leave benefits. Family leave benefits will be entirely employee paid through premiums remitted to the state fund.[422] For medical leave, employers will have the option to withhold up to 45% of the premium charged by the state from employees' paychecks, with employers covering the rest out-of-pocket.[423] However, employers with fewer than fifty employees in Washington will not be required to pay the employer portion of the medical leave premium, with the fund absorbing the additional cost in lieu of employees to covering the difference.[424] Employees covered by a voluntary plan cannot be asked to contribute more than they would be required to contribute to the state plan[425] and employees covered by a voluntary plan (and their employers) are excused from contributions to the state fund.[426]

Workers will receive benefits equal to 90% of their own average weekly wage up to an amount equal to fifty percent of the state average weekly wage, plus fifty percent of their average weekly wage above an amount equal

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[415] *Id.* § 2(14).

[416] Technically, the duration of benefits is set in hourly units, up to a maximum of twelve times the employee's typical workweek hours. *Id.* § 6(3)(b).

[417] *Id.*

[418] S.B. 5975, 65th Leg., 3rd Spec. Sess. § 6(3)(a) (Wash. 2017).

[419] *Id.* § 6(3)(c).

[420] *Id.* § 2(9).

[421] *Id.* § 10 (defining family member); *id.* § 2(15) (defining "parent" as including the parent of an employee's spouse); *id.* § 2(21) (defining "spouse" as including a registered domestic partner).

[422] *Id.* § 8(3)(b). The law allocates one third of total premiums to family leave and two thirds to medical leave. *Id.* § 8(1)(b)-(c). The initial total premium will be 0.4% of wages, *id.* § 8(3)(a), and will be adjusted thereafter based on a formula set by statute, *id.* § 8(6).

[423] *Id.* § 8(3)(c).

[424] S.B. 5975, 65th Leg., 3rd Spec. Sess. § 8(5) (Wash. 2017).

[425] *Id.* § 14(f); *id.* § 17.

[426] *Id.* § 14(1).

to fifty percent of the state average weekly wage.[427] Benefits will initially be capped at $1,000 per week, but will be adjusted thereafter to equal 90% of the state average weekly wage.[428] This means that almost all workers would receive more money in benefits in Washington than in any other jurisdiction, except for very high-income workers in California who would benefit from the higher maximum benefit.

Washington's law formally provides job protection, but only for employees who meet eligibility requirements essentially identical to those for the FMLA. This means that in practice the law will not meaningfully expand the ranks of employees entitled to job protection.[429] The law does provide some protection against interference or retaliation for all covered workers.[430] A one-week unpaid waiting period will apply for all forms of leave except bonding leave.[431]

IV. VARIETY AS OPPORTUNITY: LEARNING FROM TDI

The expansion of TDI programs into the provision of paid family leave benefits has been a powerful and effective strategy, bringing much needed benefits to millions of workers. It is, however, a strategy that has run its course. With the passage of paid family leave legislation in New York in 2016, the only remaining TDI state without a paid family leave law on the books is Hawaii and, for the reasons described above, Hawaii's system leaves much to be desired.

The next frontier, then, lies in the enactment of programs in jurisdictions without the benefit of a legacy TDI program. Building on existing TDI structures provided substantial policy and political advantages to paid family leave advocates in California, New Jersey, Rhode Island, and New York. New jurisdictions must decide how to structure their systems, convince policy makers to enact that structure, and then implement it. However, there may still be opportunities to build upon other existing programs. At a minimum, states should not feel constrained to start wholly from scratch. Instead, the lessons of the TDI states suggest that states may have more than one model for providing social insurance in their own existing laws and more than one option of how to structure an effective program.

The legacy TDI laws reflect two primary schools of thought: one based on the centrality of the state fund (Rhode Island, California, New Jersey), the other based on giving employers choices in how to meet fixed

[427] *Id.* § 6(4).

[428] *Id.* § 6(5)(a).

[429] *Id.* § 31.

[430] S.B. 5975, 65th Leg., 3rd Spec. Sess. § 72 (Wash. 2017). Though the law makes it illegal to discharge or discriminate against employees for certain actions, neither the taking of leave from work nor filing for or receiving benefits is listed as a protected act. *Id.* § 72(b).

[431] *Id.* § 6(1).

obligations under the law (New York, Hawaii). To a large extent, these disparities reflect differences between the existing state social insurance programs that the states modeled their programs on.

A. Unemployment Insurance: A Powerful Source with Powerful Limitations

Unemployment insurance is one frequently discussed potential base for paid family and medical leave programs.[432] Even President Donald Trump suggested using unemployment insurance to provide parental leave benefits.[433] As discussed above, the state fund states all based their systems on unemployment insurance.

In evaluating this approach, some background may be helpful. Unemployment insurance in the United States is provided through an unusual federal-state hybrid system. After decades of unsuccessful attempts to enact state-level unemployment insurance laws were stymied by fears of putting enacting states at a competitive disadvantage, Congress passed the Federal Unemployment Tax Act (FUTA) as part of the Social Security Act of 1935.[434] Because of New Deal-era concerns about the scope of Congress's constitutional powers, FUTA incentivize states to enact their own programs rather than establishing a national system of unemployment insurance. [435]

The law uses two tools to provide this incentive.[436] First, it sets a high federal unemployment tax on employers, but grants extremely substantial credits against that tax for employers in states whose unemployment systems are certified as meeting minimum federal requirement.[437] Second, it offers

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[432] *See, e.g.*, Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 67 (2005) ("UI has been thought of as a vehicle for funding paid leaves for many years, and may come back on the federal legislative agenda in the future.").

[433] BUDGET OF THE U.S. GOV'T: A NEW FOUND. FOR AMERICAN GREATNESS 20 (FISCAL YEAR 2018), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/budget.pdf. The budget proposal provided only very general information on the proposed program, which would only provide leave for new parents, not for worker's own medical needs or to care for a seriously ill or injured family member. Without much more information than is currently available, a full evaluation of the merits of this proposal is not possible.

[434] 26 U.S.C. § 3301-3311 (2012); *see* Edwin E. Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21, 22-32 (1945).

[435] *See* GRAETZ & MASHAW, *supra* note 66, at 75; Witte, *supra* note 434, at 29 ("Scarcely anyone then believed that the national government under our Constitution could itself establish a system of unemployment insurance, so federal legislation was sought which would induce the states to enact unemployment compensation laws.").

[436] *See* Gerard Hildebrand, *Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U. MICH. J.L. REFORM 527, 530–31 (1996).

[437] The current "standard" FUTA tax rate is 6.0%. 26 U.S.C. § 3301(b). With some restrictions, employers in qualifying states can credit the amount they paid into their state unemployment insurance fund against their FUTA burden. 26 U.S.C. § 3302(a) (allowing credit); 26 U.S.C. § 3304 (setting standards for receiving credit). In addition, employers can receive an additional credit of up to 5.4% (reducing the FUTA rate of 6.0% to 0.6%) if their state's program meets an additional set of requirements. 26 U.S.C. § 3302(b) (allowing credit); 26 U.S.C. § 3303 (setting standards for receipt of credit).

federal funds to pay for the administration of unemployment programs in states that meet a separate set of requirements.[438] As described above, these administrative payments can be used only for the administration of unemployment insurance programs.[439] These combined requirements effectively require all states to establish monopolistic state funds for unemployment insurance.[440] In addition, under sharp time constraints to come into compliance, states relied heavily on a model bill issued by the Social Security Board in order to guarantee their programs would be approved, increasing the convergence.[441]

In many ways, as Rhode Island and other states emphasized, unemployment insurance is a natural complement to a TDI system, or for that matter, to a broader paid family and medical leave system. The idea of building upon unemployment insurance to create new benefits enjoyed a renewed vogue in the late 1990s and early 2000s. Several states, beginning with Vermont in 1997, introduced legislation to extend unemployment benefits to workers not working due to family or medical needs.[442] However, the U.S. Department of Labor took the position that such measures were impermissible as violations of FUTA's requirement that, in order to qualify for unemployment benefits, workers must be "able and available" to work.[443]

In response, President Bill Clinton directed the Department of Labor to issue regulations that would allow states to provide benefits for new parents.[444] This regulation was known as Birth and Adoption Unemployment Compensation ("BAA-UC").[445] BAA-UC allowed, but did not require, states to extend benefits to new parents who left their jobs due to their new child.[446] Despite a flurry of activity, no state succeeded in passing a law

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[438] 42 U.S.C. § 502 (2012) (authorizing grants); 42 U.S.C. § 503 (2012) (setting standards for receiving funds).

[439] 42 U.S.C. § 501 (2012).

[440] *See* 26 U.S.C. § 3304(a)(1) (2012) (requiring that, for a state law to approved "all compensation is to be paid through public employment offices or such other agencies as the Secretary of Labor may approve"); 42 U.S.C. § 503(a)(1) (declaring that "such methods of administration...as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due").

[441] Witte, *supra* note 434, at 33–34.

[442] Curtis Carpenter, *LPA, Inc. v. Herman's Unanswered Question: Is the Clinton Administration's Birth and Adoption Unemployment Compensation Regulation Consistent with the Federal Unemployment Tax Act?*, 37 NEW ENG. L. REV. 63, 68–69 (2002).

[443] *Id.*

[444] Lester, *supra* note 432, at 8.

[445] Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37210-01 (Oct. 9, 2003) (codified at 20 C.F.R Pt. 604).

[446] Lester, *supra* note 432, at 8-9; *see also* Kathryn Kroggel, *Absent Fathers: National Paid Paternity Leave for the United States-Examination of Foreign and State-Oriented Models*, 23 PENN ST. INT'L L. REV. 439, 466-68 (2004).

actually allowing the use of this option.[447] The regulation faced immediate legal challenge, though the leading case was dismissed for lack of standing.[448] The Bush Administration repealed BAA-UC before any state could enact legislation, citing both policy considerations and the administration's interpretation of FUTA as prohibiting the program.[449]

The BAA-UC experience highlights some of the constraints the hybrid state-federal unemployment system creates. Most significantly, state unemployment reserves are largely locked up in unemployment trust funds, the contents of which are subject to strict limits under federal law.[450] It is for that reason that the BAA-UC regulation sought specifically to authorize their use for an alternate purpose; it is also for that reason that the Knowland Amendment was necessary.

More generally, in the absence of specific authorization like BAA-UC, states are strongly disincentivized from tinkering with their unemployment insurance program. Doing so means risking the federal government deeming a state's program non-compliant, which could risk the critical federal tax credits, administrative funds, or both.[451] In particular, states that used their existing unemployment administrative infrastructures for another purpose, such as providing medical or family leave, could risk their federal administrative funds, significantly decreasing the attractiveness of such an option.

Even if these significant barriers could be surmounted (presumably through federal intervention), direct integration with unemployment insurance may be less appealing now than in the late Clinton Administration. BAA-UC was proposed at a time when, due to strong economic conditions, state unemployment funds were relatively well-funded, similar to the conditions that prompted their use for TDI in the 1940s. After the ravages of the Great Recession, state unemployment reserves have been significantly depleted and may be inadequate to respond to a second economic decline.[452] Advocates have also called attention to major technological and administrative problems in state programs, which were exposed by the

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[447] Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992-2012 and Beyond*, 2013 MICH. ST. L. REV. 1621, 1637 (2013). Massachusetts came the closest. Carpenter, *supra* note 442, at 73.

[448] *LPA Inc. v. Chao*, 211 F. Supp. 2d 160, 164 (D.D.C. 2002); *see also* Carpenter, *supra* note 442.

[449] Unemployment Compensation—Trust Fund Integrity Rule; Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58540-01 (Oct. 9, 2003) (codified at 20 C.F.R. Pt. 604) ("While the idea of providing financial assistance to parents or families experiencing birth or adoption may be admirable, it is not in keeping with the fundamental limitation of paying [unemployment compensation] only to individuals who are unemployed due to lack of suitable work.").

[450] *See* 26 U.S.C. § 3306(f) (2012).

[451] *See* Ulrich, *supra* note 53, at 38–39.

[452] *See* RACHEL WEST ET AL., CTR. FOR AMERICAN PROGRESS, NAT'L EMP'T LAW PROJECT, & CT. FOR POVERTY AND INEQUALITY, STRENGTHENING UNEMPLOYMENT PROTECTIONS IN AMERICA (2016), http://www.nelp.org/content/uploads/Report-Strengthening-Unemployment-Protections-in-America.pdf.

recession.[453]

B. Workers' Compensation: An Overlooked Option

The state fund states built upon the unemployment insurance model. New York's distinctive path suggests a potentially equally fruitful alternative option: state workers' compensation laws. As New York did, states looking to create their own paid family and medical leave programs should consider the option of using their workers' compensation systems as resources, both as blueprints and as potential sets of administrative and structural resources. Surprisingly, unlike the well-trod potential of unemployment insurance, this option has been largely unexplored by both scholars and advocates.[454]

The most significant reason to explore this option is the simplest: workers' compensation is, ultimately, a form of social insurance. Like TDI and some elements of unemployment insurance (and unlike Social Security disability), workers' compensation is legislated at the state rather than federal level. Like unemployment insurance (and unlike TDI), almost every state in the country has some mechanism for requiring employers to provide insurance benefits to workers for workplace injuries and illnesses.[455] At minimum, this means that almost any state looking to enact a paid family and/or medical leave insurance system has an in-state model of social insurance to look at, evaluate, and chose whether and to what extent to emulate.

Like unemployment insurance, workers' compensation systems are used to fulfilling the basic function of paid family and medical leave: processing

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[453] *See id.*

[454] One author has suggested the idea of workers' compensation as a basis for family leave benefits in passing. *See* Arnow-Richman, *supra* note 16 ("Although a paid leave program should have its own funds, it could be modeled on or even take advantage of the administrative infrastructure for existing programs like unemployment insurance and workers' compensation."). Another has mentioned workers' compensation systems generally as an example of insurance systems as worker supports. Caroline Cohen, *California's Campaign for Paid Family Leave: A Model for Passing Federal Paid Leave*, 41 GOLDEN GATE U. L. REV. 213, 232 (2011) ("[W]age replacement systems that are already in place, such as workers' compensation, show that insurance funds can be used to accommodate workers' various needs."). A 1969 article by Roger C. Henderson argued for the replacement of traditional workers' compensation systems with a universal national system of compensation covering injuries without regard to occupational connection. Roger C. Henderson, *Should Workmen's Compensation be Extended to Nonoccupational Injuries*, 48 TEX. L. REV. 117 (1969). However, Henderson himself explicitly disclaimed the idea of building a New York-style separate-but-similar non-occupational system in conjunctions with workers' compensation. *Id.* at 142. Stephen Sugarman offered a mirror image of Henderson's proposal, suggesting that TDI states expand TDI coverage to occupational injuries and that non-TDI states adopt universal TDI programs covering both occupation and non-occupational injuries. Stephen Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795, 808–13 (1987). Either Henderson's or Sugarman's proposals, unlike the one brought forward by this Article, would fundamentally reshape not only social insurance but all of tort.

[455] In Texas, workers' compensation coverage is generally voluntary for employers. TEX. LAB. CODE §406.002 (1993). ("Except for public employers and as otherwise provided by law, an employer may elect to obtain workers' compensation insurance coverage.").

and paying claims for wage replacement benefits, including an appeal process.[456] Moreover, as discussed with regard to the New York program, providing workers' compensation benefits requires providing a system for evaluating the veracity of medical claims, including assessing their severity and likely duration,[457] as well as opportunities for challenges and appeals.[458] Providing medical leave or leave to attend to someone else's medical needs, requires doing precisely that, which is something unemployment insurance programs do not need to do.[459] The use of workers' compensation systems as the basis for paid family and medical leave insurance programs would also give states the practical and political benefits of using existing administrative infrastructures,[460] a powerful advantage that should not be overlooked lightly.

This is not to say that state workers' compensation programs are perfect mechanisms for vindicating workers' rights. Over the years, various state programs have rightfully been subjected to criticism and concern.[461] That such systems are imperfect, however, should not stop advocates from considering to what extent they can serve as useful resources for the creation of new worker protections. Long experience with the strengths and difficulties of a particular system could prove to be an advantage, as worker advocates would be familiar with the pitfalls and thus be able to correct for them.

Nor is this to suggest that all elements of traditional workers' compensation structures ought to be ported over to paid family and medical leave. In particular, features of workers' compensation laws designed to incentivize employers to minimize on-the-job injuries have no logical role to play in the realm of family leave or non-occupational medical leave. Just as New York did, states could build upon the useful structural and administrative aspects of their workers' compensation laws while leaving behind or changing those components that do not make sense.

In contrast to the top-down manner in which unemployment insurance

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[456] *See, e.g.*, OR. REV. STAT. § 656.262 (2017).

[457] *See, e.g.*, 77 PA. CONS. STAT. § 651 (2017).

[458] *See, e.g.*, OHIO REV. CODE ANN. § 4123.511 (LexisNexis 2017).

[459] The complexity of workers' compensation claims processes is driven, in part, by the need to assess severity of an injury or illness and establish causation. Neither would be necessary in a paid family and medical leave system, which would, one hopes, make the process easier and much less costly for workers to navigate.

[460] *See* Lester, *supra* note 432, at 66 ("Building on to an existing administrative infrastructure is likely to be more efficient than starting a program from the ground up. In addition, it may be more politically tractable to introduce legislation that expands an established program.").

[461] *See, e.g.*, Dean Haas, *Broken Promise: The Demise of "Sure and Certain Relief" Under the North Dakota Workers' Compensation Act*, 89 N.D. L. REV. 611 (2013); Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657 (1998); Eston W. Orr, *The Bargain is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 25 WORKERS' COMP. L. REV. 359, 396 (2003).

developed in the United States, workers' compensation evolved from the bottom up by states independently developing and adopting their own statutes over the course of several years.[462] This heterogeneous process resulted in states adopting various structures,[463] combining state funds, private insurance, and/or self-insurance.[464]

1. States with Monopolistic or Default State Funds for Workers' Compensation

North Dakota and Wyoming are the only two states that have monopolistic state funds[465]; however, both states (unusually) only require workers' compensation coverage for "extrahazardous" employment, making their laws much more limited than those of other states.[466]

Ohio and West Virginia formally make their respective state funds the default option, with self-insurance as a secondary option.[467] Neither state allows the use of private insurance. Washington's system looks similar in practice to those of Ohio and West Virginia, though it theoretically sets use of the state fund and qualifying as a self-insurer as options of equal status.[468] Because Washington also does not allow the use of private insurance, the state fund is the only option for employers who cannot meet the rigorous requirements to qualify as a self-insurer.[469]

These states (apart from Washington, which has already enacted a paid family and medical leave law) could most easily enact a state-fund-based paid family and medical leave law. Emulating the moves made by the state fund TDI states, these states could choose to expand on upon the legislative and administrative infrastructures of their workers' compensation state funds to create (monopolistic or default) state paid family and medical leave funds. Moreover, because they would be building on workers' compensation rather than unemployment insurance, these states would not be subject to

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[462] *See, e.g.*, Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & ECON. 305, 307 (1998) ("Workers' compensation in many ways was a national movement; most states enacted the law within a very short period in the 1910s.").

[463] *See* 1-2 LARSON'S WORKERS' COMPENSATION LAW § 2.07 (2017); *see also* Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 185 (1994) (stating that early states used monopolistic funds, while later states allowed for self-insurance and/or private insurance); Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 984-85 (2013) (describing history of enactment of workers' compensation statutes between 1910 and 1949).

[464] *See* 1-2 LARSON'S WORKERS' COMPENSATION LAW § 1.01 (2013) (stating as a feature of a "typical workers compensation act" that "the employer is required to secure its liability through private insurance, state-fund insurance in some states, or "self-insurance").

[465] *See* N.D. CENT. CODE § 65-04-04 (2009); WYO. STAT. ANN. § 27-14-202 (2012).

[466] *See* N.D. CENT. CODE § 65-04-04 (2009); WYO. STAT. ANN. § 27-14-108 (2015).

[467] *See* OHIO REV. CODE ANN. § 4123.35 (LexisNexis 2017); W. VA. CODE § 23-2-1(a) (2016); W. VA. CODE § 23-3-9(a) (2016).

[468] WASH. REV. CODE § 51.14.010 (2017).

[469] *See* WASH. REV. CODE § 51.14.020 (2017) (setting out requirements for self-insurance).

federal restrictions. For example, they would not necessarily have to scrupulously separate administrative funding for the old (workers' compensation) and new (paid family and medical leave) programs, as the state fund TDI states had to do to comply with FUTA.

2. States with an Insurance Mandate and Competitive State Funds for Workers' Compensation

Next, several states, including New York,[470] allow employers to choose between competitive state funds and private insurance for workers' compensation, with many also allowing self-insurance.[471] The exact structure of their inclusion varies. In some states, the statutory provisions describing acceptable forms of coverage explicitly refer to the competitive state fund.[472] In other states, the coverage provisions simply authorize the use of insurance by any insurer appropriately credentialed under state law,[473] while establishing the competitive state fund elsewhere.[474] In some cases, the latter approach may reflect the fact that many competitive state funds were only established in the 1990s.[475]

[470] N.Y. WORKERS' COMP. LAW § 50 (McKinney 2017). New York was actually a leader in the creation of workers' compensation insurance. *See* Fishback & Kantor, *supra* note 462, at 315 ("The American movement for compensation legislation began in 1898, when the New York Social Reform Club presented the New York legislature with a compensation bill emulating the 1897 British law"). New York passed the first state workers' compensation statute in 1910. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 503 (2d ed. 2011). The original NY law was struck down as unconstitutional, *see* Ives v. South Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911), but a state constitutional amendment quickly allowed for a replacement. 1-2 LARSON'S WORKERS' COMPENSATION LAW § 2.07 (2017) ("In New York, the *Ives* decision was answered by the adoption in 1913 of a constitutional amendment permitting a compulsory law, and such a law was passed in the same year.").

[471] California and Hawaii, which as discussed above already provides temporary disability insurance and/or paid family leave through a separate system, provide workers' compensation insurance in this matter. *See* CAL. LAB. CODE § 3700 (West 2017) (designating acceptable means of providing coverage without specific reference to the state fund); CAL. INS. CODE § 11770 (2017) (establishing state fund); HAW. REV. STAT. § 386-121 (2017); HAW. REV. STAT. § 431: 14A-101 (2017).

[472] For example, Montana's law enumerates the options as "Compensation Plan Number One" (self-insurance), MONT. CODE § 39-71-2101 (2017); "Compensation Plan Number Two" (private insurance)," *Id.*; "Compensation Plan Number Three" (insurance through the state fund), MONT. CODE ANN. § 39-71-2311 (2017); *See* MONT. CODE ANN. § 39-71-103 (2017) ("The compensation provisions of this chapter, whenever referred to, shall be held to include the provisions of compensation plan No. 1, 2, or 3 and all other sections of this chapter applicable to the same or any part thereof."). Other states are similarly explicit. *See* COLO. REV. STAT. § 8-44-110(1) (2017); N.Y. WORKERS' COMP. LAW § 50 (McKinney 2017) 77 PA. CONS. STAT. § 501 (2017); UTAH CODE ANN. § 34A-2-201 (LexisNexis 2017).

[473] *See* IDAHO CODE § 72-301 (West 2017); KY. REV. STAT. ANN. § 342.340(1) (West 2017); LA. REV. STAT. ANN. §1168(A) (2017); ME. REV. STAT. § 401(1) (2017); MD. CODE ANN., LAB. & EMPL. § 9-402 (2017); MO. ANN. STAT. § 287.280 (West 2017); N.M. STAT. ANN. § 52-1-4 (West 2017); OR. REV. STAT. § 656.017 (2017).

[474] *See* IDAHO CODE ANN. § 72-901 (2017); KY. REV. STAT. ANN. § 342.80 (2017); LA. REV. STAT. ANN. §23:1391 (2017); 24-A ME. REV. STAT. § 3703 (2017); MD. CODE INS. § 24-301 (2017); MO. ANN. STAT. § 287.900 (2017); N.M. STAT. ANN. § 59-9-1 (West 2017); OR. REV. STAT. § 656.752 (2017).

[475] *See* Martha T. McCluskey, *Insurer Moral Hazard in the Workers' Compensation Crisis: Reforming Cost Inflation, Not Rate Suppression*, 5 EMP. RTS. & EMP. POL'Y J. 55, 121–22 (2001). *See* HAW. REV. STAT. § 431: 14A-101 (2017); KY. REV. STAT. ANN. § 342.801 (2017); LA. REV. STAT. ANN. § 23:1391 (2017); 24-A ME. REV. STAT. ANN. § 3701(2017); MO. ANN. STAT. § 287.900 (2017); N.M.

The competitive state funds share a few key characteristics with one another. All are created through specific statutory authority[476] and, although the degree and mechanisms vary, all are subject to some amount of state oversight or control beyond that to which commercial insurers are subject.[477] In recent years, Oklahoma[478] and Maryland[479] have both reduced the level of oversight over their respective state funds, while maintaining some control. In contrast, Arizona[480] and Minnesota[481] previously operated competitive state funds, but have fully privatized them, with no ongoing special state role. Competitive state funds are generally explicitly designated as self-supporting,[482] usually with some specific disclaimer of state financial liability.[483] They also generally serve as insurer of last resort, designated with the task of ensuring that all employers are able to acquire coverage meeting their legal obligations.[484] Often, the premiums that state funds can charge are constrained by statute, generally to the minimum amount that allows the fund to be self-sustaining and actuarially sound.[485]

Building upon the workers' compensation systems in these states would be a somewhat more delicate matter than doing so in the states that do not allow for private insurance at all. The inclusion of private insurance in a social insurance system is not without risk. Although, as discussed above, New York, and with lesser success, Hawaii have for years largely relied upon the private market to provide disability insurance, medical leave (disability insurance) and family leave are not precisely comparable to one another for these purposes. Short-term disability insurance is an established commercial product in every state, while family leave insurance does not yet exist on the private market.[486]

STAT. ANN. § 52-9-1 (2017).

[476] *See, e.g.*, COLO. REV. STAT. § 8-45-101(2017); MONT. CODE ANN. § 39-71-2313(1)(2017); N.Y. WORKERS' COMP. LAW § 76 (McKinney 2017).

[476] *See, e.g.*, COLO. REV. STAT. § 8-45-101(2017); MONT. CODE ANN. § 39-71-2313(1)(2017); N.Y. WORKERS' COMP. LAW § 76 (McKinney 2017).

[477] A common mechanism is having state elected officials appoint members of the board. *See, e.g.*, COLO. REV. STAT. ANN. § 8-45-101(2)(West 2017); IDAHO CODE ANN. § 72-901 (2017); N.M. STAT. ANN. § 52-9-5 (2017).

[478] *See* Compsource Mutual Insurance Company Act, ch. 254, HB 2201 (2013). Various state officials and their designees still serve on the board, 85 OKLA. STAT. ANN. § 375.4 (2017), and the new entity continues to serve as insurer of last resort, 85 OKLA. STAT. ANN 375.9 (West 2017).

[479] *See* Injured Workers' Insurance Fund- Conversion to Chesapeake Employers' Insurance Company Act, ch. 570, 2012 Md. Sess. Law Serv. (2012); *see also* MD. CODE ANN., INS. § 24-307 (2017) (state maintains control over board seats).

[480] *See* 2010 Ariz. Sess. Laws 1560-62; 2011 Ariz. Sess. Laws 1000-28.

[481] *See* 2001 Minn. Sess. Law Serv. 186 (West).

[482] *See, e.g.*, N.M. STAT. ANN. § 52-9-20 (2017).

[483] *See, e.g.*, COLO. REV. STAT. ANN. § 8-45-102(1) (2017).

[484] *See, e.g.*, MONT. CODE ANN. § 39-71-2313(2) (2017).

[485] *See, e.g.*, COLO. REV. STAT. ANN. § 8-45-106(1)(2017); OR. REV. STAT. ANN. § 656.752(2)(b) (2017).

[486] *See,e.g.*, FITZPATRICK, *supra* note 160, at 4; Ulrich, *supra* note 53, at 29.

New York has attempted to leverage its unique position to solve this problem by requiring that insurers offering TDI policies (to meet the statutory requirement) must also provide paid family leave insurance in the same policy.[487] In effect, this provision conditions insurers' access to the lucrative New York TDI market on their willingness to also offer paid family leave insurance. This stick is paired with the carrot of revenues from state-mandated paid family leave insurance, eliminating insurers' fear of a market not emerging for the new product as well as guarding against adverse selection risks.[488] If this gambit is successful, it could spur insurers offering the family leave product for New York to also do so in other states, opening up exiting new opportunities elsewhere. For New York's workers, insurance carriers currently providing TDI coverage will be required to notify their policyholders whether they will offer paid family leave coverage soon, to allow employers whose current carriers are leaving the market time to acquire new coverage for both TDI and paid family leave before January 1, 2018.[489]

By statutory decree, New York operates with the safety net that at a minimum, the state's competitive insurance fund (SIF) will offer qualifying policies.[490] This eliminates the possibility that, once the law's requirements become effective, employers will be left without options to acquire needed coverage, a problem the drafters of the original New York DBL solved with the inclusion of SIF. For this reason, the states with competitive state funds for workers' compensation may be especially interested in using that model to provide paid family and medical leave. Just as New York has done, those states could insulate themselves against the possibility of a market not emerging for providing benefits by requiring their respective competitive state funds to offer coverage. New York's experience will provide useful information to states considering this approach.[491]

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[487] N.Y. WORKERS' COMP. LAW § 226(9) (McKinney 2017) ("[E]very policy of insurance issued pursuant to this article must offer coverage for both disability and family leave benefits.").

[488] *See* Lester, *supra* note 432, at 10–16 (discussing reasons the private market has not provided family leave insurance); *see also* Ulrich, *supra note* 53, at 29–30.

[488] *See* Lester, *supra* note 432, at 10–16 (discussing reasons the private market has not provided family leave insurance); *see also* Ulrich, *supra note* 53, at 29–30.

[489] N.Y. COMP. CODES R. & REGS. tit. 12, § 380-7.7(g) (2017).

[490] *See* N.Y. WORKERS' COMP. LAW § 76(2) (McKinney 2017)

[491] New York is already providing intriguing new solutions to thorny problems. All state paid family and/or medical leave laws currently on the books are at least partially employee funded, with the rule-proving exception of Washington, D.C. *See* D.C. Code § 1-206.02(a)(5) (West). Because employers (rather than employees) ordinarily get to select the method of coverage in employer insurance mandates, some mechanism is needed to limit the amount employees can be expected to contribute to avoid substantial moral hazard problems. As described in Part II.C, New York and Hawaii's TDI program solve this problem by putting a cap on the amount employees can be asked to pay and making employers responsible for any remaining cost. *See id.* As described in Part III.A, New York's paid family leave law, as implemented by the agency that regulates insurers, has put forward an elegant alternative suitable to a *fully* employee-funded program, by simultaneously setting universal community rates for insurance premiums and setting the maximum employee contributions precisely equal to those rates. *Id.*

[492] *See* ALASKA STAT. § 23.30.075(a) (2017); ARIZ. REV. STAT. ANN. § 23-961 (2017); DEL. CODE

3. Riskier Terrain: States Without a Public Option for Workers' Compensation

Until a true market for commercial paid family leave coverage emerges, it would be a considerably riskier choice for the remaining states to directly model a paid family and medical leave program on their workers' compensation structures. These states require employers to provide coverage but do not provide the option of a state fund to do so. Instead, they allow employers to choose between purchasing private insurance and becoming approved self-insurers (on either a group or individual basis, depending on the state).[492]

In general, these states solve the problem of guaranteeing access to coverage through assigned risk pools.[493] At present, this option is simply not viable for guaranteeing employers will be able to purchase family leave insurance. Without an established market, an assigned risk pool would not be an effective mechanism for ensuring access: after all, one needs a pool of insurers to whom to assign employers. In light of New York's efforts in particular, it is possible that a sufficient pool of paid family leave insurance providers will eventually arise to assuage these concerns, but such a market does not yet exist.

These states could conceivably create an assigned risk pool for purposes of medical leave coverage *only*, using the existing set of commercial disability insurance providers, effectively creating a contemporary TDI law. While this Article takes no position on the advisability of such a strategy, enacting a standalone TDI law without family leave benefits would be an unusual and unexpected move in a climate where advocates are focused on comprehensive coverage. A state that uses an assigned risk pool for workers'

ANN. tit. 19 § 2374 (2017); FLA. ST. § 440.38 (2017); GA. CODE ANN. § 34-9-121 (West 2017); 820 ILL. COMP. STAT. § 305.4 (2017); IND. CODE. § 22-3-5-1 (2017); IOWA CODE § 87.1 (2017) (private insurance); IOWA CODE § 87.4 (2017) (self-insurance); KAN. STAT. ANN. § 44-532(b) (2017); MASS. GEN. LAWS ch. 152, § 25A (2017); MICH. COMP. LAWS § 418.611 (2017); MINN. ST. § 176.181 (2017); NEV. REV. ST. § 48-145(2017); N.H. REV. STAT. § 281-A:5 (2017); N.C. GEN. STAT. § 97-93 (2017); S.C. CODE ANN. § 42-5-20 (2017); S.D. CODIFIED LAWS § 62-5-2 (2017) (private insurance); S.D. CODIFIED LAWS § 62-5-3 (2017) (group self-insurance); TENN. CODE ANN. § 50-6-405(a) (2017); VT. STAT. ANN. tit. 21, § 687 (West 2017); VA. CODE ANN. § 65.2-901 (2017); WIS. STAT. §102.28 (2017). Perhaps surprisingly, D.C., New Jersey, and Rhode Island also fall into this category. *See* D.C. CODE § 32-1534 (2017); N.J. STAT. ANN. 34:15-71 (West 2017); R.I. GEN. LAWS § 28-36-1 (2017).

[492] *See* ALASKA STAT. § 23.30.075(a) (2017); ARIZ. REV. STAT. ANN. § 23-961 (2017); DEL. CODE ANN. tit. 19 § 2374 (2017); FLA. ST. § 440.38 (2017); GA. CODE ANN. § 34-9-121 (West 2017); 820 ILL. COMP. STAT. § 305.4 (2017); IND. CODE. § 22-3-5-1 (2017); IOWA CODE § 87.1 (2017) (private insurance); IOWA CODE § 87.4 (2017) (self-insurance); KAN. STAT. ANN. § 44-532(b) (2017); MASS. GEN. LAWS ch. 152, § 25A (2017); MICH. COMP. LAWS § 418.611 (2017); MINN. ST. § 176.181 (2017); NEV. REV. ST. § 48-145(2017); N.H. REV. STAT. § 281-A:5 (2017); N.C. GEN. STAT. § 97-93 (2017); S.C. CODE ANN. § 42-5-20 (2017); S.D. CODIFIED LAWS § 62-5-2 (2017) (private insurance); S.D. CODIFIED LAWS § 62-5-3 (2017) (group self-insurance); TENN. CODE ANN. § 50-6-405(a) (2017); VT. STAT. ANN. tit. 21, § 687 (West 2017); VA. CODE ANN. § 65.2-901 (2017); WIS. STAT. §102.28 (2017). Perhaps surprisingly, D.C., New Jersey, and Rhode Island also fall into this category. *See* D.C. CODE § 32-1534 (2017); N.J. STAT. ANN. 34:15-71 (West 2017); R.I. GEN. LAWS § 28-36-1 (2017).

[493] *See, e.g.*, ALASKA STAT. § 21.39.155(a) (2017).

compensation could also theoretically create any type of state fund solely for purposes of paid family and medical leave, while emulating other aspects of their workers' compensation law. Doing so would obviously be both more difficult and more costly than a closer coordination and, having strayed that far from their existing system, such a state might choose to go an entirely different direction.

Even without directly integrating paid family and medical leave benefits into workers' compensation, states can still draw upon existing laws and regulations as models. In any structure, these laws provide language and models for key features, which a paid family and medical leave bill can borrow or cross-cite. Where a state system has acceptably answered an important question, there is no need to re-invent the wheel. Use of parallel provisions not only removes drafting questions, it increases the comfort level of workers, employers, and policymakers by increasing familiarity. It also provides the opportunities to use existing data to make appropriate estimates and plans and to leverage enforcement efforts.

CONCLUSION

A truly national family and medical leave insurance system, at least to offer a baseline of coverage for all workers, remains the ultimate goal of paid leave advocates.[494] Until such a law can be passed however, the momentum for paid family and medical leave is at the state level. This can offer the opportunity for states to experiment with different structural options, choosing from the set of options already tested or innovating their own. In so doing, they can draw upon the resource of their workers' compensation laws as well as the workers' compensation laws of other states.

Worker advocates in this country have sought to enact new protections against wage loss due to non-occupational illness or injury for over a hundred years. Nearly seventy years ago, they won an impressive set of victories. By learning the lessons of these campaigns and the programs they created, today's inheritors of that legacy can be better equipped to create strong, effective, sustainable programs today rather than waiting for federal action. America's working families have waited long enough.

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[494] *See, e.g.*, Cohen, *supra* note 11, at 27. The FAMILY Act, which proposes such a system, has been reintroduced in Congress as Senate Bill 337 and H.R. 947. *See* Elizabeth L. Aguilera, *The Best Interests of Families and Employers: Why the Family and Medical Insurance Leave Act Is the Best Hope for Easing Work-Family Tension for American Parents and Children*, 84 UMKC L. REV. 155, 162 (2015) (arguing for passage of the FAMILY Act).