

USING SICK LEAVE TO CARE FOR FAMILY MEMBERS: ISSUES AND OPTIONS

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FOREWORD

This study was prepared in response to Senate Concurrent Resolution No. 180, S.D. 1 (2002). The Concurrent Resolution requested the Legislative Reference Bureau to compare recent Hawaii legislative proposals to allow employees to use sick leave to care for their families and Hawaii's family leave law, as codified in Chapter 398, Hawaii Revised Statutes. This study presents the requested comparison, and also provides additional information on related issues, such as an overview of traditional sick leave and other states' approaches to family leave.

We hope that this report will provide useful and relevant information to assist the Legislature in making policy decisions related to mandating employers' to allow use of sick leave to care for family members with a serious health condition or in choosing any other option intended to provide wage replacement benefits to employees who take family leave.

The Bureau extends its appreciation to the representatives of various state and county agencies that assisted the Bureau in this study.

Ken H. Takayama
Acting Director

January 2003

Fact Sheet

USING SICK LEAVE TO CARE FOR FAMILY MEMBERS: ISSUES AND OPTIONS

I. Highlights

Senate Concurrent Resolution No. 180, S.D. 1 (2002) requested the Legislative Reference Bureau to compare recent Hawaii legislative proposals to require employers to permit employees to use sick leave to care for sick family members and Hawaii's family leave law, as codified in Chapter 398, Hawaii Revised Statutes.

In addition to the requested comparison, the study also summarizes and compares the Hawaii family leave law and the federal Family and Medical Leave Act of 1993. It also provides information on related issues such as an overview of traditional sick leave, other states' approaches to providing employees with wage replacement benefits for leave taken to care for sick family members, and current use of sick leave to care for family members by Hawaii employees.

II. Findings

- (A) Although family leave to care for certain family members with a serious health condition is recognized in many state and federal laws, family leave is generally unpaid leave. Federal law and Hawaii laws allow twelve and four weeks of unpaid family leave, respectively. Substitution of sick leave (paid leave) for unpaid family leave is permitted, subject to certain conditions.
- (B) Traditional sick leave is used when the employee's own health is at issue. No state or federal law requires employers to provide sick leave to employees.
- (C) Recent proposed legislation to amend Hawaii's family leave law would have added unnecessary confusion in interpretation and application of the law. Including the state and political subdivisions as an "employer" only for the purposes of sick leave would have caused avoidable uncertainty and the interaction between the proposed new law and the current use of sick leave in section 398-4(b) is uncertain.
- (D) A few states require employers who offer sick leave to permit employees to use sick leave to care for sick family members: California, Washington, and Minnesota.
- (E) California recently expanded its disability insurance program to establish a Family Temporary Disability Insurance program that will provide six weeks of

wage replacement benefits up to a maximum of \$728 weekly. The new program funding is shared by employers and employees.

- (F) Alternatives to provide benefits for family leave include expansion of unemployment insurance programs, family leave insurance funds, and tax credits for employers who offer paid family leave.
- (G) There is no law mandating a uniform standard for public or private employees' use of sick leave to care for ill family members in Hawaii.
- (H) Federal law allows most federal employees to use up to twelve workweeks of sick leave to care for certain family members with a serious health condition.
- (I) The need for expanded family leave benefits is significant in Hawaii because of the number of women in our workforce, our high cost of living, and the longest life expectancy in the nation.

III. Frequently Asked Questions

A. What is Hawaii's family leave law?

Answer: Hawaii family leave law entitles certain employees to a total of four weeks of family leave during any calendar year upon the birth of a child of an employee or adoption of a child, or to care for the employee's child, spouse or reciprocal beneficiary, or parent with a serious health condition. The law provides job protection by requiring the employee to be returned to the same or equivalent position upon return to the office after taking family leave. Unlike federal law, Hawaii law does not expressly require an employer to maintain health benefits for an employee on family leave.

B. Who qualifies for family leave under state law?

Answer: An employee who works for an employer with one hundred employees and who has worked not fewer than six consecutive months for the employer from whom family leave benefits are sought. As of July 1, 2002, state and county employees are no longer entitled to family leave under Chapter 398, Hawaii Revised Statutes.

C. Is family leave paid or unpaid?

Answer: Only unpaid family leave is guaranteed by Hawaii law. An employee or employer may substitute any of the employee's accrued paid leave for the four weeks of unpaid family leave. An employee's sick leave, however, may be

substituted for unpaid family leave only if an employer's policy or practice permits such use of sick leave, or upon mutual agreement.

D. What about state and county employees?

Answer: Generally, eligible state and county employees are entitled to family leave benefits of up to twelve workweeks of unpaid family leave under the federal Family and Medical Leave Act of 1993. For many public employees, sick leave issues are determined by collective bargaining; collective bargaining agreements may allow substitution of sick leave to care for certain family members with a serious health condition. The work conditions of public employees excluded from collective bargaining are adjusted according to Chapter 89C, Hawaii Revised Statutes. There is no law that establishes a uniform standard regarding use of sick leave to care for ill family members that addresses state and county employees.

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Chapter 1

INTRODUCTION

Nature of the Study

During the Regular Session of 2002, the Legislature adopted Senate Concurrent Resolution No. 180, S.D. 1 (S.C.R. No. 180, S.D. 1), entitled “Requesting the Legislative Reference Bureau to Compare Legislative Proposals to Allow Employees to Use Sick Leave to Care for Their Families and Hawaii’s Family Leave Law, as codified in Chapter 398, Hawaii Revised Statutes.” A copy of the Concurrent Resolution is included as Appendix A.

Hawaii’s family leave law, adopted in 1991, entitles certain employees in the private sector to take up to four weeks unpaid family leave from their job to care for designated family members with a serious health condition. Federal law entitles state and county workers to similar family leave. The state law does not apply to Hawaii public employees. Some private sector workers, however, are covered under both federal and state family leave law. Because family leave is generally unpaid leave, balancing family demands and workplace obligations is at times both financially difficult and personally stressful. Legislation introduced in recent years proposed requiring public and private employers who provide sick leave to allow employees to substitute personal sick leave for unpaid family leave provided in Chapter 389, Hawaii Revised Statutes, to care for ill family members. S.C.R. No. 180, S.D. 1, requested the Legislative Reference Bureau to compare the recent legislative proposals to Hawaii’s Family Leave Law.¹

Organization of the Study

Chapter 2 provides an overview of both Hawaii’s family leave law, as codified in Chapter 398, Hawaii Revised Statutes, and the federal Family and Medical Leave Act of 1993, and compares the two laws. To provide a better understanding of issues relating to use of sick leave to care for sick family members, Chapter 3 briefly discusses traditional sick leave for employees—how they get it and how they are allowed use it. Chapter 4 compares recent legislative proposals to require public and private employers who provide sick leave to allow employees to substitute sick leave for unpaid family leave when taking time from their job to care for certain family members with a serious health condition to Hawaii’s family leave law. Chapter 5 highlights other states’ approaches to providing paid leave to care for sick family members, including use of sick leave. Chapter 6 looks at current use of sick leave to care for family members by Hawaii employees. Chapter 7 provides a summary of the Bureau’s findings.

Endnotes

1. This study does not address issues under either state or federal law related to leave taken upon the birth or adoption of the employee’s child or due to the employee’s own health condition.

Chapter 2

TAKING CARE OF FAMILY: STATE AND FEDERAL FAMILY LEAVE LAWS

Introduction

This chapter provides an overview of family leave. It looks at Hawaii's family leave law, codified in Chapter 398, Hawaii Revised Statutes, and the federal Family and Medical Leave Act of 1993, and compares the two laws. Generally, as used in this study or unless stated otherwise, the term "family leave" refers to leave taken by an employee to care for the employee's ill child, spouse, parent or other family member.¹ "Sick leave" or "medical leave" means paid leave taken as a result of an employee's own illness or health-related condition.

Family Leave: Background and Policy

An Op-Ed article in the Boston Globe on April 22, 2002 observed that "Across the political spectrum, the family has again become the center of social policy....[T]he family has been recognized again as the ultimate building block of a good and strong community."² The article's authors point to survey results that indicate employees have significant concerns about pursuing their careers and having time to tend to family matters, while noting that "There seems to be broad understanding that the economy is only as strong as the families that make up the community."³

Working individuals—men and women, married and single—indeed often face challenges in meeting obligations at home and in the office. Despite existing caretaker arrangements for an employee's children or senior parents, occasionally employees may need to take time off from their job to care for a seriously ill family member because no other option exists. On the other hand, employers worry that their business will suffer if employees are out of the office on family leave. Family leave laws⁴ attempt to balance employer and employee concerns, entitling eligible employees to take unpaid leave from work to care for families while providing job protection for the employee on family leave.

Although "family leave" is not uniformly defined, the term commonly refers to unpaid leave to take care of ill family members. Family leave may also include maternity leave or parental leave taken upon the birth or adoption of a child. Family leave laws generally offer employees job protection by entitling an employee to be restored to the same or comparable job after returning from the leave; federal and some state family leave laws also require employers to continue employment benefits such as health care coverage during the leave period. While family leave laws do not require employers to provide paid leave, some laws have provisions that allow substitution of paid leave if certain conditions are met.

Hawaii's family leave law was passed by the Legislature in 1991, two years before Congress enacted the similar federal Family and Medical Leave Act. Currently, Hawaii's family

leave law, entitles certain employees in the private sector to a total of four weeks of unpaid family leave during any calendar year upon the birth or adoption of a child, or to care for the employee's child, spouse or reciprocal beneficiary, or parent with a serious health condition.⁵ Similarly, the federal Family and Medical Leave Act of 1993 entitles certain public and private sector employees to leave without pay upon the birth or adoption of a child, due to their own serious health condition, and to care for certain family members with a serious health condition.⁶ Both laws provide job security for eligible employees. Both laws have provisions that allow substitution of accrued paid leave for unpaid family leave, subject to certain conditions.

Increasingly, states are looking at options to provide employees with some type of paid leave for a variety of family leave purposes. At least three states have laws that require employers who provide sick leave to permit employees to use sick leave to care for ill family members. Additionally, California recently established a family disability insurance program, becoming the first state to provide workers with wage replacement benefits for leave taken to care for sick relatives.⁷

Family Leave Under the Federal Family and Medical Leave Act of 1993

Some employees in Hawaii are entitled to unpaid family leave to care for family members under the federal Family and Medical Leave Act of 1993 (FMLA or Act). The FMLA became effective on August 5, 1993⁸ as the first national policy aimed at helping working individuals meet both work and family obligations. The FMLA offers job protection and continuation of employment benefits, aimed at allowing "employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."⁹ The Act was intended to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."¹⁰ Congress noted a direct correlation between a stable family life and workplace productivity.¹¹ In addition to accommodating the interests of employers, the FMLA also seeks to promote equal opportunity in the workplace for men and women.¹²

The FMLA requires covered public and private employers with fifty or more employees to provide twelve workweeks of unpaid family and medical leave to eligible employees upon the birth or adoption of a new baby, to care for ill family members, or to recover from their own health conditions.¹³ The FMLA provides job protection that restores the employee to the same job after the employee's family leave is concluded; it also requires employers to maintain an employee's group health insurance benefits while the employee is on family or medical leave. FMLA leave is unpaid, but substitution of paid leave benefits is permitted under certain circumstances.¹⁴

A recent survey finds that the FMLA has resulted in a more uniform standard of voluntary employer leave policies and state leave laws. Employers find compliance easy and affordable. Leaves taken are not lengthy, with employees returning to their position after leave. The reduced turnover apparently is a "tangible positive effect."¹⁵ Employees have been generally pleased with FMLA: they find it easy to arrange, have little worry about losing their

job because of taking leave, and find the amount of leave satisfactory. A significant number of employees, however, have reported that although they needed to take family leave, they did not because they could not afford to take time off from work without pay.

State Family Leave Laws

Although Congress passed the federal Family and Medical Leave Act in 1993 to provide a national policy supporting families in their efforts to strike a practical balance between the often competing demands of family and office, family leave policy has its origins in the states. The earliest state family leave laws primarily related to the birth or adoption of a child. By 1990, twenty-three states had provisions for maternity leave and eleven states provided parental leave.¹⁶

States have passed or expanded family leave laws to entitle workers to protections similar to the federal FMLA. Some state family leave laws are applicable to workers not covered by the FMLA; others require different terms of unpaid leave, or provide more specific or additional types of unpaid leave.¹⁷ While California is the only state to expressly require employers to provide paid family leave, some states allow substitution of paid leave if certain conditions are met. Three states mandate employers who provide sick leave to allow employees to use personal sick leave to care for certain ill family members: Washington, Minnesota, and California.

Hawaii Family Leave Law

In recognition of the above issues, Hawaii's family leave law was enacted in 1991, and codified in Chapter 398, Hawaii Revised Statutes (HRS).¹⁸ Originally, Hawaii's family leave law entitled state¹⁹ and private employees to four weeks of family leave upon the birth or adoption of a child or to take care of a child, spouse, or parent with a serious health condition. A "serious health condition" was defined to mean "an acute, traumatic, or life-threatening illness, injury, or impairment, which involves treatment or supervision by a health care provider."²⁰ The law applied to employees who worked at least six consecutive months for an employer who employed 100 or more employees for twenty calendar weeks.

Although Hawaii family leave law guarantees only unpaid leave, use of sick leave for family leave purposes was contemplated from the beginning: "an employee or employer may elect to substitute any of the employee's accrued paid leaves such as sick, vacation, personal, or family leave for any part of the four-week period."²¹ The family leave law, however, provided little guidance on how this substitution was accomplished. Four years later, section 398-5, HRS, was amended to "subject the substitution of accrued paid leaves to certain conditions."²² As a result, section 398-5, now provides that "an employer or employee may not substitute an employee's accrued sick leave in any situation under this chapter unless:

- (1) Sick leave is normally granted for such purposes by an employer's policy or practice; or

- (2) Upon mutual agreement by the employer and employer.²³

Effective July 1, 2002, the definition of “employer” was amended to delete reference to the State or its political subdivisions.²⁴ Consequently, employees of the State or any of its political subdivisions, arguably, are no longer entitled to any type of family leave under Chapter 398, Hawaii Revised Statutes. Proposed legislation amending Chapter 398 by adding a new section to require employers to permit employees to substitute accrued sick leave for unpaid family leave is discussed in Chapter 4. This chapter seeks to provide the reader with general information on family leave, and illustrate differences and similarities between Hawaii’s family leave law and the federal Family and Medical Leave Act of 1993.

Comparison of Hawaii Family Leave Law with Federal FMLA

Covered Employer

Hawaii

- Private sector employers who employ one hundred or more employees for each working day during each of twenty or more calendar weeks in current or preceding calendar year.

FMLA

- Requires employer engaged in commerce or in industry or activity affecting commerce who employs fifty or more employees for twenty weeks during current or preceding calendar year to provide family and medical leave to an employee who has worked at least twelve months for the employer, including 1,250 hours during the previous twelve months.
- Includes public agency.

Eligible Employee

Hawaii

- Person who performs services for hire for not fewer than six consecutive months for employer from whom benefits are sought.
- Must work for covered employer.

FMLA

- Employee who has been employed at least twelve months by the employer from whom leave is requested for at least 1,250 hours of service with employer during the previous twelve month period.
- Must work for a covered employer.

Scope and Amount of Leave

Hawaii

- Four weeks of family leave in any calendar year upon birth or adoption of child; to care for employee's child, spouse or reciprocal beneficiary, or parent with a serious health condition.

FMLA

- Twelve workweeks of family and medical leave in a twelve month period upon birth of child, adoption or foster child placement; to care for employee's son or daughter, spouse, or parent with serious health condition; or for one's own serious health condition.

Family Members

Hawaii

- Spouse or reciprocal beneficiary (Neither term is defined in Hawaii's family leave law).
- "Child" includes a biological, adopted, or foster child; a stepchild; or a legal ward of the employee.
- The law does not restrict the age of the "child".
- "Parent" means a biological, foster, or adoptive parent, and includes a parent-in-law, a stepparent, a legal guardian, as well as a grandparent or a grandparent-in-law.

FMLA

- "Son or daughter" means biological, adopted, or foster child, step child, legal ward, or child of person standing in loco parentis who is:
 - Under eighteen, or

- Eighteen or older & incapable of self-care because of mental or physical disability.
- “Spouse” means husband or wife.
- “Parent” means employee’s biological parent or individual who stood in loco parentis when employee was a son or daughter.

Serious Health Condition

Hawaii

- “Serious health condition” may be either a physical or mental condition that necessitates the employee to provide care while the family member is treated or supervised by a health care provider. Additionally, the health condition must involve inpatient care or continuing treatment or supervision by a health care provider.²⁵

FMLA

- “Serious health condition” means illness, injury, impairment, or physical or mental condition involving inpatient care in hospital, hospice, or residential medical facility, or continuing treatment by a health care provider.

Relationship to Paid Leave

Hawaii

- Family leave shall consist of unpaid leave, paid leave, or combination.
- If employer provides paid family leave for less than four weeks, the additional leave needed to attain four week total may be unpaid.

FMLA

- Family leave may consist of unpaid leave.
- If employer provides paid leave for less than twelve workweeks, the additional leave needed to attain twelve workweeks may be without compensation.

Substitution of Sick Leave

Hawaii

- Employee or employer may substitute any of employee's paid leave, including sick leave for any family leave purpose, but
 - Sick leave may not be substituted unless:
 - Sick leave is normally granted for such purposes by an employer's policy or practice, or
 - Upon mutual agreement.

FMLA

- Eligible employee may elect or employer may require substitution of accrued paid leave, including sick leave, to care for family members with a serious health condition, but
 - Employer not required to provide paid sick leave or paid medical leave in situations where such paid leave not normally provided.

Job and Benefits Protection

Hawaii

- Employee restored to same or equivalent position upon return from leave.
- Taking of family leave does not result in loss of accrued employment benefit.

FMLA

- Employee restored to same or equivalent position upon return from leave.
- FMLA leave does not result in loss of accrued employment benefit.
- Employer shall maintain employee's health benefits coverage under "group health plan" during leave.

Who IS and IS NOT Covered by FMLA or Hawaii Family Leave Law²⁶

Approximately two-thirds of the U.S. labor force, including private and public sector employees are covered by the FMLA.²⁷ Nearly sixty percent of private sector employees work

for covered employers, but only those employees who meet the FMLA requirements for length of service and hours worked in the past year are eligible employees.²⁸ Combining public and private sector employees, nearly fifty-five percent were covered and eligible.²⁹

In Hawaii, state and county employees are entitled to family leave only under FMLA. Hawaii private sector employees at worksites with at least fifty employees are entitled to family leave under FMLA, while private sector employees at worksites with at least 100 employees are entitled to family leave under both state and federal family leave law. In contrast, small business employees, where an employer has forty-nine or fewer employees, are not entitled to family leave under either state or federal law. Generally, employees who do not work for a covered employer or who were recently hired are not entitled to family leave under state or federal law.

Family leave for federal employees is governed by federal law and regulations and will not be discussed in this chapter.³⁰

Summary of Comparison Under State and Federal Law

Under the federal Family and Medical Leave Act of 1993, eligible public employees and eligible private sector employees (who have worked for a covered employee at least twelve months at worksite with at least fifty employees) are entitled to up to twelve weeks of unpaid family leave to care for the employee's son or daughter, spouse, or parent with a serious health condition. In contrast, Hawaii's family leave law entitles only private sector employees to unpaid family leave up to four weeks to care for defined family members with a serious health condition. Where an employee meets eligibility requirements of both federal and Hawaii family leave law, employers must comply with both laws, and provide greater family leave rights. Federal law does not supersede any provision of state law that provides greater family leave benefits than those established under the FMLA.³¹ More generous provisions in state law supersede the FMLA; and more generous federal provisions supersede state law.

Hawaii family leave law has more narrow employer applicability than federal law (100 employees v. fifty employees in FMLA), but has less stringent employee eligibility requirements: an employee must have worked for employer for only six months where FMLA requires twelve months. Family members are more broadly defined under Hawaii law to include reciprocal beneficiary, parents-in-law, grandparents and, grandparents-in-law not included under FMLA. Additionally, while FMLA and Hawaii law define "child" and "son or daughter" similarly, Hawaii law does not restrict the age of the child.³² On the other hand, Hawaii law provides only up to four weeks of family leave (FMLA provides up to twelve workweeks) and does not expressly mandate continuation of employee's health coverage benefits during the family leave period.

Both FMLA and Hawaii family leave law have provisions that allow substitution of employee's paid sick leave for unpaid family leave if certain conditions are met. However, because federal employee's use of sick leave to care for family members is authorized in federal laws and regulations, federal employees' substitution of sick leave for unpaid family leave is much clearer. Policymakers may wish to review federal sick leave policies for federal

employees when considering whether to require Hawaii employers to permit employees to use personal sick leave to care for family members with a serious health condition.

Endnotes

1. Family leave also may include leave taken to care for a newborn or following the adoption of a child, or leave to attend school conferences or similar events.
2. “The Dilemmas of Family Leave,” *Boston Globe*, April 22, 2002.
3. *Id.*
4. Although leave for the employee’s own illness or leave to care for a new baby may be mentioned and briefly discussed within the meaning of family leave, the study analyzes family leave primarily in terms of leave to take care of an ill family member.
5. Section 398-3(a), Hawaii Revised Statutes.
6. Pub. L No. 103-3, 107 Stat. 6 (1993).
7. “Davis OKs paid leave to care for family; Workers to get about half of salary for 6 weeks,” *San Francisco Chronicle*, September 24, 2002.
8. If a collective bargaining agreement was in effect on August 5, 1993, applicability of the Act to members of that collective bargaining unit was delayed until February 5, 1994.
9. 29 C.F.R. §825.101.
10. 29 U.S.C. §2601(a) and 29 C.F.R. §825.01. The Act was to accomplish its goals to protect employers’ interests and minimize the employment discrimination issues while promoting equal employment for men and women.
11. Before the FMLA was enacted, many employees had no family or medical leave coverage, while some public and private employees received family leave either through collective bargaining, employers policy and practice, or state leave statutes. The amount of job protected unpaid leave authorized by state laws varied from 26 hours to one year, and many applied only to state employees and focused on maternity leave.
12. Family and Medical Leave Act, Employee/Employer Adviser, Wage and Hour Division, Employment Standards Administration <<http://elaws.dol.gov/fmla/wren/s1.htm>>.
13. 29 U.S.C. §§2611 and 2612.
14. 29 U.S.C. §2612.
15. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*, David Cantor, Jane Waldfogel, Mareena McKinely Wright, Kerry Levin, John Rauch, Tracey Hagerty, and Marth Stapleton Kudela, A Report Submitted by Westat, contracted by the Commission on Leave through the Bureau of Labor Statistics, 2002 <<http://www.dol.gov/asp/fmla>>.
16. Institute for Women’s Policy Research Publication #B235: *Paid Family and Medical Leave: Supporting Working Families in Illinois*, Testimony of Vicky Lovell, Ph.D., Institute for Women’s Policy Research before the Illinois General Assembly, House Committee on Labor and Commerce, Subcommittee on Unemployment Insurance for the New Workforce, September 7, 2000, citing Susan Deller Ross, “Legal

- aspects of parental leave: At the crossroads,” in *Parental Leave and Child Care: Setting a Research and Policy Agenda*, Janet Shibley Hyde and Marilyn J. Essex, eds, pp. 93-124 (1991).
17. State and Family Medical Leave Laws, National Conference of State Legislatures, <<http://www.ncsl.org/programs/employ/fmlachart.htm>>. Because medical leave most frequently refers to leave taken due to the serious illness of the employee, this study focuses on family leave.
 18. Act 328, Session Laws of Hawaii, 1991.
 19. As used in this study, “state employees” or “public employees” includes state and county employees but not federal employees.
 20. Act 328, §1, Session Laws of Hawaii, 1991.
 21. Section 398-4(b), Hawaii Revised Statutes (emphasis added). Act 328, §1, Session Laws of Hawaii, 1991. Senate Standing Committee Report No. 997 on S.B. No. 818, stated the Committee’s findings that “Hawaii is already distinguishable from other states by having one of the largest proportions of working women, a large percentage of women between the ages of 45 to 62 who are employed outside of the home, a population growth rate for the elderly that is 2.5 to 3 times the national average, and the longest life expectancy rates in the nation. When coupled with projections of static or declining personal income and rising costs of livings, these trends clearly indicate the need that Hawaii families have for an appropriate family leave policy.” See Senate Standing Committee Report No. 997 on S.B. No. 818, *Journal of the Senate of the Sixteenth Legislature* (1991) at 1186. These considerations continue to set Hawaii apart from other states.
 22. See Senate Standing Committee Report No. 997 on S.B. No. 818, *Journal of the Senate of the Sixteenth Legislature* (1991) at 1186.
 23. Act 154, §6, Session Laws of Hawaii, 1995.
 24. Section 398-1, Hawaii Revised Statutes.
 25. Section 398-1, Hawaii Revised Statutes. Originally, the law defined serious health condition as “an acute, traumatic, or life-threatening illness, injury, or impairment, which involves treatment of supervision by a health care provider. See Act 328, §1, Session Laws of Hawaii, 1991.
 26. Federal laws, including the Family and Medical Leave Act of 1993, entitle federal employees to family leave. Although federal employees use of sick leave to care for family members is discussed in Chapter *, federal employees use of sick leave is beyond the focus of this study.
 27. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*, David Cantor, Jane Waldfogel, Mareena McKinley Wright, Kerry Levin, John Rauch, Tracey Hagerty, and Marth Stapleton Kudela, A Report Submitted by Westat, contracted by the Commission on Leave through the Bureau of Labor Statistics, 2002 <<http://www.dol.gov/asp/fmla>>.
 28. *Id.*
 29. *Id.*
 30. 5 U.S.C. §§6381-6387; 5 U.S.C. §6307
 31. 29 U.S.C. §2601, et seq.
 32. FMLA limits child to under 18, or 18 and older and incapable of self-care because of physical or mental disability.

Chapter 3

TRADITIONAL SICK LEAVE: A BRIEF OVERVIEW

Introduction

To understand issues surrounding legislative proposals requiring employers to permit employees to substitute sick leave for unpaid family leave to care for certain family members with a serious health condition, a brief look at traditional sick leave is helpful—who gets it, how do they get it, and how they are allowed to use it.

Generally, sick leave provides job protection, allowing an employee to continue to receive salary payments and benefits when the employee is unable to work because of the employee's own illness or injury and similar health related conditions often including medical appointments. Although the amount of sick leave provided and the permitted uses of sick leave are not uniform, sick leave normally is not used before it is accrued; after the date of separation, retirement, or an indefinite layoff; in excess of an employee's normal hours of work; or during a temporary layoff, furlough, or leave without pay. Unused sick leave may be credited to an employee for use at a later time. If an employee quits or is terminated, the employee is not usually entitled to be paid for unused sick leave.

Traditionally, an employee used her personal sick leave only when her own health was at issue, but an employee's permitted use of personal sick leave is expanding. Some states allow employee's to use sick leave upon the birth or adoption of a child. Other states also have leave sharing programs. Most recently, three states enacted or expanded laws to require employers to allow employees to use sick leave to provide care for certain ill family members.¹

Private Sector Employees

While there is no state or federal law that requires private employers to provide paid sick leave to an employee or dictates how sick leave may be used, many private employers include paid sick leave in their employee benefits package to attract quality employees, and to provide income and job security for an ill employee. There is no uniform private sector policy that dictates how much paid sick leave private employees should receive or how sick leave may be used by the employee. While some private employers may provide sick leave according to the terms of a collective bargaining agreement, others follow a sick leave policy that applies only to their business.

For private sector employees whose employers do not provide sick leave, the Family and Medical Leave Act of 1993 (FMLA) may provide up to twelve weeks of unpaid medical leave for their own serious health conditions, but only if the employee has been employed least twelve months at a worksite with at least fifty employees and has worked 1,250 hours during the

previous twelve months. Hawaii's family leave law does not entitle an employee to leave for the employee's own illness.

State and County Employees

Prior to July 1, 2002, section 79-9, Hawaii Revised Statutes, established sick leave for public officers and employees at the rate of "one and three-quarters working days for each month of service."² Sick leave not used during the year in which it accrued was credited to employees as of December 31 of each year, with unused sick leave accumulating and available for use in succeeding years³ and sick leave payments to state and counties employees were made "only on account of sickness."⁴ Historically, use of sick leave issues for many public employees have been determined by negotiations with collecting bargaining units.

As of July 1, 2002, however, state law no longer establishes sick leave for state and county government employees. Effective July 1, 2002, state and county employees are eligible for leaves of absence, including sick leave, "with or without pay, as negotiated under chapter 89 (collective bargaining) or adjusted under chapter 89C."⁵ Additionally, Chapter 14-8, Hawaii Administrative Rules (Department of Human Resources Development) relating to "Leaves of Absence," was repealed on July 5, 2001. No rules have been adopted to replace the repealed rules.

Credit for unused sick leave upon retirement or leaving government service is provided for in section 88-63, HRS. State and county employees have no limit on the amount of sick leave that may be accumulated, and are able to use accrued sick leave for service credit for retirement purposes. For example, a public employee with sixty days of unused sick leave shall receive three additional months of service for purpose of computing their retirement allowance.⁶

Effective July 1, 2002, state and county jurisdictions are authorized to establish their own leave sharing programs that would allow their employees to donate leave to an employee in the same jurisdiction who has a serious personal injury or illness or who has a family member with a serious injury or illness; employees not entitled to vacation leave are permitted to donate accumulated sick leave credits.⁷

Endnotes

1. See California Labor Code, §233; Minnesota Statutes, §181.9413, SB 6426 was signed by the Governor of Washington on March, 2002, expanding Washington law that required employers to allow employees to use accrued sick leave to care for their minor child with a health condition to allow use of sick leave to care for spouse, parent, parent-in-law, or grandparent who has a serious health condition or an emergency condition.
2. Section 79-8, Hawaii Revised Statutes, applied to "all officers and employees in the service of the State or of the several counties."
3. *Id.*
4. Section 79-8.5, Hawaii Revised Statutes.

USING SICK LEAVE TO CARE FOR FAMILY MEMBERS: ISSUES AND OPTIONS

5. Section 78-23(a), Hawaii Revised Statutes.
6. Section 88-63, Hawaii Revised Statutes.
7. Among other conditions, recipients of donated vacation or sick leave credits must have not less than six months of services in the jurisdiction and have exhausted or about to exhaust all paid leave, except that sick leave is not required to be exhausted if the illness or injury involves the employee's family member. *See* section 78-26, Hawaii Revised Statutes.

Chapter 4

COMPARING LEGISLATIVE PROPOSALS TO HAWAII'S FAMILY LEAVE LAW

Senate Concurrent Resolution No. 180, S.D. 1, requested the Legislative Reference Bureau to “compare legislative proposal to allow employees to take sick leave to care for their families and Hawaii’s Family Leave Law, as codified in Chapter 398, Hawaii Revised Statutes.” During the last two years, three bills relating to the use of an employee’s sick leave to care for family members were introduced: S.B. No. 891 and H.B. No. 850 in 2001, and H.B. No. 2075 in 2002.¹

The three bills were almost identical, each seeking to amend Chapter 398, Hawaii Revised Statutes, by adding a new section on sick leave that would have required all public and private employers who provide sick leave to permit an employee to use the employee’s personal sick leave to care for certain ill family members. The bills proposed to require employers to let employees substitute sick leave for unpaid family leave, a proposition that currently is somewhat unclear under the present law.²

All three bills included legislative findings that “existing law does not require an employer to permit an employee to use sick leave to attend to the illness of a child, parent, spouse, or reciprocal beneficiary”, adding that the purpose of each bill was “to permit an employee to use any accrued sick leave to care for a child, parent, spouse, or reciprocal beneficiary.” (H.B. No. 2075 added “who has a serious health condition”). At the hearings on the three bills, support was predictably split, with labor unions favoring the bills and business representatives opposing them.

Proponents

Supporters noted Hawaii’s high cost of living made meeting both work obligations and care for immediate family members difficult for employees, contending that the bills strengthened the institution of the family by helping workers to fulfill both home and office responsibilities more easily, and indirectly reduced burdens on social service resources. Supporters suggested the proposed use of sick leave made good business sense, predicting that employers would benefit by increased good will and employee loyalty. Recognizing employer concern and opposition, potential for abuse was low, since use of sick leave was limited to ten days each year. Several supporters pointed out that the proposals did not require employers to provide additional sick leave, rather they extended an employee’s permitted uses of accrued sick leave to include leave to care for sick family members.

Opponents

Representatives of the business community opposed the bills. Opponents feared increased business costs because employees would use accrued sick leave more frequently; they claimed such interference in an area traditionally subject to management discretion reinforced Hawaii’s alleged anti-business reputation. Opponents noted sick leave benefits are a mandatory area of collective bargaining, possibly leading to conflict with federal labor laws. They noted that sick leave is intended to provide paid leave to employees who are sick and unable to work; sick leave is not a benefit to “assist in the illness of certainly family members.”³ Whether employees should be permitted to use accrued sick leave to care for certain family members with a serious health condition should be determined by individual employers. Some felt that the four weeks of unpaid family leave provided by state law is sufficient, and such an expansion of sick leave burdened the private sector which might cause small businesses, in particular, to delete sick leave as an employment benefit.

Government Testimony

Government officials requested that the State and its political subdivisions be excluded from covered employers since sick leave is a collective bargaining issue, and significantly, that “State and Counties already allow their employees to use up to four weeks of sick leave to attend to a child, parent, spouse, or reciprocal beneficiary with a serious health condition.”⁴ The Department of Labor and Industrial Relations opposed the bill, listing potential conflicts with state and federal law on family leave, inconsistent definitions of “employers” that could cause confusion in implementation, and stated that current law provided adequate flexibility for employers who allow employees to use sick leave for family leave.⁵

Table 1
COMPARISON OF LEGISLATIVE PROPOSALS
AND
HAWAII’S FAMILY LEAVE LAW

| Issue | HB 2075 Relating to Sick Leave | Hawaii Family Leave, Chapter 398, HRS |
|---------------------------|---|--|
| Enforced by | <ul style="list-style-type: none"> • Department of Labor and Industrial Relations (as amendment to Chapter 398, HRS) | <ul style="list-style-type: none"> • Department of Labor and Industrial Relations |
| Eligible Employees | <ul style="list-style-type: none"> • Not defined* <p><i>*HB 250 & SB 891 defined “employee” to mean” any person who performs services for hire”; definition did not require working for employer for specific time</i></p> | <ul style="list-style-type: none"> • Private employees • Performed services for hire for 6 consecutive months for the employer; • NA to employees of State or its political subdivisions—as of 7/1/02 |

COMPARING LEGISLATIVE PROPOSALS TO HAWAII'S FAMILY LEAVE LAW

| Issue | HB 2075 Relating to Sick Leave | Hawaii Family Leave, Chapter 398, HRS |
|--------------------------|---|---|
| Employers Covered | <ul style="list-style-type: none"> • Any individual or organization who provides sick leave and employs employees for hire • <u>Includes</u> State, county, and any political subdivision • Conflicts with §398-1, which deleted State and political subdivision from definition of “Employer” as of 7/1/02 • No restriction on size | <ul style="list-style-type: none"> • Any individual or organization; any partnership, association, trust, estate, joint stock company, insurance company, or corporation, or receiver or trustee in bankruptcy, or legal representative of deceased • Employs 100 employees for 20 calendar weeks in current or preceding calendar yr • State and political subdivisions deleted from definition as of 7/1/02 |
| Scope of Leave | <ul style="list-style-type: none"> • To attend to a child, parent, spouse, or reciprocal beneficiary with a serious health condition • Not applicable to birth or adoption of child | <ul style="list-style-type: none"> • To care for child, spouse or reciprocal beneficiary, or parent with a serious health condition • Birth or adoption of a child |
| Amount of Leave | <ul style="list-style-type: none"> • Not more than 10 days per year • Same conditions and restrictions applicable to sick leave by Employer also apply to sick leave taken as family leave to care for family member • Shall not decrease maximum period of family leave | <ul style="list-style-type: none"> • 4 weeks during any calendar yr – 398-3(a) • 4 wks in any 12 month period 398-3(e) |
| Sick Leave | <ul style="list-style-type: none"> • Accrued increments of compensated leave used for: • Employee physically or mentally unable to perform duties due to illness, injury or medical condition • Absences to get professional diagnosis or treatment of employee’s medical condition • Employee’s other medical reasons, e.g. pregnancy, physical exams • Does not include benefits provided under welfare benefit plant subject to ERISA, insurance benefits, workers’ compensation, unemployment, or disability benefits or benefit not payable from Employer | <ul style="list-style-type: none"> • Not defined |
| Parent | <ul style="list-style-type: none"> • Not defined | <ul style="list-style-type: none"> • Biological, foster, or adoptive, parent-in-law, stepparent, legal guardian, grandparent, or grandparent-in-law |

USING SICK LEAVE TO CARE FOR FAMILY MEMBERS: ISSUES AND OPTIONS

| Issue | HB 2075 Relating to Sick Leave | Hawaii Family Leave, Chapter 398, HRS |
|---|---|---|
| Serious health condition | <ul style="list-style-type: none"> • Not defined** <p><i>**HB 805 & SB 891 allowed employee's use of sick leave to attend to illness of family members</i></p> | <ul style="list-style-type: none"> • A physical or mental condition that warrants the employee's providing care during period of treatment or supervision by health care provider; and • Involving inpatient care in hospital, hospice, or residential health care facility, or requires continuing treatment or continuing supervision by health care provider |
| Child | <ul style="list-style-type: none"> • Not defined | <ul style="list-style-type: none"> • Biological, adopted, or foster son or daughter; a stepchild; or legal ward* |
| Spouse | <ul style="list-style-type: none"> • Not defined • Reciprocal beneficiary included | <ul style="list-style-type: none"> • "Spouse" not defined • Reciprocal beneficiary included |
| Intermittent or Reduced Schedule Leave | <ul style="list-style-type: none"> • Not defined | <ul style="list-style-type: none"> • Intermittent leave permitted • Leave not cumulative |
| Substitution of Paid Leave | <ul style="list-style-type: none"> • Requires any employer who provides sick leave to allow employees to use employee's accrued and available sick leave for family leave to attend to a child, parent, spouse, or reciprocal beneficiary with serious health condition • Requires employer to allow substitution of sick leave for unpaid family leave to attend to family member with serious health condition | <ul style="list-style-type: none"> • Family leave consists of unpaid leave, paid leave, or a combination • Employee or employer may elect to substitute any accrued leave (sick, personal, or family leave) for any part of family leave • Use of <u>sick</u> leave allowed only if sick leave is normally granted for such purposes by employer's policy or practice, or upon mutual agreement. • No law or administrative rule authorizes state employees' use of sick leave to care for sick family members; determined by collective bargaining • Private employees determine employees' amount & use of sick leave by policy and procedure or collective bargaining |

COMPARING LEGISLATIVE PROPOSALS TO HAWAII'S FAMILY LEAVE LAW

| Issue | HB 2075 Relating to Sick Leave | Hawaii Family Leave, Chapter 398, HRS |
|------------------------------|---|---|
| Employment Protection | <ul style="list-style-type: none"> • Not defined | <ul style="list-style-type: none"> • Employee restored to same or equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment • Not entitled to reinstatement in former or equivalent position if employer has layoff or workforce reduction during leave, but retain seniority rights • No “key employee” exemption for employee in highest paid 10% of employees |
| Benefits protection | <ul style="list-style-type: none"> • Not defined | <ul style="list-style-type: none"> • No loss of employment benefits accrued before leave • Law does not entitle or deny employee to accrual of seniority or employment benefits during any period of leave, or any right, employment benefit, or position to which employee entitled if leave not taken • Does not specifically require maintenance of health benefits |
| Prohibited Acts | <ul style="list-style-type: none"> • Employer shall not deny employee the right to use sick leave, discharge or threaten to discharge, demote, suspend or discriminate against employee for using sick leave for family leave to attend child, parent, spouse, or reciprocal beneficiary with serious health condition | <ul style="list-style-type: none"> • Unlawful for employer to interfere with, restrain, or deny the exercise or attempt to exercise any rights under Chapter 398 • Unlawful to discharge or discriminate against any individual for opposing any practice made unlawful by Chapter 398 • Unlawful to discharge or discriminate against any individual because he or she has: <ul style="list-style-type: none"> • Filed charge or instituted proceedings under Chapter 398; • Given information in connection with inquiry relating to any right provided in Chapter 398; or • Testified in inquiry or proceeding relating to rights under Chapter 398 |

Summary

Under current Hawaii family leave law, private sector employers who employ 100 workers for twenty weeks are required to provide unpaid family leave during any calendar year for eligible employees. If the employee has worked for a covered employer for 6 consecutive months, the employee is entitled to up to four weeks of unpaid family leave to care for a child, spouse or reciprocal beneficiary, or parent with a serious health condition.⁶ Under Chapter 398, Hawaii Revised Statutes, private sector employees may substitute sick leave for unpaid family leave only if: (1) the employer allows employees to use sick leave to care for ill family members by policy or practice; or (2) if employee and employer mutually agree to substitution of sick leave. Effective July 1, 2002, state and county employees are not entitled to family leave under Chapter 398, Hawaii Revised Statutes.

The proposed legislation sought to amend Chapter 398, Hawaii Revised Statutes, by adding a new section on sick leave to permit employees to use sick leave to care for ill family members. H.B. No. 2075 would require any employer, public or private, who provides sick leave to allow use of not more than 10 days per year of accrued and available sick leave to attend to the serious health condition of the employee's child, parent, spouse, or reciprocal beneficiary.

Perhaps the most troublesome part of the proposed new section is the inclusion of a definition of "employer" that differed significantly from the definition in section 398-1, Hawaii Revised Statutes, by including the State, counties, and any political subdivisions as an "employer" only for the purpose of substituting sick leave for unpaid family leave to care for family members with a serious health condition. Effective July 1, 2002, the State and its political subdivisions were deleted from the definition of "employer" in section 398-1. Similarly, the proposed new definition of "employer" does not appear to limit its applicability by number of workers employed in a certain period of time, including certain employers who do not meet the definition of employer in section 398-1. Consequently, the proposed legislation mandates some public and private employers not now required to provide any family leave benefits to provide family leave benefits in the form of using sick leave to attend to certain family members with a serious health condition. Inserting applicability of the proposed sick leave requirements to public and private employers not now subject to any part of Chapter 398, Hawaii Revised Statutes, could cause unnecessary confusion in application and implementation of family leave. Additionally, the interaction between the proposed section and current use of sick leave established in section 398-4(b) is uncertain.

Endnotes

1. S.B. No. 891 and H.B. No. 850, as introduced, were identical. H.B. No. 2075 differs from the earlier bills only minimally: H.B. No. 2075 proposes use of sick leave to attend to certain family members with a "serious health condition" of family members; earlier bills proposed the use of sick leave to attend to the "illness" of family members.
2. Section 398-4(b), Hawaii Revised Statutes, allows substitution of accrued sick leave for unpaid family leave only if sick leave is normally granted for such purposes by employer or upon mutual agreement of employer and employee.

COMPARING LEGISLATIVE PROPOSALS TO HAWAII'S FAMILY LEAVE LAW

3. Testimony of Rodney R. Shinkawa, Executive Vice President, Hawaii Bankers Association, on H.B. No. 2075, House Committee on Labor and Public Employment, February 9, 2002, Regular Session of 1987.
4. Testimony of Davis K. Yogi, Chief Negotiator, Department of Human Resources Development, on H.B. No. 2075 before the House Committee on Labor and Public Employment, February 9, 2002, Regular Session of 2002. Mr. Yogi made the same statements when testifying on H.B. No. 850 and S.B. No. 891.
5. Testimony of Leonard Agor, Director, Department of Labor and Industrial Relations, on H.B. No. 850 H.D. 1 re the House Committee on Finance, February 26, 2001, Regular Session of 2001.
6. An eligible employee also may take family leave upon the birth or adoption of a child. *See* section 398-4, Hawaii Revised Statutes.

Chapter 5

OTHER STATES: EXPANDING PERMITTED USE OF SICK LEAVE AND OTHER OPTIONS TO PROVIDE PAID FAMILY LEAVE

Introduction

Although family leave laws provide employees a significant benefit by requiring an employer to reinstate the employee in the same or an equivalent position upon return from family leave, it has been reported that a significant number of individuals who would qualify for family leave to care for a family member with a serious health condition do not take family leave for financial reasons—they can't afford to take leave from work without pay. The Family and Medical Leave Commission reported that the “absence of wage replacement was the number one reasons why otherwise eligible employees did not take leave under the Act.¹ Although approximately 23.8 million individuals (16.5% of employees) took family or medical leave, 3.4% of employees needed to take leave covered under the FMLA but did not take the leave. The greatest number of employees could not afford to take unpaid family leave; others were concerned that taking leave would negatively impact their job or careers.²

States have worked to assist employees in meeting this dilemma by expanding an employee's permitted use of sick leave to cover an employee's time away from work due to pregnancy, and the birth or adoption of child. Three states now require employers who provide sick leave to permit employees to use their accrued sick leave benefits to care for designated family member who are ill. Also, a significant number of states have considered other options to provide some income for employees taking family leave to care for family members. The two most commonly examined ideas look at expanding a state's unemployment insurance system or establishing or expanding temporary disability programs.

A few states, however, considered new taxes on employees and employers to fund mandatory benefits. For voluntarily provided family leave, proposed Hawaii legislation offered a tax credit to employers who provide paid family leave to employees and Minnesota proposed state reimbursement for half of the benefits paid. Whether these approaches are characterized as an expansion of permissible uses for personal sick leave or as modifications to family leave laws, the goal is the same: to provide income benefits leave for employees on unpaid family leave from their jobs to care for ill family members. It is worth remembering that some employees who take unpaid family leave end up on public assistance.³

According to the National Partnership for Women and Families, at least twenty-four states have laws that allow public employees to use sick leave to care for certain sick family members.⁴ At the time of this writing, three states, California, Minnesota, and Washington, have laws that require public and private employers to allow employees to use sick leave to care for certain ill family members.

Use of Sick Leave to Care for Family Members

California

As of January 1, 2000, California law requires any public or private employer who provides sick leave to let an employee use accrued and available sick leave “to attend to an illness of the employee’s child, parent, spouse, or domestic partner.”⁵

- “Employer” means “any person employing another under appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities.”⁶
 - No minimum number of employees to determine employer eligibility.
- “Employee” is not expressly defined.
- An employer’s restrictions on sick leave also applies to an employee’s use of sick leave to care for family members.⁷
- “Child” means biological, foster, or adopted child, a stepchild, legal ward, child of domestic partner, or child of person standing in loco parentis.
- “Parent” means biological, foster, or adoptive parent, stepparent or legal guardian.
- Amount of sick leave is an “amount not less than the sick leave that would be accrued during six months.”
- Does not extend the maximum period of leave under FMLA or California’s Family Rights Act.⁸

Washington

Current law requires employer to allow employees to “use the employee’s accrued sick leave to care for a child of the employee under the age of eighteen with a health condition that requires treatment or supervision.”⁹ On March 29, 2002, Governor Gary Locke signed into law legislation that expands the purposes for which leave may be taken. Effective January 1, 2003, an employee may take sick leave (or other paid time off) to care for the employee’s spouse, parent, parent-in-law, or grandparent who has a serious health condition or an emergency condition. The employee taking leave is required to comply with terms of collective bargaining agreements or employer policy applicable to the leave, except for any terms relating to the choice of leave.¹⁰ New definitions are added:

- “Child” means biological, adopted, or foster child, stepchild, legal word, or child of person standing in loco parentis who is under eighteen, or eighteen and older and incapable of self-care because of mental or physical disability.

- “Grandparent” means a parent of a parent of employee.
- “Parent” means employee’s biological parent or individual who stood in loco parentis when employee was a child.
- “Parent-in-law” means parent of employee’s spouse.
- “Spouse” means husband or wife.

Minnesota

Minnesota law authorizes an employee’s use of sick leave to care for an ill family member more narrowly than California and Washington: it provides that an employee may “use personal sick leave benefits provided by the employer for absences due to an illness of or injury to the employee’s child for such reasonable periods as the employee’s attendance with the child may be necessary” on same terms that employee may use sick leave for the employee’s own illness or injury.¹¹ A returning employee is entitled to be restored to her former position.¹²

- “Employee” means a person who performs services for hire for an employer from whom leave is requested for twelve consecutive months preceding leave request and for an average weekly hour rate equal to one-half the full-time equivalent position in employee’s job classification for those twelve months.
- Does not include independent contractor.
- “Employer” means person or entity that employs at least twenty-one persons at one site.
- Includes state and county.
- “Child” means individual under eighteen or under twenty and still attending secondary school.

Extending Disability Insurance

Until recently, leaves for paternity, adoption, or caring for sick family members were not covered under any state’s Temporary Disability Insurance (TDI) system, but five states have TDI programs that provide a partial wage replacement for leaves that include pregnancy and child birth: Hawaii, Rhode Island, New York, New Jersey and California (other states have similar voluntary TDI programs while some employees purchase their own coverage from an insurer). TDI systems provide some compensation for employees unable to work because of a disability that is not job-related. TDI is funded by contributions from employer, employee, or both, with program benefit periods ranging from twenty-six weeks to fifty-two weeks. Some states are considering extending TDI benefits to employees for family leave purposes. California, New

Jersey and New York have considered expanding TDI to include family leave benefits and other states are evaluating the establishment of new TDI programs; on September 23, 2002 California became the first state to establish a temporary family disability insurance program that provides wage replacement benefits for employees who take time off from work to care for certain seriously ill family members.¹³

California's Family Temporary Disability Insurance Program

Approximately 13,000,000 employees covered in California's newly expanded Disability Insurance Program will soon be eligible for paid family leave to care for a new child or seriously ill family member through the Family Temporary Disability Insurance Program.¹⁴ Additional benefits will be funded through employees to begin on January 1, 2004, with an average employee payroll deduction estimated to be \$2.75 per month. Beginning July 1, 2004, the family temporary disability insurance program will provide employees up to six weeks of tax-free wage replacement benefits, up to a maximum of \$728 per week. Because California state and local government employees contribute to a different disability fund, they are excluded from the new program.

Unemployment Insurance

Federal regulations issued in June 2000 authorize states to expand unemployment insurance programs (UI) to provide benefits to parents away from their jobs to care for newborns or recently adopted children. States are authorized to use unemployment compensation funds to pay up to twelve weeks unemployment benefits to employees on leave following the birth or adoption of a child, sometimes called "Baby UI."

Expanding UI, supporters contend, supports working parents by providing income for leave taken to care for and bond with their newest family members, helping to provide a stable workforce.¹⁵ Supporters say expanding UI gives states "greater flexibility to address the needs of the workforce....Employment law must recognize the importance of the family and the importance of keeping people connected to their jobs when they have a child."

Critics argue UI funds should be used to protect unemployed workers and "stabilize the economy in the case of economic hard times."¹⁶ Earliest opponents claimed baby UI violated federal law, specifically the requirement that recipient must be "able and available" to accept suitable jobs or lose their benefits. They fear expanding UI will endanger UI funds.

Although expanding UI programs to provide wage replacement benefits to employees who take leave from work to care for ill family members may not be expressly within the scope of the recent federal regulation authorizing "Baby UI," it is arguably a logical expansion that recognizes today's workforce. Employees unable to work because of family health care responsibilities may be compared to employees who are unable to work because of circumstances beyond their control who are eligible for UI. Using unemployment insurance to

provide paid family leave for eligible workers is an attractive possibility since states already have an operational system, funded by payroll taxes and employer contributions.

Other Models

Hawaii and many other states have introduced legislation that proposed additional models, including establishment of a family leave insurance fund, and tax credits for employers who offer paid family leave. For an informative review of a number of options, policy makers should review: *FAMILY LEAVE BENEFITS: A Menu of Policy Models for State and Local Policy Leaders*, National Partnership for Women & Families, September 2001.¹⁷

Endnotes

1. *A Workable Balance: Report to Congress on Family and Medical Leave Policies*, Commission on Family and Medical Leave, November 21, 2002, Figure 5.5
<<http://www.dol.gov/esa/regs/compliance/whd/fmla/family.htm>>.
2. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*, David Cantor, Jane Waldfogel, Mareena McKinley Wright, Kerry Levin, John Rauch, Tracey Hagerty, and Marth Stapleton Kudela, A Report Submitted by Westat, contracted by the Commission on Leave through the Bureau of Labor Statistics, 2002 <<http://www.dol.gov/asp/fmla>>.
3. *Valuing Families-Providing Family Leave Benefits*, Center for Policy Alternatives, September 2000.
4. States include Arizona, California, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Washington. *State Family Leave Benefit Initiatives in 2001: Making Family Leave More Affordable*, <<http://www.nationalpartnership.org>>.
5. California Labor Code, §233.
6. California Labor Code, §233 (b)(2).
7. “All conditions and restrictions placed by the employer upon the use by an employee of sick leave also shall apply to the use by an employee of sick leave to attend to an illness of his or her child, parent, spouse, or domestic partner.” California Labor Code, §233 (a).
8. California Government Code, §12945.2.
9. Section 49.12.270, Revised Code of Washington.
10. Section 1 of S.B. No. 6426, amending Revised Code of Washington 49.12.270.
11. Section 181.9413, Minnesota Statutes.
12. Section 181.942 subdv. 1 (a), Minnesota Statutes.
13. *Valuing Families-Providing Family Leave Benefits*, Center for Policy Alternatives, September 2000.
14. For an in-depth analysis of paid family leave issues relating to the legislation, see: *Paid Family Leave in California: An Analysis of Costs and Benefits*, Arindrajit Dube, University of Chicago, Department of

OTHER STATES: EXPANDING PERMITTED USE OF SICK LEAVE AND OTHER OPTIONS

Economics, and Ethan Kaplan, University of California, Berkeley, Department of Economics, June 19, 2002.

15. Baby UI supporters stress the importance of early parental involvement with a child's future success in life. Opponents say it is wrong to provide unemployment benefits to employees who have a job.
16. Cheye Calvo, *Parental Leave as Unemployment*, State Legislatures, October/November 2000.
17. See <<http://www.nationalpartnership.org>>.

Chapter 6

USING SICK LEAVE TO CARE FOR FAMILY MEMBERS IN HAWAII

Introduction

Currently, there appears to be little uniformity in Hawaii employees' ability to use sick leave to care for family members, regardless of whether the employee is in the public or private sector, or entitled to family leave to care for sick family members under federal law, state law, or both. In part, the discrepancies may reflect that employers and employees are somewhat uncertain about their rights and responsibilities established in the federal Family and Medical Leave Act of 1993 (FMLA); Hawaii's family leave law as codified in Chapter 398, Hawaii Revised Statutes; applicable collective bargaining agreements; employer policy; agency guidelines; and their interrelationship and applicability.

Although substitution of sick leave for unpaid family leave clearly was anticipated in the original legislation establishing a family leave law for Hawaii,¹ subsequent amendments to Hawaii's law may have added more confusion than clarification to the issue. Four years later the law was amended,² purportedly to establish procedures and remedies needed to enforce the state family leave law. Almost as an afterthought it seems, Act 154, Session Laws of Hawaii, 1995, ultimately subjected the "substitution of accrued paid leaves to certain conditions."³ As a result, current Hawaii family leave law allows an employee or employer to substitute accrued sick leave for unpaid family leave to care for ill family members only if both employer and employee agree, or if an employer's policy or practice allows use of sick leave for that purpose. Effective July 1, 2002, state and county employees are no longer covered under Hawaii's family leave law.

Private Employees Use of Sick Leave to Care for Family Members

In the private sector, sick leave issues generally depend on an employer's practice and procedure or collective bargaining agreements, or both. However, Chapter 398, Hawaii Revised Statutes, entitles certain private sector employees to up to four weeks in any calendar year of unpaid family leave to care for family members with a serious health condition.⁴ Sick leave may be substituted for unpaid family leave only upon mutual consent or if employer's existing policy allows such use.

The federal Family and Medical Leave Act of 1993 may entitle some private employees to up to twelve workweeks of unpaid family leave to care for sick family members. Substitution of sick leave under federal law has limitations similar to state law. Under the FMLA, an employee may elect or an employer may require substitution of accrued paid leave, including sick leave, for any part of unpaid family leave to care for family members. Substitution of sick leave, however, is expressly limited: an employer is not required to provide sick leave (allow substitution) in situations where sick leave is not normally provided.⁵ Unlike Hawaii law, the FMLA does not authorize substitution of sick leave upon mutual agreement of employer and

employee. Like Hawaii, however, federal law provides that if an employer provides “paid leave” for fewer than twelve workweeks, the additional weeks needed to total the twelve workweeks of family leave may be unpaid.⁶

Some private employees may be covered under both federal and state law.

While state and federal family leave law helps employees balance work and family needs by offering job protection to workers taking family leave, it appears that neither law does much to enhance an employee’s ability to control substitution of sick leave for unpaid family leave. Essentially, employers determine an employee’s use of sick leave, either by mutual agreement as required under state law or by existing policy that already allows such use, and they have the power to require substitution of accrued paid leave for unpaid family leave.

State and County Employees Use of Sick Leave to Care for Family Members

Effective July 1, 2002, state and county employees are no longer covered under Hawaii’s family leave law. The federal Family and Medical Leave Act of 1993, however, entitles eligible state and county employees to twelve workweeks of unpaid family leave to care for certain ill family members. Although the FMLA permits substitution of sick leave for unpaid family leave, the law also expressly states that an employer is not required to provide paid sick leave “in any situation in which such employer would not normally provide any such paid leave.”⁷ Federal law does not expressly authorize substitution of sick leave for family leave purposes upon mutual agreement for either public or private employees.

In hearings on legislation to amend Hawaii’s family leave law to require public and private employers to allow substitution of accrued sick leave for unpaid family leave to care for family members, Davis K. Yogi, then Chief Negotiator for the state Office of Collective Bargaining, and Director of Human Resources Development, testified that it was not necessary to include the State and its political subdivisions as an employer in Chapter 398, Hawaii Revised Statutes, because “the State and Counties already allow their employees to use up to four weeks of sick leave to attend to a child, parent, spouse, or reciprocal beneficiary with a serious health condition.”⁸ He stated that sick leave provisions are negotiated with public employer unions “as a regular collective bargaining issue.”⁹ The Bureau’s research found a less uniform practice.

To determine public employees ability to use sick leave to care for sick family members, the Bureau surveyed the personnel directors of the State, counties, legislature, and judiciary. All agencies were requested to answer identical questions. Responses received revealed significant differences in employees’ ability to use sick leave, as well as possible confusion in the relationship between collective bargaining agreements, employer policy, and the federal FMLA.

For example, the personnel director of the Office of the Administrative Director of the Judiciary replied that any employee who has worked at least six months for the employer from whom leave is sought is allowed to use sick leave to care for family members, but Maui County employees are eligible only if they have worked at least twelve months and have 1,250 hours of service during the twelve months immediately preceding the leave. Employees of the Judiciary may use four weeks of sick leave per year to care for family members; Maui County employees

may use “12 weeks in accordance with FMLA allowances.” In contrast, the City and County of Honolulu is “currently reviewing its policies and procedures and will be discussing the issue with the various unions shortly.” As for state executive department employees, “the Employer Group [the State, Hawaii Health System Corporation, Judiciary and counties] began negotiation discussions on family leave with the Unions this past summer” and had not reached agreement as of November 22, 2002. As a result, according to DHRD, the “State is operating under its State family leave guidelines that were issued to Executive Branch department on September 16, 1993, Chapter 398 provisions that were in effect prior to July 1, 2002, and federal family leave regulations.”¹⁰ However, since DHRD’s earlier response, a letter dated December 19, 2002, informed the Bureau that “the State, Judiciary, Hawaii Health Systems Corporation, and the counties of Hawaii, Maui, and Kauai recently reached agreement with the Hawaii Government Employees Association (HGEA) on family leave collective bargaining provisions for Units 2, 3, 4, 9, and 13” and that family leave provisions are the same for these bargaining units. Details of the negotiated family leave provisions were unavailable at the time this report went to press.¹¹ The Clerk of the House of Representatives responded briefly that section 23.4 of the House Administrative and Financial Manual (2001-2002) (House Manual) provides “Employees are entitled to a total of four weeks of family leave during any calendar year upon the birth of a child of the employee or the adoption of a child, or to care for the employee’s child, spouse, or parent with a serious health condition as prescribed by Chapter 398, Hawaii Revised Statutes.”¹²

Several personnel departments did not respond to the Bureau’s survey.¹³

Some difference in practice and procedure regarding public employees’ use of sick leave to care for sick family members can be attributed to how employment conditions are determined for various categories of state and county workers. Sick leave issues for a number of public employees in Hawaii are determined through collective bargaining. However, under Hawaii law, a number of state and county workers are “excluded employees,” not subject to collective bargaining.¹⁴ Excluded employees include a wide variety of public officers and employees who are employed by an “appropriate authority.”¹⁵ The employee’s “appropriate authority” adjusts employment conditions of excluded employees, subject to guidelines and limitations; separate additional adjustment conditions are established for excluded civil service employees and excluded employees exempt from civil service.¹⁶

Permanent staff of the legislative branches of the State and respective counties is not easily categorized and their entitlement to family leave benefits is no longer certain.¹⁷ There is no indication that House employees are permitted to substitute sick leave for family care; the House Clerk’s response indicated that House staff are entitled to four weeks of family leave to care for family with a serious health condition “as prescribed by Chapter 398, Hawaii Revised Statutes.”¹⁸ Since state and county employees are no longer covered by Chapter 398, Hawaii Revised Statutes, presumably legislative staff are not entitled to any benefits under that chapter. Subsequent communication from the Clerk of the House of Representatives, however, noted that “senior House staff members were meeting to discuss revisions” to section 23.4 of the House Manual.¹⁹ The proposed revisions would expand family leave to allow leave to be taken to care for an employee’s reciprocal beneficiary with a serious health condition and would clarify that House employees are entitled to family leave “in a manner consistent with” Chapter 398, HRS (as opposed to “as prescribed by”).

For public employees subject to collective bargaining, sick leave issues are negotiated; the terms of the applicable collective bargaining agreement establish whether an employee may use sick leave to care for family members. If such use is allowed under a collective bargaining agreement, it would seem that the state or county employee also is entitled to substitute sick leave to care for unpaid family leave to care for a family member with a serious health condition under the federal Family and Medical Leave Act. The ability of public employees and civil service employees excluded from collective bargaining to use sick leave to care for a family member with a serious health condition presumably would parallel collective bargaining benefits since the working conditions of excluded employees are “adjusted” under Chapter 89C, Hawaii Revised Statutes.²⁰

Clearly, public employees’ use of sick leave for family leave to care for family members is unclear and responses from public agencies were far from uniform. The Bureau is not convinced that all State and county employees are entitled to substitute four (or, for that matter any other number) weeks of personal sick leave per year to care for sick family members. Although some differences are to be expected because employment conditions for state and county employees are not determined uniformly based on the number of bargaining units alone, variation among these employees shouldn’t be surprising. The degree of difference in practice for the various employee categories is somewhat surprising. It must be noted, however, that subsequent communication with DHRD notes that the State, Judiciary, Hawaii Health Systems Corporation, and the counties of Hawaii, Maui, and Kauai recently reached agreement with HGEA on family leave for members of Units 2, 3, 4, 9, and 13 and that the terms of family leave are the same for each of these bargaining units.²¹

As for private sector employees, there is little information available to determine trends or standards. However, it is clear that all employees, public or private, face a growing need for meaningful family leave to care for certain family members with a serious health condition—a family leave that not only protects their job, but also provides at least partial wage replacement benefits.

Need for Expanded Family Leave Benefits are Significant in Hawaii

Considerations that led to family leave laws originally are even more pressing in Hawaii today. Women in Hawaii’s workforce have grown from nearly 77,000, or forty-two percent, in 1960, to 281,654 in 2000—a significant 59.1% of the labor force.²² We lead the nation in per capita two wage earner families, leaving no one at home to care for sick children, parents, or spouses—a responsibility historically assumed by women. Hawaii has the longest life expectancy in the nation. Our population of residents sixty-five years and over has grown from 25,005 in 1990 to 160,601 in 2000, or 13.3% of the State’s population, higher than the national average of 12.7%.²³ Our senior population is projected to reach nearly 200,000 by 2010 and approximately 270,000 in 2010, making caring for ill parents an increasingly critical issue for the Hawaii workforce. Our high cost of living makes taking leave without pay a difficult choice. While the federal FMLA and Hawaii’s family leave law provide job security for some, not all employees are covered and such leave generally is unpaid leave. Given these considerations, the

need for paid family leave or some form of wage replacement benefits such as permitted use of sick leave to care for ill family members is perhaps stronger in Hawaii than in many other states. The ability to take leave, particularly paid leave, to care for sick family members will continue grow in importance to employers and employees across the nation, but perhaps even more markedly in Hawaii.

Given the variety of responses from public agencies on an employee's use of sick leave to care for a family member with a serious health condition, adoption of a uniform minimum standard of family leave benefits available to all state employees may be desirable.

A State Can Expand Benefits Granted by the FMLA

The FMLA expressly states that nothing in the Act “shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act...”²⁴ Subject to the limitations governed by ERISA, states may provide “FMLA enhancements and gap-fillers.” Generally, states and their political subdivisions may establish minimum employment standards for all employers within their jurisdictions.²⁵ Legislative history indicates that Hawaii's family leave law was originally enacted to provide a labor standard.²⁶

States may enact family leave laws that enhance the federal Family and Marriage Leave Act because states “have the power to establish minimum employment standards generally, applicable to all employers within their jurisdictions.”²⁷ If the state or political subdivision has the authority to legislate under police or other local police power, and is under no other state law restriction, a state can enact family-related leave laws broader than the FMLA.

Endnotes

1. Originally, the law provided that “family leave shall consist of unpaid or paid leave or a combination of paid and unpaid....Further, an employer or employee may elect to substitute any of the employee's accrued paid leaves such as sick, vacation, personal, or family leave for any part of the four-week period [of family leave].” Act 328, §1, Session Laws of Hawaii, 1991.
2. Act 154, Session Laws of Hawaii, 1995.
3. Senate Standing Committee Report No. 1278 on H.B. No. 1997, *Journal of the Senate of the Eighteenth Legislature* (1995) at 1306. S.C.R. No. 1278 stated that the purpose of the bill was “to create a mechanism to enforce the family leave law.”
4. Under section 398-4, Hawaii Revised Statutes, eligible private sector employees who work for covered employers are authorized to substitute accrued sick leave for unpaid family leave, subject to certain conditions: existing employer policy that allows such use or mutual consent of employer and employee. An employee does not have sole discretion to substitute sick leave for unpaid family leave.

Conditions relating to substitution of sick leave seem to favor employers. The first condition appears somewhat superfluous: it authorizes employees and employers to substitute sick leave for unpaid family leave if such use of sick leave is already allowed under an employer's existing policy and procedures.

USING SICK LEAVE TO CARE FOR FAMILY MEMBERS IN HAWAII

Requiring mutual agreement leaves an employee at an employer's mercy because no law or rule requires a private employer to consent.

The amount of accrued sick leave that may be substituted under Hawaii law is uncertain. For example, if an employer allows two weeks of sick leave to be used to care for family members but the employee has more than two weeks of accrued sick leave, it is uncertain whether §398-4(b) allows the employee to substitute accrued sick leave in excess of the employer granted two weeks for unpaid family leave unless the employer agrees. Section 398-4(a) does little to clarify the issue, stating "If an employer provides paid family leave for fewer than four weeks, the additional period of leave added to attain the four-week total may be unpaid." The interrelationship of subsection (a) and (b) is confusing. Is employer provided "paid family leave" the same as employer authorized "substitution of accrued sick leave for unpaid family leave" to care for sick family members?

Employers and employees should note that the limitations apply only to substitution of sick leave; an employee may use accrued paid leave that includes vacation, personal, or family leave, for the four-week unpaid family leave. Correspondingly, an employer is authorized to require that an employee use accrued paid leave, other than sick leave, for any part of the family leave period.

5. 29 U.S.C. §2612(d)(1) and (2). Federal regulations attempt to clarify: "Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term "family leave" as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for which the employees seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employer's leave plan allows use of family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent." 29 C.F.R. 825.207 (b).

"Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave 'in any situation' where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan." 29 C.F.R. 825.207 (c).

6. 29 U.S.C. §2612(d)(1).
7. 29 U.S.C. §2612(d)(2)(B). Under federal law then, state and county employees may substitute sick leave to care for an ill family member "only if the employer's leave plan allows paid (including sick) leave to be used for that purpose."
8. Testimony of Davis K. Yogi, Chief Negotiator for the state Office of Collective Bargaining and Director of Human Resources Development, on H.B. No. 2075, House Committee on Labor and Public Employment, February 9, 2002, Regular Session of 2002.
9. *Id.*
10. *See* Letter from Kenneth Nakamatsu, Personnel Director, the Judiciary, State of Hawaii, to Wendell K. Kimura, Acting Director, Legislative Reference Bureau, August 20, 2002; Letter from Kenneth T. Taira, Acting Director of Personnel Services, County of Maui Wendell K. Kimura, Acting Director, Legislative Reference Bureau, August 12, 2002; Letter from Cheryl K. Okuma-Sepe, Director of Human Resources, City and County of Honolulu, August 21, 2002; and Letter from Davis Yogi, Director of Human Resources Development to Wendell K. Kimura, Acting Director, Legislative Reference Bureau, November 22, 2002.

USING SICK LEAVE TO CARE FOR FAMILY MEMBERS: ISSUES AND OPTIONS

DHRD responded that, under the 1993 family leave guidelines, employees are allowed to use sick leave to care for ill family members provided they earn sick leave in positions they occupy and have worked for at least six consecutive months in positions that were fifty percent or more full-time equivalent prior to the request for family leave. Full-time employees are entitled to use 160 sick leave hours per calendar year to care for an ill family member.

11. *See* Letter from Diana H. Kaapu, Acting Director, Department of Human Resource Development, to Lynn Merrick, Research Attorney, Legislative Reference Bureau, December 19, 2002. DHRD further noted the agreements with the United Public Workers and the Hawaii Firefighters Association are still outstanding. Members of those unions are covered by State family leave guidelines issued on September 16, 1993, until an agreement is reached with these unions. The State guidelines cover both included and excluded employees.
12. Letter from Patricia Mau-Shimizu, House Clerk, Hawaii State House of Representatives, to Wendell K. Kimura, Acting Director, Legislative Reference Bureau, August 14, 2002.

The Bureau received no response that related specifically to use of sick leave by county employees not covered by collective bargaining; responses referred to employees generally.

13. The County of Hawaii, County of Kauai, and the Senate did not respond.
14. *See generally* Chapters 89 and 89C, Hawaii Revised Statutes. The compensation, hours, terms, and conditions of employment, health fund contributions, and other benefits of excluded employees are adjusted to compare with related bargaining units.
15. Section 89C-1.5, Hawaii Revised Statutes. “Appropriate authority” is defined to mean the Governor, the mayors, the Chief Justice of the Supreme Court, the Board of Education, the Board of Regents of the University of Hawaii, the Hawaii Health Systems Corporation Board, the Auditor, the Ombudsman, and the Director of the Legislative Reference Bureau. The definition does not include “Speaker of the House of Representatives or Senate President” as an “appropriate authority.”
16. Sections 89C-4 and 89C-5, Hawaii Revised Statutes.
17. Section 23.1, Chapter 23, Leaves of Absence, The House Administrative and Financial Manual, House of Representatives, State of Hawaii, The Twenty-First State Legislature (2001-2002) establishes the policies and procedures governing vacation, sick leave, funeral leave, and other leaves for House employees and cites Chapter 79 (Leaves of Absence), Hawaii Revised Statutes as “statutory reference for leaves.” Effective July 1, 2002, Chapter 79 was repealed. Although section 23.3 establishes that permanent House employees earn sick leave credits with pay at 1 ³/₄ working day for each month of service (citing section 79-8, Hawaii Revised Statutes—now repealed) and section 23.4 entitles employees to four weeks of family leave “as prescribed by Chapter 398, Hawaii Revised Statutes,” there is no specific policy or procedure established for House employees substitution of sick leave for unpaid family leave.
18. Section 89-6(f), Hawaii Revised Statutes, expressly excludes “staff of the legislative branch” of the state and respective counties from collective bargaining, although Chapter 89, Hawaii Revised Statutes, Public Officers and Employers Excluded From Collective Bargaining, does not establish an “appropriate authority” who is authorized to adjust working conditions for House or Senate employees. Only agencies attached to the Legislature, the Auditor and the Director of the Legislative Reference Bureau, are expressly designated as an “appropriate authority” authorized to adjust the employment conditions of their respective employees. Presumably then, permanent appointed legislative staff are not subject to Chapter 89, and also are not expressly included in excluded employees covered in Chapter 89C, Hawaii Revised Statutes. Instead, section 22-4, Hawaii Revised Statutes, provides that permanent legislative staff is appointed and compensated as provided for in the rules of each house, and are entitled to every state employee privilege and benefit, presumably vacation leave, sick leave, and/or other leave. House and Senate permanent staff are subject only to the rules of each house; the cited statutory authority for the House Manual was repealed as of July 1, 2002.

USING SICK LEAVE TO CARE FOR FAMILY MEMBERS IN HAWAII

19. See Letter from Patricia Mau-Shimizu, House Clerk, Hawaii State House of Representatives, to Lynn Merrick, Research Attorney, Legislative Reference Bureau, December 20, 2002.
20. Diana H. Kaapu, Acting Director, Department of Human Resources Development, confirmed that benefits for excluded employees usually parallel negotiated benefits for included bargaining unit employees, and noted that “the recently negotiated family leave benefits would most likely be extended to counterpart excluded employees....” See Letter from Diana H. Kaapu, Acting Director, Department of Human Resource Development, to Lynn Merrick, Research Attorney, Legislative Reference Bureau, December 19, 2002.
21. See Letter from Diana H. Kaapu, Acting Director, Department of Human Resource Development, to Lynn Merrick, Research Attorney, Legislative Reference Bureau, December 19, 2002.
22. Table 12.01, Labor Force Status, By Sex: 1960 to 2000, The State of Hawaii Data Book 2001.
23. Table 1.26—Resident Population, By Age and Sex: 1990 and 2000, The State of Hawaii Data Book 2001; U.S. Census Bureau, ST-98-40, “Population Estimates for States by Age, Sex, Race, and Hispanic Origin: July 1, 1998”, Internet Release Date: February 11, 2000.
24. 29 U.S.C. §2651.
25. *Metropolitan Life In. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985), quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976).
26. “The bill establishes a minimum labor standard and guarantees that qualified employees shall have the right to take leave to care for seriously ill family members, or for the birth or adoption of a child. The bill acknowledges that family concerns are workplace concerns and enables workers to better balance work and family responsibilities.” Comments by Senator Eloise Tungpalan on S.B. No. 818, *Journal of the Senate of the Sixteenth Legislature* (1991) at 647.
27. Promoting Family Leave at the State and Local Level, NELP Advocacy Series citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985), quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

Chapter 7

SUMMARY

In responding to S.C.R. No. 180, S.D. 1, the Bureau compared Hawaii's family leave law to the federal Family and Medical Leave Act of 1993, briefly discussed traditional sick leave, compared legislative proposals to allow employees to use sick leave to care for their families and Hawaii's current family leave law, as codified in Chapter 398, Hawaii Revised Statutes, and looked at how other states are approaching providing paid leave to care for sick family members. We also examined the current use of sick leave to care for family members in Hawaii for private employees and public (state and county) employees. Below, we summarize significant findings of this study.

Family Leave Under State and Federal Law is Generally Unpaid Leave

- Family leave to care for certain family members with serious health condition is recognized in many state and federal laws.
- Federal and Hawaii laws allow twelve and four weeks of unpaid family leave, respectively.
- Substitution of sick leave is permitted, subject to certain conditions.
- Not all employees in Hawaii are entitled to family leave under either state law or federal law.

Traditional Sick Leave Is Used When Employee's Own Health at Issue

- No state or federal law requires employers to provide public or private employers with sick leave.
- Sick leave uses have been expanded in some states, most frequently for birth or adoption of child.

Recent Proposed Legislation to Amend Hawaii's Family Leave Law Chapter 398, Hawaii Revised Statutes, Would Have Added Unnecessary Confusion in Interpretation and Application

- Inclusion of state and any political subdivision as an "employer" in proposed new law relating to sick leave is troublesome.

SUMMARY

- State and political subdivisions were deleted from definition of “employer” in section 398-1, effective July 1, 2002.
- Proposed legislation would have added to Chapter 398, HRS, a second definition of “employer” for purposes of sick leave only.
- Two definitions of “employer” in one HRS chapter causes avoidable confusion.
- Interaction between proposed new law and current use of sick leave in section 398-4(b) is uncertain.

A Few States Require Employers to Permit Employees to Use Sick Leave to Care for Sick Family Members

- California, Washington (expanded version effective 1/1//03), and Minnesota have laws that require public and private employers who provide sick leave to allow employees to use sick leave for family care.
- At least twenty-four states have laws that allow public employees to use sick leave to care for certain sick family members.

California Extended Disability Insurance to Provide Wage Benefits for Employees Caring for Sick Family Members

- California recently expanded its disability insurance program to establish the Family Temporary Disability Insurance program.
- Funding shared by employer-employee; employee contributions to average approximately \$2.75 per month, beginning 7/1/04.
- Benefits will provide up to six weeks tax-free wage replacements, up to maximum of \$728 per week.
- Implementation builds on existing disability insurance system.
- Does not cover state or local government employees because they contribute to a different disability fund.

Some States Considering Expanding Unemployment Insurance (UI) to Provide Benefits for Family Care Leave

- Federal regulations issued in June, 2000 authorized states to expand UI programs to provide benefits for parents on leave following birth or adoption of child.

- Supporters say expanding UI for additional family leave purposes would help working parents and provide stable workforce.
- Employment law must recognize the importance of the family.
- Using UI to provide paid family leave is attractive since many states have existing system; implementing expansion would not be difficult.
- Critics say UI funds intended to protect only unemployed workers.

States are Considering Additional Models of Providing Family Leave Benefits

- Establishment of family leave insurance fund.
- Tax credits to employers who offer paid family leave.

No Law Establishes a Uniform Standard for Private Employee's Use of Sick Leave to Care for Ill Family Members in Hawaii

- For private workers: generally depends on employer's practice and procedure or collective bargaining agreements, or both.
- Some private workers are guaranteed unpaid family leave to care for family members under state law, federal law, or both.
- No information on substitution of sick leave for unpaid family leave.

No Law Establishes a Uniform Standard for State and County Employees' Use of Sick Leave to Care for Ill Family Members in Hawaii

- State and county workers no longer entitled to family leave benefits under state law (Chapter 398, HRS).
- Federal law entitles eligible public employees to up to twelve workweeks of unpaid family leave to care for designated family members with a serious health condition.
- Responses from state and county personnel departments reflect a variety of policies regarding public employees' use of sick leave to care for ill family members.
- Because public employees are subject to a variety of classifications, e.g. civil service employees, exempt employees, employees covered under collective bargaining,

SUMMARY

public officers and employees excluded from collective bargaining, sick leave issues for all public workers are not decided in the same manner and there is no universal minimum standard applicable to all public employees.

- As a result, it is uncertain whether uniformity on use of sick leave policy for all public employees is achievable or even desirable.
- However, recent correspondence from DHRD states that the State, Judiciary, Hawaii Health Systems Corporation, and counties of Hawaii, Maui, and Kauai have reached agreement with HGEA on family leave provisions for members of Units 2, 3, 5, 9, and 13 and that family leave provisions are the same for these bargaining units.
- Although employees of several agencies attached to the legislature are classified as excluded employees exempt from civil service whose “appropriate authority” is authorized to make adjustments of compensation and benefits packages, permanent staff of the House of Representatives and the Senate are not easily classified and their ability to use sick leave for family leave to care for family members with a serious health condition is uncertain.

Most Federal Employees Can Use Up to 12 Workweeks of Sick Leave to Care for Family Members with a Serious Health Condition

- Federal law provides for annual and sick leave for most federal employees.
- Federal Family and Medical Leave Act of 1993 guarantees most federal workers up to twelve workweeks of unpaid family and medical leave, including leave to care for certain family members with a serious health condition.
- Federal Employees Family Friendly Act of 1994 expanded use of sick leave to allow use of thirteen days of sick leave to care for family members or bereavement purposes.
- President Clinton, by memorandum dated May 24, 1999, directed the Director of Office of Personnel Management to propose government-wide regulations to let federal employees use up to twelve weeks of accrued sick leave each care for care for designated family members with a serious health condition, as defined in FMLA.
- Regulations implementing President Clinton’s memorandum were effective in 2001.
- Memo also directed the Secretary of Labor to propose regulation to let states develop unemployment insurance systems for parents on leave following the birth or adoption of a child.

- Additionally, the memo requested evaluation of using UI for these or related purposes (which arguably might include care for designated family members with a serious health condition).

Need for Expanded Family Leave Benefits are Significant in Hawaii

- Hawaii leads nation in per capita two wage earner families and has longest life expectancy in the nation.
- Women, historically caretakers of sick children, parents, or spouse, now make up nearly sixty percent of Hawaii's workforce.
- High cost of living makes taking unpaid leave to care for sick family member a difficult choice.
- Need for paid family leave or some form of wage replacement benefits is perhaps stronger in Hawaii than many other states.

A State Can Expand Family Leave Benefits Granted by FMLA

- Nothing in FMLA shall be construed to supersede state law that provides greater family leave than rights established under FMLA.

Policy Considerations Related to Choosing an Option

In conducting this study, the Bureau has concluded that whether to require employers who provide sick leave to use personal sick leave to care for certain family members with a serious health condition is a significant policy decision for the Legislature that has far reaching effects. As attractive as a blanket mandate might seem, the Legislature must carefully consider the consequences of such an action. The following policy considerations¹ may assist legislators in their deliberations to determine whether to choose the blanket mandate approach or other options relating to wage replacement benefits for family leave that were presented in this study. Most important issues are cost, savings, and other benefits. Program structure is critical. As the National Partnership for Women and Families has noted design decisions directly affect a program's cost, legal basis, political viability and effectiveness. The source of funding is a "final concern."

Generally, larger programs that cover a variety of conditions or long leaves are logically more costly. Correspondingly, larger programs enjoy broader public support and provide greater benefits to employers, employees, and public health. State governments have found use of sick leave to care for ill family members improves employee morale and productivity because it acknowledges the employee's family responsibilities. If parents can't miss work and send sick

SUMMARY

kids to school, states will have high rate of sickness at school. Conversely, sick kids left at home alone don't get needed care—both responses to a sick child increase public health costs.

Program Design Issues

- Factors to consider in expanding family leave benefits or establishing a program to provide wage replacements for employees away from their jobs to care for sick family members:
 - Scope of benefits – leave to care for seriously ill family members only? Which family members?
 - Duration of benefits – how long, over what period of time?
- Amount of benefits – paid at flat rate or percentage of income? Ceiling on benefits?
- Eligible employees – mandatory or discretionary?
- Beneficiaries – who is eligible? Program cannot be available only to employees of one sex.
- University requirements or voluntary – what incentives to participate if voluntary?
- Administration of program – how is benefit provided?

Funding Options

- Payroll taxes (already collected for SS, Medicare, UI and TDI). Can be collected from employer (based on percentage of payroll paid), employee (based on percentage of salary. Note—if based on percentage of salary, they are regressive taxes but may be ameliorated by progressive benefit structures), or both.
- “Shared responsibility” of employer, employee, and the state.
- General funds – states can allocate general funds for family leave benefits program as one time appropriation or ongoing program.
- Child care funds – states’ use of child care funds is limited to parental leave & have state and federal income eligibility requirements applicable to child care programs.
- TANF and MOE supplemental funds – states could use to fund low income component of paid family leave program.

- Use of tax credits or other incentives suggested to encourage employers to provide paid family leave benefits.
- Potential federal money for demonstration project or grant moneys.
- Precedent for use of sick leave to care for ill family members: federal employees.

Financial Benefits to State/County

- Any gain in tax revenue from businesses that save money from reduced turnover costs that MAY be due to paid family leave?
- Tax revenues from employees who return from leave instead of losing job and needing public assistance, including unemployment?
- Tax revenues on benefits paid to employees?
- Does state save on reduced UI and public assistance because employees return to work?
- Savings on unspent childcare assistance for parents with newborns home for FMLA's twelve weeks of family leave?
- Medicaid payments savings because incapacitated seniors remain independent for twelve weeks longer?

Endnotes

1. These policy considerations summarize material presented in *Family Leave Benefits: A Menu of Policy Models for State and Local Policy Leaders*, prepared by National Partnership for Women & Families Campaign for Family Leave Benefits, Washington, D.C., September 2001.

SENATE CONCURRENT RESOLUTION

REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO COMPARE
LEGISLATIVE PROPOSALS TO ALLOW EMPLOYEES TO USE SICK LEAVE
TO CARE FOR THEIR FAMILIES AND HAWAII'S FAMILY LEAVE LAW,
AS CODIFIED IN CHAPTER 398, HAWAII REVISED STATUTES.

1 WHEREAS, Hawaii has a high percentage of two-wage earner
2 families and a particularly high number of these families
3 include school-age children; and
4

5 WHEREAS, these parents have a difficult time balancing
6 their schedules even when family members are well; and
7

8 WHEREAS, when a parent, child, spouse, or reciprocal
9 beneficiary becomes seriously ill, employees often use vacation
10 leave to care for these individuals; and
11

12 WHEREAS, some employers do not allow employees to take
13 their own sick leave to attend to sick family members; and
14

15 WHEREAS, an alternative is for the employee to take family
16 leave, which was instituted in Hawaii in 1991 and codified in
17 chapter 398, Hawaii Revised Statutes; and
18

19 WHEREAS, Hawaii's Family Leave Law entitles an employee to
20 a total of four weeks of family leave during any calendar year
21 upon the birth or adoption of a child, to care for the
22 employee's child, spouse, or reciprocal beneficiary, or parent
23 with a serious health condition; and
24

25 WHEREAS, Hawaii's Family Leave Law covers private and
26 public employers employing one hundred or more employees for
27 each working day during each of twenty or more calendar weeks in
28 the current or preceding calendar year, and covers employees who
29 work for not fewer than six consecutive months for the employer;
30 and
31

1 WHEREAS, measures have been introduced during the Regular
2 Session of 2002 to allow employees to take sick leave to care
3 for their families; and
4

5 WHEREAS, it is apparent that Hawaii's workers are still
6 bearing the pressures and stress of work and caring for
7 themselves and their families; now, therefore,
8

9 BE IT RESOLVED by the Senate of the Twenty-first
10 Legislature of the State of Hawaii, Regular Session of 2002, the
11 House of Representatives concurring, that the Legislative
12 Reference Bureau is requested to compare legislative proposals
13 to allow employees to take sick leave to care for their families
14 and Hawaii's Family Leave Law, as codified in chapter 398,
15 Hawaii Revised Statutes; and
16

17 BE IT FURTHER RESOLVED that the Legislative Reference
18 Bureau is requested to submit findings and recommendations,
19 including any necessary proposed legislation, to the Legislature
20 no later than twenty days prior to the convening of the Regular
21 Session of 2003; and
22

23 BE IT FURTHER RESOLVED that a certified copy of this
24 Concurrent Resolution be transmitted to the Acting Director of
25 the Legislative Reference Bureau.
26