



How President Biden's Paid FMLA Proposal Would Work

Administration begins push for 12 weeks of paid family and medical leave

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President Joe Biden has proposed requiring employers to provide 12 weeks of paid family and medical leave through a new federally funded program, expanding on current requirements for employers to provide unpaid leave under the Family and Medical Leave Act (FMLA).

If the paid-leave provisions of Biden's American Families Plan (AFP) (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/presidential-address-to-Congress-2021.aspx) are enacted, employers will need to factor new paid-leave requirements into their workforce planning.

What Biden Proposed

According to a White House fact sheet (<https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/>), the AFP would create a national comprehensive paid family and medical leave program, funded through tax increases, and paying workers up to \$4,000 a month. Under that cap, it would replace a minimum of two-thirds of average weekly wages, rising to 80 percent for the lowest-wage workers.

The proposal does not define "lowest-wage workers," however, and left out details about whether eligibility would differ from current FMLA. Those specifics will be addressed when Congress drafts an actual bill.

Biden proposed that the program be phased in over a 10-year period, guaranteeing 12 weeks of paid parental, family illness, personal illness or safety-related leave by year 10. Workers would receive three days of bereavement leave per year starting in year one.

"A lack of family-friendly policies, such as paid family and medical leave for when a worker needs time to care for a new child [or] a seriously ill family member, or recover from their own serious illness, has been identified as a key reason for the U.S. decline in competitiveness," according to a White House statement.

The Society for Human Resource Management (SHRM) encourages (<https://advocacy.shrm.org/policy-areas/workplace-flexibility-leave/>) employers to voluntarily offer paid leave and flexible work options to their employees. SHRM believes that public policies should provide employers with certainty and predictability through a voluntary federal framework rather than a fragmented patchwork of state and local laws.

Reviewing the Basics: FMLA Leave

Currently, under the Family and Medical Leave Act (FMLA) (<https://www.dol.gov/agencies/whd/fmla/faq>):

- **Covered employers must provide** eligible employees with up to 12 workweeks of unpaid leave a year for illness or injury, or to care for an ill or injured family member. Employees are entitled to return to their same or an equivalent job at the end of their FMLA leave.
- **Employers are covered by the FMLA** if they employed 50 or more employees for at least 20 workweeks during the current or prior year.
- **Employees are eligible** if they worked 1,250 hours for a covered employer during the 12 months prior to the start of leave.

[SHRM members-only resource: What You Need to Know About FMLA (www.shrm.org/ResourcesAndTools/tools-and-samples/need-to-know/Pages/What-You-Need-to-Know-About-FMLA.aspx)]

Reasons for Leave

Biden's AFP stipulates workers can receive partial wage replacement to take time to:

- Bond with a new child.
- Care for a seriously ill loved one.
- Deal with a loved one's military deployment.
- Find safety from sexual assault, stalking or domestic violence.
- Heal from their own serious illness.
- Take time to deal with the death of a loved one.

"Though the fact sheet does not define these terms, it appears as though the president's plan would expand the reasons for FMLA leave and the familial relationships involved (<https://www.fmlainsights.com/president-biden-unveils-his-paid-leave-plan-how-does-the-plan-impact-employers/>)," wrote Jeff Nowak, an attorney with Littler.

Funding for Paid Leave

To pay for the program, the president's plan would increase the federal income tax rate for the top 1 percent of American income earners from 37 percent to 39.6 percent, increase capital gains and dividend tax rates for those who earn more than \$1 million a year, and eliminate certain exceptions to the estate tax.

The White House estimates that the cost of the plan will be \$225 billion over the next 10 years.

Robin Shea, a partner in the Winston-Salem, N.C., office of law firm Constangy, Brooks, Smith & Prophete, wrote that the White House cost estimate "sounds a bit optimistic (<https://www.constangy.com/employment-labor-insider/federal-paid-leave-American-Families-Plan-Healthy-Families-Act>). The cost of a much more modest paid-leave proposal championed by Ivanka Trump—which would have applied only to parental leave, would have provided only eight weeks of paid leave, would have been capped at \$600 a week, and would have been funded by a 'small' tax increase and reductions to the budget in other areas—was estimated to cost \$500 billion over 10 years," she noted.

Chances for Passage

The administration and Congress may push the proposal via the budget reconciliation process, and "if successful, that would allow it to pass the Senate with a simple majority vote and no filibustering, making it almost certain to be enacted," Shea wrote.

She added, however, that "some commentators have questioned whether the Democrats can pull that off. If not, then the AFP would have to pass the Senate with 60 votes [to avoid a GOP filibuster], which is not likely."

Given that the Democrats control the Senate only with the vice president's tie-breaking vote, Nowak believes that "we're far more likely to see a compromise plan than the president's proposal."

Expanded Paid Sick Leave

Biden also asked Congress to pass the Healthy Families Act

(<https://delauro.house.gov/sites/delauro.house.gov/files/documents/HFA%20117.pdf>), which would require employers with 15 or more employees to allow workers to accrue seven days paid sick leave per year to seek preventative care for them or their family, such as getting a flu shot; recover from short-term illness; or care for a sick child or family member, or for a family member with disability-related needs.

Building on ARPA

The American Rescue Plan Act (ARPA), enacted in March, doesn't require paid and emergency family leave (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/arpa-does-not-require-leave.aspx). But the law does extend and expand the tax credits that were available under the Families First Coronavirus Response Act (FFCRA), incentivizing small and midsize employers to provide paid time off for FFCRA and new COVID-19-related reasons. Under ARPA, tax credits continue to be available for paid sick leave, paid family leave and other reasons.

ARPA also reset the 10-day limit for the tax credit for paid sick leave under FFCRA as of April 1.

Biden's plan calls on Congress to make permanent ARPA's one-year Child and Dependent Care Tax Credit expansion, among other relief-extending actions.

"While the American Rescue Plan provided meaningful relief for hundreds of millions of Americans, too many families and workers feel the squeeze of too-low wages and the high costs of meeting their basic needs and their aspirations," according to a White House statement.

Alternative Paid-Leave Proposal

On April 27, a day before Biden's address to Congress, House Ways and Means Committee Chairman Richard E. Neal, D-Mass., introduced his own plan to provide universal paid family and medical leave for all workers in the U.S.

Neal's Building an Economy for Families Act (<https://waysandmeans.house.gov/media-center/press-releases/chairman-neal-unveils-groundbreaking-proposal-reshape-american-economy>) would be funded by new taxes on employers. Paid leave would be mandated for all of the leave-taking reasons in the FMLA along with an expanded set of family relationships for caregiving.

While Biden's proposal would take 10 years to build up to the 12 weeks of paid leave (<https://www.mercer.us/our-thinking/healthcare/biden-seeks-paid-leave-dependent-care-help-in-sweeping-family-aid-plan.html>) (except for the three days of paid bereavement leave available in year one), Neal's plan would be fully in place starting in 2023, according to HR consultancy Mercer.

"Neal's bill may put him at odds with the president (<https://www.cnbc.com/2021/04/27/house-democrat-richard-neal-unveils-sweeping-benefits-tax-credits-for-families.html>), who has expressed doubts over its chances of success in a Senate split 50-50," CNBC reported.

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