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Ways and Means Committee Approves Universal Paid Leave Provisions of Reconciliation Bill

On September 9 the House Ways and Means Committee approved legislation that would establish a universal paid family and medical leave program for all American workers. The universal paid family and medical leave legislation is part of the Build Back Better Act, which the Committee is considering pursuant to budget reconciliation instructions.

The foundation of the universal paid family and medical leave proposal is a new government program that would provide these benefits directly to individuals who need to take time off from work to care for themselves or their families. The proposal also would provide substantial government subsidies to **employers** that are willing to provide the same paid family and medical leave benefit to their employees, and even greater subsidies to states (“legacy States”) that currently have a paid family and medical leave program in place. The benefits paid by the Federal program, as well as grants to employers and legacy States, would be funded with appropriations.

As passed by the Committee, the bill does not prohibit States or local governments from establishing supplemental paid family and medical leave requirements for employers. So instead of establishing a uniform Federal standard for paid family and medical leave, the bill would add a new paid family and medical leave benefit that will be available to the workers in the 41 states that do not currently have a paid family and medical leave program. It also opens the door to the possibility that any state – regardless of whether it currently has a paid family and medical leave program – will add new requirements on top of the Federal program.

Special Considerations for Professional Employer Organizations

The bill raises many of the same questions for Professional Employer Organizations (PEOs) and their clients as it does for other employers. But one somewhat unique question is whether a PEO would be eligible to receive Federal grants for qualifying paid family and medical leave benefit programs that it helps to administer for its clients, or if the grants would go to the clients. The Committee-approved bill does not specifically address this issue. However, the intent would appear to be for the grant to go to the client to the extent that it is funding the paid family and medical leave benefit.

Summary of Proposed Federal Leave Program

The new federal program would provide for paid family and medical leave for up to 12 weeks during a 12-month benefit period. The paid family and medical leave would be available in increments of as few as 4 “caregiving hours” in a week.

A “caregiving hour” would be defined as an hour in which an individual is engaged in “qualified caregiving,” which generally would mean time spent caring for one’s self or a family member in lieu of working for compensation (including wages, paid time off, or paid sick leave). More specifically, the reason for the time off would have to be a reason described in the Family and Medical Leave Act – i.e., to address a serious personal or family health issue; to care for a newborn, newly adopted child, or new foster child; or for circumstances arising from a loved one’s military deployment or serious injury.

However, the Federal paid family and medical leave benefit would be available for reasons beyond those described in the FMLA. Specifically, when it comes to caring for family members with serious health conditions FMLA is available only to care for the employee’s spouse, son, daughter, or parent. But for purposes of the new paid leave mandate only, these relationships would be expanded to include an individual’s registered domestic partner, siblings, grandparents, and grandchildren; the spouses of these family members; and any other association by blood or affinity that is equivalent to a family relationship, as defined in Treasury regulations.

It is also important to note that, even though the paid family and medical leave benefit would define eligibility by cross-referencing the FMLA, an individual would not have to qualify for FMLA leave in order to be eligible for the paid family and medical leave benefit. For example, the paid family and medical leave benefit would be available to those employed by a company with fewer than 50 employees, or those who work for a covered employer but have not met the FMLA’s 1,250 hours requirement.

Additionally, the new benefit would provide up to 3 full paid workdays of bereavement leave at the death of a spouse, parent, or child.

Benefits will be based on the individuals average monthly earnings, with replacement rates ranging from 85% to 5% applied to specified wage bands. The formula is designed to replace two-thirds of average wages for most workers, although the replacement rate would be greater for lower paid workers, and less for those who are more highly paid.

To avoid “double-dipping,” qualified caregiving would not include any time for which an individual is receiving paid time off, sick pay, or other compensation from an employer. However, employers could supplement the Federal benefit so long as total payments to the individual would not exceed her regular rate of pay for the week.

Finally, the Federal paid family and medical leave benefit would be available to all workers, including full- and part-time, without regard to tenure, job classification, or employer size. In fact, an individual would not even have to be actively employed to qualify for the Federal benefit.

It also would be available to independent contractors and other self-employed individuals.

Employer Options and Grant Details

Employers that would prefer to provide the Federal paid family and medical leave benefit directly to their employees could do so and recover a significant portion of total benefit costs in the form of a Federal grant. As discussed below, an employer's program would have to satisfy a number of specific requirements in order for the employer to qualify for the grant.

These employer programs could be self-insured by employers with at least 50 employees, or provided through an insurance contract. If an insurance contract is used, the employer's grant would be based on 90% of the projected national average cost of providing the full Federal benefit package. Treasury would be required to determine the projected national average cost per individual for a year by October 1 of the immediately preceding year.

For employers that self-insure their programs, the grant would be the lesser of 90% of benefits paid by the employer (up to 12 weeks per individual), or the national weekly average weekly benefit paid under the Federal program multiplied by the number of weeks of leave (up to 12 per individual) paid by the employer.

Employers that choose the self-insurance route would have to obtain a surety bond to guarantee payment, and also would have to hold the funds needed to pay benefits in a dedicated account separate from the employer's general assets.

Regardless of the funding mechanism used, these employer programs would have to be in writing and would not be permitted to impose any fees or costs for coverage. Additionally, the employer's program would have to:

- Provide at least 12 weeks of benefits for all of the same qualifying reasons as the Federal program benefit, without any preexisting condition restrictions;
- Provide paid leave to employees that are not subject to a legacy State's paid leave program (see below for more about legacy States), regardless of length of service, job type, membership in a labor organization, seniority status, or any other employee classification ;
- Provide equal or higher wage replacement than the Federal program at all wage levels;
- Provide for intermittent leave;
- Pay benefits at least monthly, or more frequently; and
- Give participants the right to appeal adverse benefit determinations first internally, and then to the Treasury Department.

Additionally, employers offering their own programs would have to guarantee certain FMLA-type job protections to employees upon returning from paid leave. Also, like the FMLA, employers would have to allow employees taking paid family and medical leave to continue their group health plan benefits while on leave.

Anyone covered by an employer's program that meets all of these requirements would not be eligible to participate in the Federal program.

More on Legacy States

As noted, legacy states would also be entitled to federal grants to help pay for the cost of their paid family and medical leave programs. The proposal would define a legacy State as a state that:

- 1) had enacted a law providing paid family and medical leave benefits as of the date of the bill's enactment, and
- 2) beginning in 2025, provides a comprehensive paid leave program that covers all workers in the state who would be covered under the federal program, provides at least 12 weeks of paid family and medical leave benefits per year for all the same reasons as the Federal program, and provides benefit amounts that are at least as generous as the Federal program.

The annual Federal grant to legacy States could be as much as the amount it would have cost to provide Federal benefits to those covered by the legacy State's program.

Observations

The bill is designed to give every American worker access to paid family and medical leave. It protects States that have already enacted paid leave mandates, and gives employers the option to provide the Federal paid family and medical leave benefit directly to their employees (except for those subject to a legacy State's program). However, employers with employees in legacy States – such as California – would still face the challenges of administering different leave programs for those employees. Furthermore, the proposal does not preclude other States from imposing additional mandates on employers in the future to supplement the Federal benefit.

Other than technical corrections, it is unlikely the Committee-approved bill will change much between now and the time it comes before the full House for a vote. It is not clear if the Senate will take up a modified version of the House's bill, or if it will craft an alternative proposal.