DAVIS & HARMAN LLP

ATTORNEYS AT LAW

THE WILLARD
1455 PENNSYLVANIA AVENUE, NW, SUITE 1200
WASHINGTON, DC 20004

TEL 202-347-2230
FAX 202-393-3310 WWW.DAVIS-HARMAN.COM

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Universal Paid Family and Medical Leave Added Back to House Version of Build Back Better Act

Universal paid family and medical leave is back in the House version of the Build Back Better Act, at least for now. After the White House left paid family and medical leave out of the budget reconciliation framework it released on October 28, House Democratic leaders put it back into the version of the Build Back Better Act that the House is expected to vote on as early as next week.

According to a Rules Committee Print published on November 3, the structure of the universal paid family and medical leave proposal is substantially similar to the version reported by the Ways and Means Committee on September 15. But there are some significant changes, as summarized below.

As a preliminary matter, the Treasury Department would have been primarily responsible for setting up and operating the federal paid family and medical leave benefit under the Ways and Means Committee proposal. That would have included determining eligibility for grants to legacy states and eligible employers, and developing and implementing all needed regulations. In the updated versions, these powers and responsibilities are vested primarily in the Social Security Administration.

Additionally, the proposed effective date has been changed from July 1, 2023 to January 1, 2024.

Federal Comprehensive Paid Leave Benefits Program

The Ways and Means Committee bill would have provided up to 12 weeks of paid family and medical leave during a 12-month benefit period, and partial weekly wage replacement based on up to $250,000 in annual compensation.

The updated proposal reduces the available leave to **4 weeks** during a 12-month benefit period, and provides partial weekly wage replacement based on up to **$62,000** in annual compensation.

Other than eliminating bereavement leave, the updated proposal would make paid family and medical leave available for all the same reasons as the Ways and Means Committee version. That is, in order to care for a newborn (or newly adopted) child, or to care for one's self or a family member with a serious health condition. These are generally the same criteria that are used by the Family and Medical Leave Act (FMLA), except the proposal would (like the Ways

and Means Committee version), define "family member" more broadly than the FMLA to include:

- a spouse (including a registered domestic partner) or spouse's parent,
- a child and a child's spouse,
- a parent and a parent's spouse,
- a sibling and a sibling's spouse,
- a grandparent and a grandparent's spouse,
- a grandchild and a grandchild's spouse, or
- anyone else related by blood or affinity whose association is equivalent of a family relationship.

This discrepancy between FMLA eligibility and paid family and medical leave eligibility could have a significant impact on employees and their willingness to take paid family and medical leave. If the leave is FMLA eligible, employers must grant employees the time off, allow them to continue health benefits, and provide certain job protections upon their return. These protections would not apply to employees who take paid family and medical leave that does not also qualify as FMLA leave.

Unlike the Ways and Means Committee proposal, the updated proposal would clarify that benefits received from the federal program would not be included in the individual's gross income for federal income tax purposes. The updated proposal does not provide a gross income exclusion for family and medical leave benefits paid from any other source, including employers or legacy state programs.

Eligible Employer Programs

As with the Ways and Means Committee proposal, employers that choose to do so would have the option of providing a paid family and medical leave benefit directly to their employees and qualify for annual federal grants to offset part of their costs. Only employers that have at least one employee that is not subject to a legacy state program (see below) would be able to qualify for the federal grant.

Another precondition to grant eligibility would be the employer guaranteeing FMLA-type job and health benefit protection to employees taking paid family and medical leave. This would be a significant advantage to participants in eligible employer programs because, as noted above, these protections would be available to individuals receiving benefits from the federal program only to the extent their leave also qualified as FMLA leave.

Other requirements for eligible employer programs would include offering at least 4 weeks of paid and family leave at wage replacement rates at least as generous as the federal program. Employers also would be required to:

- give employees the right to appeal adverse benefit determinations, plus the right to a binding secondary appeal to the SSA Commissioner;
- satisfy an annual notice requirement;

- not impose any fee on employees relating to ensuring coverage or receiving comprehensive paid leave benefits;
- allow leave to be taken intermittently or on a reduced leave schedule; and
- pay benefits at least monthly.

Employers could provide these benefits through an insured or self-insured program, or through a multiemployer program. However, the self-insured option would not be available to employers with fewer than 50 employees.

In order to self-insure, employers would have to obtain a surety bond to guarantee payment of benefits. However, the updated version does not include the additional requirement in the Ways and Means Committee bill for funds to pay benefits be held in a designated account separate from general assets.

For eligible employers that self-insure, the annual grant amount would be 90% of the lesser of –

- The amount of benefits paid under the employer's program for up to 4 weeks of leave per eligible employee; or
- The national average weekly benefit amount paid under the federal Comprehensive Paid Leave Benefits program multiplied by the number of weeks of leave (up to 4 per eligible employee) paid by the employer.

The annual grant for a year would be paid no later than March 31 of the succeeding calendar year.

For eligible employers that provide benefits through insurance or through a multiemployer program, the annual grant amount would be the lesser of –

- 90% of the projected national average cost per individual providing benefits under the federal Comprehensive Paid Leave Benefits program times the number of the employer's eligible employees; or
- 90% of the total premiums paid to the insurer (or contributions paid to the multiemployer plan) by the eligible employer

The annual grant for a year would be paid no later than 30 days after the beginning of the calendar year.

Legacy States

The updated proposal also retains the legacy state concept, which means grants would be available to states that, as of the date of enactment of the BBBA, had enacted a state law that provides paid family and medical leave benefits, and that certifies within 3 years that it intends to remain a legacy state and meet certain data sharing requirements.

Among other requirements, the state law must provide at least 4 weeks of leave during a 12-month period to everyone who would be eligible for the federal Comprehensive Paid Leave Benefits program, and at a wage replacement rate that is at least as generous.

Annual grants to legacy states would be the lesser of –

- The amount of benefits the SSA Commissioner estimates would have been paid by the federal Comprehensive Paid Leave Benefits program to individuals covered by the legacy state's program, plus administrative costs not to exceed 7% of benefits paid; or
- the total cost of 4 weeks of paid family and medical leave benefits paid under the state's law, including amounts paid by employers, plus the cost of administration (up to 7% of total benefits paid under state law).

Note that, as with prior versions, the updated proposal would allow legacy states to include benefits paid by employers pursuant to the state law in their annual grant calculations. However, a new feature of the updated proposal would permit (but not require) legacy states to allocate an "appropriate share" of their grants to these employers.