House Passes Build Back Better Act with Paid Leave and ACA 'Firewall' Provisions

Legislation faces uncertain future in Senate

By Stephen Miller, CEBS
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The U.S. House of Representatives on Nov. 19 passed the Build Back Better Act (https://www.govtrack.us/congress/bills/117/hr5376/text) (BBBA), supported by the Biden administration and congressional Democrats. The act, a multitrillion dollar social spending and climate change bill, faces an uncertain future in the U.S. Senate.

The bill would be funded, in large measure, through a series of tax increases—including a new 15 percent minimum tax on large U.S.-based corporations and new surcharges on high-income taxpayers.

The BBBA contains several provisions effecting employer-sponsored benefits. Two of the most important—a new paid leave program and modification of the "firewall" that has prevented employees from receiving premium tax credits to subsidize buying health plans on the Affordable Care Act (ACA) marketplace—are highlighted below, along with other provisions effecting retirement savings plans and new penalties for labor law violations.

4 Weeks Paid Leave

The BBBA would create a program to provide paid leave for private sector workers, to take effect in January 2024.

Notably, the BBBA's paid leave program deviates from Family and Medical Leave Act (FMLA) in dramatic ways. The leave proposal would apply to all employers regardless of size and require employers to provide leave to all workers regardless of length of service, job type or worker classification. Moreover, there are significant differences in employee notice requirements and the definition of family member. The proposal does not address the variety of existing state leave laws.

Jeff Nowak, an attorney with law firm Littler and author of the FMLA Insights blog, described key elements of the bill's paid leave program (https://www.fmlainsights.com/has-federal-paid-leave-been-resurrected-from-the-dead-pelosi-backed-legislation-needs-a-lifeline-to-survive/):

- **Provide four weeks of paid leave** for reasons generally provided for under the current Family and Medical Leave Act to bond with a newborn or a newly placed child, or to provide caregiving to oneself or to a family member due to a serious health condition.
- **Broaden the definition of family members** to include extended family such as siblings, grandparents and "any other individual who is related by blood or affinity and whose association with the individual is equivalent of a family relationship."

- **Make leave available to all employed and self-employed workers,** and base eligibility on the receipt of modest wages so as to broaden the class of employees who could take leave.
- **Set the maximum benefit at a bit more than $800/week,** to be calculated as follows: 90 percent pay for those earning less than $290/week; 73 percent for those earning less than $620/week; and 53 percent for those earning less than $1192/week.
- **Require leave to be taken in at least four-hour increments,** with a one-week waiting (or elimination) period.
- **Require an abbreviated notice period,** which would allow employees to report the need for leave within seven days of taking leave.

Controversially, the paid leave program that the legislation would put in place would not supersede applicable state and local paid law requirements for employers, which the Society for Human Resource Management has called "a fragmented patchwork of state and local laws" that are burdensome for employers to administer.

Lower ACA Affordability Threshold

The BBBA modifies the affordability test for employer-sponsored health coverage under the ACA for employers that have 50 or more full time employees or part-time equivalents.

The 9.61 percent affordability percentage for 2022 (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/irs-2022-employer-health-plan-affordability-threshold.aspx)—the maximum amount of their income that employees must pay for the lowest-cost employer-sponsored health plan offered to them—would be reduced to 8.5 percent, with no inflation adjustment for 2022 to 2025.

After 2025, the affordability threshold would be set at 9.5 percent of household income with no inflation adjustment.

"Importantly, applicable large employers (i.e., those subject to the ACA employer mandate) should review their group health plan's contribution strategy (https://cosmoins.com/build-back-better-legislation-includes-benefit-provisions/) to determine whether they will have budgetary problems in the event the 8.5 percent affordability threshold becomes law," advised Cosmo Insurance Agency, a provider of business insurance. "They may be required to adjust the dollar amount of their employer premium contributions to preserve affordability and avoid potential exposure to ACA penalties," if the BBBA in its current form were to be passed by the Senate and become law.

Altered ACA Firewall

The BBBA would expand the ACA's premium tax credits to lower-income individuals through 2027, making ACA marketplace plans more affordable. Significantly, it would also let employees who are offered a health care plan from their employer that meets the ACA's coverage and affordability requirements to receive premium tax credits when purchasing an ACA marketplace plan. Employers in this case would not be penalized when employees receive premium tax credits.

The Partnership for Employer-Sponsored Coverage (P4ESC), an employers coalition, raised concerns about breeching the firewall between employer-sponsored coverage and ACA marketplace plans.

"Before 2010 [when the ACA was enacted], and since with the establishment of the firewall, employer risk pools have remained relatively stable and predictable (https://static1.squarespace.com/static/5a5ceeaf49fc2b12ef547012/t/618591ba95befe0544ac14da/1636143546804/P4ESC+re+PTC+and+Firewall.pdf), which has allowed employers to innovate and provide new and valuable benefits," the coalition wrote to congressional leaders in an Oct. 29 letter.

"The effect of such stability has radiated out to the system as a whole—providing needed certainty and reliability for providers, insurance issuers, and even the government to invest, provide more value, and innovate more broadly," P4ESC wrote. "The proposed change to the firewall here may disrupt the stability and predictability in ways that are particular to each employer on a case-by-case basis, and in the aggregate may degrade the foundation of our system for all providers and coverage offerings."

Retirement Savings Plans

Unlike earlier versions of the bill, the BBBA as passed by the House does not require employers to automatically enroll employees into a defined contribution retirement plan or into an individual retirement account (IRA).

The House bill did maintain the following provisions (https://www.octoberthree.com/retirement-policy-provisions-of-the-build-back-better-act-update/), as reported by October Three, a retirement plan advisory firm:

- **IRA contribution limit capped.** Contributions to IRAs would generally be prohibited where the total IRA and defined contribution plan accounts of high earners together exceed $10 million, effective in 2029.
- **Required distributions from large account balances.** In the year following the year in which the $10 million limit is exceeded, a minimum distribution of 50 percent of the excess would be required. Where the total in defined contribution and IRA accounts exceeds $20 million, the lesser of that excess, or the total in Roth IRAs and Roth defined contribution accounts, would have to be distributed from these accounts, effective in 2029.
- **Reporting of large balances.** Defined contribution plan administrators would be required to annually report to the IRS balances over $2.5 million, effective in 2029.
- **Elimination of conversions for high earners and of nondeductible contributions.** IRA and qualified plan Roth conversions for high earners would be prohibited beginning in 2032. So-called "backdoor" Roth conversions of nontaxable amounts (that is, after-tax contributions to a traditional defined contribution plan or IRA) would be prohibited, regardless of income level, beginning in 2022.

Increased Labor Law Penalties

The BBBA adds penalties for employers who violate labor laws, which are expected to increase revenues by $2.76 billion over a 10-year period. It would, for instance, levy new financial penalties on already-defined violations of the National Labor Relations Act, greatly increase the fines employers face for breaching the Fair Labor Standards Act through illegal overtime practices, and authorize the government to assess civil monetary penalties associated with mental health parity enforcement.

Employers who break laws enforced by the U.S. Occupational Safety and Health Administration would also see steep increases in fines.

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