

# The Family And Medical Insurance Leave (FAMILY) Act (H.R. \_\_\_/S. \_\_\_)

MAY 2023

People across the country are working hard to make ends meet, yet the nation fails to provide the support workers need to manage the demands of job and family, and that help businesses and our economy thrive. Just 25 percent of the workforce has paid family leave through their employers, and just 41 percent has personal medical leave through an employer-provided short-term disability program.<sup>1</sup>

The Family And Medical Insurance Leave (FAMILY) Act would address America's paid family and medical leave crisis and benefit working people, their families, businesses and our nation's economy.

## Paid Family and Medical Insurance Leave Overview

Sponsored by Rep. Rosa DeLauro (D-Conn.) and Sen. Kirsten Gillibrand (D-N.Y.), the Family And Medical Insurance Leave (FAMILY) Act (H.R. \_\_\_/S. \_) would create a **comprehensive national program that helps meet the needs of new parents and people with serious personal or family health issues** through a shared fund that makes paid leave affordable for employers of all sizes and for workers and their families.

The FAMILY Act would:

- Provide workers with **up to 12 weeks of partial income when they take time** for their own serious health conditions, including pregnancy and childbirth recovery; the serious health condition of a family member; the birth or adoption of a child; certain needs related to military deployment; and/or to seek certain services related to domestic violence, sexual assault or abuse.
- Enable the lowest-paid workers to earn up to **85 percent** of their usual monthly wages, and for the typical full-time worker to receive, on average, about **two thirds** of their usual wages, up to a capped amount. This ensures that **low- and middle-wage workers can afford to take leave** by keeping their benefits close to their usual paycheck.
- **Cover all working people, regardless of where they live, the nature of their job or the size of their employer.** Younger, part-time, lower-wage, contingent and self-employed workers would be eligible for benefits.

- **Protect workers from being retaliated or discriminated against** for taking leave, and guaranteeing that employees who have worked at their employer for more than 90 days have the right to **keep their health insurance during leave and be restored to their jobs after returning from leave.**
- Be funded responsibly by **small employee and employer payroll contributions** of two-tenths of 1 percent each (two cents per \$10 in wages);
- Be administered through a **new Office of Paid Family and Medical Leave.** Payroll contributions would cover both insurance benefits and administrative costs.

## **FAMILY Act Section-by-Section Summary**

### **Sec. 1. Short Title.**

Family And Medical Insurance Leave Act or FAMILY Act

### **Sec. 2. Definitions.**

- **Caregiving Day.** A calendar day in which an individual is engaged in “qualified caregiving.” An individual may not have more than 20 caregiving days in a month, or more than 60 caregiving days in a benefit period.
- **Commissioner.** The term Commissioner means the Commissioner of Social Security.
- **Deputy Commissioner.** The term Deputy Commissioner means the head of the Office of Paid Family and Medical Leave.
- **Eligible Individual.** An individual is deemed eligible for benefits in a given month if they file an application and meet the criteria for eligibility.
- **Qualified Caregiving.** Any activity engaged in by an individual, other than regular employment, for a qualifying reason.
- **Qualifying Reason.** A qualifying reason means the following:
  - The birth of and care for a new child;
  - The adoption or foster placement of a child;
  - To care for a “qualified family member” with a serious health condition;
  - The employee’s own serious health condition;
  - A “qualifying exigency” arising out of a servicemember’s deployment); or
  - To seek medical attention, obtain services or counseling, seek relocation, or take legal action as the result of experiencing domestic violence, sexual assault or stalking (as such terms are defined in the Violence Against Women Act of 1994), or to assist a family member in such activities.
- **Serious Health Condition.** “Serious Health Condition” is defined in reference to the Family and Medical Leave Act, as an illness, injury, impairment or other condition that involves inpatient care or continuing treatment by a health care provider.
- **Qualified Family Member.**

- A spouse (including a domestic partner or civil union partner) or parent of a spouse; a child or child’s spouse; a parent or parent’s spouse; a sibling or sibling’s spouse; a grandparent, grandchild, or spouse of a grandparent or grandchild; and any other individual related by blood or affinity who has the equivalent of a family relationship with the employee.
  - “Domestic Partner” means someone with whom the individual is in a committed relationship, which is a relationship between any two individuals, age 18 or older, who are each other’s sole domestic partners and who share responsibility for a significant measure of each other’s common welfare. This includes, but is not limited to, same-sex partners whose marriages, civil unions, domestic partnerships or analogous relationships are granted recognition by a state or political subdivision.
  - “Child” means biological, foster or adopted child; stepchild; child of a domestic partner; legal ward; or child of a person standing in loco parentis.
  - “Parent” means biological, foster or adoptive parent; stepparent; parent-in-law; parent of a domestic partner; legal guardian; or other person who stood in loco parentis when the employee was a child.
  - “Spouse” is defined based on the marriage laws of the state where the marriage was celebrated.
- **Victim Services Organization.** “Victim services organization” means a nonprofit, nongovernmental organization that provides assistance to, or advocates for, victims of domestic violence, sexual assault or stalking.
- **Treatment of Individuals Covered by Legacy State Comprehensive Paid Leave Program.** The Act provides an option for states with existing paid leave programs to continue such programs and be reimbursed through the federal program. These states are called “legacy states” and are discussed in more detail below.
- **National Average Wage Index.** “National Average Wage Index” is defined in reference to the Social Security Act.
- **Self-Employment Income.** “Self-employment income” is defined in reference to the Social Security Act, and means gross income derived by an individual from any trade or business carried on by such individual, minus the deductions allowed.
- **State.** The term state means all 50 states plus the District of Columbia and territories.
- **Wages.** For purposes of the taxes imposed by this Act, “wages” is defined in reference to section 3121(a) of the Internal Revenue Code of 1986, and also includes “compensation” as defined in the Railroad Retirement Tax Act.

### **Sec. 3. Office of Paid Family and Medical Leave.**

- **Establishment of Office.** This section establishes an Office of Paid Family and Medical Leave within the Social Security Administration. The Office of Paid Family

and Medical Leave shall be headed by a Deputy Commissioner who shall be appointed by the Commissioner.

- **Responsibilities of the Deputy Commissioner.** The Deputy Commissioner will be responsible for hiring personnel; issuing regulations; entering into cooperative agreements with other agencies to ensure the efficient administration of the program; determining eligibility, benefit amounts and making timely payments; establishing and maintaining records and records-keeping systems; preventing fraud and abuse with respect to benefits; providing information regarding all facets of the program; annually providing employers with a notice about the availability of benefits to share with employees; annually issuing a public report on benefit take-up and utilization rates; and conducting culturally and linguistically competent education and outreach to increase utilization of benefits.
- **Availability of Data.** The Commissioner of Social Security will make available to the Deputy Commissioner the data necessary to perform the duties listed above.

#### **Sec. 4. Family and Medical Leave Insurance Benefit Payments.**

- **In General (Eligibility).** In order to be entitled to family and medical leave insurance benefits, an individual must:
  - Have filed an application for such benefits;
  - Have been engaged in qualified caregiving, or anticipates being so engaged, during the 90-day period before the date the application is filed or within 30 days after such date;
  - Have wages or self-employment income at any time during the period beginning with the most recent calendar quarter that ends at least 4 months before the start of the individual's benefit period, and ending with the month before the month in which the benefit period begins;
  - Have at least \$2,000 in wages (adjusted annually based on the national average wage index) during the most recent 8-quarter period that ends at least 4 months before the beginning of the benefit period.
  - This eligibility standard makes it easier for younger, part-time and low-wage workers to be eligible for paid leave benefits.
- **Benefit Amount.** Paid leave benefits are progressively structured, meaning that low wages are replaced at a higher rate than higher wages. This structure ensures that low wage workers receive enough in benefits that they can afford to go without their usual pay. An individual's monthly benefit amount is calculated as the sum of:
  - 85 percent of the amount of the individual's average monthly earnings that are below \$1,257 (adjusted annually based on the national average wage index);

- 69 percent of the individual’s average monthly earnings between \$1,257 and \$3,500 (adjusted annually); and
  - 50 percent of the individual’s average monthly earnings between \$3,500 and \$6,200 (adjusted annually).
  - The minimum and maximum monthly benefit amounts are, respectively, \$580 and \$4,000, adjusted annually.
- **Annual Increase of Maximum and Minimum Benefit.** For individuals who become eligible for family and medical leave insurance benefits in the first full calendar year after enactment, the maximum monthly benefit amount shall be \$4,000 and the minimum monthly benefit amount shall be \$580. These maximum and minimum amounts reflect payments based on 20 caregiving days in a month. The maximum and minimum shall be indexed to the national average wage index.
  - **Reduction in Benefit Amount on Account of Receipt of Certain Benefits.** An individual’s FAMILY Act benefits will be reduced if they are receiving simultaneous benefits through a federal or state workers compensation plan or law or through a federal or state unemployment insurance law or plan.
  - **Coordination of Benefit Amount with Certain State Benefits.** If an individual lives in a state with a state temporary disability or family leave insurance program, their FAMILY Act benefits will be coordinated with the benefits received from the state program. The Commissioner will determine how coordination is to work through regulations.
  - **Benefit Period.** The benefit period is the 12-month period that begins on the first day of the first month in which the individual files for benefits, is engaged in qualified caregiving, and would meet the earnings requirements for eligibility in such 12-month period..
  - **Retroactive Benefits.** An individual may apply for benefits for caregiving days that occur 90 days prior to the application. In that case, the benefit period starts on the first day of the first month in which qualified caregiving began or on the first day of the first month during that 90-day period, whichever is later.
  - **Application.** An application for family and medical leave insurance shall include a statement that the individual was engaged in qualified caregiving within 90 days before the application date, or anticipates being so engaged within 30 days after the application date. If the qualified caregiving described in the application is because of a serious health condition of the individual or a family member, certification from a health care provider is required, and such certification shall require no more information than is required under the Family and Medical Leave Act’s certification process as set out in Section 103(b) of the FMLA (29 U.S.C. §2613(b)). If the qualified caregiving is for another reason, certification by a relevant authority is required. In all cases, the employee must attest that the employee has notified his or her employer

of the intent to take family or medical leave if the individual has an employer; self-employed people would so attest to the Commissioner.

- **Ineligibility for Benefit.** An individual is ineligible for benefits in any month in which they are receiving Social Security Disability Insurance, Old Age and Survivors Disability Insurance or Supplemental Security Income benefits or benefits from a state permanent disability program.
- **Disqualification.** An individual is disqualified from receiving FAMILY Act benefits for one year if they are convicted of making a false statement to secure FAMILY Act or Social Security benefits.
- **Review of Eligibility and Benefit Payment Determinations.**
  - **Eligibility Determinations.** The Commissioner shall provide notice of eligibility for benefits and estimated benefit amount for the month as soon as practicable after the application is received.
  - **Review.** Claimants may request review of an initial adverse determination within 20 days. The Commissioner shall provide a final determination as soon as practicable after the request for review.
  - **Benefit Payment Determinations.** The Commissioner shall pay benefits or provide notice of the reason for not paying a claim within 20 calendar days after receiving a claim. The Act contemplates that individuals will file a monthly benefit claim report with the Commissioner when requesting benefit payments.
  - **Review.** If the Commissioner determines that no payments should be made or that the claimant should receive payment for fewer days than requested, the individual may request review within 20 days and the Commissioner has 20 days to respond to the request.
  - **Burden of Proof.** An application for benefits and a monthly benefit claim report shall be presumed to be true and accurate unless the Commissioner demonstrates by a preponderance of the evidence that the information is false.
- **Definition of Monthly Benefit Claim Report.** The individual's report to the Commissioner of the number of caregiving days taken in a given month, which shall be filed no later than 15 days after the end of the month.
- **Review.** All final benefit determinations shall be reviewable under certain procedures set out for review of Social Security claims.
- **Relationship with State Law; Employer Benefits.** The Act does not preempt or supersede state or local laws that provide similar paid family and medical leave benefits.
- **Greater Benefits Allowed.** The Act does not diminish the obligation of an employer to comply with any contract, collective bargaining agreement, or any employment

benefit program or plan that provides greater paid leave or other leave rights to employees.

- **Employment and Benefits Protection and Enforcement.** It shall be unlawful for an employer to interfere with, restrain, deny or retaliate against an individual because the individual exercised or attempted to exercise any right provided in this section. This includes, but is not limited to: (1) discharging or in any other manner discriminating against an individual because they applied for, indicated intent to apply for or received family and medical leave insurance benefits, and (2) using the application or receipt as a negative factor in an employment action.
- **Restoration to Position.** It is interference if an employer fails to restore the individual to their previous position or an equivalent position once that individual returns from leave. This protection only applies to individuals who have worked for an employer for more than 90 days.
- **Maintenance of Health Benefits.** It is interference if an employer fails to maintain the individual's coverage under any group health plan (as defined in the Internal Revenue Code of 1986) while the individual is on leave. This protection only applies to individuals who have worked for an employer for more than 90 days.
- **Opposing Unlawful Practices.** An employer may not discharge or discriminate against an individual for opposing any practice made unlawful under this section.
- **Interference with Proceedings or Inquiries.** An employer may not discharge or discriminate against an individual for filing a charge, providing information or testifying in any inquiry or proceeding related to any right provided in this section.
- **Rebuttable Presumption of Retaliation.** If an employer takes adverse action against the employee within 12 months of the employee taking leave, there is a rebuttable presumption that the employer's action is retaliation.

#### **Civil Action by an Individual.**

- **Liability.** If an employer discriminates against an individual for applying for or receiving benefits, the aggrieved employee is entitled to recover lost or denied wages, salary, employment benefits and other compensation plus interest. In the absence of denial or loss of wages, salary benefits or other compensation, an aggrieved employee may recover the actual monetary losses incurred as a result of the violation, such as the cost of providing care, up to a sum equal to 60 calendar days of wages or salary. Interest may also be recovered. Liquidated damages may also be available. Aggrieved individuals are also entitled to equitable relief such as employment, reinstatement and promotion.
- **Right of Action.** Suits may be brought by or on behalf of the aggrieved individual and other individuals similarly situated.

- **Fees and Costs.** When judgment is awarded to the plaintiff, the court shall allow reasonable attorney's fees, expert witness fees and other costs to be paid by the defendant.
- **Limitations.** An individual's right to sue terminates if the Commissioner files a complaint to compel payment or to recover damages.
- **Action by the Commissioner.**
  - **The Civil Action.** The Commissioner may bring suit to recover damages on behalf of an aggrieved individual.
  - **Sums Recovered.** Any sums recovered by the Commissioner shall be held in a special deposit account to be paid to the affected individual; any sums not paid to an individual because of an inability to do so within three years shall be deposited in the Federal Family and Medical Leave Insurance Trust Fund.
  - **Limitation.** An action must be brought within three (3) years after the date of the last event constituting an alleged violation.
  - **Commencement.** An action brought by the Commissioner starts on the date the complaint is filed.
  - **Action for Injunction by Commissioner.** The district courts of the United States have jurisdiction in an action brought by the Commissioner for injunctive or equitable relief.
- **Applicability of Certain Social Security Act Provisions.** The provisions of the Social Security Act relating to over and underpayments; evidence, procedure, and certification for payment; representation of claimants and penalties shall apply to benefit payments authorized and paid out under the FAMILY Act.
- **Effective Date for Applications.** Applications for family and medical leave insurance benefits may be filed beginning 18 months after date of enactment.

## **Sec. 5. Funding for State Administration Option for Legacy States.**

- **Payments to Legacy States.** Beginning in 2025, the Commissioner shall make a grant to each state that was a legacy state in the prior year and met the data sharing requirements below. The grant will equal the lesser of: (1) the total amount of federal paid leave benefits that would have been paid to individuals who instead received benefits under a "legacy" state paid leave law, or (2) the total cost of paid leave benefits provided under a legacy state law, including employer-provided benefits. In either case, the total shall include the full cost to the state of administering the law, not to exceed 7 percent of total benefits paid.
- **Estimated Payments.** During any calendar year, if the Commissioner has reason to believe that a state will become a legacy state, the Commissioner may provide grants to the state equal to the estimated amount the state will receive in the following calendar year. This amount will be adjusted in the following year if needed.



- **Legacy State.** A “legacy state” means a state that has enacted a state law that provides paid family and medical leave benefits on or before this Act is enacted, that the state certifies will remain a legacy state for at least three years after this Act is enacted, and that provides at least 12 weeks of paid family and medical leave benefits per year, to all employees who would have otherwise been covered by this Act, and at a wage replacement at least equivalent to the rate specified in this Act.
- **Covered Employment Under the Law of a Legacy State.** “Covered employment under the law of a legacy state” means employment that would have otherwise been eligible for benefits under this Act if the state had not been a legacy state.
- **Employer-Provided Benefits in a Legacy State.** If a state allows paid leave benefits to be provided through private employer plans, any benefits provided under such plans are considered benefits from covered employment under the law of a legacy state, and any leave provided under such plans is considered leave from covered employment under the law of a legacy state. This includes benefits provided directly by the employer, through private insurance or through a multiemployer plan. The state may distribute an appropriate portion of its grant to such employers.
- **Data Sharing.** As a condition of receiving a grant, the state must agree to provide the Commissioner information about individuals receiving benefits, including names, identifying information, benefit dates and amounts and any other information needed to provide grants and coordinate between state and federal benefits. States must also submit the cost of paid leave benefits paid in any calendar year, and any other information needed to determine whether the state complied with grant requirements.

## **Sec. 6. Establishment of Family and Medical Leave Insurance Trust Fund.**

- **In General.** This section creates the “Federal Family and Medical Leave Insurance Trust Fund.” The Family and Medical Leave Insurance Trust Fund is separate and independent from the Social Security Trust Fund and would not impact its solvency.
- **Authorization of Appropriations.** This section designates start-up funds from the Treasury for administration, payment of benefits and grants to legacy states for the first three fiscal years after the date of enactment. It also directs the payroll contributions imposed under this Act to be placed in the Federal Family and Medical Leave Insurance Trust Fund.
- **Repayment of Initial Appropriation.** The start-up funds from the general Treasury will be repaid no later than 10 years after the first start-up appropriation is made.
- **Transfer to Trust Fund.** The initial start-up funds will be transferred from the general fund to the Federal Family and Medical Leave Insurance Trust Fund from time to time, as determined by the Secretary of the Treasury and based on estimates of tax revenue.

- **Management of Trust Fund.** Certain provisions of the Social Security Act regarding trustees, investments, sale of obligations, gifts and uncashed benefit checks, shall apply to the Federal Family and Medical Leave Insurance Trust Fund.
- **Benefits and Grants Paid from Trust Fund.** Paid family leave benefits and legacy state grants will be paid only from the Federal Family and Medical Leave Insurance Trust Fund.
- **Administration.** Administration costs for the family and medical leave insurance program and legacy state grant provision, including start-up costs, technical assistance, outreach, education, evaluation and reporting, will be paid from the Federal Family and Medical Leave Insurance Trust Fund.
- **Prohibition.** No funds from the Social Security Trust Fund or appropriated to the Social Security Administration to administer the Social Security program may be used for Federal Family and Medical Leave Insurance benefits or administration.

### **Sec. 7. Internal Revenue Code Provisions.**

This section sets out employee, employer and self-employed contributions to the Federal Family and Medical Leave Insurance Trust Fund. It contains amendments to the Internal Revenue Code to include a 0.2 percent tax on wages earned by employees in any calendar year after implementation, a 0.2 percent tax on the wages employers paid to employees in any calendar year, and a 0.4 percent tax on the self-employment income of every individual. The term “wages” means all remuneration for employment (including federal, state and local government employment), including the cash value of all remuneration (including benefits) paid in any medium other than cash, subject to the limits of the Social Security Act. Amendments to the Railroad Retirement Tax Act are also included to provide for a tax on the compensation earned by employees and employee representatives and the compensation paid by employers.

### **Sec. 8. Regulations.**

The Commissioner, in consultation with the Secretary of Labor, shall prescribe regulations to carry out the Act. When developing the regulations, the Commissioner shall consider the input of a 15-member advisory body that includes experts from the field and officials representing the states with paid family and medical leave programs.

### **Sec. 9. GAO Study.**

The GAO shall submit a report to Congress no later than three years after enactment that includes data on the number of claims filed; requests for review of initial adverse determinations; monthly benefit reports filed and requests for review of adverse determinations of monthly benefit reports; the average agency processing time for each type of response to these various filings; and identification and description of the cause of any excessive delays in processing claims, reviews and monthly benefit reports.

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<sup>1</sup> U.S. Bureau of Labor Statistics. (2022, September). *National Compensation Survey: Employee Benefits in the United States, March 2022*. (See Excel tables, Civilian industry workers, Leave). Retrieved 2 May 2023, from <https://www.bls.gov/ncs/ebs/benefits/2022/home.htm>

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