



December 9, 2021

## Build Back Better Act: Universal Comprehensive Paid Leave

The Build Back Better Act (BBBA; H.R. 5376), passed by the House on November 19, 2021, proposes a new federal cash benefit for eligible individuals engaged in certain types of family and medical caregiving (Title XIII, Subtitle A). In particular, the act proposes to amend the Social Security Act (42 U.S.C. §§301 et seq.) by adding Title XXII: Comprehensive Paid Leave Benefits, which would entitle eligible individuals to up to four workweeks of cash benefits in each benefit period (generally, a 12-month period). Benefits would be payable starting January 2024, and the program would be permanently authorized.

### Qualified Caregiving

The proposed cash benefits would be payable to eligible individuals engaged in *qualified caregiving* for at least four hours in a week. *Qualified caregiving* is defined as an unpaid activity engaged in by an individual in lieu of work for the following:

- the birth and care of the individual's child within 12 months of the child's birth,
- the placement of an adopted or fostered child with the individual within 12 months of the child's placement,
- the care for a *qualified family member* with a *serious health condition*, and
- the individual's own serious health condition if the individual is unable to perform the essential functions of his or her job.

### Qualified Family Member

The act defines *qualified family member*, with respect to the claimant, as a spouse (including a domestic partner) and a 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, a grandchild, or a spouse of a grandparent or grandchild; and any other individual who is related by blood or affinity and whose association with the individual is equivalent of a family relationship (as per regulations to be issued by the Social Security administrator).

### Serious Health Condition

BBBA uses the Family and Medical Leave Act (FMLA, P.L. 103-3, as amended) definition of *serious health condition*. Under FMLA, a *serious health condition* is one that requires inpatient care or continuing treatment by a health care provider. These terms are further defined by Department of Labor regulations, resulting in six scenarios that qualify as a serious health condition:

1. **Inpatient care:** care that includes an overnight stay in a medical facility and any associated period of incapacitation and treatment.
2. **Incapacity and treatment:** a period of incapacity that lasts more than three consecutive calendar days and

requires either two or more in-person visits with a health care provider, or a single in-person visit that results in a course of continuing treatment under a health care provider's supervision.

3. **Pregnancy or prenatal care:** any period of incapacity due to pregnancy or for prenatal care, with no requirements concerning a specific duration of incapacity or treatment by a health care provider.
4. **Chronic conditions:** a condition that requires periodic visits for medical treatment, continues over an extended period of time, and may cause episodic or continuing periods of incapacity (e.g., asthma, diabetes, epilepsy).
5. **Long-term or permanent conditions:** a period of incapacity due to a condition for which treatment may not be effective. The individual must be under the continuing supervision of a health care provider for his or her condition to qualify as a serious health condition.
6. **Certain conditions requiring multiple treatments:** restorative surgery after an injury or accident, or a condition that would likely result in a period of incapacity lasting three or more consecutive calendar days if not treated (e.g., dialysis for kidney disease).

A serious health condition generally does not describe a minor ailment (such as the common cold), barring special circumstances or medical complications, or a need for a routine doctor's appointments (such as an annual physical).

### Eligibility Requirements

In general, in order to claim the proposed federal benefit, an individual must have filed an application for benefits and have (or anticipate having) at least four caregiving hours in a week ending at any time during the period that begins 90 days before the date on which such application is filed or not later than 180 days after such date. In addition, the individual must have wages or self-employment income at some point during the period that begins with the most recent calendar quarter that ends at least four months prior to the beginning of the individual's benefit period and ends with the month before the month in which such benefit period begins. (For example, to be eligible for benefits starting in August 2024, an applicant would need to show earnings at any time during the period from January 2024 to July 2024.) Finally, an individual must have at least the *specified amount* of wages or self-employment income (\$2,000 in 2024 and adjusted thereafter) at any time during the most recent eight-calendar quarter period that ends at least four months prior to the beginning of the individual's benefit period. Individuals would not need to be employed to claim the benefit.

In general, individuals who receive wage compensation (including fully paid leave) from an employer while

engaged in caregiving may not claim the proposed benefit. However, individuals who receive employer-provided paid leave may claim the benefit if the sum of employer-provided paid leave and the proposed federal benefit do not exceed 100% of the individual's regular rate of pay.

Individuals who have been found to have used false statements or representation to obtain the federal benefit are disqualified from benefits for five years.

## Benefit Duration and Amount

Benefits would be calculated on a weekly basis and paid as a monthly benefit. Benefits would be payable after a waiting period, defined as the first week during the benefit period in which at least four caregiving hours occur. Eligible individuals may claim benefits for weeks in which they had at least four qualified caregiving hours and in total may claim up to the equivalent of four workweeks of qualified caregiving hours in a benefit period (typically 12 months). For example, an individual who regularly works 25 hours weekly may claim up to 100 caregiving hours in a benefit period and no more than 25 hours in a given week. The monthly benefit would be equal to the sum of the weekly benefit amounts for the weeks ending in that month.

## Initial Weekly Benefit Rate Formula

The weekly benefit amount would be equal to the product of the *weekly benefit rate* multiplied by the ratio of the creditable caregiving hours in the week to the hours in the regular workweek (i.e., weekly benefit rate x [hours of caregiving/ hours in regular workweek]). Creditable caregiving hours may not exceed the number of hours in an individual's regular workweek.

For January 2024 through December 2024, the *weekly benefit rate* would be the sum of:

- 90.138% x (the first \$290.00 of average weekly earnings [AWE])
- 73.171% x (the portion of AWE between \$290.01 and \$658.62)
- 53.023% x (the portion of AWE between \$658.63 and \$1,192.31)

An individual's AWE would be calculated as the quotient of total wages (including self-employment income) during the most recent eight-quarter calendar quarter period (two-year period) that ends four months prior to the beginning of the individual's benefit period and 104 (the number of weeks in two years). After calendar year 2024, the "bend points" of the weekly benefit formula—the dollar amounts used to calculate the weekly benefit rate—would increase annually by the growth in the national average wage index (42 U.S.C. §409(k)(1)) or would remain at the previous year's level if the average wage index does not increase.

For qualified caregiving that occurs in weeks that end within 2024 (after which a portion of the benefit formula will be adjusted), the maximum weekly benefit rate would be \$814.10. A minimum benefit is not proposed explicitly. However, because the proposal would require claimants to have at least \$2,000 in earnings in the eight-quarter period used to calculate AWE, the implicit minimum weekly benefit rate would be \$34.67 in 2024.

## Weekly Benefit Amount Examples

Eligible individuals who regularly work 40 hours/week with average earnings of \$15,080/year (AWE of \$290) could claim a weekly benefit of \$261.40 if they engaged in at least 40 caregiving hours. For such individuals, the weekly claim would be \$130.70 (i.e.,  $\frac{1}{2} \times \$261.40$ ) if they provided 20 hours of caregiving.

Individuals who regularly work 40 hours/week and have average earnings of \$62,000/year (AWE of \$1,192.31) or more could claim a weekly benefit of \$814.10 if they engaged in at least 40 caregiving hours; the weekly claim would be \$407.05 (i.e.,  $\frac{1}{2} \times \$814.10$ ) if they provided 20 hours of caregiving.

## Administration

The Social Security Administration (SSA) would administer the program and pay benefits. States that had enacted state leave insurance program laws by the time the bill is enacted would be permitted to administer the federal benefit for individuals in their states if certain conditions are met. Such states—called *legacy states*—would be reimbursed for benefits and program costs up to a maximum amount.

The act would also permit certain employers to pay benefits through an approved employer-sponsored leave program if certain conditions are met. Such employers would be reimbursed for a portion of actual benefits or national average costs associated with providing such paid leave benefits up to a maximum amount. Individuals who are eligible for leave benefits from approved employer-sponsored plans or under legacy state programs may not claim the federal benefit paid by SSA.

## Relationship to Job-Protected Leave

In general, the act does not propose to create a new entitlement to job-protected leave. However, employers who are reimbursed for providing paid leave must return an employee to the same job or to one that is equivalent in terms of pay, benefits, and employment terms and conditions to the one held prior to taking leave. Individuals claiming the benefit may otherwise receive job protection if entitled to job-protected leave under the FMLA, state leave laws, or their employers' leave policies, and coordinate such job-protected leave with the receipt of the proposed benefit. Some individuals eligible for the benefit may not have any access to job-protected leave.

## Financing

The bill proposes open-ended mandatory spending for paid leave benefits, grants to legacy states, grants to employers that provide the paid leave benefit, and capped mandatory spending for program administration costs starting in FY2022. It proposes to appropriate emergency funds for program administration starting in FY2024 if certain conditions are met.

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