

# The Family And Medical Insurance Leave (FAMILY) Act (S. 337/H.R. 947)

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At some point, nearly all workers will need to take time away from their jobs to deal with a serious personal or family illness or to care for a new child. Just 15 percent of the workforce has paid family leave through their employers, and less than 40 percent has personal medical leave through an employer-provided short-term disability program.<sup>1</sup> **A national family and medical leave insurance program would address this paid 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 (S. 337/H.R. 947) would create a **comprehensive national program that helps meet the needs of new mothers and fathers 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 child, parent, spouse or domestic partner; the birth or adoption of a child; and/or for particular military caregiving and leave purposes.
- ▶ Enable workers to earn **66 percent** of their monthly wages, up to a capped amount – ensuring that low- and middle-wage workers have a higher share of their wages replaced.
- ▶ **Cover workers in all companies, no matter their size.** Younger, part-time, lower-wage, contingent and self-employed workers would be eligible for benefits.
- ▶ Be funded responsibly by **small employee and employer payroll contributions** of two-tenths of 1 percent each (two cents per \$10 in wages), or less than \$1.50 per week for a typical worker.<sup>2</sup>
- ▶ 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. Findings and Purpose.

- ▶ **Findings.** This subsection describes the workers' need for income when family and medical needs arise, as well as the demographic changes that increase the nation's need for a national paid leave program. This subsection also catalogues the benefits that would result if all workers had access to paid leave. Benefits include positive economic outcomes for working families, businesses and the public; greater gender equity in family caregiving; improved family financial security; better health outcomes and well-being for workers and their children; enhanced worker safety; greater workforce attachment; savings to the health care system; and a reduction in new parents' reliance on public assistance and food stamps.
- ▶ **Purpose.** The Act helps workers afford time to care for family members and their own health and promotes equal employment opportunity by providing reasonable wage replacement during family and medical leaves in a manner that accommodates the legitimate interests of employers.

## Sec. 3. Definitions.

- ▶ **Caregiving Day.** A calendar day in which an individual is engaged in "qualified caregiving."
- ▶ **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.
- ▶ **Initial Waiting Period.** Individuals are subject to an "initial waiting period" of five days during which they provide care but for which benefits will not be paid. However, the waiting period can also be satisfied if an individual is engaged in qualified caregiving for 15 or more days in the month prior to the start of the benefit period.
- ▶ **Qualified Caregiving.** Any activity engaged in by an individual, other than regular employment, for which an individual would be entitled to leave under the Family and Medical Leave Act (29 U.S.C. 2612(a)) (i.e., the birth and care of a child, the adoption and care of a child, or the placement of a child in foster care; caring for a spouse, child or parent with a serious health condition; the employee's own serious health condition; and to address a "qualifying exigency" arising out of a servicemember's deployment or to care for a wounded servicemember).
- ▶ **Self-Employment Income.** "Self-employment income" has the same meaning for paid family and medical leave as it does in the Social Security Act. It is gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed.
- ▶ **State.** The term state means all 50 states plus the District of Columbia and territories.

- ▶ **Wages.** “Wages” has the same meaning as in the Social Security Act for the purposes of contribution and benefit calculations.
- ▶ **60-Day Limitation Period.** An individual is limited to 60 caregiving days (approximately 12 weeks) of paid family and medical leave within each one year benefit period.

#### **Sec. 4. 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. 5. Family and Medical Leave Insurance Benefit Payments.**

- ▶ **In General (Eligibility).** Every individual who is insured for Social Security Disability Insurance benefits under section 223(c) of the Social Security Act at the time the application is filed, has earned any income from employment or self-employment in the 12 months prior to applying for benefits, has filed an application for insurance benefits and is/was engaged in qualified caregiving shall be entitled to benefits. This eligibility standard makes it easier for younger, part-time and low-wage workers to be eligible for paid leave benefits.
- ▶ **Benefit Amount.** An individual’s paid leave benefit shall equal 66 percent of their highest annual earnings over the last three years. Benefits will be paid monthly. The 66 percent figure mirrors the New Jersey Family Leave Insurance program and ensures a wage replacement rate that is high enough to enable lower-income earners to take leave; a lower wage replacement rate makes leave unaffordable for people who earn low wages.
  - ▶ **Regular Benefit Formula:** The 66 percent benefit level is calculated by multiplying annual income by 1/18. To calculate the benefit amount for each caregiving day, the number of caregiving days an applicant uses in a month is divided by 20 (the usual number of workdays in a month).

**Example:** A person whose highest annual income in the last three years is \$34,400 and who takes five caregiving days in a month would receive \$478  $[(\$34,400 \times 1/18) \times (5/20)]$  in benefits for those five caregiving days. If the same person took the entire 20 caregiving days (or four workweeks) allowed in a month, they would receive \$1,911  $[(\$34,400 \times 1/18) \times 20/20]$  in benefits.

- ▶ **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. The maximum monthly benefit amount is set at approximately the same level as benefits provided under California’s paid leave insurance program. Research shows that the higher benefit level encourages middle-wage earners and both men and women to use the program.
  - ▶ **Minimum Benefit Calculation:** The minimum benefit is equal to the benefit level of an individual working part-time year-round at the current minimum wage of \$7.25 per hour [ $\$7.25/\text{hr} \times 20 \text{ hours} = (\$145/\text{week}) \times 4 = \$580/\text{month}$ ].
- ▶ **Limitations on Benefits Paid.**
  - ▶ **Nonpayable Waiting Period.** Individuals are not paid benefits during the initial waiting period of five days described in Section 3.
  - ▶ **Limitation on Total Benefits Paid.** Individuals are eligible for 60 caregiving days (12 weeks) in a calendar year, with no more than 20 caregiving days (i.e. workdays) payable in any one month.
- ▶ **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 begins on the first day of the first month in which the individual is entitled to benefits and lasts 365 days.
- ▶ **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 he or

she is 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 (Collective Bargaining).** 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.
- ▶ **Prohibited Acts; Enforcement.** It shall be unlawful for an employer to discharge or in any other manner discriminate against an individual who has applied for, indicated intent to apply for or received family and medical leave insurance benefits.
  - ▶ **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.**

- ▶ **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.
- ▶ **Special Rule for Railroad Employees.** Railroad employees are deemed eligible for paid leave benefits if they are eligible for Title II Social Security benefits.
- ▶ **Determination of Whether an Activity Constitutes Qualified Caregiving.** For the purposes of determining what "qualified caregiving" is, the term "spouse" includes the individual's domestic partner, and the term "son or daughter" includes a son or daughter of an individual's domestic partner.
- ▶ **Domestic Partner.** An individual in a "committed relationship."
  - ▶ **Committed Relationship.** 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, or analogous relationships are granted recognition by a state or political subdivision.
- ▶ **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. 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 to administer and pay benefits for the first three fiscal years after the date of enactment.
- ▶ **Repayment of Initial Appropriation.** The start-up funds from the general Treasury will be repaid no later than ten 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 Paid from Trust Fund.** Paid family leave benefits 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, 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 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 which 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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1 U.S. Bureau of Labor Statistics. (2017, September). *National Compensation Survey: Employee Benefits in the United States, March 2017* (Tables 16 and 32). Retrieved 22 September 2017, from <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-10.html>

2 National Partnership for Women & Families. Unpublished calculation based on 2016 median wage or salary for all workers. U.S. Census Bureau. (2017, September). *Wage and Salary Workers--People 15 Years Old and Over by Total Wage and Salary Income in 2016, Work Experience in 2016, Race, Hispanic Origin, and Sex* (Table PINC-10). Retrieved 22 September 2017, from <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-10.html>

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