

## **Family and Medical Insurance Leave Act (FAMILY Act)**

Reintroduced by Senator Kirsten Gillibrand and Representative Rosa DeLauro in 2023

### **Section 1: Short Title**

The Family and Medical Insurance Leave Act may be cited as the FAMILY Act.

### **Section 2: Definitions**

This section introduces several important concepts. They include:

1. *Caregiving days*, during which employees are engaged in qualified caregiving, and of which employees are entitled to use up to 20 per month or 60 per benefit period.
2. *Qualifying reasons for taking leave*, which include:
  - a. The birth and care of a new child; or
  - b. The adoption or placement from foster care of a new child; or
  - c. Any qualifying exigency (determined by regulations) that arise from the employee's covered service in the Armed Forces; or
  - d. In order to care for a qualified family member of the individual who has a serious health condition; or
  - e. Because of a serious health condition of the individual that makes them unable to perform the regular requirements of their employment; or
  - f. In order to seek medical care for the individual or a qualifying family member as a result of domestic violence, sexual assault, or stalking; to allow that person to obtain services from a victim services organization; to allow that person psychological or other counseling; to seek relocation; or to take legal action, which includes preparing for and appearing in legal proceedings
3. *Qualified family members*, as spouses (including domestic partners), children of any age, parents and parents of spouses or domestic partners, siblings and spouses of siblings, grandparents and their spouses, grandchildren and their spouses, and any individual related by blood or affinity whose association with the employee is equivalent to a family relationship
4. *Serious health conditions* are defined as, per the FMLA, an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider
5. *Child* is defined as any biological, foster, or adopted child, a stepchild, a child of a domestic partner, a legal ward, or a child of a person standing in loco parentis, all regardless of age.
6. *Domestic partner* is an individual with whom the employee is in a committed relationship, such that both individuals are at least 18 years of age, are the other's sole domestic partner, and both share responsibility for a significant measure of each other's common welfare. This also includes any relationship between two individuals, including same-sex relationships, granted legal recognition of a state or political subdivision of a state.
7. *Domestic violence* is defined as, per section 4002(a) of the Violence Against Women Act of 1994 (VAWA), felony or misdemeanor crimes of violence (including threats or attempts) by a current or former spouse of the victim, person with whom the victim shares a child in common, person who is cohabitating with or who has cohabitated with the victim as a spouse, or by anyone similarly situated to a spouse or otherwise covered

under the laws of the jurisdiction receiving grant monies. Here, the term “jurisdiction receiving grant monies” shall mean the jurisdiction where the victim lives or where the employer involved is located, and the definition also includes the term “dating violence” as that term is defined under VAWA.

8. *Parent* is a biological, foster, or adoptive parent of an employee, a stepparent, parent-in-law, parent of a domestic partner, or legal guardian or other individual who stood in loco parentis to the employee when the employee was a child.

### **Section 3: Office of Paid Family and Medical Leave**

This section establishes an Office of Paid Family and Medical Leave within the Social Security Administration. This office will be responsible for issuing regulations as may be needed to carry out the purposes of this Act, working with other agencies and department to efficiently administer the program, determining eligibility for family and medical leave insurance benefits, determining benefit amounts and ensuring timely payments of those amounts, establishing and maintaining records relating to the Office’s administration, preventing fraud and abuse of benefits, providing information upon request regarding the program, providing employers annual notice informing employees of the availability of benefits, annually providing public reports on usage of the program, and publishing education and outreach to the public that is culturally and linguistically tailored.

### **Section 4: Family and Medical Leave Insurance Benefit Payments**

a) *In general*: Employees are only eligible for benefits if they file an application for benefits within 30 days before or 90 days after the event necessitating leave and have wages or self-employment income that qualify them for benefits beginning with the most recent calendar quarter ending 4 months prior to when the benefit period begins and ending with the month before the month during which the benefit period begins.<sup>1</sup>

b) *Benefit Amount*: In general, lower employee wages are replaced at a higher rate than higher employee wages.

For individuals whose benefits begin in 2024, the monthly benefit rate of an individual shall be the sum of:

- (i) 85 percent of the individual’s average monthly earnings that are below \$1,257;
- (ii) 69 percent of the individual’s average monthly earnings that are greater than \$1,257 and below \$3,500; and
- (iii) 50 percent of the individual’s average monthly earnings that are greater than \$3,500 and below \$6,200.

This means that, if someone’s monthly income is \$1,256, then their leave benefit amount will be \$1,067.60, or 85% of their monthly income. If someone’s monthly income is \$2,500, their leave benefit amount will be \$1,925.96, or 85% of \$1,256 (which is \$1,067.60) plus 69% of \$1,244, (which is \$858.36).

For individuals whose benefits begin in any calendar year after 2024, their benefit amount shall either be the corresponding amount established for the preceding calendar year *or* an amount

derived from the national average wage index for the second prior calendar year, whichever is greater.

Within this subsection, an individual's average monthly earnings means 1/12 of their wages and self-employment income for the year during which they earned the most within the last three years.

For individuals whose benefits begin in 2024, the maximum benefit amount shall be \$4,000 and the minimum benefit amount shall be \$580. For individuals whose benefits begin during any year after 2024, the maximum benefit amount and the minimum benefit amount shall be derived by the national average wage index multiplied by either \$4,000 or \$580, respectively. These benefit amount payments shall be based on an individual using 20 caregiving days per month.

Benefits received by individuals under this law shall be reduced by the amount of any benefits that person may be receiving under workmen's compensation laws or unemployment laws. Moreover, any benefits received under this law shall be coordinated with other benefits an individual may be receiving through temporary disability insurance or family leave laws.

c) *Benefit Period*: An employee's benefit period is the one-year period that begins on the first day of the first month that they are eligible for benefits, either through the rise of a qualifying need, or, if they apply retroactively, on the first day the employee engaged in qualifying caregiving.

d) *Application*: Employee applications for benefits must include: a statement that the individual was or will be engaged in qualified caregiving during the 90 days before, or 30 days following, the application submission; certification that the individual is engaged in qualified caregiving or personally requires leave, either by a health care provider for medical leave or by a relevant authority for other qualifying leave; and an attestation by the applicant that they have given written notice to their employer (or the Commissioner if they do not have an employer).

e) *Ineligibility and Disqualification*: Individuals are ineligible for benefits under the FAMILY Act if, during the same month, they are entitled to disability insurance under the Social Security Act or permanent disability insurance under any other law or plan of a state or other political subdivision.<sup>2</sup> Furthermore, individuals are disqualified from accessing benefits under the FAMILY Act for one year if they are convicted of a violation under section 208 of the Social Security Act or have been found to used false statements to secure benefits under section 208.

f) *Review of Eligibility and Benefit Payment Determinations*: The Commissioner is to provide notice to an applicant as soon as practicable whether their application is approved and the estimated benefit amount. An individual may request review of an adverse determination within 20 days, or longer with good cause. If approved, the Commissioner is to provide an applicant notice of the approved benefit amount within 20 days after receipt of the monthly benefit claim. individuals are to file each monthly report no later than the 15<sup>th</sup> day after the end of each month. Individuals may request review of a monthly payment determination within 20 days, or longer with good cause, and the Commissioner must provide a final determination within 20 days of receipt of that request.

Applications under this section are to be presumed true and accurate unless the Commissioner can show otherwise by a preponderance of the evidence.

All final determinations by the Commissioner are reviewable per the procedures laid out in §205 of the Social Security Act.

g) *Relationship with State Law; Employer Benefits*: The FAMILY Act does not preempt any state or municipality provision or law that provides benefits similar to those provided under this Act, and this Act does not diminish an employer's obligation to comply with any contract, collective bargaining agreement, or program that provides greater rights to employees than under this Act.

h) *Employment and Benefits Protection Enforcement*: It shall be unlawful for anyone to interfere with, restrain, deny, or retaliate against an individual exercising or attempting to exercise rights to benefits under this Act. This includes prohibitions on: discharging or otherwise retaliating against an individual because that person received, applied or planned to apply for family and medical leave insurance benefits; interfering with an employee's right to return to their position or an equivalent position with equivalent benefits upon their return from leave taken under this Act; and failure to maintain all health benefits of an employee for any point during their leave. Employers are also prohibited from interfering with any investigations of violations of this Act, and from discharging or otherwise discriminating against an employee for opposing any of the practices listed above.

There is a rebuttable presumption that any of the adverse actions described above that are taken against an employee within 12 months of that employee taking leave shall constitute unlawful retaliation.

The rights to job restoration and continuation of health benefits only apply to employees who have worked for their employer for more than 90 days.

Any employee who shows a violation as described above shall be entitled to damages in the sum of: (1) damages equaling the employee's monetary losses (lost wages, benefits, or other monetary losses incurred as a result of the violation); (2) interest on that amount at the prevailing rate; (3) liquidated damages in the sum of the money damages plus interest unless the employer can show they had reasonable grounds for believing their actions did not constitute a violation; and (4) any equitable relief as may be appropriate including employment, reinstatement, and promotion.

Individuals have the right to bring an action for any of the damages or equitable relief described above in any federal or state court of competent jurisdiction on behalf of themselves and other individuals similarly situated. If such an action prevails, individuals have a right to recover reasonable costs, attorney's fees, and witness fees from the defendant. However, employees will not have a private right of action in cases where the Commissioner has already filed a complaint against the employer seeking the same relief, unless that action by the Commissioner has been dismissed without prejudice on motion of the Commissioner. The Commissioner may bring an action in any competent court to seek the same damages described above, and any sums

recovered by such an action shall be directly paid to each individual affected. US District Courts shall have jurisdiction in actions brought by the Commissioner to issue injunctions restraining any violations described above and to award any other appropriate equitable relief.

Any actions brought under this section must be filed within three years of the date of the last event constituting the alleged violation.

Applications for benefits may be filed beginning 18 months following the enactment of this Act.

### **Section 5: Funding for State Administration Option for Legacy States**

This section lays out rules for legacy states, or states that already have comparable paid family and medical leave insurance programs at the date of enactment of this Act and inform the Commissioner that they intend to maintain their own programs.

To qualify as a legacy state a state's paid family and medical leave law must provide at least 12 full work weeks of leave during each year to all employees who are eligible under section 4 and to all employees of the state and any political subdivision thereof. The state program must provide benefits at a wage replacement rate at least equivalent to the wage replacement rate defined under section 4.

Beginning in 2025, each year the Commissioner shall make a grant to any legacy state equal to *either* the total amount of paid benefits that would have been paid under section 4 by the Commissioner plus costs of program administration, *or* the total cost of benefits paid under the state law for the prior calendar year plus the cost of any benefits provided by an employer plus costs of program administration. If, during a given year, the Commissioner has reason to believe that a state will remain a legacy state during the following year, the Commissioner shall make estimated payments in advance of that following year.

For legacy states that permit paid family and medical leave benefits to be provided by an employer, those benefits shall be considered leave from covered employment under the law of that legacy state. Legacy states may distribute appropriate shares of the grant issued by the Commissioner to employers who provide benefits in this manner.

As a condition of receiving a grant from the Commissioner each year, all legacy states shall agree to periodically provide information to the Commissioner concerning individuals who received a paid leave benefit, including their name, information establishing their identity, the dates they received benefits, the amount of paid benefit, and other information needed for the purposes of carrying out this section. Annual data must be provided no later than July 1 of the following year.

### **Section 6: Establishment of Family and Medical Leave Insurance Trust Fund**

This section creates a trust fund within the US Treasury titled the "Federal Family and Medical Leave Insurance Trust Fund." The section authorizes appropriations from the general Treasury to the Federal Family and Medical Leave Insurance Trust Fund, including funds required for the establishment of the office per section 3, payment of benefits per section 4, and payment of grants to states per section 5, for the first three fiscal years of the program.<sup>3</sup> Revenue generated

by certain taxes under the Internal Revenue Code is also to be appropriated to the Trust Fund.<sup>4</sup> The Fund is to be managed pursuant to the Social Security Act in the manner of the Federal Old-Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund.<sup>5</sup> All payments and grants made under sections 4 and 5 of this Act shall be made from the Federal Family and Medical Leave Insurance Trust Fund only, as are any sums needed for the administration of the program. In particular, no funds from the Social Security Trust Fund or appropriated to the Social Security Administration are to be used for any benefits described under this act.

### **Section 7: Internal Revenue Code Provisions**

This section amends provisions of the Internal Revenue Code to designate taxes that will fund the Family and Medical Leave Insurance program. Employees shall contribute 0.2% of their annual income pursuant to Section 3101 of the Code. Employers shall contribute 0.2% of all wages paid to their employees annually, pursuant to Section 3111 of the Code. Self-employed individuals shall contribute 0.4% of their annual income to the fund, pursuant to Section 1401 of the Code.

The Railroad Retirement Tax Act is also amended pursuant to this section to include an analogous 0.2% tax on covered employees, employee representatives, and employers to contribute to the Federal Family and Medical Leave Insurance Trust Fund.<sup>6</sup>

### **Section 8: Regulations**

This section authorizes the Commissioner, in consultation with the Secretary of Labor, to prescribe regulations necessary to carry out this Act. In so doing, the Commissioner shall hear input from a volunteer advisory body of no more than 15 individuals that shall include experts in the subject matter and state officials experienced in administering state paid family and medical leave insurance programs.<sup>7</sup>

### **Section 9: GAO Study**

This section specifies that the Comptroller General shall issue a report to Congress as soon as practicable following the first year of the program (in this version, noted as 2024) on the family and medical leave insurance benefits paid under section 4 for any month during the first year of the program.<sup>8</sup>

<sup>1</sup> Payment of benefits is also to be governed by §§ 204, 205, 206, and 208 of the Social Security Act.

<sup>2</sup> Specifically, if an individual is eligible for benefits under §§223 or 202 of the Social Security Act, or under title XVI of the Social Security Act, then they are ineligible for benefits under this section.

<sup>3</sup> These moneys must be paid back to the Treasury within ten years after the first appropriation was made for this purpose.

<sup>4</sup> The taxes to be appropriated are those imposed by §§ 3101(c) and 3111(c) of the Internal Revenue Code with respect to wages; § 1401(c) of the Code with respect to self-employment income; and §§ 3201(c), 3211(c), and 3221(c) of the code with respect to compensation.

<sup>5</sup> The governing sections of the Social Security Act are: subsections (c), (d), (e), (f), (i), and (m) of section 201.

<sup>6</sup> These provisions will amend §§ 3201, 3211, and 3222 of the Railroad Retirement Tax Act.

<sup>7</sup> The advisors shall be composed of: 5 individuals appointed by the President, 3 appointed by the Senate majority leader, 2 individuals appointed by the Senate minority leader, 3 appointed by the Speaker of the House, and 2 appointed by the House minority leader.

<sup>8</sup> This report must include: (1) total number of applications for benefits received in any month of that year and the average number of days between receipt of application and determination of eligibility; (2) total number of requests for review of adverse eligibility determinations during that year and the average number of days between receipt of request and final determination of eligibility; (3) total number of monthly benefit claim reports filed during that year and the average number of days between receipt of the report and determination of eligibility; (4) total number of requests for review of adverse determinations relating to a monthly benefit claim report and the average number of days between receipt of the request and final determination of eligibility; and (5) identification of any excessive delays in the periods noted in paragraph 1-4 and a description of the causes for such delay.