



September 9, 2021

Ways and Means Budget Reconciliation Bill: Summary and Analysis of Paid Leave and Retirement Provisions

On Tuesday, Sept. 7, House Ways and Means Committee Chair Richard Neal (D-MA) released part of the committee's portion of the Build Back Better bill—the expected \$3.5 trillion budget reconciliation measure to advance the more progressive items within the Biden administration's legislative agenda. **This alert summarizes Subtitles A (Universal Paid Family and Medical Leave) and Subtitle B (Retirement).**

Released Committee Portions

The legislation contains 12 weeks of paid family and medical leave, investments in child-care facilities and workers, protections for the elderly and those with disabilities, requirements that employers automatically enroll employees in IRAs or 401(k)-type plans, an expansion of Medicare coverage to include new vision, dental and hearing services, and plans to modernize Trade Adjustment Assistance programs. The full text can be found below:

- Subtitle A: [Universal Paid Family and Medical Leave](#)
- Subtitle B: [Retirement \(JCT Description and Estimate\)](#)
- Subtitle C: [Child Care Access and Equity](#)
- Subtitle D: [Trade Adjustment Assistance](#)
- Subtitle E: Elder Health
 - Part 1: [Pathways to Health Careers](#)
 - Part 2: [Elder Justice](#)
 - Part 3: [Skilled Nursing Facilities](#)
 - Part 4: [Medicare Dental, Hearing, and Vision Coverage](#)

The committee will meet this week to mark up these portions of the bill. It has planned a two-day markup, meeting on Thursday, Sept. 9 and Friday, Sept. 10 at 10:00 a.m.

Remaining Committee Portions

This week's release is not the entirety of the committee's portion of the reconciliation bill. Provisions not in the draft bill released this week include:

- Tax increases for wealthy individuals and corporations or other significant revenue-raising provisions
- Increases to the Child Tax Credit (CTC) and the Child and Dependent Care Tax Credit (CDCTC), and a payroll tax credit to help raise wages for child care workers
- Green energy incentives

That portion of the package reportedly is still being developed in discussions among congressional Democrats, who are aiming for more widespread agreement on those items prior to committee consideration. The tax portion could be released as early as Friday, Sept. 10, with a markup potentially occurring early next week on Tuesday, Sept. 14 and Wednesday, Sept. 15.

SUBTITLE A—UNIVERSAL PAID FAMILY AND MEDICAL LEAVE

Section 130001. Paid Family and Medical Leave.

- Amends the Social Security Act (SSA) to create a new "Title XXII—Paid Family and Medical Leave Benefits."
- Impact: Creates a new benefit under SSA which includes 12 weeks of paid family and medical leave benefits for workers.

Section 2201. Table of Contents.

- Provides a table of contents for Title XXII.

Section 2202. Paid Family and Medical Leave Benefit Eligibility.

- Sets forth the requirements to qualify for the federal paid family and medical leave, which include:
 - Filing an application;
 - Having (or anticipate having) at least 4 caregiving hours (defined below) in a week ending at any time during the 90-day period prior to submitting an application (if the application is filed after caregiving begins), or up to 180 days after submitting the application (in advance of the anticipated need for paid leave); and
 - Having wages or self-employment income at any time during the period beginning with the most recent calendar quarter that ends at least 4 months prior to the start of the individual's benefit period and ending with the month before the benefit period begins.
- A worker's benefit period lasts for 12 months and during such period, they may receive up to 12 weeks of paid leave. Benefits begin in July 2023.
- Defines "caregiving hour" and "qualified caregiving" as activity performed that would qualify for unpaid leave under the Family and Medical Leave Act (FMLA). Expands the types of family relationship that allow workers to seek caregiving leave.
- Clarifies that if a worker is receiving wages or other compensation such as paid time off, such time will not count as qualified caregiving. Allows "topping up" of employer compensation but not above the regular rate of pay.
- Applies to full and part-time workers, gig workers and other self-employed workers.
- Provides bereavement leave, paid time off for the death of a spouse, parent, or child, but this leave is limited 3/5 of the number of hours in the worker's regular workweek (i.e., three workdays for someone who normally works five days a week). *Note*: The latest summary document states that leave is limited to 2/5 of the number of hours in the worker's regular workweek (i.e., two workdays). However, legislative text limits it to 3 days.
- Certain workers are not eligible for benefits:

- Those covered by a “legacy state” paid family and medical leave program.
- Those who are receiving employer-provided paid family or medical leave that is reimbursed under proposed Section 2210 or is not reimbursed under Section 2210 but will, when combined with the public benefit, replace more than 100% of wages.
- Impact: Creates a federal paid and medical leave program and describes who qualifies for paid family and medical leave, and under what circumstances they qualify. Leave will be provided for activities that would qualify for unpaid leave under the Family and Medical Leave Act (FMLA), though the definition of familial relationship has been expanded.

Section 2203. Benefit Amount.

- Describes how the benefit amount is calculated. With respect to benefits payable starting July 2023, the formula replaces:
 - 85% of the first \$290 of average weekly earnings plus
 - 75% of average weekly earnings between \$290 and \$659 plus
 - 55% of average weekly earnings between \$659 and \$1,385 plus
 - 25% of average weekly earnings between \$1,385 and \$1,923 plus
 - 5% of average weekly earnings between \$1,923 and \$4,808.
- Average weekly earning determinations will be based on the most recent 8 quarters of wage data ending with the quarter that ends four months before the start of the benefit period.
- The minimum number of hours that can be credited to a week is 4 hours, and a worker cannot be paid for more caregiving hours than they currently work in a regular workweek. If a worker takes partial leave in a week, the benefit amount is prorated.
- A worker must complete a one-week waiting period before benefits can start (may use employer-provided leave benefits during this waiting period). Benefits are paid on a monthly basis.
- Impact: The benefit amount is determined by using a formula designed to replace at least two-thirds of earnings for most workers and a larger share for low-income workers. Wages over \$250,000 are not counted in the benefit formula.

Section 2204. Benefit Determination and Payment.

- Details the required contents for the initial application to be completed by the worker. Sets forth procedures for applications in advance of needed leave and applications filed after leave begins (e.g., new parental leave or scheduled medical treatment).
- In order to be paid for a month, a worker who has been found eligible for benefits must file a periodic benefit claim report, no later than 60 days after the end of a month, specifying their caregiving days during said month. The 60-day time limit does not apply to a worker applying for retroactive benefits.
- The Treasury Secretary shall notify workers of the initial determination of eligibility not more than 15 days after the application has been filed. The Secretary must also establish a process for individuals who experience new reasons for caregiving during a benefit period to notify the Secretary of changing circumstances, without having to file a new application.
- Benefits will be paid out no later than 15 days after benefit determination based on the periodic claim report.
- Impact: Creates responsibilities for both workers and the Treasury Secretary regarding benefit determination and payment.

Section 2205. Appeals.

- Provides individuals with the right to appeal a determination of family and medical leave eligibility or benefits to the Treasury Secretary and to appeal a final decision of the secretary to federal court.
- Impact: Sets out the appeal rights and obligations.

Section 2206. Stewardship.

- Describes required activities to prevent disparities in benefits or access to paid family and medical leave, current underpayment and overpayment errors, and limits overpayment recovery when it might cause hardship.
- Requires the Treasury Secretary to establish procedures and penalties for fraud.
- Impact: Promotes equity and limits overpayment recovery.

Section 2207. Funding for Benefit Payments, Grants, and Program Administration.

- Appropriates sums as necessary to pay the paid family and medical leave benefits under this bill; provides grants to legacy states under section 2209; and provides grants to eligible employers under section 2210.
- Limits the total number of weeks eligible for federal payment or reimbursement through a grant to a legacy state under section 2209, within each person's twelve-month benefit period, to 12.
- Appropriates sums as necessary for administrative costs.
- Impact: Provides funding for the federal paid family and medical leave program.

Section 2208. Funding for Outreach, Public Education, and Research.

- Provides \$150 million per year in each of FY2022 through FY2026 for the Treasury Secretary to engage in a program of culturally and linguistically competent outreach and public education to ensure awareness of the federal paid and medical leave program.
- Provides \$150 million per year in each of FY2023 through FY2027 for the Treasury Secretary to fund grants for research to ensure full access to paid family and medical leave benefits, including through the detection and prevention of disparities on the basis of race, color, ethnicity, religion, sex, sexual orientation, gender identity, disability, age, or national origin.
- Impact: Provides funding for outreach, public education, and research in support of awareness and access to the federal paid family and medical leave benefits.

Section 2209. State Administration Option for Legacy States.

- Defines "legacy state" as a state that (1) had enacted a law providing paid family and medical leave benefits as of the date of enactment of this bill, and (2) beginning with the first calendar year that starts three years after the date of enactment of this bill (2025), provides a comprehensive paid leave program that covers all state and local workers in the state that are covered under this bill, and provides at least 12 weeks of paid family and medical leave benefits per year in amounts that are equivalent to the benefits in this bill.
 - State and local employees that are covered by a collective bargaining agreement may be excluded if 90% of the employees under the agreement agree to such exclusion.
 - Legacy state programs are not required to cover federal employees (they are covered by the federal program).
- Requires legacy states to enter into data-sharing agreements with the Treasury Secretary to provide the necessary data on eligible workers and on the total cost of the state program.
- Requires the Treasury Secretary to provide grants to assist legacy states with transitional costs associated with creating new technology systems and sharing information to demonstrate compliance with the legacy state standard.
- Impact: Provides an option for states with already-enacted paid leave laws which provide benefits equivalent to the new federal benefits to continue operating their own programs and be reimbursed by the Treasury Secretary.

Section 2210. Reimbursement Option for Employer-Provided Paid Leave Benefits.

- Provides two different payment mechanisms based on the different types of employer-sponsored plans:
 - (1) Insured employer plans that meet all conditions (listed below) will be reimbursed at a rate equal to 90% of the projected national average cost of providing the full benefit package outlined in the model template below, assuming no more administrative cost than the average in the publicly administered program, multiplied by the number of employees (pro-rated for part-time employees) covered by the plan.
 - (2) Employers who self-insure and pay benefits directly, whether or not they use a third party administrator to manage the plan, will be reimbursed for 90% of the cost of up to 12 weeks of qualified paid leave benefits (in a plan that is equal to or better than the public plan), unless that amount exceeds the national average weekly benefit paid in the public plan for that number of weeks multiplied by the number of weeks used, in which case the employer will be reimbursed for the national average multiplied by the number of weeks of benefits provided.
- Lists the rules and requirements for employer eligibility, which include:
 - Limits eligibility to employers who have at least one employee in a non-legacy state.
 - Requires employers who wish to receive reimbursement to notify the Treasury Secretary, certify that they will have in effect a plan that meets all the requirements, provide all documentation by the deadlines specified in (b)(2), and pay an initial application fee of \$1,000 or a renewal application fee of \$200 each calendar year.
 - Requires employer applications to include an attestation that the plan will be in effect for the full year (or in the case of a plan started mid-year, for the rest of the year) and all information needed to identify the employees and, if needed, pro-rate payments based on benefits paid to part-time workers, as well as any other information required by the Secretary.
 - Requires employers to retain all records relating to the paid family and medical leave benefits program for at least 3 years.
 - Lists employee rights that are a condition of the grant. These include: guaranteed reinstatement to current job or an equivalent job after leave; continuation of the group health insurance; the right to appeal adverse decisions internally, and, if denied benefits at that level, to the secretary; the right to receive an annual notice of available benefits and appeal rights; and a prohibition on having to pay a fee to receive coverage or benefits. These protections are conditions of the employer reimbursement in this section even if the employee's leave is not covered by the FMLA.
 - Requires employers to provide assurances that employees who exercise their right to paid leave will not be penalized, discriminated against, or retaliated against, as a condition of their reimbursement.
 - Sets forth additional requirements for self-insured plans seeking reimbursement, including having at least 50 employees, holding a surety bond to guarantee payment, and placing funds to pay benefits within a dedicated account. Self-insured plans for eligible public employees do not need to hold a surety bond but must be collectively bargained.
- Outlines the application timeline and the terms and conditions for an employer-sponsored plan to receive reimbursement, requires that all aspects be part of a written employer policy and are provided via one or more employee benefit plans, and describes additional conditions.
- Specifies that plans may be administered by an employer, an insurer, or a third-party administrator, must include a minimum of every element of the model template, provide benefits to all employees regardless of length of service or other characteristics, and meet all of the requirements above.
- **MODEL TEMPLATE:** Outlines the major elements of employer-sponsored plans which must be as good as or better than the public plan and requires the Treasury Secretary to publish a "model template" for plans to follow by July 1, 2022. Plans must meet or exceed the public plan level in all respects, including the following:
 - Providing equal or higher wage replacement at all income levels;

- Providing at least 12 weeks of available benefits;
 - Allowing leave for all federal qualifying reasons, without any preexisting condition restrictions;
 - Providing for intermittent leave;
 - Not imposing fees or costs for coverage;
 - Paying benefits at least monthly or more frequently;
 - With application processing and notification provided at least as quickly; and
 - Operating under a presumption that information provided by applicants is true unless demonstrated otherwise.
- Requires the Treasury Secretary to determine the projected national average cost that will be used to calculate reimbursement for insured plans in the following year by October 1 of the prior year, and to take into account the national average cost of providing the required benefits according to the model template, including overall probability of leave taking, projected durations and benefit levels, and assuming administrative cost no higher than for the public program.
 - Clarifies that nothing in the bill is intended to prohibit employers from providing benefits in excess of the model template or the amount of benefit that is reimbursable under the section.
 - Impact: Provides an option for employers to receive partial reimbursement for paid leave benefits they provide to their workers instead of the benefits their workers could receive from the federal program, under certain conditions.

Section 2211. Funding for Small Business Assistance.

- Appropriates sums for eligible employers that employ “covered individuals” and satisfy all requirements of the section to receive grants.
- Specifies that the amount of the one-time grant, for each worker on leave, is equal to 2.5 times the average weekly wage in the state in which the worker’s worksite is located.
- Limits the number of grants a small business can receive to 1 per employee, per year, and no more than 10 total.
- Allows the Secretary to recover the full amount of the grant and, in egregious situations, permanently ban an employer from the program if the employer makes false attestations to receive the grant or does not comply with grant requirements.
- Defines “covered individual” as an individual who takes, or anticipates taking, at least four weeks of qualified leave and for which the employer is not receiving another grant to cover all or part of replacement costs.
- Defines “eligible employer” as an employer with 50 or fewer employees and “qualified leave” to be family and medical leave covered by the public paid leave plan established in this subtitle, the plan of a legacy state, or the plan of an employer who qualifies for reimbursement under Section 2210 by offering a comprehensive plan.
- Impact: Directly appropriates sums as are necessary for the Treasury Secretary to provide grants for small businesses (with fewer than 50 employees) to help with costs associated with filling in for an employee on paid family and leave under the federal program, a legacy state program under section 2209, or an employer-sponsored program under section 2210 (such as hiring a temporary worker or paying for overtime).

Section 2212. Definitions.

- Defines terms used within Title XXII.
- Impact: Sets out definitions.

Sec. 130002. Access to Wage and Self-Employment Income Information.

- Provides the Treasury Secretary with access to wage data needed to administer paid family and medical leave.
- Impact: Allows the Treasury Secretary access to quarterly wage information from the National Directory of New Hires.

SUBTITLE B – RETIREMENT

Part 1 – Automatic Contribution Plans and Arrangements

Section 131101. Tax Imposed On Employers Failing To Maintain Or Facilitate Automatic Contribution Plan Or Arrangement.

- Imposes an excise tax of \$10 per day (adjusted for inflation) for failures to make an “automatic contribution plan or arrangement” available to most employees for plan years beginning after Dec. 31, 2022.
 - Employer and its controlled group are jointly and severally liable for the tax.
 - Tax limited to \$500,000 if failure due to reasonable cause and not willful neglect.
- An “automatic contribution plan or arrangement” means:
 - A 401(a), 403(a) or 403(b) defined contribution plan that has a cash or deferred arrangement and meets specific notice, eligibility, contribution, investment, fee and lifetime income requirements,
 - An automatic IRA arrangement that meets specific eligibility, contribution, investment and fee requirements,
 - A SIMPLE IRA that meets specific notice, contribution, investment and fee requirements, and
 - Any “grandfathered plan,” which is any 401(a), 403(a) or 403(b) plan, SEP or SIMPLE IRA established or maintained as of date of enactment.
- Default plan-designated elective deferrals must be at least 6% (but not more than 10) of compensation in the first year and must increase in 1% increments to be at least 10% in the fifth year (but not more than 15% in any year) and thereafter.
- Default investment fund generally must be a life-cycle and target date type of fund; however, must be a balanced fund for automatic IRA arrangements.
- Automatic contribution plans subject to the lifetime income requirement (generally all plans other than SIMPLE IRAs and automatic IRA arrangements) must permit participants to elect to receive at least 50% of their vested account balance in the form of a lifetime income feature, such as a life annuity. Accounts of less than \$200,000 are excepted from the lifetime income requirement.
- Impact: Forces employers that don’t already have defined contribution plans to implement such plans.

Section 131102. Deferral-Only Arrangements.

- Establishes a new type of stand-alone 401(k) plan, which is deemed to automatically satisfy the ADP and top-heavy tests if specific automatic enrollment, elective contribution levels, and mandatory annual employee notice requirements are met.
- Default plan-designated elective deferrals must be at least 6% of compensation (and cannot be more than 10%) and must increase in 1% increments to be at least 10% (and cannot be more than 15%) in the fifth plan year and thereafter, subject to the annual IRA deferral limitation (\$6,000 in 2021). Catch-up contributions of up to \$1,000 (adjusted for inflation) are allowed.
- No employer matching contributions or nonelective contributions are allowed.
- Impact: Provides another alternative retirement arrangement that accepts employee only contributions. This arrangement, if designed to meet the specific notice, eligibility, contribution, investment, fee and lifetime income requirements, would allow an employer to avoid the \$10 per day penalty described in Section 131101 of the bill.

Section 131103. Increase In Tax Credit For Small Employer Pension Plan Startup Costs Including Automatic Contribution Plan Or Arrangement.

- Modifies the existing nonrefundable income tax credit for qualified startup costs of an eligible small employer that adopts an eligible employer plan (i.e., a qualified retirement plan, SIMPLE IRA plan, or SEP).

- As modified, a nonrefundable income tax credit would be available for qualified startup costs of an eligible small employer (an employer with 25 or fewer employees) for up to **five years** (previously three years) beginning with the year the plan is first effective or, at the election of the employer, with the year preceding the first plan year.
- **Impact:** Extends the plan start-up tax credit but only for small employers that implement retirement plans meeting the new plan design requirements described in Section 131101 of the bill.

Section 131104. Credit For Certain Small Employer Automatic Retirement Arrangements.

- Makes available a nonrefundable income tax credit to small employers that newly (i) participate in certain automatic IRA arrangements, including an arrangement pursuant to a qualified state law, or (ii) maintain certain deferral-only arrangements.
- The credit equals \$500 per year for four years, beginning with the first taxable year for which an eligible employer includes an eligible automatic contribution arrangement in a qualified employer plan that it sponsors.
- An eligible small employer is one that employs 100 or fewer employees during the preceding year and did not maintain a plan during the current year or the prior two years.
- **Impact:** Provides financial assistance to small employers to help them establish retirement plans for their workforce.

Part 2 – Saver’s Match

Section 131011: Matching Payments For Elective Deferral And IRA Contributions By Certain Individuals.

- Beginning for tax years after Dec. 31, 2024, certain lower-paid eligible individuals, who are over age 18 and are not students or claimed as dependents on another individual’s tax return, will be allowed a refundable income tax credit, up to \$500 (adjusted for inflation), equal to a percentage of qualified retirement savings contributions made by the individual to his or her retirement account.
- This credit will be paid as a contribution to the eligible individual’s applicable retirement savings vehicle, and the contribution will be made as soon as practicable after the eligible individual files a tax return making a claim for the credit.
- The plan must account for this amount separately and it must not be counted toward any qualified plan annual limitations.
- **Impact:** Encourages lower paid individuals to save toward their retirement.

Section 131012. Deadline to Fund IRA with Tax Refund.

- Amends current law to change the deadline by which a taxpayer can fund their IRA with their federal income tax refund.
- A taxpayer now would be allowed to elect on their federal income tax return to have all or a portion of their refund for that year directly deposited into an IRA account and, any amount deposited through this election will be treated as if it were received by the end of the tax year for which the income tax filing was made.
- **Impact:** For tax years beginning after Dec. 31, 2022, taxpayers can proactively elect to have their tax refunds deposited into their IRAs as part of the effort to encourage individuals to save toward their retirement.

Russ Sullivan

Shareholder

Radha Mohan

Senior Policy Advisor and Counsel

Preston Rutledge

Strategic Consulting Advisor

Mark Warren

Shareholder

Charlie Iovino

Senior Policy Advisor and Counsel

Marckia Hayes

Associate

Nancy Strelau

Shareholder

Rosemary Becchi

Strategic Advisor and Counsel

Michael Marn

Policy Analyst

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