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Employment Law Note

February 2021

All In the FAMILY: Congress Reconsiders the FAMILY Act

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Washington employers have only just begun dealing with the impact of the state's new Paid Family and Medical Leave law (PFML). They are also in the midst of anxiously awaiting the Employment Security Department's upcoming rules implementing 2019's Long-Term Care Trust Act.

If that's not enough to be concerned about, another new bank of paid leave and benefits may be on the horizon.

On February 4, 2021, New York Senator Kirstin Gillibrand re-introduced a piece of proposed legislation called the "Family and Medical Insurance Leave Act, or the "FAMILY Act." The FAMILY Act, if passed, would provide a *paid benefit* to employees missing work under circumstances where they would otherwise qualify for federal FMLA leave. Senator Gillibrand had previously introduced the FAMILY Act in 2019, but the legislation is perceived as being significantly more likely to pass in 2021.

Who Would Be Eligible?

As currently drafted, any person who is engaged in "Qualified Caregiving" would be potentially eligible for a paid benefit under the FAMILY Act, which is broadly defined as any activity, "other than regular employment," that could qualify the individual to take federal FMLA leave. This would include pregnancy, childbirth, the new placement of an adopted or foster child, caring for one's own serious health condition or that of a family member, and any other activity for which federal FMLA leave could be approved.

There would be additional eligibility requirements as well. For example, in order to apply for paid leave benefits under the FAMILY Act, individuals would need to be otherwise actively paying into the federal Social Security System. They would also be required to file an application for benefits with the Social Security Administration, and to have some amount of "earned income from employment" during the 12 months before their FAMILY Act benefits application.

What Benefit Would Be Potentially Available?

Applicants for benefits under the FAMILY Act would, if approved, receive a benefit during any month in which they engage in at least one "Caregiving Day"--essentially, a day in which they engage in Qualified Caregiving.

An applicant's potential benefit would be based on two-thirds of their highest annual wage during the most recent three-year period. For example, an individual whose highest annual income during the most recent three-year period was $60,000 per year could receive a maximum potential FAMILY Act benefit of $3,333.33 per month (two-thirds of a monthly wage of $5,000.00). The statutory cap on monthly benefits would be $4,000 per month initially and would be indexed to the Social Security Act's average wage index after that. Applicants with 20 or more Caregiving Days in a month would receive a full benefit. Applicants with fewer than 20 Caregiving Days in a month would receive a reduced benefit to reflect the actual number of Caregiving Days that month. The FAMILY Act provides for a five-day waiting period in most instances before benefits would begin. Monthly benefits would be reduced by any benefits "otherwise received" by the individual in question, such as Social Security disability benefits and unemployment compensation benefits.

Benefits would be available for up to a maximum of 60 total Caregiving Days in any "Benefit Period" --which means (in most cases) the one-year period beginning on the first day of the month in which the employee has applied for benefits. However, no more than 20 Caregiving Days would count against this 60-day limit in any month, meaning that an individual engaged in Qualified Caregiving for an entire month could conceivably receive three months of full benefits under the FAMILY Act. Also, the FAMILY Act provides for retroactive benefits for Qualified Caregiving that takes place as early as 90 days before the individual actually applies for benefits.

Who Would Determine Eligibility?

The Social Security Administration would determine eligibility for benefits under the FAMILY Act. As the Act is currently drafted, Employers would have no input in the

process. In fact, the FAMILY Act does not contemplate any role at all for employers in the application or benefits process, although applicants would be required to attest that they have given "written notice of [their] intention to take family or medical leave" to their employer, if they have one.

Applicants for FAMILY Act benefits would be required to furnish certifications of their eligibility, similar to those sometimes required under the FMLA, but applicants would send those certifications to the Social Security Administration. (They may also send those certifications to their employers if they are also requesting a leave of absence under the federal FMLA.)

How Would All of This Be Funded?

The Social Security Administration would pay all FAMILY Act benefits. The FAMILY Act envisions those benefits being drawn from a new trust fund, administered by the Social Security Administration and funded by a new excise tax on employers. The amount of the tax would be 0.2% of all compensation paid to the employer's employees. All United States employers would pay this new excise tax, regardless of the employer's size and regardless of the number of employees.

What Would Be the Impact?

The impact of the FAMILY Act would be very significant. It would not merely transform FMLA leave into paid leave but would create **a new federal entitlement program** that also effectively extends the amount of leave that is available to every employee. As currently written, employees could theoretically stack fully paid FAMILY Act and PFML leave for as long as seven and a half months (18 weeks of PFML, stacked with three months of full FAMILY Act benefits).

Also, while the FAMILY Act refers to the FMLA's eligibility criteria to determine whether or not an applicant is engaged in Qualified Caregiving, there is nothing in the FAMILY Act requiring (or suggesting) that FAMILY Act leave and benefits would necessarily run concurrently with federal FMLA leave. The FAMILY Act does not require that applicants for benefits have any FMLA time available (or even be eligible for FMLA leave). Applicants would not even need to be actively employed, so long as they had at least some earned income from employment during the prior year.

What if a FAMILY Act applicant has no available leave? The employer may still be required to provide them with leave, potentially up to the FAMILY Act maximum. While the Act does not explicitly state that employers must provide a leave of absence concomitant with a benefits application (apart from making a general reference to the Act's "leave rights," when discussing how the Act does not diminish leave rights under other laws), the Act would make it unlawful to "discharge or in any other manner discriminate" against an employee who has "applied for" or "indicated an intent to apply for" benefits. Thus, if a new employee, ineligible for any form of leave, announces an intention to take leave and apply for FAMILY Act benefits, their employer would likely be required to approve their request.

In part because of this, employees may be able to stack their FAMILY Act leave atop federal FMLA time and PFML time, potentially giving them *more than ten months* of available paid leaves.

In sum, the FAMILY Act, if enacted, would have a direct financial and operational impact upon virtually every United States employer. Employers would be wise to track the Act's progress through Congress. If you are concerned about the potential impact of the FAMILY Act on your organization's leave-of-absence policies and practices, the lawyers at Sebris Busto James can advise you about the best steps to take to prepare for compliance.

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