AMERICAN BENEFITS COUNCIL

LEAVE Coalition

Leveraging Employers And Valuing Employees to Ensure
Federal Rules for Nationwide Employers

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BUILD BACK BETTER ACT UNIVERSAL PAID FAMILY AND MEDICAL LEAVE OPERATIONAL ISSUES

The American Benefits Council ("the Council") supports universal paid leave and the overall goal of the family and medical leave provisions of the Build Back Better Act (BBBA).[1] However, as currently structured the paid leave measure creates numerous inconsistencies with existing law and other operational impediments.

The table below and the detailed discussions that follow it identify numerous operational challenges in the legislation and set forth specific changes to remedy these serious problems, thereby enabling the legislation to successfully meet its objectives. Unless modified, these issues will create confusion for workers and complexity for employers, impairing many employers' ability and willingness to continue providing paid family and medical leave benefits directly to their employees. If that happens, it will significantly increase the federal government cost of this program as workers turn to the new federal program to obtain benefits.

Most of these suggested modifications must be addressed statutorily. Even where the regulatory process can be leveraged, specific statutory authorization may be required. Either way, the Council has tried to be mindful of "Byrd Rule" considerations.

	Method to Fix	
	Statutory	**Regulatory**
"Eligible Employer" Programs and Uniformity		
Update BBBA to include Council proposals to give legacy and non-legacy states incentives to offer a private plan alternative for "eligible employers" (i.e., those employers that qualify for federal grants because their paid family and medical leave programs meet minimum federal standards).	✓	✗

[1] All references herein to the "Build Back Better Act" or "BBBA" are to Subtitle A ("Universal Paid Family and Medical Leave") of the version of the BBBA approved by the House Committee on Ways and Means on September 15, 2021.

	Method to Fix	
	Statutory	**Regulatory**
"Eligible Employer" Program Design		
Update BBBA to specifically permit eligible employers to follow the Family and Medical Leave Act's (FMLA) 1,250-hour rule, instead of making their paid leave programs available as of the first day of employment.	✓	✗
Update BBBA to permit eligible employer programs to follow the FMLA's intermittent leave rules.	✓	✗
Update BBBA to provide flexibility for eligible employers to exclude part-time, seasonal, and temporary employees, since those individuals would still be eligible to receive benefits from the federal paid family and medical leave program.	✓	✗
Update BBBA to add a specific carve out from eligible employer programs for employees who are subject to a collective bargaining agreement.	✓	✗
Update the BBBA to eliminate the requirements for eligible employers that choose to self-insure to set aside assets in a dedicated account to pay benefits, and to obtain a surety bond.	✓	✗
Update the BBBA to clarify that employers can use existing parental, short- and long-term disability, and paid time off (PTO) programs to satisfy the eligible employer requirements and qualify for the federal grants.	✓	This potentially can be addressed through the regulatory process, but a statutory solution would be preferable.

	Method to Fix	
	Statutory	**Regulatory**
Employer Role in Facilitation of Applications for Federal Paid Family and Medical Leave Benefit		
Update the BBBA to specifically address employer and employee obligations that would be unique to the federal paid family and medical leave benefit (e.g., employer requirements relating to supporting an employee's claims for benefits with payroll or other information)	To the extent this involves employer mandates, it could be vulnerable to a Byrd Rule challenge.	Some of these issues could be addressed in regulations if specifically authorized by statute.
Update the BBBA to specify more robust requirements relating to employer and employee responsibility for administering paid family and medical leave benefit claims, in the case of employees of employers not subject to the FMLA.	To the extent this involves employer mandates, it could be vulnerable to a Byrd Rule challenge.	Some of these issues could be addressed in regulations if specifically authorized by statute.
FMLA Integration with the Federal Paid Family and Medical Leave Benefit		
Update BBBA to mirror the FMLA's eligibility criteria for employees of employers subject to the FMLA.[2]	✓	✗
Update the BBBA to mirror the FMLA rules for calculating the 12-month benefit period.	✓	✗

[2] Note that this is also relevant to the employer's role in facilitating applications for the federal paid family and medical leave benefit.

"Eligible Employer" Programs and Uniformity

The BBBA would give employers the option of providing a paid family and medical leave benefit directly to their employees in lieu of the federal paid family and medical leave benefit, and to be considered an "eligible employer." if their programs meet certain minimum requirements. Federal grants will be available to offset a significant portion of the costs of providing this benefit for employers that qualify. However, the BBBA does not protect "eligible employers" from having to comply with legacy state paid family and medical leave programs, or any additional paid family and medical leave requirements that might be imposed in the future by legacy states, non-legacy states, or local government entities.

- **Why does this matter?**
    - Employers already face significant challenges trying to comply with different rules in the nine states (plus the District of Columbia) that currently have paid family and medical leave programs ("legacy states").
    - Many employers will be reluctant to undertake the additional burdens of complying with the requirements needed to be an "eligible employer" under the BBBA, even if very substantial federal grants are available, if they also have to continue to contend with different rules in legacy (and potentially non-legacy) states.
- **How can this be remedied?**
    - The Council has developed legislative proposals to incentivize states to create special safe harbors for "eligible employers," so that employers qualifying for federal grants would also qualify for these state-based safe harbors.
        - These proposals have been drafted to avoid any Byrd Rule problems by tying the incentives to federal spending.
    - **This is a statutory issue. It cannot be resolved through the regulatory process.**

"Eligible Employer" Program Design

The BBBA would impose numerous design requirements on "eligible employer" programs. Although these types of requirements are expected, there should be an effort to balance employees' access to paid leave with employers' needs to manage their business and workforce.

- **Why does this matter?**
    - Excessive complexity and a lack of flexibility will discourage employers from becoming "eligible employers".
    - If employers choose to let their employees claim the federal paid and family medical leave benefit instead of offering "eligible employer" programs, the overall cost to the federal government will be significantly higher.
- **How can this be remedied?**
    - Update the BBBA requirement for eligible employers to provide paid family and medical leave benefits to "all employees … regardless of length of service, job type, membership in a labor organization, seniority status, or any other employee classification" as follows:
        - Specifically permit eligible employers to follow the FMLA's 1,250-hour rule, instead of making their paid leave programs available as of the first day of employment.
        - Permit eligible employer programs to follow the FMLA's intermittent leave rules.
        - Provide flexibility for employers to exclude part-time, seasonal, and temporary employees, who would still be eligible to receive benefits from the federal paid family and medical leave program.
        - Add a specific carve out for employees who are subject to a collective bargaining agreement.
        - **These are all statutory issues that cannot be resolved through the regulatory process.**
    - Update the BBBA to eliminate the requirements for eligible employers that choose to self-insure to set aside assets in a dedicated account to pay benefits, and to obtain a surety bond.
        - Only larger employers, most of whom already self-insure more complex benefits such as group health benefits, are likely to self-insure their paid family and medical leave programs.
        - Unlike health or retirement benefits where employee contributions are typically involved, paid leave – by definition – only involves employer funds. Employers are not obligated to set aside money in

separate accounts, or post surety bonds to pay wages and salaries. Requiring them to do so to meet paid leave obligations is completely unnecessary and adds cost and complexity for no logical purpose.

- **This is a statutory issue. It cannot be resolved through the regulatory process.**

- Update the BBBA to clarify that employers can use existing parental, short- and long-term disability, and paid time off (PTO) programs to satisfy the eligible employer requirements and qualify for the federal grants.

    - Employers can update existing programs to meet the substantive requirements for eligible employer programs more easily than they can replace popular employee programs with a new federal program that delivers the exact same benefits.

    - **This potentially could be accomplished through the regulatory process, but for clarity a statutory solution would be preferable**.

EMPLOYER ROLE IN FACILITATING APPLICATIONS FOR FEDERAL PAID FAMILY AND MEDICAL LEAVE BENEFIT

Any time an employee needs to take leave – whether it is paid or unpaid, legally mandated or pursuant to the employer's voluntary leave policies – the employer is necessarily a key stakeholder in that process. Other than the fact that some leave requests under the BBBA will also be covered by the FMLA, the BBBA does not contemplate any employer role in this process. This raises numerous questions that need to be addressed in order to protect the interests of employees and employers, and to ensure the effective operation of the federal paid family and medical leave benefit.

- Will employers be required to screen leave requests and determine eligibility for Federal paid family and medical leave benefits, or will that process be done solely by the Treasury Department?

- Will employers have any obligation to answer employee questions about their potential eligibility for the Federal paid family and medical leave benefit?

- Other than requiring employees to give employees notice of the need for leave no more than seven days after the need arises, what (if any) obligations will employees have to explain to employers:

- Why they need leave?
- When they expect to take the leave?
- When and how they expect to take intermittent leave, if applicable?
- How much leave they need?
- When they will be returning to work?

- Will the employee and/or Treasury Department have any obligation to share the following with employers regarding an employee's application for the federal paid family and medical leave benefit?
  - Whether the employee's application is approved or denied
  - When the employee's 12-month benefit period begins and ends
  - What leave qualifies for the Federal paid family and medical leave benefit
  - How much federal paid family and medical leave benefit an employee has used during the current 12-month benefit period

- When an employee is absent from work due to a qualified leave event, the employee may be paid by the employer while the Treasury Department adjudicates the claim. How will the Treasury Department ensure that employees are not paid more than 100% of wages?
  - If an employee is overpaid, can an employer recoup the overpayment from future wages?

- The BBBA provides that individuals applying for the federal paid family and medical leave benefit must initially provide certain information and attestations (including that they notified their employer of the need to be absent from work no more than seven days after the need arose), and that the information will be "presumed to be true and accurate." To rebut this presumption, the Secretary of Treasury must demonstrate "by a preponderance of the evidence that information contained in the application or periodic benefit claim report is false." Based on that:
  - What obligations will employers have to provide documentation (e.g., number of hours in a regular workweek, pay records, leave requests, etc.) supporting an employees' claim for federal paid family and medical leave benefits?

        - Will any such requirement be automatic with respect to any employee who applies for the federal paid family and medical leave benefit, or will it be upon request by the Treasury Department?

        - If employers will be expected to directly provide the Treasury Department with otherwise confidential information relating to an employee's request for leave, how will potential conflicts with other federal, state, and local privacy laws be addressed?

        - What, if any, obligations will employers have to notify the Treasury Department if they have reason to believe an employee is improperly receiving the Federal paid family and medical leave benefit?

- **Why does this matter?**

    - In order to manage workforce and business needs employers must be informed when employees will take leave, how much leave they need, and when they plan to return to work.

    - A recent public opinion poll demonstrates that employees clearly prefer the one-stop-shop convenience of engaging with their employers rather than managing multiple processes with their employer as well as the Treasury Department.[3]

    - Employees will be discouraged from relying on the federal paid family and medical leave benefit if there is significant uncertainty about their eligibility, the availability of job protection, etc.

- **How can this be remedied?**

    - The BBBA should be updated to mirror the FMLA's eligibility criteria for employees who work for employers subject to the FMLA.

        - This would ensure that most federal paid family and medical leave claims would also be subject to the FMLA's well-established administrative processes.

[3] See September 17, 2021 Memo from ALG Research regarding "Key findings from research on paid leave," available at: https://www.americanbenefitscouncil.org/pub/30B714C6-1866-DAAC-99FB-E18AFA825CAE.

        - No amendment to the FMLA is needed to mirror eligibility criteria.

    - The BBBA should be updated to specifically address employer and employee obligations that would be unique to the federal paid family and medical leave benefit (e.g., employer requirements relating to supporting an employee's claims for benefits with payroll or other information)

        - To the extent these BBBA changes involve imposing requirements on employers, this approach could be vulnerable to challenge under the Byrd Rule

    - The BBBA should be updated to specify more robust requirements relating to employer and employee responsibility for administering paid family and medical leave benefit claims, in the case of employees of those employers not subject to the FMLA.

        - To the extent these BBBA changes involve imposing requirements on employers, this approach could be vulnerable to challenge under the Byrd Rule

    - **The regulatory process may be available to address *some* of these discrepancies**

        - It is not clear if the Treasury Department would be able to prescribe administrative requirements for employers without specific statutory authorization

    - **Due to tremendous uncertainty on these critically important operational matters, statutory solutions, to the extent possible, are strongly preferred.**

FMLA Integration with the Federal Paid Family and Medical Leave Benefit

Even though the BBBA cross-references the FMLA for purposes of establishing certain basic eligibility criteria for the proposed federal paid family and medical leave benefit, the BBBA cannot directly amend the FMLA. This will lead to a number of inconsistencies and inequities that cannot be addressed or corrected through the regulatory process.

- Depending on the reason an employee is claiming the federal paid family and medical leave benefit, the period of paid family and medical leave may or may not count against the employee's FMLA entitlement.

- Depending on whether an employee has satisfied the FMLA's 1,250 hour rule, the period of paid family and medical leave may or may not count against the employee's FMLA entitlement.

- Depending on how an employer measures the 12-month period for FMLA purposes, the period of paid family and medical leave may or may not count against the employee's FMLA entitlement.

- **Why does this matter?**

    - If the leave does count as FMLA leave, the employee will get FMLA job and benefit protection for the paid leave period.

    - If it does not count as FMLA leave, the employee can exhaust their paid leave benefit and still be eligible for up to 12 weeks of unpaid FMLA leave.

    - These different outcomes for otherwise similarly situated employees are due to the fact that the BBBA leverages some FMLA eligibility criteria, but not all. Additionally, the BBBA uses the FMLA's reasons for taking paid family and medical leave, but also expands them by broadening the definition of "family member."

- **How can this be remedied?**

    - The BBBA should be updated to mirror the FMLA's eligibility criteria for employees who work for employers subject to the FMLA.

    - The BBBA should be updated to mirror the FMLA rules for calculating the 12-month benefit period.

    - No amendment to the FMLA is required.

    - **This is a statutory issue. It cannot be resolved through the regulatory process.**

The FMLA requires employers to give employees time off for qualifying leave, to continue health benefits during FMLA leave, and to guarantee that employees can return to the same or a comparable position. These protections will apply to paid family and medical leave to the extent that it also qualifies as FMLA leave. However, the BBBA cannot amend the FMLA to extend these protections to employees claiming the paid family and medical leave benefit, and they cannot be implemented through the regulatory process.

- **Why does this matter?**
    - If an employer does not offer time off for reasons that otherwise qualify for the paid family and medical leave benefit, employees might be forced to choose between taking leave and keeping their jobs.
    - Even if employees can take the time off, the potential interruption in health benefits might prevent employees from taking advantage of the paid family and medical leave benefit.
    - Without the assurance that they will have a job to come back to, employees might take less time off than they need or forgo leave altogether even though the paid family and medical leave benefit is available.

Clearly, any of these results would thwart the purpose of creating a federal paid leave program.

- **How can this be remedied?**
    - The BBBA should be updated to mirror the FMLA's eligibility criteria for employees who work for employers subject to the FMLA.
    - No amendment to the FMLA is required to achieve this.
    - **This is a statutory issue. It cannot be resolved through the regulatory process**.