

The Healthy Families Act Mandates At Least 56 Hours of Paid Sick Leave

H.R. 2460/S. 1152 Would be Make Sick Leave Available to Part-Time Employees and Permit Paid Leave to be Taken Intermittently

As a central component in the Democratic Congress' "family friendly" agenda in prescribing workplace flexibility and broad employer-provided paid leave mandates—the "Healthy Families Act" (HFA) (H.R. 2460/S. 1152)—has been reintroduced by Rep. Rosa DeLauro (D-CT) and Sen. Edward Kennedy (D-MA). This expansive mandate would require employers to provide 56 hours of paid sick leave per year. The bill contains minor improvements over the previous version of the legislation but is more expansive in some areas, most notably by requiring paid sick leave be provided to all employees. For employers who already provide equivalent or more generous leave benefits to their employees, the greatest challenge of the bill will conforming to the bill's highly prescriptive requirements regarding how those benefits are provided.

All Employees Entitled to 56 Hours of Annual Paid Sick Leave Under the HFA, employees working for an employer with 15 or more employees would "earn" one hour of paid sick leave for every 30 hours worked up to a maximum of 56 hours per year. This would apply to all employees regardless of full or part-time status, whereas the previous version of the legislation would have applied only to employees who work 20 or more hours per week or 1000 hours per year. Accordingly, the HFA does not exempt part-time employees. Unlike the FMLA which requires 12 months of employment and 1,250 hours of work annually for an employee to be eligible for leave, the HFA makes all employees immediately eligible for paid sick leave and they can use accrued leave after 60 calendar days of employment. Thus, many temporary and seasonal employees would likely be eligible for paid sick leave.

Ability to Take More Than 56 Hours Per Year The legislation provides that employees may "use the paid sick leave as the time is accrued" and unused HFA leave may be carried forward to the next year. While an employer is not required "to permit an employee to accrue more than 56 hours of earned paid sick leave at a given time," employees could continue to bank paid sick leave from year to year and use more than 56 hours of paid sick leave in any calendar year. In addition, under the HFA, if an employee is separated from employment but is rehired within 12 months, the employer must restore the employee's previously accrued paid sick time and the employee may use and accrue additional paid sick time upon reemployment. An employer, however, is not required to pay out or reimburse an employee for unused paid sick time upon his or her termination, resignation, retirement, or other separation from employment.

Sick Leave Available on Hourly Basis or Less Employees could use paid sick leave for periods of less than a full workday and at least on an hourly basis, but employees could also likely use the paid leave in fractions of an hour. The current version of the HFA permits employees to "use the paid sick time as the time is earned" and employers must "permit each employee" to earn one hour of paid sick leave for every 30 hours worked. Under the previous version of the bill, employees could take paid sick leave for periods less than a full workday on the lesser of an hourly basis or the "smallest increment that the employer's payroll system uses to account for absences or use of leave." While that provision is no longer in the legislation, the practical result will likely be the same. The HFA is silent regarding whether paid time is accrued or "earned" in fractions of an hour. Because most employers track work time in fractions of an

hour, paid sick leave would likely be determined to accrue in fractions of an hour. Accordingly, employees would likely be permitted to take HFA leave in less than one-hour increments.

More Expansive Uses of Paid Sick Leave Than Under FMLA The bill provides that employees may use paid sick leave for absences due to their own “physical or mental illness, injury, medical condition,” to obtain a “medical diagnosis or care, or preventative medical care” or attend to activities associated with “domestic violence, sexual assault, or stalking” including taking legal action, seeking medical attention, relocating, or recovering. In addition, paid leave could also be taken for the same reasons to care for or assist a “child, parent, spouse, or any other person related by blood or affinity whose close association with the employee is the equivalent of a family relationship” such as domestic partners. This standard is much more expansive than the FMLA, which provides leave for an employee’s “serious health condition” or to care for his or her spouse, children, or parents for the same reason.

Inadequate Notice & Certification Requirements Under the bill, employers have little protection against employees taking the paid leave for reasons that ultimately prove ineligible for the leave. Employees must, either orally or in writing, request the paid sick leave explaining the reason for the duration of the leave. The bills would require employees to provide seven days’ notice if the leave is foreseeable or as soon as the employee is aware of the need to use the leave. An employer may require that a health care professional certify the leave if it extends for more than three consecutive workdays. In that case, employees must provide the employer the certification no later than 30 days after the first day of leave. But employers cannot deny or delay the leave on the grounds that they have not received the certification. Under the HFA, employers would have already paid the employee for the sick leave and may have to wait as long as 30 days to determine whether the reason for the leave and certification are legitimate.

Employers’ Existing Leave Policies Vulnerable In a revised provision, employers with paid leave policies that provide an equivalent amount of leave to employees as that mandated by the HFA are not “required to permit employees to earn additional paid sick time” so long as the paid leave may be used “for the same purposes and under the same conditions” as required by the legislation. It is unclear, however, whether this provision would be interpreted so that most employer-provided paid leave programs would be considered to satisfy the demands of the HFA or whether such paid leave programs would have to meet a high threshold of hyper-technical requirements.

Non-Employees Able to File Lawsuits The HFA’s discrimination and remedies provision are largely the same as those under the FMLA, with one notable exception. The HFA allows employees, individuals, and others similarly situated to bring suit against an employer whereas the FMLA only permits employees to sue. This would unnecessarily increase litigation under the bill, which already includes multiple vague provisions and terms.

Litigation as an Enforcement Mechanism Too Heavy-Handed A significant problem with the HFA is that paid sick leave claims would be enforced through private lawsuits. But the HFA’s enforcement mechanism is grossly disproportionate to the monetary amount that would be in dispute, which in most cases would be a few days or even hours of paid sick leave. A more responsible approach would be adopting a low-cost, more effective and efficient administrative enforcement procedure through a government agency such as the Department of Labor similar to how claims of unemployment compensation are handled in the states.