



Memorandum

April 29, 2008

TO: Hon. Carolyn B. Maloney
Attention: Elizabeth Down

FROM: Jon O. Shimabukuro
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SUBJECT: H.R. 5781, the Federal Employees Paid Parental Leave Act of 2008

This memorandum discusses H.R. 5781, the Federal Employees Paid Parental Leave Act of 2008 (“FEPPLA”), introduced by Rep. Carolyn B. Maloney on April 14, 2008 and amended by the House Committee on Oversight and Government Reform on April 16, 2008.¹ FEPPLA would amend section 6382 of title 5, U.S. Code, the Congressional Accountability Act (“CAA”), and the Family and Medical Leave Act (“FMLA”) to provide four workweeks of paid parental leave to most federal and congressional employees. This memorandum reviews the changes proposed by FEPPLA and pays particular attention to the employees who would be affected by the legislation.

Under existing law, most federal and congressional employees are entitled to a total of 12 workweeks of unpaid leave during any 12-month period because of the birth of a child, the placement of a child for adoption or foster care, to care for specified family members with a serious health condition, or because of an employee’s own serious health condition.² FEPPLA would allow a covered employee to substitute up to four workweeks of paid parental leave for any of the unpaid leave permitted for the birth of a child or the placement of a child for adoption or foster care.³ The measure would not allow such a substitution because of a serious health condition.

Under FEPPLA, an employee would not be required to use all or any portion of accrued annual or sick leave before being allowed to use the paid parental leave provided by the

¹ This memorandum is a revised version of an April 7, 2008 memorandum prepared for Rep. Carolyn B. Maloney.

² See, e.g., 5 U.S.C. § 6382(a)(1); 2 U.S.C. § 1312(a)(1).

³ FEPPLA would also enable the Director of the Office of Personnel Management to promulgate regulations to increase the amount of paid parental leave available under section 6382 of title 5, U.S. Code, to a total of not more than eight workweeks based on the consideration of specified factors. See H.R. 5781, 110th Cong. § 2(a)(3) (2008).

measure. However, paid parental leave provided under FEPLA would not accumulate for subsequent use if it was not used before the end of the 12-month period.

Paid Parental Leave Under Title 5, U.S. Code

Section 2(a) of FEPLA would amend section 6382 of title 5, U.S. Code, to provide paid parental leave to most federal employees. Section 6382, which discusses generally the availability of family and medical leave, was added to title 5 as part of the FMLA.⁴ 5 U.S.C. § 6381(1) defines the term “employee” for purposes of section 6382. In providing a definition for the term, 5 U.S.C. § 6381(1) references two other definitions sections of the U.S. Code: 5 U.S.C. § 6301(2) and 5 U.S.C. § 2105. Most federal employees appear to be contemplated by 5 U.S.C. § 2105. For example, 5 U.S.C. § 2105(a) states:

For the purpose of [title 5 of the U.S. code], ‘employee’, except as otherwise provided by this section or when specifically modified, means an officer and an individual who is –

(1) appointed in the civil service by one of the following acting in an official capacity –

- (A) the President;
- (B) a Member or Members of Congress, or the Congress;
- (C) a member of a uniformed service;
- (D) an individual who is an employee under this section;
- (E) the head of a Government controlled corporation; or
- (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

Some federal employees, however, are not considered to be “employees” for purposes of section 6382. These individuals are identified in 5 U.S.C. § 6301(2) and 5 U.S.C. § 6381(1)(A). The group of excluded employees includes the following: any individual employed by the government of the District of Columbia; any individual employed on a temporary or intermittent basis; any employee of the Government Accountability Office (“GAO”) or the Library of Congress (“Library”); any part-time employee who does not have an established regular tour of duty during the administrative workweek; any employee of the Panama Canal Commission when employed on the Isthmus of Panama; any employee of either House of Congress or of the two Houses; any employee of a corporation supervised by the Farm Credit Administration if private interests elect or appoint a member of the board of directors; any alien employee who occupies a position outside the United States, except as provided by 5 U.S.C. § 6310; any chief of mission, as defined in section 102(a)(3) of the Foreign Service Act of 1980; and any officer in the legislative or judicial branch who is appointed by the President.⁵

⁴ See Pub. L. No. 103-3, § 201(a), 107 Stat. 6, 19 (1993).

⁵ Eligibility for benefits is also subject to specified length of service requirements. Under 5 U.S.C. § 6381(1)(B), an employee must have completed at least 12 months of service as an employee to be eligible for benefits.

Although congressional employees and employees of GAO and the Library are excluded from coverage under section 6382, they remain eligible for family and medical leave benefits pursuant to the CAA and the FMLA. Sections 3 and 4 of FEPPLA would address this distinction, and provide paid parental leave to these employees by amending the CAA and the FMLA.

Paid Parental Leave for Congressional Employees

Section 3(a) of FEPPLA would amend section 202 of the CAA to provide paid parental leave to congressional employees. In general, the CAA applies twelve employment statutes, including the FMLA, to congressional employees.⁶ Section 202(a)(1) indicates that the rights and protections established by the FMLA will apply to covered employees.⁷ Section 101(3) of the CAA defines the term “covered employee” for purposes of section 202(a)(1).⁸ Section 101(3) states that the term includes any employee of the following: the House of Representatives; the Senate; the Capitol Guide Service; the Capitol Police; the Congressional Budget Office; the Office of the Architect of the Capitol; the Office of the Attending Physician; the Office of Compliance; and the Office of Technology Assessment.⁹ If enacted, FEPPLA would permit covered employees to substitute up to four workweeks of paid parental leave for any of the unpaid leave permitted for the birth or placement of a child.

Paid Parental Leave for GAO and Library of Congress Employees

Section 202(c)(1)(A) of the CAA amended the FMLA to include GAO and the Library within the statute’s definition for the term “employer.”¹⁰ Although public agencies have always been included within the FMLA’s definition of “employer,” the amendment addressed specifically the application of the statute to the two agencies. During consideration of the CAA, Sen. Chuck Grassley, the measure’s sponsor, explained that the CAA “clarifies existing coverage in certain respects . . .”¹¹

The availability of family and medical leave for GAO and Library employees under the FMLA may be distinguished from the availability of such leave for congressional employees by virtue of specific provisions in the CAA. GAO and Library employees may also be distinguished from most other federal employees who are eligible for family and medical leave pursuant to section 6382 of title 5, U.S. Code. As indicated previously, GAO and Library employees are not covered by that section.

⁶ For additional information on the CAA, see Office of Compliance, *Basic Information on the Office of Compliance and the Congressional Accountability Act (CAA)*, available at <http://www.compliance.gov/organization/caabackgroundfactsheet.pdf>

⁷ 2 U.S.C. § 1312(a)(1).

⁸ 2 U.S.C. § 1301(3).

⁹ The Office of Technology Assessment ceased operations on Sept. 29, 2005. See U.S. Gov’t Printing Office, OTA Archive, available at <http://www.gpo.gov/ota/> (last visited Apr. 28, 2008). Eligibility for benefits is also subject to specified length of service requirements. Section 202(a)(2)(B) of the CAA, 2 U.S.C. § 1312(a)(2)(B), provides that a covered employee must have been employed for 12 months and for at least 1,250 hours of employment during the previous 12 months to be eligible for benefits.

¹⁰ See 29 U.S.C. § 2611(4)(A)(iv).

¹¹ 141 Cong. Rec. 654 (1995).

Section 4 of FEPPLA would amend section 102(d) of the FMLA to provide paid parental leave to GAO and Library employees under similar terms as such leave is available for federal employees under section 6382 and for congressional employees under the CAA. Thus, FEPPLA would permit these employees to substitute up to four workweeks of paid parental leave for any of the unpaid leave permitted for the birth or placement of a child.

Study

Finally, section 5(a) of FEPPLA would direct GAO to study and submit to Congress a written report on the “feasibility and desirability” of offering an insurance benefit to federal employees that would provide wage replacement during periods related to a serious health condition. At a minimum, the report would have to include a brief description of any plans or arrangements under which similar benefits are currently provided to employees in the private sector, in state or local governments, or in other countries.

In describing the period for which an insurance benefit could be available, FEPPLA uses the term “period of qualified leave.” Section 5(b) provides a definition for that term:

- . . . the term ‘period of qualified leave’, as used with respect to a Federal employee, means any period of leave under section 6382 of title 5, United States Code, which would otherwise be leave without pay, and which is available by reason of –
- (1) the need to care for the spouse or a son, daughter, or parent of the employee having a serious health condition; or
 - (2) a serious health condition affecting the employee that renders such employee unable to perform the functions of the employee’s position.

Given the exclusion of congressional employees and employees of GAO and the Library from coverage under section 6382, it is uncertain whether the availability of an insurance benefit for these employees would be studied by GAO. As noted, these employees are not considered “employees” for purposes of section 6382.