



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

June 1, 2021

Chairman Richard Neal
Ways and Means Committee
U.S. House of Representatives
1102 Longworth House Office Building
Washington, DC 20515

Dear Chairman Neal:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) Paid Leave Ad Hoc Task Force write in response to your proposal, the Building an Economy for Families Act. We thank you for focusing on families and the needs of family caregivers and recognizing that the Care Infrastructure of the country desperately needs investment as we begin to recover from the COVID-19 pandemic. We also have several suggestions that would strengthen the proposal for people with disabilities. The CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

The CCD Paid Leave Ad Hoc Task Force has principles detailing what a disability-inclusive paid leave program must includeⁱ and your proposal meets or exceeds many of these principles. It is inclusive of medical, parental, and caregiving leave; covers a broad definition of family, and is available to all workers, including the disproportionate number of people with disabilities (especially people of color with disabilities) and caregivers who are part-time worker. It provides a comprehensive progressive wage replacement rate and a full 12 weeks of leave. It also has a new funding source and is not carved out of existing programs and provides the Treasury Department (Treasury) with sufficient funds to build the necessary infrastructure to run such a program. However, there are a few areas of concern for people with disabilities: the structure of intermittent leave, the omission of job protection and anti-retaliation protections for workers, the use of non-Administrative Law Judges in the appeals process, and improvements to the Worker Information Network.

1) Intermittent Leave

The proposal allows for leave to be taken for “caregiving days” and the smallest increment of time allowed is four hours, effectively allowing people to take half days of leave. This proposal

departs from the current Family and Medical Leave Act (FMLA) structure for intermittent leave, which allows for leave to “be taken intermittently or on a reduced leave schedule under certain circumstances.”ⁱⁱ 31 percent of all FMLA leaves are taken are taken intermittently, demonstrating that it is a crucially important way for intermittent use to be available for those who need it.ⁱⁱⁱ Only 13 percent of intermittent leave is related to a new child; unlike a new child, medical conditions and the commitments of family caregivers are more likely to require a hour or a few hours a day to respond to, rather than weeks at a time, although that can also be required.^{iv} Examples would be a person with a disability recovering from a car accident who needs to attend physical therapy once a week or a family caregiver who escorts his family member to regular substance abuse treatment programing. In order for the new paid leave program to work for people with disabilities and family caregivers, we urge the Committee to adopt the current FMLA standards for intermittent leave rather than this new definition of caregiving day.

We will also note that for workers who are part time or who are gig workers, the minimum four hour requirement is complex to implement. If a usual gig shift is three hours a day, would a worker would need to work two shifts in order to qualify for half of a caregiving day? If worker usually works six hour shifts, would they be unable to reduce those shifts by an hour in order to attend chemotherapy with wage replacement? These circumstances demonstrate that intermittent leave will be even more important given the extended eligibility for the new paid leave program.

In addition, by not utilizing the FMLA standard, the proposal creates tensions between existing FMLA law and the new paid leave benefit. People will be forced to choose between unpaid and paid leave with different standards, with the paid leave standard being more restrictive. This is unworkable.

If the Committee is concerned about the employer experience with intermittent leave, it is not clear from the Department of Labor’s research that intermittent leave is more difficult to deal with than other forms of leave. By far the most difficult situation for employers related to unscheduled leave for any duration, which makes sense given the unplanned nature of the leave.^v The next most difficult circumstance is planned long-term leave, which suggests that planned intermittent leave is actually easier on employers.

We will also note that the discussion draft makes the provision of intermittent leave an optional component of the employer reimbursement provisions. We believe that intermittent leave should be a required component.

2) Job Protection

We are concerned that the proposal does not include job protection or anti-retaliation provisions. We understand that these provisions are not within the jurisdiction of the Ways and Means Committee, but disability discrimination in the workplace is prevalent. In 2018, people with disabilities accounted for 32 percent of all charges filed with the Equal Employment

Opportunity Commission.^{vi} Just over half of all charges were retaliation charges. BIPOC with disabilities also face compounding racial discrimination in addition to disability discrimination and these protections are even more important to them. Job protection and anti-retaliation provisions are crucial protections that must be a part of any paid leave program and we would urge the addition of these components as the legislation moves forward.

3) Eligibility and Appeals Process

We strongly support the determination and notice, expedited benefit payment, and application provisions. We also support basing the appeals structure on the Medicare Low-Income Subsidy (LIS) appeals process. Since the new paid leave program will not be means tested, this simplified procedure with only one level of agency review makes sense. However, we would recommend requiring the use of Administrative Law Judges (ALJs) instead of hearing officers to review the applications. As Congress recognized in the Administrative Procedures Act, ALJs should be used to adjudicate appeals of agency administrative decisions in all but a very limited set of circumstances. The qualified judicial independence of ALJs is essential to ensuring that paid leave beneficiaries receive a fair hearing from an impartial adjudicator. Especially since this will be the only level of appeal before beneficiaries are asked to take on the burden of seeking remedy from the federal courts, they must be assured impartial and well-trained adjudicators. We understand that ALJs have increased costs as opposed to the hearing officers utilized by the Medicare LIS system, but their use will also help reduce the burden on federal courts and ensure program integrity for the paid leave system.

4) Worker Information Network

We are very glad that the proposal recognize that beneficiaries will need assistance in accessing the new paid leave benefits and related Federal benefits that support families and included the Worker Information Network (WIN). We have two suggestions to strength this resource for the families who will rely on it. First, we believe that adding a concrete set of assistance services to the responsibilities of the WIN would increase accessibility to all of these programs. Information and referral and training are useful and should certainly be funded, but without assistance with applying for or navigating the appeals process, beneficiaries may be left without recourse. While existing benefits are built into the existing legal and community services system, the new paid leave benefit has not be incorporated into current funding structure for those programs. An alternative to making this the responsibility of WIN would be funding legal services and other community assistance programs to help with paid leave benefits applications and appeals; this would ensure that they had the resources to make these new benefits a priority and build on the trusted relationships they already have working on unemployment insurance appeals and navigating child care resources.

Second, we appreciate the referral system that will be created, but many families will not only have questions about paid leave, unemployment, and child care, but also about the Family and Medical Leave Act (FMLA), Social Security Disability Insurance, Supplemental Nutrition Assistance, and other Federal programs. We understand the Committee's focus on programs

within their jurisdiction, but we believe that the WIN should have a baseline understanding of how all Federal programs interreact given that eligibility for some programs could jeopardize or complicate other benefits received. An example would be the receipt of paid leave benefits by the parent of a child on Supplemental Security Income (SSI). If paid leave benefits are counted as unearned income (as unemployment income is), the child's SSI and related Medicaid benefits could be a risk. It is crucial that WIN staff be aware of these complications. The referral out to others about other federal programs will not address this challenge. We would urge the addition of cross-program training and awareness that would reduce the bureaucratic burdens on beneficiaries, especially low-income beneficiaries and Black, Indigenous and beneficiaries of color.

Sincerely,

Autistic Self Advocacy Network
Institute for Educational Leadership
Epilepsy Foundation
Paralyzed Veterans of America
The Arc of the United States

ⁱ CCD Paid Leave Principles (2021), http://c-c-d.org/fichiers/Updated-CCD-Paid-Leave-Principles_4-14-21.pdf.

ⁱⁱ 29 CFR § 825.20.

ⁱⁱⁱ U.S. DEPARTMENT OF LABOR, CHIEF EVALUATION OFFICE, EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHF_FMLA2018SurveyResults_FinalReport_Aug2020.pdf.

^{iv} *Id.* at 30-31.

^v *Id.* at 51.

^{vi} U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS (2019), <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.