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FISCAL IMPACT REPORT

ORIGINAL DATE 1/29/19
LAST UPDATED 2/18/19 **HB** 213/HCEDCS

SPONSOR HCEDC

SHORT TITLE Paid Family and Medical Leave Act **SB** _____

ANALYST Chilton

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		
	\$1,000.0	Non-recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Planning Year		\$36,000.0		\$36,250	Non-recurring	General Fund
Implementation and Subsequent Years			\$20,250.0	\$20,250	Recurring	Paid Family and Medical Leave Insurance Fund
Total		\$36,000.0	\$20,250.0	\$56,250.0		

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with House Bill 264

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Department of Workforce Solutions (WSD)
 Department of Transportation (NMDOT)

SUMMARY

Synopsis of House Commerce and Economic Development Committee Substitute

House Bill 213 as substituted would enact the Paid Family and Medical Leave Act through a new division in the Department of Workforce Solutions. It would create a new, nonreverting “family and medical leave insurance fund.” The new DWS division would be charged with collecting, managing, and distributing proceeds from the fund, monitoring the program’s effectiveness, reporting on the financial status of the fund and its accomplishments to the Legislature, enforcing rules related to the act, and requesting additional legislation as needed to maintain the fund’s financial viability.

The new division and its paid family and medical leave program would be phased in over three years, beginning July 1, 2019, at which time phase one would begin. One year later, the fund would begin to collect premiums (phase two), and phase three, beginning July 1, 2021, would represent the beginning of payouts to those who had contributed to the fund and now applied for paid leave according to the act.

The core of the act is its provision that employees covered by the program (all but employees of the U.S. government, employees of railroads, and certain others in railroad unions) would be able to take 12 weeks’ leave within a 12-month period to deal with medical issues of the employee or a family member (broadly defined in the bill), as well as the birth of a child within the family or adoption or fostering of a child with the family. It would also allow for the designation of an additional person, not included in the broad definition of family within the bill, for whom the covered employee could also take leave if needed in the case of a serious medical problem.

Collection of contributions to the fund would begin on July 1, 2020, but beginning July 1, 2021, the act will require employers to allow employees to take family leave or medical leave in accordance with the provisions of the Paid Family and Medical Leave Act and rules issues by the division within DWS. The employee would not be eligible for paid leave benefits until the employee had been absent from work for at least five days due to a serious health condition or because of the need for family leave. A healthcare provider would need to verify the individual’s or family member’s serious health condition and the employee’s need for leave. The employee would need to file a claim for leave and must have made 26 contributions to the fund. Employees would be eligible to take a maximum of 12 weeks of leave during any 12-month period; employees would be able to take the total of 12 weeks’ leave all at once or divided into intermittent shorter periods.

The employee’s biweekly benefit would be based on the average weekly income for the 12 month period preceding submission of an application for leave divided by the number of weeks the employee worked during the same period. The maximum biweekly leave compensation is 120 percent of the state average weekly wage multiplied by two (in other words, the state average *biweekly* wage); the bill specifies a complicated formula for calculation of the biweekly benefit, giving low-paid workers a higher proportion of their usual wage than higher-paid workers. Paid family and medical leave insurance benefits would not be payable for fewer than eight hours of family and medical leave taken in one work week. Employers would have to allow the return of an employee after leave under this act to the same or a substantially equivalent position with equivalent pay and benefits.

The fund, to be invested by the state investment officer, would be used both to pay benefits as described above and to administer the fund.

A process is described in the bill for an employee’s appeal of an adverse decision on taking medical leave, and there is a prescribed penalty for employees who fraudulently claim a need for leave.

The Paid Family and Medical Leave Act, HB213, as substituted, appropriates \$1 million from the general fund to the Department of Workforce Solutions for the purpose of planning activities and readying the Paid Family and Medical Leave Division to begin accepting contributions (premiums) from employees throughout the state on July 1, 2020.

FISCAL IMPLICATIONS

The appropriation of \$1 million contained in this bill is a nonrecurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2020 shall revert to the general fund.

The main agency affected by this legislation is WSD. Costs to that agency to form and house a new division, to set up appropriate database and other computer systems to deal with the expected workload are estimated to be \$36 million for the first year. Costs for on going maintenance and operation of all of the data systems, call centers, revenue collections, and complaint resolution systems are estimated to be \$20.25 million per year thereafter. A breakdown of these calculated costs, provided by WSD, is as follows:

- a. Initial Start Up Costs:

Initial Estimates Project Efforts	
Planning Activities: Rule Making, Assessm	\$ 1,000,000.00
IT Systems PFML Build	\$ 32,000,000.00
Operations PFML Build	\$ 1,500,000.00
Facilities & Infrastructure Build	\$ 1,500,000.00
	\$ 36,000,000.00

- b. Ongoing Costs:

Ongoing Recurring Costs	
Ongoing IT Budget	\$ 7,250,000.00
Ongoing Operations Budget	\$ 13,000,000.00
	\$ 20,250,000.00

- c. Detailed Operations Budget/Staffing

Ongoing Operations Costs Breakdown			
Labor Category	Estimated Rate	Hours	Extended
Division Director	\$55.00	2080	\$114,400.00
Division Management	\$40.00	6240	\$249,600.00
Supervisors	\$25.00	20800	\$520,000.00
Business Analyst/Testers	\$25.00	20800	\$520,000.00
CSA Specialist	\$21.00	18720	\$393,120.00
CSA Advanced	\$21.00	41600	\$873,600.00
CSA Basic	\$13.20	83200	\$1,098,240.00
CSA Operational	\$16.00	124800	\$1,996,800.00
Tax Specialists	\$20.00	20800	\$416,000.00
Quality Control	\$21.00	14560	\$305,760.00
Adjudication Law Judges	\$24.00	16640	\$399,360.00
Administrative Support	\$15.00	12480	\$187,200.00
Attorney's	\$55.00	8320	\$457,600.00
Policy Analyst	\$28.00	4160	\$116,480.00
Trainer/Communications	\$20.00	4160	\$83,200.00
Economist	\$30.00	4160	\$124,800.00
Financial Coordinator	\$25.00	4160	\$104,000.00
Accountant and Auditor	\$25.00	1040	\$26,000.00
Total Staffing			\$7,986,160.00
			<i>Benefits</i>
			\$3,194,464.00
			<i>Indirect Costs</i>
			\$1,996,540.00
Total Ongoing Ops Budget			\$13,177,164.00

This bill creates a new fund and provides for continuing appropriations. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

SIGNIFICANT ISSUES

All three agencies commenting (AOC, NMDOT, and WSD) comment on the complex interface between the federal Medical Leave Act and the proposed New Mexico Paid Family and Medical Leave Act. Definitions vary, and it is unclear whether FMLA leave would be concurrent with PFMLA paid leave, or would be in addition to it – e.g., would a covered employee.

AOC comments, “The Paid Family and Medical Leave Act does not include the provision of its sister bill or the federal family medical leave act requiring employees to make a reasonable effort to schedule leave so as not to unduly disrupt the operations of the employer.”

NMDOT makes several points specifically with regard to that agency, but apply more broadly:

First, HB213 premises eligibility for the PFMLA on three grounds: (1) at least five days’ absence due to a serious health condition or because of the “need for family leave,” (2) that the employee has filed a PFMLA claim with the Paid Leave Division, and (3) that the employee has made “at least twenty-six contributions to the fund in accordance with department rules.” Based on these eligibility criteria, the employer is required to allow the employee to take PFMLA leave. Whether actual PFMLA leave compensation is approved is irrelevant in this context. As such, this lends toward the PFMLA being a state-like FMLA. However, unlike the FMLA, where an employee typically applies to the employer for eligibility and approval, HB 213 has the employee seeking approval from a division of an outside agency, the Paid Leave Division. This is problematic,

because the employer may not be aware of an employee's eligibility. For instance, pursuant to HB 213, the employee files their claim with the Paid Leave Division. The employer may or may not be aware that this was done. In accordance with the FMLA, the employee typically files their request for FMLA leave with their employer.

Also, whether an employee's absence is due to a serious health condition for which FMLA applies is also something that can be tracked by the employer. Again, this is because the employee typically applies for FMLA leave with the employer. Because HB 213 has the employee communicating with the Paid Leave Division, the employer may be unaware whether the employee's absence is due to a serious health condition, let alone "the need for family leave." With regards to this latter "need," it is unclear what HB 213 means by "family leave" because it is not defined.

Further, an employer may not be aware whether an employee has made at least 26 contributions. This is because HB 213 speaks to contributions that include gifts as well as money deducted quarterly from an employee's wages. How the employer is able to track contributions outside those it has directly deducted from an employee's wages is unclear. Thus, an employee may make voluntary contributions that lend toward the 26 contributions, but the employer may be unaware of this. That said, if contributions were only drawn from an employee's wages quarterly for each calendar year, and twenty-six contributions were required, this would exceed the 1,250 hours of service required under the FMLA, and result in approximately 6½ years of contributions before the employee would be eligible for PFMLA leave (and not just PFMLA leave compensation).

Second, HB 213 does not address the interrelationship of accrued forms of paid leave versus leave compensation. That is, the FMLA allows for an employer to require an employee exhaust accrued paid leaves of absence in the course of FMLA leave before resorting to unpaid leave. NMDOT requires that employees do so in such an instance. HB 213 is silent with regards to the use of accrued paid leave for PFMLA leave. As such, it appears arguable that an employee could use accrued paid leave while on PFMLA leave, and acquire leave compensation as well. The same applies to donated leave. Namely, once an employee has exhausted accrued paid leave while on FMLA leave, the employee may – pursuant to NMDOT policy and in accordance with 1.7.7 NMAC – request donated leave hours up to the duration for which FMLA leave may apply. On its face, there is a risk that employees could seek and receive donated leave while receiving also PFMLA leave compensation.

Third, Section 5 of HB 213 requires that an employee's leave continue to accrue during the time the employee is on PFMLA leave. Again, whether the PFMLA leave has resulted in leave compensation is unclear. It is also unclear how this impacts NMDOT's current compliance with FMLA and 1.7.7 NMAC, Absence and Leave, especially as NMDOT requires that an employee exhaust available annual, sick, and other leave hours prior to using unpaid leave under the FMLA. For employees who are utilizing accrued paid leave, they continue to accrue paid leave and benefits, such as insurance, while utilizing said leave. However, for employees on unpaid leave, they do not continue to accrue leave and risk benefits, with insurance at risk of being lost absent continued contribution. (Note that HB 213 does set forth the expectation of continued contribution in order to maintain insurance in Section 8.)

Because the employer may be subject to civil penalties insofar as not complying with the PFMLA, having a sense of defined parameters is essential. HB 213's PFMLA also has greater application than that offered under the FMLA. While NMDOT is accustomed to complying with both state and federal law where those laws differ, it should be noted that insofar as PFMLA grants eligibility for instances concerning care of grandparents, grandchildren, siblings, and any other "designated person" as "family members," its reach extends beyond the FMLA. For instance, with regards to the definition of a "designated person," this reach may even extend beyond familial ties altogether. Moreover, assuming that FMLA and PFMLA are sought and approved of through different channels, include NMDOT for FMLA-approved leave, and the Paid Leave Division for PFMLA-approved leave, NMDOT may deny a request for FMLA leave under some legitimate reason, but the Paid Leave Division may approve PFMLA leave for another reason. Conversely, NMDOT may approve requested FMLA leave, but because of differences in eligibility, the Paid Leave Division may deny PFMLA leave. To such ends, what isn't clear is whether the Paid Leave Division only serves to evaluate, approve or deny, and distribute leave compensation pursuant to the PFMLA, or have the larger role of approved leave (funded or otherwise) altogether under the PFMLA. HB 213 implies the latter.

ADMINISTRATIVE IMPLICATIONS

WSD, the agency most affected by the provisions in House Bill 213, makes the following points of significant fiscal and administrative import:

The PFML insurance fund will be used to not only distribute PFML leave compensation but also to cover administrative costs of administering the PFML program. The proposed legislation does not designate what allowable administrative costs are or how to ensure solvency for the fund if the administrative costs and the benefits are comingled.

Definitions in this proposal are inconsistent with current definitions used by NMWSD, such as the definition of "employer", "employee", and "wages".

This proposed legislation has no provisions for confidentiality of the records. Records maintained by NMDWS, as a state agency, are currently subject to IPRA. Medical records and sensitive personal information are necessary to make eligibility determinations in these cases and any perception that the records could become public record or are not protected by confidentiality provisions may inhibit complete disclosure by an applicant/claimant.

The proposed bill calls for a panel of hearing officers for the denied claims. Currently, NMDWS has an appeal tribunal that can hear administrative appeals, but is not staffed to have three hearing officers in one appeal. Resources would need to be allocated for additional staffing and training of hearing officers.

TECHNICAL ISSUES

It is not clear when the covered employee would have to make the designation of the one additional person for whom the employee would need to care in the case of serious health conditions.

It is not clear from the bill how a self-employed person would choose to opt into the program and to pay into the fund.

Section 9 of the bill indicates that employees choosing to avail themselves of the Family and Medical Leave Act will pay into the fund, but it does not specify the amount or how the amount might be calculated, other than to say that “employers shall deduct from each employee’s pay a minimum of two dollars per calendar quarter.”

In addition, WSD notes the following technical aspects of the bill which might be susceptible to improvement:

Section 6, subsection D, states that the “Family and medical leave insurance benefits are not payable for fewer than eight hours of family and medical leave taken in one work week.” The term “family and medical leave insurance benefits” is not defined in the act. Section 6, subsection D, states that leave can be divided down to 8 hours in one work week, guidance should be given as to what the minimum daily increment should be. For instance, minimally 1 hour per day in 30 minute increments thereafter.

The bill states that the division may provide leave compensation payments on the same schedule as the state payroll to increase efficiency and cost-effectiveness. NMDWS does not currently use the state payroll schedule to distribute unemployment insurance benefits, nor plans to use the state payroll schedule to distribute paid family leave benefits. UI benefits administered by NMDWS are paid weekly and consistency with the programs would be advisable.

In section 4, subsection G, the division is allowed to “coordinate and collaborate with other agencies to achieve the purpose of the Paid Family and Medical Leave Act”. This may require additional resources for data transfer, if necessary for medical records or information, and again raises confidentiality and security concerns.

Employees who have been absent from work for a minimum of five days can file a claim for PFML. The bill does not state whether an employee can file a claim for PFML before that date, specifically in cases where an employee could know in advance of their absence of the need for leave. Conversely section 12, subsection A and B states an employee is to notify his or her employer at least 30 days in advance of his or her intent to file a claim if the leave is unforeseeable. If foreseeable, the employer is to be notified within ten days. The secondary provision contradicts the former.

DWS also points out the complexity and possible conflicts of dealing with both IPRA and the federal Health Information Portability and Accountability Act (HIPAA) requirements.

AOC notes that the requirement that leave must be at least five days long to qualify for payment under this act, with that requirement differing from the three-day requirement under the federal Family and Medical Need Act. In addition, AOC cites provisions of the federal Military Leave Act that conflict with provisions of this act.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

In the words of WSD, “The purpose of this bill [and of House Bill 264] is to provide resources to

employees during times of family or medical necessity. Not enacting [one of these two pieces of] legislation to provide for a source of income when employees are otherwise unable to receive wages is detrimental to the health and wellbeing of New Mexico employees, especially those without benefits available through work, and impacts the NM economy as a whole. It is therefore important that any proposed legislation is adequately funded and efficiently administered to ensure solvency for the fund throughout all economic climates. The consequences of not enacting viable legislation that provides for income during family medical leave periods are significant in that individuals could be left without adequate resources to support their families and would have to make the decision whether to sacrifice certain costs including basic necessities or whether to return to work too soon against medical advice. Properly executed legislation would reduce the strain on employees faced with these decisions.”

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