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## FISCAL IMPACT REPORT

SPONSOR Chandler/Roybal ORIGINAL DATE 01/29/21  
Caballero/Serrato LAST UPDATED 02/24/21 HB 38/aHCEDC/aHJC

SHORT TITLE Paid Family & Medical Leave Act SB \_\_\_\_\_

ANALYST Chilton/Iglesias

### REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23	FY24	FY25		
-	-	-	\$412,850.0	\$430,750.0	Recurring	Paid Family and Medical Leave Trust Fund

Parenthesis ( ) indicate revenue decreases

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>WSD Initial Start-Up Expense</b>		\$30,000.0 to \$35,000.0		\$30,000.0 to \$35,000.0	Nonrecurring	General Fund
<b>WSD Ongoing Operational Cost</b>			Up to \$10,400/year	Up to \$10,400.0	Recurring	PFML Trust Fund
<b>State Employer Contributions to PFML Trust Fund</b>	Does not begin until July 1, 2023 (FY24), estimated \$12.3 million annually				Recurring	General Fund
<b>Total</b>		\$30,000.0 to \$35,000.0	Up to \$10.5 million/year	Up to \$45,500.0	Recurring	Mixed

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Human Services Department (HSD)  
 Workforce Solutions Department (WSD)  
 Department of Transportation (NMDOT)  
 Taxation and Revenue Department (TRD)

#### No Response Received

Department of Health (DOH) (declined)

## SUMMARY

### Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 38 makes numerous changes in the title and body of the bill, including the following substantive changes:

- 1) It reinstates section 12 and 13 of the original bill, providing a private right of action against employers (section 12 of the original bill) and noting that the act does not invalidate provisions in collective bargaining agreements (section 13). However note that section 12 is replaced by a new section 12 in another of the HJC amendments (see (6) below).
- 2) It substitutes “application for leave compensation” for “application for leave” in numerous places within the bill.
- 3) It exempts employees working under the federal Railway Labor Act or other federal labor laws from consideration under the act.
- 4) Although contributions to the fund would still begin On July 1, 2023, payout for leave under the act would begin until July 1, 2024, giving an extra six months for contributions to accumulate in the fund. The same date change is applied for eligible self-employed persons as to persons employed by other employers.
- 5) A new subsection is added to section 7, “Employee Notice to Employer – Reduction of Other Leave Prohibited,” which states that employers must allow an employee to take up to twelve weeks’ paid medical or family leave in a twelve-month period, either in one twelve-week episode or in multiple shorter episodes.
- 6) The bill again removes section 12 of the original bill on a private right of action against employers, replacing it with a new section on preemption, which would disallow any subunit of the state’s establishing a paid family and medical leave regulation for other than its own employees.

### Synopsis of HCEDC Amendment

The House Commerce and Economic Development Committee amendment to House Bill 38 makes numerous changes and additions, including the following substantive changes and clarifications:

- The amendment makes it clear that administrative costs and leave compensation will come from the employer and employee contributions.
- To receive paid family or medical payments under the bill, the individual must certify she or he has not begun new employment.
- The amendment makes it clear that leave compensation will be paid [only] to eligible employees whose claims have been approved.
- Self-employed individuals must supply WSD with figures of net rather than gross income.
- Any administrative penalties collected for violations of the act would be deposited in the paid family and medical leave fund.
- Section 12 of the original bill, which provided for a private right of action of employees against employers, is removed.

Synopsis of Original Bill

House Bill 38 would enact the Paid Family and Medical Leave Act through the Workforce Solutions Department. It would create a new, nonreverting “family and medical leave trust fund.” WSD would administer the fund and would constitute an unsalaried “paid family and medical leave implementation advisory committee,” staffed by WSD, with specified membership of 13 members, as follows:

- (1) A representative of a nonprofit organization that advocates for women and girls;
- (2) A representative of a nonprofit organization with expertise in elder care;
- (3) A representative of a statewide chamber of commerce;
- (4) Two representatives of a small business development center advisory council;
- (5) A representative of a medical society with expertise in the care of children;
- (6) A member representing the parents of newborn children;
- (7) A member representing adoptive and foster parents;
- (8) Two advocates for families;
- (9) The director of the commission on the status of women;
- (10) A representative of the university of New Mexico bureau of business and economic research; and
- (11) A representative of a nonprofit organization with expertise in chronic illnesses and disabilities.

Members of the committee would not be entitled to per diem or mileage expenses.

The core of the act is its provision that employees covered by the program 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, 2023. HB 38 specifies the amount to be collected quarterly from each participating employee at 0.5 percent of that employee’s earnings. Employers would be assessed 0.4 percent of the earnings of an employee and self-employed persons wishing to participate would pay 0.9 percent of annual earnings.

Employers who already had an employee paid family leave program could apply for a waiver from participation in this program, but must notify employees about their own plan and grant leave and compensation for leave equivalent to or better than that afforded to employees covered by this legislation, with employees having the right to contest the employers’ plan if they found it violating aspects of this act.

Beginning January 1, 2024, the act will require employers to allow employees to take family leave or medical leave in accordance with the provisions of the Paid Family Medical Leave Act and rules issues by the division within WSD. 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 contributions to the fund for at least six of the 12 months preceding the claim. They would have to ascertain that they would not take other employment, contract or regular, during the time of the paid leave. 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 twelve weeks' leave all at once or divided into intermittent shorter periods.

Employees would not be eligible for leave compensation if their claims were fraudulent, or if it were found the injury or illness to the employee or the person being cared for was induced by the employee or if it were found the employee did not in fact provide the care for the other person as described in the application for leave. Information in the employer's and individual's files related to the act would be confidentially held.

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; the bill specifies a complicated formula for calculation of the weekly benefit, giving low-paid workers a higher proportion of their usual wage than higher-paid worker, with a minimum of the weekly wage of a minimum-wage worker in the state, and a maximum of the annual mean wage of all occupations in New Mexico.

Self-employed individuals participating in the plan would have benefits determined in the same way, but based on a determination of annual income declared by that individual, which could be adjusted annually. 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. Employees must make a "reasonable effort" to schedule leave so as not to interrupt employers' needs and to provide prior notice of leave to be taken, when possible.

The fund, to be invested by the state investment officer, would be used both to pay benefits as needed by employees who had paid into the fund as described above and to pay the costs of administering the fund. Payment would have to be begun within 10 days of application or 10 days of the beginning of approved leave.

Confidentiality of information provided to justify the medical leave would be guaranteed. Employers would be required to pay the employer's share of health coverage while the employee was on leave; on the employee's side, he/she would be responsible for required training or education missed during the period absent from work. Employers could not retaliate against employees for taking leave or applying for leave or making a complaint under the act, and if an employee were found to have been discharged as a result of use of the act, that employee would have the right to be rehired. A process is described in the bill for an employee's appeal of an adverse decision on taking medical leave.

The act would not diminish the rights of any employee under a collective bargaining agreement.

The bill requires the establishment of the paid family and medical leave implementation committee no later than July 1, 2022, and it would continue to function until July 1, 2023.

## **FISCAL IMPLICATIONS**

No appropriation is included in House Bill 38 for the initial startup costs to the Workforce Solutions Department (WSD), including new technology operating systems and FTE to develop the program. A similar act in Colorado passed in November 2020, for which the state estimated

would cost \$3.2 million in FY22 and \$48.6 million in FY23 to begin administration of the program.<sup>1</sup> Washington State requested start-up funds of \$84 million for its paid family and medical leave program, of which \$63.2 million was spent during the 2017-2019 biennium.<sup>2</sup> In conversations with WSD, the initial start-up costs for this program in New Mexico is estimated at \$30 million to \$35 million. An appropriation to the department would be necessary to carry out the provisions of the act prior to when the Paid Family and Medical Leave (PFML) trust fund begins receiving contributions.

Planning for implementation of the Paid Family and Medical Leave Act would start by July 1, 2022, and would require staff, office space, and equipment at WSD to accommodate the planning. WSD notes its costs are estimates that include “not only initial funding for planning during the first year but an infusion of general fund for a new system, operational start up, and subsequent ongoing operations. Funding is estimated and could increase based on the results of the first-year implementation plan.”

To estimate the ongoing administrative cost of the PFML program, to be paid from contributions to the PFML trust fund, LFC staff used the unemployment compensation program as a proxy. WSD Unemployment Insurance Division’s total FY21 operating budget is \$10.4 million.

Expenditures for employer and employee contributions to the PFML trust fund would begin on July 1, 2023. Total contributions to the PFML trust fund are estimated using UNM’s Bureau of Business and Economic Research forecast for total wages and salaries excluding federal government wages. Total contributions for the first year of implementation (FY24) are estimated at \$412.9 million.

Payments from the PFML trust fund for family and medical leave benefits would begin January 1, 2024. This would allow for 6 months of employer and employee contributions to accumulate in the fund before benefit payments begin. However, due to the timing of collections and potential for a high volume of benefit applications in the first six months of the program, it is possible that total collections may be insufficient to cover program expenditures in the first year. This could be addressed by allowing for one full year of contributions into the trust fund prior to beginning benefit payouts, as was done in the Washington state program.

Using data from Public Use Microsample (PUMS) data from the 2019 American Community Survey, along with data on the number of births and disability claims in the state, total annual PFML benefits are estimated at about \$295 million in FY25. Based on the estimated annual revenue into the fund and benefit payments, the fund should be self-sufficient to cover the benefit claims and administrative costs of the program once fully implemented. However, it should be noted that, because the bill’s definition of a “serious health condition” is fairly broad and would need to be promulgated by rule, it is possible the annual payouts could be larger than estimated here depending on what exactly constitutes a qualifying event that is eligible for medical leave benefits.

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<sup>1</sup> [http://leg.colorado.gov/sites/default/files/blue\\_book\\_english\\_for\\_web\\_2020\\_0.pdf](http://leg.colorado.gov/sites/default/files/blue_book_english_for_web_2020_0.pdf)

<sup>2</sup> <https://www.opportunityinstitute.org/research/post/preliminary-lessons-from-implementing-paid-family-medical-leave-in-washington/>

Based on 2020 state-funded salary figures, the table below estimates the State of New Mexico employer and employee contributions. The employer contribution illustrates the estimated annual general fund cost of contributions into the PFML trust fund, beginning in FY24.

<b>Category of Employee</b>	<b>Annual Total Salary (2020)</b>	<b>Employer Contribution/year at 0.4%</b>	<b>Employee Contribution/year at 0.5%</b>
School employees	\$1.9 billion	\$7.6 million	\$9.5 million
Other state employees	\$1.18 billion	\$4.7 million	\$5.9 million
<b>Total</b>	<b>\$3.08 billion</b>	<b>\$12.3 million</b>	<b>\$15.4 million</b>

### Continuing Appropriations

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**

Family and medical leave would be an important benefit to families through at least two generations. The time to adequately recover from a medical illness or procedure or an injury or to care for a relative recovering from illness or injury would likely pay dividends in terms of future health, and the ability to spend time with a newborn or newly adopted or newly fostered infant or child would likely pay dividends in terms of family functioning and child development. WSD comments on this:

The purpose of this bill is to provide resources to employees during times of family or medical necessity. Not enacting 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.

The Taxation and Revenue Department (TRD) notes that, although the proposed legislation splits the contribution to be made to the PFML trust fund between employers and employees, the ultimate economic burden of these contributions is most likely to be borne by the employees<sup>3,4</sup>. Generally, employers will seek to maintain profits and may pay their contributions and then pass on the burden of those contributions to employees in the form of lower wages, or on to

<sup>3</sup> Jonathan Gruber, The Incidence of Payroll Taxation: Evidence from Chile, NBER Working Paper No. 5053 (Mar. 1995), <http://www.nber.org/papers/w5053>.

<sup>4</sup> Stephen Entin, Tax Incidence, Tax Burden, and Tax Shifting: Who Really Pays the Tax?, <http://iret.org/pub/BLTN-88.PDF>

consumers in the form of higher prices. How much of the employer burden gets passed on to the employees depends on how sensitive labor supply and demand are to change in wages. If wages are flexible and employees value the programs financed by such taxes as much as the contribution costs, the full amount of these taxes maybe passed down to them and there may not be any negative impact on employment (See for example Deslauriers et al (2018))<sup>5</sup>.

However, if wages are not flexible or if the employees do not value the benefits as much as the costs, TRD notes the burden is passed on to the employees only partially, raising the employer costs. This, in turn, could have negative have employment effects. (Kugler and Kugler (2009))<sup>6</sup>. TRD further states there is evidence that such negative employment effects are more pronounced among lower skilled workers. In other words, any given increase in labor cost to the employers leads them to reduce employment of teenage and young adult workers, or less educated workers, by more than that of mature workers or college graduates. Employers are usually easily able to substitute more skilled workers for less skilled ones (Hamermesh (2014))<sup>7</sup>. Such an effect has the potential to increase income inequality in the economy and increase the employment and wage gap between skilled and unskilled workers.

TRD provides the following additional commentary regarding contributions for the self-employed:

The bill creates a new program that is similar in many respects to the federal Social Security Insurance program, or Medicare program, by imposing a new, dedicated tax to be paid into a special, segregated fund for the purpose of providing a form of social insurance, in this case to protect against the risk of family medical issues. Under such programs, the employee pays half of the tax, and the employer pays half the tax; furthermore, that portion of the tax paid by the employer is not considered wages (i.e., income) to the employee. In order not to treat self-employed persons (who pay both the employee and employer share) unfairly, such existing programs therefore provide an additional deduction from income for the self-employed, equal to half the tax. This bill imposes a 0.4 percent tax on employers with respect to employee earnings, and a 0.5 percent tax on employees. It therefore imposes, a 0.9 percent tax on the self-employed. As with the federal programs, the portion of the tax paid by the employer would not be considered wages or income to the employee. While the self-employed are not required to participate in the program, payment of this higher, and unequal, rate of tax would deter participation by the self-employed, and TRD recommends that such persons be given a deduction from their income equal to the 0.4 percent employer contribution for those not self-employed. Such deduction would only apply to the calculation of income for state income tax purposes.

## RELATIONSHIP

House Bill 219 from 2019 is virtually the same as this bill except it included an appropriation. HB38 relates to the following bills in the current Legislature:

- House Bill 20 (Healthy Workplace Act)

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<sup>5</sup> Deslauriers et al, Estimating the Impacts of Payroll Taxes: Evidence from Canadian Employer-Employee Tax Data, IZA Discussion Paper 11598, June 2018.

<sup>6</sup> Kugler, A., and M. Kugler. "Labor market effects of payroll taxes in developing countries: Evidence from Colombia." *Economic Development and Cultural Change* 57:2 (2009)

<sup>7</sup> Hamermesh, D. Do labor costs affect companies' demand for labor? *IZA World of Labor* 2014: 3 doi: 10.15185/izawol.3

- House Bill 37 (Paid Sick Leave)
- House Bill 38 (Paid Family and Medical Leave Act)
- House Bill 72 (Family Friendly Workplace Training)
- House Bill 134 (Family Friendly Workplace Policies)

## TECHNICAL ISSUES

HSD raises the following points:

- “HB38 does not address if an employee is allowed to utilize their own accrued leave in conjunction with the Paid Family and Medical Leave Act. HSD currently allows employees to utilize their own accrued leave while approved for leave taken under Family and Medical Leave Act (FMLA).
- HB38 also does not address whether an employee is required to have an FMLA approval or separate medical leave approval in place through their employer when they request compensation through this program.
- It is not clear in the bill whether program participation is elective for an employee or a requirement.
- The bill does not address how employer contributions to fund the program are collected and applied.”

WSD raises other issues related to suggested changes to the bill, including the following:

- Definitions used in this act differ from those used in unemployment insurance statutes and should be brought into agreement.
- The amount required to pay requests from the fund may vary from year to year, requiring adjustment of the employer and employee contributions to the fund. WSD’s recommendation is to “implement a trigger like the Unemployment Insurance Trust Fund and calculate PFML contribution rates on a yearly basis to ensure the PFML trust fund remains solvent.”
- The bill addresses unemployment insurance but does not address worker’s compensation.
- The requirement that employers apply for a waiver from the program [if they are providing leave benefits equal or better than the PFMLA act benefits] needs to have an anniversary date so that WSD could evaluate changes for continued adequacy to extend a waiver.
- There is no provision for an audit of employers or self-employed individuals to determine if reporting and compliance with the act is adequate, and no provision as to what to do if such an audit showed failure of compliance.

DOT comments that HB38 would appear to substitute WSD for the employer in decisions as to when paid leave could be taken.

TRD points out the following technical issues:

**[Section 2]** Under Subsection (F) of this section, “employers” are defined to include the state, and political subdivisions of the state. However, some public employers may not be political subdivisions of the state, as that term is defined in law. TRD recommends expanding the definition to include all public employers.



**[Section 4]** Subsection (A)(3) applies the provisions of the bill to self-employed individuals who opt in. The bill does not provide any mechanism for self-employed individuals to opt in to the program. This subsection also applies to self-employed individuals “subject to state jurisdiction.” The phrase “subject to state jurisdiction” is vague and susceptible to multiple interpretations, which could lead to confusion. TRD recommends using more precise language, such as “subject to state jurisdiction for personal income tax purposes” or “subject to filing a return for personal income taxes with the state.”

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