F I S C A L I M P A C T R E P O R T

SPONSOR Chandler **ORIGINAL DATE** 1/29/19 **LAST UPDATED** 2/01/19 **HB** 264

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

ANALYST Chilton

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY20	**FY21**		
$1,000.0	$1,000.0	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		$36,250.0	Non-recurring	General Fund
Implementation and Subsequent Years			$20,470.0*	$20,470.0*	Recurring	Paid Family and Medical Leave Insurance Fund
Total		$36,000.0	$20,470.0	$56,470.0		

(Parenthesis ( ) Indicate Expenditure Decreases) *Includes estimate of costs of providing payments for leave based on a best estimate of number of employees taking paid leave in a given year, in excess of premiums paid into the plan.

Conflicts with House Bill 213

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Workforce Solutions Department (WSD)

SUMMARY

Synopsis of Bill

House Bill 264 would enact the Paid Family and Medical Leave Act through the department of

workforce solutions. It would create a new, non-reverting "family and medical leave trust fund." WSD would administer the fund, and would constitute an unsalaried "paid family and medical leave implementation advisory committee," 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.

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, 2020. HB 264 specifies the amount to be collected quarterly from each participating employee at 0.5% of that employee's earnings up to "maximum earnings of $60,000." (If this means quarterly earnings of $60,000, the quarterly contribution would be no more than $300; if it means annual earnings of $60,000, the quarterly contribution would be no more than $75. See technical issues, below.) Employers would be assessed 0.4% of the earnings of an employee up to a maximum earnings of $60,000 (per quarter or per year?) and self-employed persons wishing to participate would pay 0.9% of annual earnings up to annual earnings of $60,000, or $135 per quarter at most.

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 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 Medical Leave Act and rules issues by the division within DWS. A health care 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 twelve weeks of leave during any twelve-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 were self-induced, if he/she induced the injury or illness in the person to be cared for, or if it were found that the employee did not in fact provide the care for the other person as described in the application for leave.

The employee's biweekly benefit would be based upon their average weekly income for the twelve 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 ten days of application or ten 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.

FISCAL IMPLICATIONS

The main agency affected by this legislation is WSD. WSD estimates that its costs to hire, train and maintain the staff necessary to carry out the mandates of this act, 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 $20,250,000 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 Buid	$ 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**
		Benefits	$3,194,464.00
		Indirect Costs	$1,996,540.00
	Total Ongoing Ops Budget		**$13,177,164.00**

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.

In addition to the costs to the agency to set up, equip and house the group that would administer the fund, it is uncertain whether the income into the fund would be sufficient to cover payouts for member employees' leave. Using a variety of assumptions based on experience elsewhere,

especially in the state of Washington, WSD estimates that there would be $121 million annual shortfall in the fund. Here is the WSD reasoning:

> Using IPUMS data from the 2017 American Community Survey, total annual PFML benefits is estimated to be $381 million in the first year of the program. To compute this estimate, it was assumed that the average duration of PFML would be 8.16 weeks and ten percent of all eligible workers would apply for and receive benefits.
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> PFML benefits would be paid out from monies collected from employers. Charging 0.5 percent to an employee's annual salary up to maximum earnings of $60,000 in order to fund leave compensation payments would collect $143.9 million annually. Charging 0.4 percent to an employee's annual salary up to maximum earnings of $60,000 in order to fund administrative costs would collect $115.1 million annually.
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> Thus, inclusive of the $1 million appropriated, total estimated collections would be estimated at $260 million and create an estimated annual shortfall of $121 million in the trust fund balance.

SIGNIFICANT ISSUES

All three agencies commenting (AOC, DOT, and DWS) 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 unclear whether FMLA leave would be concurrent with PFMLA paid leave, or would be in addition to it – e.g., would a covered employee

In commenting on the conflicting House Bill 213 (which is referred to throughout the copied commentary, but also applies to House Bill 264), DOT makes several points specifically with regard to that agency, but applying more broadly:

> First, HB 213 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.
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> 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.

PERFORMANCE IMPLICATIONS

WSD makes the following points about provisions of House Bill 264:

The bill requires a 10 day deadline for appeal hearings to be completed upon notice of an appeal by an interested party. 10 days for the hearing will not likely be sufficient enough time for notice to all parties to allow for the gathering of necessary documentation, exhibits or witnesses for a hearing. NMWSD also presumes, but is not informed from this proposal, that the appeals may be conducted telephonically. In person hearings would place a greater burden on the department resources and would require additional time before the hearings may be set.

The bill permits any individuals who believe that the program is violating the Paid Family and Medical Leave Act to appeal to the secretary who shall offer mediation and hold a hearing over the allegations. The bill does not indicate whether the mediation is internal or external to the department or whether the appeal may be heard by the same appeal body that heard the initial matter or if a separate appellate body is required. If employers and claimants are both required to be present at a hearing to determine if a violation of the Act has occurred, certain provisions should be implemented to ensure confidentiality of the record and HIPAA protections for the claimant.

NMWSD is afforded the ability to assess punitive measures against those in violation of the Act. Currently the bill does not indicate how the fines will be applied – whether they go into the trust account for future benefit payments or whether they are allocated to the department for administrative costs. It is also not clear how the penalties may be assessed so as to avoid arbitrary applications of fines and penalties.

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 NMWSD, 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, NMWSD 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.

CONFLICT with HB 213, which has the same aim but different definitions of family members, contributions to the fund, and other differences; HB 213 would establish a division within WSD to administer this fund, while HB 264 does not.

TECHNICAL ISSUES

On page 7, lines 2-3 and lines 9-10, it is not specified whether the $60,000 figure refers to quarterly or annual income. On line 16 of the same page, the self-employed individuals would contribute an amount calculated on "annual earnings" of $60,000.

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, although the self-employed person's contribution amounts are defined.

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:

An annual financial analysis of the PFML Trust Fund is to be presented to the legislature for adjustment of the formula used to determine employer and employee contributions to the fund. If the fund is insolvent at a time in which the legislature is not meeting, or is insolvent before this annual review, there may be a chance that the PFML act cannot be enforced. The department will require adequate time to notify employers and self-employed individuals of contribution rate changes so that they may disseminate the information to employees and make adjustments to their accounting and payroll systems. Recommendation: implement a trigger like the UI Trust Fund and calculate PFML contribution rates on a yearly basis to ensure the PFML trust fund remains solvent. There are no explicit provisions in the bill to protect the trust fund and restrict the fund from being swept during economic downturns…

HB264 includes provision for Unemployment Insurance but does not include provision for Worker's Compensations. Additionally, there is also no clear guidance or requirements for intermittent leave or PFML compensation for partial weeks. The bill does not state whether compensation received pursuant to this Act is subject to withholding or other tax obligations. If such withholdings apply, NMWSD would have to facilitate those payroll deductions when issuing compensation payments. NMWSD will also be obligated to issue the appropriate tax documents to cover the receipt of compensation under the Act. NMWSD would not have the authority under rule-making

to assert tax provisions for compensation received under this Act that the statute does not explicitly authorize.

The definition of "employee" should be consistent with the definition used for Unemployment Insurance with the exception of "self-employed" which is not defined in the bill. This will allow for clear guidance when determining employer compliance for reporting quarterly earnings and PFML contributions. The requirement for employers to apply for a waiver each calendar year should have an anniversary date with a requirement that the department will issue a determination granting appeal rights.

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.

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."

LAC/al/sb