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FISCAL IMPACT REPORT

SPONSOR Lopez/Roybal **ORIGINAL DATE** 02/04/21
Caballero **LAST UPDATED** _____ **HB** _____

SHORT TITLE Paid Sick Leave Act **SB** 198/ec

ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Increased agency personnel costs		Uncertain; probably moderate	Uncertain; probably moderate	Uncertain; probably moderate	Recurring	General Fund
DWS Administrative costs		\$831.1	\$831.1	\$1,662.2	Recurring	General Fund
Total		>838.1	>\$831.1	>\$1,662.2	Recurring	General fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to House Bill 38, House Bill 20
 Duplicate of House Bill 37

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Workforce Solutions (WSD)
 Human Services Department (HSD)

No Response Received

Department of Health (DOH)

SUMMARY

Synopsis of Bill

House Bill 37, Paid Sick Leave Act, creates a right to paid sick leave for New Mexico workers. It creates additional paid sick leave benefits related to declared public health emergencies. Its provisions are spelled out in the following sections:

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Section	Provisions
1	Establishes the name “Paid Sick Leave Act.”
2	<p>Definitions used in the act, including</p> <ul style="list-style-type: none"> • Paid sick leave, defined as time compensated at the same rate and accorded the same benefits as usual pay and benefits • Public health emergency as resulting from a declared emergency under federal, state or local law • family member, broadly defined
4	<p>Details of use and accrual for all employees: Each would accrue one hour of paid sick leave for every thirty hours worked. Earned sick leave would carry over from year to year, but the maximum that could be used in a year would be 56 years, unless an employer wished to offer a higher limit.</p> <p>Sick leave could be used in case of an employee’s or family member’s mental or physical illness or injury or for absences due to the employee’s or family member’s need for care due to domestic violence, sexual abuse, or stalking.</p> <p>Employees are to begin earning paid sick leave at the beginning of employment and can use accrued leave beginning sixty days after then. If an employee changes location or job position within a firm, or if the firm changes hands, the sick leave accrued would remain in place.</p> <p>Employees should make a request for use of sick leave orally, electronically, or in writing, attempting to estimate how long the absence might be required, but could not be required to use other leave before using sick leave or to find a replacement during his/her absence.</p> <p>Employers could not avoid liability for sick leave by misclassifying the employee as an independent contractor.</p> <p>Documentation for sick leave use could not be required if the sick leave lasted for less than three consecutive days. In the case of physical or mental needs, a health care professional’s certification would suffice; court or other legal or counseling person’s documentation would be accepted in case of absence due to stalking, sexual assault or domestic abuse. Information obtained in documenting an employee’s need to take sick leave must be treated as confidential.</p>
4	<p>Deals with required supplemental leave during a public health emergency: supplemental paid sick leave must be provided to each employee beginning on the date of declaration of a public health emergency: 80 hours for a full-time employee, and twice the weekly average hours worked for part-time employees. If HB37 is passed and signed, this provision would begin immediately if the public health emergency is then persisting. The supplemental paid sick leave would be available for testing, preventive treatment or self-isolation of the employee or a family member</p>

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5	Employers need not provide paid sick leave beyond that required under this bill.
6	Retaliation against an employee is prohibited in the case of <ul style="list-style-type: none">• Use of this benefit, or• Employee allegation of violation of this act Employers could not discipline or otherwise punish an employee for use of sick leave. Contracts between employer and employee cannot contain provisions that would abrogate the employee's right to use sick leave.
7	Employers would be required to post notice of their policies with regard to paid sick leave; the contents of the required postings are specified. DWS would post such a notice, in English and Spanish, on its website within 30 days of the act's taking effect. Documentation of hours worked and paid sick leave accrued and used must be maintained by employers.
8	The secretary of DWS would enforce provisions of the act, to include receiving complaints against employers and investigating allegations of non-compliance with the act.
9	Civil claims against an employer for violation of the act could be filed up to three years after the alleged violation. The action could be brought by the employee, his/her agent, or DWS.
10	Employers found to have violated provisions of the act would be liable for the wages the employee should have received up to three times that amount, or \$500-\$1 thousand, depending on which part of the act had been violated.
11	The Paid Sick Leave Act would not supplant other laws, regulations, or collective bargaining agreements that provide greater benefits.
12	Severability provision.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

There is no appropriation in this bill. The Department of Workforce Solutions, which would be charged with record-keeping, reporting, and investigating allegations of employer non-compliance with the bill, estimates its costs as follows:

The fiscal implications of HB37 would require DWS to obtain five (5) additional Investigator FTE, one (1) Administrative Assistant FTE, one (1) Legal Attorney FTE, and one (1) Legal Assistant. A total of eight (8) new FTE positions would need to be approved for DWS to assist in fulfilling the requirements in HB37. This additional staffing would also require increases to the workforce technology division including 1FTE for Technical Support and 1 FTE as a systems analyst.

In order to support additional enforcement activities, DWS would need to ensure that the

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staff have the appropriate tools to track the work and manage the cases. An investment would be required to secure either a commercial off-the-shelf system or to incorporate this work into the planned case management solution. Either approach will require the funding for the technology tools and support staff to build out this solution. Estimated cost for this is \$ 98 thousand.

HSD notes that the requirement to allow paid sick leave in keeping with this bill would increase employee cost, but does not estimate how much that cost would be. It is likely that other state government agencies would also see increased costs in similar fashion.

SIGNIFICANT ISSUES

The following is a summary of extensive significant issues raised by DWS:

1. Employers and DWS are tasked with multiple record-keeping activities under the act; employees with very few.
2. Employers must pay the cost of supplemental doctor visits if those are necessary only for documentation of the employee's need for sick leave.
3. DWS is required to maintain confidentiality of employee-claimants, which might hamper investigation of the claims made.
4. Employers can grant sick leave before an employee has earned it; the act does not indicate what should be done if the "frontloaded" sick leave is not repaid before the employee is separated from his/her employment.
5. It appears to DWS that not only employees alleging employers violating the act but also advocacy groups lacking usual standing in court could seek relief.
6. The bill would impose a 30-day limitation on time to investigate complaints, which is inconsistent with other investigations that the Labor Relations Division (LRD) is tasked with. LRD would have no discretion as to whether or not legal action would be initiated in such cases.
7. The bill would require LRD to act, but also authorizes the attorney general to intervene, not district attorneys, who work with LRD on other wage issues.
8. Records of paid sick leave accrued and used by employees are to be kept for four years, longer than the usual 12-month requirement for other wage issues.
9. The act would require LRD to "endeavor to maintain confidentiality," an ambiguous requirement.
10. If employers failed to keep record of time worked and paid sick leave accrued and used, the employee's "reasonable estimates" would be used. The standard in other cases is "credible recollection or the hours worked and the wages paid and unpaid."

In addition, according to DWS,

HB37 imposes new notice and recordkeeping obligations on employers and subjects them to monetary penalties for violating the proposed law, allowing courts to impose liquidated damages ranging from \$500 to \$1,000 per violation *plus* actual damages, back pay and benefits, reinstatement, rescission of disciplinary action, litigation costs and attorney fees. These penalties/damages considerably outpace those available under existing wage-and-hour statutes. The Act creates six (6) new causes of action for things such as misclassification of employees as independent contractors, retaliation and recordkeeping violations. A cursory review of similar PSL legislation across the United States reveals that no single state law has as aggressive an array of requirements and employer penalties as HB37... Fourteen states and the District of Columbia have PSL

statutes, none of which are as comprehensive and punitive as HB37.

The Act requires the labor relations division (LRD) of the workforce solutions department to investigate complaints alleging violations of the Act, provide progress reports every 90 days, and file civil lawsuits against employers for violations. HB37 does not give the LRD the same discretion that it has in other types of wage claims to select cases that it deems “just and valid” for litigation. Rather, the bill mandates that LRD take all claims alleging PSLA violations to court, regardless of agency resources, evidentiary challenges, dollar amount in controversy, bona fide employer errors, or whether violations are isolated or repetitive in nature. Significantly, establishing an entire new class of cases that the LRD must investigate and litigate will necessitate considerable additional funding in order to support the personnel and structural enhancements required to execute these mandates.

HSD comments on new requirements in the bill regarding supplemental sick leave during a public health emergency, such as the present pandemic:

Currently, state employees are offered Covid-19-Related Conditions Leave that is administrative leave (rather than sick leave) as directed by the State Personnel Office (SPO). This leave already exceeds the 80 hours of supplemental leave that would be required by HB37, some of the purposes for which the leave may be used are expanded.

Specifically, the supplemental leave that would be afforded under HB37 allows an employee to take leave to care for a family member when that family member’s care provider is unavailable due to the public health emergency. The current paid Covid-19-related conditions leave allow employees to take such leave but only to care for their child(ren).

Additionally, the supplemental leave for a public health emergency in HB37 would not require documentation for its use. The current Paid Covid-19-Related Conditions leave requires specific documentation to support each request.

HB37 would require HSD to reinstate accrued sick leave to employees that separate from employment in state government and are employed with HSD within twelve (12) months of the separation. Currently, employees lose any accrued leave upon separation from state government.

ADMINISTRATIVE IMPLICATIONS

HSD responded regarding that agency’s work force; the same would probably apply to all state government agencies: “Since the HSD follows the requirements of the State Personnel Board Rules, the administrative impact of HB37 to HSD would be limited. HSD would have to develop policies to implement the new provisions of HB37 regarding extended sick leave.”

RELATIONSHIP with House Bill 20, which offers some of the same paid sick leave requirements as this bill, and House Bill 38, which provides longer-term medical and family benefits, paid from a fund made up of employer and employee contributions.

DUPLICATES House Bill 37.