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FISCAL IMPACT REPORT

SPONSOR <u>Stewart/Padilla/Chandler/Serrato/ Roybal Caballero</u>	LAST UPDATED <u>2/25/2023</u> ORIGINAL DATE <u>2/9/2023</u>
SHORT TITLE <u>Paid Family & Medical Leave Act</u>	BILL NUMBER <u>Senate Bill 11/aSTBTC/aSFC</u>
ANALYST <u>Faubion/Chenier</u>	

APPROPRIATION* (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY23	FY24		
	\$36,500.0	Nonrecurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

REVENUE* (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		
		\$6,000.0	Recurring for six to nine years	General Fund
		(\$6,000.0)	Recurring for six to nine years	PFML Fund
	\$197,054.1 - \$231,584.0	\$408,196.6 - \$470,115.6	Recurring	Contributions to PFML Fund
		(\$368,330.9 - \$793,415.3**)	Recurring	Benefits Paid from the PFML Fund

Parentheses () indicate revenue decreases.
 *Amounts reflect most recent analysis of this legislation.
 **To approximate a high-end estimate, \$100 million was added to the LFC estimate of \$653 million summarized below.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	\$ 33,550.0	\$ 33,550.0	\$29,000.0	\$ 96,100.0	Recurring	WSD Operating Costs - Initially General fund
		\$8,882.2	\$17,764.3	\$26,646.5	Recurring	State Employer Contributions
Total	\$33,550.0	\$42,432.2	\$46,764.3	\$122,746.5		

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Relates to House Bill 25 and House Bill 28

Sources of Information

LFC Files

Responses Received From

University of New Mexico (UNM)
Workforce Solutions Department (WSD)
Attorney General's Office (NMAG)
State Personnel Office (SPO)
Economic Development Department (EDD)
Human Services Department (HSD)

No Response Received From

Public Education Department (PED)
Department of Finance and Administration (DFA)

SUMMARY

Synopsis of SFC Amendment to Senate Bill 11

The Senate Finance Committee amendment to Senate Bill 11 adds a definition for “Indian tribe” and changes subsequent tribal references to Indian tribe. The amendment also changes the standard by which an employer may apply for a waiver from the program from having to provide a leave compensation program that is “equal to or greater” than the proposed plan to providing a plan that is “substantially similar.” Additionally, the original bill would have allowed leave to be taken in increments of four hours and the amendment changes the increment to eight hours.

Synopsis of STBTC Amendment to Senate Bill 11

The Senate Tax, Business and Transportation Committee amendment to Senate Bill 11 makes several grammatical changes such as changing references of “earnings” to “wages” and making clearer a sentence that prohibits employers from charging the 0.5 percent wage assessment to an employee’s leave contributions. The amendment makes clear that employers shall not recover or seek to recover their portion of contributions to the PFML fund from an employee. The amended bill also clarifies that PFML leave shall not result in a reduction in leave to which the employee is otherwise entitled.

The amendment would increase the number of members on the paid family medical leave implementation advisory committee from 13 to 15 to include two members from a statewide organization representing labor.

Synopsis of Original Bill

Senate Bill 11 would establish a 12-week Paid Family Medical Leave (PFML) benefit for nearly all workers in the state. The 12-week benefit could be taken intermittently and in increments of no less than four hours at a time. To receive the benefit, the employee would have to pay into the fund for at least a six-month period in the year prior to taking leave. The bill establishes procedures for calculating paid leave, administering the leave benefit, taxing the benefit, and requiring notice be provided to the employer by the employee upon taking leave or returning from leave.

The bill would require employee contributions of 0.5 percent and employer contributions of 0.4 percent of wages into the newly established PFML fund. The PFML benefit would be paid for with money in the PFML fund, with some of the money in the fund going toward administrative costs and paying back the general fund for startup costs incurred by WSD. Starting on January 1, 2027, the WSD secretary would be required to ensure the fund is self-sufficient by performing an annual financial analysis and setting the premium for the following calendar year at a rate that would obtain contributions equal to 135 percent of the benefits paid during the previous fiscal year and all administrative costs minus net assets remaining in the fund as of June 30 of the current calendar year. The premium set by this standard would be paid 55 percent by the employee and 45 percent by the employer.

The bill appropriates \$36.5 million from the general fund to WSD for expenditures in FY24 and FY25 for the administrative costs associated with establishing the PFML Act. The bill also includes annual \$6 million fund transfers starting on January 1, 2026, from the newly created PFML fund to the general fund until the total transfers from the PFML fund equal the amount of appropriations made to WSD for administrative costs.

The bill includes a provision allowing the department to waive employers and employees from contributing to the fund if the employer already has a leave program in place that is equal to or more generous than the proposed PFML benefit.

The bill creates a PFML implementation advisory committee with members from various community organizations and others, provides for rule-making authority for WSD, clarifies that the bill would not affect collective bargaining unit agreements, preempts local entities' policies, creates an administrative process for appeals, establishes WSD disciplinary powers, and makes it unlawful for an employer or other person to interfere with a person attempting to exercise a right under PFML.

Different provisions in this bill start at different times. However, the appropriations contained in the bill start on July 1, 2023.

FISCAL IMPLICATIONS

The Paid Family and Medical Leave Taskforce, created by Senate Memorial 1 in the 2022 legislative session, studied the impacts of establishing a 12-week paid family and medical leave (PFML) benefit for nearly all state residents and produced a report with their findings. According to the report, contributions to the fund are expected to generate \$463.2 million in 2025. The report estimated benefit pay outs of \$368.3 million in 2026.

No other agencies provided analysis or estimates of fund revenue, expenditures, or solvency.

Fund Solvency

The current FIR analysis identifies potential risk for fund insolvency as the uptake rate increases. Two scenarios were used to provide a range of potential costs depending on uptake rate. In the lower range (BBER analysis) the uptake rate of 4 percent suggests the SB11 appropriation and contributions are sufficient to cover costs; in a higher uptake rate scenario of 10 percent, the appropriation and contributions are insufficient, and the fund becomes insolvent, triggering a provision requiring the secretary to increase rates.

There are several reasons to suggest New Mexico could have a higher uptake rate than 4 percent:

- Several states have uptake rates higher than 4 percent.
- UNM shows an uptake rate of 5 percent for parental leave alone.
- The package proposed in SB11 for New Mexico covers more eligibility categories than comparator states like Washington, which has uptake rates higher than 4 percent.
- Data from the U.S. Department of Labor shows low-wage workers have a 3 percent higher rate of taking leave for FMLA reasons, and New Mexico has the highest percentage of low-wage workers in the nation.
- New Mexico ranks unfavorably on several potentially impactful, qualifying health outcomes, including diabetes, accidents, and chronic liver disease.
- The percentage of U.S. workers taking leave for FMLA reasons increased by 2 percent from 2012 to 2018, even while number of eligible workers declined by 3 percent over the same period.

The taskforce report's assumptions on the uptake rate are on the lowest end of what the state could expect. The report's estimate also did not consider the number of employers that would opt for a waiver, further depressing the estimate. To estimate claims, the report used annual births and annual disability claims to arrive at a 4 percent to 4.15 percent annual take-up range among covered employees. However, the bill would likely result in more than one claimant per birth because both parents, as well as possibly other caregivers for the child or the birthing parent, would be eligible to claim PFML. Additionally, eligibility requirements for disability are much narrower than eligibility requirements for this bill because the bill allows for leave to take care of family members and includes events such as stalking, miscarriage, domestic violence, and others. For these reasons, the PFML claims could be much higher than the model assumes.

Federal FMLA claims, whose criteria match very closely to the eligibility criteria outlined in this bill, also tend to be higher than this model assumes. A widely quoted take-up rate is around 14 percent of workers, supported by federal studies.¹ While some of these workers may claim FMLA and use existing benefits, like accrued sick leave, instead of PFML, these higher take-up rates suggest the model could be underestimating.

UNM reported a take up rate of 5 percent in FY22 for their paid parental leave program, which is much more narrowly defined than the proposal. Washington state reported a 7.4 percent take up rate, but their program is also narrower than the proposed bill and does not allow for safe leave.

On the revenue side, the report's estimate may not have accounted for waiver-eligible businesses. If a business provides leave and leave compensation that is equal to or better than PFMLA then they can receive a waiver. Businesses qualifying for a waiver would likely be larger with higher wages, such as governments, universities, large corporations, national labs, etc. Excluding these high-wage jobs from collections will eventually require the WSD secretary to adjust the premium paid to make up for those who are not paying into the fund.

Contribution payments by employees and employers into the PFML fund begin January 1, 2025. Leave compensation payments to employees from the PFML fund begin January 1, 2026. The estimated contributions and payouts included in the revenue table above for FY25 and FY26

¹Department of Labor:
https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHF_FMLA2018SurveyResults_Appendices_Aug2020.pdf

represent a range of scenarios given varying, but plausible, estimates of the number, duration, and average amount of leave compensation claims, as well as varying estimates of the value of contributions. Other assumptions—such as wage levels, employment duration, length of leave, number of claims per qualifying event, and others—could have significant impacts on the estimates of the fund’s revenues and disbursements.

The high-end estimate of contributions to the fund and the low-end estimate of the benefit claims included in the table above is the estimate included in the Paid Family and Medical Leave Taskforce report. The low-end estimate of contributions to the fund and the high-end estimate of the benefit claims assumes the number of claims are closer to the federal FMLA take-up rate and set at 10 percent, considers roughly 10 percent of employers will be granted waivers, and assumes the average length of leave for federal FMLA claims of 8.5 weeks instead of the full 12 weeks as assumed in the task force report.

Medium Cost Scenario

	2025	2026	2027	2028
Eligible Workers	871,247	883,184	895,121	907,058
Take Up Rate (10%)	87,125	88,318	89,512	90,706
Annual Payout w/8.5 Week Average Utilization		\$653,865,274	\$676,398,184	\$699,296,365
Administrative Costs	\$33,550,000	\$33,550,000	\$29,000,000	\$29,000,000
Reimburse General Fund	\$6,000,000	\$6,000,000	\$6,000,000	\$6,000,000
Total Estimated Cost	\$39,550,000	\$693,415,274	\$711,398,184	\$734,296,365
Fund Balance Prior Year		\$354,558,159	\$69,339,458	(\$219,216,918)
Estimated Revenue to FMLA Fund	\$394,108,159	\$408,196,573	\$422,841,808	\$437,427,265
FMLA Fund Balance (deficit)	\$354,558,159	\$69,339,458	(\$219,216,918)	(\$516,086,018)

Low-Cost Scenario, Based on Taskforce Parameters

	2025	2026	2027	2028
Eligible Workers	871,247	883,184	895,121	907,058
Take Up Rate (TF report 4%)	35,211	35,253	35,729	36,206
Annual Payout w/12 Week Average Utilization		\$368,464,356	\$381,162,039	\$394,065,559
Administrative Costs	\$61,368,706	\$62,657,449	\$29,000,000	\$29,000,000
Reimburse General Fund	\$6,000,000	\$6,000,000	\$6,000,000	\$6,000,000
Total Estimated Cost	\$67,368,706	\$437,121,805	\$416,162,039	\$429,065,559
Fund Balance Prior Year		\$395,808,573	\$438,421,515	\$519,206,097
Estimated Revenue to FMLA Fund	\$463,177,279	\$479,734,747	\$496,946,621	\$514,088,242
Fund Balance (deficit)	\$395,808,573	\$438,421,515	\$519,206,097	\$604,228,780

After FY27, this bill does allow the secretary of WSD to adjust the rate to ensure collections reach 135 percent of disbursements. This could significantly increase the required contributions for both employees and employers. The bill does not include other solvency triggers, such as allowing WSD to lower the benefit rate or payout amounts if solvency is in question. Payout amounts would naturally rise with inflation and wage increases because the payout is capped at the New Mexico median income.

Appropriations

The appropriation of \$36.5 million contained in this bill is a nonrecurring expense to the general fund for the first two years and a recurring expense to the PFML fund thereafter. Any unexpended or unencumbered balance remaining at the end of FY25 shall revert to the general fund.

The bill also includes annual transfers of \$6 million, starting on January 1, 2026, from the newly created PFML fund to the general fund until the total transfers from the PFML fund equal the amount of appropriations made to WSD for administrative costs

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

Direct Costs to State Agencies

Total cost to the state to pay the 0.5 percent employer contribution is \$22.2 million. The state may choose to give employees a raise to cover the employee contribution above other planned compensation increases. If state agencies absorb the 0.4 percent employee contribution in the form of higher salaries, the cost is \$40 million. A high-level breakdown can be found in the table below.

	Salary	0.5% employee contribution	0.4% employer contribution	Total Contribution
Legislative	\$13,821,700	\$69,109	\$55,287	\$124,395
Judicial	\$215,677,000	\$1,078,385	\$862,708	\$1,941,093
Executive	\$1,090,958,200	\$5,454,791	\$4,363,833	\$9,818,624
Public Education	\$2,212,350,000	\$11,061,750	\$8,849,400	\$19,911,150
Higher Education	\$908,264,400	\$4,541,322	\$3,633,058	\$8,174,380
Total	\$4,441,071,300	\$22,205,357	\$17,764,285	\$39,969,642

*LFC Volume III, FY24

Agency analysis may vary. This analysis uses payroll figures as reported in Volume III of the 2023 LFC report to the Legislature, *Legislating for Results: Supplemental Tables and Graphs*, for consistency. For example, UNM estimates its costs to pay both the employee and employer contributions to exceed \$7.3 million annually. This figure includes central campus, branch campuses, and the Health Sciences Center, but excludes UNM Hospital, which is estimated to cost \$6 million annually.

Workforce Solutions Department

The estimated cost associated with this new program including a new system, IT infrastructure and associated staffing for the first two fiscal years would be approximately \$51.7 million. This means there would be a shortfall from the initial appropriation in the estimated amount of \$15.2 million. This includes direct operational staffing, IT Infrastructure support and indirect cost for operational sustainment—such as facilities and administrative services.

Year	Estimated Costs
Year 1: Fiscal Year 2024 Planning, initial staffing to build program, rulemaking, initial contracts	25,335,937
Year 2: Fiscal Year 2025 Operational builds for it and facilities; hire significant staff; public education; employer contributions begin	26,457,629
Year 3: Fiscal Year 2026 Full hiring; full program implementation	35,000,000
Recurring thereafter	35,000,000

WSD uses a variety of methods to compute staffing, including receiving data from states with existing programs, evaluating the bill for program requirements, and modeling staffing based on the unemployment insurance staffing structure. Comparisons with other states were difficult to obtain because no other state seems to include contributions, benefit administration, appeals and enforcement all in one agency.

WSD reports the following policy choices would affect staffing, and as a result, funding estimates:

- The timeline of 10 days for WSD to issue a determination of eligibility after an application is complete is likely onerous. PFML cases may entail medical documents that require review and evaluation under strict confidentiality requirements pursuant to the HIPAA. Washington State for example reports 3.6 average weeks for processing claims, with a median of 2.3 weeks, now that its program is mature.² Earlier months showed average processing times of 5 weeks and more. The provision that defers the 10-day timeline to start running when all information has been received is helpful on this issue. However, if this requirement remains, it may increase the number of claims processing staff required.
- Similarly, SB11 prescribes narrow timeframes for hearings to be held within ten (10) days with a ruling and final decision due five (5) days later. These narrow time frames entail significant amounts of staffing and resources dedicated to the hearing procedures to ensure timeliness and compliance. Also as a practical matter, it is unlikely that all parties will always be available and prepared to present all relevant evidence at hearing within these narrow time frames. Timeliness and compliance will require significant staffing and resources dedicated to meet PFMLA’s objectives.
- Making government agencies subject to PFML means WSD (like all agencies) will need to staff in anticipation of coverage issues. States with lower staffing agencies do not mandate that public agencies are covered (RI, CA, NJ, DC).
- Other states have noted that the availability of small increments of intermittent leave makes calculations and claims processing more complex, requiring more resources.

Other Financial Considerations

² Washington State Employment Security Department:
<https://media.esd.wa.gov/esdwa/Default/ESDWAGOV/newsroom/Legislative-resources/paid-leave-program-operational-needs-resources-220902.pdf>

- In executive order 2019-036 the governor created a 12-week paid parental leave program for state employees after employees complete one full year in the position. The Legislature passed a similar policy for legislative staff in 2022.
- In 2019, the state enacted Section 10-16H-1 NMSA 1978 which expanded state employee and public-school employee use of accrued sick leave for extended family members.
- In 2021, in Section 50-17-1 NMSA 1978 the state enacted the Healthy Workplaces Act requiring all public and private employers to allow employees to accrue earned sick leave of 64 hours per year.
- According to a September 2022 NCSL report, 11 states and the District of Columbia offer paid family and medical leave. All state programs are funded through employee-paid payroll taxes, and some are also partially funded by employer-paid payroll taxes.
- Federal social security disability benefits apply to those with a terminal diagnosis or if the disability diagnosis is determined to last at least 12 months.
- The PFML taskforce estimated the administrative cost to the Workforce Solutions Department (WSD) at \$59 million in FY23. However, the FY22 expense to run the Unemployment Insurance Division of WSD was \$16.2 million which included significant costs related to pandemic claims.
- The bill does not include guardrails around WSD’s authority to adjust the benefit in the event of surpluses in the fund as opposed to adjusting the rate.

SIGNIFICANT ISSUES

Workforce Solutions Department Administration

The following issues would need to be clarified by rule. WSD supports flexibility in this respect but draws attention to these elements in case the Legislature wishes to be more specific:

- The process for WSD to investigate, prosecute, or adjudicate a fraudulent claim, or recoup leave compensation that is obtained fraudulently (As a possible model, the unemployment insurance (UI) program has detailed provisions empowering WSD to take appropriate steps to maintain program integrity and protect the UI trust fund from fraud.);
- The process for WSD to recoup leave compensation that has been improperly paid to an individual;
- The frequency and detail of wage reporting;
- The process for getting proof of each element of a claim and the extent to which claimants may “self-attest” to various elements of the claim, such as the familial relationship;
- The procedures and detailed timelines for hearings after an appeal is properly made.

The following drafting issues may need to be addressed:

- Section 4(A) uses the phrase “subject to state jurisdiction.” This may be intended to cover those who work remotely for out-of-state employers. However, whether an out-of-state entity or person is subject to state jurisdiction is determined by the significance of their contacts to the state, may be different in different contexts, and is subject to ongoing court interpretation.
- Although Section 10(A) affords aggrieved parties the right to judicial review of a final agency dean appeal, SB11 does not establish that WSD has the right to be an interested party to such appeal. WSD does have the right and standing as an interested party in district court for appeals arising from the UI program. It is helpful for WSD to have the

right and standing as a party of interest because, otherwise, judicial review of PFML decisions may occur without WSD being involved, and the courts would not have the advantage of WSD’s subject matter experts.

- WSD is not sure what the phrase “includes an agent of an employer” in Section 2(E) means.

Waiver Eligibility

UNM notes the following issues with waiver eligibility:

The criteria used for considering a waiver outlined in Section 4 (G) are unclear, specifically as it pertains to existing paid leave programs that run concurrently with FMLA and how they will be evaluated. For instance, UNM offers a wide variety of paid leave programs which are paid at full salary and at no cost to the employee. It is not clear that these programs will be treated when evaluating a waiver request, as they are not formal paid FMLA programs but provide leave benefits that are used in parallel with FMLA and provide leave compensation that is much more generous than that provided for in the proposed legislation.

UNM operates a paid parental leave (PPL) program that provides for 4-weeks of paid leave to be used in conjunction with other available employee sick and annual leave. UNM’s PPL program allows employees to be compensated at their current base pay, and at no cost to the employee. The PPL program has been well received by the UNM campus. Regular full-time staff employees also accrue nearly seven weeks of sick and annual leave each year (264 hours), and together can accrue a total of nearly 1300 hours of leave before maxing out (1,040 sick leave and 252 annual leave). When used, these leave hours are paid at an employee’s full salary and are often take concurrently with FMLA. Additionally, UNM provides other programs such as a catastrophic leave program to safeguard employees who are required to be out of the office for extended periods of time for medical reasons.

Further, UNM faculty are eligible for a semester of parental leave at full pay where they are relieved from teaching duties, as well as up to six months of paid sick leave for cases of extended illness or injury.

Given the significant paid leave benefits already in place at UNM, it is unlikely that the utilization rate of the State FMLA program will be high, resulting in UNM and its employees making contributions to a leave program for which it will likely see only limited participation. It is unclear if, beginning in 2028, premiums will be based on individual employer utilization (similar to unemployment) or if all employers in the state will pay the same premium rate.

Finally, because it prohibits the reduction of other leave benefits, this legislation also raises the possibility of employees utilizing more than the allotted 12 weeks by stacking other employer-provided leave with the paid state FMLA program. For instance, an employee could take the 12 weeks of paid FMLA, and then request four weeks of paid PPL from UNM at full pay, and then exhaust any paid sick or annual leave, significantly exceeding the 12-week duration of leave. The administrative burden of these programs potentially running in parallel will be significant, and likely require additional staff resources to manage and oversee these programs.

New Mexico Independent Community Colleges (NMICC) provided the following:

If there are not offsetting appropriations to the institutions to fund the employer cost of the family and medical leave program institutions, institutions will look to other revenue sources, such as tuition increases, to offset the increased employer cost. If there are not offsetting employee compensation appropriations, employees will see a decrease in their net pay. The legislature could appropriate a compensation increase to cover the employee’s 0.5 percent contribution. However, as higher education institutions do not receive sufficient appropriations to cover all salaries, the institutions will look to other revenue sources, such as tuition increases, to fully fund the compensation appropriation.

The following two tables show the higher education institution employer and employee costs as estimated by NMICC and Council of University Presidents. However, to maintain consistency among all state agencies, the analysis in the tables above did not include these figures.

Institutions	Estimated Annual Contribution		
	Employer	Employee	Total
Clovis CC	\$40,755	\$50,944	\$91,698
Central NMCC	\$386,043	\$482,554	\$868,597
Luna CC	\$23,332	\$29,165	\$52,496
Mesalands CC	\$13,363	\$16,703	\$30,066
NM Junior College	\$60,995	\$76,243	\$137,238
NM Military Institute	\$67,939	\$84,924	\$152,863
San Juan College	\$139,501	\$174,376	\$313,878
Santa Fe CC	\$89,187	\$111,483	\$200,670
Southeast NM College	\$8,274	\$10,343	\$18,618
Total	\$829,388	\$1,036,735	\$1,866,124

Institutions	Estimated Annual Contribution		
	Employer	Employee	Total
ENMU	\$226,000	\$282,500	\$508,500
NMHU	\$142,773	\$178,466	\$321,239
NMSU	\$1,090,280	\$1,362,850	\$2,453,130
NMT	\$1,500,000	\$719,863	\$2,219,863
NNMC	\$60,000	\$75,000	\$135,000
UNMMain	\$3,252,603	\$4,065,754	\$7,318,357
UNMH	\$2,669,376	\$3,336,720	\$6,006,096
WNMU	\$99,450	\$124,213	\$223,663
Total	\$9,040,482	\$10,145,366	\$19,185,848

The State Personnel Office notes the following issues with waiver eligibility:

The effect of this Act on the State of New Mexico as an employer is unclear.

Section 11 of the Act pre-empts a city, county, home rule municipality or other political subdivision of the state from adopting or continuing any program that provides rights and benefits as set out in the Act. But the bill is silent on whether the State of New Mexico is pre-empted as well.

Section 4(G) of the Act permits an employer that has adopted and operates a paid family and medical leave plan equal or greater to the program offered under the Act to apply for a waiver exempting the employer from participating in the program. But Section 4(I)(1) presupposes that any employer granted a waiver is covered by a *privately* run leave program rather than a public plan. There is no recognition that the State of New Mexico has its own Paid Parental Leave policy in place pursuant to Executive Orders 2019-036 and 2020-062.

If the State is not pre-empted from maintaining a competing program and if the State would have to seek a waiver in order to continue its *publicly* run Paid Parental Leave policy, it is uncertain if the State would qualify for such a waiver here. Again, a waiver is only available to an employer that has adopted and operates a paid family and medical leave plan equal or greater to the program offered under the Act.

In some respects, the leave provided under the Act surpasses that offered by the State's Paid Parental Leave policy. The State's Paid Parental Leave policy provides up to 12 consecutive weeks of paid leave to employees who have been employed with the State for at least 12 months in order to bond with a new child during the first six months after a birth or adoption. But the Paid Family and Medical Leave Act provides greater benefits, including up to 12 non-consecutive weeks of paid leave to all employees in order to bond with a new child during the first 12 months after birth or adoption, to provide care for themselves or family members experiencing a serious health condition, or to protect themselves or family members who are victims of domestic violence, stalking, or sexual assault.

In other respects, the leave compensation provided under the Act falls short of that offered by the State's Paid Parental Leave policy. The State's Paid Parental Leave policy pays employees 100 percent of their regular compensation for up to 12 weeks of leave. The Act pays employees 100 percent up to minimum wage, and then only 67 percent of their regular compensation above minimum wage for up to 12 weeks of leave.

Business Environment

This bill acts as a 0.4 percent payroll tax increase on employers and a 0.5 percent payroll increase on employees. According to UNM-BBER, total wages and salaries will be \$56.5 billion in 2025. A 0.9 percent payroll increase on every employee in the state equates to over half a billion dollars in increased payroll taxes. The *Tax Foundation 2023 State Business Tax Climate Rankings* currently rank New Mexico at 28th overall, with corporate taxes ranking 12th and unemployment insurance taxes (one of the primary payroll taxes) ranked 9th.³ Increasing taxes on businesses will likely make New Mexico less competitive compared with other and neighboring states.

Increasing payroll taxes also may impact businesses' demand for labor, as well as the supply of labor. In normal labor markets, payroll taxes are typically passed on to employees, effectively lowering the take-home pay of workers.³ While the STBTC amendment excludes employers

³ Tax Foundation: <https://taxfoundation.org/what-are-payroll-taxes-and-who-pays-them/>

from passing on their tax to their employees, there is no effective way to track or enforce this as it is usually accomplished through suppressed wages. This could dull the effects of measures to increase the minimum wage, such as those included in HB25 and HB28. However, in a tight and competitive labor market like New Mexico experienced in 2022 and into 2023, these taxes are more likely to be carried by the employer, making hiring new and keeping existing workers more expensive and burdensome.

The reporting and administrative requirements outlined in this bill may present excess burdens on business owners, especially smaller businesses and those without a full human resources department or staff (see “Administrative Implications” for further discussion).

The Economic Development Department notes the following regarding employer participation:

Human Resources (HR) is the department primarily responsible for important tasks like recruiting talent, signing on new hires, and managing payroll and benefits administration. A high-performing HR team is key to running a successful business, or government department. However, there may be instances when it makes sense to outsource certain tasks, like FMLA management, to a third party, like WSD. When doing so, it’s important to consider potential drawbacks to outsourcing HR functions, such as:

- HR manages many important tasks that have to do with a company’s employees. Outsourcing may result in loss of internal controls.
- Employees may feel disconnected from the company or department and prefer to interact with internal HR staff.
- A company or government department may have less capacity for flexibility with their employees if they are required to adhere to policies and procedures mandated by an external entity.

The positive result of implementing a mandatory paid family and medical leave program, and presumably the intent, is to make the benefits available to a larger population and to ease the financial burden that often results with having to take unpaid time off for family or medical leave. The recommendation would be to ensure that all lines of communication between employee and employer remain open and that the employee’s experience is regularly evaluated to ensure that they are supported. It is equally important to maintain a business-friendly environment that promotes expansion and job creation.

It does not appear that there is any requirement that the employee request approval or notify the employer that they are applying for this program. WSD is required to notify the employer of the approved application and the employee is required to provide a copy of that approved application to the employer, but the employer has no knowledge of the employee’s application until it has been completed and approved by WSD. This could put the employer in a burdensome situation if they have little or no notice that the employee will be out on extended leave and the employer is forced to find a temporary replacement.

ADMINISTRATIVE IMPLICATIONS

Workforce Solutions Department

Building and administering the PFML program will entail a massive administrative undertaking. WSD estimates it will need 216 staff positions, roughly the same staffing as the entire UI program, including staff who are in other divisions but support the program. From WSD:

- Part of the basis of WSD’s staffing analysis is the estimated number of annual claims. Estimates of the number of annual claims varies quite widely. BBER estimated a little over 35,000 claims annually. However, applying Washington State’s claim numbers to New Mexico’s population yields a number of estimated annual claims of 53,000. Direct comparisons are challenging because each state has its own definitions of covered conditions, and each state has unique population characteristics. All in all, WSD believes estimating based on UI staffing levels with certain adjustments is the best method of approximation.
- From the UI base staffing, we have increased PFML processing staff to reflect the statutory timelines for processing claims and hearings that we do not have in UI.
- In comparison to certain other states with lower relative staffing levels, WSD allows filing by phone and in person for UI, and would anticipate the same for PFML. New Mexicans require phone and in-person service because of broadband access, computer literacy, familiarity with government services. WA, RI and CA do not do in person claims, while NJ started in 2022. DC does not allow filing by phone or in person.
- Comparison to other states’ staffing levels is also challenging because states with lower relative staffing levels have different roles and less administrative burden. For example, CA appeals from PFML go to a different agency. Job protection is not available (so doesn’t need to be enforced) in CA, in the initial NJ law, or for an employee’s own health issues in RI and DC. RI and DC do not have waiver programs.

Participating Workplaces

The reporting and administrative requirements outlined in this bill may present excess burdens on business owners, state agencies, and other eligible places of work, especially smaller businesses and those without a full human resources department or staff. For example, the business owner must work with the WSD to report employees applying for PFML and help certify their leave. Additionally, businesses must hold a position for employees that take PFML and who have worked for that business for at least six months. This requirement could be difficult for businesses with a small workforce where a single worker may constitute a large share of the business output. They may be forced to stretch their remaining employees’ duties to cover the absent coworker, or the business may hire someone new to cover their duties and be forced to release the new worker or be overstaffed on return of the worker on PFML.

UNM notes particularly as it relates to intermittent leave, significant administrative effort from the institution will be required to monitor and track employee leave usage, ensure accurate timekeeping, and prevent overpayment. UNM Hospital notes employers’ total (and employees’ individual) payroll fluctuates each pay period due to variable pay differentials, incentives, and premiums, and variable work schedules, raising administrative challenge and potential for error in funding calculation.

UNM Hospital also notes the legislation does not provide clarity regarding the administrative challenge of employer obligations to validate intermittent usage with WSD, employer obligations to notify WSD when employee returns from leave, and employee burden in submitting duplicate leave request documentation to employer and WSD.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to House Bill 25 and House Bill 28, which adjust minimum wage rates.

OTHER SUBSTANTIVE ISSUES

Legislative session analysts raised concerns related to the anti-donation clause in Article 9, Section 14 of the New Mexico Constitution. The anti-donation clause includes an exemption for sick and indigent persons. Because of the bill's broadly defined eligible use categories, many people using PFMLA would not be sick or indigent, leaving the state open for anti-donation related lawsuits. However, there are other examples of programs or tax expenditures that do not meet this test, such as recently enacted tax rebate programs.

EDD notes the following unaddressed issues:

The bill does not address the potential fiscal impact of the paid family and medical leave program to state agencies, which currently adhere to the federal FMLA requirements, which include unpaid leave.

The bill does not address whether an employee may use accrued leave in conjunction with the Paid Family and Medical Leave Act.

The bill does not address whether WSD or an employer may require an employee to exhaust accrued leave before implementing the Paid Family and Medical Leave Act compensation.

The Human Services Department notes the following unaddressed issues:

The bill does not specify how employee contributions will be collected (payroll deduction or employee pays third party administrator).

This bill does not specify time limits of employee enrollment. For example, will enrollment be allowed at any time, during open enrollment only, or 30 days from employee start date, etc.?

This bill does not address the implications or option of waiving/opting out once employee is enrolled in program.

The bill does not define self-employed individuals.

The bill does not define tribal governments.

SB11 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).

SB11 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.

ALTERNATIVES

WSD notes a variety of alternative programs exist in other states, including programs that are more limited (for example, parental leave) and programs that are broader (for example, without the ability to offer an alternative equivalent plan).

POSSIBLE QUESTIONS

How does this program affect Medicaid enrollment? Could PFML bump some people out of Medicaid income eligibility **because** they will not lose as much income when taking leave?

How does this bill affect labor supply and demand? A full review of the labor market and the New Mexico economy is needed to determine the impact of PFML and the associated payroll tax.

Can someone take 12 weeks of leave every 12 months indeterminately? Should there be a lifetime max or other kind of cap on claims or amount of leave taken?

How does PFML as proposed interplay with state-mandated sick leave, unemployment insurance, and social security disability payments? How do these benefits stack, overlap, or duplicate?

Attachment

1. Eligible Uses

EC/JF/mg/hg/mg/rl/ne/al/rl/ne/al/ne/hg/mg

New Mexico Eligible Uses

Family Leave

Bond with a child after birth, adoption, or foster placement

Care for a family member with a serious health condition

Following death of a child

Definition of Family includes

Child of employee whether

- Biological child
- Adopted child
- Foster child
- Step child
- Legal ward
- Child of domestic partner
- Loco parentis relationships (whether child or now grown)

Parent of employee whether

- Biological parent
- Adoptive parent
- Foster parent
- Stepparent
- Legal guardian of employee
- Spouse's parent
- Domestic partner parent
- Loco parentis relationships to
 - An employee
 - An employee's spouse
 - An employee's domestic Partner

Marriage to Employee

- Legally married
- Domestic partner of the employee

Grandparent of employee or spouse or domestic partner of employee whether biological, foster, adoptive, or step relationship

- Grandparent
- Great grandparent
- Grandchild
- Sibling

Family Leave (Any other individual related by blood or affinity whose close association with the employee or employee's spouse or domestic partner is the equivalent of a family relationship)

Safe Leave ("family member" applies to all relationships listed above)

- Victim of domestic violence
- Family member of victim of domestic violence
- Victim of Stalking
- Family Member of victim of stalking
- Victim of sexual assault
- Family member of victim of sexual assault
- Victim of abuse
- Family member of victim of abuse

Safe leave applies if employee or employee's family member is doing one of the following

- Seeking a civil protection order
- Obtaining medical care or mental health counseling
- Seeking new housing, relocating, or making home secure
- Attending or preparing for court proceedings
- Seeking legal assistance

Medical Leave (to care for one's self)

Washington Eligible Uses

Care for family members with a serious condition who are

Spouses

Domestic Partners

Children whether

- Biological
- Adopted
- Foster
- Stepchild
- Legal Guardian
- Loco Parentis

Siblings

Grandchildren

Grandparents

Spouse's Grandparents

Son-in-law

Daughter-in-law

Someone with an expectation of care from employee

Bond with a new child born or placed into family

Military Related

- Spend time with family about to be deployed overseas
- Family member is returning from overseas

Death of a child

Medical Leave (to care for one's self)