

LFC Requester: \_\_\_\_\_

**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

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**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**      X   **Amendment**    \_\_\_\_\_  
**Correction**    \_\_\_\_\_ **Substitute**    \_\_\_\_\_

**Date** January 19, 2024

**Bill No:** HB 11

**Sponsor:** M. Matthews  
**Short Title:** Paid Family and Medical Leave Insurance Act

**Agency Name and Code Number:**

63100-NMDWS

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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		
0	0		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		
Unable to estimate	See Narrative			

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	<b>FY25</b>	<b>FY26</b>	<b>FY27</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	See Narrative					

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB6, SB3 (Paid Family Medical Leave Act)  
 Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: House Bill 11 creates the Paid Family Medical Leave Insurance Act (Act) which would establish a paid family and medical leave program in New Mexico, loosely based on Connecticut’s paid family and medical leave program.

***The Authority.*** The bill creates a Paid Family & Medical Leave Insurance Authority (the “Authority”) to oversee administration of the benefit. The Authority is governed by a board with 11 voting members, with a majority of 6 being governor appointees (three cabinet secretaries and three appointees). The Governor selects the Chair. Legislative appointments must also meet certain criteria related to experience and expertise. Board members serve 4-year terms after an initial staggering of terms. The Board hires a director for the Authority and the Authority may hire additional staff. The Authority is expressly granted the right to enter into contracts for administration of the program.

***The Fund and Contributions.*** Employees make all contributions to the Fund, at a rate set by the Authority and capped at 0.5% of subject earnings. “Subject earnings” is limited to earnings up to the Social Security cap. The Authority may adjust the rate annually based on an actuarial study, subject to the same caps. Contributions are remitted by the employer quarterly. The State Investment Officer is charged with investing the Fund.

***Qualifying Events.*** Eligible individuals may take time off from work for up to 6 weeks per year and receive leave compensation while on leave. The leave and accompanying compensation under the Act may be used for:

- bonding with newborn or recently adopted children
- to care for oneself or family members with a “serious health condition” (physical or mental)

In contrast to HB6/SB3, HB 11 does not provide (a) paid leave for the death of a child, (b) “safe leave” to seek protective measures against domestic violence, stalking, or sexual assault or abuse for oneself or family member(s); or (c) “qualifying exigency leave” for individuals on active military duty or who’ve received an impending call to active duty.

Bonding leave may not be taken intermittently without the express advance agreement of the

employer. Other leave may be taken intermittently at an increment of no less than 8 hours.

***How much is leave compensation?*** An employee's weekly leave compensation payment is 95% of base weekly earnings up to 40 times the state minimum wage rate, plus 60% of the weekly earnings above that. The maximum benefit is 60 times the minimum wage rate, subject to adjustment by the Authority. At the current minimum wage of \$12/hour, the maximum weekly benefit would be \$720.

***Who is eligible?*** Covered employees must have:

- contributed to the Fund for at least six months in the 12-month period before applying;
- earned at least \$2,325 in the employee's highest earning quarter in the first four of the last five months (similar to UI eligibility) or is self-employed.

***Who is not eligible?*** The following individuals are ineligible:

- individuals who have not contributed to the PFML fund for at least six months in the 12-month period preceding application;
- those who file fraudulent claims for leave or have done so within the previous three years;
- those who receive unemployment insurance (UI) benefits during the claimed leave period; and
- persons who, during leave, fail to provide the care or use the leave as described in their application.

***Exemptions authorized.*** Employers with paid family and medical leave plans or programs for the benefit of their employees that provide at least 6 weeks of leave with at least as much compensation as the Act provides and with the same or better conditions, restrictions and premiums may apply for a waiver to exempt the employer and its employees from participating in the program. Employers may appeal a denial of a waiver.

***Protected Leave.*** The bill establishes job protection for employees who have been employed with their current employer for at least 120 days. The bill also prohibits interference or retaliation related to exercising rights under the Act.

***Violations.*** The Authority may file a suit in district court for alleged violations of the PFML. Section 14 enables the Authority to take disciplinary action against parties, such as fines, censure or revocation of a waivers of participation in the state program. Appeals or judicial review of the agency's final decision on an appeal or administrative action would be pursuant to Section 39-3-1.1.

***Preemption.*** HB 6 preempts cities, counties, and other political subdivisions from having their own laws governing paid family and medical leave, with the exception of paid-time-off or paid-sick-leave ordinances, policies, or resolutions, or leave policies for its employees.

***Collective bargaining.*** Nothing in the bill shall be construed to diminish the rights, privileges or remedies of any employee under any collective bargaining agreement.

***Promulgation of Rules.*** Section 5(F)(6) gives the Authority the ability to promulgate rules and

regulations necessary to carry out the purposes of the Act.

## **FISCAL IMPLICATIONS**

No appropriation appears in the bill, the LFC budget recommendation, or the executive budget recommendation. It is unclear how DWS or the Authority would fund the substantial start-up costs of the program. There is also no mechanism to loan money to or repay money from the Fund or the Authority, if general funds were used for start-up. The Authority does not have the ability to issue bonds.

As currently structured, it does not appear that the administrative costs of the program would differ substantially from the administrative costs of the Paid Family and Medical Leave program contemplated by HB 6/SB 3, except that most costs would be borne by the Authority instead of DWS. DWS estimated the administrative costs of the program under HB6/SB3 to be \$24,362,500 in Year 1, \$23,125,000 in year 2, \$28,725,000 in year 3, and \$22,849,000 ongoing annually.

Part of the basis of DWS's staffing analysis is the estimated number of annual claims. Estimates of the number of annual claims vary quite widely. BBER estimated a little over 35,000 claims annually. However, applying Washington State's claim numbers proportionally 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. DWS believes estimating based on UI staffing levels with certain adjustments is the best method of approximation.

- Using the UI staffing base as a comparator, DWS projects an increase for PFML processing staff to reflect the statutory timelines for hearings that we do not have in UI.
- In comparison to certain other states with lower relative staffing levels, DWS allows filing by phone and in person for UI, and would anticipate that the Authority would do 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 than the Authority would have. 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.

A very significant factor in the program cost is the decision of whether to outsource any part of the program, and if so, the bids that would come in response to that decision. DWS would not be making that decision.

DWS would need to receive funds for start-up costs associated with setting up the Authority and may also need to receive funding for administrative oversight of the Authority, although the extent of those responsibilities is unclear.

### ***Comparison to Connecticut Start-Up Costs***

Comparison to Connecticut's costs may be helpful, to the extent that the Authority follows the same path of outsourcing claims administration to a third-party. HB6 differs from the Connecticut model, in that the Authority handles all enforcement matters. In Connecticut, the Connecticut Department of Labor enforces complaints and violations of the leave program.

Based on public information and conversations with the Executive Director of the CTPFML Authority, Connecticut received \$5.1 million in start-up funds for operating expenses, and a \$50 million bond was authorized. The \$5.1 million went to start-up staffing and equipment, and they issued a \$12.2 million bond that set up the informational website and contribution process. The CTPFML Authority paid AFLAC \$1.5 million in start-up costs. These lower start-up costs reflect the fact that the contribution system was based on AFLAC's existing benefit administration platform, and AFLAC's amortization of other start-up costs over the life of their administration contract.

In addition Connecticut's outreach budget, through a contract with United Way, was:

FY21 = \$655,000  
FY22 = \$800,000  
FY23 = \$1,000,000  
FY24 = \$1,000,000

This totals start-up costs of \$19.4 million.

### ***Comparison to Connecticut Ongoing Costs***

Comparisons to Connecticut should take into account that although they have a higher population, they do not cover governmental entities. The Connecticut Act also covers safe leave and military leave, and offers a 12-week benefit. In FY23, Connecticut processed 82,008 claims as administratively complete and granted leave in 57,192 claims. Based on BBER's estimate of 871,247 covered lives in FY25, NM would generate the same number of claims if we saw a 9% take-up rate. Their 70% approval rate is lower than most previous estimates for New Mexico. It may be safe to assume that Connecticut's costs are somewhat higher because of their higher population, broader eligibility, and longer duration of leave. However, the New Mexico program could reach the same or close to the same volume of claims, necessitating the same administrative costs.

The CTPFML Authority handles outreach and contributions directly. Accordingly, their ongoing costs include those associated with contribution calculation, collection, management, etc. The Authority also manages the relationship with AFLAC very closely and is staffed accordingly, including 6 auditors. The Authority's staff is currently 40 people. They estimated that if they had not outsourced claims, they would need a staff of 230. AFLAC charges for benefit administration on a "per lives" basis.

The "actual to budget" page of the Connecticut Trust Fund Report for 2023 shows that the costs of AFLAC's "Benefit Administrative Fees" was \$22,380,144 (the \$25 million contract amount was reduced to reflect penalties). In addition, the Paid Leave Authority had expenditures totaling \$15,000,000. This brings the total annual administration cost to \$37,380,144 plus the amount that CT Department of Labor spent on appeals and claims related to leave protection. This amount is significantly more than the DWS estimate.

The following policy choices would affect staffing, and as a result, funding estimates:

- Sections 13(A)(2) and 13(B)(2) of the bill prescribe narrow time frames for hearings to be held within ten business (10) days of receipt of those appeals or complaints, with a ruling and final decision five (5) business days later. These time frames (shorter than those in HB6) 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 the Authority to have significant staffing and resources dedicated to meet PFMLIA's objectives.
- Making government agencies subject to PFML means DWS (like all agencies) will need to staff in anticipation of coverage issues. Many states do not mandate that public agencies are covered (RI, CA, NJ, DC).

Estimates related to fund solvency are difficult to make with any degree of confidence. In terms of expenditures, utilization rates vary widely from state to state and change over time. For example, Washington State has [found](#) that demand for leave increased dramatically over time, receiving 40,000 more applications in FY23 than in FY22.

In terms of revenue estimates for the Fund, the contribution rate cap of 0.5% of wages is significantly less than the 0.9% rate in HB6/SB3. Presumably this is considered prudent because the duration of the benefit in HB11 is half of that in HB6/SB3, and the benefit amount is somewhat smaller. In the short time allotted, DWS is not able to make a reliable determination as to whether these factors are truly offsetting. DWS is not sure whether it would be methodologically sound to estimate contributions as a fraction of estimated contributions under HB6/SB3.

In terms of overall solvency, while the costs of claims may decrease in a “straight line” based on the shorter duration of the benefit, administrative costs clearly do not.

## **SIGNIFICANT ISSUES**

The bill lacks the customary provisions associated with creating a new political subdivision or agency. See for example, NMSA § 5-11-10 (powers of a Public Improvement District), §72-1-10 (ABC Water Utility Authority powers), or §10-7C-7 (Duties of Retiree Healthcare Authority). The shorter list of duties in Section 4(B), together with the specific authority to contract for certain services in Section 5(G), may create uncertainty as to whether the Authority has the broad powers of other similar entities. Similarly, the specific authority to contract for program administration, actuarial studies and public outreach in Section 5(G) may cause uncertainty about the Authority's ability to undertake other types of contracts (for example, audit, legal services, IT).

Although the bill defines “Indian Tribe,” Section 2(G) and (H) do not exempt employees of Indian Tribes from the bill. DWS was unable to find any other section exempting Indian nations. This raises issues of tribal sovereignty. This omission may be inadvertent.

Section 7(C) limits “intermittent leave” to 8-hour intervals. The absence management industry distinguishes between “intermittent leave” and “reduced schedule.” An example of a “reduced schedule” would be an employee taking their parent to dialysis every Tuesday at 3. Intermittent leave refers to leave that is unpredictable, for example, an employee who needs to take time off when they have a flare up of lupus. It is unclear which of these situations is contemplated by the limitation on “intermittent leave” in this bill. DWS has also heard from employers that they want to retain the flexibility to have an employee take off one hour on a day, as opposed to losing that employee for the entire day.

Section 7(G) does not specify that workers’ compensation benefits preclude paid leave only if the benefits are being claimed for the same time period.

Section 7(G) does not preclude an employee from receiving benefits if they are earning duplicate wages for the same time period.

Section 7(H)(4) requires an employee seeking medical leave to certify that the condition is not eligible for benefits under Worker’s Comp or the NM Occupational Disease Disablement Law. Eligibility may involve complex legal determinations. It is unclear whether the Authority would be required to validate these determinations or would simply accept self-certification. It is unclear how a claimant would make this determination for themselves.

Section 8(A) requires self-employed individuals to be enrolled for 3 years, but it does not explain the consequences if they are not. It is also not clear if “enrolled in the program” would include making contributions as an employee of a covered employer.

Section 9 does not require a healthcare provider to specify the duration of leave necessitated by the serious medical condition. It is unclear whether the Authority would need to make an independent determination of leave duration.

Section 11(A) purports to define “fraud” but does not contain the element of intent to deceive that is ordinarily associated with common law fraud. As written, an unintentional misstatement would constitute fraud. This is particularly troubling given the criminal penalties set forth in Section 11(B). It is highly unlikely that any law enforcement agency in the state would have the capacity to pursue the criminal charges set forth in Section 11(B).

The bill does not address giving notice of an employee’s return to work.

No appropriation related to this program appears in the bill, the LFC budget recommendation, or the executive budget recommendation. It is unclear how DWS or the Authority would fund the substantial start-up costs of the program. There is also no mechanism to loan money to or repay money from the Fund or the Authority, if general funds were used for start-up. The Authority does not have the ability to issue bonds.

In discussions with other states, the cost of processing applications to opt out of the fund and program and address related claims is substantial. Because opt-out programs do not pay into the fund, this is an unfair burden on participating employers. Other states have imposed fees on the opt-out application and related appeals and claims in order to address this issue. It is unclear whether the Authority would be permitted to impose such fees.

## **PERFORMANCE IMPLICATIONS**

Based on conversations with Connecticut, it is not feasible to tie the premium contribution system to other existing tax payment systems when a separate entity is administering the paid leave program. Assuming the Authority came to the same conclusion, employers remitting contributions would need to interface with a third system for this program, as connection to NMTAP or the UI system would not be feasible.

Connecticut's experience with AFLAC as a third-party administrator suggests that if the Authority followed a similar path, the program could achieve extremely strong wait and processing times. 80% of their calls are currently answered within 90 seconds, with an abandonment rate of less than 3%. This is primarily because a private administrator can be considerably more flexible in its staffing structure than any state entity can be. The AFLAC operation is fully remote. Although initial problems arose with claim denial rates and a lack of transparency, those were addressed over the first year of operations and AFLAC was penalized pursuant to its contract.

The other tremendous benefit Connecticut derived from outsourcing claims administration to a third party was in the speed of setting up the system and coming online. AFLAC altered an existing benefits system and built a document tracking system that has proven highly popular.

## **ADMINISTRATIVE IMPLICATIONS**

Although the Authority would be a separate entity, DWS anticipates that setting up the Authority and giving it guidance in the first year would represent a significant investment of time and resources. At least four positions would be necessary at the DWS level for at least 2 years. We believe this is reflected in the cost estimates above.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB11 sets up an alternative paid family medical leave system that would take effect instead of the system proposed in HB 6/SB 3.

## **TECHNICAL ISSUES**

Section 2(F) does not require self-employed individuals to meet the earnings criteria set forth in 2(F)(1) because of the "or" between (1) and (2). It is unclear if this is intentional.

The bill begins to discuss the Paid Family and Medical Leave Insurance Fund before defining and creating the Fund. Section 5 should come after Section 6.

Section 5(F)(1) is unclear. DWS is not sure what is meant by "a process by which employers may credit covered employee contributions to the fund."

In Section 7(C), it is unclear what the difference is between the rules for bonding leave ("shall not be taken intermittently unless the covered employee and the employer agree otherwise") and the rules for other leave ("may be taken intermittently if both the covered employee and employer agree"). All intermittent leave arrangements require agreement of the employer, so it is



unclear why these two cases are treated differently.

Section 7(H)(2) suggests that the Authority would need to request certification of the employee's need for leave. This conflicts with Section 9(A) that requires such documentation.

Sections 10(A) et seq. refer to an opt-out as a "waiver." Our colleagues in other states have indicated that this is not consistent with common industry language and suggest that an "opt-out" would be clearer. It also appears that employees are effectively penalized if they work for an opt-out employer, because they must work at an in-fund employer and make contributions for 6 months before becoming eligible. It may be advisable to disclose this information in the required notice to employees of opt-out employers.

In Section 5(J), would it make more sense to put this language in the notification of approval of an application rather than when an application is first filed.

### **OTHER SUBSTANTIVE ISSUES**

The concept of a dedicated Authority to administer a program as complex as Paid Family & Medical Leave has merit. The Authority could develop a depth of expertise, and there may ultimately be cost savings from not being subject to overhead charges from a federally funded entity like DWS. Connecticut used a separate structure because their state law exempts quasi-governmental entities like their CTPFML Authority from procurement and personnel rules. However, the separate structure may be beneficial even without those advantages.

The concept of outsourcing claims administration also has clear advantages from the staffing, economy of scale, and inherited expertise perspectives. That said, DWS does not believe that any agency requires statutory authority to outsource a program in this manner, absent an express prohibition.

The Department does not take a position on the issues of benefit duration, eligibility, or benefit amount.

### **ALTERNATIVES**

HB6/SB3 offers an alternative.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Paid family and medical leave will not be a legal requirement.

### **AMENDMENTS**