Colorado Legislative Council Staff

HB17-1307

FISCAL NOTE

FISCAL IMPACT: ☒ State ☒ Local ☒ Statutory Public Entity ☒ Conditional ☐ No Fiscal Impact

Drafting Number: LLS 17-0034
Prime Sponsor(s): Rep. Winter

Date: April 10, 2017
Bill Status: House Business
Fiscal Analyst: Erin Reynolds (303-866-4146)

BILL TOPIC: FAMLI INSURANCE PROGRAM WAGE REPLACEMENT

Fiscal Impact	FY 2017-2018	FY 2018-2019	FY 2019-2020
State Revenue*	**Potential increase.**	**up to ($6.2 million)**	**at least $573.5 million**
General Fund**		(6.2 million)	(18.5 million)
Cash Funds	Bonding; potential gifts, grants, and donations.		at least 592 million
State Expenditures***	**$673,426**	**$18,933,511**	**at least $29,090,679**
Cash Funds	559,919	17,929,903	at least 25,276,141
Indirect Costs	113,507	1,003,608	3,814,538
TABOR Impact		($6.2 million)	Not estimated.
FTE Position Change	6.3 FTE	57.2 FTE	219.2 FTE
Appropriation Required: None.			
Future Year Impacts: Ongoing revenue and expenditure increase.			

* *State revenue to an enterprise is TABOR-exempt.*
** *The General Fund state revenue decrease in conditional.*
*** *State expenditures include program costs only. For the estimated benefit payout beginning in FY 2019-20, see Table 5 on page 7.*

Summary of Legislation

The bill creates the Division of Family and Medical Leave Insurance (FAMLI division) as an enterprise in the Colorado Department of Labor and Employment (CDLE). The purpose of the FAMLI division is to provide wage-replacement benefits for up to 12 weeks per year to eligible employees. Paid leave must be taken concurrently with the unpaid, job-secured Family and Medical Leave Act (FMLA) leave available under current federal law. The FAMLI division will pay benefits through a premium deducted from all employees' payroll, paid to the newly created FAMLI enterprise fund, which is TABOR-exempt. The division will set the premium by rule based on an employee's annual wages, not to exceed 0.99 percent of annual taxable wages.

Applicability and definitions. The bill requires a premium payment to be deducted from the wages of all public and private sector employees and agricultural workers. Sole proprietors may opt in to the program. Family member is defined as a person who is related by blood, marriage, civil union, or adoption, and up to one additional person designated annually by the employee. Qualifying events include an individual's serious health condition; caring for a newborn, an adopted child, or a child placed through foster care for the first year; caring for a family member with a serious health condition; events related to a family member's active military duty; or any other leave authorized by the FMLA.

Elective coverage. Self-employed individuals may elect coverage for an initial period of not less than three years or a subsequent period of not less than one year. The individual opts in by filing a notice of election in writing with the director, which becomes effective on the day the notice is filed. Notice must be provided to the division in advance of withdrawal from the program.

Premiums and benefits. The division director must determine the premium amount, not to exceed 0.99 percent of total annual taxable wages, and may adjust the premium amount annually to ensure actuarial fund soundness and to avoid an excessive fund balance. If necessary, the division director may later establish a solvency surcharge by rule.

Table 1 shows the benefit amount in relation to the individual's annual salary amount as a percentage of the annual mean wage, as determined by the Bureau of Labor Statistics, for all occupations in Colorado. Benefits are capped at $1,000 per week. The $1,000 cap will be adjusted each year in relation to the personal income growth rate.

Table 1. Benefit Structure Under HB17-1307

Individual's Income Compared to State Annual Mean Wage	Percentage of Weekly Wage Eligible for Benefit
not more than 20%	95%
20% to 30%	90%
30% to 50%	85%
50% or more	66%

The division must make the first benefit payment to a claimant within two weeks after the claim is filed, and bi-weekly thereafter, for up to 12 weeks. The division must adjust the maximum weekly benefit according to a formula outlined in the bill annually beginning January 1, 2020.

Proof of eligibility. The division director will set rules related to claim forms and the manner in which claims are filed; however, the bill makes several requirements related to claims, including that an employee prove eligibility, meet certain hourly thresholds of employment per year, disclose relevant medical records, and attest that his or her employer was notified in writing. The division may also require additional attestations from employees.

Employer requirements. Employers must collect premiums through a payroll deduction and remit the funds to the division. Employers can choose to establish a designated person selection process and allow employees to annually update their designated person; if no process is set up by the employer, the employee designates upon making a claim. Employers may not require employees to take any other form of leave during an employee's FAMLI leave. If an employer has a disability or family leave policy already in place, this leave can be taken concurrent to FAMLI leave. Finally, employers must post notices related to and notify new hires of the FAMLI benefit program.

FAMLI Fund. The FAMLI Fund is an enterprise fund within the State Treasury. The fund may be used only to repay revenue bonds issued to cover start-up costs; collect employee FAMLI premiums; pay FAMLI benefits to employees; and cover program administration and outreach costs. The fund may receive any gifts, grants, or donations accepted by the division. The fund is continuously appropriated to the FAMLI division.

Claim denial and appeals process. The division may deny a FAMLI leave claim, and the employee may appeal the division's decision using the same process in law for unemployment insurance appeals. An employee has 20 calendar days to submit his or her appeal in writing. Upon receipt, the division must schedule a hearing.

Employer penalties. While an employee is on leave, an employer must maintain the employee's benefits and may not discriminate against the employee in response to the employee's actual or requested leave. The division director will create a fine structure for employers who violate these requirements.

Fraud. The director may develop a procedure for recovering erroneous benefit payments. The director may exercise discretion to partially or wholly waive repayment amounts.

Other division responsibilities. The director must follow federal tax withholding policies and may establish any other rules as necessary to establish the program. The division must report to the General Assembly by September 1, 2020, and each year thereafter, on program participation, including demographics, as well as premium rates, fund balances, and outreach efforts.

Income tax deduction. The bill creates an individual income tax deduction for FAMLI benefits.

Timeline. The bill requires the following implementation schedule:

- program implementation begins July 1, 2018;
- outreach program implemented by January 1, 2019;
- employee premium collection begins July 1, 2019; and
- benefits available as of January 1, 2020.

Background and Data

Federal Family and Medical Leave Act. The federal FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave for specified family and medical reasons, with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Employees may use sick time, vacation time, or other accrued leave time along with FMLA leave in order to continue being paid. The employer must have at least 50 employees within 75 miles of an employee's worksite for the employer to be subject to FMLA requirements.

Paid family leave in other states. Three states — California, New Jersey, and Rhode Island — currently have paid family leave programs; California's began in 2002, New Jersey's in 2008, and Rhode Island's in 2013. The family leave programs operate in conjunction with each state's temporary disability insurance program. The programs are funded through employee contributions. Washington passed a paid family leave program in 2007 that has not yet been funded. New York and Washington D.C. have also recently passed paid family leave programs, effective 2018 and 2020, respectively. The utilization rate in these states has varied between 1.5 and 5 percent.

Colorado employment data. Table 2 shows the number of Colorado employees by employer type. As a point of reference, under current federal law, the only employee group currently covered under FMLA are those who work for a private employer that employs 50 or more individuals. The bill covers all but federal employees, and coverage is mandatory for all but sole proprietors, who may opt in to the benefit program.

Table 2. Colorado Employees by Category	
Type of Employer	**Number of Employees**
Private Employer Employing ≥ 50 Employees	1,084,744
Private Employer Employing < 50 Employees	1,081,773
Agricultural Sector	18,127
Sole Proprietor	138,700
State Government	97,784
Local Government	257,330
Federal Government	54,860
Total Employees in Colorado	**2,733,318**
Total Employees Estimated in Fiscal Note*	**2,539,758**

Source: Quarterly Census of Employment Wages (2016, 3rd Quarter), CDLE.
* *This fiscal note has not included sole proprietors (who may opt in under the bill) or federal employees in the number of total employees participating in the program.*

State Revenue

From 2017-18 through FY 2018-19, funding must be procured to cover the expenditures outlined in the State Expenditures section below, expected through a combination of revenue bonds and gifts, grants, or donations. Beginning in FY 2018-19, the bill may conditionally reduce General Fund revenue from individual income taxes by ***$6.2 million in FY 2018-19 and $18.5 million in FY 2019-20*** and have other indeterminate impacts on income tax, outlined below. Beginning in FY 2019-20, this bill is expected to increase cash fund revenue to the FAMLI Fund by ***at least $592 million*** from employee-paid FAMLI premiums. This enterprise revenue is TABOR-exempt.

Bonding and gifts, grants, and donations. In advance of premium revenue collection, a combination of bonding and gifts, grants, and donations is required to cover start-up costs for the enterprise, which cannot be funded by the state. The amount of revenue to the FAMLI division will depend on many factors that have not been estimated for this fiscal note, but at a minimum will cover the costs outlined in the State Expenditures section for FY 2017-18 and FY 2018-19. No source of gifts, grants, or donations has been identified at this time.

Pre-tax treatment of FAMLI premium payments — conditional. Conditional upon how the IRS treats employee FAMLI premiums for purposes of federal income tax, the bill may reduce General Fund revenue from individual income taxes by $6.2 million in FY 2018-19, $18.5 million in FY 2019-20, and $24.7 million in FY 2020-21. If the IRS allows these premium payments to occur on a pre-tax basis for determining an employee's wages for federal income tax purposes, federal taxable income will be reduced by the amount of the premium. This will, in turn, reduce Colorado taxable income. Because premiums will be collected for the second half of tax year 2019, a partial-year impact is expected to be accrued into FY 2018-19.

Income tax deduction for FAMLI benefits — indeterminate. The income tax deduction in the bill for individuals who utilize FAMLI benefits is not expected to affect state revenue. Depending on how employees spend the money they would have otherwise received as wages under current law, state tax revenue from sales, use, and other excise taxes may be affected; however, this amount is unknown and not estimated.

Data and assumptions. This fiscal note applies the wage growth rate from the March 2017 Legislative Council Staff Economic and Revenue Forecast to the 2016 Colorado wage and salary income from the Bureau of Economic Analysis. It assumes that in the first fiscal year of premium collections (FY 2019-20), 2018 wage information will be used to estimate the premium.

FAMLI Fund. The division will begin collecting premiums on July 1, 2019, for deposit into the FAMLI Fund. The premium rate is to be set administratively by the FAMLI division, which will rely on the findings of an actuarial analysis before setting the rate. Under the bill, the maximum premium is 0.99 percent. A minimal amount of fine revenue related to employer penalties is also expected beginning in FY 2019-20. The fiscal note shows a range of premium revenue between 0.33 percent and 0.99 percent in Table 3.

Table 3. FAMLI Premium Revenue Range Under HB17-1307 in FY 2019-20

Premium Rate Range		Total Estimated Taxable Wages	Low Range of Premium Collection	Maximum Premium Collection
Low	Max			
0.33%	0.99%	$179 billion	$592 million	$1.8 billion

TABOR Impact

This bill reduces state revenue from the General Fund, which will reduce the amount of money required to be refunded under TABOR for FY 2018-19. TABOR refunds are paid out of the General Fund. TABOR refund obligations have not been estimated for FY 2019-20. This bill is expected to reduce the TABOR surplus by $6.2 million in FY 2017-18 and $18.5 million in FY 2018-19, reducing the amount of revenue refunded through the Six Tier Sales Tax Refund by equal amounts. Since the bill reduces both revenue to the General Fund and the refund obligation by equal amounts, there is no net impact on the amount of money available in the General Fund for the budget. However, the bill will reduce money available for the General Fund budget in the future during years the state does not collect money above the TABOR limit.

State Expenditures

Exclusive of FAMLI benefits, the bill will increase state expenditures by ***$673,426 and 6.3 FTE in FY 2017-18, $18,933,511 and 57.2 FTE in FY 2018-19, and $29,090,679 and 219.2 FTE in FY 2019-20.*** Under the bill, initial expenditures are required to be paid with revenue bonds or gifts, grants, and donations to the FAMLI Fund. As of January 1, 2020, these expenditures will be paid from premium revenue available in the FAMLI Fund, as shown in Table 5.

Assumptions. The costs in this fiscal note are based on the following assumptions:

- a 3.5 percent utilization rate and 2.5 million eligible employees, which results in an estimated 87,500 individuals who will utilize the program annually;
- the state's Unemployment Insurance (UI) program processed an average of 179,000 claims in the past two fiscal years; as a result, the fiscal note assumes that the FAMLI program will require approximately half of the resources dedicated to UI (the UI program currently employs 458 FTE); and
- because of essential differences between UI benefits and the FAMLI benefit created under the bill, the fiscal note assumes approximately one-quarter of the hearings staff currently dedicated to the UI program will be required for the FAMLI program.

Division of Family and Medical Leave Insurance — CDLE. The newly created FAMLI division will ramp up in the first two implementation years and bring on approximately half of the number of staff currently allocated to the UI program in FY 2019-20. An exception to the one-half staff rule is the hearings division, which is assumed to need one-quarter of the UI program staff, as explained in the Assumptions section above. Staff includes:

- a program director, deputy director, and director's assistant beginning in FY 2017-18;
- claim clerks, appeal clerks, research analysts, auditors, and file clerks, as well as additional executive director staff beginning in FY 2018-19; and
- hearings officers and assistants beginning in FY 2019-20.

Additionally, beginning in FY 2018-19, the FAMLI division will have costs for actuarial analysis, third-party program outreach, mailings, legal services, a phone system, an electronic content management system, and a banking interface. The division will also rely on the Office of Information Technology (OIT) to implement a technology platform. Beginning FY 2018-19, CDLE will also require approximately 285 hours of legal services per year provided by the Department of Law. These costs are outlined in Table 4 below, and OIT costs are discussed further below.

Table 4. Administrative Expenditures Under HB17-1307

CDLE Cost Components	**FY 2017-18**	**FY 2018-19**	**FY 2019-20**
Personal Services	$206,642	$2,680,827	$10,837,614
FTE	2.7 FTE	47.0 FTE	209.0 FTE
Operating Expenses and Capital Outlay Costs	16,674	251,582	960,436
Actuarial Analysis	-	50,000	20,000
Outreach	-	500,000	-
Mailings	-	155,000	-
Legal Services	-	27,089	27,089
FTE	-	0.2 FTE	0.2 FTE
Call Center	-	350,000	87,500
Scanning	-	56,000	-
Accounting Interface	-	487,685	-
Indirect Costs*	54,879	844,219	3,655,149
CDLE Subtotal	**$278,195**	**$5,402,402**	**$15,587,788**
OIT Cost Components	**FY 2017-18**	**FY 2018-19**	**FY 2019-20**
Personal Services	311,971	828,602	828,602
FTE	3.6 FTE	10.0 FTE	10.0 FTE
Operating Expenses and Capital Outlay Costs	22,232	37,718	9,500
Cell Phones	400	400	400
Training	2,000	5,000	5,000
Hardware and Software	-	12,500,000	12,500,000
Indirect Costs*	58,628	159,389	159,389
OIT Subtotal	**$395,231**	**$13,531,109**	**$13,502,891**
TOTAL	**$673,426**	**$18,933,511**	**$29,090,679**
TOTAL FTE*	**6.3 FTE**	**57.2 FTE**	**219.2 FTE**

** Indirect costs will be paid from the FAMLI Fund.*

Office of Information Technology. OIT will begin its requirements and approval work in FY 2017-18. The creation of the technology solution will take place from FY 2018-19 through FY 2019-20. Ongoing maintenance costs, which are not shown in Table 4, are expected to be approximately $5 million per year beginning in FY 2021-22.

FAMLI benefits. Beginning January 1, 2020, this bill will increase expenditures for FAMLI benefit payments. Table 5 shows the estimated benefits for FY 2020-21, the first full implementation year of the benefit program. The fiscal note uses $56,720 as the annual mean wage (AMW) for 2020, which applies the employment growth rate from the March 2017 Legislative Council Staff Economic and Revenue Forecast to the 2016 Occupational Employment Statistics from the Bureau of Labor Statistics.

A minimum and maximum weekly benefit range is shown to indicate the dollar amounts relative to the income, percentage income compared to the annual mean wage, and FAMLI benefit under the bill. For the final column, which indicates an estimate of the annual FAMLI benefits the division will pay out in FY 2020-21, the fiscal note makes a basic estimate that each income group represents one-quarter (21,875) of the estimated 87,500 individuals that will utilize this benefit per year (2.5 million employees, 3.5 percent utilization rate), and shows the expenditure based on the 12-week maximum benefit.

Table 5. Estimated FAMLI Benefits Paid to Individuals Under HB17-1307

Individual Income Compared to AMW	Individual Annual Wage Range	Individual Weekly Wage Range	FAMLI Benefit	Weekly Income-based Benefit Range	12-week Maximum Benefit*	Estimated Annual FAMLI Benefit Paid
up to 20%	up to $11,344	up to $218	95%	up to $207	$2,487	$54 million
20% to 30%	11,344 to	218 to 327	90%	196 to 295	3,534	77 million
30% to 50%	17,016 to	327 to 545	85%	278 to 464	5,563	122 million
50% or more	28,260 or more	545 or more	66%	360 to 1,000	12,000	263 million
					TOTAL	**$516 million**

** Under the bill, the maximum weekly benefit amount will be adjusted annually according to personal income growth.*

Indirect costs to CDLE and OIT. Certain costs associated with this bill are typically addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. However, because the bill will be funded by the FAMLI Fund, which is an enterprise, these costs are shown as indirect costs in Table 6. Leased space is included to show the impact of additional FTE at CDLE, and calculated at CDLE's rate of 250 square feet per FTE at $21 per square foot.

Table 6. Indirect Costs Under HB17-1307

Cost Components	FY 2017-18	FY 2018-19	FY 2019-20
Employee Insurance (Health, Life, Dental, and STD)	$51,287	$442,393	$1,671,928
Supplemental Employee Retirement Payments	46,470	314,465	1,045,360
Leased Space	15,750	246,750	1,097,250
TOTAL	**$113,507**	**$1,003,608**	**$3,814,538**

All state agencies. Workload will increase in all state agencies to perform employee outreach and to track and administer time, leave, and short-term disability (STD) claims. Tracking of the FMLA, STD, Workers' Compensation, and PERA STD can be administratively complex.

Increased utilization of leave. Additionally, the bill allows employees who have worked for at least 680 hours during their qualifying year to receive benefits. This is a lower threshold than the state's current eligibility requirements that require permanent state employees to perform one year of service before utilizing family and medical leave, and temporary state employees to have worked for at least 1250 hours in the qualifying year. This may have a significant fiscal and operational impact to departments that hire temporary employees, especially in round-the-clock departments such as the Departments of Corrections and Human Services.

To the extent additional resources are required related to these two issues, these will be requested during the annual budget process beginning in FY 2019-20.

Department of Personnel and Administration. The Department of Personnel and Administration (DPA) will set up the new deduction. It will also perform outreach to the state personnel system and update rules, technical guidance, and existing documentation to include information about the FAMLI benefit program. These workload increases can be accomplished within existing appropriations.

Short-term disability benefits. The bill may result in a reduction in the amount of STD benefits paid to employees, which may result in a cost savings through a reduction of the STD premium. If this occurs, this adjustment will be addressed through the total compensation analysis included in the annual budget process.

Department of Revenue. The fiscal note assumes that the IRS will provide guidance to payroll departments in advance of FAMLI implementation in the state in FY 2019-20. If this does not occur, the Department of Revenue may incur additional workload or costs to respond to taxpayer questions and address filing errors. In FY 2020-21, the bill will require changes to the department's GenTax software system to implement the income tax deduction for FAMLI benefits. The fiscal note assumes those costs will be addressed during the annual budget process.

Judicial Department. Beginning in FY 2019-20, the Judicial Department may see a minimal increase in discrimination claims against employers for violating the employment protection provisions of the bill. This increase is not expected to require new appropriations.

Local Government, School District, and Statutory Public Entity Impact

Like the state, local governments, school districts, and statutory public entities will be required to implement payroll deductions for employees and coordinate sick leave, FMLA, and STD benefits when an employee applies for family and medical leave.

Effective Date

The bill takes effect August 9, 2017, if the General Assembly adjourns on May 10, 2017, as scheduled, and no referendum petition is filed.

Departmental Difference

OIT used the Unemployment Insurance Modernization System project as a proxy to base its costs. As a result, OIT estimates computer programming costs of:

- $22 million and 4.0 FTE in FY 2017-18;
- $23 million and 15.0 FTE in FY 2018-19;
- $13 million and 15.0 FTE in FY 2019-20; and
- ongoing costs of $7.6 million and 10.0 FTE in FY 2020-21.

The fiscal note assumes that there are several mitigating factors to OIT costs, which include:

- collaboration with other states that have implemented a similar program, and the ability to utilize other state's program expertise;
- utilization of the open source code currently being developed at the U.S. Department of Labor for family and medical leave insurance implemented at the state level;
- use of least cost alternative hardware; and
- use of existing staff, programs, software, and network connections to offset costs.

State and Local Government Contacts

Information Technology	Judicial	Labor
Law	Municipalities	Personnel
Regulatory Agencies	Revenue	Treasury