Minnesota
Employment
Law Council

MEMORANDUM

TO:	Chairs Alice Mann and Ruth Richardson & Members of the Conference Committee on H.F. 2
FROM:	Minnesota Employment Law Council
DATE:	May 12, 2023
RE:	Paid Family Medical Leave – H.F. 2

We write to express the support of the Minnesota Employment Law Council for several important provisions of the Senate version of the Paid Family Medical Leave bill presently before the Committee, and to respectfully recommend certain additional amendments that have received support from the Senate author and commissioners. We appreciate the discussions and collaboration with MELC that led to those provisions, and we urge their inclusion in any final bill.

Intermittent Leave (S.F. Lines 29.30-30.16 / H.F. 37.22-37.33)

One of the most concerning implications of the PFML bill for employers has been the prospect of up to 24 weeks (or more) of intermittent leave. Because a qualifying employee may take intermittent leave at their discretion and with little or no notice day to day, employers cannot plan for those absences, and practical experience tells us that the employee's co-workers are left to pick up those duties. There is no undue hardship exception for employers. Under current law (up to 12 weeks of unpaid intermittent leave under the FMLA for qualifying employers), this frequently results in substantial burdens and stress on co-workers, and relational strains among work teams, as one employee's leave impacts other employees' workload and ability to meet their own goals and objectives. Expanding the entitlement to 24 weeks of *paid* intermittent leave would exacerbate this difficulty substantially, in many cases likely allowing employees to be on intermittent leave perpetually. MELC respectfully submits that this additional burden should not be imposed on co-workers.

The provision in the Senate version of the bill that allows an employer to limit intermittent leave to 480 hours in a 12-month period is important to balance the costs and benefits of the PFML bill, and we urge its inclusion.

MELC further urges inclusion of the Senate language at S.F. 29.4-29.11, which confirms that employers may require that employees comply with the employers' ordinary attendance and call-out policies and procedures, to ensure employees using leave provide adequate notice as a condition of using leave.

Definition of Family Members (S.F. 2 Lines 11.16-11.31 / H.F. 2 Lines 15.13-15.30)

We appreciate the willingness of both the House and Senate authors to address concerns that had been raised regarding the definition of "Family Member," which could create significant ambiguity and compound the concern that many PFML leaves will *not* run concurrent with FMLA-qualifying leave.

We believe the Senate version provides for greater clarity and certainty for the benefit of employers and employees alike. MELC's only suggestion is to clarify in line 11.23 that the additional individual may be selected by the employee, not the incapacitated person (since the PFML bill is intended to provide

protections for employees), and that the selection may be made once per year, so that employers may develop reasonable procedures for selection to provide for clarity and certainty.

Definition of Serious Health Condition; Pregnancy

We also appreciate the willingness of both the House and Senate authors to align the definition of "Serious Health Condition" in the bill more closely with the FMLA. However, we recommend that the final bill include the Senate language clarifying, in various places, that pregnancy or recovery from pregnancy on its own (unrelated to any serious health condition or incapacity) is not a qualifying basis for PFML benefits or protected leave.

Covered Employment (S.F. 2 Lines 9.22-10.2 / H.F. Lines 13.18-14.3)

We recommend that the Committee adopt the Senate definition of "covered employment," to avoid extraterritoriality (enforceability) concerns.

Right to leave (H.F. Lines 35.27-36.6)

This section in the House version of the bill creates job protections – rights to leave and reinstatement – for employees. Subpart (a)(1) would give job protections for any employee who is eligible for benefits, even if the employee has not applied for benefits. Thus, H.F. 2 would make employers responsible for eligibility judgments *they are not authorized to make* (and potentially without the benefit of information disclosed on an application). Is the employer required to hold an employee's position open indefinitely, not knowing if the employee has been deemed eligible by the state? Is an employer subject to being sued for not reinstating an employee, if the employer has never been informed that the employee is or is not eligible?

Alternatively, subpart (a)(2) creates job protections for any employee who applies in good faith for benefits. This also places the onus on employers to determine eligibility (*i.e.*, to determine if an employee has applied in "good faith"). Further, given the definition of "good faith," it is unclear if an employee who has applied in good faith – but who has failed to comply with the reasonable notice requirements for protected leave – is nonetheless entitled to leave.

It is more practical, fair and efficient for an employer to rely on the state's determination of benefits eligibility, once it is made. If an employee does not apply for benefits, it is unreasonable to require an employer to provide job protections based on an employer's judgments regarding eligibility for benefits. Likewise, the law should be clear that if an applicant has not provided proper notice, they are not entitled to protected leave.

The Senate author and the Commissioner of Labor and Industry previously agreed to the following common sense amendment to address this concern. We recommend this language be included in the final bill.

> *Subdivision 1.* ***Right to leave****. Ninety calendar days from the date of hire, an employee has a right to leave from employment for any day, or portion of a day, for which the employee ~~would be eligible for~~ has been deemed eligible for benefits under this chapter.~~, regardless of whether the employee actually applied for benefits and regardless of whether the employee is covered under a private plan or the public program under this chapter~~.*

Right of Appeal (S.F. Lines 20.24-20.29 / H.F. Lines 28.3-28.8)

An applicant's status is unclear during the 60-day appeal period or during a pending appeal from a denial of benefits. For example, if an employee is denied benefits and is separated from employment following

the initial determination, are they entitled to reinstatement if the denial of benefits is later reversed on appeal? If the employer has lawfully replaced the employee, what is the impact on the new employee if the denial of benefits is later reversed? It is practical, fair and efficient for an employer to rely on the state's determination of benefits eligibility, then in effect.

To address this concern, the Senate author and the Commissioner of Labor and Industry previously indicated a willingness to accept the following amendment, which we recommend be incorporated in the final bill.

> *Add a new subsection 7(c) after **S.F. Line 20.29 / H.F. Line 28.8**:*
>
> *(c) Notwithstanding any other provision of this chapter, an employer shall not be required to provide leave under this chapter during the pendency of an appeal from a denial of benefits, or retroactive leave for the period during an appeal from a denial of benefits. An employer shall not be required to reinstate an employee otherwise lawfully terminated or who experiences any other change in the terms and conditions of employment during the pendency of an appeal from a denial of benefits, and subject to the provisions of Section 268B.09, subdivisions 1 and 2, shall not be liable for a violation of this chapter based on otherwise lawful actions taken during the pendency of an appeal from a denial of benefits.*

Seven-day waiting period for benefits

MELC recommends that any PFML law require a 7-day waiting period before payment of benefits, consistent with Massachusetts' PFML law, as reflected in the Senate version.

Remedies (S.F. 34.32-35.14 / H.F. 42.22-43.10)

MELC recommends that any final bill include the Senate version of the liquidated damages calculation, which conforms more closely with ordinary remedies provisions in employment-related laws. MELC also respectfully suggests that the reference to "any and all damages recoverable by law" in subpart (a)(1) of both versions is vague, and Minnesota courts would benefit from a more specific statement of the employment-related benefits that may be recoverable: "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation."

Thank you for your consideration and don't hesitate to reach out if you have any question or would like to discuss in more detail.

Respectfully,

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