

ASSEMBLY APPROPRIATIONS COMMITTEE

STATEMENT TO

ASSEMBLY COMMITTEE SUBSTITUTE FOR **ASSEMBLY, No. 873**

with Assembly committee amendments

STATE OF NEW JERSEY

DATED: MARCH 10, 2008

The Assembly Appropriations Committee reports favorably Assembly Bill No. 873 (ACS), with committee amendments.

This bill, as amended, extends the State's existing temporary disability insurance (TDI) system to provide workers with family temporary disability leave benefits to care for members of the worker's family unable to care for themselves, including sick family members and newborn and newly adopted children.

The bill provides up to six weeks of TDI benefits for a worker taking leave to participate in providing care certified to be necessary for a family member of the worker suffering a serious health condition, or taking leave to be with a child of the worker during the first 12 months after the child's birth or placement for adoption with the worker's family.

The bill applies to all private and governmental employers subject to the "unemployment compensation law" (R.S.43:21-1 et seq.), including local governmental employees who choose to opt out of the regular TDI program.

The weekly benefit amount paid under the bill is the same as the weekly amount for TDI benefits during a worker's own disability and is subject to the same one-week waiting period. The employer may require that the employee take up to two weeks of available sick or vacation pay or other fully-paid leave provided by the employer before receiving benefits under the bill, and may require that the period of benefits under this bill be reduced by the amount of time in which fully paid leave is provided. If the employee is required to take fully paid leave, the bill requires that the employee be permitted to use the first week's worth of the fully paid leave during the one-week waiting period that precedes the family leave benefits.

If the leave is for care of a child after birth or adoption, the employee is required to give at least 30 days prior notice, except when unforeseeable circumstances prevent that prior notice. If the leave is for the care for sick family members, the employee is required to schedule, when possible, the leave in a manner to minimize disruption

of employer operations, and give, if possible, 15 days prior notice for leave which is intermittent. Intermittent leave is provided in increments of not less than one day. Employees are required to take benefits provided under the bill concurrently with any unpaid leave taken under the State "Family Leave Act," P.L.1989, c.261 (C.34:11B-1 et seq.) or the federal "Family and Medical Leave Act of 1993," Pub.L.103-3 (29 U.S.C. s.2601 et seq.).

The bill does not grant employees any entitlement to be restored by employers to employment held prior to taking family temporary disability leave or any right to take action against an employer who refuses to restore the employee to employment and does not increase, reduce or modify any employee entitlements or rights provided by the "Family Leave Act" or the federal "Family and Medical Leave Act of 1993". The bill provides that if an employee receives family leave benefits under the bill with respect to employment with an employer who is not an employer as defined in the State "Family Leave Act" and that employer fails or refuses to restore the employee to employment after the period of family leave benefits, that failure or refusal shall not be a wrongful discharge in violation of a clear mandate of public policy, and the employee shall not have a cause of action against that employer, in tort, or for breach of an implied provision of the employment agreement, or under common law, for that failure or refusal. The bill affirms as the reason for treating periods of family leave benefits differently from periods of worker disability that, while the Legislature recognizes the pressing need for benefits for workers taking leave to care for family members incapable of self-care, it also finds that the need of workers for leave during their own disability continues to be especially acute, as a disabled worker has less discretion about taking time off from work than a worker caring for a family member.

The bill provides that the collection of an assessment on employees to pay for family temporary disability leave benefits will commence on January 1, 2009 and that the payment of family leave benefits will commence on July 1, 2009. During 2009, the bill will raise revenues necessary to pay the benefits through an assessment paid by workers of 0.09% of the portion of each worker's wages subject to TDI taxes. In 2010 and subsequent years, the rate would be 0.12%. If the 0.12% assessment rate were applied to the \$27,700 of a worker's wage which is taxable in 2008, the maximum annual assessment paid by a worker would be \$33, approximately 64 cents per week. The funds raised through that assessment would be deposited into an account to be used only for family leave benefits and their administration, including the cost of an outreach program to eligible employees and the cost of issuing annual reports on the use of the benefits. The bill permits the Department of Labor and Workforce Development to borrow up to \$25 million from the TDI fund for start-up costs of the program, including the costs of setting up the revenue collection system, and

requires the borrowed amount to be repaid by 2015. No family leave benefits, assessments or loans under the bill will be considered in determining the TDI tax rates of employers, ensuring that the bill has no effect on employer TDI tax rates.

The bill increase the penalties for misrepresentations, fraud and other violations regarding both the existing TDI program and the family temporary disability benefit program established by the bill. Penalties for knowingly making a false statement or knowingly failing to disclose a material fact to improperly obtain benefits or avoid paying benefits or taxes are increased from \$20 to \$250 per statement or non-disclosure. Penalties for other willful violations of the TDI law or the bills are increased from \$50 to \$500 and additional penalties for violations with intent to defraud the program are increased from not more than \$250 to not more than \$1,000.

The bill provides that, as with TDI, employers would have the option of using the State-operated plan or a private plan though self-insurance or an insurance policy, so long as employees are not charged more, the benefits are not lower and eligibility is not more restrictive than under the State plan. The bill provides that private plans may cover TDI benefits, family leave benefits, both or neither. The bill requires no changes in existing private plans.

Finally, the bill reaffirms the State's commitment to sustaining the State-operated, nonprofit State disability benefits plan, which has been found to be a highly efficient and cost-effective means of ensuring the availability of coverage for employers and workers with low overhead costs and impartial claims processing.

As amended and reported, this bill is identical to S-786 (1R) as also amended and reported by the committee.

FISCAL IMPACT:

The Office of Legislative Services (OLS) notes that the cost of the benefits provided under this bill are paid for from assessments on employees' wages. This bill, therefore, will have no impact on the State General Fund.

The bill assesses an additional tax on that portion of an employee's wages that are subject to the State TDI tax. Beginning January 1, 2009, the additional tax rate would be 0.09 percent and will increase to 0.12 percent on January 1, 2010. The revenue generated by this additional tax will be deposited into the Family Temporary Disability Leave Account within the State TDI fund. Paid Family Leave (PFL) benefits would be made available from this account beginning July 1, 2009. An amount not to exceed \$25 million may be transferred from the State TDI fund to the new account to support start-up costs. Any such transferred funds must be repaid starting January 1, 2011 and must be completely repaid by December 31, 2015.

Benefit Costs

The OLS estimates that approximately 38,200 people may file claims under this program in 2009, but since the program is only operable during the second half of the first year, the actual experience should be approximately 19,100 claims (half of the total expected for CY 2009). The estimate of claims is extrapolated using CY 2005 NJ TDI eligible pregnancy claims (the most recent available) and analyzing California's experience (the only other state to have a currently operating Paid Family Leave program). The number of estimated claims will need to be adjusted upward in future years to reflect the actual increase in covered employment and benefit rates.

Each claimant is eligible for six weeks of PFL at the same rate as TDI benefits. The average weekly benefit for PFL for 2009 is estimated to be \$415. The experience in California indicates that the average claimant takes 5.5 weeks PFL. Therefore, the total benefit cost of PFL for CY 2009 is \$43.6 million (19,100 claimants multiplied by \$415 is equal to \$7.9 million; 5.5 weeks multiplied by \$7.9 million is \$43.6 million). The PFL benefits for CY 2010 and 2011 are calculated in the same manner and are estimated to total \$90.4 million and \$94 million, respectively.

Administrative Costs

According to the department, estimated administrative costs will be \$5.2 million for CY 2009. The first year may have unforeseen costs associated with the establishment of the program and the administration of the benefits in the second half of the year only. Some of these costs may be covered by the \$25 million maximum that may be borrowed by PFL from the TDI fund.

Repayment of Start Up Costs to TDI fund

The department has previously indicated that a repayment schedule of \$2.5 million per year for the five years, as permitted under the bill, would be followed. It is uncertain at this time what amount will be borrowed from the TDI fund to establish the program.

Estimated Revenue

The revenue to fund the PFL program will be generated from an additional employee only tax on wages subject to the TDI tax, approximately \$27,700 in CY 2008. The maximum cost of the PFL program to an employee, assuming the CY 2008 wages of \$27,700, will be \$25 in CY 2009 and \$33 for CY 2010.

The department has estimated that taxable wages subject to the TDI tax would equal \$82.1 billion in CY 2009, \$86.1 billion in CY 2010 and \$89.9 billion in CY 2011.

Based on these estimated taxable wages, the OLS estimates that \$64.5 million in revenue will be raised in CY2009 (at a tax rate equal to 0.09 percent), and \$97.4 million in CY 2010 and \$104.2 million in CY 2011 (at a tax rate equal to 0.12 percent).

In summary, the OLS estimates that the revenue generated from the PFL tax will adequately fund the costs associated with the program, for the time period addressed in this estimate.

COMMITTEE AMENDMENTS:

The committee amendments:

1. Provide that if an employee receives family leave benefits under the bill with respect to employment with an employer who is not an employer as defined in the State “Family Leave Act,” P.L.1989, c.261 (C.34:11B-1 et seq.), and that employer fails or refuses to restore the employee to employment after the period of family leave benefits, that failure or refusal shall not be a wrongful discharge in violation of a clear mandate of public policy, and the employee shall not have a cause of action against that employer, in tort, or for breach of an implied provision of the employment agreement, or under common law, for that failure or refusal;

2. Affirm that while the Legislature recognizes the pressing need for benefits for workers taking leave to care for family members incapable of self-care, it also finds that the need of workers for leave during their own disability continues to be especially acute, as a disabled worker has less discretion about taking time off from work than a worker caring for a family member. The amendments further affirm that, notwithstanding any interpretation of law which may be construed as providing a worker with rights to take action against an employer who fails or refuses to restore the worker to employment after the worker’s own disability, the Legislature does not intend that the policy established by the bill of providing family leave benefits be construed as granting any worker an entitlement to be restored by the employer to employment held by the worker prior to taking family leave or any right to take action, in tort, or for breach of an implied provision of the employment agreement, or under common law, against an employer who fails or refuses to restore the worker to employment after the leave, and the Legislature does not intend that the policy of providing family leave benefits be construed as increasing, reducing or otherwise modifying any entitlement of a worker to return to employment or right of the worker to take action under the provisions of the State “Family Leave Act” or the federal “Family and Medical Leave Act of 1993,” Pub.L.103-3 (29 U.S.C. s.2601 et seq.).

3. Eliminate references in the bill to “providing psychological comfort and arranging third party care for the family members” as part of the care of family members during periods of leave covered by the bill, instead indicating that care covered by the bills is the same as is defined and provided in the State “Family Leave Act,” and regulations adopted pursuant to that act; and

4. Increase the penalties for misrepresentations, fraud and other violations regarding both the existing TDI program and the family

temporary disability benefit program established by the bill. Penalties for knowingly making a false statement or knowingly failing to disclose a material fact to improperly obtain benefits or avoid paying benefits or taxes are increased from \$20 to \$250 per statement or non-disclosure. Penalties for other willful violations of the TDI law or the bills are increased from \$50 to \$500 and additional penalties for violations with intent to defraud the program are increased from not more than \$250 to not more than \$1,000.

5. Provide that employer TDI taxes will be calculated as if no funds are loaned from the regular TDI fund to the “Family Temporary Disability Leave Account,” effectively ensuring that the loans will not result in any increase in employer TDI tax payments.