

HOUSE BILL NO. 392

INTRODUCED BY J. ECK

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4 A BILL FOR AN ACT ENTITLED: "AN ACT CREATING A MONTANA FAMILY AND MEDICAL LEAVE
5 INSURANCE ACT; CREATING AN ENTERPRISE FUND WITH CONTRIBUTIONS FROM NONEXEMPT
6 EMPLOYERS AND EMPLOYEES; PROVIDING CRITERIA FOR BENEFIT ELIGIBILITY, DURATION OF
7 BENEFITS, COORDINATION OF BENEFITS, AND TERMS FOR MAKING CONTRIBUTIONS; IMMUNIZING
8 THE STATE FROM TOTAL FUND LIABILITY IN CASE OF INSOLVENCY; PROVIDING THE COMMISSIONER
9 OF LABOR AND INDUSTRY WITH THE DUTY TO DETERMINE AND MAINTAIN FUND SOLVENCY;
10 EXTENDING PROTECTIONS FOR JOB RIGHTS AND HEALTH INFORMATION PRIVACY TO THOSE USING
11 BENEFITS; PROVIDING FOR PUBLIC OUTREACH AND NOTIFICATIONS; PROVIDING PENALTIES FOR
12 MISREPRESENTATIONS AND FAILURE TO FORWARD CONTRIBUTIONS; PROVIDING RULEMAKING
13 AUTHORITY; AMENDING SECTION 2-18-606, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE."

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15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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17 NEW SECTION. **Section 1. Short title.** [Sections 1 through 13] may be cited as the "Montana Family
18 and Medical Leave Insurance Act".

19
20 NEW SECTION. **Section 2. Definitions.** For the purposes of [sections 1 through 13], the following
21 definitions apply:

- 22 (1) "Average annual wage" has the meaning provided in 39-51-2201.
23 (2) "Base period" with respect to an eligible employee's benefit year under [sections 1 through 13] has
24 the meaning provided in 39-51-201.
25 (3) "Base wages" is the annual earnings needed by an individual to qualify for the maximum weekly
26 benefit under [section 6(3)].
27 (4) "Benefit year" means the 12-month period beginning on the first day of the calendar week in which
28 an eligible employee files an application to be covered by family and medical leave insurance benefits allowed
29 under [sections 1 through 13].
30 (5) "Child" means, regardless of age, a biological, adopted, or foster child, stepchild, or legal ward, a

1 child of a domestic partner, or a child for whom the covered individual stood in loco parentis when the child was
2 a minor.

3 (6) "Contributions" means the money payable to the Montana family and medical leave insurance fund
4 by covered employers and eligible employees.

5 (7) "Covered active duty" means:

6 (a) duty served by a member of a regular component of the armed forces while deployed with the U.S.
7 armed forces to a foreign country; or

8 (b) duty served by a member of a reserve component of the U.S. armed forces, including a member of
9 the national guard or reserves, who is deployed with U.S. armed forces to a foreign country under a call or order
10 to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B) regarding contingency military
11 operations.

12 (8) (a) "Covered employer" means an employer as defined in 39-51-202.

13 (b) The term does not include a federal or tribal government employer.

14 (9) "Covered individual" means any natural person who:

15 (a) earned qualifying wages from work during the 12-month period prior to submitting an application;

16 (b) has paid contributions into the family and medical leave insurance fund;

17 (c) meets the eligibility requirements in [section 5]; and

18 (d) submits an application as provided in [section 5].

19 (10) "Covered servicemember" means:

20 (a) a member of the U.S. armed forces, including a member of the national guard or the reserves, who
21 is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on
22 the temporary disability list, for a serious injury or illness; or

23 (b) a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness
24 and who was a member of the U.S. armed forces, including a member of the national guard or reserves, at any
25 time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment,
26 recuperation, or therapy.

27 (11) "Department" means the department of labor and industry, provided for in Title 2, chapter 15, part
28 17.

29 (12) "Eligible employee" means an individual in employment, as defined in 39-51-203, subject to the
30 exclusions from employment described in 39-51-204, and employed by a covered employer.

1 (13) "Family and medical leave insurance benefits" means the money payable to a covered individual,
2 as provided in [sections 1 through 13].

3 (14) "Family member" means an individual with any of the following relationships to the eligible employee:

4 (a) spouse and parent of the spouse;

5 (b) a child and spouse of the child;

6 (c) a parent and spouse of the parent;

7 (d) any sibling and spouse of the sibling;

8 (e) a grandparent and spouse of the grandparent;

9 (f) a grandchild and spouse of the grandchild;

10 (g) a domestic partner and parent of the domestic partner, including the domestic partner of any
11 individual in subsections (14)(a) through (14)(f); and

12 (h) any other individuals related to the eligible employee by blood or whose close association with the
13 eligible employee is the equivalent of an acknowledged family relationship.

14 (15) "Health care provider" means an individual licensed in good standing pursuant to Title 37, chapter
15 3, 4, 6, 8, 10, 11, 12, 17, 20, 22, 23, 26, 27, 35, or 37.

16 (16) "Next of kin" means an individual's nearest blood relative.

17 (17) "Parent" means a biological, adoptive, or foster parent, stepparent, or legal guardian of a covered
18 individual or of a covered individual's spouse or domestic partner. The term includes a parent who stood in loco
19 parentis when the covered individual or the covered individual's spouse or domestic partner was a minor child.

20 (18) "Qualifying exigency leave" is leave for the family member of a covered active duty servicemember
21 for the purposes and periods outlined in 29 CFR 825.126, including short-notice deployment, military events and
22 related activities, child care and school activities, financial and legal arrangements, counseling, rest and
23 recuperation, postdeployment activities, and parental care. The length of qualifying exigency leave is limited to
24 the period provided under 29 CFR 825.126.

25 (19) "Qualifying wages" has the meaning of wages subject to contribution under 39-51-2105.

26 (20) "Serious health condition" means an illness, injury, impairment, or physical or mental condition that
27 for the eligible employee or eligible employee's family member involves:

28 (a) inpatient care in a hospital, hospice, or residential medical care facility; or

29 (b) continuing treatment by a health care provider as defined in 29 CFR 825.102.

30 (21) "Wages" has the meaning of wages under 39-51-201.

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2 **NEW SECTION. Section 3. Creation of fund -- uses of fund -- schedule of contributions --**

3 **rulemaking.** (1) (a) There is an enterprise fund known as the family and medical leave insurance fund, which is

4 to be kept separate from all other public money and used exclusively for the purposes of [sections 1 through 13].

5 (b) The fund includes:

6 (i) contributions from covered employers and employees of covered employers;

7 (ii) interest earned upon any money in the fund; and

8 (iii) any gifts, grants, or donations acquired to conduct the actuarial valuation and fund the administrative

9 costs of setting up and maintaining the fund and program covered by [sections 1 through 13].

10 (2) The commissioner of labor and industry is the ex officio treasurer of the fund.

11 (3) Expenditures from the fund may be used only for the purposes and administration of the family and

12 medical leave insurance benefits program outlined in [sections 1 through 13] and rules adopted to implement

13 [sections 1 through 13]. Only the commissioner or the commissioner's designated agent may authorize

14 expenditures from the fund. However, the commissioner may not prevent distributions from the fund unless the

15 fund is determined to be actuarially unsound.

16 (4) Money in the family and medical leave insurance fund in excess of the amount needed for benefits,

17 as determined by the commissioner, is to be invested by the board of investments.

18 (5) (a) The department is responsible for evaluating and determining on an annual basis the amount of

19 contributions necessary to finance the family and medical leave insurance benefits program and shall determine

20 by rule the amount of contributions necessary to ensure solvency of the fund.

21 (b) The department may not require contributions by the employer and the employee combined that

22 exceed 1% of any eligible employee's monthly wages from a covered employer as calculated on base wages

23 earned in a calendar year.

24 (6) (a) The department shall assess contributions and collect from the covered employer the amount to

25 be submitted by the covered employer and the equal amount to be submitted on behalf of the covered employer's

26 eligible employees.

27 (b) A covered employer may pay both the employer's and the employees' shares of the contribution.

28 (c) If a covered employer assesses to eligible employees their share of the overall contribution, the

29 covered employer shall collect the employees' amount as a payroll deduction from the eligible employees' wages

30 each payroll period and remit to the department as provided in subsection (7).

1 (7) The covered employer is responsible for remitting the full contribution to the department on a
2 quarterly basis.

3 (8) If payments into the fund under this section are greater than two times the need projected by the
4 department for benefit payout for the upcoming year, the department may declare a payment holiday for the
5 upcoming year, to be shared equally by the covered employer and employees of the covered employer, as
6 provided by the department by rule, unless the covered employer pays the full contribution without deducting from
7 its eligible employees' wages.

8 (9) The department shall adopt rules as necessary to implement [sections 1 through 13].
9

10 **NEW SECTION. Section 4. Rights to benefits subject to availability of funds -- state not liable for**
11 **fund shortage -- dissolution.** (1) Family and medical leave insurance benefits payable under this chapter are
12 available only to the extent that money is available in the Montana family and medical leave insurance fund.

13 (2) (a) The state is subject to [sections 1 through 13] as an employer.

14 (b) The state has no more liability than any other employer if the department declares a shortage of
15 funds.

16 (3) Any shortage of funds must be addressed by using the payment determination in [section 3].

17 (4) There is no vested private right of any kind against amendment or repeal of [sections 1 through 13].
18 If repealed and a balance remains in the Montana family and medical leave insurance fund, the money not paid
19 out in family and medical leave insurance benefits under [sections 1 through 13] must be transferred to the
20 general fund.
21

22 **NEW SECTION. Section 5. Benefit payments -- eligibility -- application -- privacy protection.** (1)
23 A payment to a covered individual under [sections 1 through 13] may be made no sooner than 30 days after the
24 commissioner declares that the family and medical leave insurance fund is solvent.

25 (2) To receive payments from the family and medical leave insurance fund, an individual must:

26 (a) meet the definition of a covered individual; and

27 (b) meet one of the following requirements:

28 (i) have a serious health condition;

29 (ii) be caring for a new child within the first year after the child's birth, the first year of adoption, or the first
30 year of placement of a child through foster care into the covered individual's family;

- 1 (iii) be caring for a family member who has a serious health condition;
- 2 (iv) be caring for a covered servicemember who is the covered individual's next of kin;
- 3 (v) be taking qualifying exigency leave arising out of the fact that the family member of the covered
- 4 individual is on covered active duty, is a covered servicemember, or has been notified of an impending call or
- 5 order to covered active duty in the armed forces; or
- 6 (vi) be taking any other leave from work authorized by the federal Family and Medical Leave Act, 29
- 7 U.S.C. 2601, et seq.

8 (3) The department may by rule determine whether a covered individual is subject to documenting the

9 reason for eligibility under subsection (2). The rule may not be more restrictive than is required under the federal

10 Family and Medical Leave Act.

11 (4) Prior to being recognized as a covered individual or a covered servicemember, an employee or the

12 employee's authorized legal representative shall submit an application for family and medical leave insurance

13 benefits under this section to the department and a copy of the application to the covered employer.

14 (5) Eligibility documentation, to be determined by the department by rule, must be submitted with the

15 application. The department may not require documentation that exceeds the right to privacy allowed under the

16 Health Insurance Portability and Accountability Act, 42 U.S.C. 201, et seq., the Americans with Disabilities Act

17 of 1990, 42 U.S.C. 12101, et seq., and the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. 2000ff,

18 et seq.

19 (6) If the department requires certification by a health care provider as to eligibility, the health care

20 provider is responsible for retaining patient confidentiality if the applicant has not waived one or more portions

21 of that confidentiality.

22 (7) The covered individual shall state in the application to the best of the covered individual's knowledge

23 whether the leave eligible for family and medical leave insurance benefits under [sections 1 through 13] is

24 intended to be taken sequentially or intermittently and for how much time.

25

26 **NEW SECTION. Section 6. Benefits -- duration.** (1) Family and medical leave insurance benefits

27 under [sections 1 through 13] correspond to the covered individual's wages during the base period. The wages

28 may be the sum of all covered employment for which the covered individual is taking leave under [sections 1

29 through 13].

30 (2) Subject to subsection (3), a weekly benefit amount is to be calculated as follows:

1 (a) for a covered individual whose wages in the base period are not more than 50% of the average
2 annual wage, the department shall pay weekly benefits in an amount equal to 1.92% of the covered individual's
3 wages in the base period;

4 (b) for a covered individual whose wages in the base period are more than 50% of the average annual
5 wage, the department shall pay weekly benefits equal to 1.92% of 50% of the average annual wage, plus 0.96%
6 of the amount of wages in the base period that are in excess of 50% of the average annual wage.

7 (3) (a) A weekly benefit may not exceed \$1,000 or the average weekly wage, as defined in 39-51-2201,
8 whichever is greater.

9 (b) Benefits for partial weeks of leave must be prorated.

10 (c) If a covered individual is eligible and seeking family and medical leave insurance benefits for more
11 than one job, the benefits must be calculated by the department based on a combination of wages from all jobs
12 from which the covered individual is taking leave based on [sections 1 through 13].

13 (4) An eligible employee may receive no more than 480 hours of family and medical leave insurance
14 benefits in a benefit year, regardless of whether the family and medical leave insurance benefits are for more than
15 one reason of eligibility.

16
17 **NEW SECTION. Section 7. Coordination of benefits.** (1) (a) The provisions of [sections 1 through 13]
18 run concurrently with the benefits covered by the federal Family and Medical Leave Act, 29 U.S.C. 2601, et seq.

19 (b) A covered employer may require that the covered individual take family and medical leave insurance
20 benefits payments concurrently, or otherwise coordinated with, payment made or leave allowed under the terms
21 of disability or family care leave under a collective bargaining agreement or employer policy. The covered
22 employer shall give employees written notice of this requirement.

23 (2) The provisions of [sections 1 through 13] do not:

24 (a) supersede any provision of law, collective bargaining agreement, or other contract that provides paid
25 leave rights in addition to the rights under [sections 1 through 13]; or

26 (b) prevent a covered employer from adopting or retaining a paid leave policy that provides greater
27 benefits than are required by [sections 1 through 13].

28 (3) The department may not provide family and medical leave insurance benefits for any period in which
29 the covered individual is receiving unemployment insurance benefits or workers' compensation, excluding medical
30 benefits.

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2 **NEW SECTION. Section 8. Employment and benefits protection -- rights -- enforcement --**
3 **definition.** (1) A covered employer shall restore a covered individual who receives family and medical leave
4 insurance benefits under [sections 1 through 13] to the position held by the covered individual immediately prior
5 to using the family and medical leave insurance benefits provided by [sections 1 through 13]. If the same position
6 is not available, the covered employer shall provide a position with equivalent seniority, status, employment
7 benefits, pay, and other terms and conditions of employment, including benefits and service credits that the
8 covered individual had been entitled to immediately prior to taking leave under [sections 1 through 13].

9 (2) A covered employer may not at any time, including the period before which family and medical leave
10 insurance benefits are granted but after an application is received, retaliate against an eligible employee for
11 exercising the rights and provisions of [sections 1 through 13], including but not limited to the rights listed in
12 subsection (3).

13 (3) Rights under [sections 1 through 13] include the right to:

14 (a) request, file for, apply for, or use family and medical leave insurance benefits;

15 (b) communicate to the covered employer or any other person or entity an intent to file a claim, a
16 complaint with the department or courts, or an appeal;

17 (c) testify or assist in any investigation, hearing, or proceeding under [sections 1 through 13] at any time,
18 including during the period in which the covered individual receives family and medical leave insurance benefits;

19 (d) inform any person about any covered employer's alleged violation of [sections 1 through 13]; and

20 (e) inform any person of the rights available under [sections 1 through 13].

21 (4) A covered employer who provides health and pension benefits to employees shall continue coverage
22 to an eligible employee who is receiving family and medical leave insurance benefits under [sections 1 through
23 13]. If the covered employer requires employees to share the cost of health insurance premium payments or
24 toward pension payments, the same terms apply to a covered individual taking family and medical leave
25 insurance benefits under [sections 1 through 13]. A covered individual who fails to pay the employee's required
26 share of a health or pension contribution within 30 days of written notification by a covered employer of an
27 overdue payment is subject to loss of those benefits.

28 (5) For a violation of rights under this section:

29 (a) a covered individual not subject to a collective bargaining agreement may:

30 (i) seek arbitration in the same manner as provided in 39-2-914(1) through (3). A covered individual who

1 makes a valid offer to arbitrate and who prevails in the arbitration is entitled to have the arbitrator's fee and all
2 costs of arbitration paid by the employer.

3 (ii) seek enforcement of this section in the same manner as provided in Title 39, chapter 3, part 2.

4 (b) a covered individual subject to a collective bargaining agreement shall follow the process outlined
5 in the collective bargaining agreement.

6 (6) For the purposes of this section, "retaliate" means to discharge, demote, or otherwise discriminate
7 or take an adverse employment action against the covered individual because of the covered individual's actions
8 to gain family and medical leave insurance benefits under [sections 1 through 13].

9

10 **NEW SECTION. Section 9. Disqualification for benefits -- erroneous payments -- enforcement --**
11 **penalties.** (1) An eligible employee is disqualified from receiving family and medical leave insurance benefits
12 under [sections 1 through 13] for 1 year if the eligible employee, in connection with an application for benefits
13 under [sections 1 through 13], knowingly makes a false statement or misrepresentation regarding a material fact
14 or knowingly fails to report a material fact.

15 (2) For family and medical leave insurance benefits paid erroneously under [sections 1 through 13],
16 whether through error by the department or knowing misrepresentation by an eligible employee, the department
17 may seek repayment of family and medical leave insurance benefits from the eligible employee. The department
18 may adopt rules to determine reasons to waive the right to seek repayment and procedures for recovering
19 erroneous payments.

20 (3) (a) The department may assess a fine of no less than \$500 against a covered employer who fails to
21 reinstate an eligible employee as provided in [section 8]. Any fines received under this subsection must be
22 deposited in the Montana family and medical leave insurance fund.

23 (b) A covered employer who fails to forward to the department at the time specified by the department
24 by rule both the covered employer's share and the eligible employee's share of the assessment for the family and
25 medical leave insurance fund determined under [section 3] is guilty of a misdemeanor and subject to a fine of no
26 more than 110% of the assessment due but not forwarded to the department.

27

28 **NEW SECTION. Section 10. Appeal procedures.** If the department denies an application from an
29 eligible employee, the eligible employee has the right to a review and redetermination in the manner provided in
30 39-51-2402, except that the time extensions in 39-51-2402(4) and (5) do not apply. Further appeal procedures

1 are available in the manner provided in 39-51-2403, 39-51-2404, and 39-51-2407 through 39-51-2410.

2

3 **NEW SECTION. Section 11. Notice of eligibility.** (1) (a) A covered employer shall provide to each
4 eligible employee upon hiring a written notice that must include descriptions of:

5 (i) the eligible employee's right to family and medical leave insurance benefits under [sections 1 through
6 13] and the terms under which family and medical leave insurance benefits may be accessed;

7 (ii) the amount of family and medical leave insurance benefits that the eligible employee may be eligible
8 to receive;

9 (iii) the procedure for filing a claim for family and medical leave insurance benefits;

10 (iv) the right to job protection and continuation of benefits as provided in [section 8];

11 (v) protections against discriminatory and retaliatory personnel elections under [sections 1 through 13];

12 and

13 (vi) the right to file a complaint for violations of [sections 1 through 13].

14 (b) A covered employer shall display and maintain a poster in a conspicuous place accessible to eligible
15 employees at the covered employer's place of business. The poster must include the information required in
16 subsection (1)(a).

17 (2) An eligible employee or the eligible employee's legal representative shall provide notice to the
18 employee's covered employer as soon as practicable of the eligible employee's intention to access family and
19 medical leave insurance benefits.

20

21 **NEW SECTION. Section 12. Public outreach.** (1) The department is authorized to conduct public
22 outreach to inform workers and employers regarding the availability of the family and medical leave insurance
23 benefits.

24 (2) The department may use 1% of the funds collected for the family and medical leave insurance fund
25 in any one fiscal year to pay for the public outreach, including costs for posters.

26

27 **NEW SECTION. Section 13. Federal income tax -- rulemaking -- state income tax.** (1) If the internal
28 revenue service determines that benefit payments under [sections 1 through 13] are subject to federal income
29 tax, the department shall:

30 (a) inform an eligible employee filing an application for family and medical leave insurance benefits at

1 the time of the filing that the internal revenue service has determined that family and medical leave insurance
2 benefits are subject to federal and state taxes;

3 (b) inform the eligible employee that requirements exist pertaining to estimated tax payments or to
4 withholding from family and medical leave insurance benefit payments; and

5 (c) adopt rules, as necessary, to implement [sections 1 through 13].

6 (2) An eligible employee shall notify the department as to whether to withhold estimated tax payments
7 from family and medical leave insurance benefits.

8 (3) If the eligible employee elects for the department to handle withholding of federal income tax, the
9 department shall retain the withheld amount in the Montana family and medical leave insurance fund until
10 transferring that amount to the federal taxing authority as a payment of federal income tax.

11 (4) Family and medical leave insurance benefits under [sections 1 through 13] are part of gross income
12 under the state's individual income tax, as defined in 15-30-2101, and the provisions of subsections (1) through
13 (3) of this section apply to withholding state income taxes.

14

15 **Section 14.** Section 2-18-606, MCA, is amended to read:

16 **"2-18-606. Parental leave for state employees.** (1) The department of administration shall develop a
17 parental leave policy for permanent state employees that is in compliance with [sections 1 through 13]. The policy
18 must ~~permit coordinate the provisions in [sections 1 through 13] for an employee to take a reasonable leave of~~
19 ~~absence and permit the employee to use sick leave immediately following the birth or placement of a child for a~~
20 ~~period not to exceed 15 working days if:~~

21 ~~——(a) regardless of whether the employee is the birth mother, adopting a child;₁ or~~

22 ~~——(b) the employee is a the birth father.~~

23 ~~——(2) As used in this section, "placement" means placement for adoption as defined in 33-22-130.~~

24 ~~(3)~~(2) A state agency that is not subject to the provisions of the Family and Medical Leave Act of 1993,
25 29 U.S.C. 2601 through 2654, may extend the provisions of that act to the employees of the agency."

26

27 **NEW SECTION. Section 15. Notification to tribal governments.** The secretary of state shall send
28 a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell
29 Chippewa tribe.

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