

Department of Human Resources:

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H.107 Issues

In H.107, there is a general structural issue in that it adds or expands benefits in addition to the existing laws, Federal Family and Medical Leave (FMLA) and Vermont State law (21 VSA 471 *et seq.*) (PFLA), instead of overlaying them.

A simple approach could be to indicate wage replacement for those individuals already entitled to FMLA and/or PFLA. The closer to the existing law, the less likely it is to create a new or expanded benefit. As drafted, H.107 creates in large part, new or expanded benefits and resulting costs (in dollars or productivity) to employers.

For example,

- 1. Job protection:** Because H.107 provides more expansive job protection than FMLA or PFLA, there is an increased burden on small employers. Under FMLA, job protection is not afforded to employees of employers who have fewer than 50 employees, while under PFLA, job protection is not afforded to employees of employers who have fewer than 15 or 10 employees (depending on type of leave). Under H.107, job protection is afforded for up to 12 weeks for **any** employee eligible for the benefit (i.e. has earned wages in excess of 1040 times minimum wage, over the prior 4 calendar quarters). This is an expansion of job protections and imposes a new burden on very small employers.

By effectively creating a benefit that is separate from FMLA/PFLA, it is possible, notwithstanding the “calendar year” issue or any fix discussed below that an employee may use FMLI and then have a second qualifying event which is not covered by FMLI, but by FMLA/PFLA (intermittent leave, for example). If eligible, the employee might be entitled to an additional protected leave under FMLA.

Additionally, it is conceivable that an employee could be eligible for FMLI, use the benefit and then later become eligible for FMLA/PFLA, thereby becoming entitled to an additional leave within the same 12-month period.

- 2. “Calendar Year”:** Under H.107 benefits are provided on a calendar year basis. This could provide additional benefits, intentionally or not, to employees of current employers who use a different method to determine the 12-month period for family and medical leave. For example, the 12-month period for state employees begins when the employee first uses FMLA/PFLA, not on a calendar year.

Example: Under the current State method, if an individual takes a 12-week FMLA/PFLA leave, beginning October 1, 2019 they can use accrued leave during the entire period which ends near

the end of December. They would not be eligible for FMLA/PFLA leave again until October 1, 2020. Under H.107, the same individual (depending on interpretation of H.107 provisions- see below) would be eligible for an additional (non-FMLA/PFLA) paid (FMLI) leave for up to an additional 12 weeks, beginning as early as January 1, 2020. And then, Starting October 1, 2020, they would be again eligible for FMLA/PFLA and could take up to another 12 weeks of leave during which they could use their accrued leave. So, conceivably an individual could use and be paid for up to 36 weeks of leave, in a 15-month period. Note that while the 12 weeks of paid leave under H.107 would not be a direct salary cost to an employer (though they might have paid the FMLI Tax), it would result either in the employer hiring a temporary employee, paying overtime or losing productivity. If the term “calendar year”, were replaced by the term “a 12-month period”, AND the benefit tied only to the use of existing FMLA/PFLA leave this level of expansion of benefit would not occur. In which case, this would mean that a state employee in the example could only use the H.107 benefit for up to 12 weeks from October 1 to September 30, and only if they did not use accrued leave.

- 3. Tying H.107 payments exclusively to FMLA/PFLA:** Per H.107 Sec 575 (d) “A bonding leave or medical leave for which benefits are paid pursuant to this subchapter shall run concurrently with a leave taken pursuant to section 472 of this title or the federal Family and Medical Leave Act 29 U.S.C. Section 2611-2654.”

Especially for employers with fewer than 10 employees, there would be no FMLA or PFLA benefit to their employees, so it would be a stand- alone benefit.

As drafted, this language could violate an employee’s rights under FMLA (and arguably PFLA) if they are employed by an employer who uses a method other than a calendar year to determine the 12-month period for FMLA eligibility, such as the State of Vermont. It is unclear that if an employee who is subject to FMLA and/or PFLA has exhausted that leave under those statutes within a 12-month period, whether they could avail then themselves of the payment provisions in H.107 as an additional covered leave.

Recommendation: “Benefits paid for a bonding leave or medical leave **are wage replacement exclusively** for leave taken pursuant to section 472 of this title and/or the federal Family and Medical Leave Act 29 U.S.C. Sections 2611-2654”.

- 4. Alternative Insurance or Benefits:** It is unclear as to whether an employer’s existing paid leave plan would be applicable to H.107’s provisions allowing an employer to provide an alternative benefit.

Additional Issues

- **Military exigency/caregiver leave not a covered benefit under H.107:** This is an FMLA benefit and would allow an employee to potentially take additional leave as described in Sections 1-3 above.
- **Reinstatement:** H.107 contains a provision which seems to allow an employer to separate an employee after more than two years have elapsed since the conclusion of the employee’s leave, but is not tied to any specific event to trigger such separation.

- **Revenue vs. Cost:** State employees. Estimated revenue by 2021 for State employees (regardless of who contributes) is about \$3.5M, and based on state employee FMLA usage, would cover about 1.9 weeks on average of H.107 leave. We estimate that 2.4 weeks of unpaid FMLA leave would be incurred on average by the state employees, at a cost of about \$4.4M, so it appears that the rate used would generate less revenue than required.
- **State Employee Bargaining:** These provisions, because they leave open the question (which is to be bargained) of how much of the tax, if any that the State would pay, allows a possible assumption within the FY20 budget of no additional cost of this bill. Which, may or may not be true, depending on negotiations. Additionally, while H.107 allows the State to bargain two different rates/benefits levels with its two existing unions, non-bargaining unit employees can only have the same rate/benefit as that bargained with VSEA.