

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

House Bill 4385

FISCAL
NOTE

BY DELEGATES ESTEP-BURTON, WALKER, WILLIAMS,
ZUKOFF, ROWE, LAVENDER-BOWE, PUSHKIN, BATES,
HANSEN AND EVANS

[Introduced January 16, 2020; Referred to the Committee
on the Judiciary then Finance]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §16-2P-1, §16-2P-2, §16-2P-3, §16-2P-4, §16-2P-5, §16-2P-6, §16-2P-7,
 3 §16-2P-8, §16-2P-9, §16-2P-10, §16-2P-11, §16-2P-12, §16-2P-13, §16-2P-14, §16-2P-
 4 15, §16-2P-16, §16-2P-17, §16-2P-18, §16-2P-19, and §16-2P-20, all relating to
 5 establishing the Family and Medical Leave Insurance Benefits Act; defining terms;
 6 detailing eligibility requirements; declaring the duration of benefits authorized by the
 7 article; noting the amount of benefits; specifying contributions; setting certain requirements
 8 and entitlements under the article; protecting against certain adverse action for exercising
 9 certain rights under the article; prohibiting retaliation or discrimination under the article;
 10 declaring the article to run concurrently with other leave-related laws; requiring employers
 11 to provide certain notice; detailing the process for enforcing the article; addressing
 12 erroneous payments and disqualification; permitting self-employed persons to elect
 13 coverage with certain requirements; requiring the Insurance Commissioner to establish
 14 the Family and Medical Leave Insurance Program; requiring certain disclosures related to
 15 federal income tax; creating the Family and Medical Leave Insurance Account Fund;
 16 authorizing certain expenditures from the fund and investments of the fund; requiring
 17 annual reports to the Legislature; requiring the Insurance Commissioner to implement a
 18 public education program; encouraging the Insurance Commissioner to use state data
 19 collection and technology to integrate the program with other state policies; authorizing
 20 legislative rules by a certain date; and setting an effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2P. FAMILY AND MEDICAL LEAVE INSURANCE BENEFITS ACT.

§16-2P-1. Definitions.

1 As used in this article:

2 “Application year” is the 12-month period beginning on the first day of the calendar week
 3 in which an individual files an application for family and medical leave insurance benefits;

4 “Covered active duty” is as defined in the Family and Medical Leave Act, 29 U.S.C.
5 §2611(14);

6 “Covered individual” is:

7 (1) Any person who: (A) Contributed \$1,000 to the paid leave system during the 12-month
8 period prior to submitting an application; (B) worked for 40 weeks for any employer during the 12-
9 month period prior to submitting an application; (C) earned \$10,000 from work during the 12-
10 month period prior to submitting an application; or (D) is self-employed, elects coverage and
11 meets the requirements of §16-2P-13 of this code;

12 (2) Meets the administrative requirements outlined in this article and in any applicable
13 rules; and

14 (3) Submits an application.

15 “Covered servicemember” is as defined in the Family and Medical Leave Act, 29 U.S.C.
16 §2611(15);

17 “Department” is the West Virginia Office of the Insurance Commission;

18 “Director” is the Insurance Commissioner;

19 “Employee” is as defined in §5-11-3 of this code;

20 “Employer” is as defined in §5-11-3 of this code;

21 “Family and medical leave insurance benefits” are the benefits provided under the terms
22 of this article;

23 “Family member” is: (1) Regardless of age, a biological, adopted or foster child, stepchild
24 or legal ward, a child of a domestic partner, a child to whom the covered individual stands in loco
25 parentis, or a person to whom the covered individual stood in loco parentis when the person was
26 a minor; (2) a biological, adoptive or foster parent, stepparent or legal guardian of a covered
27 individual or a covered individual’s spouse or domestic partner or a person who stood in loco
28 parent is when the covered individual or the covered individual’s spouse or domestic partner was
29 a minor child; (3) a person to whom the covered individual is legally married under the laws of any

30 state; (4) a grandparent, grandchild or sibling (whether a biological, foster, adoptive or step
31 relationship) of the covered individual or the covered individual's spouse or domestic partner; or
32 (5) a designated person, which shall mean one additional person designated by a covered
33 individual for whom the covered individual will provide care under this article if the designated
34 person has a serious health condition;

35 "Health care provider" is any person licensed under this code or federal law to provide
36 medical or emergency services, including, but not limited to, doctors, nurses and emergency room
37 personnel, or certified midwives;

38 "Next of kin" is as defined in the Family and Medical Leave Act, 29 U.S.C. §2611(17);

39 "Qualifying exigency leave" is leave for the family member of a military member for the
40 purposes specified in subsections (i) through (iv) of 29 C.F.R. 825.126(b)(3) and subsections (i)
41 through (iv) of 29 C.F.R. 825.126(b)(8), as well as the following reasons:

42 (1) To address any issue that arises from the fact that the military member is notified of an
43 impending call or order to covered active duty seven or fewer calendar days prior to the date of
44 deployment. Leave taken for this purpose can be used for a period of seven calendar days
45 beginning on the date the military member is notified of an impending call or order to covered
46 active duty;

47 (2) To attend any official ceremony, program or event sponsored by the military that is
48 related to the covered active duty or call to covered active duty status of the military member;

49 (3) To attend family support or assistance programs and informational briefings sponsored
50 or promoted by the military, military service organizations or the American Red Cross that are
51 related to the covered active duty or call to covered active duty status of the military member;

52 (4) To make or update financial or legal arrangements to address the military member's
53 absence while on covered active duty or call to covered active duty status, such as preparing and
54 executing financial and healthcare powers of attorney, transferring bank account signature
55 authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining

56 military identification cards or preparing or updating a will or living trust;

57 (5) To act as the military member's representative before a federal, state, or local agency
58 for purposes of obtaining, arranging or appealing military service benefits while the military
59 member is on covered active duty or call to covered active duty status, and for a period of 90 days
60 following the termination of the military member's covered active duty status;

61 (6) To attend counseling provided by someone other than a healthcare provider, for
62 oneself, for the military member, or for the biological, adopted or foster child, stepchild or legal
63 ward of the military member, a child of the military member's domestic partner, or a child to whom
64 the military member stands in loco parentis, provided that the need for counseling arises from the
65 covered active duty or call to covered active duty status of the military member;

66 (7) To spend time with the military member who is on short-term, temporary, Rest and
67 Recuperation leave during the period of deployment. Leave taken for this purpose can be used
68 for a period of 15 calendar days beginning on the date the military member commences each
69 instance of Rest and Recuperation leave;

70 (8) To attend arrival ceremonies, reintegration briefings and events and any other official
71 ceremony or program sponsored by the military for a period of 90 days following the termination
72 of the military member's covered active duty status;

73 (9) To address issues that arise from the death of the military member while on covered
74 active duty status, such as meeting and recovering the body of the military member, making
75 funeral arrangements and attending funeral services;

76 (10) To address other events which arise out of the military member's covered active duty
77 or call to covered active duty status provided that the employer and employee agree that such
78 leave shall qualify as an exigency, and agree to both the timing and duration of such leave;

79 "Retaliatory personnel action" means denial of any right guaranteed under this article
80 including, but not limited to, any threat, discharge, suspension, demotion, reduction of hours, any
81 other adverse action against an employee for the exercise of any right guaranteed herein, or

82 reporting or threatening to report an employee's suspected citizenship or immigration status or
83 the suspected citizenship or immigration status of a family member of the employee to a federal,
84 state or local agency. Retaliatory personnel actions shall also include interference with or
85 punishment for in any manner participating in or assisting an investigation, proceeding or hearing
86 under this article.

87 "Serious health condition" is an illness, injury, impairment, pregnancy, recovery from
88 childbirth, or physical or mental condition that involves inpatient care in a hospital, hospice or
89 residential medical care facility, or continuing treatment by a health care provider.

§16-2P-2. Eligibility.

1 Beginning January 1, 2021, family and medical leave insurance benefits are payable to
2 an individual who:

3 (1) Meets the definition of "covered individual" contained in section one of this article; and

4 (2) Meets one of the following requirements:

5 (A) Because of birth, adoption or placement through foster care, is caring for a new child
6 during the first year after the birth, adoption or placement of that child;

7 (B) Is caring for a family member with a serious health condition;

8 (C) Has a serious health condition that makes the covered individual unable to perform
9 the functions of the position of such employee;

10 (D) Is caring for a covered service member who is the covered individual's next of kin;

11 (E) Because of any "qualifying exigency leave" arising out of the fact that the family
12 member of the covered individual is on covered active duty (or has been notified of an impending
13 call or order to covered active duty) in the armed forces; or

14 (F) Any reason set forth in §21-5D-1 et seq. of this code.

§16-2P-3. Duration of Benefits.

1 (a) The maximum number of weeks during which family and medical leave insurance
2 benefits are payable under this article in an application year is 12 weeks.

3 (b) Family and medical leave insurance benefits are not payable for the first five calendar
4 days in an application year that a covered individual meets the eligibility requirements of §21-5D-
5 2 of this code. This shall be known as the “waiting period”. If the covered individual uses 10 or
6 more days of family and medical leave insurance benefits in an application year, the covered
7 individual shall be paid for the waiting period. The waiting period need only be served once every
8 application year.

9 (c) The first payment of benefits must be made to an individual within four weeks after the
10 claim is filed and subsequent payments must be made biweekly thereafter.

§16-2P-4. Amount of Benefits.

1 The amount of family and medical leave insurance benefits shall be determined as follows:

2 (1) The weekly benefit shall be 67 percent of the covered individual’s average weekly
3 wages during the 12 months preceding submission of the application (or the average weekly
4 wages during the time the covered individual worked if it was less than 12 months), up to a
5 maximum of \$1,000 and in no case shall the weekly benefit be less than \$250.

6 (2) Family and medical leave insurance benefits are not payable for less than eight hours
7 of family and medical leave taken in one work week.

§16-2P-5. Contributions.

1 (a) Payroll contributions shall be authorized in order to finance the payment of benefits
2 under the family and medical leave insurance program.

3 (b) Payroll contributions shall be paid equally by employers and employees in an amount
4 to be determined by the Insurance Commissioner. In no case shall payroll contributions from an
5 employee exceed five percent of wages in any 12-month period. The Insurance Commissioner
6 shall be responsible for evaluating and determining on an annual basis the amount of payroll
7 contributions and maximum employee contribution necessary to finance the family and medical
8 leave insurance benefits program.

§16-2P-6. Reduced leave schedule.

1 (a) A covered individual shall be entitled, at the option of the covered individual, to take
2 paid family and medical leave on an intermittent or reduced leave schedule in which all of the
3 leave authorized under this article is not taken sequentially. Family and medical leave insurance
4 benefits for intermittent or reduced leave schedules shall be prorated.

5 (b) The covered individual shall make a reasonable effort to schedule paid family and
6 medical leave under this section so as not to unduly disrupt the operations of the employer. The
7 covered individual shall provide the employer with prior notice of the schedule on which the
8 covered individual will be taking the leave, to the extent practicable. Paid family and medical leave
9 taken under this section shall not result in a reduction of the total amount of leave to which an
10 employee is entitled beyond the amount of leave actually taken.

11 (c) Nothing in this section shall be construed to entitle a covered individual to more leave
12 than required under §16-2P-3 of this code.

§16-2P-7. Leave and employment protection.

1 (a) Any covered individual who exercises his or her right to family and medical leave
2 insurance benefits or earns waiting period credits under this article shall, upon the expiration of
3 that leave, be entitled to be restored by the employer to the position held by the covered individual
4 when the leave commenced, or to a position with equivalent seniority, status, employment
5 benefits, pay and other terms and conditions of employment including fringe benefits and service
6 credits that the covered individual had been entitled to at the commencement of leave.

7 (b) During any leave taken pursuant to §16-2P-2 of this code, the employer shall maintain
8 any health care benefits the covered individual had prior to taking such leave for the duration of
9 the leave as if the covered individual had continued in employment continuously from the date he
10 or she commenced the leave until the date the family and medical leave insurance benefits
11 terminate: *Provided*, That the covered individual shall continue to pay the covered individual's
12 share of the cost of health benefits as required prior to the commencement of the leave.

13 (c) This section is enforceable in a manner consistent with the rights and remedies

14 contained in the West Virginia Human Rights Act, §5-11-1 et seq. of this code.

§16-2P-8. Retaliator personnel actions prohibited.

1 (a) It shall be unlawful for an employer or any other person to interfere with, restrain, or
2 deny the exercise of, or the attempt to exercise, any right protected under this article.

3 (b) An employer, temporary help company, employment agency, employee organization
4 or other person shall not take retaliatory personnel action or otherwise discriminate against a
5 person because he or she exercised rights protected under this article. Such rights include, but
6 are not limited to, the right to request, file for, apply for, or use benefits provided for under this
7 article; communicate to the employer or any other person or entity an intent to file a claim, a
8 complaint, or an appeal, or has testified or is about to testify or has assisted in any investigation,
9 hearing or proceeding under this article, at any time, including during the waiting period and the
10 period in which the person receives family and medical leave insurance benefits under this article;
11 inform any person about any employer's alleged violation of this article; and the right to inform
12 any person of his or her rights under this article.

13 (c) It is unlawful for an employer's absence control policy to count paid family and medical
14 leave taken under this act as an absence that may lead to or result in discipline, discharge,
15 demotion, suspension or any other adverse action.

16 (d) Protections of this section shall apply to any person who mistakenly but in good faith
17 alleges violations of this article.

18 (e) This section is enforceable in a manner consistent with the rights and remedies
19 contained in the West Virginia Human Rights Act, §5-11-1 et seq. of this code.

§16-2P-9. Coordination of benefits.

1 (a) Leave taken with wage replacement under this act that also qualifies as leave under
2 the federal FMLA and shall run concurrently with leave taken under the federal FMLA.

3 (b) An employer may require that payment made pursuant to this article be made
4 concurrently or otherwise coordinated with payment made or leave allowed under the terms of

5 disability or family care leave under a collective bargaining agreement or employer policy. The
6 employer must give employees written notice of this requirement.

7 (c) This article does not diminish an employer's obligation to comply with any of the
8 following that provide more generous leave:

9 (1) A collective bargaining agreement;

10 (2) An employer policy; or

11 (3) Any law.

12 (d) An individual's right to leave under this article may not be diminished by a collective
13 bargaining agreement entered into or renewed, or an employer policy adopted or retained, after
14 the effective date of this article. Any agreement by an individual to waive his or her rights under
15 this article is void as against public policy.

§16-2P-10. Notice.

1 (a) Each employer shall provide written notice to each employee upon hiring and annually
2 thereafter. An employer shall also provide written notice to an employee when the employee
3 requests leave under this article, or when the employer acquires knowledge that an employee's
4 leave may be for a qualifying reason under this article.

5 (b) The notice required by this section shall include: (1) The employee's right to family and
6 medical leave insurance benefits under this article and the terms under which it may be used; (2)
7 the amount of family and medical leave insurance benefits; (3) the procedure for filing a claim for
8 benefits; (4) the procedure for selecting a designated person as defined in this article; (5) the right
9 to job protection and benefits continuation under this article; (6) that discrimination and retaliatory
10 personnel actions against a person for requesting, applying for or using family and medical leave
11 insurance benefits is prohibited under this article; and (7) that the employee has a right to file a
12 complaint for violations of this article. An employer shall also display and maintain a poster in a
13 conspicuous place accessible to employees at the employer's place of business that contains the
14 information required by this section in English and any language that is the first language spoken

15 by any employee. The Insurance Commissioner may adopt policies to establish additional
16 requirements concerning the means by which employers shall provide such notice.

17 (c) An employer may establish a uniform process for employees to select a “designated
18 person” as defined in this article within 30 days of the individual’s date of hire. Thereafter, the
19 employer must permit the employee to make or change such a designation, as applicable, on an
20 annual basis. If an employer establishes a uniform process, the covered employee must make
21 such a designation using the employer’s process. If an employer does not establish such a
22 uniform process, the employee may make such a designation when filing a claim for benefits.

23 (d) Employees shall provide notice to their employers as soon as practicable of their
24 intention to take leave under this article.

§16-2P-11. Enforcement.

1 (a) The director shall establish a system for appeals in the case of a denial of family and
2 medical leave insurance benefits. In establishing such system, the director may utilize any and all
3 procedures and appeals mechanisms established under other state law.

4 (b) Judicial review of any decision with respect to family and medical leave insurance
5 benefits shall be permitted in a court of competent jurisdiction after a party aggrieved thereby has
6 exhausted all administrative remedies established by the director.

7 (c) The director shall implement procedures to ensure confidentiality of all information
8 related to any claims filed or appeals taken to the maximum extent permitted by applicable laws.

§16-2P-12. Erroneous payments and disqualification for benefits.

1 (a) A covered individual is disqualified from family and medical leave insurance benefits
2 for one year if the individual is determined by the director to have willfully made a false statement
3 or misrepresentation regarding a material fact, or willfully failed to report a material fact, to obtain
4 benefits under this article.

5 (b) If family and medical leave insurance benefits are paid erroneously or as a result of
6 willful misrepresentation, or if a claim for family and medical leave insurance benefits is rejected

7 after benefits are paid, the department may seek repayment of benefits from the recipient. The
8 director shall exercise his or her discretion to waive, in whole or in part, the amount of any such
9 payments where the recovery would be against equity and good conscience.

§16-2P-13. Elective coverage.

1 (a) A self-employed person, including a sole proprietor, partner or joint venturer, may elect
2 coverage under this article for an initial period of not less than three years. The self-employed
3 person must file a notice of election in writing with the director, as required by the department.
4 The election becomes effective on the date of filing the notice. As a condition of election, the self-
5 employed person must agree to supply any information concerning income that the department
6 deems necessary.

7 (b) A self-employed person who has elected coverage may withdraw from coverage within
8 30 days after the end of the three-year period of coverage, or at such other times as the director
9 may prescribe by rule, by filing written notice with the director, such withdrawal to take effect not
10 sooner than 30 days after filing the notice.

§16-2P-14. Family and medical leave insurance program.

1 (a) No later than January 1, 2021, the department shall establish and administer a family
2 and medical leave insurance program and pay family and medical leave insurance benefits as
3 specified in this article.

4 (b) The department shall establish reasonable procedures and forms for filing claims for
5 benefits under this article and shall specify what supporting documentation is necessary to
6 support a claim for benefits, including any documentation required from a health care provider for
7 proof of a serious health condition.

8 (c) The department shall notify the employer within five business days of a claim being
9 filed pursuant to this article.

10 (d) The department shall use information sharing and integration technology to facilitate
11 the disclosure of relevant information or records so long as an individual consents to the

12 disclosure as required under state law.

13 (e) Information contained in the files and records pertaining to an individual under this
14 article are confidential and not open to public inspection, other than to public employees in the
15 performance of their official duties. However, the individual or an authorized representative of an
16 individual may review the records or receive specific information from the records upon the
17 presentation of the individual's signed authorization.

18 (f) The director shall propose rules for legislative approval in accordance with the
19 provisions of §29A-3-1 et seq. of this code, as necessary to implement this article.

§16-2P-15. Federal income tax.

1 (a) If the Internal Revenue Service determines that family and medical leave insurance
2 benefits under this article are subject to federal income tax, the department must advise an
3 individual filing a new claim for family and medical leave insurance benefits, at the time of filing
4 such claim, that:

5 (1) The Internal Revenue Service has determined that benefits are subject to federal
6 income tax;

7 (2) Requirements exist pertaining to estimated tax payments;

8 (3) The individual may elect to have federal income tax deducted and withheld from the
9 individual's payment of benefits in the amount specified in the federal Internal Revenue Code;
10 and

11 (4) The individual is permitted to change a previously elected withholding status.

12 (b) If the individual elects to have federal tax payments withheld, the department shall
13 deduct and withhold the amount specified in the Internal Revenue Code in a manner consistent
14 with chapter 11 of this code, and amounts deducted and withheld from benefits must remain in
15 the Family and Medical Leave Insurance Fund established in §9-12-16 of this code until
16 transferred to the federal taxing authority as a payment of income tax.

17 (c) The director shall follow all procedures specified by the Internal Revenue Service

18 pertaining to the deducting and withholding of income tax.

§16-2P-16. Family and medical leave insurance account fund.

1 (a) The Family and Medical Leave Insurance Fund is created as a special revenue account
2 under the direction of the Insurance Commissioner. Expenditures from the fund may be used only
3 for the purposes of the family and medical leave insurance benefits program. Only the Director of
4 the Department or the Director's designee may authorize expenditures from the fund.

5 (b) Whenever, in the judgment of the State Budget Director, there shall be in the Family
6 and Medical Leave Insurance Fund an amount of funds in excess of that amount deemed by
7 Budget Director to be sufficient to meet the current expenditures properly payable there from, the
8 West Virginia Investment Management Board shall have full power to invest, reinvest, manage,
9 contract, sell or exchange investments acquired with such excess funds in the manner prescribed
10 by this code.

§16-2P-17. Reports.

1 Beginning in 2020, the department shall report to the Legislature by September 1 of each
2 year on projected and actual program participation by purpose, gender of beneficiary, premium
3 rates, fund balances, outreach efforts, and, for leaves taken under the article, family members for
4 whom leave was taken to provide care.

§16-2P-18. Public Education.

1 The department shall conduct a public education campaign to inform workers and
2 employers regarding the availability of family and medical leave insurance benefits. The
3 department may use five percent of the funds collected for the family and medical leave insurance
4 benefits program in a given year to pay for the public education program, as appropriated by the
5 Legislature for that purpose.

§16-2P-19. Sharing technology.

1 The department is encouraged to use state data collection and technology to the extent
2 possible and to integrate the program with existing state policies.

§16-2P-20. Effective date.

- 1 This article is effective on January 1, 2021. The Insurance Commissioner shall propose
- 2 rules necessary for implementation of this statute so that they are before the Legislature during
- 3 the 2021 Regular Legislative Session.

NOTE: The purpose of this bill is to create the Family and Medical Leave Insurance Benefits Act.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.