MEMORANDUM

JOINT BUDGET COMMITTEE

TO	JBC Members
FROM	JBC Staff
DATE	February 17, 2022
SUBJECT	Figure Setting - Comeback Packet 1

Included in this packet are staff comeback memos for the following items:

Total Compensation, page 1 (Robin Smart): R2 Paid Family Medical Leave Funding (*Tabled Item)*

Total Compensation, page 4 (Robin Smart): BA1 Colorado WINS Partnership Agreement (*Tabled Item)*

MEMORANDUM

JOINT BUDGET COMMITTEE

TO	Members of the Joint Budget Committee
FROM	Robin J. Smart, JBC Staff (303-866-4955)
DATE	February 17, 2022
SUBJECT	JBC staff comebacks for Department of Personnel, Total Compensation prioritized budget requests

Decisions concerning the following prioritized requests were delayed by the Joint Budget Committee during the FY 2022-23 Total Compensation figure setting presentation.

➔ R2 PAID FAMILY MEDICAL LEAVE FUNDING

DEPARTMENT REQUEST

The Department requests $5.4 million total funds, including $3.0 million General Fund, to cover the backfill costs associated with state employees utilizing 160 hours or four weeks of Paid Family Medical Leave. This is a statewide request and includes the creation of a new line item in each affected department's section of the Long Bill.

JBC STAFF RECOMMENDATION

Staff recommends denial of the Department's request.

ANALYSIS

The Department's statewide FY 2022-23 R2 Paid Family Medical Leave Funding request should not be confused with the Proposition 118 Paid Family and Medical Leave Insurance approved by voters in November 2020 (discussed above). This request is for funds to cover the backfill costs associated with state employees utilizing 160 hours or four weeks of Paid Family Medical Leave. According to the Department the funding applies only to departments that have positions that cannot be left vacant, including 24/7 work centers, direct care positions, and hourly non-exempt positions. It is estimated that one-third of all positions will require funding to cover the cost of backfilling the temporarily vacant positions.

Prior to the legislative session, the Department of Personnel authorized the use of up to 80 hours per employee for paid family medical leave. At that time, the cost of backfilling essential positions was absorbed by each department's budget through vacancy savings. The Department contends that increasing the number of hours to 160 per the Colorado WINS partnership agreement may result in the inability of state departments to fully fund the cost of the temporary hires within existing resources.

AUTHORITY TO IMPLEMENT PAID FAMILY MEDICAL LEAVE

The Department cites the last sentence of Section 24-50-104 (1)(g), C.R.S., as its authority to implement and establish a number of hours available to an employee under the paid family medical leave program:

> *Section 24-50-104 (1)(g), C.R.S., Employee benefits shall include insurance, retirement, and leaves of absence with or without pay and may include jury duty, military duty, or educational leaves. The state personnel director shall prescribe procedures for the types, amounts, and conditions for all leave benefits that are typically consistent with prevailing practices, subject to the provisions governing the benefits provided in subsection (7) of this section. The General Assembly shall approve any changes to leave benefits granted by statue before such changes are implemented.* ***The state personnel director shall prescribe by procedure any nonstatutory benefits.***

In a March 5, 2021 legal opinion, the State Attorney General's Office responded to two specific questions posed by the Department related to the paid family leave:

1. "Is the State Personnel Director ("Personnel Director" or "Director") authorized to adopt and implement a new type of leave, specifically paid family leave, for employees within the Colorado state personnel system?"

   Attorney General's Response: "Yes, as a general rule, the State Personnel System Act ("Act"), § 24-50-101, et seq., C.R.S. authorizes the Personnel Director to adopt benefits, including leave benefits, even if not explicitly provided for by statute. The power to do so is significantly circumscribed, however, and the Director must ensure that any new type of leave benefit: (1) is adopted pursuant to technically and professionally sound survey methodologies; (2) is typically consistent with prevailing practices; (3) is adopted pursuant to formal rulemaking processes; and (4) is not inconsistent with and does not change any leave provisions already provided for by statute. Only if all these conditions are satisfied does the statute authorize the Personnel Director to adopt paid family leave as a nonstatutory benefit. However, while the Personnel Director may establish such a benefit nonstatutorily, implementation of the benefit remains subject to the General Assembly's power of appropriation.

2. "If so, is it lawful for the Personnel Director to adopt and implement a job protected leave benefit for family and medical reasons as codified in 4 Code Colo. Regs. 801-1, § 5-16?"

   Attorney General's Response: Yes, based on the analysis, the promulgation of Rule 5-16 is a lawful action by the Personnel Director to grant new leave benefits to state employees.

COMMITTEE ON LEGAL SERVICES

On December 20, 2021, the Committee on Legal Services reviewed State Personnel Rule 5-16 through which the State Personnel Director created the benefit for full time employees in which up to 80 hours of paid leave per rolling 12 month period is made available for the following:

- Birth and care of a child;
- Placement and care of an adopted or foster child;
- Serious health condition in a person related to the employee;
- Employee's own serious health;
- Certain active duty military leave;
- Military care giver leave; and
- Employee or family member who is victim of domestic violence, stalking, or other related crime.

The 80 hour leave benefit was established based on the passage of Proposition 118, however the proposition does not give the Department the authority to establish the benefit prior to the implementation identified in the proposition (January 1, 2024).

In a memo presented to the committee, the Office of Legislative Legal Services (OLLS) recommended that the rule not be extended "because it conflicts with Section 24-50-104 (1)(g), [C.R.S.,] and because [paid family medical leave] is not typically consistent with prevailing practices." The Committee on Legal Services voted not to extend Rule 5-16.

The OLLS recommendation and the subsequent committee vote was related to the original benefit of 80 hours of paid family and medical leave. The Department's R2 budget request is for funding to expand this benefit to 160 hours. Because the committee determined that the State Personnel Director does not have the authority to implement the 80 hour benefit, it cannot be expanded to 160 hours per 12 month period. JBC staff recommends denial of the Department's request.

LEVEL OF EVIDENCE PURSUANT TO S.B. 21-284

The Department identified five factors supporting the premise that paid family and medical leave programs are economically beneficial, including: increased labor-force participation, increased employee retention, limited or positive impacts on business operations, increased lifetime earnings and retirement security among workers, especially women, and increased used of leave among working fathers. The Department indicates that this budget request is for funding to support a theory-informed practice.

Based on a limited review of scholarly articles, JBC staff found that contrary to the assertion by the Department that the program would increase employee retention, some research indicates that "[women] who had access to paid leave were no more likely to remain with their pre-birth employer than women without paid leave access, both in the short and long run."[1] That said, there is some evidence to indicate that a paid family and medical leave program may improve the health and well-being of newborns by reducing abuse[2], may reduce the number of children born but tended to increase investments in children, may increase the duration of breastfeeding, and may increase involvement of the father.[3]

The Department has identified the theory of change for this request as "providing 160 hours of paid family and medical leave" with the objective of ensuring "that the state is an employer of choice." A theory of change is a method that explains how a given intervention, or set of interventions, is expected to lead to specific outcomes, drawing on a causal analysis based on available evidence. JBC staff believes that a paid family and medical leave program may qualify as a theory-informed practice. Staff does not believe, however, that the request for funds to cover the cost of temporary employees filling positions vacated by staff who utilize this benefit is evidence-informed. Pursuant to S.B. 21-284 (Evidence-based Evaluations for Budget), assignment of a level of evidence is not applicable to this request.

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[1] https://www.nber.org/system/files/working_papers/w26416/w26416.pdf, pg 4.
[2] https://injuryprevention.bmj.com/content/22/6/442.short
[3] Ibid, www.nber.org, pg 4-5.

STATEWIDE REQUEST (FOR REFERENCE ONLY)

The Department estimated the required funding by state department to backfill paid family medical leave positions based on an estimated utilization rate of 10.2 percent applied to the number of permanent employees. The estimated percent of employees that are in job classes requiring backfill is applied to the number of employees using the benefit to estimate how many positions would require backfill. Finally, an average actual weekly salary is used to calculate the impact of 4 weeks of leave backfill for those positions. The following table identifies the requested appropriations by state department.

STATEWIDE REQUESTS APPROPRIATION TO BACKFILL PAID FAMILY MEDICAL LEAVE POSITIONS		
DEPARTMENT	FY 2022-23 REQUESTED APPROPRIATION	PERCENT OF UTILIZED BENEFIT REQUIRING BACKFILL
Personnel	$27,923	14.3%
Agriculture	41,536	39.1%
Corrections	2,025,459	76.8%
Education	29,961	7.7%
Governor's Office	0	0.0%
Public Health and Environment	268,051	36.1%
Higher Education	664,209	33.8%
Transportation	31,381	2.2%
Human Services	1,575,727	73.3%
Judicial Branch	0	0.0%
Labor and Employment	371,656	67.2%
Law	0	0.0%
General Assembly	0	0.0%
Local Affairs	0	0.0%
Military and veterans Affairs	17,716	25.0%
Natural Resources	111,198	18.0%
Public Safety	43,460	4.1%
Regulatory Agencies	36,163	11.5%
Revenue	143,618	21.3%
Health Care Policy and Financing	5,978	1.9%
State	6,330	8.3%
Treasury	0	0.0%
TOTAL	$5,400,366	31.2%

➔ BA1 COLORADO WINS PARTNERSHIP AGREEMENT

DEPARTMENT REQUEST

The Department requests $4,873,621 total funds, including $3,560,157 General Fund, to implement the terms of the Colorado Workers for Innovative and New Solutions (Colorado WINS) Partnership Agreement that was ratified on November 18, 2021.

The request includes:

- A reduction of $713,581 total funds relative to the November 1, 2021 budget request for Health, Life, and Dental appropriations;
- Funding for proposed changes in shift differential;
- Funding for proposed changes in on-call pay; and

- Funding for FTE to process tuition reimbursements.

JBC STAFF RECOMMENDATION

Staff recommends denial of the Department's request for:

- $4,638,458 total funds for proposed changes in shift differential; and
- $832,456 total funds for proposed changes in on-call pay.

The Department's request for an adjustment related to the cost of Health, Life, and Dental is captured in the common policy recommendation below.

The Department's request for funds to process tuition reimbursements will be addressed by Tom Dermody during the Department of Personnel figure setting presentation.

ANALYSIS

In its FY 2022-23 BA1 Colorado WINS Partnership Agreement budget request, the Department requests $4,873,621 total funds, including $3,560,157 General Fund, to implement the partnership agreement ratified on November 18, 2021. The request includes the following adjustments:

- A reduction of $713,581 total funds relative to the November 1, 2021 budget request for Health, Life, and Dental appropriations;
- An increase of $4,638,458 total funds for proposed changes in shift differential;
- An increase of $832,456 total funds for proposed changes in on-call pay; and
- An increase of $116,289 total funds for FTE to process tuition reimbursements.

This analysis will address the request for increased funding for shift differential and for on-call pay. The health, life, and dental adjustment is captured in the common policy Health, Life, and Dental decision item presented below. The request concerning FTE to process tuition reimbursements will be addressed by Tom Dermody during the Department of Personnel figure setting presentation.

SHIFT DIFFERENTIAL

Shift differential is additional pay beyond base pay for employees working shifts during non-regular working hours (Monday through Friday between 8:00 and 5:00). The Department publishes eligible classes in the annual pay plan. Department heads may designate eligibility for individual positions in classes not published and must maintain records. Shift differential does not apply to any periods of paid leave. Shift differential includes two shift rates: second shift (when half or more of the scheduled work hours fall between 4:00 and 11:00 p.m.) and third shift (when half or more of the scheduled work hours fall between 11:00 p.m. and 6:00 a.m. The following table includes the current and proposed rates for both the non-health care and health care services classes.

SHIFT DIFFERENTIAL ADJUSTMENTS					
		CURRENT RATES AS OF JULY 1, 2021		PROPOSED RATES FOR FY 2022-23	
GROUP	SHIFT	WEEKDAY	WEEKEND/ HOLIDAY	WEEKDAY	WEEKEND/ HOLIDAY
Non-health care services classes	1	n/a	n/a	n/a	20.0%
	2	7.5%	7.5%	7.5%	20.0%
	3	10.0%	10.0%	14.0%	20.0%
Health care services classes	1	n/a	7.5%	n/a	20.0%

SHIFT DIFFERENTIAL ADJUSTMENTS					
		CURRENT RATES AS OF JULY 1, 2021		PROPOSED RATES FOR FY 2022-23	
GROUP	SHIFT	WEEKDAY	WEEKEND/ HOLIDAY	WEEKDAY	WEEKEND/ HOLIDAY
	2	7.5%	14.0%	7.5%	20.0%
	3	14.0%	20.0%	14.0%	20.0%

Estimated department allocations are provided below.

ADDITIONAL SHIFT DIFFERENTIAL EXPENSES AS A RESULT OF PARTNERSHIP AGREEMENT			
DEPARTMENT	FY 2022-23	FY 2023-24	FY 2024-25
Agriculture	$126	$130	$134
Corrections	2,023,211	2,083,907	2,146,424
Education	9,571	9,859	10,154
Governor's Office	27,637	28,466	29,320
Higher Education	6	6	7
Human Services	2,453,122	2,526,716	2,602,517
Military & Veterans Affairs	7,700	7,931	8,169
Natural Resources	89	92	95
Personnel	3,836	3,951	4,070
Public Safety	89,104	91,777	94,530
Revenue	24,056	24,777	25,521
TOTAL	$4,638,458	$4,777,612	$4,920,941

ADDITIONAL SHIFT DIFFERENTIAL EXPENSES AS A RESULT OF PARTNERSHIP AGREEMENT (FULLY BURDENED)							
Department	FY 2022-23 Salary	PERA @ 10.9%	Medicare @ 1.45%	AED @ 5%	SAED @ 5%	STD @ 0.16%	Total
Agriculture	$103	$11	$1	$5	$5	$0	$125
Corrections	1,651,466	180,010	23,946	82,573	82,573	2,642	2,023,210
Education	7,813	852	113	391	391	13	9,573
Governor's Office	22,559	2,459	327	1,128	1,128	36	27,637
Higher Education	5	1	0	0	0	0	6
Human Services	2,002,385	218,260	29,035	100,119	100,119	3,204	2,453,122
Military & Veterans Affairs	6,285	685	91	314	314	10	7,699
Natural Resources	73	8	1	4	4	0	95
Personnel	3,131	341	45	157	157	5	3,947
Public Safety	72,732	7,928	1,055	3,637	3,637	116	89,020
Revenue	19,636	2,140	285	982	982	31	24,025
TOTAL	$3,786,188	$412,695	$54,899	$189,310	$189,310	$6,057	$4,638,459

ON-CALL PAY

The State's current on-call policy includes additional pay beyond base pay for employees (excluding State Troopers) specifically assigned, in advance, to be accessible outside of normal work hours and where freedom of movement and use of personal time is significantly restricted. Time while on-call is paid at a rate of two additional dollars per hour. The estimated costs for the changes are identified in the following table.

ADDITIONAL ON-CALL EXPENSES AS A RESULT OF PARTNERSHIP AGREEMENT			
BENEFIT	FY 2022-23	FY 2023-24	FY 2024-25
Increase from $2 to $5 per hour	$830,647	$830,646	$830,646
Min 2 hours callback	786	810	834
Min 2 hours callback, overtime	1,023	1,054	1,086
TOTAL	$832,456	$832,510	$832,566

Estimated department allocations are provided below.

ON-CALL EXPENSES BY DEPARTMENT				
DEPARTMENT	ON-CALL $5	MIN 2 HR CALL BACK	MIN 2 HR CALL BACK, OT	TOTAL
Personnel	$26,082	$0	$0	$26,108
Corrections	462,247	0	0	462,247
Education	5,046	0	0	5,046
Governor's Office	69,717	0	0	69,717
Human Services	233,340	0	996	234,336
Military & Veterans Affairs	14,598	786	0	15,384
Revenue	19,617	0	0	19,617
TOTAL	$830,647	$786	$1,023	$832,456

JBC STAFF RECOMMENDATION

Shift differential appropriations have historically been made based on 100 percent of the previous year's expenditures. While the partnership agreement results in significant anticipated increases in shift differential and on-call expenditures, JBC staff is concerned that changing the methodology for shift differential and on-call appropriations will set a precedent for ongoing adjustments to be requested outside of the regular common policy methodology and process. Staff recognizes that, barring any changes in the agreement, this may result in the need for departments to utilize vacancy savings or indirect cost recoveries to cover the additional cost; however, JBC staff recommends denial of the Department's request.