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Fiscal Note Memorandum

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TO: Sen. Winter, Sen. Williams, and Members of the Senate Finance Committee

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SUBJECT: Fiscal Assessment of Proposed Amendment SB188_L.045.

This memorandum is an assessment of the fiscal impact of the attached proposed Amendment L.045 to Senate Bill 19-188. This fiscal assessment is for the impact of the bill with inclusion of this amendment only. Any other added amendment could influence the fiscal impact.

Summary of Proposed Amendment

Amendment L.045 is a strike-below amendment that replaces the introduced bill and the amendments made by the Senate Business, Labor, and Technology Committee. The amendment creates the Family and Medical Leave Insurance program and division (FAMLI program and division) as a state enterprise in the Colorado Department of Labor and Employment (CDLE). The purpose of the FAMLI program is to provide partial wage-replacement benefits for up to 12 weeks per year to eligible employees, and employment protection for employees that take leave. The program includes an option for additional weeks of benefits under certain circumstances. The bill requires a premium payment from each employer and employee, with the exception of federal employees. Local governments may choose not to participate. Sole proprietors and local government employees may opt-in to the program.

Applicability and definitions. "Family member" is defined as a person who is related by blood, marriage, domestic partnership, civil union, or adoption, or a person for whom the covered individual is responsible for providing unpaid physical, psychological, health, legal, or financial assistance, as well as support of the type traditionally provided by family. Qualifying events include an individual's serious health condition; caring for a newborn, an adopted child, or a child placed through foster care for the first year; caring for a family member with a serious health condition; and circumstances related to a family member's active military duty. Under the amendment, domestic abuse, sexual assault or abuse, and stalking are also defined as serious health conditions for which a person may receive benefits.

Employee eligibility. An employee is eligible to claim benefits from the program after working 680 hours, or 504 hours in the case of an airline flight crew member, for one or more employers during the employee's qualifying year. Benefits are available to all eligible individuals regardless of their employment, citizenship, or immigration status. The amendment specifies procedures for self-employed individuals to elect coverage.

Actuarial and feasibility studies. The CDLE is required to contract for an actuarial study of the FAML I program and to issue a request for information (RFI) from third parties that may be willing to administer the program. The CDLE will study the feasibility of contracting with a third party, taking into account the short and long term cost-effectiveness for both the state and covered individuals while assuring quality, worker experience, affordability, coverage, and program accountability. The CDLE must provide the results of the studies to the Governor and the Family and Medical Leave Insurance Advisory Board (see below) by March 1, 2020. The executive director of CDLE will make the final determination of how to administer the program.

Advisory board. The amendment creates the 15-member Family and Medical Leave Insurance Advisory Board. The members are appointed by the Governor based on criteria included in the amendment. Board members serve without compensation, but are entitled to receive reimbursement for expenses. The board will meet at least four times per year and, no later than June 1, 2020, make recommendations to the CDLE executive director based on the actuarial and feasibility studies conducted. The board will also provide comment on rulemaking, policies, implementation, utilization of benefits, and other initiatives. The board is subject to repeal September 1, 2026, following a sunset review.

Outreach. The FAML I division must develop an outreach program by July 1, 2022, that explains the eligibility requirements, claims process, benefit amounts, notice and medical certification requirements, reinstatement and nondiscrimination rights, confidentiality of records, employment protection, and any other pertinent details, paid for by the newly created FAML I fund.

Premiums. Employer and employee premium payments begin on January 1, 2023. Premiums are split evenly between employer and employee, except for employers that qualify for premium discounts (see below). The initial premium amount is set in the amendment at 0.64 percent of wages per employee in the program's first two years. Premiums are applied on up to 80 percent of the maximum amount of wages subject to the Social Security Old-Age, Survivors, and Disability Insurance Tax, which will be \$124,080 for calendar year 2023. The division is required to set the premium for calendar year 2025 at a rate necessary to obtain a total amount of premium contributions equal to 150 percent of the prior year's claims and 100 percent of the cost of administration. For the 2026 calendar year and each calendar year thereafter, the division is required to set the premium at a rate necessary to obtain a total amount of premium contributions equal to 125 to 150 percent of the prior year's claims and 100 percent of the cost of administration. The premium is capped at 0.99 percent.

Premium discounts. Small private employers and state and local governments receive a discount on the employer portion of the premium. For private employers with one to four employees and local governments, the employer pays 12.5 percent of the premium amount. For private employers with five to 10 employees and state government, the employer pays 25 percent of the premium amount.

Benefits. Beginning January 1, 2024, the FAML I division will pay benefits from the FAML I Fund using revenue bond proceeds, premiums, and any fines imposed and collected. The amount of benefits an eligible individual can receive is based on the individual's wage in relation to the average weekly wage (AWW) set annually by the CDLE for Workers' Compensation claims. The 2024 AWW is projected to be \$1,294. An eligible individual will receive 90 percent of their weekly wage for wages that are less than 50 percent of the AWW and 50 percent of wages that equal or exceed 50 percent of the AWW, up to a maximum weekly benefit of \$1,000. Beginning January 1, 2025, the division will annually adjust the maximum weekly benefit amount to equal 90 percent of the AWW. The division must make the first benefit payment to a claimant within 2 weeks after the claim is filed, and weekly or bi-weekly thereafter, for up to 12 weeks or longer under certain circumstances.

If the eligible individual is able to continue working at a second job while taking FAML leave, the FAML division may not consider the eligible individual's weekly wage earned from that second job when calculating his or her weekly benefit amount. The maximum number of weeks for which FAML benefits are payable to an eligible individual in any consecutive 52-week period is 12 weeks, except that benefits are payable up to an additional 4 weeks to an eligible individual with a serious health condition related to pregnancy or childbirth complications. The maximum number of weeks for which FAML benefits are payable to an eligible individual in aggregate for separate purposes in any consecutive 52-week period is 14 weeks, except for the circumstance outlined above for an eligible individual with a serious health condition related to pregnancy or childbirth complications. Caring for a new child is a separate qualifying event from a serious health condition related to, and including, pregnancy and recovery from childbirth.

An eligible individual may take intermittent leave in increments of one hour or shorter if consistent with the increments the employer uses to measure employee leave, but the benefit is not payable until the eligible individual accumulates one day or 8 hours of FAML leave.

Employment protection. An employer is required to restore an employee to their prior position or a comparable position upon returning from leave if the employee was employed for 90 days or longer prior to taking FAML leave. While an employee is on leave, an employer must maintain the employee's benefits and may not discriminate against the employee in response to the employee's actual or requested leave. Job protection is not extended to seasonal employees under the amendment.

Coordination of benefits. Where available, paid leave must be taken concurrently with the unpaid, job-secured leave available through the federal Family and Medical Leave Act (FMLA). An employee may supplement FAML benefits through vacation, sick, or other paid time off, but employers may not require employees to take any other form of leave during an employee's FAML leave. If an employer has a disability or family leave policy already in place, this leave can be taken concurrently with FAML leave. For someone with a work-related qualifying event, combined workers' compensation benefits and FAML benefits paid can not exceed the covered individual's weekly wage.

Local government employer declination. A local government can decline coverage according to rules set by the FAML program director.

Elective coverage. Self-employed individuals and employees of a local government that has declined coverage may elect coverage for not less than three years or a subsequent period of not less than one year immediately following another period of coverage. Self-employed individuals or local government employees whose employer does not participate who opt-in pay only the employee portion of the premium directly to the FAML division.

FAML Fund. The FAML Fund is an enterprise fund within the State Treasury. The fund may be used only to repay revenue bonds issued to cover start-up costs; collect FAML premiums; pay FAML benefits to eligible individuals; and cover program administration, advisory committee, and outreach costs. The fund may also receive and spend any gifts, grants, or donations received by the division to finance program set-up costs. The fund is continuously appropriated to the FAML division.

Employee disqualification and erroneous payments. An employee who willfully makes a false statement or misrepresentation regarding a material fact or willfully fails to report a material fact is disqualified from receiving FAML benefits for one year. The FAML division may also develop a procedure for recovering erroneous benefit payments, and may exercise discretion to partially or wholly waive repayment amounts under certain circumstances.

Employer requirements. Employers must collect employee premiums through a payroll deduction and remit the employer and employee contributions to the FAMLI division. Employers must post program notices and notify new hires of the FAMLI benefit program. Employers must also inform employees about the program upon learning of an employee's qualifying life event.

Claims. The FAMLI division is required to notify an employer of their employee's FAMLI leave claim within 5 business days after an eligible individual files a claim for benefits. The FAMLI division will set rules related to claim forms and the manner in which claims are filed; however, the amendment makes several requirements related to claims, including that an employee prove eligibility, meet certain hourly thresholds of employment per year, disclose relevant medical records, and attest that his or her employer was notified in writing. The division may require additional attestations from employees. In certain circumstances, a family member may file a claim on behalf of a covered individual. An employer may pay FAMLI benefits directly to an eligible individual and seek reimbursement from the FAMLI division.

Employer penalties. The FAMLI division will, by rule, create a fine structure for employers who violate employer requirements in the amendment. Fines are deposited into the FAMLI Fund.

Private plans. With division approval, an employer may choose to provide benefits through a private plan that provides the same rights, protections, and benefits as those provided under the FAMLI program. The costs to an employee for a private plan must not exceed what a covered individual would pay in premiums into the FAMLI Fund. The director will determine the division's costs arising out of the administration of private plans and each entity offering a private plan is required to reimburse the division for that amount. An employer that fails to operate the plan according to the requirements in the amendment will be subject to penalties.

Enterprise and type 2 transfer designation. The FAMLI division is created as an enterprise which may issue revenue bonds and is limited to 10 percent of annual revenue from state and local governments. The division is also designated as a type 2 transfer, which means that it is directly under the control of the executive director of CDLE, including its statutory powers, duties, records, property, personnel, and functions of budgeting, purchasing, and planning.

Rulemaking, reporting, and other division responsibilities. The FAMLI division must adopt rules establishing the form and manner of filing a claim, setting premium amounts, and establishing a fine structure for employers. The division must follow federal tax withholding policies and may establish any other rules as necessary to establish the program. The division must report to the General Assembly by September 1, 2024, and each year thereafter, on program participation, including demographics, as well as premium rates, fund balances, and outreach efforts.

Complaints. The FAMLI division will investigate complaints and may resolve them through mediation. Claims must be brought within two years after the date of the last event constituting the alleged violation. The division must rule within 180 days. An aggrieved individual may take civil action after the administrative complaint process is exhausted. This process does not apply to an employee of a local government that has elected coverage.

Federal and state income tax deduction. The amendment requires the division to inform individuals filing claims about federal tax implications of benefits, IRS requirements, and that taxes can be deducted on the front end from benefit payments. Under the amendment, FAMLI benefits are not subject to state income tax. The division is required to provide electronic data to the Department of Revenue regarding taxpayers who have been paid FAMLI benefits.

Assumptions

This analysis assumes the following:

- the FAML I division will complete the RFI process and actuarial analysis required by the amendment by December 31, 2019;
- the division will administer the program;
- 50 percent of local governments will opt-out of the program; and
- benefits will be utilized by 3.0 percent of employees in FY 2022-23 and FY 2023-24 for the maximum 12 weeks.

Bill's Revised Fiscal Impact with Amendment

Table 1 shows the fiscal impact of strike below Amendment L.045. The division is expected to issue \$110 million in revenue bonds prior to premiums being collected. Expenditures for the first four years are for establishing the program including developing a premium and benefit management system. Premium collection will begin in FY 2022-23 for one-half of the fiscal year. Benefits will be paid beginning in FY 2023-24 for one-half of the fiscal year.

As noted above, this analysis assumes that the FAML I division will administer the program. Should the CDLE executive director choose to appoint a third party to administer the program, the premium and benefit management system will not be developed and staffing and some operational costs will be reduced, while costs to contract with a third party would increase.

Implementation costs in Table 1 include:

FY 2019-20 - staff, legal services, statistical and actuarial contractors, information technology contractors, outreach mailings, and board expense reimbursements; and

FY 2020-21 - staff, legal services, statistical and actuarial contractors, information technology contractors, outreach mailings, and board expense reimbursements, and \$40 million for the premium and benefit management system.

This analysis does not address costs associated with bond issuance and repayment.

**Table 1
State Fiscal Impacts Under Amendment L.045**

		FY 2019-20	FY 2020-21	FY 2021-22	FY 2022-23 (half year of premiums)	FY 2023-24 (half year of benefits)	FY 2024-25
Revenue	Cash Funds	\$110 million in bond revenue			\$488,609,215	\$1,030,004,796	\$1,081,909,782
	Total				\$488,609,215	\$1,030,004,796	\$1,081,909,782
Expenditures	General Fund	-	-	-	-	-	\$141,464
	FAMLI Fund - Administration	\$2,812,953	\$42,755,948	\$2,755,948	\$6,399,237	\$15,872,563	\$15,872,563
	FAMLI Fund - Benefits	-	-	-	-	\$417,397,609	\$947,115,099
	Various Funds*	-	-	-	\$5,762,472	\$12,015,318	\$13,725,492
	Centrally Appropriated	\$324,829	\$367,487	\$367,487	\$873,258	\$2,900,357	\$2,932,100
	Total	\$3,137,782	\$43,123,435	\$3,123,435	\$13,034,967	\$448,185,847	\$979,786,718
	Total FTE	14.5 FTE	16.4 FTE	16.4 FTE	61.1 FTE	205.1 FTE	207.6 FTE

* These expenditures represent the employer share of state employee FAMLI premiums and will come from the General Fund, cash funds, and federal funds but these fund splits have not been identified for this analysis.