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Delegate R. Lee Ware
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Via email: DeLLWare@house.virginia.gov

Senator William M. Stanley, Jr.
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Glade Hill, VA 24092
Via email: district20@senate.virginia.gov

Re: HB 2120 and SB 1639 – Paid Family and Medical Leave Programs

Greetings:

The American Council of Life Insurers (ACLI) advocates on behalf of 280 member companies dedicated to providing products and services that promote consumers' financial and retirement security. Ninety million American families depend on our members for life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, dental, and vision and other supplemental benefits. ACLI represents member companies in state, federal and international forums for public policy that supports the industry marketplace and the families that rely on life insurers' products for peace of mind. ACLI members represent 95 percent of industry assets in the United States. ACLI appreciates the opportunity to provide comments as to our opposition of the two paid family and medical leave (PFML) bills as currently written. The proposed legislation would create a state-run only PFML program while ignoring similar benefits already offered by employers and provided by the insurance industry.

Overview

For decades, disability insurers have been providing American workers with income protection when a medical condition keeps them out of the workplace. In 2017 alone, this private insurer-based system paid American workers more than \$20 billion as they recovered from conditions that kept them from their jobs.^[1] As Virginia legislators look at the possibility of a state PFML program, disability insurers understand this effort and note that they can provide employers with additional options to help them provide employees with the coverage they need.

Based on our experience in the private market and in other states that have considered a state PFML program, we urge Virginia legislators to understand the program design and implementation challenges that result from this benefit program – as highlighted below – including the interplay with the existing private market, the need for precision and clarity in program design, and finally, the significant challenge in standing up a program of this scale and educating consumers and businesses prior to implementation.

Existing Private Market Should Not Be Ignored or Eliminated in any PFML Program

Currently, seven out of eight states have passed paid family and medical leave/disability laws that allow disability insurers to work with employers to create plans that meet or exceed the statutory requirements.^[2] Short-term disability income policies address the same needs as paid medical leave – that is, pay for employees who cannot work due to their medical condition during a specified period of time. The private market is both a highly regulated and highly competitive industry. Millions of Americans already have income replacement benefits through their workplace. Nearly 40% of American workers are currently covered by private-sector short-term disability policies that provide income protection while they deal with their own serious medical condition, including paid medical leave for women recovering from childbirth.^[3] Approximately 74% of the private short-term disability policies provide American workers with 60% or more of their compensation during their leave.^[4] Of this short-term disability income market, 75% of short-term policies provide a maximum of 22 weeks of income replacement benefits, and 50% of short-term policies provide a maximum of 26 weeks of income replacement benefits.^[5]

In addition to offering the policies and having the infrastructure to support administration, insurers help employers comply with unpaid leave requirements and accommodation services. Workers depend on their employers to help navigate the multiple and not always consistent benefits available at the employer level, the state level, and/or the federal level. Insurers have helped to facilitate employers' compliance with the various leave programs, paid and unpaid. This facilitation occurs because employers have trusted these companies' experience, expertise, and understanding of the entitlements under the various federal, state, and municipal laws which sometimes may overlap and other times may have different (and sometimes competing) eligibility rules, leave entitlements, and administration requirements. Competition has driven better services and better value for employers and employees. Accordingly, any PFML program should include at a minimum an option for private plan administration by insurance carriers on a self-insured and fully insured basis.

Unintended Consequences

Creating a State-run only program that excludes the well-established private expertise and infrastructure could lead to the following unintended consequences:

- Workers may miss out on additional benefits for which they are eligible. This could occur because the State PFML program is solely focused on benefits it provides and is not also administering or necessarily acknowledging all potential benefits available for the employee. This could create undue burden for the program as they receive calls from employees about other benefits to which they might be entitled but do not fall within their knowledge or expertise (i.e., federal unpaid but job protected FMLA, State sick/PTO leaves, etc.).
- Possibility of a coverage gap for an employee. An employer, if mandated to offer the State plan only, may choose to discontinue comparable or more robust coverage provided by the private market without understanding the differences and the gaps in coverage that may result. A coverage gap may be created due to:
 - the duration of the PFML program for the employee not addressing longer-term disabilities of the employee;
 - less paid benefits duration for the employee's own medical needs, if the employee also took time for paid family leave; or
 - the wage replacement percentages falling below a fixed percentage (e.g., 60%) of an employee's normal wages, since the State program sliding scale would be focused on lower wage earners.
- Elimination of the private short-term disability market would lead to decreased premium tax revenue for Virginia (approximately \$5.3 million based on 2017 state estimated short-term disability premiums).

Benchmark Against Existing Programs

It is imperative for any sustainable program, especially one contemplated by the two bills, to review true actuarial projections. As part of that exercise, one should test cost projections for reasonability through comparisons to similar programs in other states. Although the bills do not provide specifics, there are many factors that need to be reviewed. Examples of the more impactful items to review include eligibility requirements, benefit amount/duration, sustainability of the contribution model, and definitions of “family member” and “serious health conditions.” Also, we encourage comparison of like programs. The comparison should be mindful that many of the more recent state programs have not yet been fully implemented and the full cost of those programs are not yet known. This review will help to ensure financial stability of the program adopted. A dissimilar comparison may result in an underestimation of benefits and costs.

Realistic Implementation Timelines in Legislation

A viable, solvent PFML program is the result of realistic timelines outlined in legislation. There needs to be sufficient time for regulations to be completed prior to the State’s collection of premiums. This time should include ample comment periods to receive feedback from all stakeholders for review and discussion. There should also be a unified approach, rather than a phased approach, to the regulatory process wherein regulations are drafted and considered in their entirety. For the employer, there needs to be enough time to identify their actions for compliance. For example, providing the necessary notification of the program to their employees. Employer compliance timelines should be part of the discussion when promulgating regulations.

Bureau of Insurance Involvement Should Occur

The ACLI encourages any PFML program to include the Bureau of Insurance in the implementation process. As currently written, the bills do not encourage or even mention the Bureau of Insurance; they just update the unemployment statutes. Leveraging the Bureau’s expertise would benefit any potential PFML program. Insurers must file and receive approval from the Bureau for short-term disability policies while following established regulation for disability income products and could do the same for newly developed products for any established PFML program. This coordination is particularly relevant, and has been shown to be effective in states, to providing seamless coordination of benefits between PFML and short-term disability policies where other income benefits are generally offset from short-term disability benefits. Involving the Bureau in the development of regulations is critical to minimizing disruption to existing employee benefit programs. There is specific expertise at various state agencies and divisions; and establishing an open line of communication between the agency tasked to create/develop the PFML program and already established infrastructures within the State will help avoid potential missteps and/or conflicting regulations. Furthermore, there are extensive privacy protocols for handling and obtaining medical information that are overseen by the Bureau already. Again, many nuances that are not contemplated in the two PFML bills.

Separate Medical Leave and Family Leave (Bonding/Care)

Any PFML program should consider separating the medical leave components for employees from the family leave portion. Splitting coverage and allowing employer policies administered through a private carrier to satisfy many statutory requirements to cover an employee’s own medical condition would reduce the administration burden on both the employer and State administrator. For ease of administration, maximum benefit period durations can be calculated separately without coordination. Separating medical leave and bonding leave will also help avoid discrimination as it would clarify what each leave is for and avoids confusion among employees (for example, where a partner claims discrimination due to bonding leave and medical leave not matching). By separating the types of leave, pricing could be established for each leave and the respective leave premiums could be charged accordingly. Premiums could be remitted to the covering plan, be it private plans or

the State plan. Again, using what is already established without eliminating existing disability insurance programs will benefit a newly formed program. These bills do not contemplate separation of medical leave and family leave, and as previously noted, they ignore the already established marketplace for employers.

General Comments on Plan Details in PFML Legislation

We request that the authors avoid vague provisions in legislation. Precise, clear provisions and definitions ensure that benefit administration and utilization occur as intended and supports program cost predictability. PFML language should be consistent with existing state and federal law. For example, each state program can use the “eligible employee” definition already existing in your state or the federal FMLA rather than creating a new definition. Utilizing what has already been created will help lead to ease of administration of the program. Appropriate exclusions should be included in legislation (for example, exclusions for self-inflicted injury, alcohol/drug use, crime, etc.)

Additionally, developing a policy template, in coordination with the Bureau of Insurance, should be considered. A template helps streamline the review and approval process for the state and employers and sets expectations for what is covered by the program or private plan. Such uniformity will help the implementation and administration of the plan be more efficient and cost effective. ACLI member companies bring a wealth of knowledge based on recent experience in several states on how to develop a well-run administration process for determining eligibility, paying benefits, and reporting. This reiterates the need for any PFML program to include the private market.

Ensure an Incentive to Return to Work

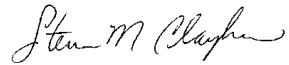
Private carriers have worked extensively on their return to work programs. This helps employees stay engaged in their careers, helps employers retain good employees, and helps keep costs under control. Most state PFML programs limit the approved absence benefits to 12 weeks, which is consistent with the federal FMLA. While there are varying limits to income replacement in the private short-term disability market, the typical income replacement rate is 60%. To address lower wage earners, instead of a cumbersome progressive formula that can be difficult to administer and hard for employees to calculate, perhaps consider a higher percentage replacement; for example, 70% of pay if the employee is earning below the state average weekly wage (SAWW), and 60% of pay if the employee is earning above the SAWW.

Any legislation should expressly provide that the state leave runs concurrently with unpaid FMLA, as intended by the federal FMLA, and other potentially available leave programs where the leave reason and eligibility overlap (e.g., Virginia’s existing family care, adoption, organ donor, domestic abuse, or other unpaid leave entitlements). It is important to note that the FMLA already allows many employees to take up to 12 weeks of job protected leave for family and medical leaves of absence. This helps to discourage over-insurance, lowers the probability of an employee becoming complacent and staying away from work, and provides clarity for employers’ work/staffing schedules. We note that legislators should recognize that plan design may influence employee behavior and strike a balance between the needs of both employees and employers by providing employees these paid leaves in their time of need while still caring for employers’ productivity needs.

Conclusion

In conclusion, the ACLI appreciates the opportunity to provide our rationale as to why we oppose the bills as currently written. We hope you find our comments and suggested considerations useful and meaningful as you continue to gather information regarding these bills and PFML programs in general.

Sincerely,

A handwritten signature in cursive script that reads "Steven M. Clayburn".

Steven M. Clayburn, FSA, MAAA

cc: Patrick Cushing, Williams Mullen, ACLI Counsel
Joann Waiters, ACLI Regional Vice President
Tom Stevens, Division of Legislative Services
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