

- SUBJECT:** Employee leave for certain family or medical obligations
- COMMITTEE:** Economic Development — committee substitute recommended
- VOTE:** 4 ayes — Deshotel, Straus, Morrison, Ortiz
- 0 nays
- 3 absent — Kolkhorst, Dunnam, Veasey
- WITNESSES:** For — Shannon Brooks, National MS Society; (*Registered, but did not testify*: Jim Arnold, Texas Association of Goodwills, Dennis Borel, Coalition of Texans with Disabilities; Michael Cunningham, Texas Building and Construction Trades, AFL-CIO; James Gray, American Cancer Society; Rick Levy, Texas AFL-CIO; Arlis Luck, Tribal Iron Riders Association; Joel Romo, American Heart Association)
- Against — Christopher Hahn, Texas Employment Law Council; Bill Hammond, Texas Association of Business
- On — (*Registered, but did not testify*: Jerry Ramos, Texas Workforce Commission)
- BACKGROUND:** The federal Family and Medical Leave Act of 1993 (FMLA), 5 U.S.C. 6381-6387, grants employees up to a total of 12 work weeks of unpaid leave during any 12-month period for one or more of the following reasons: birth of a child or care for a newborn; placement of an adopted or foster child with the employee; care for an immediate family member (spouse, child, parent) with a serious health condition; or the employee's inability to work due to a serious health condition. The FMLA allows for the substitution of paid leave by an employer in some cases. Employees may elect, or employers may require, accrued paid leave to be substituted, but an employee may not substitute paid leave for any situation not covered by the employers' leave plan. The FMLA applies only to employers of 50 or more employees.
- Under Government Code, sec. 661.202, a state employee may take regular sick leave to care for and assist a member of the employee's immediate family who is sick. This applies to an individual who resides in the same

household as the employee and is related to the employee by kinship, adoption, or marriage; a foster child of the employee residing in the same household who is under the conservatorship of the Department of Protective and Regulatory Services; and a minor child of the employee, regardless of whether the child lives in the same household. An employee's use of sick leave to care for a family member not described above is strictly limited to the time necessary to provide care and assistance to a spouse, child, or parent as a direct result of a documented medical condition.

DIGEST:

CSHB 3037 would allow an employee who was entitled to sick leave or other paid time off to use any or all of the leave to care for certain family members with a serious health condition. The bill would specify prohibited acts that would be enforceable by the Texas Workforce Commission (TWC). Further, an employer who committed a willful violation would be subject to a civil penalty for which the attorney general could bring an action.

Under the bill, "employee" would mean an individual who performed services for an employer for compensation under an oral or written contract of hire. The term would not include an independent contractor. The bill would define "serious health condition" to be an illness, injury, impairment, or physical or mental condition that required inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. The term would include a serious disease such as cancer or AIDS.

Family medical leave. An employee would be entitled to use the employee's choice of accrued paid sick leave or other accrued paid leave to care for the employee's:

- child;
- grandchild;
- spouse;
- siblings;
- parent or parent-in-law; or
- grandparent or grandparent-in-law

Leave program not mandatory. CSHB 3037 would not require an employer who did not provide paid sick leave or other paid medical leave

to institute a program of paid leave for any situation in which that employer was not extending leave.

Required notice and civil penalty. Each employer would post in conspicuous places in the workplace where notices to employees were customarily posted a notice, prepared or approved by the TWC, setting forth the pertinent provisions of this legislation and information relating to enforcement. An employer who willfully violated these provisions would be liable for a civil penalty not to exceed \$100 per violation. The attorney general could bring an action to collect a penalty. Assessed civil penalties would be deposited in the state's general revenue fund.

Foreseeability of leave. If the necessity for leave was reasonably foreseeable, the affected employee would provide notice to the employer as was practicable. If the necessity for leave was foreseeable because of planned medical treatment, the employee would make a reasonable effort to schedule the treatment to avoid unduly disrupting the operations of the employer, subject to the approval of the health care provider of the employee or the employee's family member having treatment.

Certification of request. An employer could require that a request for leave be certified by the related health care provider as appropriate. The employee would provide timely a copy of the certification to the employer. Certification would be sufficient if it stated:

- the date on which the serious health condition began;
- the probable duration of the condition;
- the appropriate medical facts within the knowledge of the health care provider regarding the condition; and
- a statement that the eligible employee was needed to care for the specified family member and an estimate of the amount of time that the employee needed to care for that individual.

Employment and benefits protection. An employee who took leave would be entitled, upon return, to reinstatement in the former position of employment or an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. Leave taken could not result in the loss of any employment benefit accrued before the date on which the leave began. The bill would not entitle an employee who was reinstated in employment to the accrual of seniority or other employment benefits during the leave or any right, benefit, or position of employment

other than any right, benefit, or position to which the employee would have been entitled if the employee had not take the leave. The bill would not prohibit an employer from requiring an employee on leave to report periodically to the employer on the status and intention of the employee to return to work.

Prohibited acts. An employer could not interfere with or deny the exercise of any right provided by the bill. An employer could not discharge or otherwise discriminate against an individual for opposing a practice that the bill would make unlawful.

A person could not discharge or otherwise discriminate against an individual because the individual had:

- filed a charge, or instituted or caused a proceeding related to these provisions;
- given any information in connection with an inquiry or proceeding related to a right provided by the legislation; or
- testified, or was about to testify, in an inquiry or proceeding relating to a right provided by the bill.

Enforcement. An employer would commit an unlawful employment practice subject to enforcement by TWC under Labor Code, ch. 21 if the employer performed any of the prohibited acts.

TWC would adopt rules and prescribe the required notice and forms not later than November 1, 2007.

The bill would take effect September 1, 2007. It would apply only to a suspension, termination, or other adverse employment action relating to an employee absence authorized by this bill that occurred on or after January 1, 2008. An employee could not take leave as provided by the bill until January 1, 2008.

**SUPPORTERS
SAY:**

CSHB 3037 would permit an employee who already was entitled to sick leave or other accrued leave to use any or all of this paid time off to care for a family member with a serious health condition. The bill would involve taking care of a loved one with a medical condition that required inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. It would not place an undue burden on an employer to provide new or additional paid leave.

An estimated 1.9 million Texans are informal caregivers to loved ones with chronic illnesses. Texas, along with a majority of other states, already allows its state employees to use sick leave to care for sick family members. CSHB 3037 would mirror aspects of the FMLA but would permit the use of paid sick leave. Also, it would extend the family members beyond a spouse, child, or parent for whom an employee could assist to include a beloved in-law or grandparent. A proposed floor amendment would exclude employers with under 50 employees, as the FMLA does.

Employees often juggle work with their care-giving responsibilities in order to meet both their own financial obligations and the costs associated with a seriously ill loved one. HB 3037 would aim to extend to employees that are family caregivers the flexibility and support they need during difficult times while limiting provisions to family requiring inpatient care or continuing treatment. The bill would follow the lead of about 12 other states that have passed similar family and medical leave laws affecting private employees.

**OPPONENTS
SAY:**

Employers are frequently sympathetic and flexible with employees who have a seriously ill family member, but CSHB 3037 would create an unfunded mandate on the business community due to loss of productivity. Because estimates are that almost a tenth of the Texas population are informal caregivers to chronically ill family members, CSHB 3037 could generate a sizeable economic burden from employees' exhausting leave time that they might not otherwise use. The Legislature should not interfere with this aspect of the employer-employee relationship. Employers should continue setting parameters regarding leave, not the government.

NOTES:

The author plans to offer a floor amendment that would limit the bill to employers with 50 or more employees, which would conform with the Senate companion.

According to the fiscal note, the bill would cost an estimated \$348,876 for fiscal 2008-09 due to anticipated complaints and enforcement procedures at TWC.

The companion bill, SB 996 by Watson, was heard in the Senate Business and Commerce Committee on April 3.

