

Washington's Paid Family and Medical Leave: Roundtable Series

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PRESENTED BY

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WITH SPECIAL GUEST

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Overview for the Day

Overview of the Washington PFML Program



How the PFML Intersects with Other Leave Laws



Supplemental Benefits



Amendments, Benefits, and Tax Issues



PFML Question & Answers

Overview of the PFML Program

Statewide insurance plan - requires employers to report wages, hours worked, and additional information quarterly

Funded by premiums paid by employees and larger employers

Premium collection started January 1, 2019, and employees could start using leave as of January 1, 2020

Eligible employees will generally receive up to 12 weeks with some exceptions granting 16-18 weeks per calendar year

Who is Eligible?

- All employees who have worked at least **820 hours** for any employer in Washington during the qualifying period
 - **Qualifying Period:** The first four of the last five completed calendar quarters, or the last four quarters from the date the leave begins
 - Hours can be earned working for **more than one Washington employer**



What About Unions?

Are employees covered by a CBA eligible for PFML starting in 2020?
Maybe...

Employees subject to collective bargaining agreements in effect ***before October 19, 2017*** are not required to comply until the CBAs expire, are reopened, or are renegotiated.

Employers with a unionized workforce must inform ESD when the existing CBA expires, or when it is reopened or renegotiated by the parties.

What Is Covered?

Qualifying Events:

- **Qualifying Medical Leave Events:**
 - Employee's own "serious health condition"
- **Qualifying Family Leave Events:**
 - Caring for a family member with a "serious health condition"
 - Bonding in the first 12 months after adoption, birth, or fostering a child under 18 years
 - Certain military connected events

Definition of Family Member:

- Children (by birth, adoption, or foster care as well as **spouse of children**), parents, spouses, **siblings**, **grandparents**, and **grandchildren**, **parents-in-law** and **grandparents-in-law**

How Does It Work?

First,

- An employee must generally notify his or her employer at least 30 days before the expected start of PFML.

Second,

- The employee must file an initial claim with ESD and meet certain eligibility requirements, such as the minimum hours worked and qualifying event.

Third,

- ESD must send the employee his/her first benefit payment within 14 calendar days **after the first properly completed weekly application** is received.

Seven-Day Waiting Period and Duration of Leave



For all leaves except baby bonding, there is a **seven-day waiting period** before an employee is eligible for PFML benefits.

But note, the waiting period may not always be seven days....

If ESD approves the application, ESD pays the benefit directly to the employee.

The minimum claim duration payment is currently **eight consecutive hours**.

What About My Job and Benefits?

- FMLA Intersection?
- Right to reinstatement if:
 - Employer has at least 50 employees in Washington **and**;
 - Employee has worked for the employer for at least 12 months **and**;
 - Employee has worked at least 1,250 hours in the preceding year.
- Benefits Continuation?
- Retaliation is Prohibited



How are Premiums Paid?

- Employers collect (or cover) PFML premiums from employee paychecks.
- Employers with 50+ employees must also pay toward the medical leave premium.
- **Small businesses** (less than 50 employees in WA) are not required to pay toward premium (but may opt in).
- Employer submits to the state insurance program on a quarterly basis.
- Employers may get approval from ESD to operate a **voluntary plan**.





INTERSECTION WITH OTHER LAWS

FMLA vs. PFML Employee Eligibility

FMLA

- Only those workers who have worked:
 - 1,250 hours
 - 12 months
 - For current employer, who employs 50 or more employees

PFML

- All workers who have worked:
 - 820 hours (in 4 quarters)
 - For any WA employers (it's portable)

Covered Purposes

FMLA

Medical Leave – for his or her own “serious health condition”

Family Leave – 1) bond with new baby, adopted or foster child; 2) care for “family member” with serious health condition

PFML

Medical Leave
(same)

Family Leave– same as before, **PLUS:**

- Expanded definition of “family”
- Military exigency

Who is a “Family Member”?

FMLA

- Child
- Parent
- Spouse
- State-registered domestic partner

PFML

“Family Member” expands to also include:

- Grandchildren
- Grandparents
- Siblings
- In-laws
- Child’s Spouse

Duration of Leave

FMLA

12 weeks, in a 12-month period

PFML

12 weeks

16 weeks if employee needs both family and medical leave

18 weeks if pregnant employee has a serious health condition resulting in incapacity

Funding and Pay

FMLA

Unpaid

- Note: some employers have 1) paid leave policies; 2) short-term disability insurance

PFML

Paid

- Funded through premiums paid by employer and employee
- Benefit amount depends on employee's wage
- \$1,000 is max weekly

Intermittent Leave

FMLA

Permitted for
serious health
condition

Increments vary

No intermittent
leave required for
baby bonding

PFML

Permitted

Minimum increment
of 8 hours

Employees may use
intermittent leave for
baby bonding

Other Employment Laws Relating to Leave

■ Washington

- Washington Family Care Act
- Domestic Violence Leave
- Washington Law Against Discrimination
 - RCW 49.60
 - WAC 162-30-020
- Pregnancy Accommodation (RCW 43.10.005)
- Workers' Compensation
- State and local paid sick leave

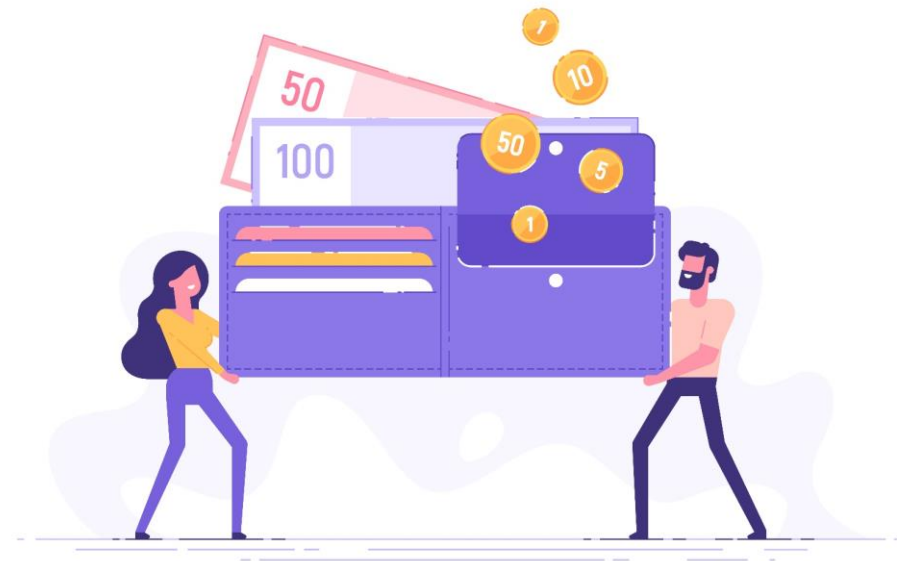
■ Federal

- FMLA
- ADAAA
- USERRA/other service members, veterans, and family protections



New York CLE Credit Code: 756347

SUPPLEMENTAL BENEFITS



Supplemental Benefits

- Employers/employees are allowed to top-off PFML with “supplemental benefits.”
- **Supplemental Benefits:** defined as “payments made by an employer to an employee as salary continuation or as paid time off. Such payments must be *in addition* to any paid family or medical leave benefits employee is receiving.”
- **Wages (for PFML):** Are reportable for premium and payment of benefits purposes and include “remuneration paid by an employer to an employee.”
- **Remuneration:**
 - “Means all compensation paid for personal services including commissions and bonuses and the cash value of all compensation paid in any medium other than cash.”
 - “Remuneration ***does not*** include: (i) The payment of tips; (ii) ***Supplemental benefit payments made by an employer to an employee in addition to any paid family or medical leave benefits received by the employee...***”

Supplemental Benefits

Defined as “payment offered by an employer to an employee who is taking leaving under Title 50A RCW.” (WAC 192-500-180)



- Includes “salary continuation, vacation leave, sick leave or other paid time off.”
- Employers can offer paid time off to employees on PFML leave, but there *is no requirement* to do so.
- ***It is the employee’s choice to use any offered supplemental benefits.***
- This is different from the FMLA.....

Supplemental Benefits: FMLA Issues

- Under the FMLA, employers can *require* the use of paid time off (except protected paid sick leave) during FMLA leave.
- This is not permitted under the PFML.
- There will be instances where employees are eligible for both PFML and FMLA.
- Rules and law provide no guidance on this issue.



Supplemental Benefits: Amounts and Reporting



- Rules specify that supplemental benefit payments are *excluded from the definition of wages* and should not be reported to the ESD (WAC 192-620-030).
- Supplemental benefit payments will not reduce employee's weekly benefit payment.
 - Employees may receive amounts in excess of normal compensation from a combination of PFML and supplemental benefits.
 - Rules do not specify a ceiling on amount of supplemental benefits.

SHORT-TERM DISABILITY



Short-Term Disability Benefits

- Not a supplemental benefit
- Not reportable wages
- Plan terms control
- Disability benefits may be offset (reduced by) PFML (for now)
 - Eligibility v. receipt
 - ERISA v. payroll practice
- Revisit cost of STD coverage



2020 AMENDMENTS



Update...

PFML Updates

- PFML Amendments recently signed into law
- ESD was initially backlogged, and working on processes
- ESD reports improved turnaround times
- What about employer documentation?

“Casual Labor”

- Created a definition for “casual labor”
 - Work that:
 - Is performed infrequently and irregularly; and
 - If performed for an employer, does not promote or advance the employer’s customary trade or business.
 - “infrequently” means work performed 12 or few times per calendar quarter
 - “irregularly” means work performed not on a consistent cadence

Why is this important?

- Employers who hire someone for **casual labor** do not need to report or remit premiums for that work. Someone who performs casual labor cannot use those hours or wages toward their eligibility for PFML

Definition of “Child”

- Changed definition of “child”
 - Now includes “child’s spouse”; i.e. daughter-in-law or son-in-law

Why is this important?

- Expands scope of “family member” for Family Leave Events
- Employees may now qualify for paid leave to care for daughter-in-law or son-in-law’s serious health condition

“Paid Time Off” and “Supplemental Benefits”

- Created a definition for “**paid time off**”
 - Defined to include “vacation leave, personal leave, medical leave, sick leave, compensatory leave, or any other paid leave offered by an employer under the employer’s established policy”
- Created a definition for “**supplemental benefit payments**”
 - Defined to be “payments made by an employer to an employee as salary continuation or as paid time off. Such payments must be in addition to any paid family or medical leave benefits employee is receiving”

Why is this important?

- Helps clarify how we have been providing supplemental benefits
- Does not change how the program operates!

Changes to the “Waiting Period”

Changes to the “waiting period”

- There has always been a 7-day waiting period, except for the birth or placement of a child (limited to baby bonding leave)

Amendments

- In addition, 7-day waiting period does not apply to “any qualified exigency as defined by RCW 50A.05.010(10)(c)”
- Changed to begin “the previous Sunday of the week” when an otherwise eligible employee takes leave
- Clarifies that eligible employees may satisfy 7-day waiting period while receiving PTO

Changes to “Child Support”

Amendments:

- Department clarified that, if an employee owes child support, the Department shall notify the applicable agency and deduct and withhold benefits
- Does not impact employer’s operations!

Who Is Disqualified From Receiving PFML Benefits?

- Clarified that employee is disqualified from receiving PFML benefits in weeks where he/she is receiving, has received, or will receive compensation from:
 - Title 50 (Washington unemployment)
 - RCW 51.32.060 (Washington permanent disability)
 - RCW 51.32.090 (Washington temporary disability); or
 - Any other applicable federal unemployment, industrial insurance, or disability insurance laws



Expanded Scope of Complaints & Investigations



- Has always been unlawful to interfere with, restrain, or deny the exercise of benefits under PFML (i.e. no discrimination or retaliation!)
- Amendments:
 - Outlines procedure for employees to file a complaint
 - Outlines Department's authority to investigate
 - Outlines potential damages
 - Provides a “private right of action” for employees to sue employer

Complaint & Investigation Procedure



- First, employee may file a complaint with the Department within three years.



- Second, Commissioner may investigate and determine if a violation has occurred.



- Third, upon completing the investigation, Commissioner shall issue a determination, and may order the employer to pay damages. Note: Private Right of Action!

FINAL RULES PROVIDE RIGHT TO CONTINUATION OF HEALTH BENEFITS



Benefits Continuation: What is Required?

RCW 50A.35.020 : “If required by the federal family and medical leave act, as it existed on October 19, 2017...”

“The department is continuing to develop administrative rules”

WAC 192-700-020: *An employee taking PFML is “entitled to the continuation of health benefits as provided in this section when there is at least one day of concurrent use with leave taken under the federal Family and Medical Leave Act as it existed on October 19, 2017.”*

- Effective June 14, 2020
- Key: One day of overlap with FMLA
- Employers may require employee to pay his or her share of premiums

Action Items: Work with legal counsel and insurance carriers to review and update plan documents and employee communications

TAXATION AND REPORTING



Are PFML Benefits Taxable?

- The IRS has elected not to provide guidance regarding tax treatment at this time
- Until additional guidance is received, employers should:
 - Treat premium deductions as taxable and report on Form W-2 as “other” income
- For voluntary plans, benefits should be treated as:
 - Tax-free if premiums paid by employee only
 - Taxable if premiums paid by employer only or if shared cost
- ESD to determine whether it will report state-paid benefits on Form 1099-G



PFML Questions



General Questions





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