

10 Things Employers Need to Know About PFML

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Washington's Paid Family and Medical Leave: Roundtable Series

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10 Things Employers Need to Know about PFML:

1. Communications from ESD

2. The Waiting Period

3. PFML Notice Requirement

4. Intermittent Leave

5. Supplemental Benefits

6. Short Term Disability

7. Benefits Continuation

8. When is Leave Protected?

9. Intersection of *Escriba*, PFML, and FMLA

10. Voluntary Plans

PFML Overview

- Partial wage replacement, available for *serious health condition* of employee or family member
- Family Members?
 - Includes grandchildren, grandparents, sons, daughters-in-law, and siblings as qualifying family members, in addition to parents, spouses, and children.
- Portable benefit from employer to employer
- Must work 820 hours for Washington employers in qualifying period to be eligible
- Must provide employees with required written notice
- Long delays for approval from ESD
- Cannot force employees to apply for PFML
- May run concurrently with FMLA if covered by FMLA
- Employees have a private right of action with attorneys fees and costs



1. Communication Strategies

Communication from ESD (or lack thereof)

- Notification when employee applies
- Limited/changing information
- Award letter to employee
- Might not include:
 - Reason
 - Total hours eligibility
 - Continuous or intermittent



Communication from Employee

Must provide 30 days' notice if foreseeable

Notice must be provided “as soon as practical” if unforeseeable

Notice must include: anticipated timing and duration of leave

Communication from Employee

Intermittent leave: notice need only be given once, but employee must inform the employer if dates of the scheduled leave change, are extended, or were initially unknown

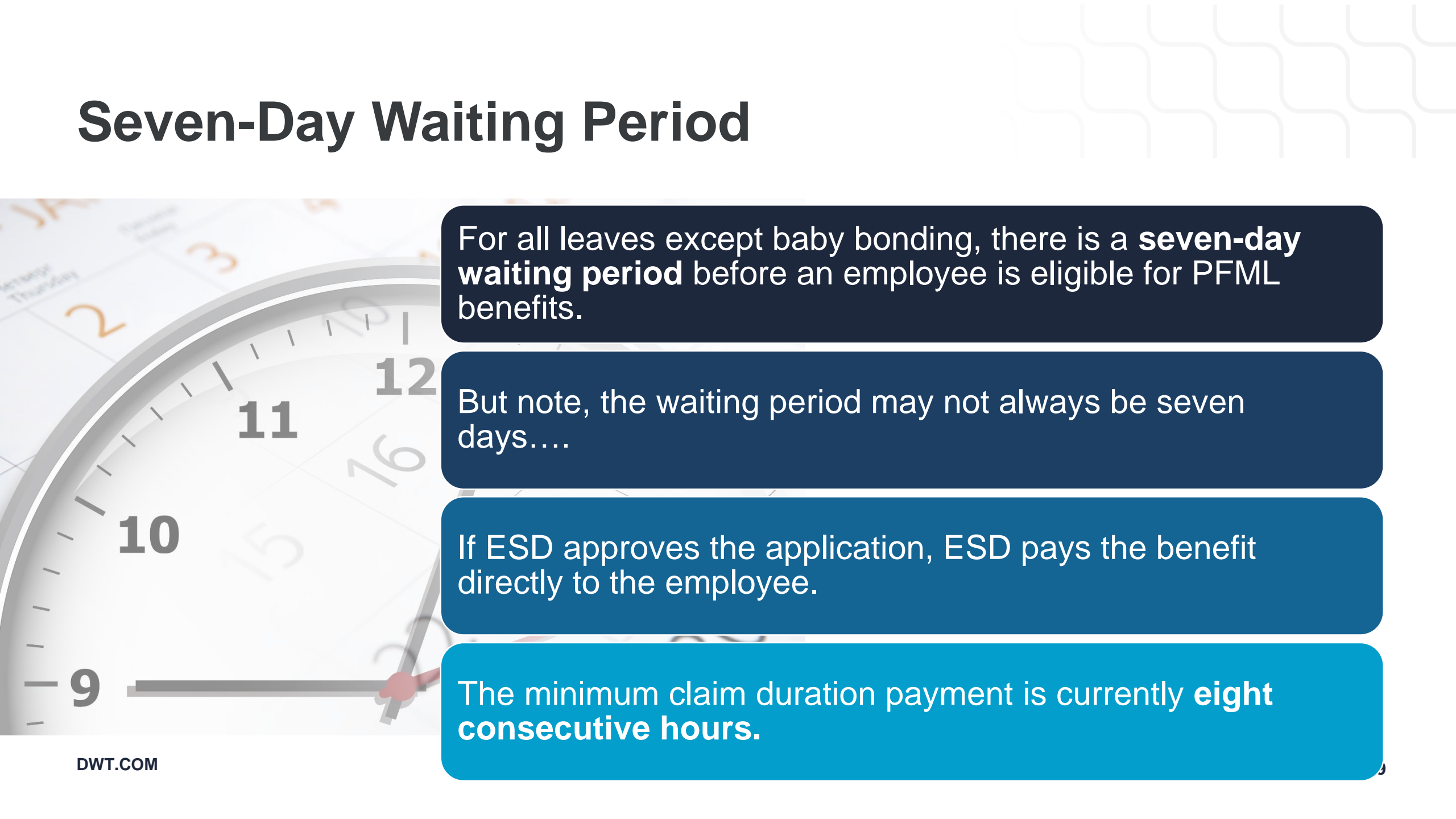
Ask employees for the information you need including anticipated timing, duration, weekly award amount, etc.

Failure to provide timely notice may result in delay or denial of benefits.



2. What is the Waiting Period?

Seven-Day Waiting Period



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**.

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

3. PFML Notice Requirement

PFML Notice Requirement

- *Employer must give the employee a **PFML Statement of Rights** and notice of eligibility form provided by the state within:*
 - **Five business days** after the employee's seventh consecutive day of absence due to family or medical leave; or
 - **Five business days** after the employer has received notice that the employee's absence is due to family or medical leave, whichever is later.
 - Employers **must** use the notice provided by the state:
<https://paidleave.wa.gov/app/uploads/2019/12/Employer-to-employee-notice-2019.pdf>
 - **FMLA paperwork should also be provided**

Employer requirement to provide notice to employees

Employers with employees working in Washington state must provide the following notice to employees who may be eligible for Paid Family and Medical Leave the later of:

- Five business days after an employee's seventh consecutive day of absence due to family or medical leave, or
- Five business days after an employer becomes aware that the employee's absence is due to family or medical leave.

Paid Family and Medical Leave

Statement of Employee Rights

You may qualify for Paid Family and Medical Leave

As of Jan. 1, 2020, Washington employees who have worked 820 hours or more in the qualifying period and experience(d) a qualifying event have access to Paid Family and Medical Leave.

Employees who have missed work due to family or medical reasons may be eligible for paid family or medical leave for the following qualifications:

- Care for and bond with a child younger than 18 following birth or placement
- Care for yourself or a family member experiencing a serious health condition
- Certain military-connected events.

Paid Family and Medical Leave requires that you give your employer(s) written notice at least 30 days in advance of when you plan to take leave. However, if the reason you need leave was not foreseeable, you may notify your employer(s) as soon as possible.

The Paid Family and Medical Leave Benefit Guide provides information on how to apply for benefits and submit weekly claims. It also explains your rights and responsibilities under the law. Download the guide at www.paidleave.wa.gov/benefit-guide.

For more information about how to apply, contact us at 833-717-2273 or visit www.paidleave.wa.gov.

Important information for when you apply

Employer UBI #: _____

This employer offers supplemental benefits: Y _____ N _____

Noter Except during the waiting week, employees cannot use employer provided paid time off at the same time as Paid Family and Medical Leave, unless the employer chooses to offer a "supplemental benefit." Supplemental benefits can be used along with Paid Family and Medical Leave to provide additional pay while an employee receives partial wage replacement through Paid Leave benefits. Employees may accept or reject supplemental benefit payments.

EMPLOYER NOTICE TO EMPLOYEE
UPDATED NOVEMBER 2019



4. Intermittent Leave

Intermittent Leave

- Employees may use PFML on an intermittent basis for family and medical leave
- Unlike the FMLA, employer approval is NOT required intermittent PFML “baby bonding” leave
- Consider permitting intermittent FMLA leave for the birth, placement, or adoption of a child
- Review FMLA policy and make necessary adjustments- perhaps special provisions for Washington
- Minimum increment of use is 8 hours (WAC 192-620-005)





5. Supplemental Benefits

Supplemental Benefits: Overview

- Employers/employees are allowed to top-off PFML with “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.”
- 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.



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.

6. 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
- Long-term disability



7. Benefits Continuation

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...”

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
- Nothing prevents employers from maintaining benefits for all employees (if plan permits)

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

Benefits Continuation: *Unanswered Questions*

- How are “health benefits” defined?
- Does ERISA preempt this requirement for self-insured ERISA plans?
- How does PFML coordinate with an employee’s termination and COBRA eligibility? (WAC 192-700-010)
- When do continuation rights start if FMLA overlap does not occur on first day of PFML?
 - Is coverage retroactive?



8. When is Leave Protected?

When is Leave Protected?

- Under 50 employees in Washington?
 - No job protection.
- At least 50 employees in Washington?
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.
- Retaliation is Prohibited



Job Protection: At Least 50 Employees in Washington

Does an employee have job protection?

- Employees who return from leave under PFML must be restored to a same or equivalent job.
- An employee may also be protected under other local, state, and federal laws.
- An employer can deny job restoration if:
 - They can show that the employee's job would not have existed when the employee returned from leave,
 - The worker is salaried and among the highest paid ten percent of employees within 75 miles of the facility where the employee works.

9. PFML, FMLA, and *Escriba*

How are PFML and FMLA Different?

- **Is the leave paid?** PFML provides partial wage reimbursement; FMLA does not.
- **What is the duration of leave?** PFML is based on typical workweek hours (not to exceed 12 times the typical workweek hours during the year); FMLA is up to 12 workweeks of leave.
- **What family members are covered?** PFML includes grandchildren, grandparents, sons, daughters-in-law, and siblings as qualifying family members, in addition to parents, spouses, and children.
- **Is the leave job protected?** There is no 75-mile radius component for PFML. Employers with less than 50 employees have obligations under PFML, but do not under FMLA.

What is the *Escriba* case?

- Factual Background of Case
- Ninth Circuit's Holding:
 - Escriba argued she was entitled to FMLA protection, so Foster Farms should have designated her leave as such, and provided her with appropriate notices regardless of whether she had declined such a designation.
 - The Ninth Circuit disagreed and concluded that an employee can affirmatively decline to use FMLA leave, even if eligible for leave.
 - The Ninth Circuit reasoned that under certain circumstances an employee might seek time off but still decline to invoke FMLA leave in order to preserve FMLA for future use.



Escriba: Implications for Employers

Employers should consider documenting whether an employee intends to take FMLA leave when the employee is eligible to take it.

Escriba's holding that employees have the right to decline FMLA leave should not be taken out of context. *Escriba* involved a leave to care for a family member; it did not involve a leave for the employee's own serious health condition.

Escriba did not address whether an employee could decline FMLA entitlement—thereby saving it for future use—while demanding a leave to accommodate the employee's own disability.

Opinion Letter: No delay for FMLA Leave



- “[A]n employer is prohibited from delaying the designation of FMLA qualifying leave as FMLA leave.”
- Once an eligible employee communicates a need for FMLA leave, it must be designated as FMLA qualifying, and counts towards the employee’s FMLA entitlement.
- Employers cannot delay in designating leave as FMLA qualifying *“even if the employee would prefer the employer delay the designation.”*
- Once employee provides notice, employer must provide notice of designation within 5 days.
- Employers cannot extend FMLA qualifying leave by allowing employees to use PTO/sick time before designating leave as FMLA.
- Paid leave counts towards the FMLA entitlement for FMLA qualifying reasons.

How to Handle the Intersection?

Paid Family Medical Leave

FMLA

Escriba





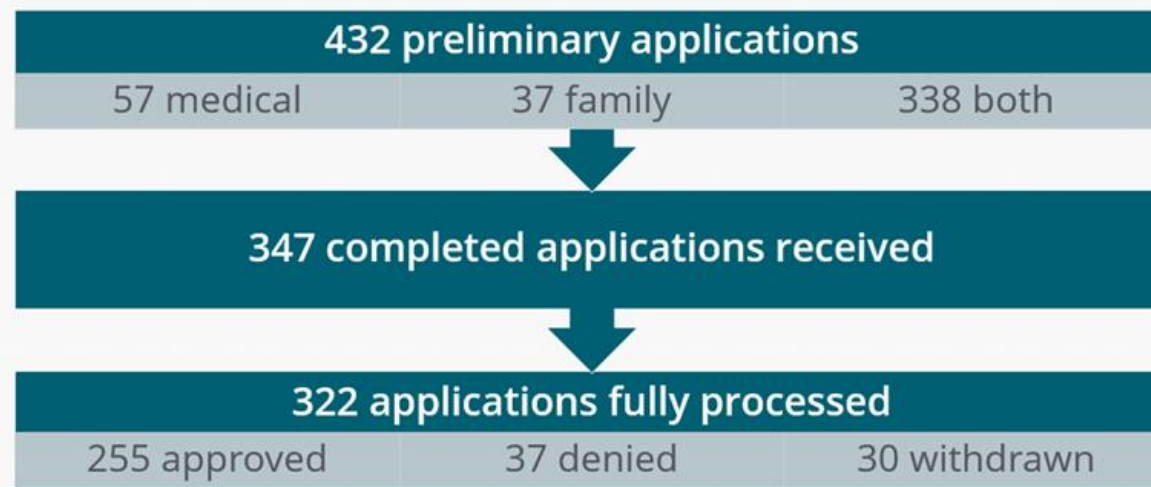
10. Voluntary Plans

Voluntary Plans

- No duplication of benefits permitted
- Reporting obligations still exist
- Employers may have voluntary plans for both family and medical leave, or one or the other
- Third-Party Administration is permitted
- Accelerated Payment Offer
- Posting and Notice Requirements

Voluntary plan update

As of 10/09/2020



*Prepared by Washington ESD. Used with permission.

Voluntary Plan: Benefit Requirements



- Eligibility requirements (and restrictions)
- Premium calculations
- Leave Duration
- Weekly Benefit
- Job Protection
 - Nine months with employer
 - 965 hours worked in 12 months preceding date leave will begin
- Benefits Continuation

Questions



Thank you



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