

Employee Benefit Plan Review

A Primer for Washington Employers on Complying with the Paid Family & Medical Leave Program

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Washington State has begun implementing its new Paid Family & Medical Leave¹ (PFML) program. Therefore, Washington employers should be mindful of their obligations under the PFML program. To educate employers on their obligations, the Washington Employment Security Department (ESD), which will administer the PFML program, has created a useful website² that summarizes the new program's key components. The website includes an Employer Toolkit³ to help employers comply with the program.

Washington State has already taken some key steps in the implementation of the PFML program: On January 1, 2019, employers were required to begin collecting PFML premiums, and, as of May 6, 2019, employers could apply online for voluntary plan exemptions.⁴ Other key dates that employers should be aware of include the following:

- July 1-August 31, 2019: Employers had to begin reporting and remitting premiums for Quarters 1 and 2.
- December 31, 2019: Washington's current Family Leave Act will sunset.
- January 1, 2020: Employees are eligible to take leave.

In addition, and as a reminder, Washington divided the rulemaking process⁵ into six phases, and the first four phases are complete. Employers still have the

opportunity to participate in Phases Five and Six through the online public comment forum⁶ and public hearings that will be held throughout the remainder of 2019.

SUMMARY OF THE PAID FAMILY & MEDICAL LEAVE PROGRAM

Beginning January 1, 2020, employees may take leave and collect benefits pursuant to the PFML program:

- (i) For their own serious health condition;
- (ii) To bond with a newborn child or a child placed for adoption or foster care;
- (iii) To care for a family member with a serious health condition; or
- (iv) For certain military-connected activities.

Under the PFML program, most employees will be eligible for a maximum of 12 weeks of partially paid leave.⁷ The benefit amount will be a maximum of \$1,000 per week, as calculated by the ESD.⁸

PFML is organized as an insurance program, with the cost of premiums split between employers and employees. Employers typically use payroll deductions to collect premiums from employees. For 2019, the premium rate is 0.4 percent of an employee's gross wages; the premium rate is divided into the family leave portion (1/3 of the total premium) and the medical leave portion (2/3 of the total premium).⁹

Employers may withhold 63.33 percent of the premium from employee wages (accounting for 100 percent of the family leave portion and 66.67 percent of the medical leave portion); the employer portion is 36.67 percent of the total premium. Employers can opt to cover some or all of their employees' share of the premiums.

PFML is organized as an insurance program, with the cost of premiums split between employers and employees.

The ESD will reassess the employee premium annually, based upon guidelines set by the commissioner of the ESD. Each year, the commissioner also will set a cap for the amount of wages that are subject to the premium calculation (currently set at \$132,900).

Importantly, companies with fewer than 50 employees in the state of Washington are not required to remit the employer portion of the premiums, but they must remit their employees' premiums and report certain information, including employee wages and hours, to the ESD. Employers with fewer than 50 employees that elect to pay the premiums may be eligible to receive financial assistance from the state to help pay for their leave program.

To qualify for leave, an employee must have worked 820 hours in the qualifying period, generally within 12 months of the qualifying life event. The PFML program acknowledges certain circumstances under which an employee is not eligible for benefits, such as employees who are absent as a result of an intentional injury to themselves or others, or employees who are suspended from their employment. In addition, leave benefits will not be applied retroactively; to be eligible

to receive benefits, an employee must be qualified prior to taking the leave. Finally, any employee who knowingly and willfully makes false statements to obtain or attempt to obtain benefits will be disqualified from receiving benefits. For instance, while there are situations in which an employee may receive benefits while working,¹⁰ an employee who, e.g., takes leave due to the need for bed rest but then continues to work a second job will likely be disqualified from receiving benefits. There is a tiered penalty scheme for employees who make false misrepresentations in an effort to improperly receive benefits.

REQUIRED QUARTERLY REPORTING

Employers are responsible for reporting certain information about both their employees and their business. Reporting is made through Paid Leave accounts on the ESD's new system. The ESD launched the system on July 1, 2019, and has provided guidance and instructions¹¹ on how to create an account and file reports. Generally, an employer must report its Unified Business Identifier, the name of the business, the total premiums collected (if any) from employees, and the name of whomever prepared the employer's report. For each employee, an employer must report the employee's Social Security or Individual Taxpayer Identification Number, the employee's name, and the wages paid, and the hours worked for the employer in the reporting quarter.

In addition to identifying information, starting in 2020, employers will be required to file their quarterly wage reports according to the following schedule:

- Quarter 1 reporting for January, February, and March will be due each year on April 30.
- Quarter 2 reporting for April, May, and June will be due each year on July 31.

- Quarter 3 reporting for July, August, and September will be due each year on October 31.
- Quarter 4 reporting for October, November, and December will be due each year on January 31.

As noted above, employers' reporting and remitting of premiums for Quarters 1 and 2 of 2019 were due between July 1 and August 31, 2019. Employers should be aware that, if they did not start collecting premiums from employees on January 1, 2019, the ESD will not impose a penalty, and the employer can, with one pay period's advance notice, begin withholding employee premiums at any time. Employers may not, however, retroactively withhold premiums from employees, and employers are responsible for paying any missed employee premiums on behalf of those employees for whom premiums were not collected. Under the PFML program, employers are required to maintain records of the reporting and remitting information for six years.

CLAIMS PROCESS

In order to receive leave benefits, a qualifying employee must provide the employer with *written* notice of his or her intention to take leave as follows:

- For the birth or placement of a child, the employee must provide the employer with written notice at least 30 days before the start of the family leave. If the leave is to begin less than 30 days before the birth or placement, the employee must provide notice as soon as is practicable.
- If the employee is taking leave for a family member's serious medical condition, and the leave is foreseeable, the employee must make reasonable efforts to schedule treatments so as not to unduly disrupt the employer's business operations (subject to the instructions of the health care provider). Leave for a family member's serious health

condition also requires, to the extent that it is practicable, at least 30 days' notice to the employer.

- If the employee applies for benefits to take military-related leave, the employer may ask for documentation of a military exigency.

Additionally, all employees taking PFML leave must submit an application attesting that they have provided their employer with written notice of their intent to take leave.

INTERACTION WITH STATE/ FEDERAL LEAVE LAWS AND COMPANY POLICIES

As the PFML program becomes effective, Washington's current Family Leave Act will sunset on December 31, 2019. The PFML law makes clear that PFML leave will run concurrently with leave taken under the federal Family and Medical Leave Act (FMLA), where applicable.

It is important to note that employers may not require employees to take other forms of paid time off, such as paid vacation or paid sick leave, in lieu of or concurrently with PFML benefits. Employees may, however, elect to take these other forms of leave concurrently with their PFML leave.

JOB PROTECTION AND BAN ON RETALIATION

The PFML law provides job-protected leave to employees who meet eligibility requirements similar to those under the federal FMLA. To qualify for job protection while on leave, the employee must (i) work for an employer with 50 or more employees, (ii) have been employed with the employer for 12 months or more, and (iii) have worked for the employer for 1,250 hours during the 12 months immediately preceding the date when the leave is scheduled to start. Employees who take leave must be restored to the same position, or an equivalent position in terms of

benefits, pay, and other terms and conditions of employment, that they held prior to taking leave. Employees are also entitled to any employment benefits that accrued before they took leave. Seniority does not accrue while an employee is on leave.

If an employer maintains a voluntary private plan as opposed to participating in the state program (discussed below), employee entitlement to these job protections do not kick in until the employee has worked for the employer for nine months, and for 965 hours for that employer during the 12 months before the start date of the leave.

Employers may be subject to penalties for interference with the use of PFML benefits, or for taking adverse action against employees who take PFML.

Employers may be subject to penalties for interference with the use of PFML benefits, or for taking adverse action against employees who take PFML. The ESD has set forth an extensive scheme¹² for calculating damages owed to an employee from an employer that has violated the employee's rights under the law.

FITNESS-FOR-DUTY CERTIFICATION, PERIODIC REPORTING, AND HIGHLY PAID EMPLOYEES

Employers are permitted to require fitness-for-duty certification from the employee's health care provider when the employee is ready to return to work, but the policy has to be enforced uniformly. Employers may also require that employees periodically report their status and intention to return to work. Additionally, there is a

carve-out for employers to deny job protection to highly paid employees when, among other reasons, it would cause economic hardship to the employer (similar to the "key employee" exception under the FMLA).

STATUTORY EXEMPTIONS

While most employees will qualify to receive benefits, there are some statutory exceptions. The PFML program does not cover federal employers, federally recognized tribes, and self-employed workers. Such tribes and self-employed workers, however, may opt in to the program and receive benefits. Further, employees who are covered by a collective bargaining agreement (CBA) that was in existence on or before October 19, 2017, are not subject to the PFML law, and will not pay premiums for the PFML law, until the CBA is reopened, renegotiated, or expires. Finally, employers whose leave programs are comparable to or exceed the requirements of the state's law may opt out of the state program, and instead offer a voluntary plan (discussed below).

POSTING AND NOTICE REQUIREMENTS

Employers must post a notice that will be prepared and offered by the commissioner on or before January 1, 2020. Once available, employers must display the poster in a conspicuous place where employment posters are usually displayed. Any employer that willfully violates the posting requirement may be fined up to \$100 for each separate offense. There is also an optional paystub insert¹³ that is currently available.

Additionally, when an employee takes leave that would qualify as PFML for more than seven consecutive work days, the employer must provide a written notice of rights to that employee. The employer must provide the notice by the fifth business day after the employee's seventh consecutive day out on PFML leave, or by the fifth business day after

the employer becomes aware that the employee is out on PFML leave, whichever is later.

EXEMPTION BY PROVIDING A VOLUNTARY PRIVATE PLAN

Instead of providing benefits under the state's program, Washington employers may develop a voluntary plan for family leave, medical leave, or both. Generally, the voluntary plan must be available to all employees and meet or exceed the requirements of the state program, including the provisions concerning premium withholdings. The ESD must approve the voluntary plan before employers can offer it to their employees.

There are some requirements specific to voluntary leave plans. Because paid family and medical leave benefits are portable between jobs, employers with voluntary leave plans are required to maintain certain records. Employers also have the option to work with a third party to manage and maintain their voluntary plan; however, they remain legally liable for ensuring compliance with the program. When employees apply for benefits under a voluntary plan, they will file claims for benefits directly with the employer or designated third-party agent. There are additional penalties for employers with a voluntary plan that fail to comply with the law.

One unique component of the rules for voluntary leave plans is the option to provide employees with an accelerated payment offer. This option allows an employer that maintains a voluntary plan a way to incentivize an employee to return to work sooner by offering an accelerated payment schedule—i.e., the

employee will receive the money he or she is entitled to under the voluntary plan in a shorter period of time. The employee, who has sole discretion in deciding whether to take the offer, has the choice to return to work early. The PFML law requires that the employer offer, at a minimum, all the financial benefit in half the entitled amount of leave time.¹⁴

ADDITIONAL PENALTIES

Employers that willfully, i.e., knowingly and intentionally, fail to make the required reports are subject to fines ranging from \$75 to \$250 per instance. Failure to remit premiums can result in a variety of penalties, including fines, liens, loss of a bond, or injunction. Employers can appeal these penalties.

WHAT WASHINGTON EMPLOYERS SHOULD DO NOW

- Consider participating in the Phase Five and Six hearings and the public comment forum.
- Review payroll and recordkeeping practices to ensure that procedures for deducting and remitting employee premiums are properly set up and recorded.
- If deductions were not made from wages for the period of January 1, 2019, to the present, make sure that all premiums due are paid during the first reporting period.
- Ensure that all relevant staff are properly trained and prepared to meet the quarterly reporting mandates. 🌟

NOTES

1. <http://lawfilesexst.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/5975-S.SL.pdf?cite=2017%203rd%20sp.s.%20c%205%20C2%A7%2066>.

2. <https://paidleave.wa.gov/>.
3. <https://paidleave.wa.gov/employers>.
4. <https://paidleave.wa.gov/voluntary-plans>.
5. <https://www.paidleave.wa.gov/Rulemaking>.
6. https://www.opentownhall.com/portals/289/Issue_6945.
7. For medical leave, the maximum duration is 12 weeks, plus two additional weeks if the leave is the result of pregnancy complications. Employees may be entitled to up to 16 weeks per year for a combination of family and medical leave, plus the additional two weeks if the leave results from a pregnancy complication (thus, birthmothers may be entitled to as much as 18 weeks of partially paid leave).
8. The benefit amount is calculated pursuant to an equation provided in Section RCW 50A.04.020 of the PFML statute, available at <https://app.leg.wa.gov/RCW/default.aspx?cite=50A.04.020>.
9. The ESD's premium calculator is a helpful tool for determining premium amounts, available at <https://paidleave.wa.gov/premium-calculator>.
10. For example, an employee who takes leave from his or her 9 a.m. to 5 p.m. job may receive benefits even though he or she works a second job from 6 p.m. to 10 p.m.
11. <https://paidleave.wa.gov/how-do-i-report>.
12. <https://app.leg.wa.gov/RCW/default.aspx?cite=50A.04.100>.
13. <https://paidleave.wa.gov/paystub>.
14. The ESD provides a helpful example: "[I]f an employee intends to take 10 weeks of paid family and medical leave, the employer could offer eight weeks of paid leave and then compensation of the final two weeks when they return to work. Thus, if the employee accepts the offer, they would be on leave for eight weeks and receive the compensation of the full 10 weeks that they had intended to be out." Employers can get more information on the Voluntary Plan Page, available at <https://www.paidleave.wa.gov/VOLUNTARY-PLANS> or from the Voluntary Plan Guide, available at https://pfmlorcbard.blob.core.windows.net/media/Default/Documents/VoluntaryPlans/PFML_VoluntaryPlanGuide_V1.1.pdf.

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