

2020 Updates to the Washington Paid Family Medical Leave Act

By Susan Stahlfeld

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Believe it or not, there are some upcoming legislative changes for Washington employers that have nothing to do with COVID-19.

One set of important changes has to do with the Washington Paid Family Medical Leave Act (PFML). In early March 2020, the state legislature sent SHB 2614 to Governor Inslee, who signed the bill into law on March 25, 2020. These new provisions amend RCW 50A and become effective on June 11, 2020. Below are the substantive changes that should be of interest to employers as they administer PFML for their employees.

Expanded Definition of “Child”

PFML provides leave to an employee to care for a family member with a serious health condition, including children. Now, “child” also includes “a child’s spouse.”

Casual Labor Is Excluded

“Casual labor” is excluded from the definition of “employment” for PFML purposes. Casual labor is work that 1) is performed infrequently and irregularly, and 2) does not promote or advance the employer’s customary trade or business. “Infrequently” is defined as work performed fewer than thirteen times per calendar quarter, and “irregularly” is defined as not performed on a “consistent cadence.” (We believe that the legislature meant to state not performed on a consistent “basis.”)

Supplemental Benefits Now Defined

Recall that under the rules adopted in 2019, employers may allow, but not require, employees to use accrued paid leave benefits as a supplement (i.e. in addition to) to PFML benefits. This year’s amendments clarify that “supplemental benefits” include salary continuation and Paid Time Off (PTO). PTO is any “paid leave offered by an employer under the employer’s established policy,” including vacation, medical leave, sick leave, personal leave, and compensatory time. Note, when using PTO or salary continuation for supplementation, the employer should designate the payments as “supplemental benefits” to avoid the risk that they will reduce the employee’s weekly PFML benefit amount.

Changes to Waiting Period

Prior to these amendments, employees had a seven-day waiting period before they could receive PFML benefits, unless the leave was related to the birth or placement of a child. The waiting period has now been eliminated for PFML related to military exigencies.

Also new, the waiting period will not necessarily be seven actual days. Originally, the waiting period began the day the employee began their leave, whatever day of the week that happened to be. Under these amendments, however, the waiting period commences on the Sunday before the employee begins their leave. Thus, an employee who begins their leave on a Friday will have satisfied the waiting period by the end of the day on Saturday.

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However long the employee's leave during the waiting period is, these new amendments make clear that receipt of PTO during the waiting period will not affect the employee's PFML benefits thereafter.

Clarifications to Who Qualifies as Out-of-State Employees

Employers and employees can obtain waivers from PFML coverage for "out-of-state employees." Originally, an out-of-state employee was one "physically based" outside the state. Effective June 11, 2020, an out-of-state employee is now defined as someone who "primarily performs work" outside the state. Additionally, to be considered "out-of-state," the employee must be working in the state on a limited or temporary work schedule, and not work 820 or more hours in Washington in "a period of four consecutive completed calendar quarters."

Interplay with Other Government Benefits

Originally, an employee who was eligible to receive unemployment or workers' compensation benefits was disqualified from receiving PFML benefits. Under the new amendments, the employee is only disqualified from receiving PFML benefits if he or she is actually "receiving, has received, or will receive" compensation under those programs for the same time period. Additionally, in regard to workers' compensation benefits, it is only the receipt of time-loss benefits that is disqualifying. The Employment Security Department (ESD) will determine whether an employee can receive, or is disqualified from receiving, PFML benefits.

Private Lawsuit versus an Agency Complaint

Employees who believe their PFML rights have been violated have two possible courses of action: 1) file a private lawsuit, or 2) file a complaint with the ESD. These new amendments provide some clarity on those processes.

The same three-year statute of limitations to bring a claim applies to both private lawsuits and agency claims. There is no requirement that an employee first file with the ESD before filing a private lawsuit.

If the employee elects to file a claim with the ESD and does not withdraw it within ten (10) business days, the employee is thereafter barred from pursuing a private lawsuit. If the employee withdraws the ESD complaint, the ESD will not investigate and the employee can proceed with a private lawsuit.

Should the employee fail to withdraw the ESD complaint within ten (10) business days, the ESD will investigate and make a determination as to whether the employer violated the PFML. The employer and employee can agree to privately resolve the dispute up until the ESD issues its determination.

If the ESD determines that there is a violation, the ESD is empowered to award damages. If the ESD issues a determination of violation, the employer has 30 days to either pay the damages awarded or appeal the determination. If the employer does neither, the employee can initiate a collection action in any county by filing a warrant with the county clerk.

Finally, the statute now specifically provides that an employee may file a lawsuit on behalf of themselves and other employees similarly situated (i.e., a class action based on violation of PFML).

Potential Damages for Violations

The statute has always provided that the employee may recover 1) lost wages, lost benefits, and any other lost compensation, or 2) if no wages were denied, any actual monetary losses related to the violation (e.g., the cost of paying someone to provide care to the family member that the employee would have provided if leave had been granted) up to a sum equal to the employee's wages for 16 weeks. The statute also provided for interest and an amount equal to the damages as liquidated damages for willful violations by the employer. In a private lawsuit, the employee can also recover their attorney fees.

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The new amendments provide that the ESD can determine and assess not only damages, but also the interest and liquidated damages.

Finally, the amendments make clear that all damages, interest, and liquidated damages are paid directly to the employee, including if awarded by the ESD.

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