



Paid Family and Medical Leave Proposed New and Amended Rules Related to Employer Size, Appeals, Definition of “Illegal Act”, Hearings, and Proration

March 2021

Introduction

Title 50A RCW created a statewide Paid Family and Medical Leave (Paid Leave) insurance program that provides partial wage replacement when a qualified employee takes approved family or medical leave.

The law gives the Employment Security Department (department) general rulemaking authority under RCW 50A.05.060 to administer the program. These proposed rules include technical and grammatical changes and a number of amendments to Title 192 WAC to further align the administrative rules with the Paid Leave statute.

These proposed rules were developed by the department and were filed in accordance with Chapter 34.05 RCW. The department is completing this analysis in accordance with RCW 34.05.328(1).

Describe the proposed rules, including a brief history of the issue, and explain why the proposed rules are needed.

AMENDATORY SECTION

WAC 192-510-050 How will the department assess the size of new employers?

An employer that has not been in business in Washington long enough to report four calendar quarters by September 30th will have its size calculated after the second quarter of reporting is due by averaging the number of employees reported over the quarters for which reporting exists. Premium assessment based on this determination will begin on this reporting date. This size determination remains in effect until for the following September 30 pursuant to calendar year under RCW 50A.10.030(8)(c).

Explanation of proposed rule: Proposed amendments to the rule clarify that new employer size remains in effect for a calendar year following the determination, and not until September 30, which is when the department determines the employer size. This proposed amendment aligns with RCW 50A.10.030 and also removes the reference to an RCW subsection to ensure the rule accurately references sections of statute.

AMENDATORY SECTION

WAC 192-560-010 Which businesses are eligible for small business assistance grants?

(1) An employer(s) determined to have one hundred fifty or fewer employees in the state that ~~((are))~~ is assessed the employer share of the premiums ~~((are))~~ is eligible to apply for small business assistance grants.

(2) An employer(s) determined to have fewer than fifty employees ~~((are))~~ is only eligible for a small business assistance grant if ~~((those))~~ the employer(s) opts to pay the employer share of the premiums. ~~((Such))~~

(a) The employer(s) will be assessed the employer share of the premiums for a minimum of ~~((three years))~~ twelve consecutive calendar quarters beginning with the first calendar quarter after ~~((any))~~ the most recent grant is ~~((received))~~ approved. ~~((An))~~

(b) The employer may provide notice ~~((for opting out after the three year period))~~ at any time after the approval of the grant to opt out of paying the employer share of the premiums.

(i) If the twelfth consecutive quarter following approval of the grant has ended, the opt-out will become effective on the first day of the following quarter.

(ii) If the twelfth consecutive quarter following approval of the grant has not ended, the opt-out will become effective on the first day of the thirteenth quarter following approval of the grant.

(3) An employer is not eligible for a small business assistance grant if, at the time of application, the employer has outstanding and delinquent reports, outstanding and delinquent payments, or due and owing penalties or interest under Title 50A RCW.

(4) An employer may request only one grant per year for each employee who takes paid family or medical leave under this title. Submissions under (a) and (b) of this subsection do not qualify as grant applications and therefore do not count against the employer's limit of ten applications per year.

(a) An employer that qualifies for a grant under RCW 50A.24.010 ~~((3)(b))~~ for an amount that is less than one thousand dollars may submit documentation of significant additional wage-related costs incurred after filing the initial grant application in an attempt to qualify for additional grant funds.

(b) An employer may submit a revised application for a grant under RCW 50A.24.010 ~~((3)(c))~~ in an attempt to qualify for additional grant funds.

(5) An employer must apply for ~~((the))~~ any grant no later than four months following the last day of the employee's paid family or medical leave.

Explanation of proposed rule: Proposed amendments to the rule clarify premium payment requirements for employers that receive small business assistance grants and make grammatical and clarifying changes to increase readability and understanding. RCW subsections have also been removed to ensure the rule accurately references sections of statute.

NEW SECTION

WAC 192-610-090 What is an illegal act for the purposes of benefit disqualification?

(1) Under RCW 50A.15.060, an employee is not entitled to paid family or medical leave benefits for any absence resulting from any injury or illness sustained in the perpetration by the employee of an illegal act.

(2) For purposes of benefit disqualification the following definitions apply:

(a) An "illegal act" is any unlawful action punishable as a felony or gross misdemeanor of which the individual has been convicted or has admitted committing to a competent authority.

(b) A "competent authority" is:

(i) A court (including magistrate or court commissioner), prosecuting attorney, or law enforcement agency; or

(ii) An administrative law judge; or

(iii) A regulatory agency or professional association charged by law with maintaining professional standards or codes of conduct; or

(iv) Any other person or body, other than your employer, with authority to administer disciplinary action against you.

(3) An admission to your employer or to an employee of the department that you have committed a criminal act is not considered an admission to a competent authority for the purposes of RCW 50A.15.060.

Explanation of proposed rule: The new proposed rule defines "illegal act" for the purposes of benefit disqualification under RCW 50A.15.060.

AMENDATORY SECTION

WAC 192-620-020 What information will the department request from an employee((s)) when filing for weekly benefits?

(1) The department must determine if an employee qualifies for benefits when the employee files a weekly claim for the payment of benefits. For the week that the employee is claiming, the department will ask if the employee:

(a) Worked for wages during the week, and for the hours associated with that work;

(b) Received any paid leave such as vacation leave, sick leave, or other paid time off that was not considered a supplemental benefit payment provided by the employer, and the hours associated with that leave;

(c) Received any benefit that may disqualify the employee for paid family or medical leave, such as unemployment insurance; and

(d) Experienced a change in the qualifying event that affects the eligibility for, or duration of, paid family or medical leave benefits.

(2) The employee may be asked to provide additional information.

AMENDATORY SECTION

WAC 192-620-035 When will a weekly benefit amount be prorated?

(1) For an employee on paid family or medical leave, a weekly benefit amount is prorated when:

(a) The employee reports hours worked for wages;

(b) The employee reports hours for paid sick leave, paid vacation leave, or other paid time off that is not considered a supplemental benefit payment as defined in WAC 192-500-180; or

(c) The employee files a weekly application for benefits that contains a day or days for which the employee did not claim paid family or medical leave.

(2) If an employee reports hours under subsection (1)(a) or (b) of this section, proration will be calculated as specified by RCW 50A.15.020(2).

(3) If an employee claims part of a week under subsection (1)(c) of this section, proration will be calculated by dividing the employee's typical workweek hours and weekly benefit amount for that week by sevenths, then multiplying by the number of days for which the employee claimed paid family or medical leave for that week. The remainder of the week will be calculated as specified by RCW 50A.15.020(2) and subsection (1)(a) and (b) of this section.

Example 1: An employee has already served a waiting period in the claim year and files a claim for a week of paid medical leave. The employee typically works forty hours a week at eight hours per day. In the week for which the employee is claiming, the employee claimed one day of paid medical leave and worked the other four days. This employee's weekly benefit is usually eight hundred dollars. The weekly benefit would then be prorated by the hours on paid medical leave (eight hours) relative to the typical workweek hours (forty hours). Eight hours is twenty percent of forty hours. The employee's weekly benefit would be prorated to twenty percent for a total of one hundred sixty dollars.

Example 2: An employee files a claim for eight hours of paid family (~~and~~) or medical leave and takes sick leave from the employer for the same day. The employer does not offer the sick leave as a supplemental benefit payment. The sick leave is considered hours worked by the employee. The employee is being paid for the same hours claimed on paid family (~~and~~) or medical leave. This employee is not eligible for benefits for this week.

Example 3: The employee's typical workweek hours are forty hours per week, and the weekly benefit amount is one thousand dollars. The employee files a claim for leave that starts on a Tuesday. Because the employee's claim did not include Sunday or Monday of that week, the employee's typical workweek hours and weekly benefit amount for that week will be prorated by two-sevenths, or two days of the seven days in the week. For that week only, the employee's typical workweek hours will be twenty-eight (five-sevenths of forty, rounded down to the nearest hour) and the weekly benefit amount will be seven hundred fourteen dollars (five-sevenths of one thousand dollars, rounded down to the nearest dollar).

Explanation of proposed rules: Proposed amendments to these sections clarify that an employee must establish that hours were worked *for wages* when filing for weekly benefits or for the purposes of proration.

NEW SECTION

WAC 192-700-006 What hours are considered "worked" for the purposes of employment restoration?

For the purposes of employment restoration under Title 50A RCW, the number of hours worked is determined in accordance with 29 C.F.R. 825.110(c) and any subsequent amendments to that regulation.

NEW SECTION

WAC 192-700-007 Employment restoration requirements for predecessor and successor employers.

For the purposes of employment restoration under Title 50A RCW, hours worked for a predecessor employer will be considered worked for the successor employer as described in 29 C.F.R. Sec. 825.107 and any subsequent amendments to that regulation.

Example: An employee works at a florist called ABC Flower Shop. The business is sold to another entity and is renamed XYZ Flower Shop. The new owner applies for a new universal business identifier and is considered a new employer. The employee is retained and continues to work in a similar job function for the new employer. According to 29 C.F.R. Sec. 825.107 of the federal Family and Medical Leave Act, XYZ Flower Shop is considered a "successor in interest" of ABC Flower Shop. As such, the hours worked by the employee for ABC Flower Shop should be included when considering whether or not employment restoration rights apply to a period of leave taken from XYZ Flower Shop.

AMENDATORY SECTION

WAC 192-800-045 ~~When e~~Can an appeal be withdrawn?

(1) An aggrieved person may withdraw their appeal or petition for review upon approval by the office of administrative hearings or the commissioner's review office, respectively, at any time prior to the decision, ~~in which case~~ When an appeal or petition for review is withdrawn, the determination, redetermination, order and notice of assessment of premiums or penalties, or other decision that was appealed, shall be final in accordance with the provisions of Title 50A RCW.

(2) If an appeal is filed and a determination or redetermination of the decision has been made in the aggrieved party's favor, the appeal will be considered withdrawn unless the aggrieved party contests the withdrawal of the appeal within thirty days of the date of redetermination.

Explanation of proposed rule: Proposed amendments establish that an appeal will be withdrawn when a redetermination has been made in an aggrieved party's favor unless such withdrawal is contested within thirty days of the redetermination.

NEW SECTION

WAC 192-800-155 When are proceedings open to the public, and what information from a proceeding before the appeal tribunal or commissioner is publicly disclosable?

To maintain confidentiality of records under chapter 50A.25 RCW:

(1) All proceedings will be closed to the public unless otherwise agreed upon by all parties appearing for hearing;

(2) All proceeding records will be sealed for hearings closed to the public and are not publicly disclosable; and

(3) All personal identifying information concerning an individual or employer will be redacted from the record if the hearing is open to the public.

Explanation of proposed rule: The new proposed rule clarifies that all hearings will be closed to the public unless an open hearing is agreed upon by all parties and outlines what hearing information

is publicly disclosable. This is consistent with the privacy protections established under chapter 50A.25 RCW.

Is a Significant Analysis required for these rules?

A significant analysis is required for:

WAC 192-610-090 What is an “illegal act” for the purposes of benefit disqualification?

The proposed rules in the table below do not meet the definition of significant legislative rules under RCW 34.05.328 and do not require a significant analysis. Each rule and the reason for the exemption is listed below:

| PROPOSED AMENDED SECTIONS | | | |
|---------------------------|--|--|-----------------------------------|
| WAC Section | Section Title | Exempting reason | Exempting statute |
| WAC 192-510-050 | How will the department assess the size of new employers? | The proposed rule clarifies language without changing its effect, and is explicitly and specifically dictated by statute. | RCW 34.05.328(5)(b)(iv) and (v) |
| WAC 192-560-010 | Which businesses are eligible for small business assistance grants? | The proposed is a procedural rule that adopts a policy pertaining to the internal operations of the department. Procedural rules are not significant legislative rules under RCW 34.05.328(5)(c)(iii) and (5)(a)(i). The rule also clarifies language without changing its effect, and is explicitly and specifically dictated by statute. | RCW 34.05.328(5)(b) (iv), and (v) |
| WAC 192-620-020 | What information will the department request from an employee when filing for weekly benefits? | The proposed rule clarifies language without changing its effect. | RCW 34.05.328(5)(b)(iv) |
| WAC 192-620-035 | When will a weekly benefit amount be prorated? | The proposed rule clarifies language without changing its effect. | RCW 34.05.328(5)(b)(iv) |
| WAC 192-800-045 | Can an appeal be withdrawn? | The proposed rule is a procedural rule related to agency hearings. Procedural | RCW 34.05.328(5)(c)(i)(A) |

| | | rules are not significant legislative rules under RCW 34.05.328(5)(c)(iii) and (5)(a)(i). | |
|-----------------------|--|---|---------------------------|
| PROPOSED NEW SECTIONS | | | |
| WAC Section | Section Title | Exempting reason | Exempting statute |
| WAC 192-700-006 | What hours are considered “worked” for the purposes of employment restoration? | The proposed rule incorporates by reference without material change federal regulations. | RCW 34.05.325(5)(b)(iii) |
| WAC 192-700-007 | Employment restoration requirements for predecessor and successor employers. | The proposed rule incorporates by reference without material change federal regulations. | RCW 34.05.328(5)(b)(iii) |
| WAC 192-800-155 | When are proceedings open to the public and what information from a proceeding before the appeal tribunal or commissioner is publicly disclosable? | The proposed rule is a procedural rule related to agency hearings. Procedural rules are not significant legislative rules under RCW 34.05.328(5)(c)(iii) and (5)(a)(i). | RCW 34.05.328(5)(c)(i)(A) |

Clearly state in detail the general goals and specific objectives of the statute that the rules implement.

The Paid Family and Medical Leave insurance program provides at least partial wage replacement when a qualified employee takes approved family or medical leave.

The goals and objectives of the Paid Family and Medical Leave Act, Title 50A RCW, are outlined in RCW 50A.05.005 and state in part:

“The demands of the workplace and of families need to be balanced to promote family stability and economic security. Access to paid leave is associated with many important health benefits. Research confirms that paid leave results in decreased infant mortality and more well-baby visits and reductions in maternal postpartum depression and stress. Paid leave increases the duration of breastfeeding, which supports bonding, stimulates positive neurological and psychological development, strengthens a child's immune system, and reduces the risks of serious or costly health problems such as asthma, acute ear infections, obesity, Type 2 diabetes, leukemia, and sudden infant death syndrome. When fathers have access to paid leave they are more directly engaged during the child's first few months, thereby increasing father infant bonding and reducing overall stress on the family.”

Title 50A RCW requires the department to create rules to administer the program.

Explain how the department determined that the rules are needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rules.

The rules are needed to further implement and clarify provisions of Title 50A RCW. If the rules are not adopted, there will not be clear direction to the public regarding assessment of new employer size, eligibility for small business assistance grants, what constitutes an “illegal act” related to benefit disqualification, information required from an employee filing for weekly benefits, when a benefit amount will be prorated, clarification regarding premium payments for employers that have received small business assistance grants, clarification regarding employment restoration, the circumstances under which an appeal can be withdrawn, and if hearings will be open or closed to the public. Adopting the rules will provide enhanced direction to the public.

Explain how the department determined that the probable benefits of the rules are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

The proposed rules listed in the table that are not deemed significant under RCW 34.05.328 will benefit the public by providing clarity and transparency in program administration. There are no costs to PFML program participants to comply with those proposed amended and new rules.

Proposed WAC 192-610-090 What is an “illegal act” for the purposes of benefit disqualification? establishes what constitutes an “illegal act”. The rule requires cost/benefit discussion. The proposed rule further clarifies language under RCW 50A.15.060. The statute explicitly states that benefits must be denied to an employee who is absent from work due to injury or sickness resulting from the commission of an illegal act, but does not clarify what constitutes such an illegal act.

The proposed rule establishes that an employee is not entitled to PFML benefits from any injury or illness sustained in the commission of any illegal act. An illegal act includes any unlawful action punishable as a felony or gross misdemeanor of which the individual has been convicted or has admitted committing to a competent authority.

The probable costs of the proposed rule outweigh the probable benefits by providing guidance to Washington employers and employees by removing ambiguity under the statute. The public will clearly understand what acts will constitute disqualification of benefits under the proposed rule.

Identify alternative versions of the rule that were considered and explain how the department determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated previously.

WAC 192-560-010 – A version of the rule was considered that did not include guidance on how an employer with fifty employees may opt out of paying employee premiums and the timeframe in which the department must receive notice of that opt-out. The addition of this language provides clear guidance to employers.

WAC 192-610-090 – Versions of the rule were considered that included driving under the influence of intoxicating liquor or drugs and any alternative sentencing for those acts, misdemeanors, Alford pleas, and stipulations of facts. After considering public comments received in writing and at the public hearing on February 9, 2021, the department simplified and clarified the language limiting disqualification to conviction or admittance to a competent authority of felonies and gross misdemeanors.

WAC 192-620-020 and WAC 192-620-035 - A version of these rules was considered that referenced “physically” working to clarify what information the department will request and how a benefit amount will be prorated. After considering public comments received in writing and at the public hearing on February 9, 2021, the department removed the word “physically” and changed the reference to “worked for wages.”

WAC 192-700-007 – A version of this rule was considered that did not include an example. After considering public comments received in writing and at the public hearing on February 9, 2021, the department added an example to clarify the situations in which the provisions of the rule apply.

WAC 192-800-155 – A version of this rule was considered that didn’t include information about proceedings in the title of the rule and referenced removal of personal identifying information from the record for an aggrieved party and an employer if a hearing is open to the public. Proceeding information was added to the title of the rule, clarification was added that all closed proceeding records are not publicly disclosable, and rule language was changed to reference redacting personal identifying information for individuals if the hearing is open to the public.

A public hearing was held on February 9, 2021 regarding the initial proposed rules published as WSR 21-02-088. Based on comments received on the initial proposed rules, the department made revisions that required an additional public hearing on April 7, 2021. The rules were drafted and revised as the least burdensome alternative to those required to comply with them. The rules further implement provisions of Title 50A RCW. Adoption of the rules will achieve the general goals and objectives of administering Title 50A RCW and will provide clarification to the public.

Conflicts with Federal or State law

None of the rules conflict with Federal or State law.

Performance impositions on private vs. public sectors

Since all employers and employees, regardless of public or private sector employment status, are required to participate in Paid Family and Medical Leave, there is no evidence to suggest that any proposed rule will have a measurably different impact between the two sectors.

Conflicts with Federal or State regulatory bodies

None of the rules conflict with any applicable Federal or State regulatory requirements.

Coordination with Federal, State, or local laws

Sections of the proposed rules align with federal Family and Medical Leave laws where applicable. For example, proposed new sections (WACs 192-700-006 and -007) refer directly to federal requirements under FMLA related to employment restoration.