

## August 10 PFML Rulemaking Hearing

BRETT CAIN:

We will get started in just a bit here. Everyone is muted now but you can unmute yourself by pressing \*(Indiscernible) on your phone and press the icon if you are in teams.

BRETT CAIN:

Good morning again everyone I hope you are all here for the WSESD-PFML Rulemaking Hearing. If you are asked for a comment on our rules you can use the teams platform microphone and it should unmute you. If you're on the phone you can use \*six on your phone... We will get started right around 9 o'clock.

Can I confirm that stenographers are on the phone.

BRETT CAIN:

Welcome everyone why don't we get started. I want to let everyone know that I mentioned a few minutes ago but some others have joined us. We have a stenographer on the call who will be

Recording the meeting and the testimony and I have also enabled the recording function on teams here so we will have a couple ways that we are capturing this meeting which will become part of the rulemaking file.

Let's get starting, my name is Brett Cain... Thank you for joining us today for this rulemaking hearing, before we get started, I would like to go over a few housekeeping items. Just a reminder that this meeting concerns proposed regulations regarding the Washington state Paid Family and Medical Leave (PFML) program. I will not have a discussion of any specific application or claim and attendance is optional completely. If you have questions regarding your claim, you can call our customer care team at 833717 22 73. Again... Concerning when a benefit amount will be pro mandated and when a weekly claim will be backdated. If you would like to require written comments you may do so by email at [rules@esd.wa.gov](mailto:rules@esd.wa.gov). Again that is [rules@esd.wa.gov](mailto:rules@esd.wa.gov).

You can go to [paidleave@esd.wa.gov](http://paidleave@esd.wa.gov)... Click on the section called prorating and backdating. Clicking on each topic will open the proposed rules for the topic. Today we will discuss two topics. We will go through each of those in order to the hearing. Before we begin are there any questions about the purpose of today's meeting or way to find the proposed rules. You can unmute yourself using the teams window or hitting star 6 on your phone. Any questions about the purpose of the hearing or where to find the rules?

Not hearing any, we will go ahead and get started with the hearing. Pursuant to the authority given under Washington state law... Chapter 42.30 RCW of the open Public meetings act and chapter 30 for 05 of RCW of the administrative procedure act this hearing is hereby convened. For the record, this record is beginning at nine: 04 a.m. on August 10, 2021 online and by conference call.

This hearing is convened to consider testimony considered testimony about rulemaking. It amends rules related to prorating and weekly benefit amounts and the circumstances under which an employee may backdate an application or weekly claim for benefits. Notice that this hearing was filed with the Washington State register on July 7, 2021 as WSR number 21 – 14 – 093 and was sent to interested parties and posted on the department's webpage.

My name is Brett Cain and I'm a policy analyst for the leading care for the employment security Department. I represent Commissioner Cami Feek as the hearing officer presiding at this rulemaking hearing. There are staff members from the leave and care policy attending this by phone. Staff members on the call please introduce yourself by name and title.

Thank you Jeanette and Jason. As I stated a bit ago, please be advised that this is being transcribed by a court reporter and by the Microsoft teams platform. The transcript and recording will become a part of the official rulemaking file. To facilitate this transcription please state and spell your name before your testimony. Please also note that this hearing is convened to consider comments on the proposed rules. Because of the formal nature of this hearing, we are unlikely to answer any questions you may ask. If you pose a question I will ask you to rephrase your

question as a comment. Questions can be emailed to us at [paidleave@esd.wa.gov](mailto:paidleave@esd.wa.gov). Our customer support staff will respond to your question.

Written comments on the proposed rules will be accepted through today by email at [rules@esd.wa.gov](mailto:rules@esd.wa.gov)

Summary and response to all comments received after the publication of the proposed rules will be placed in the permanent rulemaking file posted on line. This document will be sent to all interested parties who have signed up to receive Paid Family and Medical Leave (PFML) emails. We will begin with Jason Barrett who will provide a brief explanation of the proposal.

JASON BARRETT:

Thank you. The paid family and medical leave act was passed by the legislature in 2017. On January 1, 2019 employers began assessing premiums on employee wages since January 1, 2020 Washington workers can apply for paid family or medical leave benefits. Today's hearing concerns proposed amendments to WAC 192 – 620 – 035 to improve the readability of the rules and provide clear examples related to the proration of weekly claims for the benefit of employers, employees and staff. Currently proposing amendments to (Indiscernible) to improve the readability of the rule and allow for more accessibility when processing benefit claim. I encourage you to read the text of the rules and the supporting documents for a robust understanding. Thank you for your help in administering this important program and we will look forward to hearing your comments today.

BRETT CAIN:

Thank you. We will now hear testimony from those in attendance. All attendees are currently muted and if you wish to speak you can unmute yourself or press \*six if you're joining by phone. When you testify, please speak clearly and state your name, spell your last name and state who you represent if you are here in a representative capacity. When you have finished testifying please meet yourself to your teams window or hit star six on your phone. We are now ready to accept public comment from those on the phone or participating online.

We will start with the proration rule which is WAC 192 – 620 – 035 when will a weekly benefit amount be prorated both the if you would like to provide comment on this rule, unmute yourself now.

Speaker mac hello there I would like to provide comment, should I go ahead and begin?

BRETT CAIN:

Please state and spell your name and if you are here representing an organization, please also state what the organization is.

my name is Casey Osborne Henman, Casey Osborn Henman... I am representing Moms Rising.

We are a member of the advising committee and I would like to thank the team for the work on these proposed rules. Washington state is figuring out many of these program complexities for the first time with no national template to follow and we really appreciate all of the challenges that that brings. However, we are very concerned about the impacts of the two potential rules being discussed today and right now my testimony will focus on the first rule, proration.

The formula proposed in the strict draft rules is extremely problematic and will deprive some workers of their full paid leave benefits. First the formula is extremely complex and making it very difficult for workers, leave administrators or employers to calculate an employee's benefit amount. This is especially critical for low income workers who need to be able to plan for the exact benefit amount in order to know what their family's income will be that week or month.

Further, for many workers the formula as proposed will result in a benefit amount that is lower than what a worker should be eligible for based on their weekly wages. This is unacceptable and inequitable for hourly workers who are more likely to be low income. Finally, this proposed language runs counter to the underlying paid family and medical leave statute that clearly states that the weekly benefit will be prorated as a percentage at the typical work week on the number of hours taken poorly.

We are here to work directly with the advisory group to develop a formula that is equitable, accessible and does not unfairly and unjustly reduce the benefit amount for hourly workers. I will hold my comment on backdating until we get to that part of the agenda. Thank you so much.

BRETT CAIN:

Thank you Casey. Other comments, I see that you are on muted do you have a comment?

SPEAKER:

Lyndey Brennan - that statute states that benefits shall be prorated by the percentage of hours of leave compared to the number of hours provided as the typical workweek hours. This statutory proration calculation is already reflected in the rules at WAC 192... The negative impact of that to reiterate what Casey had said is that employees may receive disparate amounts of benefits for the time they are reporting as missed work depending on which proration calculation is used. For example, applying a seven day workweek as prescribed in this proposed rule versus using the proration method already prescribed by statute, will lead to a lesser benefit. The employee does not work a seven day workweek. A quick and typical example is that if an employee works full-time Monday through Friday on a full-time schedule and returned from a continuous leave on a Tuesday, missing 1/5 days, but the department prorated by a seven day work week instead of 1/5 as per the statute, the department benefit calculation will be lower for that employee. In addition, conflicting with the statute, it is not clear which scenario is supposed to apply to which raises the following concerns from our perspective.

The lack of clarity as to which proration method to apply will yield inconsistent results between private plans as well as between private plans and the Washington employment security Department. And the lack of clarity will lead to confusion for employers and employees as to the correct amount of benefits, making it difficult for employees to make informed choices about which benefit to take. It would be in the best interests of everyone to have a single, clear and consistent method for prorating benefits when an employee is not approved for a claim for a full work week. This calculation is already law as well as WAC 192610051 which prescribes a simple percentage comparison of hours on leave versus hours in a typical work week. That is the end of my comment. Thank you.

BRETT CAIN:

Thank you, Lindsay.

SPEAKER:

Hello, this is (unknown name) of the opportunity Institute. That is Marilyn Watkins, and I would basically second everything that Casey and Lindsay have both stated. The proposed rule does, in fact, violate the plain language of the statute. It also violates legislative intent. Which, was to create an equitable, fair, program - not one that simply helped the people who were already most privileged. But, who actually helped everyone.

Particularly, was accessible and equitable for low wage workers. And part-time workers. The dual proration methods that are given in the examples, seem to actually favour high wage, salary workers who would get the percentage of their hours paid out in benefits. While, shift workers would get theirs arbitrarily reviewed - indirect conflict with the actual plain language of the law. And the legislative intent. So, I would bly urge going back to the drawing board on this one.

And redrafting to a simple, fair, percentage of hours, worked or not worked, percentage of hours week taken, there is nothing in the statute that says that people take dates of leave. They take hours of leave. That is the way that the formula should be based. Thank you.

BRETT CAIN:

Thank you, Marilyn. Do others have testimony on this rule (indiscernible), before we move to the next? OK, hearing done. Let's go ahead and move onto the next section we are proposing. Amendment two. Which is, WAC 192 – 610 – 400, titled, can an employee (indiscernible) for weekly benefits.

SPEAKER:

Hi, this is Marilyn Watkins of the opportunity Institute again, I also have a comment. On this... Proposed rule. Because it does in fact continue to have a lot of unclarity about what will actually be considered, to be a reasonable period. To get someone to apply for this benefit. People cannot apply in advance. They have to apply after an event has occurred.

And, almost by definition, needing a family on a medical leave means someone is, in many cases, suffering from a medical condition themselves or is under a situation of extreme stress and life transition. So they cannot immediately

jump in and make the application. In addition, it can often take a great deal of time to get the documents in order. Not everyone has access to computers, and fast and speedy internet, as we become painfully aware in the last year and 1/2.

People who have - who are well-educated, who have all of those things to them, often have an easier time getting documents together, other than people who may not be English language proficient. So, there needs to be something that is actually quite clear for people. That is consistent with practice. Giving people let's say, a period of 30 days in order to get their claim in. Seems like a reasonable amount of time.

That both allows people to gather what they need to gather, as well as act in a recently, fast fashion. But, there needs to be some clarity for people so that people are not left wondering what is actually going to be... Follow the procedures, and what is not going to.

BRETT CAIN:  
Thank you, Marilyn.

SPEAKER:  
Hi there, this is Casey Osborn Hinman, again, from mom's rising. I would reiterate a lot of what you just heard from Marilyn. We know that play family medical leave is inherently a benefit that people are applying to, during times of intensity. And stress. The paid leave application window should not add to that stress. The proposed backdating procedures are punitive, and they are really unrealistic for families who are experiencing medical emergency.

Caring for a sick family member, or caring for a new child. From our experience, working with paid leave applicants at Moms Rising, we have heard directly from workers about the difficulties they face in obtaining medical certification forms. From providers.

This is often due to long delays and getting appointments. Providers who won't complete a form, better recording backlog, and the inability to spend hours navigating all of these really. At a time when they are trying to care for themselves, or family member. Who is often experiencing a serious medical condition.

... With additional documentation, and medical certification forms is unfair. And, it is really quite unrealistic... Email delays, the programming is per currently experience in. It is unacceptable to put a new burden on worker applicants when they cannot contact ESD with a reasonable timeframe to clarify that they need to prove the cause. And troubleshoot applicant delays that may have a huge impact on their families economic security.

We believe that the backdating period should be 30 days. And we urge them to reconsider this. Thank you.

BRETT CAIN:  
Thank you, Casey. Dani Scott, I see that you had your hand up, are you able to unmute yourself and provide comment? I am not sure if you are having audio difficulties... Oh,

DANI SCOTT:  
Can you hear me?

BRETT CAIN:  
Yes, I can. There is a bit of an echo. Are you on the phone and through the link?

DANI SCOTT:  
Correct.

BRETT CAIN:  
You have to make sure that one of those two is muted. And now you're muted. There was just a whole lot of feedback there, Dani. Can you try muting on the online platform and pressing \*six on your phone?

DANI SCOTT:  
Can you hear me?

BRETT CAIN:

Yes, but there is... Pretty significant echo. Why don't we... See if anyone...

DANI SCOTT:

Can you hear me here?

BRETT CAIN:

Yes, that is much better.

DANI SCOTT:

OK, sorry. First of all, I appreciate (unknown name)'s comment, and someone educated, I am clearly technologically (indiscernible). So, I may not always have the easiest way to navigate the system. No matter how hard, or how much we are educated. I had my 16-year-old help me with this. But, anyway, my comments are, my name is (unknown name), I am an employer and a work complication specialist...

In regards to back dating... I hear that they are asking for 30 days. I honestly believe that it should be longer. Because, I can testify to the fact that providers often do not want to the forms.

People are dealing, usually, with some sort of medical situation. Chaotic situation, that just do not allow them to follow the processes that are in place. Again, with providers, not wanting to fill out forms because they deal with a multitude of instances. And, ideally that all the time. For compensation. At (unknown name) We actually have a year to backdate. I do not see why that cannot be utilized. The medical emergency can obviously be documented.

It can give someone ample time to get over a situation. And that have a time to breathe and actually fill out the necessary documentation. We are paying for this. This is a program that is supposed to help people. I think, we need to make it so that it is easy to navigate in a timely manner. So, that people have the time to actually get the necessary documentation they need to proceed forward. That is all I have. Thank you!

DAVID VICKERS:

Sorry about that, this is David. My last name is Vickers... (indiscernible). Just checking to make sure that everyone can hear me OK.

BRETT CAIN:

We can hear you. There is a bit of a background noise.

DAVID VICKERS:

OK, thank you. I would say that the biggest (indiscernible), I would also say that most state plans allow 30 days. Whether it is disability or paid family claim to be able to file. My understanding is that, Washington doesn't tend to be one of the most generous places in the country. So, I feel that - given employees may have two weeks less than average to file a complaint, it seems again, that Washington's intention is that.

Just taking a few states off the top of my head, New Jersey, California, all allow for the 30 day filing period. From the start of the claim. So again, I support what others have said and would push my support to allow more time and less, you know, administrative burden on the employees. Then add more on their plate. Thank you, that is what I have to say.

BRETT CAIN:

Thank you, David.

ALI SCHAAF SMA:

This is Ali Schaafsma, we represent several employers throughout the United States. Including those with large employee numbers in Washington State. In regards to this particular (indiscernible), as the other speakers have noted in testimonies, this is putting a burden on several employers simply because employers have the opportunity to offset benefits that may be applicable to employees (indiscernible), and the state.

Because of this limiting ability for employees to apply for the use of quickly, employers are having to pick up the gap and they are originally offsetting the amount in having to go back and pay the employee. At a later date once the denial is received. So, that employees is not only receiving a Washington paid family leave benefits, they are also

going for long periods of time.

In receiving the employee benefit that they should be getting from their employer. Additionally, two other speakers, there are several paid family leave laws in existence that allow anywhere from 30 to 90 days posted the first day of absence to be able to apply. For benefits. So, it would be our recommendation that - that the Washington does expand that timeframe. To ensure that employees are being paid correctly, not only from the Washington benefit, but also from their employers.

And they are being paid timely. Also, quickly, I was unfortunately not able to get my phone to unmute correctly so will there be a possibility to go back to the first WAC for the end of the meeting to make testimony.

BRETT CAIN:

We will go ahead and finish testimony on this and then before I conclude the hearing I will ask if others have comments on either section. There will be an opportunity.

SPEAKER:

Great and thank you.

BRETT CAIN:

Other comments on this section?

Any other comments on the proposed amendment to WAC 192 610 400 can employee backdate?

Okay... So now, Ali is there any further testimony from anyone on the phone or online before we conclude?

ALI SCHAAFSMA:

Awesome and thank you. In regards to WAC 119, 630... And representing several large employers for their previous comments relating to the fact that the calculation is inequitable across employee types and employee salaries, I would like to add that again, back to the concept of employers are working diligently to ensure that any employer paid benefit is paid timely to employees.

Because the calculation is difficult, it is unknown how the employee is being paid and which calculation is applying, which example is applying to proration. Employers are left unable to appropriately calculate the offsets for the benefits the employee should be receiving from the employer.

Because the employer does not have the right to the information from the state and has to rely upon the employee to send in the benefit award letter, employees either are getting incorrect benefit amounts from their employers and sometimes that benefit is less than it should be for the employee and sometimes it is more causing the employer to overpay the employee.

It is becoming quite problematic for several large employers. It is leading them to want to disallow employees in the state of Washington to be eligible for their paid benefits. This would be a true loss of benefit for that employee. I just want to put out there that it would be much more simplistic to follow the original rules so the employee, employers can appropriately calculate the benefits and quickly pays employees without having to wait for that approval letter from the state.

BRETT CAIN:

Thank you. Any other testimony from anyone else on either section?

Hearing done, I will take one more brief pause.

Any further testimony on either section?

Okay, in conclusion this hearing was convened to consider testimony on Paid Family and Medical Leave (PFML) rulemaking. All oral testimony presented at this hearing and written submissions will become part of the official record.

The deadline for submission of written comments is today August 10, 2021. You may submit written comments by emailing [rules@esd.wa.gov](mailto:rules@esd.wa.gov). Comments must be received by the end of the day to be considered part of this

rulemaking.

A final decision regarding adoption of the proposed rules will be made after all testimony and written comments have been fully considered, which will be on or shortly after August 11, 2021.

On behalf of Commissioner Cami Feek thank you for participating in this hearing.

This hearing is adjourned at 9:36 AM on August 10, 2021.

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