

# **Concise Explanatory Statement**

Paid Family and Medical Leave

Rulemaking

WAC 192-700-010 • WAC 192-700-020

Public Hearing: May 6, 2020

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## I. Introduction

The Employment Security Department (department) is developing rules to implement, clarify, and enforce Title 50A RCW. This document will serve as the Concise Explanatory Statement (CES) for this rulemaking, which covers the topic of health benefit continuation.

An informal public meeting was held to gather public comment on draft rules. Informal feedback was accepted on the draft rules through our online portal, by phone, in-person, and by email until the filing of the CR102. After the CR102 was filed, formal comments were accepted until 5 p.m. on May 6, 2020. The formal CR102 hearing was held on May 6, 2020 by conference call.

## II. Rules Summary and Agency Reasons for Adoption

### AMENDATORY SECTION

**WAC 192-700-010 Can an employer deny employment restoration?** (1) An employee is not entitled to ~~((employment protection under Title 50A RCW))~~ rights under RCW 50A.35.010(1) if:

(a) An employer exercises its right to deny restoration under RCW 50A.35.010 (6)(b) and the employee has elected not to return to employment after receiving notice under subsection (2) of this section; or

(b) The employer is able to show that an employee would not otherwise have been employed at the time ~~((of reinstatement))~~ the employee would return to work after the employee's family or medical leave under Title 50A RCW ends.

(2) An employer that chooses to deny restoration under subsection (1)(a) or (b) of this section to an employee on paid medical or family leave must notify the employee in writing as soon as the employer decides to deny restoration. The employer must serve this notice to the employee either in person or by certified mail. The notice must include:

(a) A statement that the employer intends to deny employment restoration when the leave has ended;

(b) The reasons behind the decision to deny restoration;

(c) An explanation that health benefits will still be paid for the duration of the leave; and

(d) The date ~~((it))~~ on which eligibility for employer-provided health benefits ends.

(3) Employers that choose to deny restoration ~~((are required to adhere to the))~~ under this section must provide continuation of health benefits as required in RCW 50A.35.020 ~~((for the remainder of the employee's approved leave))~~ and WAC 192-700-020.

**Agency reason for adoption:** The amendments to WAC 192-700-010(1) clarify requirements of RCW 50A.35.010(1). The amendments to WAC 192-700-010(3) clarify that RCW 50A.35.020 requires the continuation of health benefits for employees who are required to receive such benefits for the duration of their leave under Title 50A RCW. The department has interpreted “for the duration of such leave” to include the entire period for which the employee is claiming benefits under Title 50A RCW. There is no provision in statute to indicate that the employer’s responsibility to continue health benefits ends in the event of the employer’s decision not to offer employment restoration to the employee under RCW 50A.35.010(6)(b). Therefore, the department has interpreted the legislation in such a way as to require the provisions of RCW 50A.35.020 to apply even in the event of such a decision.

### NEW SECTION

**WAC 192-700-020 When does an employer need to provide a continuation of health benefits to an employee who is on paid family or medical leave?** (1) An employee taking family or medical leave under Title 50A RCW 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.

(2) When required under subsection (1) of this section, the employee's health benefits must be maintained as if the employee had continued to work from the date family or medical leave under Title 50A RCW commenced until whichever of the following occurs first:

(a) The employee's family or medical leave under Title 50A RCW ends; or

(b) The employee returns from leave to any employment.

(3) If the employer and employee share the cost of existing health benefits, then during any continuation of health benefits as provided in this section, the employee remains responsible for the employee's share of the

cost as prescribed by 29 C.F.R. 825.210, 825.211, and 825.212, and any subsequent amendments to those regulations.

(4) Nothing in this section should be construed as restricting an employer from providing a continuation of health benefits for any employee's claim for paid family or medical leave.

**Agency reason for adoption:** RCW 50A.35.020 requires employers to maintain health benefits for employees who are required to receive such benefits under the federal Family and Medical Leave Act (FMLA) for the duration of their leave under Title 50A RCW. Once the requirement for health benefit continuation is met, benefits must be continued "in force for the duration of such leave." The department has interpreted "for the duration of such leave" to include the entire remaining period for which the employee is claiming benefits under Title 50A RCW, regardless of the circumstances that may alter the employee's eligibility under the FMLA at some later date.

### III. Changes to Rules

None.

## IV. Public Comment and Responses

Below is delineation of all comments received during the formal comment period on the proposed rules. All comments are either copied directly from the original written source (online portal post, email, hearing transcript, etc.) or paraphrased from the original verbal source (phone call, comment received at a presentation, etc.).

#	Source	Name	Comment	Response
1	Portal, hearing	Kristin Anger Candice Bock George Caan Kseniya Daly Brandon Dolquist Laura Folheim Judi Gladstone Tracy Harness Nicole Hite Kristy Hulverson Lorna Klemanski Candis Martinson Mellani McAleenan Amy Mensik Charity Miller Suzi Washo Katherine Weber	Several respondents expressed a concern that proposed WACs 192-700-010 and 192-700-020 do not adhere to a plain-text reading of RCW 50A.35.020 and/or create an undue burden on employers.	<p>In addition to the statements above describing the agency reasons for adoption of these rules, the department has interpreted the statutory phrase “such leave” to mean leave taken under Title 50A RCW rather than leave taken under the FMLA. In the department’s view, the reference to the FMLA is only intended to refer to eligibility criteria and not a period of leave taken under that program.</p> <p>The FMLA only allows for a maximum of 12 weeks of leave in most cases, while Paid Family and Medical Leave allows for a combined maximum of 16 weeks of leave in most cases and 18 weeks of leave in extreme cases involving pregnancy incapacity. There has always existed the possibility of a gap in health benefit coverage if leave under both programs is taken concurrently. The legislature, in the department’s view, anticipated this possibility and specifically authored RCW 50A.35.020 to address this gap. By not requiring that both types of leave be taken concurrently, an overlap of at least one day ensures continuation of health benefit coverage to employees taking leave under Title 50A RCW.</p> <p>This interpretation is also consistent with the department’s implementation of the “claim year” system for paid family or medical leave benefits. Once an employee submits an application and is determined to be eligible for benefit payments, the employee remains eligible for payments for the remainder of their claim year, even if at some later date in their claim year they no longer would be determined to have worked 820 hours in the first four of the preceding five calendar quarters (or preceding four calendar quarters).</p>

				The underlying purpose of the “claim year” system is that it protects employees to ensure employees have enough leave. The same type of protection is true for the continuation of health benefits. Once an employee becomes eligible for such continuation, they remain eligible “for the duration of” their paid family or medical leave, as required by RCW 50A.35.020.
2	Hearing	Julie Salvi	The WEA supports the proposed rule regarding health benefits. We concur with the department’s analysis that this is consistent with statutory language that references “from the date the employee commenced family or medical leave until the date the employee returns to employment.” The statute itself, RCW 50A.34.020, is clear and concise in stating existing health benefits shall be maintained. This proposed rule is consistent with the language and intent of the statute. In addition, individuals will find the rule easier to understand when continuation of benefits is provided throughout their leave. If this continuation of health benefits only applied to a subset of the Paid Family and Medical Leave, there would be greater confusion for individuals and more complexity for the administration of benefits.	This is consistent with the department’s interpretation of statutory language and with the language of the proposed rule.
3	Hearing	Kaileah Baldwin	Concern expressed that these rules are an additional reason more correspondence is needed between the employer and program administrators around how long the employee is on PFML. That way, the employer would know how long medical benefits should be continued. Also requesting clarification regarding returning from leave to any employment. Requiring continuation of health benefits is an important part of this program, especially	The Department is not able to determine an employee’s eligibility for FMLA protections. If an employee believes they were improperly denied health insurance benefits, they may file a complaint with the Department and additional fact-finding may occur to determine if damages should be assessed.



			through COVID. This is a particularly important time for folks to be able to continue health benefits and depend on their employer for that.	
4	Hearing	Rachel Taber Nicole Hite	Would like clarity on how this rule would interact with third-party administrators and collective bargaining agreements.	Employers are responsible for compliance with state laws and regulations in all cases, regardless of whether a relationship exists with a third-party administrator.  Unless the collective bargaining agreement in question is subject to exemption under RCW 50A.05.090 and related rules, all parties are required to adhere to all state laws and regulations.
5	Hearing	Rachel Taber	Requesting clarification on (b) which says the employee may return from leave to any employment. It doesn't define current employer. Leave in Washington right now is based on any employment they received at the point of requesting leave.	An employee's return to any employment, including employment with another employer, will terminate an employer's responsibility to continue health benefits.
6	Hearing	Michelle Cvitaovic	Many group health plans have employment requirements as well as pay requirements in order to remain eligible for those group plans. If an employee can lose their employment while on leave but employers have to main benefits – is counter to our contract with our providers. If we can't confirm that an employee who was maintaining their employment is being paid by the state, it goes counter to our contract as well.	Employers are responsible for compliance with state laws and regulations in all cases, regardless of whether a relationship exists with a third-party administrator.
7	Hearing	Maggie Humphreys	Support the rules, particularly regarding an earlier comment made about the plain reading of the statute. Statute says, "If required by the federal Family and Medical Leave Act, during any period of leave taken under this title, the continuation of health benefits must be maintained." Wants to underline the importance of the rules as our state is weathering this public health crisis. The continuation of	This is consistent with the department's interpretation of statutory language and with the language of the proposed rule.

			access to healthcare is extremely critical to families always, but particularly right now.	
8	Hearing	Jessica Cromer	It is confusing whether one full scheduled shift must be missed under FMLA and PFML concurrently or any overlap of hours missed by PFML or FMLA on the same day would qualify. Someone on PFML for just hours per day and not a full shift missed would be ineligible for benefits continuation. I don't know if that is the intent of the proposed rule or not. Thank you.	At least eight consecutive hours of leave must be taken from an employer in order for an employee to be eligible for PFML benefit payments. If there is at least one day where an employee was eligible for the continuation of health benefits under FMLA <u>and</u> claimed hours of PFML, then the continuation of health benefits would be required for the remainder of the employee's use of PFML until they return to work.