

Concise Explanatory Statement

Paid Family and Medical Leave

Phase One

Chapter 192-510 WAC • Chapter 192-520 WAC • Chapter 192-530 WAC

Public Hearing: May 23, 2018
Adoption: May 29, 2018
Effective Date: July 1, 2018

Contents

I. Introduction	3
II. Rules summary and agency reasons for adoption.....	4
III. Changes to rules	16
IV. Public comment and response	17

I. Introduction

In 2017, the Washington State Legislature passed Substitute Senate Bill 5975 relating to paid family and medical leave. The bill was signed on July 5, 2017 and codified as Title 50A RCW.

The Employment Security Department (ESD) is developing rules to implement, clarify, and enforce this law. Multiple phases of rulemaking will occur around this law. This document will serve as the concise explanatory statement for phase one of rulemaking, which covers the following topics:

- Voluntary plans
- Collective bargaining agreements
- Premium liability

Four informal public meetings were held to gather public comment on this phase of rules. The formal hearing was held on May 23, 2018, in Lacey, WA. Informal feedback was taken on draft rules through our online portal until the filing of the CR-102, whereupon formal feedback was taken for inclusion in this document.

II. Rules summary and agency reasons for adoption

WAC 192-510-010(1): *Self-employed persons as defined in RCW 50A.04.105(1) and federally recognized tribes as defined in RCW 50A.04.110 may elect coverage under Title 50A RCW.*

This rule is a re-statement of statute for additional clarity – self-employed persons and federally recognized tribes may opt into the Paid Family and Medical Leave (PFML) program per Title 50A.RCW. This rule potentially affects all self-employed persons, tribal governments, and employees of tribal governments in the State of Washington.

WAC 192-510-010(2): *Notice of election of coverage must be submitted to the department online or in another format approved by the department.*

This rule clarifies how self-employed persons, and federally recognized tribes, may choose to opt into the PFML program. We are proposing this rule because we are required to do so by statute. This rule potentially affects all self-employed persons, tribal governments, and employees of tribal governments in the State of Washington.

WAC 192-510-010(3): *Elective coverage begins on the first day of the calendar quarter immediately following the notice of election.*

This rule clarifies when self-employed persons, and employees of federally recognized tribes, are eligible for benefits after having opted into the PFML program. We are proposing this rule to streamline the administration of the program and record keeping of those electing coverage. This rule potentially affects all self-employed persons, tribal governments, and employees of tribal governments in the State of Washington.

WAC 192-510-010(4): *A period of coverage is defined as:*

- (a) Three calendar years following the first day of elective coverage or any gap in coverage; and*
- (b) Each subsequent calendar year.*

This rule clarifies the duration of coverage for self-employed persons, and employees of federally recognized tribes, that opt into the PFML program. We are proposing this rule because we are required to do so by statute. This rule potentially affects all self-employed persons, tribal governments, and employees of tribal governments in the State of Washington.

WAC 192-510-010(5): *Any self-employed person or federally recognized tribe may file a notice of withdrawal within 30 days after the end of each period of coverage.*

This rule clarifies when self-employed persons and federally recognized tribes that have previously opted into the PFML program may withdraw from coverage. We are proposing this rule because we are required to do so by statute. This rule potentially affects all self-employed persons, tribal governments, and employees of tribal governments in the State of Washington.

WAC 192-510-010(6): *A notice of withdrawal from coverage must be submitted to the department online or in another format approved by the department*

This rule clarifies the process whereby self-employed persons and federally recognized tribes that have previously opted into the PFML program may withdraw from coverage. We are proposing this rule because we are required to do so by statute. This rule potentially affects all self-employed persons, tribal governments, and employees of tribal governments in the State of Washington.

WAC 192-510-010(7): *Any levy resulting from the department's cancellation of coverage is in addition to the due and unpaid premiums and interest for the remainder of the period of coverage.*

This rule clarifies how penalties may be assessed for self-employed persons, and federally recognized tribal governments, whose coverage under the PFML program has been cancelled by ESD. We are proposing this rule because we are required to do so by statute. This rule affects any self-employed individual, tribal government, and employee of tribal governments that have previously opted into the PFML program and whose coverage has been cancelled by ESD.

WAC 192-510-020(1): *Federally recognized tribes electing coverage are employers as defined in RCW 50A.04.010 and are subject to all rights and responsibilities under Title 50A RCW*

This rule clarifies the role of federally recognized tribes as employers per RCW 50A.04.010. We are proposing this rule because we are required to do so by statute. This rule affects all tribal governments, and employees of tribal governments in the State of Washington.

WAC 192-510-020(2): *Employees of federally recognized tribes that elect coverage are employees as defined in RCW 50A.04.010 and are subject to all the rights and responsibilities under Title 50A RCW*

This rule clarifies the role of employees of federally recognized tribes as employees for the purposes of the PFML program. We are proposing this rule because we are required to do so by statute. This rule affects all employees of federal recognized tribal governments in the State of Washington.

WAC 192-510-030(1): *The department will use the self-employed person's reported income and divide it by the state's minimum wage to presume the number of hours worked.*

Example: For this example, the state's minimum wage is \$12.00 per hour. The self-employed person electing coverage reports \$10,000 of income in a quarter. The department will divide \$10,000 by \$12.00 and presume the self-employed person worked 833 hours in that quarter

This rule clarifies how self-employed individuals' hours worked will be determined for the purposes of PFML benefit eligibility. We are proposing this rule because we need a means of establishing the number of hours a self-employed person works for the purposes of establishing benefits eligibility and the statute directs us to create a rule to calculate wages and hours. This rule potentially affects all self-employed persons in the State of Washington.

WAC 192-510-030(2): *The self-employed person may overcome the presumption of hours by providing sufficient documentation to the department, including, but not limited to, personal logs or contracts.*

This rule provides an alternate way for self-employed persons to establish the number of hours worked for the purposes of PFML benefit eligibility. We are proposing this rule to allow for greater flexibility in the determination of hours among self-employed persons. This rule potentially affects all self-employed persons in the State of Washington.

WAC 192-510-030(3): *The department may require copies of tax returns, bank records, or any other documentation deemed necessary by the department to verify or determine the self-employed person's hours and wages.*

This rule provides an alternate way for ESD to establish the quarterly hours worked by self-employed individuals for the purposes of PFML benefit eligibility. We are proposing this rule to allow for greater flexibility in the determination of hours among self-employed persons and the ability to enforce this chapter of the law. This rule potentially affects all self-employed persons in the State of Washington.

WAC 192-510-040(1): *To assess premiums and determine eligibility for small business assistance grants, the department must determine the size of each applicable employer. The department will only count the number of in-state employees as defined in RCW 50.A.04.010(4) when calculating employer size.*

This rule clarifies how the size of the employer will be determined for the purposes of premium assessment and small business assistance grants. We are proposing this rule because we are required to do so by statute. This rule affects all employers in the State of Washington.

WAC 192-510-040(2): *If the department determines that the employer's status has changed as it relates to premium liability, the department will notify the employer. This notification will include the following information:*

(a) If the employer was determined to have 50 or more employees for the preceding calendar year, and the employer is then determined to have fewer than 50 employees for the subsequent calendar year, the employer will not be required to pay the employer portion of the premium for the next calendar year; or

(b) If the employer was determined to have fewer than 50 employees for the preceding calendar year, and the employer is then determined to have 50 or more employees for the subsequent calendar year, the employer will be required to pay the employer portion of the premium for the next calendar year.

Example: On September 30, 2018, a business is determined to have had 53 employees on average during the previous four completed quarters, which covers July 1, 2017, through June 30, 2018. The employer is liable for the employer portion of premiums for 2019. On September 30, 2019, the business is determined to have had 48 employees on average during the previous four completed quarters, which covers July 1, 2018, through June 30, 2019. The employer is no longer liable for the employer share of premiums for 2020.

This rule clarifies how premiums will be assessed for employers that cross the 50-worker threshold for determining small business status across time. This rule also provides clarification on how employers will be notified of their size. We are proposing this rule because we are required to do so by statute. This rule affects any employer that crosses the 50-worker threshold from one year to the next.

WAC 192-510-050: *An employer that has not been in business in Washington long enough to report four calendar quarters by September 30 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 the following September 30 pursuant to RCW 50A.04.115(8)(c).*

This rule clarifies how we will determine employer size for the purposes of premium assessment and small business assistance grants among newly established employers. We are proposing this rule because we are required to do so by statute and to clarify to the public how we will determine employers' sizes. This rule will potentially affect all newly established employers in the state, as well as any workers employed by such employers.

WAC 192-510-060(1): *Premiums must be paid quarterly. Each payment must include the premiums owed on all wages subject to premiums during that calendar quarter. Payments are due to the department by the last day of the month following the end of the calendar quarter for which premiums are being paid.*

This rule establishes a quarterly premium remittance cadence and establishes a due date for premium remittances. We are proposing this rule because a well-defined remittance cadence is essential to the administration of the PFML program. Further, we are proposing a quarterly cadence because it is consistent with the reporting cadence of the Unemployment Insurance (UI) program. By setting up PFML remittance payments on the same cadence as UI reporting requirements, we hope to minimize any confusion and administrative burden that the addition of new statutory requirements may cause to employers. This rule affects all employers in the State of Washington.

WAC 192-510-060(2): *Payments made by mail are considered paid on the postmarked date. If the last day of the month falls on a Saturday, Sunday, or a legal holiday, the premium payment must be postmarked by the next business day*

This rule establishes a payment remittance-by-mail deadline. We are proposing this rule because it helps to clarify when premiums must be remitted to the PFML program account. Further, we are proposing this rule because it is consistent with the the Unemployment Insurance program. We hope that this rule helps to clarify when payments are considered on time and reduce the informational burden these new statutory requirements place on employers. This rule affects all employers in the State of Washington.

WAC 192-510-060(3): *Premium payments are due within 10 calendar days when a business is dissolved or the account is closed by the department. Premiums not paid timely are delinquent and subject to interest under RCW 50A.04.140.*

This rule establishes a due date for premium remittances in the event that a business is dissolved or the account is closed by ESD. We are proposing this rule because we are required to do so by statute. This rule will affect all employers that dissolve their businesses or see their PFML accounts closed by ESD.

WAC 192-510-070(1): *An employee's work is localized in Washington and subject to reporting requirements and premiums when the work is localized in Washington. An employee's work is considered localized in Washington when:*

- (a) All of the employee's work is performed entirely within Washington; or*
- (b) Most of the employee's services are performed within Washington, but some of the work which is temporary or transitory in nature, or consists of isolated transactions is performed outside of Washington.*

This rule clarifies when an employee is considered to be localized in the State of Washington for the purposes of PFML reporting requirements, premium withholdings, and benefits eligibility. We are proposing this rule because we are required to do so by statute.

WAC 192-510-070(2): *Services that are not localized in Washington will be subject to reporting requirements and premiums when the services are not localized in any state, but some of the services are performed in Washington, and;*

- (a) *The base of operations of the employee is in Washington, or if there is no base of operations, then the place from which such services are directed or controlled is in Washington; or*
- (b) *The base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in Washington.*

Example: A storm hits Washington. An employer in Oregon dispatches an employee who typically lives and works in Oregon to help with repair work. The employee works temporarily in Washington for the employer for one week, and then returns to work in Oregon for the employer. The employment is localized within Oregon and is not subject to premium assessment.

This rule clarifies when an employee is considered to be localized in the State of Washington for the purposes of PFML reporting requirements, premium withholdings, and benefits eligibility. We are proposing this rule so that the public can better understand when wages and hours must be reported to the department.

WAC 192-510-080(1): *An employer and employee may be eligible for a conditional waiver of premium payments by satisfying the requirements of RCW 50A.04.120*

This rule restates the premises of RCW 50A.04.120 for additional clarity. We are proposing this rule for the added clarity it provides. This rule potentially affects all employers that hire non-localized workers. This rule will also affect all employees who are either non-localized or independent contractors.

WAC 192-510-080(2): *A conditional premium waiver is not required for work that is not subject to premiums under **WAC 192-510-070** or fails to meet the definition of employment in RCW 50A.04.010(7)(a).*

This rule clarifies when an employer is not required to request a conditional premium waiver. Specifically, workers who are not localized within Washington state and workers who do not meet the definition of employee per RCW 50A.04.010(7)(a) do not require a conditional premium waiver to exempt employers from withholding premium payments. We are proposing this rule for the added clarity it provides. This rule will affect all employers that hire non-localized workers. This rule will also affect all employees who are either non-localized or independent contractors.

WAC 192-510-080(3): *Any conditional premium waiver request must be submitted to the department online or in another format approved by the department.*

This rule clarifies how employers may request conditional premium waiver requests for eligible non-permanent workers. We are proposing this rule so the public knows how to request a conditional waiver. This rule will potentially affect all employers that hire eligible non-permanent workers, as well as the eligible non-permanent workers themselves.

WAC 192-510-080(4): *As a condition to granting the conditional premium waiver, the employer will file quarterly reports to verify that employees still qualify for the conditional premium waiver.*

This rule clarifies the statutory requirement that employers that receive a conditional premium waiver for a particular worker are required to file quarterly reports to ensure the worker is eligible for the waiver. We are proposing this rule so we can adequately enforce this provision of the law. This rule will potentially affect all employers that hire eligible non-permanent workers, as well as the eligible non-permanent workers themselves.

WAC 192-510-080(5): *Once an employee works 820 hours in a qualifying period localized in Washington for an employer, the conditional premium waiver expires.*

This rule clarifies the statutorily determined expiration of conditional premium waivers in the event that a worker exceeds the 820-hours threshold in a qualifying period. We are proposing this rule for the added clarity it provides. This rule will affect any employer or employee who has been granted a conditional premium waiver that exceeds the 820-hour threshold in a qualifying period.

WAC 192-510-080(6): *The department may require the employer to submit additional documentation as necessary.*

This rule clarifies the conditions under which conditional premium waivers may be granted, as well as the terms of their expiration. We are proposing this rule so we can adequately enforce this provision of the law. This rule will potentially affect all employers that request conditional premium waivers on eligible non-localized employees.

WAC 192-510-080(7): *If the employee exceeds the eight hundred and twenty hours or more in a qualifying period, the conditional waiver expires and the employer and employee will be responsible for their shares of all premiums that would have been paid during the qualifying period in which the employee exceeded the eight hundred and twenty hours had the waiver not been granted. Upon payment of the missed premiums, the employee will be credited for the hours worked and will be eligible for benefits under this chapter as if the premiums were originally paid.*

Example: A storm hits Washington. An employer in Oregon hires a new employee who lives in Oregon to help with repair work. The employee only works in Washington for the employer for one week and is then laid off. The employer could request a conditional premium waiver for this employee.

This rule clarifies the statutorily determined back-payment requirements in the event of the expiration of a conditional premium waiver. Note that these back-payment requirements are explicitly referenced in statute. We are proposing this rule for the added clarity it provides. This rule will affect all employers and workers for whom a conditional premium waiver is deemed expired.

WAC 192-520-010(1): *The rights and responsibilities under Title 50A RCW do not apply to parties covered by collective bargaining agreements in effect before October 19th, 2017, unless and until the agreements expire, are reopened, or are renegotiated.*

This rule restates statute. This rule clarifies the statutory mandate that any provisions of RCW 50A do not apply to parties covered by collective bargaining agreements in effect prior to October 19th, 2017, until those agreements reach expiration or are renegotiated. We are proposing this rule for the added clarity it provides. This rule will affect all employers that operate under a collective bargaining agreement in effect prior to October 19, 2017, and employees working for such employers.

WAC 192-520-010(2): *Employers must inform the department immediately upon the reopening, renegotiation, or expiration of a collective bargaining agreement that was in effect prior to October 19, 2017.*

This rule establishes that employers operating under a collective bargaining agreement in effect prior to October 19, 2017, must notify ESD immediately upon the expiration or renegotiation of the collective bargaining agreement. We are proposing this rule to expedite the transition to PFML participation among employers that were previously exempted due to the presence of a legacy collective bargaining agreement. This rule will affect all employers and employees who, on January 1, 2019, operate under a collective bargaining agreement in effect prior to October 19, 2017.

WAC 192-520-010(3): *An employer must file quarterly reports once a collective bargaining agreement expires, is reopened, or is renegotiated.*

This rule re-states statute for added clarity. We are proposing this rule for the additional clarity it provides. This rule will affect all employers, and employees, whose collective bargaining agreement (in effect prior to October 19th, 2017) expires or is re-negotiated or reopened.

WAC 192-520-010(4): *To be eligible for benefits, an employee must have worked at least 820 hours during the qualifying period. If the employee's qualifying period includes any quarter prior to a collective bargaining agreement being reopened, renegotiated, or expiring, the department will request the employee's qualifying period wages and hours from the employer. The employer must provide the wages and hours to the department within ten calendar days.*

This rule requires employers whose collective bargaining agreements (in effect prior to October 19, 2017) expire or are re-negotiated or reopened to report qualifying employees' wages and hours prior to the expiration, renegotiation, or reopening of a collective bargaining agreement for the purposes of establishing benefits eligibility. We are proposing this rule as a means to establish eligibility among employees whose collective bargaining agreements (established prior to October 19th, 2017) expire, are renegotiated, or are reopened. We have a statutory mandate to impose this rule. This rule will affect all employers that operate under a collective bargaining agreement in effect prior to October 19, 2017.

WAC 192-520-010(5): *Employees not covered by a collective bargaining agreement are subject to the rights and responsibilities of Title 50A RCW. Employers are also subject to the rights and responsibilities of Title 50A RCW for employees not covered by a collective bargaining agreement, regardless of whether the employer is party to a collective bargaining agreement covering other employees.*

This rule clarifies the statutory requirement that employers and employees who are not covered by a collective bargaining agreement in effect on October 19, 2017, are subject to all the rights and responsibilities of Title 50A RCW. We are proposing this rule because it clarifies a statutory requirement. This rule will affect all employers, and employees, not covered by a collective bargaining agreement in effect on October 19, 2017.

WAC 192-520-010(6): *Employers party to multiple collective bargaining agreements among different bargaining units are subject to the rights and responsibilities of Title 50A RCW as they pertain to the bargaining units whose collective bargaining agreement has been expired, been reopened, or renegotiated, on or after October 19, 2017.*

This rule clarifies the statutory requirement that employers and employees covered by a collective bargaining agreement negotiated on or after October 19, 2017, are subject to all the rights and responsibilities of Title 50A RCW. We are proposing this rule because it clarifies a statutory requirement. This rule will affect all employers, and employees covered by a collective bargaining agreement in effect on October 19, 2017.

WAC 192-530-010(1): *A voluntary plan application must be submitted to the department online or in another format approved by the department. Incomplete applications will not be reviewed. Voluntary plan application fees are due at the time the application is submitted to the department. The fee is non-refundable. If the voluntary plan is denied, a new application fee is required with each application.*

This rule clarifies how applications for voluntary plans must be submitted for approval. We are proposing this rule because it is necessary to administer the application process and review of proposals for voluntary plans. This rule will affect all employers that file an application for a voluntary plan.

WAC 192-530-010(2): *Voluntary plans will take effect on the first day of the quarter immediately following the approval of the plan.*

This rule establishes when voluntary plans may take effect. We are proposing this rule in order to facilitate an orderly transition from the state plan to voluntary plans. We are also proposing this rule in order to maintain a uniform cadence for reporting requirements for all employers and to ease the administrative burden to the department and employers. This rule will affect all employers with an approved voluntary plan as well as all employees working for said employers.

WAC 192-530-020(1): *An employer's voluntary plan must:*

- (a) Allow the employee to take at least the same duration of leave from work as the state plan; and*
- (b) Pay at least equivalent total monetary benefits as the state plan.*
- (c) Not withhold an amount from an employee's wages that is higher than what would be withheld under the state plan for the same period of time; and*
- (d) Offer leave for at least the same reasons as the state plan.*

This rule restates the statutory requirement that the rights and responsibilities under a voluntary plan must be at least as generous as those provided under the State plan. We are proposing this rule because we are required to do so by statute. This rule will affect all employers with an approved voluntary plan as well as all employees working for said employers.

WAC 192-530-020(2): *An employer with an approved voluntary plan may, at its discretion, use an accelerated payment schedule. The total monetary benefit must be equal to or greater than what the employee would have received under the state plan.*

- (a) If the employer chooses to use an accelerated payment schedule, the total monetary benefit must be paid to the employee over a length of time that is no less than one-half of what would have been provided under the state plan.*
- (b) Whether an employer elects to use an accelerated payment schedule has no impact on the length of job-protected leave to which the employee is entitled.*

- (c) *If an employer chooses to utilize an accelerated payment schedule and the employee agrees to return to work earlier than required, the employer cannot require the employee to repay benefits as a result of returning to work earlier.*

This rule clarifies the conditions under which an employer with a voluntary plan may elect to use a statutorily allowed accelerated payment schedule. We are proposing this rule because we are required to do so by statute. This rule will potentially affect all employers with voluntary plans as well as all workers who elect to avail themselves of the accelerated payment schedules allowed under the auspices of voluntary plans.

WAC 192-530-020(3): *Employees covered by a voluntary plan are entitled to at least the same length of job-protected leave to which they would be entitled under the state plan. An employer and an employee may enter into an agreement wherein the employee returns to work at an earlier date.*

Example: An employee elects to take 12 weeks of leave for the birth of a new child. The weekly benefit amount is \$750. The employer decides to pay the employee \$1,500 weekly over six weeks. In addition, the employer and the employee agree that the employee will return to work after six weeks. In this example, the employee would still have been permitted to take the full 12 weeks of leave if the employee had decided to do so.

This rule clarifies the conditions under which an employee may take advantage of any accelerated payment schedule offered by an employer with a voluntary plan. We are proposing this rule because we are required to do so by statute. This rule will affect all employers with voluntary plans that elect to adopt an accelerated payment schedule as well as all workers employed by said employers that elect to avail themselves of benefits on an accelerated schedule.

WAC 192-530-020(4): *A \$250 fee will be required for every new application or non-statutorily required amendment filed by an employer seeking approval for a voluntary plan.*

This rule clarifies the circumstances under which an application fee for a voluntary plan must be submitted to ESD. We are proposing this rule because we are required to do so by statute. This rule will affect all employers that apply for a voluntary plan multiple times, or that make non-statutorily required amendments to existing voluntary plans.

WAC 192-530-020(5): *If an employer elects to have a voluntary plan for either family leave or medical leave, but not both, the employer is responsible for withholding the employee share of the premium for the portion that is covered by the state plan. The department will post the rates for family and medical leave for the following calendar year to its website by November 30th each year. The employer is responsible for paying the premiums due to the state plan in accordance with WAC 192-510-060.*

This rule clarifies how employers who elect to implement a voluntary plan for family leave, or medical leave, but not both must comply with withholding requirements. We are proposing this rule because we are required to do so by statute. This rule will affect any employer that elects to implement either a voluntary family leave, or a voluntary medical leave program, but not both, as well as any worker employed by said employers.

WAC 192-530-030(1): *To qualify for an employer's approved voluntary plan, an employee must have been:*

- (a) In employment for at least 820 hours during the qualifying period and in employment with that employer for at least 340 hours; or*
- (b) Covered by an approved voluntary plan through their previous employer.*

This rule clarifies the statutorily determined conditions whereby an employee working for an employer with an approved voluntary plan may not be denied benefits. We are proposing this rule because we are required to do so by statute. This rule will affect all employers with an approved voluntary plan as well as all employees working for said employers.

WAC 192-530-030(2): *Employees working for an employer with a voluntary plan who have not yet met eligibility requirements for that plan are eligible for benefits under the state plan so long as all other requirements are met.*

This rule clarifies when newly hired employees of an employer with an approved voluntary plan are eligible for benefits under the state plan. We are proposing this rule because we are required to do so by statute. This rule will affect all newly hired employees of an employer with an approved voluntary plan.

WAC 192-530-030(3): *When an employee files a claim for benefits, an employer will access the employee's weekly benefit amount and typical workweek hours information online, or in another format approved by the department, and ensure the employee qualifies for at least an equivalent benefit amount from its voluntary plan.*

This rule establishes a mechanism whereby employers with a voluntary plan must check with ESD prior to determining the terms of PFML benefits to ensure that benefits allocated under the voluntary plan are at least as generous as those offered under the state plan. We are proposing this rule as a safeguard to ensure that the statutory requirement that voluntary plans be at least as generous as the state plan are adequately met. This rule will affect all employers with a voluntary plan.

WAC 192-530-030(4): *Upon hiring an employee previously covered under a state plan, the employer with an existing voluntary plan must report to the department online, or in another format approved by the department, the new employee's status for the voluntary plan after the employee becomes eligible for that plan.*

This rule establishes a mechanism whereby employers with a voluntary plan must notify ESD whenever a newly hired employee reaches the 340-hour threshold for benefits eligibility under the voluntary plan. We are proposing this rule because we need to be informed when an employee is no longer eligible for benefits under the state plan because he/she is now covered under a voluntary plan. This rule will affect all employers with a voluntary plan, as well as all employees working for said employers.

WAC 192-530-040(1): *The department will provide a notice which meets the requirements of RCW 50A.04.075 to employers with approved voluntary plans if requested.*

This rule clarifies that employers may request signage detailing employee's rights under an approved voluntary plan from ESD should they choose to do so. We are proposing this rule because we are required to do so by statute. This rule will affect any employer with an approved voluntary plan who wishes to be supplied statutorily required signage by ESD.

WAC 192-530-040(2): *Employers may create their own notices that meet the requirements of RCW 50A.04.075. Each employer must provide a copy of its voluntary plan notice to the department for approval. The notice must be submitted online or in another format approved by the department and must contain at least the same information as the state notice.*

This rule clarifies the statutory requirement that employers post signage detailing employee's rights under an approved voluntary plan and that such signage must obtain the approval of ESD. We are proposing this rule because we are required to do so by statute. This rule will affect any employer with an approved voluntary plan.

WAC 192-530-050(1): *Employees cannot collect benefits from both the state plan and a voluntary plan for the same period. To ensure compliance, employers with an approved voluntary plan must report:*

- (a) All information required of employers by the state plan;*
- (b) Weekly benefit and leave duration information for any employee who takes leave under that plan for reasons that would have qualified for leave under the state plan; and*
- (c) Premiums, if any, withheld from employee wages.*

This rule clarifies the reporting requirements imposed on employers with approved voluntary plans. We have a statutory right to impose this rule per RCW 50A.04.665. We are proposing this rule because we need an effective way to monitor compliance with Title 50A RCW among employers with voluntary plans. This rule will affect all employers who operate an approved voluntary plan.

WAC 192-530-050(2): *Upon request, the department will provide weekly benefit, typical workweek hours, and leave duration information to any employer with an approved voluntary plan that requests it for an employee who intends to take leave under that plan.*

This rule establishes a mechanism whereby employers with approved voluntary plans may compare benefits levels in relation to the state plan. We are proposing this rule because it provides a means for employers with approved voluntary plans to verify that their plans are in accordance with state law. This rule will potentially affect all employers with approved voluntary plans.

WAC 192-530-060(1): *If the employer chooses to withdraw from a voluntary plan, the employer must notify the department at least 30 calendar days before the withdrawal. Notification of withdrawal shall be submitted to the department online or in another format approved by the department.*

This rule clarifies the process whereby employers who choose to withdraw from a voluntary plan may do so. We are proposing this rule because we are required to do so by statute. This rule will affect any employer that elects to withdraw from a voluntary plan as well as all workers employed by said employers.

WAC 192-530-060(2): *If the department has terminated an employer's participation in a voluntary plan, the department will calculate the amount owed by the employer and send an invoice for payment. The amount due will consist of all moneys in the plan, including premiums paid by the employer, premiums paid by the employees, moneys owed to the voluntary plan by the employer but not yet paid to the plan, and any interest accrued on all these moneys. The amount will be due immediately. Any balance owed will not start collecting interest until 30 calendar days after the date of the invoice.*

This rule clarifies how employers who elect to withdraw from a voluntary plan will be billed for collection of premium withholdings in their now terminated voluntary plan PFML accounts. We are proposing this rule because we are required to do so by statute. This rule will affect any employer that chooses to withdraw from an approved voluntary plan.

III. Changes to rules

In WAC 192-530-020(1)(a), the words “at least” were added after the word “take” to clarify that a voluntary plan may offer more leave than is required by statute.

In WAC 192-510-010(4)(a), the word “and” was added after the semi-colon to connect the two clauses.

In WAC 192-510-050 and WAC 192-530-050(2), the word “who” following “employer” was changed to “that” since employers are entities.

In WAC 192-530-050, the word “reports” was removed to correct a duplicate word error and the word “wishes” was changed to “intends” for purposes of clarity.

IV. Public comment and response

Below is a table of all comments received during the formal comment period on the proposed rules that were deemed relevant by department staff. In instances where comments with similar content were received, the department only included the first instance for response. All comments are copy and pasted directly from the original source (forum post, email, hearing transcript, etc.).

#	Comment source	Comment	ESD response
1	Online portal	<p>WAC 192-530-030 (1)(b) Clarify why an employee needs to have been covered by their previous employer in order to be covered by the current employer's voluntary plan. How does this apply to new hires, transfers into WA, or employees previously covered under the state plan?</p>	<p>This rule references a requirement in RCW 50A.04.610.</p>
2	Online portal	<p>WAC 192-530-050 How does this section relate to 195-500-610 as the titles are similar? Where can employers find the complete current set of regulations? In general, why does this section exist as the State of WA will know which employers/employees have self-insured?</p>	<p>A previous version of this proposed rule existed as WAC 192-500-610. The numbering has changed. Since claims filed under a voluntary plan are not submitted to the department, the department requires this information to be reported to ensure compliance with the law and to provide a future employer with the information it requires to ensure that the correct amount of leave is offered. Example: Employer A and Employer B both manage voluntary plans that are identical to the state plan. An employee takes six weeks of family leave under Employer A, then leaves to take a job with Employer B. Employer B would only be required to offer six more weeks of family leave to that employee during that benefit year to comply with the law. But Employer B would not have that information unless it was collected and provided by the department.</p>

#	Comment source	Comment	ESD response
3	Online portal	<p>WAC 192-530-050</p> <p>(b) What is the frequency of reporting for the weekly benefit paid by self-insured employers?</p> <p>(2) Please clarify what is meant by this paragraph. Why would a self-insured employer need to check for workweek hours and leave duration given that the self-insured employer is administering the leave? Is it for historical look-up for the current employer to account for employees changing employers? Will the department provide the information instantaneously with an on-line look-up?</p>	<p>Employers with an approved voluntary plan are required to adhere to the same reporting schedule as employers on the state plan. This schedule will be clarified in phase two of rulemaking. An employer with an approved voluntary plan may need to verify that a new employee has worked the required 820 total hours in the qualifying period to be eligible for the voluntary plan. The information will be accessible online or in another manner approved by the department.</p>
4	Online portal	<p>WAC 192-530-060</p> <p>Clarify if employers will maintain voluntary plan accounts by FEIN OR in aggregate under the parent FEIN and how this impacts voluntary plan terminations.</p>	<p>The current draft of phase two rules identifies any entity with a Unified Business Identifier number as an employer that would need to apply for a voluntary plan. This rule is not yet in the CR102 phase.</p>

#	Comment source	Comment	ESD response
6	Online portal	<p>Regarding use of paid Family and Medical Leave for "Certain military connected events, including leave for short-notice deployments...."</p> <p>Insert: "including short-notice Department of Homeland Security/FEMA deployments for State and Presidentially declared disaster events," as a qualified use for leave. Adding a DHS/FEMA clause provides for employees who are not 'military' in the strict sense of the definition but are Government/DHS deployed disaster workers. This would allow employees to deploy for short-term, disaster-related service (30 to 60 days) without losing employer benefits (vacation/sick/pension) or use vacation time while deployed. If an employee takes Leave Without Pay (LWOP) to serve, FML should bridge the hours needed to maintain benefits. Loss of benefits penalizes willing disaster workers. Allowing this DHS/FEMA clause would enable disaster employees to meet employer 'stay in pay status' mandates. This 'maintain pay status' requirement penalizes an employee by requiring the use of 90 +/- vacation hours per 30 days of service while in a Homeland Security/FEMA deployment status. FML can thus support and increase the number of disaster workers willing to serve by covering their loss of benefits and bridging a deployed disaster worker's pay status--enough so that benefits are not sacrificed in order to serve.</p>	<p>The law excludes federal employees from coverage under Title 50A RCW.</p>
7	Online portal	<p>Allow for a centralized signature for multiple applications coming from someone with "officer" rights to sign documents. An example would be a corporate controller with officer rights.</p>	<p>Assuming this comment is referring to voluntary plan applications, the department will require an application from each employer with a \$250 application fee to cover the administrative costs of reviewing, verifying, and approving the application.</p>
8	Online portal	<p>Request only the data absolutely needed.</p>	<p>The data being requested from employers by the department is the least amount of data necessary to properly execute department functions. We have worked closely with employee advocates to ensure that what is</p>

#	Comment source	Comment	ESD response
			being shared does not step outside the scope of Employment Security Department needs.
9	Online portal	Section 192-530-020 (1) (a) should insert the words "at least" so it reads "allow the employee to take at least the same duration of leave from work as the state plan."	The rule was amended to reflect this change.
10	Online portal	Section 192-530-050. It is no clear that the reporting requirements for voluntary plans are necessary in order to prevent employees from receiving both state and private voluntary payments. In that regard, voluntary plans may be more generous than state plans. Can employers just report what was paid and the length of leave under their voluntary plan and not have to parse out what would have been paid under the statutory plan?	Regulations around receipt of benefits when covered by multiple plans will be addressed in phase three of rulemaking. Employers with approved voluntary plans are not required to include a direct comparison to state requirements when they report.
11	Online portal	In general, the rules do not address the possibility of insurers offering insured plans that meet the benefit requirements (e.g. amount of benefit, reason for leave and length of benefit). If there is an insured plan, can the employer satisfy the voluntary plan requirements by having the insurer provide the benefits and the employer provide the job protection? We assume that the answer is yes but it might be helpful to draft some specific rules for voluntary plans provided by insurers, including a process by which an insurer could get a "standard" voluntary plan approved that could then be offered to a number of employers in the state.	Nothing in statute prevents an employer from contracting with a third-party to manage its voluntary plan. The employer will still be liable for all responsibilities required by the law.
12	Online portal	Please be sure to address how the paid family and medical leave from the employment security department with coincide with employees using accrued sick and/or vacation time.	This issue will be addressed in phase three of rulemaking.
13	Online portal	Reporting requirements for employers who choose to offer voluntary plans should be minimized. While we appreciate ESD's need to ensure that employees receive the benefits they are entitled under the law, burdensome employer reporting requirements may discourage employers who wish to offer "richer" voluntary plans to their employees from doing so. Only those reporting requirements that are absolutely necessary should be mandated, and then compliance should	Additional reporting requirements for employers with an approved voluntary plan are necessary to facilitate information between employers to ensure access to benefits and to prevent overpayment from employers who might otherwise not have access to information pertaining to previous employee claims.

#	Comment source	Comment	ESD response
		<p>be made as simple as possible. The requirements in Sections 192-530-030(3) and (4) and 192-530-050 may make employers hesitant to consider voluntary plans, even those that might benefit their employees.</p>	
14	Online portal/email	<p>WAC 192-530-010 provides that an application for voluntary plan must be submitted for approval. We understand this to mean that each employer must submit for approval their application for a voluntary plan, despite obtaining coverage from an insurance carrier that has a standard voluntary plan design that conforms to the requirements of the law and regulations.</p> <p>We request that the ESD consider allowing a carrier to submit a model voluntary plan policy to the ESD for ongoing approval. Insurance carriers seeking to provide voluntary medical and/or family leave coverage will be required to file their fully-insured model policies (along with variability inclusive of any benefits above the statutory minimums they intend to offer) for approval with Washington State’s Office of the Insurance Commissioner. Voluntary plan benefits will be issued to policyholders (i.e. employees covered by voluntary plans) using approved model policies.</p> <p>This would simplify the approval process and reduce administrative burden for the ESD and carriers. Insurance carriers would also coordinate the client application process by having the employer complete all necessary paperwork and submit on their behalf to the state. The insurance carrier, not the employer, would be the primary contact for questions regarding the application and would receive the approval from the state. In other states that allow employers to opt for a voluntary plan to meet the state’s statutory disability or paid family leave requirements, it is customary for the insurance carrier to facilitate most correspondence with the state regarding the setup of the employer’s plan on their behalf.</p>	<p>The \$250 application fee for each voluntary plan application is required by statute (RCW 50A.04.600(1)) and, as such, not subject to change by rule. The fee is necessary for the administrative costs associated with reviewing the application. While we recognize that third-party administrators may offer identical plans to multiple employers, it is the responsibility of the department to ensure that every application is thoroughly reviewed for compliance with the law and that employers abide by the provisions of the approved plan.</p>

#	Comment source	Comment	ESD response
		<p>Finally, we recommend a one-time payment of the \$250 application fee for the review of the model voluntary plan policy. Corollary to that, we also recommend the waiver of the \$250 application fee for each instance of a voluntary plan following the model policy, particularly if the streamlined carrier approval approach outlined above were implemented. A fee of this nature is not commonplace in states like New York, New Jersey and Hawaii which also allow voluntary coverage for their statutory disability and paid family leave programs. The fee could also prove burdensome for employers as they move from one carrier to another for their voluntary plan.</p>	
15	Online portal/email	<p>WAC 192-530-040 holds that an employer must create a notice of coverage as prescribed by the state of Washington and submit when they submit their voluntary plan for approval. Similar to comments under 192-530-010, we request consideration that carriers have the option to create a model notice of coverage and submit for one-time approval as they would submit their model policies. Approved notices would then be issued to policyholders as they onboard and would be updated periodically as the state sets forth new or modified expectations.</p>	<p>Department approval of employer-created common area notices is required by statute (RCW 50A.04.075) and, as such, not subject to change by rule.</p>
16	Online portal/email	<p>WAC 192-530-050 provides that employees cannot collect benefits from both the state plan and a voluntary plan for the same period. To ensure compliance, employers with an approved voluntary plan must report benefit and leave duration information for employees who take leave to the department. Likewise, the department will provide information upon request to any employer with an approved voluntary plan.</p> <p>We foresee this information not being sufficiently up-to-date at the point of claim intake and payment of benefits for an employee who is covered by both the state plan and a voluntary plan. There is risk an employee who is covered by both the state plan and a voluntary plan</p>	<p>The purpose of WAC 192-530-050 is intended precisely to mitigate the scenario outlined in this comment. By facilitating the transfer of information between employers, the department is able to ensure employee privacy while simultaneously providing information to employers about an employee's claim(s) previously made to a voluntary plan. Employers with an approved voluntary plan will be able to make more-informed determinations regarding the amount of leave to which an employee is entitled.</p>

#	Comment source	Comment	ESD response
		<p>may exceed the combined total of 16 weeks for both paid family and medical leave benefits, and result in excess approved time and an overpayment of benefits.</p> <p>Lastly, to avoid duplication of benefits under state and voluntary plans, the department may wish to consider administratively distinct leave entitlements for employees who are covered by both the state plan and a voluntary plan. The department may wish to consider disaggregating the combined total of 16 weeks for both paid family and medical leave benefits for administrative purposes.</p> <p>It is important the department provide further guidance on how to avoid duplication of benefits under state and voluntary plans in a way that requires minimal administrative disruption and considers the time and cost for both the department and employers/leave administrators tracking these benefits.</p> <p>In order to avoid such a result, we are requesting further guidance on the frequency and mechanism by which benefit and leave duration information is shared between employers with an approved voluntary plan and the department. Our mutual goal should be to ensure this information is sufficiently up to date to properly coordinate benefits in an efficient and cost-effective manner for both parties.</p>	
17	Online portal/email	<p>In addition, RCW 50A.04.065 provides that individuals who are paid any amount as benefits to which he or she is not entitled shall be liable for repayment of the amount overpaid. However, this provision does not provide for how employers or carriers administering a voluntary plan would be able to recoup overpayments to employees. We are requesting, first, confirmation that employers or carriers administering a voluntary plan should be able to recoup overpayments to employees, and second, guidance on the recovery of benefit overpayments, similar to the procedures of the department.</p>	<p>The decision to internally manage a paid family and medical leave plan carries with it the responsibility of private debt collection. The department is unable to provide guidance in this matter.</p>

#	Comment source	Comment	ESD response
18	Online portal/email	<p>WAC 192-530-060 indicates employers must provide at least a 30 day notice to withdraw from a voluntary plan. We request consideration of the following comments as it relates to what is proposed on notices of termination sent by the insurance carrier (in the context of an employer that have voluntary coverage in place with an insurance carrier):</p> <p>Termination of the plan as requested by policyholder: As outlined in our comments under WAC 192-530-010, it is customary for an insurance carrier to manage correspondence directly with the state, including notification of an employer terminating coverage. To align to this market expectation, additional consideration would be needed to allow a carrier to submit this change on the employer’s behalf.</p> <p>Cancellation of plan for nonpayment: Insurance contracts commonly have a 31 days grace period to allow employers additional time to pay their premium before the policy is in danger of lapsing. Other states employ a 10 to 15-day advance notice period to the state and the employer to shorten the amount of advanced notice required to terminate a group for nonpayment. In most cases, an employer has already received notice that their premium is late before they receive the final notice that their policy will terminate within 10 to 15 days. Use of a 30-day notice period either would require a carrier to issue a termination notice at the beginning of an employer’s grace period (indicating the plan would terminate at the end of the grace period) or they would issue the notice during or at the end of the grace period which would potentially extend their claim liability. Regardless of the time period that is ultimately set forth, carriers will need a means of communicating a policy terminating for nonpayment.</p> <p>Notice of termination of one plan and setup of another: An employer’s termination of its voluntary plan is not necessarily an indication the</p>	<p>Timelines around the withdrawal or termination of a voluntary plan are required by statute (RCW 50A.04.600(5)(e) and RCW 50A.04.650, respectively) and, as such, not subject to change by rule. There is no single trigger for the termination of a voluntary plan. All terminations are at the discretion of the department and determinations for such action will be made on a case-by-case basis. There is no requirement that an employer with an approved voluntary plan withdraw their plan in order to implement a new one. The employer can simply submit a new application that, if approved, will go into effect the following quarter pursuant to WAC 192-530-010(2).</p>

#	Comment source	Comment	ESD response
		<p>employer wishes to no longer have voluntary coverage. It is very likely that an incumbent carrier's notice of termination of an employer's voluntary plan will be followed up with a request for new voluntary coverage from a new carrier. A streamlined application process is highly recommended to mitigate any disruption in coverage. In addition, the state's automatic calculation of premium within the state-administered program is likely to be an unnecessary and potentially confusing step for employers. It may be more beneficial for the state to defer that step to 30-45 days from the date of termination of the previous policy to allow time for any new carrier to submit an application for new voluntary coverage.</p>	
19	Public hearing	<p>In 192 510 080 entitled, What are the requirements to be eligible for a conditional premium waiver, we believe that there is a gap in the rule that the department should consider filling. So if you consider a worker who has two jobs, one in Washington and one in Oregon, and the Oregon job dispatches a worker to Washington with a premium waiver in place, and the Washington job is reporting hours normally without a waiver, if more than 820 hours were earned under the Washington job alone, or nearly 820 hours with the Oregon job's hours bumping it above that threshold, it's not clear how the department will account for those hours earned by the Oregon job. This is not a matter of whether or not the waiver was appropriate or inappropriate, but the rule does not appear to contemplate the circumstance.</p>	<p>Hours worked for an employer outside the state of Washington do not count towards the 820-hour requirement for eligibility under paid family and medical leave.</p>
20	Public hearing	<p>In 192 530 040, Voluntary plans, notice requirements under RCW 50A.04.075, subsection (2) should provide more in the rule, subsection (2) should provide more details as to what is required in an employer's own notice documents if they choose not to utilize standardized documents from the department. We believe the employer's notice should include information informing the worker that they are utilizing a voluntary plan in lieu of a state plan, that the employee notice of the employee's rights to take leave for qualifying circumstances, a statement of the employee's rights to certain benefit</p>	<p>Additional rules around required notices will be written in phase two of rulemaking.</p>

#	Comment source	Comment	ESD response
		amounts, a description of the process used to apply for benefits, and a description of the process used to appeal, and a denial of benefits with the employer and then also with the state.	
21	Public hearing	I am not sure I do agree with the comment regarding 040, section (2), on more detail on what is required in the notice if employers do not use the online one or the one provided. I think it's clear, it's got to provide the same information. Any more detail could end up resulting in you drafting one for us. That's the point. They didn't draft it. They wanted to use their own.	Comment noted.
22	Public hearing	I have one comment, and it's on WAC 192 520 010 with collective bargaining agreements, and in the 102 filing I appreciate there has been some revisions because there has been need for clarity about timing, when you have collective bargaining agreements expiring, and it looks like you are looking for us to basically stay in communication with you in the department, to file quarterly reports if we are in bargaining. I want to make sure I understand what the intent of that is. Is it to make sure there is progress in that we are bargaining over the new law? And when we do finally complete our bargaining, nothing here addresses like when implementation has to happen. Are you going to be allowing employers, and working with their representative employees, reasonable time to implement, especially say that we chose to do a voluntary plan?	The immediate application of all rights and responsibilities under paid family and medical leave upon the reopening, renegotiation, or expiration of a collective bargaining agreement that was in effect on October 19, 2017, is required by statute (RCW 50A.04.235) and, as such, not subject to change by rule.
23	Online portal	In section WAC 192-530-030 relating to employee eligibility for voluntary plans, paragraph (1)(a) says that an employee must have been "in employment" for 820 hours during the qualifying period, and "in employment" specifically with the employer for at least 340 hours, in order to be eligible for that employer's voluntary plan. It would be helpful to have more clarity on what "in employment" means.	For the purposes of paid family and medical leave, the term "employment" is defined in RCW 50A.04.010(7).
24	Online portal	WAC 192-530-060 What happens at the end of a voluntary plan? This section should include employee notification requirements or a reference to employee notification requirements if contained in other portions of the law. If an employer withdraws from a voluntary plan,	Multiple notices of employee rights and benefits are required by statute. One of these notices is required when an employee takes an extended period of leave for a reason covered

#	Comment source	Comment	ESD response
		they should not only notify the department of withdrawal, but also their employees of any change in benefits, wage withholding, and rights related to the employer's withdrawal.	by the law. These notices must always contain information that reflects the current plan (whether voluntary or state) that covers the employer. When an employer changes its plan, or switches to/from a voluntary plan, the notices must be updated to reflect that change to ensure employee awareness.