

Location	Association of Washington Businesses - 1414 Cherry St SE Olympia
Time	10:00 a.m. – 12:00 p.
Attendees	Department Representative: Carla Reyes, Paid Family and Medical Leave Director Paid Family and Medical Leave Act Ombuds: Edsonya Charles Employer’s Interests Representative: Bob Battles Employer’s Interests Representative: Julia Gorton Employer’s Interests Representative: Samantha Grad Employee’s Interests Representative: Maggie Humphreys Employer’s Interests Representative: Christine Brewer Employee’s Interests Representative: Joe Kendo Employee’s Interests Representative: Marilyn Watkins
Guests	PFML Policy & Rules Manager: Matt Buelow PFML Interim Operations Manager: John Mattes PFML Communications Manager: Clare DeLong
Members Absent	Employer’s Interests Representative: Tammie Hetrick
Scribe	Linda Kleingartner

Welcome and Introductions: Carla Reyes

- Introductions at the table. (Note: sign in sheet will capture audience in the room, and conference call technology records the participants dialing in.)
- October meeting minutes were reviewed and approved.

Communications Update – Clare DeLong

PFML had circulated a draft “Employer Letter” to the Advisory Committee on 11/14/18 for comments. Once the letter is reviewed and feedback is provided by the Advisory Committee, ESD will make all necessary changes and circulate to approximately 600,000 employers (provided in the Department of Revenue’s employer listing). The mailing is expected in approximately 2 weeks. The Advisory Committee provided the following suggestions to the letter:

- Show the range of leave (“in some cases 18 weeks”) in the first paragraph
- Highlight the reporting via SAW account in April
- Add the formula for calculating premiums, referencing more details in Employer Toolkit
- Add independent contractors along with sole proprietor, direct them to the website, and define the opt-in process
- Add the Customer Care Team phone number.

ACTION Clare DeLong: Provide a generic copy of the letter to Advisory Committee once it is circulated, so they can reinforce the messaging.

Clare DeLong provided a summary of the Communications activities:

- The webinars are quickly filling up so more have been added.
- Outreach events prove to be useful for the employers.

- Website hits continue to increase reflecting new views.
- Paid ads (e.g. digital, radio, print) are underway.
- High click thru rates on social media. All signal new viewers and ESD is reaching more people.

Advisory feedback (**Action Clare DeLong**):

- **ACTION:** Send the Advisory Committee the paid ads, materials, videos so they can circulate to their teams.
- Interest in seeing an employee facing video to briefly explain the new deduction in their checks. AWB is thinking of doing one. Maggie has an animated video that may be of interest.
- **ACTION:** Look at the possibility of creating an employee facing video.
- Is there a way to test saturation of awareness with the independent contractors & sole-proprietors?
- **ACTION:** Consider adding another landing page on the website for sole-proprietors and independent contractors, or ways to assess their awareness on PFML.

Policy & Rule Making Update – Matt Buelow

Matt Buelow provided the following overview around the rule making for PFML:

- Phase 1 rules have been finalized.
- Phase 2 (Employer requirements, premiums) - CR103 (adopted rules) were filed on November 2 with the Office of the Code Reviser. Rules should become effective December 3, 2018.
- Phase 3 (Benefit Applications, more premiums) – held the second stakeholder meeting and draft 2 posted to engagement site on November 2nd. Anticipate the CR102 to be filed on January 3, 2019.
- Phase 4 (Ongoing employee eligibility) – CR101 was filed in October. Stakeholder meetings are scheduled for November 27, 2018, and January 16, 2019.
- Phase 5 (Job protection, benefit overpayments) – CR101 is scheduled to be filed in January 2019, and first listening session will be on January 11, 2019.
- Phase 6 (Appeals) – scheduled for April 2019.

FMLA and Minimum Claim Duration policy discussion – Matt Buelow

A subset of the Advisory Committee participated in a conference call with the Department to clarify the intent of the language in two areas (FMLA and Minimum Claim Duration) and it was determined this needed to come before the entire Advisory Committee for discussion.

Minimum Claim Duration

Matt Buelow provided a summary of the issue: Law states leave must be 8 consecutive hours; which means many part time employees or shift employees will not be able to take the benefit unless the time off equates to multiple shifts that are consecutive.

Joe: During negotiations in relation to the “8 consecutive hours” his recollection is that there was agreement to remove the word “consecutive” but it didn’t appear to get removed from the draft

Julia: Recalls that the agreement was 8 hour increments to be sure there was clarity from the paid sick and safe leave

Marilyn: Acknowledges that the chunk has to be big enough to be worthwhile to pay as a claim; however, some illnesses may require differing amounts of time off that don’t equate to a full shift or 8 hours and the desire is to preserve a pragmatic chunk of time that meets both employer and employee interests to take only the leave needed and not more (e.g. cancer treatment, where an employee will work as much as they can).

Bob: PFML was not intended to cover people in and out over the course of a day; but, rather to take the day. The intention was not to keep part time workers from ever being able to take the leave. Anticipated people would take sick leave for smaller time blocks (like 15 minutes, half hour, etc.) and use PFML to cover being out for an entire shift. Believes we can find a solution to this but need to look at it in context of the FMLA issue.

Samantha: Agrees with Bob, but most of her members don’t work 8 hour shifts.

FMLA

Matt provided a summary: In crafting rules, it became apparent that as the law is written if someone elects to take FMLA first (e.g. FMLA starts prior to 2020 when PFML is available) the Department can’t see how the FMLA and PFML can run concurrently.

Julia: The negotiation intent was to run PFML concurrent with FMLA.

Bob: Referencing numerous notes over the course of negotiations (4/16/17 recap by Joan; 4/26/17 recap from Rebecca Johnson, the Senate Commerce, Labor and Sports Committee 6/26/17 notes) the interpretation was clear that PFML and FMLA are intended to run concurrently. The intent was that one can’t take FMLA without impacting PFML weeks of benefits and weeks of job protection. Key word is concurrent.

Joe: FMLA is fundamentally about job protection. If the employee takes the social insurance benefit beyond the weeks of job protection they could be let go by the employer. But since they paid the premium they should be able to use the benefit; even if the job protection is not there. So, sever the job protection from the paid component.

Julia—asked Joe if he is envisioning that an employee could take 12 weeks (FMLA qualified) then another period for and additional covered period of time?

Marilyn—all agreed the employer has the right to say the PFML and the FMLA need to run concurrently. Understands the impact on employers and could support maintaining the limitation on job protection. But, say a person’s mom breaks her hip and the daughter uses 3

weeks of sick leave which employer designates as FMLA; thus reducing remaining FMLA to 9 weeks. Then she has a baby and wants to take 16 weeks. The issue of concurrence was specific to job protection, so [in this example, the mom] would only be able to have 9 weeks job protected.

Bob—Negotiations were clear to say the number of weeks PFML leave and benefits run concurrently with FMLA. If not, why would there be an 18 week designation? 24 weeks was never considered.

Joe—doesn't severing the benefit and protected time solve the issue?

Bob—that assumes the employer wants to terminate employment. Employers want to retain the employee.

Joe—But even if we limit the coverage, the employee likely still needs the leave time and should be able to get the leave benefit whether or not the employer decides to keep them employed or let them go

Bob—Weeks was so critical to Employers in the negotiations and what we heard was portability was so important to [Labor]. If there are not concurrent weeks then why would we have negotiated the 18 weeks?

Maggie—Concerned that when weeks run out the benefit the employee has paid for cannot be accessed. Portability was important.

Matt Buelow offered the employer is required to designate FMLA once they have enough information to designate it as such. He also mentioned the 9th circuit courts ruling where the employee can opt in or out as well.

Christine—What would be the impact on employers and what incentives would they have to offer PTO if there is not concurrence?

Bob—What about the impact on VP plans?

Marilyn/Joe—Not saying employers must allow more than 18 weeks of job protection.

Matt Buelow summarized he is hearing Labor anticipated separation between the job protection and benefit period.

Julia— Concerned about the anti-discrimination penalties—what if employers let someone go for taking PFML? Washington State negotiated the most generous program in the country and are disappointed that you are now trying to go back on the agreement

Joe—His understanding was 18 weeks of job protection limit. Employer's obligation ends at 18 weeks. It's about portability. The benefits people earned should not be a question the employer has a say in once employment has been severed.

Christine—can you give an example of an employer who doesn't want to terminate the employee and what the impacts of your interpretation is on them?

Joe—it's the same as what the employer does now under FMLA—make a business decision to either continue accommodating the employee to take the time and return to the position or take the time and terminate their employment.

Marilyn—If we look at this from the reverse angle; a person uses 12 weeks taken concurrently at the end of which time their doctor says they are still not ready to return to work. The employer chooses at that point whether to allow them to return to work after the additional time off or to terminate. Is the reverse not true?

Groups adjourned to caucus

Bob—We disagree with ESD's interpretation that the PFML and FMLA cannot run concurrently. We also disagree with the employee representative interpretation that would provide up to 7.5 months of leave. At this point do not believe this can be resolved today at this table without further conversations with stakeholders, Legislators, etc. Don't include in any technical fix bill without that conversation.

Maggie—It is not our intent to re-negotiate/re-litigate what was previously agreed upon and we agree other conversations need to take place

Joe—We would like to go back to our communities to identify scenarios where running [PFML and FMLA] concurrently does or does not make sense; to zero in on specific problems. We are going to back to our communities to do this and would ask that you to do the same. We are hopeful that we can work together to arrive at a successful solution.

Open Comment

- Rebecca Johnson/ UFCW21- pleased the Advisory Committee is looking at specific issues, recognized this is a complex issue. Believes through collaboration this can be the best program.
- Logan Bahr/Association of Washington Cities – appreciate the conversation, would be interested in seeing an analysis of the other states and how they handle this. Would like to see how ESD summarized the problem (referencing a paragraph outlining the problem statement).

ACTION Matt Buelow- share ESD Problem Statement(s) for FMLA and Minimum Claim Duration.

[Inserted below is the language ESD shared regarding the problem and potential resolutions regarding minimum claim duration:

The minimum claim duration for a PFML benefit payment is for eight consecutive hours of paid family or medical leave. RCW 50A.04.020(2). Therefore, part-time workers or other employees that need leave for less than eight consecutive hours may not be eligible for PFML benefits. Additionally, employees who work shifts longer than eight hours would not need to miss an entire shift, whereas part-time employees may need to miss multiple shifts before reaching the minimum claim duration requirement.

The department recommends:

- (1) Removing the requirement that the eight hours be consecutive and allow the eight hours minimum claim requirement to be taken within a week; or

(2) Requiring a minimum claim duration of one typical work shift, which the department will calculate by dividing the employee's typical work week hours by seven.]

Matt also shared the Department would gladly review the different scenarios offered by the Advisory Committee.

- Allie (phone) encouraged the Advisory Committee to look at separation of the benefit and job protection. An employee may be eligible for PFML before FMLA.

Joe asked the Department to provide a paper outlining how the Department would implement the law as written if no changes were to be made as well as a comparison chart for PFML/FMLA—to identify where they are the same and where they are different.

ACTION Matt Buelow agreed to provide the information requested. ESD can do the comparison chart but with the caveat that we would do so *from our understanding of FMLA* as ESD does not administer FMLA (Labor & Industries administers the FMLA program). In other words any comparison would be ESD interpretation of FMLA and its intersection with PFML.

- Jean (phone) would like clarification on who are the eligible family members. She would like employees to be given a choice to use their PTO, and they are also able to then take their PFML benefit.
- Leah (phone) suggested using “regular work day” for the minimum claim duration. Advisory Committee responded there are challenges with this approach.

Operations Update – John Mattes

The Advisory Committee had a couple questions regarding the Voluntary Plan Dashboard. Christine indicated some employers had asked for ESD to provide in person consultation on the development of their voluntary plan application and the Department was unwilling to meet. Carla shared approximately half of the applications received so far have consisted of the Department working with the employer to refine their application, a lot of back and forth is happening. The Department intends to support employers.

Other questions posed:

- Any concerns that ESD can process the volume of applications that come forward between now and the end of the year? No- just added in the next cohort of trained Customer Care Team members, and average processing time continues to improve.
- Is December 1st a hard deadline for submitting the Voluntary Plan application? No- this is a guideline; the Department will accept Voluntary Plans at any time. If an Employer waits to submit at the end of the quarter, there is a chance they may have to use the state plan for one quarter if it isn't approved by the end of the quarter.
- What is the number of employees covered by the voluntary plans? ESD will not know this information until the 1st quarter reporting is provided (April 2019) by the employer.
- Are the Voluntary Plans beyond the minimum requirements? Yes, this is the case in many of the applications.

Items not discussed – deferred to next month’s agenda

- Operations – voluntary plan application best practices
- Technology Update

December 13, 2018 meeting will be in Seattle at Washington State Labor Council