

PRELIMINARY Significance Analysis
Title 50A RCW
Paid Medical and Family Leave
Phase Four

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Contents

Introduction.....	3
Chapter 1: Describe the proposed rules, including a brief history of the issue, and explain why the proposed rules are needed.....	4
Chapter 2: Is a Significance Analysis required for these rules?	13
Rules requiring a significance analysis.	13
Rules not requiring a significant analysis.....	13
Chapter 3: Clearly state in detail the general goals and specific objectives of the statute that the rules implement.....	15
Chapter 4: Explain how the department determined that the rules are needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rules.....	16
Chapter 5: Explain how the department determined that the probable benefits of the rules are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.	17
Chapter 6: Identify alternative versions of the rule that were considered and explain how the department determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated previously.	18
Chapter 7: Conflicts with Federal or State law.....	19
Chapter 8: Performance impositions on private vs. public sectors	20
Chapter 9: Conflicts with Federal or State regulatory bodies	21
Chapter 10: Coordination with Federal, State, or local laws.....	22

Introduction

In 2017, the Washington State Legislature passed Substitute Senate Bill 5975 relating to Paid Family and Medical Leave (PFML). Substitute Senate Bill 5975 was codified as Title 50A RCW.

Title 50A RCW creates a statewide Paid Family and Medical Leave insurance program that provides for at least partial wage replacement when a qualified employee takes leave for an approved reason related to family or medical leave.

The legislation requires the state to develop rules implementing the program.

These rules are being developed by the Employment Security Department (“the department”) and will be filed in multiple phases. This filing comprises rules developed in Phase Four, which covers the payment of benefits while the employee is on leave and fraud determination procedures.

Chapter 1: Describe the proposed rules, including a brief history of the issue, and explain why the proposed rules are needed.

WAC 192-500-110 Week.

A “week” is a period of seven consecutive calendar days beginning on Sunday 12:00 a.m. and ending at 11:59 p.m. the following Saturday.

This rule establishes the timeframe that the department will always consider to be a week, regardless of the period during the week any particular event occurred. This aligns with unemployment insurance policy and is intended to create a clear, simple calendar that employees, employers, and the department can follow in order to remain consistent.

WAC 192-500-120 Employee fraud.

(1) “Fraud” means an action taken by an employee where either of the following is determined to have occurred:

(a) Willful nondisclosure as defined in WAC 192-500-140; or

(b) Misrepresentation as defined in WAC 192-500-150.

(2) A finding of fraud will result in a disqualification of benefits and applicable penalties under Title 50A RCW.

The department has a duty to identify fraud and attempt to prevent payments to or recover payments from employees committing fraudulent acts. As a starting point, a definition of fraud was necessary to clarify statutory references and allow the department to use a general defined term when defining processes.

WAC 192-500-130 Nondisclosure.

“Nondisclosure” occurs when information, that is known or should have been known by the employee at the time it is requested by the department, is not disclosed either inadvertently or through unintentional oversight.

While willful nondisclosure is considered fraud, the department found it necessary to clarify that nondisclosure will not be considered a fraudulent act unless the nondisclosure is willful.

WAC 192-500-140 Willful nondisclosure.

“Willful nondisclosure” occurs when:

(1) An employee omits or fails to disclose information;

(2) The employee either knew or should have known that the information should have been provided;

- (3) *The information concerned a fact that was material to the employee's rights and responsibilities under Title 50A RCW; and*
- (4) *The employee omitted or did not disclose the information with the intent that the department would take action on other information the employee did provide.*

The willful nondisclosure of material information will be considered fraud. As such, a definition of the term was necessary to establish the elements required to make a determination of fraud.

WAC 192-500-150 Misrepresentation.

"Misrepresentation" occurs when:

- (1) *The employee has made a statement or provided information;*
- (2) *The statement was false;*
- (3) *The employee either knew or should have known the statement or information was false when making or submitting it.*
- (4) *The statement or submission concerned a fact that was material to the employee's rights and responsibilities under Title 50A RCW; and*
- (5) *The employee made the statement or submitted the information with the intent that the department would rely on the statement or information when taking action.*

Misrepresentation of information will be considered fraud. As such, a definition of the term was necessary to establish the elements required to make a determination of fraud

WAC 192-500-160 Continued claim.

- (1) *An employee is a "continued claim" recipient if the employee:*
 - (a) *Is eligible for benefits; and*
 - (b) *Has received credit for the waiting period or payment of benefits for one or more weeks in a claim year and in the current continued claim series.*
- (2) *Continued claim status will end following four or more consecutive weeks for which the employee does not file a claim or is not taking paid family or medical leave.*

The term "continued claim" refers to a claim for which the department is currently paying benefits to the filing employee. This status is necessary to define in order to determine when an employee may be eligible for the payment of conditional benefits as defined in WAC 192-620-025.

WAC 192-500-170 Self-employed.

- (1) *A "self-employed" person is:*
 - (a) *A sole proprietor;*
 - (b) *A joint venturer or a member of a partnership that carries on a trade or business, contributes money, property, labor or skill and shares in the profits or losses of the business;*
 - (c) *A member of a limited liability company;*

- (d) An independent contractor who works as described in RCW 50A.04.010(7)(b); or*
 - (e) Otherwise in business for oneself as indicated by the facts and circumstances of the situation, including a part-time business.*
- (2) A corporate officer is an employee and not self-employed.*

A definition is necessary to clarify who the department will consider self-employed and therefore not required to participate in Paid Family and Medical Leave. Statutory definition does not specifically cite certain individuals as either “employed” or “self-employed,” so the department felt it was necessary to provide this information by rule.

WAC 192-510-025 What wages are reportable to the department for premium assessment purposes?

(1) Examples of wages reportable to the department for premium assessment purposes include, but are not limited to:

- (a) Salary or hourly wages;*
- (b) Cash value of goods or services given in the place of money;*
- (c) Commissions or piecework;*
- (d) Bonuses;*
- (e) Cash value of gifts or prizes;*
- (f) Cash value of meals and lodging when given as compensation;*
- (g) Holiday pay;*
- (h) Paid time off, including vacation and sick leave, as well as associated cash outs;*
- (i) Bereavement leave;*
- (j) Separation pay, including, but not limited to, severance pay, termination pay, and wages in lieu of notice;*
- (k) Value of stocks at the time of transfer to the employee if given as part of a compensation package;*
- (l) Compensation for use of specialty equipment, performance of special duties, or working particular shifts; and*
- (m) Stipends/per diems unless provided to cover a past or future cost incurred by the employee as a result of the performance of the employee’s expected job functions.*

(2) Examples of what the department will not consider wages include, but are not limited to:

- (a) A supplemental payment from an employer benefit that is not part of the employee’s standard compensation.*

Example:

While on paid medical leave, an employee receives 61 percent of the employee’s typical weekly wage from the state. Through an internal short-term disability benefit, the employer pays the employee the remaining 39 percent of the employee’s typical weekly wage as her supplemental benefit payment, bringing the employee’s total benefit to 100 percent of the employee’s typical weekly wage. Since this supplemental benefit payment is not part of the employee’s standard compensation, it is not considered

a wage, and should not be reported on either the employee's weekly claim or the employer's quarterly report.

(b) Any payment made to an employee to cover a past or future cost incurred by the employee related to the performance of the employee's expected job functions. Such costs include, but are not limited to, costs of meal and travel.

Example:

An employer pays a per diem to an employee on a business trip to cover the cost of local travel and meals. This amount is not considered a wage, even if the per diem exceeds the actual cost incurred.

(c) The amount of any payment made (including any amount paid by an employer for insurance or annuities, or into a fund to provide for any such payment), to, or on behalf of, an individual or the individual's dependents under a plan or system established by an employer which makes provision generally for individuals performing service for the employer (or for such individuals generally and their dependents) or for a class or classes of such individuals (or for a class or classes of such individuals and their dependents), on account of:

(i) Retirement;

(ii) Sickness or accident disability;

(iii) Medical or hospitalization expenses in connection with sickness or accident disability; or

(iv) Death.

The department has encountered a great deal of community confusion with regard to which employer payments are considered a wage for the purposes of Paid Family and Medical Leave and which are not. The department felt it would offer maximum clarity to provide a non-exhaustive list of payments that will be considered a wage and are therefore assessable for premiums.

WAC 192-610-070 Can an employee cancel a claim after it has been submitted to the department?

(1) If an employee has not been issued a payment on the claim, an employee may cancel a claim within thirty days of the date of the submitted application for benefits.

(2) The commissioner, at the commissioner's discretion, may permit cancellation of a claim without an issued payment after thirty days from the date of the submitted application for benefits in extreme and unusual circumstances.

(3) An employee may not cancel a claim that has been issued a payment. The department will only cancel a claim that has been issued a payment in any amount if the department made the payment due to departmental error.

(4) If the department has denied benefits before the request to cancel the claim was received, the denial will remain in effect.

(5) The denial of a request to cancel a claim is not subject to appeal.

This rule is necessary to clarify under what circumstances an employee is able to cancel a claim that has already been accepted by the department.

WAC 192-610-075 Can an employer require an employee to take paid time off in place of paid family or medical leave benefits?

Employers may not require employees to take paid vacation leave, paid sick leave, or other forms of paid time off provided by the employer before, in place of, or concurrently with paid family or medical leave benefits.

This rule clarifies employers cannot require use of paid time off for the purposes of Paid Family and Medical Leave.

WAC 192-610-080 When should an employee reopen a claim?

- (1) When an employee has an existing claim year and more than four consecutive weeks have passed since the employee filed a weekly claim for benefits, or the employee experiences a new qualifying event, the employee must reopen the claim in order to receive benefit payments.*
- (2) If the duration of leave for a qualifying event has not expired:*
 - (a) The employee can reopen the claim and file weekly claims as necessary.*
 - (b) If the employee requests to claim the weeks prior to the date the claim is reopened, the employee must have good cause as defined in WAC 192-610-040 to claim prior weeks.*
- (3) If the duration of leave for the qualifying event has expired or the reason for leave is not the same as the previous qualifying event, the employee must reopen the claim by updating the application as required under WAC 192-610-010 before benefits will be paid.*

This WAC explains when an employee who is in an existing claim year should reopen an existing claim. This will occur in many scenarios, including when employees experience multiple qualifying events in a claim year.

WAC 192-610-085 How should an employee reopen a claim?

An employee may reopen a claim by:

- (1) By using the department's online services;*
- (2) Contacting the paid family and medical leave customer care center by telephone; or*
- (3) Alternate methods authorized by the commissioner.*

This WAC explains the process of reopening a claim in an existing claim year.

WAC 192-620-005 What is the minimum claim duration?

- (1) The minimum claim duration for paid family or medical leave is eight consecutive hours in a week.*

(2) *If an employee on leave typically works less than eight-hour shifts, the employee will meet the requirement of a minimum claim when the employee has missed eight consecutive hours in a week the employee typically would have been scheduled.*

Example: *An employee typically works four-hour shifts. The employee will need to take two consecutive shifts of leave in a week to have a minimum claim.*

Statute requires a minimum claim duration of eight hours. This rule further clarifies that when an employee works fewer than eight hours in a typical shift, the employee will need to take multiple, consecutive shifts in order to meet the minimum duration.

WAC 192-620-010 How should employees request benefit payments?

- (1) *An employee must file a weekly claim to receive benefits.*
- (2) *An employee may file a weekly claim by:*
 - (a) *Using the department's online services;*
 - (b) *Using the department's telephone services; or*
 - (c) *The commissioner may authorize alternative methods of filing weekly claims.*
- (3) *A weekly claim can only be made after the end of the week being claimed.*
- (4) *A weekly claim must be completed in its entirety. Incomplete weekly claims will not be processed.*
- (5) *No more than four weeks of claims can be made at one time, except in limited circumstances, such as backdating for good cause as defined in WAC 192-610-040.*

This rule clarifies the process by which an employee will file a weekly application with the department while on leave in order to receive benefits.

WAC 192-620-020 What information will the department request from employees when filing for weekly benefits?

- (1) *The department must determine if an employee qualifies for benefits when the employee files a weekly claim for the payment of benefits. For the week that the employee is claiming, the department will ask if the employee:*
 - (a) *Worked during the week, and for the hours and wages associated with that work;*
 - (b) *Received any paid leave such as sick leave, vacation leave, or other paid time off provided by the employer, and the hours and wages associated with that leave;*
 - (c) *Received any benefit that may disqualify the employee for paid family or medical leave, such as unemployment insurance; and*
 - (d) *Experienced a change in the qualifying event that affects the eligibility for or duration of paid family or medical leave benefits.*
- (2) *The employee may be asked to provide additional information.*

This rule designates the content of the weekly application and allows the department to request additional information, if necessary.

WAC 192-620-025 What happens if an employee is being conditionally paid benefits?

- (1) If an employee is a continued claim recipient, and eligibility is questioned by the department, the employee will be conditionally paid benefits for weeks the employee claims without delay.*
- (2) The employee may request the department to hold conditional payments until the question of eligibility is resolved when the employee has been notified the department questions their eligibility.*
- (3) An overpayment for a conditionally paid week cannot be waived and must be repaid.*

This rule explains the process by which an employee may receive conditional benefits in the event that the department has reason to question the employee's eligibility. The employee may elect not to receive such benefits rather than face the possibility of paying them back at a later date.

WAC 192-630-005 What happens if there is a question regarding whether an employee is qualified for benefits?

- (1) The department will send interested parties a notice when the department has a question of whether an employee is qualified for benefits prior to making a determination on the claim. The notice will include:*
 - (a) The department's questions regarding the employee's qualification for benefits; and*
 - (b) The date by which the interested parties must respond. This date will be no earlier than five calendar days from the date the notice is sent. Reasonable mailing time will be added when the notice is sent via postal service.*
- (2) The employee has a right to respond to the department on qualification issues.*

When the department has reason to question an employee's eligibility for paid family or medical leave benefits, the department will engage in fact-finding to determine eligibility. This WAC outlines process by which the department will seek information from interested parties in order to make that determination.

WAC 192-630-010 What happens if an interested party does not respond to the department's request for information?

- (1) If an interested party fails to respond by the due date on the notice provided under WAC 192-630-005, the department will make a determination based on available information.*
- (2) Subject to RCW 50A.04.510, if benefits are denied because the employee did not respond to a request for information, the denial will remain in effect until the employee provides sufficient information to establish that the employee is qualified for paid family or medical leave.*

The department determined that it was necessary to establish a path to a determination in the event that an interested party does not respond to the department's request. This WAC provides that procedure.

WAC 192-630-015 How will a determination be made about an employee's eligibility for benefits?

- (1) When the department has issued a notice under WAC 192-630-005 the department will not make a determination on whether an employee qualifies for paid family or medical leave until all interested parties have had an opportunity to provide information about the question of eligibility by the due date indicated on the notice.*
- (2) If new facts are discovered before the determination is made, the department will provide interested parties with an opportunity to respond to the new information.*
- (3) After the department makes a determination, all interested parties will be provided with a copy of that determination.*
- (4) If the department receives new and relevant information after a determination is made:*
 - (a) The information will be considered by the department;*
 - (b) Interested parties will be given an opportunity to respond, if necessary; and*
 - (c) The department may make a new determination based on the newly provided information.*

Once fact-finding has concluded in a question of employee eligibility, the department will make a determination based on the available information. In certain circumstances, that determination may be delayed. This WAC outlines how the department will respond to new information and how determinations will be communicated to interested parties.

WAC 192-800-005 What is the standard the department will use to determine fraud?

The department will determine if fraud has been committed under WAC 192-500-120 based on a showing of clear, cogent, and convincing evidence.

This WAC establishes the standard of proof for a determination of fraud.

WAC 192-800-010 How will the disqualification periods and penalties be assessed for an employee who is determined to have committed fraud?

- (1) The department will assess disqualification periods and penalties for each fraud determination individually under RCW 50A.04.045(3).*
- (2) All disqualifications and penalties in RCW 50A.04.045(3) are in addition to the required repayment of any benefits paid as a result of fraud.*

- (3) The department will assess the fraud penalties established under RCW 50A.04.045(3) based on the percentage of benefits paid for those weeks in which the fraud occurred or that were paid as a result of fraud. The penalty will not apply to other weeks that may be included in the same eligibility decision.*
- (4) The penalty amount, if not a multiple of one dollar, is rounded up to the next higher dollar.*

Once an employee is determined to have committed fraud, the department will assess penalties. This WAC specifies the penalties that will be assessed and the process in which those penalties will be determined.

WAC 192-800-015 When will the department change an occurrence of fraud?

- (1) Determinations of fraud are appealable. If an employee has been assessed with multiple determinations of fraud and any determination changes due to a redetermination or an appeal, the department will send a new fraud determination showing the corrected disqualification period and penalty under Title 50A RCW.*

Example: *The department issues a determination that an employee has committed a third occurrence of fraud. Through appeal, the second occurrence is overturned. The department will send a redetermination of the third occurrence indicating that it is now the second occurrence of fraud and the appropriate penalties will apply.*

- (2) Although the revised determination in subsection (1) of this section does not restart the appeal period included in the original decision, employees may appeal a change in the penalty amount or length of disqualification.*

When the department overturns a previous determination of fraud, it is necessary to adjust the number of occurrences of fraud accordingly to avoid assessing penalties disproportionate to the new number of fraud occurrences. This WAC establishes how the department will update employee records to reflect accurate information related to fraud.

Chapter 2: Is a Significance Analysis required for these rules?

Rules requiring a significance analysis.

None.

Rules not requiring a significant analysis.

The following rules do not require a Significance Analysis because they either:

1. Adopt, amend, or repeal: a) Any procedure, practice, or requirement relating to any agency hearings; b) Any filing or related process requirement for making application to an agency for a license or permit; or c) Any policy statement pertaining to the consistent internal operations of an agency (RCW 34.05.328(5)(c)(i));
2. Set forth the agency's interpretation of statutory provisions it administers, the violation of which does not subject a person to a penalty or sanction (RCW 34.05.328(5)(c)(i) and (5)(c)(ii));
3. Adopt or incorporate by reference without material change federal statutes or regulations, Washington State statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule (RCW 34.05.328(5)(b)(iii));
4. Only correct typos, address or name changes, or clarify language without changing effect (RCW 34.05.328(5)(b)(iv));
5. That put forth content specifically and explicitly dictated by statute (RCW 34.05.328(5)(b)(v)); or
6. Are not "significant legislative rules" insofar as the proposed rule does not make significant amendments to a policy or regulatory program (RCW 34.05.328(5)(c)(iii)(C)).

WAC Section	Section Title	Exempting reason	Exempting statute
WAC 192-500-110	Week.	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-500-120	Employee fraud.	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-500-130	Nondisclosure.	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-500-140	Willful nondisclosure.	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-500-150	Misrepresentation.	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-500-160	Continued claim.	Interpretive	RCW 34.05.328(5)(c)(ii)

WAC 192-500-170	Self-employed.	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-510-025	What wages are reportable to the department for premium assessment purposes?	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-610-070	Can an employee cancel a claim after it has been submitted to the department?	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-610-075	Can an employer require an employee to take paid time off in place of paid family or medical leave benefits?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-610-080	When should an employee reopen a claim?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-610-085	How should an employee reopen a claim?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-620-005	What is the minimum claim duration?	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-620-010	How should employees request benefit payments?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-620-020	What information will the department request from employees when filing for weekly benefits?	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-620-025	What happens if an employee is being conditionally paid benefits?	Interpretive	RCW 34.05.328(5)(c)(ii)
WAC 192-630-005	What happens if there is a question regarding whether an employee is qualified for benefits?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-630-010	What happens if an interested party does not respond to the department's request for information?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-630-015	How will a determination be made about an employee's eligibility for benefits?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-800-005	What is the standard the department will use to determine fraud?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-800-010	How will the disqualification periods and penalties be assessed for an employee who is determined to have committed fraud?	Procedural	RCW 34.05.328(5)(c)(i)
WAC 192-800-015	When will the department change an occurrence of fraud?	Procedural	RCW 34.05.328(5)(c)(i)

Chapter 3: Clearly state in detail the general goals and specific objectives of the statute that the rules implement.

N/A

Chapter 4: Explain how the department determined that the rules are needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rules.

N/A

Chapter 5: Explain how the department determined that the probable benefits of the rules are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

N/A

Chapter 6: Identify alternative versions of the rule that were considered and explain how the department determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated previously.

N/A

Chapter 7: Conflicts with Federal or State law

None of the rules analyzed in this Significance Analysis conflict with Federal or State law.

Chapter 8: Performance impositions on private vs. public sectors

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

Chapter 9: Conflicts with Federal or State regulatory bodies

None of the rules analyzed in this Significance Analysis conflict with any applicable Federal or State regulatory requirements.

Chapter 10: Coordination with Federal, State, or local laws

There are no other Federal, State, or local laws applicable to the rules analyzed in this Significance Analysis.