

REALTIME FILE

Phase 5, Stakeholder Meeting
Washington Employment Security Department

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>> APRIL: All right. Welcome. My name is April Amundson and we're here to hold the first stakeholder meeting for Phase 5 rulemaking for Paid Family and Medical Leave. Rules in this stage relate to job protection and benefit overpayment as well as other rules that we are going to propose to implement for the administration of our program. You can find these rules by going to b-i-t dot l-y forward slash comment forum. And in the top banner, you can select the info dropdown. In the middle of that list select the link for Phase 5 rules. A couple of lines down you'll see the link for first draft of Phase 5 rules and you can select that to review our current draft that we are speaking to today.

We do have a lot of attendees by phone so thank you very much for attending our meeting. I am a policy analyst for Paid Family and Medical Leave. My name again is April Amundson and I will be your host for today.

I'll go ahead and let my team introduce themselves.

>> MATT: Good morning. This is Matt Buelow, the policy and rules manager for Paid Family and Medical Leave.

>> BRITTANY: And this is Brittany McVicar, policy analyst with Paid Family and Medical Leave.

>> CHRISTINA: Good morning everyone. This is Christina Streuli, and I'm the rules coordinator. And I'm very happy to have you all attending today.

>> APRIL: Perfect. Thank you. Our agenda is to go over our goals, give you rule making updates for our phases, accept public comment. And then we'll go ahead and go over some final thoughts for our next steps.

In our rule making overview, this is one of six phases currently of rulemaking of Washington state family and medical leave. We have chosen to do our rulemaking in phases so we can have some finality for the rules over specific aspects of our program while that program is still being in development for the system and operations.

Phase 2 is final and we were effective early December of 2018.

For Phase 3 around our benefit applications and benefit eligibility, ESD will propose two public meetings, public hearings, in March of this year. And we expect those rules to become final in April.

April . . . Excuse me. Phase 4, continuation of benefits and fraud, we are going to host two public meetings in May of 2019. And we expect those rules to become final in July of this year.

We are here today for Phase 5. And then in April of 2019 we will begin drafting our Phase 6 rules around appeals.

This is a brief timeline of our Phase 5 rulemaking. As you can see, we are still in the early stages of our rulemaking for Phase 5. This is our first of two stakeholder meetings. We'll also have two hearings around these rules in July of 2019. Our goal is that these rules will take effect in September.

We're going to go ahead and start taking comments for our first draft of Phase 5. We do have a court reporter here today so if you do make a comment, please state your name, spell your last

name and if you are affiliated with any company or work group, and speak into your phone so everyone here can hear you.

For those attending in the phone, we will give everyone - excuse me - we will give everyone an opportunity for those to present in the room and make comment, and then you will be unmuted and given the opportunity to make your comment. We also received comments by the chat forum and will be able to receive those as well and in the forum of our WebEx meeting if you have that available.

We do have a first set of rules for comments that are amended existing rules. The first rule is WAC 192-520-010, parties to a collective bargaining agreements. Do we have any comments on that rule in the room?

Do we have any comments on this rule over the phone?

>> Yes. My name is Bijan Jalili, last name J-a-l-i-l-i. And I'm here not on behalf of anyone. A number of our employers do have collective bargaining agreements. And the language "reopened, renegotiated or expired" is proving to be a little difficult to work with without any definitions. The reason for that is "reopened" can be someone saying hey let's talk about one provision of the collective bargaining agreement, renegotiated while there's negotiation happening far in advance of expiration of the contract. So we found that language to be a little broad as it's read and broad as written. You know, we could be - the employer could be starting to collect payments months before any expiration of contract. So that's just one of the concerns that we had.

>> APRIL: Thank you for your comment. Are there any other comments on the phone about this rule?

Okay. Hearing none, we're going to go ahead and accept comments about Rule 192-540-040. How should employers report hours for each calendar quarter? Do we have any comments in the room?

Do we have any comments on the phone? All right. If there are no other comments, we'll go ahead and move forward.

Overpayment of Benefits. WAC 192-640-005 are definitions. Are there any comments in the room about this rule?

Any comments on the phone?

>> Can you hear me?

>> APRIL: I can hear you.

>> Hi. I was trying to make a comment on section 540 and I just don't think my - my phone is picking up.

>> APRIL: Sure. Can you go head and state your name and spell your last name and make your comment.

>> Great. Thanks. Sorry to make you go back. This is Shannon Lawless. I'm with the Ryan Swanson law firm. My comment is on subsection 2, employees on salary. So right now the rule says that an employer should report 40 hours in each week in which a salaried employee worked. And my suggestion would be that that should be changed so that employers have the option to either report 40 hours per week or to report the actual amount of hours worked, for a couple of reasons.

One is that that's the way it's done for purposes of unemployment. And it's burdensome for employers to have to track differently for salaried employees for purposes of the PFMLA and

unemployment.

And the second issue is that there are a lot of salaried employees who work less than 40 hours a week on a regular basis. You could have somebody who's regularly working 20 hours a week, for example. And if the employers are reporting 40 hours a week for those folks, their benefits eligibility is going to be inflated and it really just doesn't accurately reflect what's going on. So that would be my suggestion.

>> APRIL: Thank you for your comment. Can you go ahead and spell your last name, Shannon.

>> L-a-w-l-e-s-s.

>> APRIL: Thank you. Were there any comments over the phone about our definitions for overpayments of benefits?

All right. We'll move on to WAC 192-640-010, How are overpayments assessed on employees? Are there any comments in the room?

Any comments on the phone?

>> This is Daris Freeman, D-a-r-i-s, Freeman with Unum. And my question actually applies not only to this but kind of goes through all the overpayment sections, and that's going to be how do these work for employers with voluntary plans? Because all the references starting with 010 talk about the department determining if there's an overpayment, if it's the department who waives the overpayment.

So I think there just needs to be some clarity on what happens when there's a voluntary plan. Who does that? Can the department intervene? Those kinds of questions come up for me in all of these sections.

>> APRIL: Thank you for your comments. Any other comments on this rule?

WAC 192-640-015, Can the department waive an overpayment?

Are there any comments in the room?

Any comments on the phone?

All right. We'll go ahead and move forward.

WAC 192-640-020, How will equity and good conscience be applied in overpayment waiver decisions? Are there any comments in the room?

Any comments on the phone?

WAC 192-640-025, What happens if the overpayment was made due to an inaccurate employer reporting? Are there any comments in the room?

Any comments on the phone?

>> This is Jamie Bailey, B-a-i-l-e-y, with GE. And just a comment on section 025. Underneath section 1, that sentence is pretty long and lacks some clarity. So could you either clarify what that intention is? Or maybe rewrite the sentence is my recommendation.

>> APRIL: Thank you very much, Jamie. We'll look at that rule. Any other comments on 025?

All right. WAC 192-640-030, What does the department consider "at fault" for an overpayment. Are there any comments in the room?

Any comments on the phone?

>> Yes. This is Jamie Bailey, B-a-i-l-e-y with GE, a comment about letter number (b).

>> APRIL: In which subsection?
>> Actually 030.
>> APRIL: All right.
>> Letter (b).
>> APRIL: Thank you. Go ahead
>> Yeah. The employer paid the employee sick leave, vacation leave or other paid time off after the employee claimed for paid family or medical leave for the same week. Is this section going to change and be revised if SHD 1399 is passed?
>> MATT: Thank you for the question, Jamie. I'm sorry?
>> Go ahead.
>> MATT: This is Matt Buelow. We will take a look at every rule that's either in flight or already been promulgated should any legislation pass that impacts the Paid Family and Medical Leave Program and adjust them as necessary.
So that's a long way to say yes, we will look at this and any other WAC's, where they are in the process, should that legislation pass.
>> Can you comment to the group on the likelihood of it passing and the timing of it?
>> MATT: I cannot.
>> Okay. Thanks.
>> APRIL: Thank you for your comment
>> I had a comment on 030 as well. This is Daris Freeman with Unum again. The intro to this says that at fault is limited to the result of fraud or nondisclosure. Then subsection (2)(a) indicates that hours and wages were reported during the weekly claims but the department paid benefits at the full amount or incorrectly deducted the earnings. That doesn't appear to be fraud or nondisclosure on the part of the employee because they did report hours and wages. So it seems like that subsection doesn't line up with the definition of at fault.
>> APRIL: Thank you.
>> This is Lena with Standard Insurance.
>> APRIL: Can you repeat your name again? I'm sorry. It got cut out. Can you go ahead and repeat your name?
>> Sure. Lena, L-e-n-a. Last name Forrester, F-o-r-r-e-s-t-e-r, Standard Insurance.
>> APRIL: Thank you.
>> And my comment is also on paragraph (2)(b) that paid family and medical leave is not capitalized so it's difficult to determine if you're talking about an employer program or the state Paid Family and Medical Leave Program.

And that comment applies to other places where paid family and medical leave referring to the state plan is not capitalized throughout the other portions of the regulations.

>> APRIL: We'll go ahead and look at those throughout our rules. Thank you very much for your comment.

Are there any other comments on 030? All right. We'll go ahead and move forward.

WAC 192-640-035, Will the employee be notified of rights to appeal the overpayment? Are there any comments in the room?

Any comments on the phone?

Our next set of rules around collections and recovery of overpayments, WAC 192-650-005, How will the department collect overpayments owed by an employee? Are there any comments in the room?

Any comments on the phone?

>> This is Jenny Haykin at Puget Sound Energy, last name H-a-y-k-i-n. And I apologize. I actually had a comment on the last one and I had mute set up in multiple locations and didn't get them all off in time.

In regards to number 1 the department will send employee and all interested parties information about the overpayment assessment, it's not clear who all interested parties are. But I certainly hope that the employer would be considered an interested party.

>> APRIL: Sure. In a previous phase, we do have interested parties defined as employers and employees. So if that does not address, we'll go ahead and review that rule to make sure that that is clear.

>> Great. Thank you.

>> APRIL: Thank you. Are there any other comments on 005?

All right. WAC 192-650-010, How does an employee make a negotiated settlement offer to repay overpayments? Any comments in the room?

Are there any comments on the phone?

WAC 192-650-015, How are payments and offsets applied when an employee has more than one overpayment? Are there any comments in the room?

Any comments on the phone?

Our next set of rules are around employment restoration. WAC 192-700-005, When is an employee entitled to employment restoration after leave ends? Are there any comments in the room?

Any comments on the phone?

>> I've got a question. Can you hear me?

>> APRIL: I can.

>> Okay. This is Lori Welty with FINEOS.

>> APRIL: I'm sorry. I'm going to interrupt you. Can you go head and repeat your name and spell your last name?

>> You bet. Lori, L-o-r-i, Welty, W-e-l-t-y.

>> APRIL: Thank you.

>> And I'm with FINEOS. The question I have about job protection is - basically has to do with what period of time is job protected. So I notice that this part talks about when they are entitled to employment restoration. But I'm wondering for what period of time that extends until.

So I know that there is a section in the regs and statute about different time periods that you can take leave, like 12 weeks of leave and then that can be extended for various reasons. But there's also a waiting period discussed. And I'm not clear on what is the entire period of time subject to this job restoration, so you know, the 12 weeks plus the week of waiting period. So basically just what is the entirety of that job protected period?

>> MATT: Thanks for the question, Lori. This is Matt Buelow. The entirety of the period that someone is on Paid Family and Medical

Leave, including the waiting period, would be job protected as long as job protection applies. We will take a look at that and see whether or not that's something we can make clearer in the rules for you. If you have that question, I'm sure others do as well. So thank you for flagging that.

>> Okay. And to go along with that, I think there's some - it's a little vague as to how many different waiting periods somebody would need to serve throughout the course of the year. And I've gone back and forth on that in some questions and answers, and it's been really helpful. But I want to make sure that that's clear in the regs because while the e-mail exchanges I've had have been helpful, I don't know that it's clear in the regs that you would only need to observe one waiting period per year regardless.

And I only bring that up because it does change the amount of job protected leave if there's multiple waiting periods that would be job protected.

>> MATT: That's great. Thanks for flagging that.

>> APRIL: All right. We have another rule for employment restoration, WAC 192-700-010, Can an employer deny employment restoration. Are there any comments in the room?

>> Hi. This is Daris Freeman. I had another comment on 005.

APRIL: Okay.

>> Sorry. I thought you were going to ask for other comments. My bad. There still is some ambiguity on this reference to RCW 025(6)(a) that talks about the requirements for job restoration which is the 12 months, 1250 and 50 employees. But I think there's still some ambiguity about employee, how to count those 50 employees. Are those - is that going to use the definition of employee and employment which would be 50 in the - localized there in the state of Washington? Is that 50 total? Or is that similar to the FMLA where it's 50 at a work site?

>> APRIL: We'll go ahead and look at that rule and see if we can't clear it up on the count to make it more clear.

>> Appreciate it.

>> APRIL: Are there any other comments on 005? I apologize for not asking earlier.

>> This is Shannon Lawless again, L-a-w-l-e-s-s. And this comment is really I guess about what is not in the rule as compared to what is in the rule.

I would really hope that the department would address the situation of when FMLA and PFMLA don't precisely line up. So I think there are lots of instances where that can happen. For example, if there's a voluntary plan and so job protection starts earlier, at nine months and 965 hours and some of the other qualifying conditions and they take their 12 weeks of Paid Family and Medical Leave during that - you know, after nine months. And then, you know, FMLA kicks in. That person could then potentially be entitled to 24 job protected weeks off during a single year period. And that's just one example.

So I hope the Department would write a rule explaining how PFMLA and FMLA interact, and particularly if job restoration applications take into account those situations where the two don't

line up perfectly.

>> APRIL: Thank you for your comment. Are there any other comments on 005?

Hearing none, we'll go ahead and go to WAC 192-700-010, Can an employer deny employment restoration? Are there any comments in the room?

Any comments on the phone?

We do have one practice and procedure rule, WAC 192-800-020, How will the department differentiate between employers? Are there any comments in the room?

Any comments on the phone?

>> This is Shannon Lawless again. And I have a question about this, which is how is the department going to review whether an entity maybe should be considered with other entities, you know. I don't know if you can answer that here. Or if not, it would be helpful to have some clarification so employers can know when to expect the Department might look at them and consider them to be multiple entities together.

>> MATT: Thank you for the question, Shannon. This is Matt Buelow. Yeah. We won't be able to address that in today's hearing. But we'll take the comment, go back and see what we can do to clarify so employers know what we're looking at. Appreciate the comments.

>> Thanks.

>> APRIL: Are there any other comments about this rule?

All right. We have reached the end of our current first draft of Phase 5 rules. Now is the opportunity to speak to any rules that we may have missed for this phase, if there are any rules that should be included that we have not discussed or any rules that should be removed from this phase.

In the room, are there any final comments or additional rules that you may want to give us thought to today or present if we missed anything?

How about on the phone? Are there any thoughts to any rules that we might have missed today?

All right. Well, thank you again for your attendance for our Paid Family and Medical Leave rulemaking. We are at the department truly appreciate any comments and consider every statement and have made its previous rules based on public feedback. So we really do value your opinions.

Our next steps for Phase 5 Draft 2 will be publicly posted online March 25th, 2019. Our second stakeholder meeting will be held on March 27th, 2019. And we will host two public hearings, one here and one on the east side of Washington, both in July of 2019. Please stay tuned for dates and locations of those meetings.

If there were any unanswered questions or new questions or comments that you may have thought of after this meeting is concluded, you can contact us at paidleave@esd.wa.gov. You can also contact us on any forum we have here on this slide, our website, our email. You can also call us. We really appreciate your being connected to our rulemaking process.

You can also stay in contact with our rulemaking efforts

and any program information on our website. You can sign up for our Paid Family and Medical Leave listserv and periodically receive information about our program.

This concludes our meeting. Thank you very much for attending.

[End of meeting]