

PAID FAMILY & MEDICAL LEAVE PUBLIC RULES HEARING

9:03 A.M. - 9:34 A.M.

Tuesday, November 26, 2019

640 Woodland Square Loop SE

Lacey, Washington

LORRAINE M. MILLAY, CCR/RPR

1 APPEARANCES:

2

3 POLICY ANALYST: MS. BRITTANY MCVICAR
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12 RULES COORDINATOR: MS. CHRISTINA STREULI
13

14 ALSO PRESENT: BARBARA LEMBER
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1 BE IT REMEMBERED that on Tuesday, November 26,
2 2019, at 9:03 a.m. at 640 Woodland Square Loop SE, Lacey,
3 Washington, before LORRAINE M. MILLAY, Washington Certified
4 Court Reporter;

5 WHEREUPON, the following proceedings were had,
6 to wit:

7 * * * * *

8 MS. STREULI: Good morning. Pursuant to the
9 authority given under Washington State Law RCW 50A.05.060
10 Chapter 42.30 RCW of the Open Public Meetings Act and
11 Chapter 34.05 of the Administrative Procedures Act, this
12 hearing is hereby convened.

13 For the record, this hearing is beginning at 9:03 on
14 November 26, 2019, in the Park Place Conference Room at 640
15 Woodland Square Loop in Lacey, Washington.

16 This hearing is convened to consider testimony
17 concerning the Paid Family & Medical Leave rule-making.
18 At a high level this rule-making incorporates changes to
19 prior rules and creates new rules the Department sees as
20 necessary for proper implementation of the Paid Family &
21 Medical Leave Program.

22 The Department is always working to refine and
23 improve the program and this rule-making is one way to
24 provide clear guidance to the community.

25 Notice of this hearing was filed with the Washington

1 State Register on October 15, 2019, as WSR No. 19-21-095.

2 It was sent to interested parties and it was posted online.

3 My name is Christina Streuli and I am the Rules
4 Coordinator for the Paid Family & Medical Leave Division of
5 the Employment Security Department. I represent
6 Commissioner Suzi Levine as the hearing officer presiding
7 at this public rule-making hearing.

8 We have another staff member with us today from Paid
9 Family & Medical Leaves Policy Team and I will allow her to
10 introduce herself by name and title.

11 MS. MCVICAR: Thank you, Christina. My name is
12 Brittany McVicar and I'm a policy analyst with the Paid
13 Family & Medical Leave.

14 MS. STREULI: Please be advised that this
15 hearing is being transcribed by a court reporter and the
16 transcript will become part of the official rule-making
17 file.

18 To facilitate this transcription, we ask that you
19 please state and spell your name before your testimony.
20 Please also note that this hearing is held to consider
21 comments on the proposed rules.

22 Because of the formal nature of the hearing we are
23 unlikely to answer any questions you may ask. If you do
24 pose a question, I will probably ask you to rephrase it as
25 if it is a comment.

1 Questions can be e-mailed to us at
2 paidleave@esd.wa.gov. So again that's paidleave, all one
3 word, @esd.wa.gov. If you e-mail us there our customer
4 support staff will always respond promptly.

5 A concise explanatory statement of the Agency's
6 reasons for adoption of the rule, including a summary and
7 response to all comments we receive after the publication
8 of the proposed rule, will be placed into the permanent
9 rule-making file and posted online. This document will
10 also be sent to all interested parties who have signed up
11 to receive our e-mails.

12 We'll begin today with Brittany McVicar who will
13 provide a brief explanation of the proposed rules.

14 MS. MCVICAR: Thank you, Christina. The Paid
15 Family & Medical Leave Act was passed by the Washington
16 State Legislature in 2017.

17 January 1st of 2019 employers could start assessing
18 premiums on employee wages. Applications for benefits will
19 be accepted in 2020.

20 This rule-making is part of the effort to prepare the
21 program to function properly and to provide information for
22 the community.

23 This formal public hearing covers the topics of
24 assessing and collecting premiums, voluntary plans,
25 penalties and audits, small business assistance, dispute

1 resolution, claim determinations, overpayment of benefits,
2 collections and recovery of overpayments, employment
3 restoration, and certain public disclosure and privacy
4 requirements for the program.

5 I encourage you all to read the text of the rules for
6 a more robust understanding. The draft rules are intended
7 to interpret and clarify Title 50A of the Revised Code of
8 Washington.

9 Thank you for your interest and participation in our
10 rule-making efforts to implement this important program.
11 We look forward to hearing your comments today.

12 MS. STREULI: Thank you, Brittany. We will now
13 open for testimony from anyone in attendance. We don't
14 have very many people joining us in the room, so I'm going
15 to go ahead and open the room and the phone at the same
16 time. So whenever you're ready we would love to have your
17 comment.

18 MS. MENSIK: Hello.

19 MS. STREULI: Good morning. Please go ahead.

20 MS. MENSIK: Hi. My name is Amy Mensik. I'm an
21 attorney with Witherspoon Kelley. I'm located in Spokane,
22 Washington.

23 A brief background. We represent employers regarding
24 navigating various employment law changes, including
25 helping them, advising them to comply with those changes,

1 so businesses, nonprofits. I've been practicing in this
2 area for about 11 years now.

3 I just have a couple comments regarding in particular
4 proposed WAC 192-700-020. And before I go further, I
5 forgot to spell my last name. My first name is A-M-Y. My
6 last name is Mensik, M-E-N-S-I-K.

7 And as I was stating, I'd like to make comments on
8 proposed WAC 192-700-020 regarding continuation of
9 benefits. First off, thank you for your tremendous effort
10 in implementing the Paid Leave Program.

11 I know no matter, you know, what side you might view
12 this, you've implemented tremendous effort in implementing
13 this huge program, so thank you for that.

14 A few comments, though. Regarding the proposing WAC
15 I mentioned, RCW 50A.35.020 says that benefits continuation
16 is only required if, quote, required by the Federal Family
17 Medical Leave Act.

18 However, we believe that the proposed language for
19 WAC 700-020 that said benefits continuation will be
20 required if eligibility requirements are met for the FMLA.

21 We believe that is contrary to the explicit language
22 of the RCW and can actually lead to situations requiring
23 benefits continuation that are not, quote, required by the
24 FMLA as the statutory language directs.

25 Several comments here on the online open forum. I've

1 already pointed out situations, but one situation I'd like
2 to point out in particular, for example, our understanding
3 from the interpretation of this proposed WAC, including
4 discussions with ESD have indicated that, for instance,
5 even if an employee has first sought FMLA and exhausted
6 their 12 weeks of FMLA and then delayed their application
7 for Paid Family Leave benefits, in other words they seek
8 FMLA, they exhaust that and then apply for 12 weeks of
9 PFML, they would actually be entitled to continued
10 healthcare benefits during PFML as well, so that would be
11 close to 24 weeks or more of benefits continuation.

12 In our view that does not comply with the statute
13 because under FMLA explicit regulations state that when an
14 employee exhausts FMLA the employer's obligation to
15 continue benefits ceases.

16 So under our view the rule would be inconsistent to
17 the extent that employees would have -- excuse me,
18 employers would have to continue benefits during that 12
19 weeks that they filed for PFML benefits after they've
20 already exhausted FMLA leave.

21 I'll provide more details in my actual written
22 commentary to the online forum, and I know it's hard to
23 take down details in terms of statutory citations to the
24 CFR.

25 Besides the legalese that is inconsistent with the

1 actual written rules, we'd like to point out the huge
2 economic cost to employers, and not only the huge economic
3 cost but the surprising added cost of coming very late in
4 the game before this is implemented.

5 Per the RCW, as I said, employers have a reasonable
6 expectation that they would not have to continue benefits
7 during PFML particularly in a situation where the employee
8 attempts to stack FMLA and PFML. Now there is a process
9 that they will now have to pay potentially thousands more
10 in premiums.

11 Like I said, this is -- we all agree that Paid Family
12 Leave is a very important benefit, but in addition to the
13 very already surprising fact that employees can simply
14 stack FMLA and get up to potentially 30 weeks of protected
15 leave, the added cost of now having to continue benefits
16 during that entire period could be thousands of dollars has
17 been not only surprising in and of itself because of the
18 statutory language, but the fact that we're now in November
19 at this point and employers have already been planning for
20 years to try to control operational costs and this is a
21 very surprising change late in the game.

22 Lastly, I'd just like to suggest it's unclear to me
23 when comments close on this proposed rule. Currently the
24 open town hall does not state that there's no deadline set,
25 yet elsewhere, I had to dig for it, suggests that comments

1 close today.

2 I respectfully request that, given that the only
3 hearing on this rule is actually taking place today, that
4 there be a little bit extension for written comments to be
5 submitted.

6 Thank you so much for your time again and your
7 tremendous work on this effort.

8 MS. STREULI: Thank you, Amy, for those
9 comments, and thank you for spelling your name. I just
10 want to make sure I captured everything accurately as we go
11 through this.

12 So what I'm hearing from you is sort of two comments
13 about the benefit continuation, the first being the
14 stacking of protected leave if FMLA has been exhausted, and
15 then also the economic cost with this rule coming
16 relatively late in the game. Is that accurate?

17 MS. MENSİK: Yes. About the stacking, we
18 realize now that, as you may be aware, that for decades now
19 almost under the Washington Leave Act which is being
20 replaced by the Paid Family Leave Act employers could run
21 FMLA, Federal FMLA and WSLA concurrently.

22 Because of how Paid Family Leave was drafted, we're
23 not sure if there was an oversight, an employee could
24 essentially stack leave simply by delaying their
25 application of Paid Family Leave until after FMLA is

1 exhausted.

2 We're aware of that fact now that has been understood
3 so we know that, okay, it looks like they've stacked,
4 that's not really my concern here.

5 My concern here is that the additional, because of
6 the proposed rule I mentioned, since employers will now
7 have to continue paying healthcare benefits in that
8 additional stacked period, that was something we were not
9 expecting even though we had kind of come to terms with the
10 stacking elements but not having to pay the additional
11 healthcare benefits during that stacked period, if that
12 makes sense.

13 MS. STREULI: Okay. That makes perfect sense.
14 So I'll take down concerns about the eligibility being
15 allowed under the statute versus eligibility for FMLA
16 specifically in the rule maybe not lining up perfectly.

17 MS. MENSİK: Sure. And like I said, I'll also
18 be submitting written comments via the online town hall and
19 via e-mail that will have more specific citations that ESD
20 could refer to. So thank you again.

21 MS. STREULI: Okay. Thank you. And the
22 deadline for submission of written comments, and I
23 apologize if that's not online, is 5 p.m. today, but we'll
24 take your comment into consideration about a possible
25 extension.

1 MS. MENSİK: Thank you.

2 MS. STREULI: We have a comment in the room.

3 MS. BOCK: Good morning. My name is Candace
4 Bock. I'm representing the Association of Washington
5 Cities.

6 I would like to actually echo a lot of what the
7 previous speaker outlined starting with our appreciation
8 for the hard work of the team here at ESD who is tasked
9 with implementing this entirely new program.

10 UNKNOWN SPEAKER: Is it possible for her to get
11 closer to the microphone for those who are on the phone?

12 MS. STREULI: She's scooting.

13 MS. BOCK: I'm scooting and I'm hunching right
14 into the microphone now. Thanks for that. So again,
15 Candace Bock representing the Association of Washington
16 Cities.

17 Again echoing perhaps many of the things that the
18 earlier speaker said, including the note about the comment
19 period appearing to remain open online.

20 I was checking that just before coming here and
21 thought, oh, there's no deadline, we've got time. So I
22 would appreciate your consideration of perhaps giving us a
23 few more days, especially with the holiday coming.

24 I again want to express our concerns at AWC on
25 behalf of the cities and the state with the interpretation

1 of RCW 50A.35.020 as it's being interpreted in the proposed
2 WAC 192-700-020.

3 We do believe that this is contrary to the plain
4 reading of the RCW which does state that continuation of
5 benefits will occur if required by the Federal Family
6 Medical Leave Act.

7 As you heard from the previous speaker, it appears
8 that under the proposed WAC those benefits would continue
9 even if an employee has exhausted their FMLA leave time and
10 are stacking PFML leave on top of it. We do believe that
11 this creates a significant cost and an undue burden on
12 employers.

13 The typical medical benefit cost that city employers
14 are providing ranges from about \$1,000 a month for an
15 individual employee to \$2,400 a month for a family.

16 If they're expected to continue those benefits for up
17 to, in a worst case scenario, 30 weeks that's a significant
18 unanticipated cost for particularly the city employers that
19 I represent. Again as the previous speaker indicated, this
20 was not something that employers were expecting.

21 Again based on the plain reading we believe in
22 50A.35.020 that it would continue to be consistent with our
23 current requirement to continue benefits during FMLA
24 authorized leave and not once those benefits are expired.

25 So we would ask that the Department reconsider that

1 interpretation and match that up with the RCW. Thank you.

2 THE REPORTER: Can you spell your name?

3 MS. BOCK: Candace Bock. Last name is B-O-C-K.

4 THE REPORTER: Thank you.

5 MS. STREULI: Thank you so much for that. Just
6 to reiterate that, there's another comment and we have
7 received several in our portal as well as another commenter
8 said about benefit continuation needing to be only when the
9 person is on approved FMLA. So thank you for that. We
10 have another comment in the room.

11 MS. MAREK: Hi. My name is Angela Marek,
12 M-A-R-E-K. I'm with the Washington Association of School
13 Business Officials. We support K-12 education business
14 offices, and I would like to echo some of the same
15 comments.

16 Our concerns are the continuation of benefits, the
17 stacking of them. In our case, as of on January 1, 2020,
18 we will also be introducing the new sub, our school
19 employees benefits for medical for all K-12 education, and
20 in that in the past with FMLA if the employee's portion was
21 not paid we could stop benefits.

22 Here we have a situation where with the new sub we
23 are required to pay the monthly premiums that come in
24 regardless and then try and collect from the employee if
25 they return. This just stacks additional cost to the

1 districts on top of that. We're looking at additional
2 premiums.

3 Our question is, in this case if they're not getting
4 a paycheck who is going to be ultimately responsible for
5 the employee's portion of the premiums for Paid Family &
6 Medical Leave, and then we get into the medical coverage
7 and we've already been told by sub or Healthcare Authority
8 that we will have to pay those premiums and so we have
9 grave concerns on that.

10 Again, I echo the same sentiments that the previous
11 two speakers had, so there's no need to go over that again.
12 And then the child support notification portion of it, we
13 do have one concern on that. Our concern is and it clearly
14 states that the Paid Family & Medical Leave will send in
15 their portion of it and stuff.

16 In the school districts we are required to give
17 notification also, and our concern is where is that
18 ultimate responsibility going to lie. Thank you.

19 MS. STREULI: Can you clarify responsibility for
20 which part of the child support?

21 MS. MAREK: The notification.

22 MS. STREULI: Notification, okay. Thank you so
23 much. And I will also take down that you reiterated the
24 comments about the health benefit continuation.

25 We are open for other comments on the phone or in the

1 room.

2 MS. BRONSON: Hi. This is Allysa Bronson with
3 the City of Bellingham, and my name is spelled A-L-L-Y-S-A,
4 last name Bronson, B-R-O-N-S-O-N.

5 And I'm the benefit and payroll manager for the city,
6 and I would like to add to the previous comments about the
7 concern about the continuation of the healthcare and just
8 add another consideration for that is that it doesn't seem
9 as if the ESD either understands or is taking into
10 consideration that an employee can affirmatively decline
11 currently their FMLA under the Ninth Circuit Escriba Ruling
12 and if they decline their benefits or decline FMLA we're
13 not required to continue benefits.

14 So when it previously stated if required, that is
15 very different from if eligible. So under this same
16 scenario if an employee were to decline their FMLA and take
17 potentially up to 18 weeks of Washington Paid Family &
18 Medical Leave then we would also have to continue the
19 benefits for 12 additional weeks and that provides
20 additional undue hardship to the city and the budget and
21 ultimately the taxpayers are the ones who are paying for
22 those benefits.

23 And you probably are thinking why would an employee
24 affirmatively decline their FMLA, and we have had that
25 happen because there are certain other job protections

1 under city policy, as well as while using leave there is
2 certain job protection as our attorneys have deemed that,
3 so I just wanted to tag on and add that additional
4 component.

5 MS. STREULI: Thank you very much for that. It
6 sounds like there's concerns about an employee who can deny
7 FMLA under the court ruling and how that will interact with
8 the continuation of benefits. Is that accurate?

9 MS. BRONSON: Yes, that's correct.

10 MS. STREULI: Thank you very much for bringing
11 that forward.

12 MS. BRONSON: I have one additional concern.
13 May I bring that up at this time?

14 MS. STREULI: Absolutely. Go for it.

15 MS. BRONSON: Okay. So we have a concern about
16 granting intermittent leave for baby bonding where under
17 the Federal FMLA it is at the employer's discretion whether
18 or not intermittent leave is allowed for baby bonding.

19 And while we try to accommodate that as much as
20 possible, there are times where that creates an operational
21 hardship where under the State Paid Leave we can't have
22 that be at an employer's discretion.

23 So I just want to kind of share a couple examples of
24 that is you could have an employee that could be taking two
25 days per week for up to 30 weeks and where that can really

1 be critical to operations of the city is where they might
2 be working at the waste water treatment plant or more in
3 fire and police dispatch, and so that's making it a real
4 challenge for us and how we're going to be providing
5 coverage for those critical positions where we're not as
6 able to provide that flexibility for employees.

7 MS. STREULI: Thank you for that as well.
8 That's very helpful about baby bonding and intermittent
9 leave.

10 MS. BRONSON: Thank you.

11 MS. STREULI: Any other comments on the phone?

12 MS. LAWLESS: This is Shannon Lawless,
13 S-H-A-N-N-O-N L-A-W-L-E-S-S. I'm an attorney with the Law
14 Firm of Ryan Swanson and my comments are on WAC 192-500-185
15 regarding the waiting period.

16 Overall, I have some concerns about the Department's
17 manner of calculating the waiting period which I don't
18 think really squares with RCW 50A.15.020(1) which talks
19 about a waiting period of seven consecutive calendar days.

20 That said, I realize on November 26th that probably
21 isn't going to change before this program rolls out, so
22 putting that aside a couple operational pieces that would
23 be really helpful.

24 One is if we could get clarification of whether
25 voluntary plan employers are required to use this

1 definition of the waiting period that's set forth in
2 WAC 192-500-185.

3 Most voluntary plan employers I know wrote their
4 plans assuming that seven consecutive calendar days meant
5 seven consecutive calendar days, and now it's possible that
6 employees if they were under the state plan will actually
7 get benefits much sooner, they could get benefits after
8 only taking actually one day of qualifying leave.

9 I am concerned about whether voluntary plan employers
10 are going to be at risk if they use seven calendar days
11 waiting period and we need clarification on that.

12 The second comment is about Subsection 6 which talks
13 about -- it states the waiting period does not apply to
14 family leave related to either a childbirth or a placement
15 of a child, I guess the word "child" is in there a couple
16 of times, so you'd probably eliminate one of them.

17 But beyond that I don't think that the statute in
18 RCW 50A.15.020 limits the no waiting period for birth or
19 placement to situations of family leave and if it is
20 truly -- which I understand it to be the Department
21 sometimes to require a medical period for birthing
22 mothers -- excuse me, a waiting period for birthing mothers
23 who would presumably be taking their medical leave at the
24 beginning and then take their bonding leave, so a full 16
25 weeks of leave, I think the Department should make that

1 explicit because I think that Subsection 6 has got that
2 word "family" in it, I don't think that most people have
3 realized that that means that a birthing mother is actually
4 going to have a waiting period during that first week after
5 she gives birth.

6 MS. MCVICAR: Shannon, thank you for that
7 comment. I want to make sure -- this is Brittany. I want
8 to make sure we've captured that.

9 So you are referring to Subsection 6 specifically,
10 that the reference to family leave might cause some
11 confusion where people think that that's all family leave,
12 and you're saying that some clarification there to show
13 that, correct, that family leave that would award no
14 waiting period is only for the bonding or placement of
15 child and that medical leave of giving birth would require
16 that waiting week; is that correct?

17 MS. LAWLESS: Yes, that's correct.

18 MS. MCVICAR: Okay.

19 MS. STREULI: Thank you, Brittany. And just to
20 clarify, I also took down your concerns about voluntary
21 plan employers and how they might be subject to that
22 definition of waiting week as well.

23 MS. LAWLESS: Thank you.

24 MS. STREULI: Thank you. Other comments?

25 (Pause in proceedings.)

1 MS. STREULI: We are open for testimony from
2 anyone either in the room or on the phone.

3 MS. MCALEENAN: Hi there. This is Mellani
4 McAleenan from the Washington State Association of
5 Counties. Mellani is M-E-L-L-A-N-I. McAleenan is
6 M-C-A-L-E-E-N-A-N.

7 I don't think I need to repeat what has been said,
8 but to pile on I wanted to offer our concern as well with
9 the benefits issues that has been previously raised by
10 other public employers such as the Association of
11 Washington Cities and the attorney who spoke first.

12 We are very concerned about what we perceive to be
13 more or less a surprise cost that we weren't anticipating
14 in this late hour.

15 MS. STREULI: Thank you very much, Mellani.
16 I'll take down that comment as well about the benefit
17 continuation having a cost and coming in November.

18 MS. MCALEENAN: Thank you.

19 MS. STREULI: Other comments from those on the
20 phone or in the room?

21 (Pause in proceedings.)

22 MS. STREULI: Is there any further testimony
23 from anyone either on the phone or in person before I
24 conclude this hearing?

25 (Pause in proceedings.)

1 MS. STREULI: Before I conclude this hearing I'd
2 like to say on a personal note that this is the last
3 proposed rule-making that's on deck for Paid Family &
4 Medical Leave. There of course can always be more, but
5 there are no other proposals under consideration.

6 So as we come to the end of this year, I just want to
7 thank everybody for their commitment to the program, for
8 showing up, for submitting comments, for being involved,
9 and for being involved in such a thoughtful manner.

10 It has definitely helped us produce a better program.
11 We have considered thoughtfully every comment we've
12 received and the program would not be as good as it's going
13 to be if it weren't for all of you, so I really appreciate
14 that.

15 I know that we didn't always decide the way everybody
16 wanted, but we did consider your feedback and I'm very
17 grateful to have had it. So in conclusion, this hearing
18 was convened to consider testimony on Paid Family & Medical
19 Leave rule-making.

20 All oral testimony presented at this hearing and
21 written submissions will become part of the official
22 record. The deadline for submission of written comments is
23 5 p.m. November 26, 2019.

24 You can submit written comments online by entering
25 bit.ly/commentforum, all one word, into your browser

1 window. Comments must be received by that deadline to be
2 considered as part of this rule-making.

3 A final decision regarding adoption of this proposed
4 rule-making will be made after all testimony and written
5 comments have been fully considered with a target date of
6 December 3, 2019.

7 On behalf of Commissioner Suzi Levine, I personally
8 thank you all for participating in this hearing. This
9 hearing is adjourned at 9:34 on November 26, 2019. Thank
10 you.

11 (Hearing concluded.)
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C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF PIERCE)

I, LORRAINE M. MILLAY, the undersigned Registered Professional Reporter and Washington Certified Court Reporter, hereby certify that the foregoing Hearing upon oral examination was taken stenographically before me on the 26th day of November, 2019, and transcribed under my direction;

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of December, 2019.

\S\LORRAINE M. MILLAY

Lorraine M. Millay, CSR#2374
NCRA Registered Professional Reporter
Washington Certified Court Reporter
License expires October 20, 2020