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
APPEARANCES:

POLICY ANALYST: MS. BRITTANY MCVICAR
Employment Security Department
Policy Analyst
Paid Family & Medical Leave
640 Woodland Square Loop SE
Lacey, Washington 98507-9046
360-515-6745
bmcvicar@esd.wa.gov

RULES COORDINATOR: MS. CHRISTINA STREULI

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

WHEREUPON, the following proceedings were had, to wit:

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

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

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

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

Notice of this hearing was filed with the Washington
State Register on October 15, 2019, as WSR No. 19-21-095.
It was sent to interested parties and it was posted online.

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

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

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

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

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

Because of the formal nature of the hearing we are
unlikely to answer any questions you may ask. If you do
pose a question, I will probably ask you to rephrase it as
if it is a comment.
Questions can be e-mailed to us at paidleave@esd.wa.gov. So again that's paidleave, all one word, @esd.wa.gov. If you e-mail us there our customer support staff will always respond promptly.

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

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

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

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

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

This formal public hearing covers the topics of assessing and collecting premiums, voluntary plans, penalties and audits, small business assistance, dispute
resolution, claim determinations, overpayment of benefits, collections and recovery of overpayments, employment restoration, and certain public disclosure and privacy requirements for the program.

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

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

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

MS. MENSIK: Hello.

MS. STREULI: Good morning. Please go ahead.

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

A brief background. We represent employers regarding navigating various employment law changes, including helping them, advising them to comply with those changes,
so businesses, nonprofits. I've been practicing in this area for about 11 years now.

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

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

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

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

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

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

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

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

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

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

Besides the legalese that is inconsistent with the
actual written rules, we'd like to point out the huge
economic cost to employers, and not only the huge economic
cost but the surprising added cost of coming very late in
the game before this is implemented.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. STREULI: She's scooting.

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

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

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

I again want to express our concerns at AWC on behalf of the cities and the state with the interpretation
of RCW 50A.35.020 as it's being interpreted in the proposed WAC 192-700-020.

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

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

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

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

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

So we would ask that the Department reconsider that
interpretation and match that up with the RCW. Thank you.

THE REPORTER: Can you spell your name?

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

THE REPORTER: Thank you.

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

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

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

Here we have a situation where with the new sub we are required to pay the monthly premiums that come in regardless and then try and collect from the employee if they return. This just stacks additional cost to the
districts on top of that. We're looking at additional premiums.

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

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

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

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

MS. MAREK: The notification.

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

We are open for other comments on the phone or in the
room.

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

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

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

And you probably are thinking why would an employee affirmatively decline their FMLA, and we have had that happen because there are certain other job protections
under city policy, as well as while using leave there is
certain job protection as our attorneys have deemed that,
so I just wanted to tag on and add that additional
component.

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

MS. BRONSON: Yes, that's correct.

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

MS. BRONSON: I have one additional concern.

May I bring that up at this time?

MS. STREULI: Absolutely. Go for it.

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

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

So I just want to kind of share a couple examples of
that is you could have an employee that could be taking two
days per week for up to 30 weeks and where that can really
be critical to operations of the city is where they might be working at the waste water treatment plant or more in fire and police dispatch, and so that's making it a real challenge for us and how we're going to be providing coverage for those critical positions where we're not as able to provide that flexibility for employees.

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

MS. BRONSON: Thank you.

MS. STREULI: Any other comments on the phone?

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

Overall, I have some concerns about the Department's manner of calculating the waiting period which I don't think really squares with RCW 50A.15.020(1) which talks about a waiting period of seven consecutive calendar days. That said, I realize on November 26th that probably isn't going to change before this program rolls out, so putting that aside a couple operational pieces that would be really helpful.

One is if we could get clarification of whether voluntary plan employers are required to use this
definition of the waiting period that's set forth in WAC 192-500-185.

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

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

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

But beyond that I don't think that the statute in RCW 50A.15.020 limits the no waiting period for birth or placement to situations of family leave and if it is truly -- which I understand it to be the Department sometimes to require a medical period for birthing mothers -- excuse me, a waiting period for birthing mothers who would presumably be taking their medical leave at the beginning and then take their bonding leave, so a full 16 weeks of leave, I think the Department should make that
explicit because I think that Subsection 6 has got that word "family" in it, I don't think that most people have realized that that means that a birthing mother is actually going to have a waiting period during that first week after she gives birth.

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

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

MS. LAWLESS: Yes, that's correct.

MS. MCVICAR: Okay.

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

MS. LAWLESS: Thank you.

MS. STREULI: Thank you. Other comments?

(Pause in proceedings.)
MS. STREULI: We are open for testimony from anyone either in the room or on the phone.

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

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

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

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

MS. MCALEENAN: Thank you.

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

(Pause in proceedings.)

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

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

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

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

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

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

You can submit written comments online by entering bit.ly/commentforum, all one word, into your browser
Comments must be received by that deadline to be considered as part of this rule-making.

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

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

(Hearing concluded.)
CERTIFICATE

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