

Concise Explanatory Statement

Paid Family and Medical Leave

Phase Three

Chapter 192-500 WAC • Chapter 192-600 • Chapter 192-600 • WAC 192-610 • WAC 192-800

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I. Introduction

In 2017, the Washington State Legislature passed Substitute Senate Bill 5975 relating to Paid Family and Medical Leave. The bill was signed on July 5, 2017 and codified as Title 50A RCW.

The Employment Security Department (the department) is developing rules to implement, clarify, and enforce this law. Multiple phases of rulemaking will occur around this law. This document will serve as the Concise Explanatory Statement (CES) for Phase Three of rulemaking, which covers the following topics:

- Definitions
- Initial Application for Benefits
- Assessing and Collecting Premiums
- Employee Notice to Employer
- Practice and Procedure

Practice and Procedure: Four informal public meetings were held to gather public comment on draft rules. Informal feedback was accepted on the draft rules through our online portal, by phone, in-person, and by email until the filing of the CR102. After the CR102 was filed, formal comments were accepted until 5pm on March 18, 2019. The formal CR102 hearings were held on March 13, 2019 in Lacey, WA, and on March 18, 2019 in Spokane, WA.

II. Rules Summary and Agency Reasons for Adoption

WACs 192-500-050 through 192-500-100 establish definitions that apply only the PFML program.

WAC 192-500-050 De facto parent. *A “de facto parent” is limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in a child's life where the natural or legal parent consented to and fostered the parent-like relationship.*

Title 50A RCW refers to a “de facto parent” as an individual who is eligible to take family leave, but does not provide a definition of the terminology. To properly identify such individuals, the department determined that a definition was necessary.

WAC 192-500-060 In loco parentis. *An individual stands “in loco parentis” when the individual acts in place of a parent, intentionally takes over parental duties, and is responsible for exercising day-to-day care and control fulfilling the child’s physical and psychological needs.*

Title 50A RCW refers to an individual who stands “in loco parentis” as an individual who is eligible to take family leave, but does not provide a definition of the terminology. To properly identify such individuals, the department determined that a definition was necessary.

WAC 192-500-070 Claim year.

(1) *“Claim year” is the fifty-two week period beginning Sunday of the week of:*

(a) *The date of the birth or placement of a child; or*

(b) *The date of the filing of a complete and timely application for all other qualifying events.*

(2) *For applications that are backdated, the claim year is the fifty-two week period beginning Sunday of the week to which the application was backdated.*

(3) *An employee may only have one valid claim year at a time.*

The department determined that the establishment of a “claim year” was necessary to properly implement Title 50A RCW by creating a precise time period during which an initial claim for benefits is active. The claim year will be used to determine the time frame in which an employee can use an entitlement.

WAC 192-500-080 Qualifying event.

A “qualifying event” is:

(1) *For family leave, events described in RCW 50A.04.010(9).*

(2) *For medical leave, events described in RCW 50A.04.010(14).*

Many department rules refer to “qualifying events.” This specifies the meaning of the term where the context so dictates.

WAC 192-500-090 Health care provider.

“Health care provider” means:

- (1) A physician or an osteopathic physician who is licensed to practice medicine or surgery, as appropriate, by the state in which the physician practices;*
- (2) Nurse practitioners, nurse-midwives, midwives, clinical social workers, physician assistants, podiatrists, dentists, clinical psychologists, optometrists, and physical therapists licensed to practice under state law and who are performing within the scope of their practice as defined under state law by the state in which they practice;*
- (3) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of the health care provider’s practice as defined under such law; or*
- (4) Any other provider permitted to certify the existence of a serious health condition under the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6, as it existed on October 19, 2017).*

In many cases, Title 50A RCW requires an employee to submit documentation from a health care provider to establish a serious health condition. While statute does offer a definition for the term, the department determined that statutory language was insufficient and additional clarifying language was necessary to establish who will be considered a “health care provider.”

WAC 192-500-100 Salaried employee.

- (1) A “salaried employee” is any employee who receives a fixed periodic compensation from an employer to be paid for hours worked full-time as defined by the employer.*
- (2) Employees that work less than full-time as defined by the employer are not considered a salaried employee for the purposes of Title 50A RCW.*

Statute requires employers to report 40 hours for “salaried employees.” To offer additional clarity to employers, many who have “part-time salaried employees,” the department determined that a definition of this term was necessary to ensure proper reporting.

WAC 192-510-085 How will the department assess premiums when a conditional premium waiver expires?

- (1) If an employee who is exempt from premiums under a conditional waiver works 820 hours in any period of four consecutive quarters, the waiver will be determined to have expired.*
- (2) Upon expiration of a conditional premium waiver, the department will assess and notify:*
 - (a) The employer of all the owed employer premiums; and*
 - (b) The employee of all the owed employee premiums.*
- (3) Payment will be due upon receipt of the assessment.*
- (4) Failure to pay the assessment by the required date will result in the accrual of interest under RCW 50A.04.140.*
- (5) Upon payment of the employee premiums, the employee will be credited for the hours worked and will be eligible for benefits under Title 50A RCW as if the premiums were originally paid.*
- (6) Nothing in this section prevents the employer from paying part or all of the employee’s share of the premiums.*

Title 50A RCW allows for an employer and an employee who meets certain criteria to apply for a premium waiver. One of those criteria is that the employee is not employed in the state for 820 hours in a four-quarter period. If and when that does occur, all premiums are retroactively assessed and the waiver expires. This rule establishes the process the department will use to assess back premiums in the event of a waiver expiration.

WAC 192-600-005 When must an employee provide notice to the employer for foreseeable leave? (1)(a)

An employee must provide the employer at least thirty days' written notice before paid family or medical leave is to begin if the need for the leave is foreseeable based on an expected birth, placement of a child, or planned medical treatment for a serious health condition.

(b) An employee must provide the employer written notice as soon as is practicable when thirty days' notice is not possible, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency.

(2) An employee must provide the employer written notice as soon as is practicable for foreseeable leave due to a qualifying military exigency, regardless of how far in advance such leave is foreseeable.

(3) Whether paid family or medical leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, written notice need only be given one time, but the employee must inform the employer as soon as is practicable if dates of the scheduled leave change, are extended, or were initially unknown.

Title 50A RCW requires employees to provide sufficient notice to their employers before a claim will be approved. In situations of foreseeable leave, an employee must provide 30 days' notice to the employer. This rule establishes how the department will determine if given notice was sufficient.

WAC 192-600-010 When must an employee provide notice for unforeseeable leave?

(1) When the need for leave is not foreseeable, an employee must provide written notice to the employer as soon as is practicable under the facts and circumstances of the particular situation.

(2) If the employee is unable to provide notice personally, written notice may be given by another responsible party, such as the employee's spouse, neighbor, or coworker.

Example 1: *An employee's spouse is in a car accident and is taken to the emergency room. The employee would not be required to leave the spouse in the emergency room in order to report the absence while the spouse is receiving emergency treatment. The employee would be expected to provide written notice, such as an email, to the employer as soon as is practicable.*

Example 2: *An employee is in a car accident and is taken to the emergency room for emergency surgery. The employee's parent may provide written notice on behalf of the employee as soon as is practicable.*

Title 50A RCW requires employees to provide sufficient notice to their employers before a claim will be approved. In situations of unforeseeable leave, an employee must provide notice to the employer as soon as is practicable. This rule establishes how the department will determine if sufficient notice was given.

WAC 192-600-015 What does "as soon as is practicable" mean for this chapter? *For the purposes of this chapter, "as soon as is practicable" means as soon as it is both possible and practical to provide notice, taking into account all of the facts and circumstances in the individual situation. When an employee becomes aware of a need for paid family or medical leave less than thirty days in advance, the determination of when an employee could practicably provide notice must take*

into account the individual facts and circumstances.

Title 50A RCW requires employees to provide sufficient notice to their employers before a claim will be approved. In situations of unforeseeable leave, an employee must provide notice to the employer as soon as is practicable. This rule establishes how the department will define “as soon as is practicable” for the purposes of approving a claim.

WAC 192-600-020 What must an employee’s notice for leave to an employer include? *An employee must provide written notice to make the employer aware that the employee may need paid family or medical leave. The notice must contain at least the anticipated timing and duration of the leave. Written notice includes, but is not limited to, handwritten or typed notices, and all forms of written electronic communications such as text messages and email.*

Title 50A RCW requires employees to provide sufficient notice to their employers before a claim will be approved. This rule establishes the criteria of what this notice must include in order to be approved by the department.

WAC 192-600-025 What happens if an employee fails to provide proper notice? *If the department determines that the employee failed to provide proper notice to the employer, the employee’s benefits will be denied for a period of time equal to the number of days that notice was insufficient.*

Example: *If an employee should have provided 30 days’ notice for a qualifying event the employee was aware of 60 days in advance, but instead the employee provided notice 15 days prior to the scheduled leave, the department will deny paid family or medical leave benefits for 15 days. The employee is not required to file a new initial application for benefits. After the required 15 days, the employee may start receiving benefits upon proper filing of weekly claims if otherwise eligible.*

Title 50A RCW requires employees to provide sufficient notice to their employers before a claim will be approved. This rule establishes the process through which the department will delay the approval of a claim until the department can determine that sufficient notice was provided.

WAC 192-610-005 How does an employee apply for benefits?

(1) An employee may apply for paid family or medical leave benefits under the state plan by:

- (a) Using the department’s online services;*
- (b) Contacting the paid family and medical leave customer care center by telephone; or*
- (c) Alternate methods authorized by the commissioner.*

(2) An employee who works for an employer with an approved voluntary plan must follow the application guidelines of the approved plan.

This rule establishes the methods employees may use to file a claim with the department. This guidance is necessary to ensure workers understand how to apply for benefits and to ensure that the program is accessible.

WAC 192-610-010 What information is an employee required to provide to the department when applying for benefits?

- (1) When an employee submits an application for paid family or medical leave benefits, the employee must provide information sufficient for the department to determine eligibility for benefits. This information includes, but is not limited to, information identifying the employee, the type and anticipated duration of leave, as well as certification or documentation to validate the qualifying event.*
- (2) If an employee is in a claim year and has need for successive periods of benefits for the same qualifying event beyond what was originally approved, the employee must update the application.*
- (3) If an employee experiences a new qualifying event during a claim year, the employee must restart the claim and provide additional information required by the department before benefits can be paid.*

The department is required to establish benefit eligibility when an employee files a claim. Certain information must be provided by the employee for that determination to be made. This rule establishes what information the department will require in order to ensure accurate eligibility determinations and the proper payment of benefits.

WAC 192-610-015 When will the employee be required to provide documentation or certification to the department?

- (1) Any time an employee applies for paid family or medical leave benefits, the application must be supported by documentation or certification as required in Title 50A RCW and the rules adopted by the department.*
- (2) If an employee does not provide sufficient documentation or certification substantiating the employee's qualification for benefits, the department will deny benefits until sufficient documentation or certification substantiating the qualifying event is provided.*
- (3) The department may require the employee to provide additional documentation or certification to substantiate the qualification for benefits if:*
 - (a) The employee requests an extension of the leave originally planned;*
 - (b) Circumstances of the serious health condition change;*
 - (c) Information is provided to the department that the employee may no longer be qualified for benefits; or*
 - (d) Other circumstances cause the department to question the employee's qualification for benefits.*

This rule authorizes the department to seek additional information from the employee to ensure the assessment of initial and ongoing eligibility is properly made. This rule also clarifies that all applications for paid family or medical leave benefits must be supported as required by law, and states that unsupported applications will be denied.

WAC 192-610-020 What is required on the certification for medical leave or for family leave to care for a family member who has a serious health condition? When leave is taken because of an employee's own serious health condition or the serious health condition of a family member, certification from a health care provider will be required. Certification must include the following:

- (1) The name, address, telephone number, and contact information of the health care provider and type of medicine the health provider is licensed to practice;*

- (2) The anticipated duration of leave;*
- (3) Other information as requested by the department to determine eligibility for the qualifying event; and either*
 - (a) For medical leave, information from a health care provider that the employee has a serious health condition; or*
 - (b) For family leave, information sufficient to establish that the family member has a serious health condition requiring physical or psychological care.*

In many cases, Title 50A RCW requires an employee to submit documentation from a health care provider to establish a serious health condition. This certification must be submitted with the initial claim for benefits and any subsequent application to extend an existing claim. This rule establishes the content of that certification in order to give the department enough information to determine eligibility.

WAC 192-610-025 Documenting the birth or placement of a child for family leave. *When family leave is taken to bond with the employee's child after birth or placement, the department may request a copy of:*

- (1) The child's birth certificate;*
- (2) Certification from a health care provider;*
- (3) Court documents to show placement; or*
- (4) Other reasonable documentation to substantiate the qualifying event.*

This rule indicates the type of documentation the department may request from an employee seeking to take leave under Title 50A RCW for the birth or placement of a child.

WAC 192-610-030 Documenting a military exigency for family leave. *When family leave is taken because of a qualifying military exigency, the employee will be required to provide documents or information such as:*

- (1) Active duty orders;*
- (2) The approximate dates in which leave will be needed; or*
- (3) Other information to substantiate the qualifying event.*

This rule indicates the type of documentation the department may request from an employee seeking to take leave under Title 50A RCW for a qualifying military exigency in order to verify the facts and circumstances to ensure accurate payment.

WAC 192-610-035 Documenting a family relationship. *The department may request documentation or information from the employee that is sufficient to establish the familial relationship for the purposes of benefit eligibility and program integrity.*

This rule authorizes the department to seek documentation establishing a familial relationship from an employee seeking to take leave for a family member under Title 50A RCW. This rule is needed to ensure proper benefit payment.

WAC 192-610-040 Can an employee backdate an application or a weekly claim for benefits?

(1) Generally, paid family or medical leave benefits are payable on or after the date the employee applies for benefits. An application or weekly claim may be backdated for good cause or for the convenience of the department.

(2) For the purpose of this section:

(a) (i) "Good cause" means factors that prevented an employee from applying for benefits prior to or at the time of need for paid leave such as a serious health condition, a period of incapacity, or a natural disaster.

(ii) The burden of proof is on the employee to provide all pertinent facts and evidence to the department to determine good cause. The evidence must show that the factors prevented the employee from applying for or claiming benefits when the qualifying event occurred and any subsequent duration in which the employee did not apply or claim for benefits. This evidence may include, but is not limited to, medical certification from a health care provider, evidence of a natural disaster, or other information required by the department.

(b) "For the convenience of the department" means for the purpose of program administration or situations when accepting timely applications or weekly claims was difficult or impossible. These include, but are not limited to, equipment breakdown or lack of available staff.

(3) An employee who wants to backdate an application or weekly claim must file for benefits during the first week in which the factors that constitute good cause no longer exist.

The department determined it was necessary to create a good cause standard for backdating claims where either an employee was unable to apply for benefits when a qualifying event occurred, or the department was unable to timely process a claim.

WAC 192-610-045 May the department refuse to accept an employee's application, appeal, or petition? *No employee or agent of the department may refuse to accept a properly-filed application or weekly claim for paid family or medical leave benefits, a signed appeal, or a petition for review by the commissioner related to any program administered by this department regardless of the employee or agent's opinion concerning its merits.*

This rule establishes that no employee of the department may refuse to accept an application, appeal, or petition without processing it to protect the public.

WAC 192-610-050 How are typical workweek hours determined?

(1) For salaried employees, the number of hours worked in a week are assumed to be forty, regardless of how many hours are actually worked. Typical workweek hours are determined by multiplying the number of weeks in the qualifying period the employee held the salaried position by forty, adding any other hours that were not salaried, if any, and then dividing that amount by fifty-two.

(2) For all other employees, typical workweek hours are determined by dividing the sum of all hours reported in the qualifying period by fifty-two.

(3) The maximum amount of typical work week hours for all employees is forty hours per week.

This rule clarifies the calculation the department will use to determine an employee's typical workweek hours for transparency purposes

WAC 192-610-055 What is an employee's maximum benefit length?

- (1) The maximum duration of paid family leave may not exceed twelve times the typical workweek hours during a claim year.*
- (2) The maximum duration of paid medical leave may not exceed twelve times the typical workweek hours during a claim year. This leave may be extended to fourteen times the typical workweek hours during a claim year if the employee experiences a serious health condition with a pregnancy that results in a period of incapacity.*
- (3) An employee is not entitled to paid family or medical leave benefits under this chapter that exceeds a combined total of sixteen times the typical workweek hours during a claim year. The combined total of family and medical leave may be extended to eighteen times the typical workweek hours during a claim year if the employee experiences a serious health condition with a pregnancy that results in a period of incapacity.*

This rule clarifies the maximum benefit length for the program participants. This clarity is needed for transparency and public knowledge and to ensure that the department is operating the program equitably for all participants.

WAC 192-610-060 Will the employer be notified if an employee files an application for benefits?

- (1) The department will send a notice to the employee's current employer(s), if applicable, when an employee files an application for paid family or medical leave benefits.*
- (2) The department may, when necessary, send a notice to the employee's most recent employer(s).*
- (3) Any employer that receives such a notice must respond to the department as indicated on the notice. If the employer does not reply within the provided time frame, the department will determine eligibility without input from the employer.*

When an employee submits an application for benefits to the department, the department will require certain information regarding employer notice, details of the qualifying event, and other relevant information. This rule addresses when the department will notify an employer to allow it the opportunity to contest the application.

WAC 192-800-003 Designating an authorized representative.

- (1) The department may authorize another individual to act on the employee's behalf for the purposes of paid family and medical leave benefits if:*
 - (a) An employee designates an authorized representative by submitting written documentation as required by the department;*
 - (b) A court-appointed legal guardian with authority to make decisions on a person's behalf submits documentation as required by the department;*
 - (c) An individual designated as a power of attorney submits documentation satisfactory to the department to act on the employee's behalf; or*
 - (d) If an employee is unable to designate an authorized representative due to a serious health condition, an individual may represent the employee by submitting a complete and signed authorized representative designation form made available by the department, which must include:*
 - (i) Documentation from the employee's health care provider certifying that the employee is*

incapable of completing the administrative requirements necessary for receiving paid family and medical leave benefits and is unable to designate an authorized representative to act on the employee's behalf; and

(ii) An affidavit or declaration authorized by RCW 9A.72.085 attesting to the responsibility to act in the employee's best interest.

(2) The department will terminate the authority given to the authorized representative:

(a) When the employee or authorized representative notifies the department verbally or in writing; or

(b) At the department's discretion.

(3) For the purposes of paid family and medical leave the term employee is used for both employee and authorized representative.

In the event that an employee is unable to act for themselves if they have a serious health condition, the department will allow an authorized representative to act on behalf of an employee for the purposes of Paid Family and Medical Leave. This rule establishes the process by which an authorized representative may be appointed.

III. Changes to rules

NA

IV. Public Comment and Responses

Below is delineation of all comments received during the formal comment period on the proposed rules. All comments are either copied directly from the original written source (online portal post, email, hearing transcript, etc.) or paraphrased from the original verbal source (phone call, comment received at a presentation, etc.).

Formal Comment 1: *Received through the online portal.*

With all respect to those in office I would like to start with this, I am not against the program itself and I understand the intentions behind it. What I will say is, some of the worse things have been done with the best intentions. This seems to be one of them due to the lack of thought put into it. This should be a voluntary program for those who wish or choose to pay into it. It should also cover all who choose to pay into it not just if you have worked 820 hrs or more. We have already in place programs like LNI Insurance, Unemployment Insurance, Affordable Care Act, and other insurance agencies that provide this kind of coverage or something similar. What about people who have already paid for this type of insurance with other agencies? Now they are having to pay twice. This seems like another program that most taxpayers are going to pay into and few are going to use or will be able to really benefit from. The thing that I don't like about these programs is how the money moves in and out is never transparent. How can we be certain that state reps will not dip into this fund to cover other expenses, use the money fraudulently, or abuse it? How will the activity and finances used in this program be reported to all WA residents? What checks and balances, audits, and controls are in place to prevent abuse by the employees and the state? How do we know that the overhead for the program will not become bloated?

The chances of people who fall into the exact circumstances to claim these benefits seem too low, and yet all have to pay to have such a large program created and burden the people of Washington even more.

There are already too many mandatory state-funded programs and high taxations in Washington. This is just adding to the growing problem and people more education, not more financial assistance. They need to be helped to learn to be responsible with their money, save their money, be frugal with spending, plan for the future, live within their means, avoid going into debt and take precautions to protect themselves financially in case of emergencies. If people are not willing to be grown adults, why should everyone else be responsible to pay for them?

Washington has too many people on state aid as it is, and this state aid doesn't really help better the lives of those on it, it more enables people not to move forward, to become more stagnant, or digress instead of progressing. Some people abuse programs and will intentionally keep their situation destitute, to remain on gov/state-funded housing, food stamps, income stipends, etc. just to continue to get aid. Programs should be created to only teach and educate people on how to maneuver themselves in better situations, so they can have the ability to handle unforeseen events. The state doesn't need to manage this for the majority of people.

I only ask that we are given a choice to opt into or out of this program. Leave it up to each individual to pay into it if they want. And give it to all who pay into it regardless of how long they work. These would be the two major changes I see that need to be made. By making this mandatory, it has the appearance that the state is just finding another way to generate revenue for other agendas not disclosed to the people.

Agency Response 1: The Employment Security Department (ESD) is bound by the state statute that passed into law in 2017. The statute, codified as chapter 50A RCW does not allow a Washington employee to opt-out of the program. Because the statute does not allow for it, ESD

cannot draft a rule that would allow individuals to do so as that rule would violate the law. Additionally, the 820 hours requirement is also codified in statute. As such, ESD cannot write a rule allowing individuals to participate in the program prior to reaching the minimum hours requirement for the qualifying period because doing so would violate the statute as written.

This comment brings forward concerns about the use of funds collected by the program. ESD is bound by the statute. The statute created two fund accounts for the Paid Family and Medical Leave (PFML) program. The fund created in RCW 50A.04.220(1) is where premium collections will be placed. It requires that "expenditures from the account may be used only for the purposes of the family and medical leave program." 50A.04.225 established the enforcement account for PFML and states that all funds collected through penalties (etc.) "...shall be deposited into the account and shall be used only for the purposes of administering and enforcing this chapter." ESD is not writing rules to prevent the PFML funds from being used for other purposes or to prevent abuse by state employees because these provisions in statute provide the needed protection already.

Formal Comment 2: *Received through the online portal.*

Please consider allowing families who give birth in 2019 to apply for paid leave. My husband and I are both teachers and are currently trying to have a baby. If we are due in 2019, we will be able to spend time with our new baby without it being detrimental to our finances. On behalf of all families looking to expand in the next year, thank you for considering.

Agency Response 2: Congratulations on your plans to expand your family! The state statute related to PFML eligibility (RCW 50A.04.020(1)) states that benefits become available to qualified applicants starting January 1, 2020. Because ESD cannot write rules that would violate the statute, we cannot draft a rule that would allow benefits to be paid for a period of time prior to January 1, 2020. However, if an employee had a qualifying event that occurred in 2019 and met the eligibility requirements, the employee may be eligible to receive benefits beginning January 1, 2020 so long as he or she is otherwise qualified.

Formal Comment 3: *Received through the online portal.*

As a Federal disabled retired employee I am paying for health care short term and long term disability supplemental health and dental the federal government already reduced our health and welfare by 800.00 a year now I am forced to pay for a family and medical leave with out the option to opt out sugar tax gas tax medical leave tax I guess the only thing left is the death tax reminds me of the Beatles song tax man so unfair to the working class people of this state can't even solve your homeless problem signed not a happy veteran Naval Station Everett.

Agency Response 3: The state statute tasked ESD with implementing the program as written. While ESD understands that there is some public frustration with the premium requirement, we hope that the ability to take leave to care for a loved one or for yourself helps to mitigate it. ESD must implement the program as passed into law.

Formal Comment 4: *Received through the online portal.*

The provision "WAC 192-610-050 How are weekly benefit payments calculated?", which was found in the second draft of the rules, was deleted from the final proposed rules CR-102 filed 01/07/19. Why was this deleted? How will Washington employees and employers know how to calculate their expected benefits?

Agency Response 4: ESD determined that more conversations were needed in order to draft informed, accurate, and useful rules on that topic. The rule was pulled to allow ESD staff to implement this phase of rules on-time while continuing to determine how to clarify in rule how weekly benefits are calculated. ESD is hopeful that more discussion on this topic will be included in future phases as there are still many months before benefits become payable on January 1, 2020.

Formal Comment 5: *Received through the online portal.*

My company has only one employee who worked far less than 820 hours in the past year and in the present year has a contract to work only 20 hours a month and so could not qualify for family leave. Colleen at ES explained that even though we have no employee who could qualify for family leave, we still need to deduct the applicable percentage from that employee's wages and pay it to WA ES or else pay it to WA ES in addition to paying the employee. In our case, the one employee is a senior citizen with no other employment, so could not qualify for family or medical leave based on other employment. Because of the way this new mandate is written now, my company will have to deduct \$0.68 from this employee's wages for a benefit excluded from him by this mandate's definitions. It is like demanding that all people in WA state pay property taxes even if they do not own property, or demanding that all people in WA pay for car insurance even if they do not own a car. Linguist's Software, Inc. is being required to pay WA ES $\$0.68 \times 4 = \2.72 this year, but we will also be paying $\$0.55 \times 4$ for postage = \$2.20 plus the cost of the envelopes (whether we pay or WA pays for the envelopes plus shipping them to us). But costing us far more is the extra burden of calculating and reporting and explaining to the employee why he is being paid less than his contract. Please consider adding to the family and medical leave act that any employer with no employees who could qualify for family and medical leave benefits, namely who could not accumulate more than 820 hours of work in the year, are exempt from reporting, deducting from pay, and paying the premium. As it is now, WA ES is requiring us (and many other employers) to pay for something we and our employees by definition cannot use. For most, this will mean WA workers receiving smaller pay checks for no conceivable benefit to them. Please also let the WA Personal Property Tax people know that the requirement that every business, no matter how small, keep track of all personal property purchases and when each went out of service with no time limit. It has taken me probably 500 hours since 1988 to keep track of all this. Last year our Personal Property Tax was \$20.38, and the previous year was \$16.21 for goods that originally cost \$14,228. I have spent probably ten times more in the worth of the hours spent than WA state has received in the tax. Either the people who wrote these requirements have no idea how onerous this bookkeeping requirement is or they must not care how much of a burden they are inflicting WA businesses. Why not just add one or more options such as: If your total personal property is less than \$20,000, in lieu of submitting all the paperwork you may pay \$20. If your total personal property is less than \$10,000, in lieu of submitting all the paperwork you may pay \$10. I can't imagine how much it must cost you to process all the paperwork this requirement generates. Do you keep all the records we send you for decades without limit like your requirements implicitly require us to do? WA Personal Property tax record keeping requirements are the most onerous government requirement I know for such little return to the state.

Agency Response 5: The premium assessment calculation and requirement exist in state statute. ESD cannot make rules that would violate the statute so cannot draft a rule to allow those who cannot accumulate 820 hours in the qualifying period to “opt out” of the program. ESD does not operate the Personal Property Tax program and cannot make changes to it for that reason.

Formal Comment 6: *Received through the online portal.*

I am writing with comments on the definition of "salaried" in proposed WAC 192-500-100, in the Phase 3 Draft 2 rules. If ESD wants to adopt the definition of “salaried” that is currently proposed, then it should also amend WAC 192-540-040(2), which currently provides that for PFMLA, an employer should report that all salaried employees work 40 hours/week.

For purposes of unemployment, ESD allows employers to report a salaried employee’s hours as either 40 hours/week or the employee’s actual hours worked. (See ESD’s Employer Tax Handbook for July 1, 2018 – June 30, 2019, pp. 4, 10). It would be a significant administrative burden for employers to have to track hours for salaried employees differently for purposes of unemployment and PFMLA.

Also, reporting 40 hours/week for all salaried employees would artificially inflate many employees’ eligibility for benefits, because many businesses employ part-time salaried workers who work less than 40 hours week.

Thank you for your consideration.

Agency Response 6: The department understands the desire to align PFML reporting with Unemployment Insurance (UI) reporting to make the reporting practice easier for employers. WAC 192-500-100 was written to clarify that if an employee does not work full-time as defined by the employer, that the employer should report the hours the employee works and for PFML purposes, that individual is not considered a ‘salaried employee’. In statute, RCW 50A.04.010(23)(b) states that typical work week hours for a salaried employee is forty hours regardless of how many hours the salaried employee typically works. The rule attempts to prevent part-time employees from having forty hours reported on their behalf.

Formal Comment 7: *Received through the online portal.*

NEW SECTION WAC 192-500-090: (2) Doctors of Chiropractic added to the language under the definition of “Health care provider”

Rationale: Doctors of Chiropractic have been licensed in Washington State since 1919. Currently, Doctors of Chiropractic are participating providers in all state healthcare plans and most all private healthcare plans. At the Department of Labor and Industries, Doctors of Chiropractic are attending providers and manage occupational injury claims in the same manner as medical doctors. We currently determine time loss for injured workers, perform second opinions for the department and rate disability. Chiropractors are allowed to certify disabled parking applications and offer patient hardship from jury duty. A Doctor of Chiropractic is also able to certify a serious health condition under the federal Family and Medical Leave Act.

A Doctor of Chiropractic should be included in your list of limited licensed Healthcare providers performing certification of a serious health medical condition within our scope. This takes advantage of an already established doctor-patient relationship and utilization of services that chiropractic doctors already provide in other healthcare settings. We respectfully request you include doctors of chiropractic to this list of providers.

Respectfully submitted.

Agency Response 7: WAC 192-500-090(4) states that all providers permitted under the Family and Medical Leave Act (FMLA) to certify serious health conditions are considered “health care providers” for purposes of PFML. ESD staff are not experts on FMLA and are not authorized to give advice on that program. However, it is ESD’s understanding that FMLA considers chiropractors to be health care providers under certain circumstances. If this is true, chiropractors who qualify under FMLA would also qualify under PFML.

Formal Comment 8: *Received through the online portal.*

WAC 192-610-040 Can an employee backdate an application or a weekly claim for benefits? As premium collections for PFL began in 2019, it would be inequitable to disallow those with qualifying events from making eligible claims for the 2019 period during which premium collection occurred. This section appears to allow those having qualifying events within the 12 month period preceding the 2020 claims processing date to have backdated claims. For example, for a baby born in May of 2019 - this would be a qualifying event and the parent should be allowed to back date an application and receive retroactive benefits. However, according to section 192-610-040(3), "an employee who wants to backdate an application or weekly claim must file for benefits during the first week in which the factors that constitute good cause no longer exist." The fact that claims processing did not begin until 2020 would clearly constitute good cause. If the department intends to hold firm on backdating applications for those eligible claims made in 2019 to the first week of January 2020 (when claims processing begins), I believe the department needs to (1) clarify and carefully publicize the the fact that retroactive benefits will be available to this limited class of individuals, and (2) allow this limited class of individuals more time than one week to make a retroactive claim after January 2020. This system is totally new and the public is completely unaware of the ability to make backdated claims for the 2019 period. This is entirely inequitable based on the fact that premium contributions began in 2019. Without such action, I am confident the department will face a class action lawsuit from these excluded claimants.

Agency Response 8: ESD must comply with the state statute related to PFML that passed into law in 2017. RCW 50A.04.115 requires ESD to begin assessing premiums January 1, 2019, and 50A.04.020 requires payment of benefits to qualified applicants to begin January 1, 2020. Because these dates are set in statute, ESD cannot write rules to allow benefits to be received in 2019. For this reason, ESD will not allow claimants to back date claims into 2019 and receive benefit payment for a period of time prior to January 1, 2020. Benefits cannot be paid prior to this date. ESD is not updating WAC 192-610-040 to reflect this because when read in conjunction with the statute, ESD does not believe the issues of when benefit payments can be made to be ambiguous or in need of clarification due to the clarity of the language in the statute.

Formal Comment 9: *Received through the online portal.*

Section 5(2) of the bill says “An employer may allow an employee who has accrued vacation, sick, or other paid time off to choose whether: (a) To take such leave; or (b) not to take such leave and receive paid family or medical leave benefits, as provided in section 6 of this act.” We have an approved voluntary plan and an accrued leave plan already in place. Is it possible to allow:

- Payments to the employee equivalent to the state payment AND
- the ability for employees to supplement that payment with their accrued leave?

We would like to do this on our 2020 voluntary plan.

If not, does this mean that one of our employees who has a leave balance of 12 weeks can take those 12 weeks off using accrued leave and then get approved to be on the state plan (since you do not distinguish WORKED hours from hours PAID via your reporting protocols) for another 12 weeks receiving partial pay?

Please seriously consider revising the rules to (1) allow for the supplementation to the state payment of accrued leave balances and (2) use hours WORKED towards the eligibility for WA PFML.

Agency Response 9: No change is being made because current state statute does not allow for an employee to receive paid family and medical leave benefits for the same time that the individual receives wages, sick leave, paid time off, or vacation. ESD cannot write rules that would violate the current statute so cannot make the requested change.

Formal Comment 10: *Received through email. Comments 10-14 were received in the same email. We are responding individually to each topic.*

WAC 192-500-070 (Claim Year): According to (3), an employee can only have one valid claim year at a time. Let's say an employee files a claim for care of a family member on January 15, 2020. His claim year would start on that date according to (1)(b). He takes two weeks of continuous leave and may need to take intermittent time to care for the family member as well. My understanding is that the claim year would continue to be the fifty-two week period following January 15, 2020. Let's further say that the same employee adopts a child, and the placement date is March 15, 2020. If the employee takes family leave to bond with that child, (1)(a) directs that the claim year should be the fifty-two week period following March 15, 2020... but the employee would already have a claim year in place. Could you clarify how this type of scenario should be handled?

Agency Response 10: This comment does not request any changes to the Phase 3 rules so no changes are being made due to it. In response to the hypothetical question presented, the employee would have an existing claim when the employee applied for family leave on March 15, 2020 and have until January 14, 2021, to use any benefits that employee would be eligible for in that claim year.

Formal Comment 11: *Received through email. Comments 10-14 were received in the same email. We are responding individually to each topic.*

WAC 192-600-025 (What happens if an employee fails to provide proper notice?): If I'm reading this correctly, this rule is saying that the department will delay benefits under the state plan, if the employee does not give enough advance notice to the employer of the need to be out on foreseeable leave. Is that correct? If so, I'm wondering what the vision is for how the department will know whether the employee provided enough advance notice to the employer?

Agency Response 11: WAC 192-600-025 does indicate that ESD will deny benefits for a period of time to employees who did not give proper notice for the same period of time as the number of days that the notice was insufficient. ESD is required to notify employers if an employee is applying for benefits. ESD could be notified of a lack of proper notice by either the employer, the employee, or even potentially a third party. ESD is not adding this component to the rule because the requirement to notify the employer of an application of benefits is elsewhere.

Formal Comment 12: *Received through email. Comments 10-14 were received in the same email. We are responding individually to each topic.*

WAC 192-610-010 (What information is an employee required to provide to the department when applying for benefits?): I'm confused by (3) -- specifically, the statement that an employee with a new qualifying event in a claim year must "restart" the claim. Could you elaborate on what "restart" means (or perhaps rephrase the WAC to be more clear)? I'm also wondering if this part is intended to address the situation I outlined in my question above about WAC 192-500-070. I'm not sure that's the case, though, because that would imply that a new claim year (during which the employee's full entitlement could be used) begins when the new qualifying event happens.

Agency Response 12: "Restart" in this context means the employee, after a period of not claiming, is intending to access benefits within a claim year where benefits have been previously claimed. If a claim is "restarted" the employee will need to contact the agency and follow the procedures required by the agency to begin claiming again. ESD is not changing the rule to reflect this because this clarity will be provided in internal process documents and to the public through the documents created to assist in benefit application filing.

Formal Comment 13: *Received through email. Comments 10-14 were received in the same email. We are responding individually to each topic.*

WAC 192-610-025 (Documenting the birth or placement of a child for family leave): Is there a reason why this says the department "may request" documentation, even though the WAC directly before and after say "the employee will be required to provide documents" for other qualifying reasons?

Agency Response 13: RCW 50A.04.035(1)(f) requires a certification when taking leave for a serious health condition either for medical leave or family leave. No such requirement exists in statute to provide certification for birth or placement of a child. Because of this, the language used in the rules related to certification for birth or placement is permissive and the language related to a serious medical condition mandatorily requires the certification. Also, prior to a birth of a child, an employee may have already accessed benefits nearing the end of the pregnancy. This comment does not ask for a change to rule so we are not making one.

Formal Comment 14: *Received through email. Comments 10-14 were received in the same email. We are responding individually to each topic.*

WAC 192-610-055 (How are typical workweek hours determined?) and WAC 192-610-060 (What is an employee's maximum benefit length?): If I'm reading these two WACs together correctly, I think they're saying that an employee is entitled to an amount of paid leave from work that's based on that employee's average hours worked in the qualifying period, NOT the employee's scheduled hours during the time they actually need leave. Is that correct? I ask because I'm concerned about the implications for how that could play out. Let's say an employee worked 15 hours per week for the majority of his qualifying period. At some point during the end of the qualifying period, he got a promotion and moved into a full-time position working 40 hours per week. Over the qualifying period, he worked an average of 20 hours per week. He is in the 40-hour position when he becomes a father and files a claim for family leave, expecting to take 12 weeks off. However, as I read these two WACs, they seem to be saying that you'd take his average hours per week -- 20 -- and multiply that by 12 week, to get a maximum duration of 240 hours. On the employee's current schedule, that means he would only be able to take 6 weeks of leave. If this is the intended result, it seems counter to the spirit of the law. Could you clarify please?

Agency Response 14: RCW 50A.04.010(23) defines typical workweek hours. With WAC 192-610-050 ESD is attempting to clarify how the department will determine typical workweek hours. While an employer may consider a part-time employee “salaried” for purposes of PFML, the hours a part-time employee will not be assumed to be forty hours per week. WAC 192-610-050 addresses how a typical workweek is calculated, not whether an employee is hourly or salaried, as defined in RCW 50A.04.010(23).

Formal Comment 15: *Received verbally during the public hearing on 3-13-19.*

I'm here today representing the Washington State Chiropractic Association as follow-up to a letter sent on February 27, 2019, although the letter said '18.

I would like to make comment specific to WAC 192-500-090 requesting that chiropractors be included in the list of healthcare providers eligible to certify a serious health condition.

Currently chiropractors determine time loss for injured workers. They perform second opinions. And the Department -- and for the Department, and they rate disabilities. So they're in the same status as a medical physician for determining all kinds of health conditions for injured workers, which makes it consistent for other State agencies to include chiropractors, as well. They're licensed currently under RCW 18-25, and within their scope of practice they are able to certify serious health conditions.

RCW 48.43.515 gives chiropractor -- or patients, actually, direct access to chiropractors without needing a referral in both state health programs as well as private health-insurance programs.

The Labor and Industries statute is 51.36, and as I mentioned, they're able to manage all health conditions for injured workers and currently are managing one-third of the state's occupational low-back-pain injuries.

I would like to offer to you Dr. Morgan Young, who is the associate medical director, who is no longer a practicing chiropractor. He's full time with Labor and Industries, who's replaced former Dr. Bob Mootz, who was the first ever chiropractor in an associate medical position in the entire country. So Washington is leading in that regard, and he's been made available to you for any questions that you might have on the clinical side.

In terms of the clinical aspects, I can take questions from you and provide follow-up if needed. But at that point, that concludes my testimony.

We want them to be listed in the current list of providers that are there. You have other professions listed that have less education, less training in this regard. And there are others that have more. And we feel like we should be included, as well.

Agency Response 15: WAC 192-500-090(4) states that all providers permitted under the Family and Medical Leave Act (FMLA) to certify serious health conditions are considered “health care providers” for purposes of PFML. ESD staff are not experts on FMLA and are not authorized to give advice on that program. However, it is ESD’s understanding that FMLA considers chiropractors to be health care providers under certain circumstances. If this is true, chiropractors who qualify under FMLA would also qualify under PFML.

Formal Comment 16: *Received verbally during the public hearing on 3-13-19.*

The first comment is on Section 192-500-070, the definition of "claim year."

And I note that for all other qualifying events other than the birth of a child a claim year is a 52-week period beginning the Sunday of the week that

an application was filed, a timely and complete application.

And I note that that can be confusing when, if employers are trying to figure out how much time an employee has available to them, oftentimes the way that calculation is done is by the date of the event itself, like the date the leave would begin, as opposed to the date the application is completed because the date of the application can vary, you know, largely from the date of the leave. So it can be well before the leave, or it can be actually after the leave.

So if the entitlement to your 12-week period where your claim year is calculated is based on the completion of an application, that can get confusing because it's not timed to the actual leave event but rather timed to the application.

Agency Response 16: The definition of “claim year” attempts to further clarify RCW 50A.04.050 and the expiration of leave entitlement. Statute requires that entitlement to leave expires at the end of twelve months after the birth or placement of a child, or at the end of a twelve month period from the date of a filed application for benefits for other kinds of paid family or medical leave. ESD believes the issue is unambiguous in both statute and rule so is not making the requested changes.

Formal Comment 17: *Received verbally during the public hearing on 3-13-19.*

The other section is 192-610-055, where it talks about what is an employee's maximum benefit length. And in there it states that -- it states that, "The maximum duration of paid family leave may not exceed twelve times the typical workweek hours . . . " And then it says, "The maximum duration of paid medical leave may not exceed twelve times the typical workweek hours of during a claim year."

It's unclear in reading that whether or not that applies -- whether or not that maximum 12-week period is talking about benefits, like payment, or whether it's talking about leave entitlement.

And it seems to be talking about both, and certainly seems to be talking about leave entitlement because it says "the maximum duration of paid family leave" and "the maximum duration of any medical leave" is 12 weeks.

And the reason why this is confusing is because I've been informed that the waiting period of seven days is job protected. And so if the waiting period is job protected and that is a one-week period and the maximum duration of leave is 12 weeks, then it seems there's only 11 weeks left of paid benefits.

So I think there's a confusion there as to what the maximum entitlement of leave is and the maximum entitlement of benefits is.

And those are my two comments.

Agency Response 17: RCW 50A.04.020(3) indicates that the maximum amount of “paid” leave may not exceed twelve times the typical workweek hours in a claim year. While the waiting period is considered job protected, it does not deduct from the total of paid weeks available to an employee. RCW 50A.04.010(23) defines typical workweek hours. ESD is attempting to clarify how the department will determine typical workweek hours. While an employer may consider a part-time employee “salaried” for the purposes of PFML, the hours a part-time employee works will not be assumed to be forty hours per week. ESD believes these issues are clear in the current rules and is not making changes for that reason.

Formal Comment 18: *Received verbally during the public hearing on 3-13-19.*

My comment pertains to the employee notice to employer, specifically WAC 192-600-025. If an employee fails to provide proper notice, the regulation or the rule discusses how the Department may deny benefits. But there's no discussion about the job-protected time off and whether an

employer can deny the job-protected time off.

So, my comment is to include implications of the job-protected time off, the leave, not just the paid benefits, under the employee-notice section of the rules.

Agency Response 18: The rules around job protection were introduced in Phase 5 of PFML rulemaking. ESD will consider this feedback in that phase.

Formal Comment 19: *Received verbally during the public hearing on 3-13-19.*

We have a comment regarding WAC 192-610-015 about the documentation for certification. It doesn't specify how long an employee has to submit the documentation, which leaves the employer not knowing if the employee will be completing their claim in time.

Agency Response 19: In WAC 192-610-010 regarding the information an employee is required to provide when applying for benefits, the rule indicates that in order to apply for and be considered for PFML benefits, the employee must provide certification to determine eligibility. WAC 192-600-020 addresses the notice to the employer and requires the employee to provide notice of the anticipated timing and duration of the leave. Because this WAC addresses the comment, no changes are being made to Phase 3 rules.

Formal Comment 20: *Received verbally during the public hearing on 3-18-19 and followed-up with an email.*

Our first concern is what will be a typical workweek hours for agriculture farmers? Most dairy farmers and particularly our employees usually work around 50-60 hours a week. In the Paid Family and Medical Leave Rules Form (page 13) states "typical workweek hours are determined by dividing the sum of all hours reported in the qualifying period by fifty-two". Does this give employee 12-18 weeks of time off??

When Sick Leave came into effect in 2018, employers had to pay 1 hour for every 40 hours worked. Since our employees work 50-60 hours a week this allows them to use 78-104 hours a year: paid! {50 hours: $1.5 * 52 = 78$ hours; 60 hours: $2 * 52 = 104$ hours}. This is not including the amount of leave they may receive during their family leave.

As a business, will we have to hire a new employee during the time that employee claims family leave? If so, when that employee comes back to work, do we have to fire the new employee we had to hire to make sure the job got done while the person was on leave? Also, what happens to the training period—the most expensive part of labor. On average, it takes 30 days to train someone efficiently and successfully.

Agency Response 20: This comment does not request any changes to the rule in Phase 3 so no changes are made. In response to the hypothetical questions, statute provides for the duration of leave and it depends on the persons typical workweek hours. The maximum amount of paid family leave may not exceed twelve times the typical workweek hours during a period of 52 weeks, and the maximum duration of paid medical leave may not exceed 12 times the typical workweek hours during period of 52 weeks. Medical leave may be extended by two times the typical workweek hours if the employee experiences a serious health condition with a pregnancy that results in incapacity. There is no legal requirement for an employer to hire a new employee while another employee takes leave. RCW 50A.04.230 allows for small employers to apply for a grant from the department for wage related expenses.

Formal Comment 21: *Received verbally during the public hearing on 3-18-19 and followed-up with an email.*

What if more than one employee request *Family Leave and Medical Leave* in the same department/job description at the same time? As a business, will that even be financially successful?

Agency Response 21: The law does not prevent multiple employees from taking PFML at the same time. ESD cannot write rules to only allow a single employee to be out on PFML leave as doing so would violate the law.

Formal Comment 22: *Received verbally during the public hearing on 3-18-19, and followed-up with an email.*

Does sick leave get replaced or edited since many rules overlap with the *Paid Family and Medical Leave*? How will agriculture farmers and dairy farmers compete with other states when our employees are given 12-20 weeks off? (with sick leave and family leave)

Agency Response 22: Sick leave laws are separate from PFML and administered by the Department of Labor and Industries. Employees cannot receive sick leave and PFML for the same time period under RCW 50A.04.045 and RCW 50A.04.240. Because these regulations are clear in statute, ESD is not pursuing a change to rule.

Formal Comment 23: *Received verbally during the public hearing on 3-18-19, and followed-up with an email.*

Our second concern, what documentation will be shown for someone who is applying for *Paid Family and Medical Leave*?

Will people need to show recent pay stubs, W2 forms, and social security, picture ids?

Agency Response 23: This comment does not request any changes to the Phase 3 rules so no changes are being made. The minimum requirements for applications are found in RCW 50A.04.035, which requires Social Security Numbers (SSNs), provided notification from the employee to the employer of the intent to take leave, and disclosure of health information.

Formal Comment 24: *Received verbally during the public hearing on 3-18-19 and followed-up with an email.*

How will we know there will be no fraud and medical favoritism with doctors or health care providers?

Agency Response 24: If the employer questions the validity of a claim, the law provides that an employer can contest an application for PFML benefits under RCW 50A.04.040. Fraud regulations are handled in Phase 4 of the PFML rulemaking so no change to phase 3 rules is being made.

Formal Comment 25: *Received verbally during the public hearing on 3-18-19 and followed-up with an email.*

When an employee(s) are on L&I will they be able to apply for these benefits as well? We know that many people have milked the system on L&I and fraud has happened by careless documentation and favoritism and pay by doctors. Employers have little room to explore in these areas—because we are at fault until proven wrong. Will this be similar for family leave?

Agency Response 25: The law states that an employee is disqualified from receiving PFML benefits for the same time they receive unemployment benefits or industrial insurance (L&I) (RCW 50A.04.240). Because this safeguard exists in statute, ESD is not changing any rules in Phase 3 to reflect it.

Formal Comment 26: *Received verbally during the public hearing on 3-18-19, and followed-up with an email.*

Will there be drug testing upon application process? Our labor force is getting more difficult each year. We struggle finding adults that are negative on drugs use that are willing to work.

In conclusion as a family business that is dying in the United States, we hope that our government takes these considerations while creating the rules for the *Paid Family and Medical Leave*. If you have any questions or comments please contact us.

Agency Response 26: The department does not have legal authority to drug test employees who wish to apply for PFML, so cannot draft rules that would require drug testing as doing so would violate the statute.

Formal Comment 27: *Received through email. Comments 27-39 came from the same letter.*

192-500-100: Salaried employee definition. We note the definition of salaried employee is different than and does not include reference to exempt/non-exempt. Using the term “salaried employee”, if not “exempt is confusing. If this difference is intentional, it would be helpful in definition to understand why it is being defined differently.

Agency Response 27: WAC 192-500-100 was written to clarify that if an employee does not work full-time as defined by the employer, that the employer should report the hours the employee works and for PFML purposes, that individual is not considered a ‘salaried employee’. No change is being made to Phase 3 rules because of directive language in statute, RCW 50A.04.010(23)(b) that states that typical work week hours for a salaried employee is forty hours regardless of how many hours the salaried employee typically works. The rule attempts to prevent part-time employees to have forty hours reported on their behalf.

Formal Comment 28: *Received through email. Comments 27-39 came from the same letter.*

192-610-010: Required Application information:

- a. It seems odd that an applicant does not include information regarding their scheduled work during the leave period. This information would be critical in the department calculating “hours on leave” from 50A.04.020(2)(a), especially for applicants with non-standard work schedules. We recommend this be included in the application.
- b. The definition of a “new qualifying event” should be clarified either through a definition section, a reference, or 1-2 examples.
- c. Will the public have an opportunity to comment on the standardized application form when it is issued?
- d. Will an employer be permitted to modify that form or make the form mandatory?

Agency Response 28: WAC 192-610-010 indicates that the department will request specific information from an employee when they file an application for benefits. The rule also provides that the information is not limited to the specific information listed in the WAC. ESD is not changing

the rule based on this feedback because ESD is still building business practices and technology, and because the rule as written does not limit the ability to request more information to determine an employee's eligibility.

Formal Comment 29: *Received through email. Comments 27-39 came from the same letter.*

192-610-015: Timing of documentation:

- a. This section needs timing guidelines for the provision of documentation. While we appreciate the goal of being as accommodating as possible, there needs to be some certainty on behalf of the state, the applicant and the employer. There could be an exception process if necessary.
- b. If the applicant is temporarily denied awaiting the approval, the employee may request to use PTO to cover pay in the interim. Then, if the employee is ultimately approved, then the employer will potentially need to recoup paid time off. This should be expressly addressed in the rules.

Agency Response 29: WAC 192-610-010 indicates that in order to apply for and be considered for PFML benefits, the employee must provide certification to determine eligibility. ESD is not changing the rule to reflect this request because this clarity will be provided in internal process documents and to the public through the documents created to assist in benefit application filing.

Formal Comment 30: *Received through email. Comments 27-39 came from the same letter.*

192-610-020: Certification:

- a. Will the certification be different than the current FMLA certification form?
- b. Will the public have an opportunity to comment on the certification form?

Agency Response 30: ESD is not making changes to the rules based on this comment because the PFML program is still developing business processes and documents.

Formal Comment 31: *Received through email. Comments 27-39 came from the same letter.*

192-610-040: Backdated Applications:

- a. This section needs timing guidelines for the limits of backdating. While we appreciate the goal of being as accommodating as possible, there needs to be some certainty on behalf of the state, the applicant and the employer. There could be an exception process if necessary.
- b. The request for backdating should also require the applicant to notify the state what compensation the applicant has or will receive during the requested period.
- c. The applicant may have received payment and/or discipline for the time missed that is now subject to the application, including but not limited to separation of employment. The rules should clearly state how an employer should handle payments and employment actions for backdated applications that are approved.

Agency Comment 31: No changes are being made to Phase 3 rules because the agency provides that if the employer questions the validity of a claim, the law provides that an employer can contest an application for PFML benefits. See RCW 50A.04.040. When the department sends a notice to the employer that an employee has applied for benefits, the employer will have an opportunity to respond to the department and provide information such as suspension, separation, or wages. In Phase 4 of PFML rulemaking, the department is addressing the concept of weekly claiming to receive benefits. There are proposed requirements for asking for information related to wages, including sick leave, PTO or vacation.

Formal Comment 32: *Received through email. Comments 27-39 came from the same letter.*

WAC 192-610-050: Typical workweek calculations: For applicants with non-standard work schedules, this calculation could result in a skewed result when calculating the benefits eligible. This will be especially true for intermittent leave payments. Applicants with short weeks and long weeks will make more for absences on their short weeks than they will on their long weeks.

Agency Response 32: In statute, RCW 50A.04.010(23)(b) states that typical work week hours for a salaried employee is forty hours regardless of how many hours the salaried employee typically works. The rule attempts to prevent part-time employees from having forty hours reported on their behalf. The department is still building the business processes and technology, and is in the process of determining how to equitably provide benefits under the current statute when an employee's qualifying period average hours is different from the employee's current hours. Because these business and technology processes are not yet complete, no change to the rule is being made.

Formal Comment 33: *Received through email. Comments 27-39 came from the same letter.*

WAC 192-610-055: Maximum Benefits: This section seems to say the same thing as 50A.04.020(3). The rule could reference that RCW.

Agency Response 33: No change is being made to Phase 3 rules because the agency recognized the importance of the maximum durations of leave intended by the legislation. Its purpose of being duplicated in rule is to tie it to the other rules that provide the explanation of benefits.

Formal Comment 34: *Received through email. Comments 27-39 came from the same letter.*

192-610-060: Employer Notice & Response:

- a. The rules should provide a timeframe that the state must provide notice to the employer.
- b. It is difficult to comment on employer response time if we don't have any guidance on the expected response time the employer will be provided.
- c. It would be helpful to provide circumstances where the department would potentially send notice to the applicant's most recent employer.
- d. It should be clear that an employer's response or failure to respond does not (1) act as a waiver to future rights, and (2) constitute an acknowledgement of the truth of any of the information contained in the application for this or any other action.

Agency Response 34: WAC 192-610-060 states that the department will send a notice to the employee's current employer (s) when an employee files an application for paid family or medical leave benefits. It is the intent of the department have the process of notice to the employer begin upon receipt by the department of the employee's notice so no changes were made to Phase 3 rules. The second comment (b) does not request any changes to Phase 3 rules so none were made. To the comment in (c) the department will send notice to an employee's most recent employer when the employee is not currently in employment with an employer. To point (d), no changes were made because there is no statutory reference to a waiver of rights of the employer. RCW 50A.04.040 provides that if an employer contests an employee's application for benefits, the employer must do so within eighteen days of receipt of the notice. The department is required to pay a properly made application within fourteen days of the application. There is nothing in statute that prevents an employer from providing information after the fourteen days or eighteen days has expired.

Formal Comment 35: *Received through email. Comments 27-39 came from the same letter.*

192-510-085: Conditional Premium Waivers: It would be helpful to have a statutory reference to where "conditional premium waivers" are described, including the conditions eligible for waiver and timing and form in which they are notified to the employer and the date on which they are effective for the calculations under (1).

Agency Response 35: WAC 192-510-080 cites to RCW 50A.04.120 directly, and that since -085 occurs directly after -080, there's no need to change the rule since the statutory reference is clear. WAC 192-510-080 points to RCW 50A.04.120 which describes conditional waivers and it's requirements.

Formal Comment 36: *Received through email. Comments 27-39 came from the same letter.*

192-610-005: Employee Notice: It seems like a "medical emergency" would shift a foreseeable leave to an unforeseeable leave, so would recommend "a change in circumstances making the foreseeable leave unforeseeable" rather than introducing a new undefined term.

Agency Response 36: The agency addresses both foreseeable and unforeseeable leave in 192-600-005 and 192-600-010 so no changes were made to Phase 3 rules. An employee must provide notice for foreseeable leave based on expected birth, placement of a child, or planned medical treatment for a serious health condition. [WAC 195-600-010](#) states "When the need for leave is not foreseeable, an employee must provide written notice to the employer as soon as is practicable..." If an employee has already provided notice for foreseeable leave and has a medical emergency, then WAC 192-600-010 would apply.

Formal Comment 37: *Received through email. Comments 27-39 came from the same letter.*

1. 192-610-005: 192-610-005: Employee Notice: It seems like a "medical emergency" would shift a foreseeable leave to an unforeseeable leave, so would recommend "a change in circumstances making the foreseeable leave unforeseeable" rather than introducing a new undefined term.

Agency Response 37: The agency addresses both foreseeable and unforeseeable leave in 192-600-005 and 192-600-010 so no changes were made to Phase 3 rules. An employee must provide notice for foreseeable leave based on expected birth, placement of a child, or planned medical treatment for a serious health condition. WAC 195-600-010 states “When the need for leave is not foreseeable, an employee must provide written notice to the employer as soon as is practicable...” If an employee has already provided notice for foreseeable leave and has a medical emergency, then WAC 192-600-010 would apply

Formal Comment 38: *Received through email. Comments 27-39 came from the same letter.*

192-610-020: Timely Notice:

- a. Please clarify whether the employer can determine that an employee failed to provide proper notice and assess it’s own consequences in addition to denial of benefits such as discipline or determining job abandonment. It could be construed that this is the only consequence for failure to notify.
- b. It would be helpful for the state to provide examples of failure to provide timely notice for unforeseeable leaves and approved intermittent leaves.

Agency Response 38: Statute does not speak to an employer’s rights for addressing an employees failure to provide notice so the agency is not able to write a rule addressing this. The preceding WAC, 192-600-010, addresses examples for unforeseeable leave. No changes were made to Phase 3 because intermittent leave would be subject to the employee’s notice requirements.

Formal Comment 39: *Received through email. Comments 27-39 came from the same letter.*

2. 192-800-003: Designation of Authorized Representative:
 - a. Please clarify whether the departmenet will notify the employer of authorization provided by an applicant.
 - b. Please consider and address circumstances where the applicant authorizes an individual to communicate for state purposes but not for employer purposes, and whether the designation form/process will address communication with both the state and the employer.

Agency Response 39: Statute does not require an employee to notify an employer of the designation of an authorized representative. The employee who designates an authorized representative is responsible under WAC 192-800-003 (3) “For the purposes of paid family and medical leave, the term ‘employee’ is used for both ‘employee’ and ‘authorized representative.’” All notification requirements in law would still apply so no changes are being made to Phase 3 rules.

Formal Comment 40: *Received through email. Comments 40-42 address one letter.*
WAC 192-500-160 (Continued Claim)

This definition was added but it isn't clear to what a "continued claim recipient" or "continued claim status" refer or how the terms will be used in relation to WPFML. Please clarify.

Agency Response 40: No changes to Phase 3 rules were requested so no changes are being made. To address the comment, continued claim is a concept that was introduced in a later phase of rulemaking. It was introduced in Phase 4 of PFML rulemaking and the department will address this comment in Phase 4.

Formal Comment 41: *Received through email. Comments 40-42 address one letter*

WAC 192-510-025 (What wages are reportable)

This rule appears to exclude from the "wages" on which premiums are assessed any "supplemental payment from an employer benefit that is not part of the employee's standard compensation" without defining what types of payments are included in this carve-out. This statement of exclusion would accurately describe several types of payments listed in section (1), including bonuses, gifts or prizes, and separation pay. How are employer supposed to distinguish between the payments outside the employee's "standard compensation" that are included as wages and those that are not? Furthermore, it is perplexing why short-term disability benefit payments, which serve as a form of wage replacement benefits, are (a) excluded from premiums, and (b) even allowed while an employee is receiving WPFML paid benefits, when state-mandated paid sick leave is treated differently on both counts.

Agency Response 41: No changes to Phase 3 rules were requested so none are being made. Standard compensation is a concept that was introduced in a later phase of rulemaking. It was introduced in Phase 4 of PFML rulemaking and the department will address this comment in Phase 4.

Formal Comment 42: *Received through email. Comments 40-42 address one letter*

Changes to WAC sections previously "finalized" in earlier Phases:

We respectfully request that ESD create, maintain, and provide to the public a single document containing all the current sections of the WAC regarding WPFML that have been drafted to-date in numerical order so that stakeholders can refer to a single document for the current proposed and/or "final" regulations, regardless of the phase in which they were drafted or revised.

Agency Response 42: No changes to Phase 3 rules were requested so none are being made. The department will take it under advisement as we continue rulemaking.

Formal Comment 43: *Received through email. Comments 43-49 address one letter*

WAC 192-500-070 Family leave includes bonding with a child within one year after placement for adoption or foster care. If possible, the rules should make this leave also available for pre-placement needs such as court hearings, meetings with officials, home visits, etc. FMLA allows this. It is fair to the employee and makes administration easier for employees if both cover this time that is necessary in connection with a placement.

If this addition can be made, then the rule defining a “claim year” 192-500-070 might also need to be revised with respect to family leave due to adoption or foster placement.

If the Rules cannot address this because it is not in the statute, can an employer’s voluntary plan allow the employee to take time for pre-placement activities and attribute that time and benefits to the employee’s PFML entitlement?

Agency Response 43: The law does not provide for employees to take leave for pre-placement activities prior to a placement therefore no changes are being made to Phase 3 rules. To address this comment, if an employer has a voluntary plan and wishes to provide leave for such occasions, nothing prevents the employer from doing so. The employer still has to maintain up to 12 weeks of leave for the birth or placement of a child if the employee otherwise qualifies for the leave. (RCW 50A.04.600).

Formal Comment 44: *Received through email. Comments 43-49 address one letter*

WAC 192-600-020 The employee’s notice to the employer should also include (1) whether the anticipated leave will be intermittent, reduced schedule, or continuous, and (2) the leave reason, at least in general (e.g., my own serious health condition, bonding, to care for a family member, military exigency, etc.).

Agency Response 44: ESD is currently in the process of building its business practices for PFML. It is not being included in rule as it is considered an operational policy.

Formal Comment 45: *Received through email. Comments 43-49 address one letter*

WAC 192-600-025 Please clarify that an employee’s benefits and job protected leave will be delayed/denied if late notice is given, for the period of time by which the notice was late.

Clarify whether an employer can elect to waive the required advance or “proper” notice and allow an employee to take leave and receive benefits despite giving shorter notice than required by the rules, (1) under the state plan and (2) under a voluntary plan.

The example makes reference to the employee filing “weekly claims” but I have not seen any rules addressing a weekly filing process, contents, etc., after filing the initial claim documentation. Please clarify or add this if weekly filing is required, and address whether a voluntary plan can waive weekly filing and approve for the duration of the requested leave.

Agency Response 45: RCW 50A.04.030 states certain requirements for employees’ notice to their employer of their intention to take leave, and the Department cannot adopt rules inconsistent with the statutory requirements..

Formal Comment 46: *Received through email. Comments 43-49 address one letter*

WAC 192-610-010 Subsection (1) states the employee must provide information sufficient for the department (or a voluntary plan?) to determine “eligibility” for benefits. However, “eligibility” is defined in RCW 50A.04.015 as an employee who has worked at least 820 hours during the qualifying period. The term “eligibility” should be reserved for use in this context only. Rather, in this rule, please use the term “qualification” for benefits. This is how it is appropriately phrased in the next rule, 192-610-015.

All the proposed rules should be reviewed for this mix-up of terminology.

Agency Response 46: No changes are being made to Phase 3 rules because the agency interprets eligibility for benefits to apply to receiving paid family and medical leave benefits.

Formal Comment 47: *Received through email. Comments 43-49 address one letter*

WAC 192-610-020 The required content of a medical certification should include in subsection (2) not just the duration of the leave, but also the required schedule for a reduced schedule leave and the frequency and duration of absences for an intermittent leave. Without this information, the Department and the employer with a voluntary plan will be unable to assess whether the employee is using the leave as anticipated or significantly beyond the health care provider’s expectations and medical opinion. Of course intermittent leave for flare-ups of a serious health condition will necessarily be an estimate, but the provider should be able to give that estimate.

In subsection (3)(a), the medical certification should include that the employee’s serious health condition renders the employee unable to work – many of us work all day, every day even though we have a serious health condition so incapacity is equally important.

Agency Response 47: No changes are being made to Phase 3 rules because ESD is currently in the process of building its business practices and operational policy for PFML. Thank you for your suggestion, we will take this under advisement as we create our documents. In draft rule WAC 192-610-010 we are proposing to require employees to provide the type, and anticipated duration of leave as well as certification. The department will notify an employer of an employee’s application for PFML benefits, which may include this information.

Formal Comment 48: *Received through email. Comments 43-49 address one letter*

WAC 192-610-055 The law and this rule state that an employee can take up to 14 weeks of medical leave if she “experiences a serious health condition with a pregnancy that results in a period of incapacity.” Clarification is definitely needed here. Are the extra 2 weeks available only if the full 12 weeks have been taken due to a pregnancy-related serious health condition? Only if the last leave reason that otherwise would take her to the 12 week (or 16 week cap) is pregnancy related and she needs more time as a continuation of that pregnancy-related serious health condition? Or can the employee take the extra 2 weeks if the 12 weeks have been used for something else but now she has a pregnancy-related serious health condition? Examples (assuming all leave is within the same claim year), would the 2 extra weeks be available in any or all of the following situations:

- Employee takes 12 weeks due to a non-pregnancy-related surgery and recovery, then develops a separate, unrelated pregnancy-related serious health condition. Can she take the extra 2 weeks?
- Employee takes 2 weeks for a pregnancy-related serious health condition. Then, she needs time due to her own serious health condition that is not pregnancy-related. Can she take an additional 12 weeks, for 14 weeks total? (Or, same scenario, she takes 6 weeks for pregnancy-related serious health condition, can she then take 8 more weeks for her separate, unrelated pregnancy-related serious health condition?)
- Employee takes 12 weeks of family leave to care for her mother with a serious health condition. She then develops a pregnancy-related serious health condition. Can she take only 4 weeks of medical leave due to the 16-week annual cap, or does she get 6 more weeks since some of the time was pregnancy-related?
- Similar situation in reverse: Employee takes 6 weeks of leave due to her pregnancy-related serious health condition. Can she then take 10 weeks to care for her mother, capped at 16 weeks total, or can she take 12 weeks (for 18 weeks total) since some of the time was pregnancy-related?

As you can see, the examples could go on and on. We need clarity on when that extra 2 weeks is available if the employee has used some of her PFML for non-pregnancy reasons.

Agency Response 48: The definition of “family leave” under Title 50A states that *“family leave” means any leave taken by an employee from work:*

(a) To participate in providing care, including physical or psychological care, for a family member of the employee made necessary by a serious health condition of the family member;

(b) To bond with the employee's child during the first twelve months after the child's birth, or the first twelve months after the placement of a child under the age of eighteen with the employee; or

*(c) Because of any qualifying exigency as permitted under the federal family and medical leave act, 29 U.S.C. Sec. 2612(a)(1)(E) and *29 C.F.R. Sec. 825.126(a)(1) through (8), as they existed on October 19, 2017, for family members as defined in subsection (10) of this section.”*

Per RCW 50A.04.020, the minimum claim duration payment is for eight consecutive hours of leave and the maximum duration for paid family leave may not exceed 12 times the typical workweek hours during a 52-consecutive calendar week period. An employee taking family leave may qualify for 12 weeks of family leave. The leave for the additional two times the typical workweek hours is only applicable if the employee experiences a serious health condition with a pregnancy that results in incapacity.

As for the hypothetical examples presented, the agency needs more information to provide an answer. For example, we would need to know the employees typical work week hours, whether the employee is qualified to take paid family or medical leave, whether the employee has certification for a serious health condition, and other details that are not provided in the comment.

Formal Comment 49: Received through email. Comments 43-49 address one letter

CHAPTER 192-610 WAC – INITIAL APPLICATION FOR BENEFITS -

Missing rule #1 This chapter should include a provision for the Department or a voluntary plan to obtain a second medical opinion when the employee's original medical cert is of questionable validity – for example, a cert for a cardiac condition from a podiatrist; a cert that endorses a much longer leave than is considered medically necessary such as 12 weeks to recover from an appendectomy without complications; or a cert from the employee's physician spouse. The rules could mimic the FMLA regulations on 2nd/3rd opinions in such circumstances. See 29 C.F.R. 825.307(b) and (c).

Missing rule #2 Section 50A.04.020 of the PFML statute provides: *(c) The minimum claim duration payment is for eight consecutive hours of leave.*

- (1) Please provide clarification how this is measured – for example, a full time employee who takes leave for 3 hours Tuesday afternoon and 5 hours Wednesday morning? A part time employee who takes off two consecutive scheduled 4-hour shifts on Tuesday and Thursday?
- (2) Clarify what happens if the employee only needs leave intermittently and takes 3 hours off per week for treatment – does he not get paid because the duration is less than 8 hours, or does he get paid but only after multiple times off total 8 hours or more? If so, then once he has aggregated 8 hours of leave, clarify whether the employee gets paid each week for the 3-hour absence, or only every 2-3 weeks each time the leave totals 8 hours?
- (3) Consider, for example, an employee with a chronic condition that flares up irregularly and for fewer than 8 hours at a time. That employee will never meet the requirement of 8 consecutive hours unless he lies about how long he needed off in order to meet the 8 hours. Or, is he forced to take a full day even though he doesn't need it and could be working the other hours?

Agency Response 49:

The department does not have the authority to require a second opinion from another health care provider. The department has written WAC 192-610-015 proposed rule indicating that if the employee does not provide sufficient documentation or certification substantiating the employee's qualification for benefits, the department will deny benefits until sufficient documentation is provided. To the second example, the minimum claim duration will be for eight consecutive hours of leave. This is to be clarified in Phase four draft rules under WAC 192-620-005.