

Concise Explanatory Statement

Paid Family and Medical Leave

Phase Four

Chapter 192-500 WAC • Chapter 192-510 • Chapter 192-610 • WAC 192-620 • WAC 192-630 •
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 Four of rulemaking, which covers the following topics:

- Definitions
- Assessing and Collecting Premiums
- Initial Application for Benefits
- Continuation of benefits
- Practice and Procedure
- Fraud

Practice and Procedure: Three 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 May 29, 2019. The formal CR102 hearings were held on May 22, 2019 in Lacey, Washington, and on May 29, 2019 in Spokane, Washington.

II. Rules Summary and Agency Reasons for Adoption

Chapter 192-500 WAC DEFINITIONS

NEW SECTION

WAC 192-500-110 Week.

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

Reason for adoption

Title 50A RCW and associated rules refer to a "week" in several different contexts. Defining a "week" was necessary to establish a consistent meaning for use in all instances.

NEW SECTION

WAC 192-500-120 Employee fraud.

- (1) "Fraud" means an action taken by an employee where either of the following is determined to have occurred:
- (a) Willful nondisclosure as defined in WAC 192-500-140; or
 - (b) Misrepresentation as defined in WAC 192-500-150.
- (2) A finding of fraud will result in a disqualification of benefits and applicable penalties under Title 50A RCW.

Reason for adoption

The department is required to identify fraud and deny benefits to individuals who commit it. In order to meet this obligation, a clear definition of fraud is necessary.

NEW SECTION

WAC 192-500-130 Nondisclosure.

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

Reason for adoption

In order to develop processes to determine fraud based on an instance of willful nondisclosure, a definition of the term is necessary. There is a material difference between nondisclosure and willful nondisclosure, which is why the department developed separate definitions for the terms.

NEW SECTION

WAC 192-500-140 Willful nondisclosure.

"Willful nondisclosure" occurs when:

- (1) An employee omits or fails to disclose information;
- (2) The employee either knew or should have known that the information should have been provided;
- (3) The information concerned a fact that was material to the employee's rights and responsibilities under Title 50A RCW; and

(4) The employee omitted or did not disclose the information with the intent that the department would take action on other information the employee did provide.

Reason for adoption

In order to develop processes to determine fraud based on an instance of willful nondisclosure, a definition of the term is necessary. There is a material difference between nondisclosure and willful nondisclosure, which is why the department developed separate definitions for the terms.

NEW SECTION

WAC 192-500-150 Misrepresentation.

"Misrepresentation" occurs when:

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

Reason for adoption

In order to develop processes to determine fraud based on an instance of misrepresentation, a definition of the term is necessary.

NEW SECTION

WAC 192-500-160 Continued claim.

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

Reason for adoption

There are multiple requirements that can apply to someone receiving a benefit payment for a claim. For example, a claim for benefits under Title 50A RCW that is currently paying out benefits to an employee carries a different set of requirements, both legal and operational, to process. It was necessary to define a continued claim to ensure consistent processing of claims and provide clarity for the department and employees.

NEW SECTION

WAC 192-500-170 Self-employed.

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

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

Reason for adoption

Self-employed individuals in Washington are not required to participate in Paid Family and Medical Leave. They are permitted to opt in, but they are subject to a different set of processes than employees. For example, the department calculates typical workweek hours quite differently for self-employed individuals than it does for employees. Defining the term clarifies these processes for the department as well as the general public.

Chapter 192-510 WAC ASSESSING AND COLLECTING PREMIUMS

NEW SECTION

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

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

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

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

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

Example: While on paid medical leave, an employee receives sixty-one percent of the employee's typical weekly wage from the state. Through an internal short-term disability benefit, the employer pays the employee the remaining thirty-nine percent of the employee's typical weekly wage as a supplemental benefit payment, bringing the employee's total benefit to one hundred percent of the employee's typical weekly wage. Since this supplemental benefit payment is not part of the employee's standard compensation, it is not considered a wage, and should not be reported on either the employee's weekly claim or the employer's quarterly report.

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

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

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

- (i) Retirement;
- (ii) Sickness or accident disability;
- (iii) Medical or hospitalization expenses in connection with sickness or accident disability; or
- (iv) Death.

Reason for adoption

The department received many questions regarding what is and what is not considered a wage for the purposes of premium assessment under Title 50A RCW. This rule clarifies what the department will consider wages for this purpose.

NEW SECTION

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

- (1) If an employee has not been issued a payment on the claim, an employee may cancel a claim within thirty days of the date of the submitted application for benefits.
- (2) The commissioner, at the commissioner's discretion, may permit cancellation of a claim without an issued payment after thirty days from the date of the submitted application for benefits in extreme and unusual circumstances.
- (3) An employee may not cancel a claim that has been issued a payment. The department will only cancel a claim that has been issued a payment in any amount if the department made the payment due to departmental error.
- (4) If the department has denied benefits before the request to cancel the claim was received, the denial will remain in effect.
- (5) The denial of a request to cancel a claim is not subject to appeal.

Reason for adoption

The department recognizes that claims will be filed that never move into continued claim status. This rule will allow an employee to cancel the initial claim for a certain period, after which the department will need to approve the cancellation.

NEW SECTION

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

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

Reason for adoption

The Family and Medical Leave Act (FMLA) allows for employers to require the employee to exhaust their bank of paid time off in coordination with FMLA protections. Many employers have incorrectly assumed this is also

the case with Paid Family and Medical Leave. This rule clarifies that an employer is not permitted to require this of employees.

NEW SECTION

WAC 192-610-080 When should an employee reopen a claim? (1)

When an employee has an existing claim year and more than four consecutive weeks have passed since the employee filed a weekly claim for benefits, or the employee experiences a new qualifying event, the employee must reopen the claim in order to receive benefit payments.

(2) If the duration of leave for a qualifying event has not expired:

(a) The employee can reopen the claim and file weekly claims as necessary.

(b) If the employee requests to claim the weeks prior to the date the claim is reopened, the employee must have good cause as defined in WAC 192-610-040 to claim prior weeks.

(3) If the duration of leave for the qualifying event has expired or the reason for leave is not the same as the previous qualifying event, the employee must reopen the claim by updating the application as required under WAC 192-610-010 before benefits will be paid.

Reason for adoption

This rule clarifies when an employee may reopen a claim once their claim is no longer in continued claim status if their qualifying event resumes or if they experience a new qualifying event in the same claim year.

NEW SECTION

WAC 192-610-085 How should an employee reopen a claim? An employee may reopen a claim by:

(1) By using the department's online services;

(2) Contacting the paid family and medical leave customer care center by telephone; or

(3) Alternate methods authorized by the commissioner.

Reason for adoption

This rule clarifies the methods available with which an employee may reopen a claim in the scenario described in WAC 192-610-080.

Chapter 192-620 WAC WEEKLY BENEFITS

NEW SECTION

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

(1) The minimum claim duration for paid family or medical leave is eight consecutive hours in a week. If an employee on leave claims eight consecutive hours at any point during a week, the minimum claim duration is satisfied.

Example 1: An employee typically works six-hour shifts each weekday. The employee takes leave Monday, works Tuesday and Wednesday, and takes leave Thursday and Friday. The minimum claim duration requirement would be satisfied with the leave taken Thursday and Friday. That employee could also include the hours missed on Monday in the weekly claim.

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

Example 2: An employee typically works four-hour shifts. The employee will need to take two consecutive

shifts of leave in a week to have a minimum claim.

Reason for adoption

Statute requires a minimum claim duration of eight-consecutive hours of leave. The department received many questions asking the department to clarify and provide examples, which prompted the development of this rule.

NEW SECTION

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

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

Reason for adoption

RCW 50A.04.040 references a “weekly application” that must be filed by an employee on leave in order to receive payment. This weekly application is necessary to verify that the employee’s qualifying event still exists and to determine how many hours, if any, the employee works each week while on leave for the purposes of proration.

NEW SECTION

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

- (1) The department must determine if an employee qualifies for benefits when the employee files a weekly claim for the payment of benefits. For the week that the employee is claiming, the department will ask if the employee:
 - (a) Worked during the week, and for the hours associated with that work;
 - (b) Received any paid leave such as vacation leave, sick leave, or other paid time off that was not considered a supplemental benefit payment provided by the employer, and the hours associated with that leave;
 - (c) Received any benefit that may disqualify the employee for paid family or medical leave, such as unemployment insurance; and
 - (d) Experienced a change in the qualifying event that affects the eligibility for, or duration of, paid family or medical leave benefits.
- (2) The employee may be asked to provide additional information.

Reason for adoption

This rule determines the content of the weekly application that an employee on leave must file with the department in order to receive payment.

NEW SECTION

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

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

Reason for adoption

If an employee's eligibility or benefit amount cannot be immediately verified, conditional payments may be made to the employee. This rule describes that process and establishes that an employee may refuse such payment.

**Chapter 192-630 WAC
CLAIM DETERMINATIONS**

NEW SECTION

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

benefits? (1) The department will send interested parties a notice when the department has a question of whether an employee is qualified for benefits prior to making a determination on the claim. The notice will include:

- (a) The department's questions regarding the employee's qualification for benefits; and
 - (b) The date by which the interested parties must respond. This date will be no earlier than ten calendar days from the date the notice is sent. Reasonable mailing time will be added when the notice is sent via postal service.
- (2) The employee has a right to respond to the department on qualification issues.

Reason for adoption

If additional information is required for the department to make a determination on an employee's claim, the department may reach out to interested parties in order to collect that information. This rule clarifies that process and establishes clear timelines by which time interested parties must respond to requests for information.

NEW SECTION

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

information? (1) If an interested party fails to respond by the due date on the notice provided under WAC 192-630-005, the department will make a determination based on available information.

(2) Subject to RCW 50A.04.510, if benefits are denied because the employee did not respond to a request for information, the denial will remain in effect until the employee provides sufficient information to establish that the employee is qualified for paid family or medical leave.

Reason for adoption

After interested parties have been contacted in the process described in WAC 192-630-005, the department will make a determination based on available information if the parties do not respond. This rule establishes

the department's procedure to make this determination and clarifies how such a determination may be changed by providing the information requested.

NEW SECTION

WAC 192-630-015 How will a determination be made about an employee's eligibility for benefits? (1) When the department has issued a notice under WAC 192-630-005 the department will not make a determination on whether an employee qualifies for paid family or medical leave until all interested parties have had an opportunity to provide information about the question of eligibility by the due date indicated on the notice. (2) If new facts are discovered before the determination is made, the department will provide interested parties with an opportunity to respond to the new information. (3) After the department makes a determination, all interested parties will be provided with a copy of that determination. (4) If the department receives new and relevant information after a determination is made: (a) The information will be considered by the department; (b) Interested parties will be given an opportunity to respond, if necessary; and (c) The department may make a new determination based on the newly provided information.

Reason for adoption

As described in WAC 192-630-010, the department may make a determination based on available information if interested parties do not provide the requested information before the deadline. This rule establishes the process through which the department will make that determination.

NEW SECTION

WAC 192-800-005 What is the standard the department will use to determine fraud? The department will determine if fraud has been committed under WAC 192-500-120 based on a showing of clear, cogent, and convincing evidence.

Reason for adoption

The department must create a clear standard for fraud in the event of misrepresentation or willful nondisclosure so that appropriate action may be taken. This rule establishes that standard.

NEW SECTION

WAC 192-800-010 How will the disqualification periods and penalties be assessed for an employee who is determined to have committed fraud? (1) The department will assess disqualification periods and penalties for each fraud determination individually under RCW 50A.04.045(3). (2) All disqualifications and penalties in RCW 50A.04.045(3) are in addition to the required repayment of any benefits paid as a result of fraud. (3) The department will assess the fraud penalties established under RCW 50A.04.045(3) based on the percentage of benefits paid for those weeks in which the fraud occurred or that were paid as a result of fraud. The penalty will not apply to other weeks that may be included in the same eligibility decision. (4) The penalty amount, if not a multiple of one dollar, is rounded up to the next higher dollar.

Reason for adoption

When fraud is determined to have occurred, appropriate penalties and disqualification periods will be assessed to the individual(s) in question. This rule sets out the department's process for assessing those penalties.

NEW SECTION

WAC 192-800-015 When will the department change an occurrence of fraud? (1) Determinations of fraud are appealable. If an employee has been assessed with multiple determinations of fraud and any determination changes due to a redetermination or an appeal, the department will send a new fraud determination showing the corrected disqualification period and penalty under Title 50A RCW.

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

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

Reason for adoption

Penalties are assessed based on the number of occurrences of fraud that occurred. This rule allows the department to modify a penalty based on the redetermination of a previous occurrence of fraud.

III. Changes to rules

192-630-005 – Change “five” to “ten.”

The department has made this change in response to feedback from stakeholders who had expressed concern that a minimum of five business days was insufficient for employees to provide requested information.

IV. Public Comment and Responses

	Method	WAC	Comment	Response
1	Portal	192-500-130	The phrase “should have been known” should be omitted. Including a “should have known” standard is overly broad and will result in claimants being penalized for the nondisclosure of information which they did not actually know. If the employee does not actually know the information, they should not be held responsible for providing such information to the department. Given that the reason for these definitions is to not only charge claimants for overpayments but to penalize them, the definition should be narrower, applying only to those claimants who knowingly defraud the system.	ESD is not making changes to this rule based on this comment because the definition follows the same meaning used in the agency’s other programs.
2	Portal	192-500-140	The phrase “should have known” should be omitted. Including a “should have known” standard is overly broad and will result in claimants being penalized for the nondisclosure of information which they did not actually know they needed to disclose. If the employee does not know the information should have been shared and does not therefore intentionally withhold information, they should not be penalized for failing to providing such information to the department. Given that the reason for these definitions is to not only charge claimants for overpayments but to penalize them, the definition should be narrower, applying only to those claimants who knowingly defraud the system.	ESD is not making changes to this rule based on this comment because the definition follows the same meaning used in the agency’s other programs.
3	Portal	192-610-010	<p>The requirement of filing weekly applications should be omitted. The filing of weekly applications is unduly burdensome for employee applicants who have already demonstrated they qualify for leave for a particular period. For example, if the employee’s original application for family leave for the birth or placement of a child includes the requisite documentation of the birth or adoption, and the employee has requested an amount of time for which they are eligible (e.g. 12 weeks), there is no need for the employee to file weekly applications that reiterate the same information. Similarly, for a foreseeable medical condition for which the employee submitted a certification from a health care provider indicating the anticipated amount of leave, there is no need to continue to file weekly applications unless the anticipated time of leave changes.</p> <p>A weekly application is particularly burdensome and may create barriers to</p>	The state statute tasked ESD with implementing the program as written. RCW 50A.04.040 (1) requires a weekly application to receive benefits. WAC 192-610-040 provides an employee with the ability to backdate an application or weekly claim for benefit.

			<p>accessing paid leave for low-wage workers who may not have access to the internet or a phone. Often low-wage workers do not have any or any reliable internet service. They may not be able to afford internet or data services at their home or on their phone, or they may live in a remote rural area where service is limited. This employee will be burdened by having to leave their home every week in order to access the internet and file an application during a time when they are supposed to be on leave and able to stay at home. Additionally, low-wage workers also are often not able to reliably pay a phone bill or pay for cell phone minutes. The lack of access to a phone should not affect their eligibility for benefits for which they have previously established eligibility.</p> <p>Furthermore, workers who do not speak English will face additional challenges with every contact required with the agency, as well as requiring agency resources for interpretation. These repeated applications are unnecessary if their eligibility for ongoing paid leave has been previously established.</p> <p>A requirement to file a weekly application creates an undue burden for all employees by requiring the time and hassle of submitting applications during a period when the intent of the leave is to be able to focus on caring for their newborn or their own or a family member's serious medical condition. Taking the time to submit a weekly form during such leave undermines the very purpose of the leave law—to allow employees to take care of their baby or their health condition.</p> <p>A requirement that the employee affirmatively contact the department if any of the events listed at WAC 192-620-020 occur should suffice to ensure no change of circumstances has occur affecting the employee's eligibility.</p>	
4	Portal	192-500-160	This section should be omitted, consistent with our proposal to omit the requirement that an application who has previously established ongoing eligibility need not submit weekly application.	The state statute tasked ESD with implementing the program as written. RCW 50A.04.040 (1) requires a weekly application to receive benefits.
5	Portal	192-620-025	Section (3) should be omitted, and overpayments for conditionally paid weeks treated the same as other overpayments. This would allow waiver of an overpayment “when the employee is not considered at fault and it would be against equity and good conscience for the department to require the	The inability for the department to waive an overpayment made in a conditional payment is mandated by RCW 50A.04.040(2)(c).

			employee to repay the full amount.” WAC 192-640-015. This is still an appropriate standard to determine whether an employee is eligible for a waiver, even if the payment was conditional, because the waiver will only be available if the employee was not at fault. This will ensure that overpayments that are the result of mistake will not result in penalizing an employee whose financial condition makes them unable to repay the overpayment.	
6	Portal	192-630-005	<p>This section should be amended to replace “five calendar days” with “14 calendar days.” The five-day minimum for response to a question about eligibility provides inadequate time for an employee to gather necessary information and respond completely to a request for additional information. A low-income employee’s ability to respond in this period will be further challenged if they do not have regular access to the internet or phone. Often low-wage workers do not have any or any reliable internet service. They may not be able to afford internet or data services at their home or on their phone, or they may live in a remote rural area where service is limited. Additionally, low-wage workers also are often not able to reliably pay a phone bill or pay for cell phone minutes. The lack of access to the internet or phone should not affect their ability to apply for benefits. Providing additional time to respond to a request will assist those employees with barriers to timely respond.</p> <p>Furthermore, any employee dealing with a health condition or caring for a newborn may not be able to regularly access the phone or email, even if such services are available to them. If the employee does not speak English or is low-literacy, they require additional time and assistance to understand and respond to an inquiry.</p> <p>A reasonable time for employees in the midst of family or health conditions, or with need for assistance to complete an application, would be 14 days.</p>	The department has amended the language in question to read: “ten business days.”
7	Portal	192-630-010	<p>Section (1) should be amended to add the following: However, the department will not deny benefits until it can confirm that the notice was actually communicated to the employee, until which point the department will continue to issue conditional benefits.</p> <p>This addition is necessary to ensure that workers who do not receive the notice from the department are not unnecessarily penalized. This applies</p>	ESD’s internal policies will focus on communicating with the employee via the method the employee provides on the initial application. It is the position of the department to rely on the contact information provided by the employee

			<p>particularly to H-2A Temporary Agricultural Workers, who will likely need to leave the United States for the purposes of their paid family or medical leave. Agricultural employers increasingly utilize the H-2A Temporary Agricultural Workers program, bringing employees from their home countries outside of the United States to Washington State to work for periods from two to ten months. Consequently, when an eligible H-2A employee has need for leave, they will likely need to return to their home country to be with their family member or receive medical care. Communications to the employee in their home country via mail are often limited and frequently take weeks to arrive, if at all. The employee may also have limited access to email or phone in their home country, particularly if they reside in a remote or rural location with limited data service or internet infrastructure. The department should therefore confirm that the notice is actually communicated to the employee prior to denying benefits.</p>	<p>therefore no changes are being made to this rule.</p>
8	Portal	192-510-025	<p>In the New Section of WAC 192-510-025 (2) Examples of what the department will not consider wages include, but are not limited to: (c) - "The amount of any payment made...." Does this section mean we are to reduce wages by employee portion of medical and dental premiums? What about employee portion of State retirement contributions? We've been deducting the FLI/MLI amounts from employees, however there doesn't seem to be clear language regarding items that may be deductions to wages.</p>	<p>This comment does not request any changes to the rule in Phase 4 so no changes are made. This rule speaks to what the department would consider wages that would count toward the total premium owed, and therefore allowing the employer to deduct from those wages for the purposes of PFML. Further clarification will be provided in subsequent rules that are currently being developed.</p>
9	Portal	192-510-025	<p>There is still a lot of confusion regarding whether 3psp is included in subject wages or wages that are reportable to the department for premium assessment purposes.</p> <p>Please clarify what is the difference between 3psp (wages administered by a 3rd party to pay for short term disability) and (2) (c) "The amount of any payment made on account of "sickness or accident disability".</p> <p>Also, in an earlier example in WAC 192-510-025 it states "A supplemental payment from an employer benefit that is not part of the employee's standard compensation" and provides an example of an employee out on</p>	<p>Payments to an employee on leave from an employer benefit program (short-term/long-term disability, salary continuation, etc.) are not considered wages for the purposes of premium assessment. This may contrast from previous guidance offered by the department prior to the passage of HB 1399, which was signed into law in April, 2019. That bill removed premium liability for</p>

			<p>paid medical leave receiving short-term disability. It is stated there that these short-term disability payments are not part of the employee's standard compensation and therefore not considered a reportable wage.</p> <p>This is contrary to what we were told previously about how sick pay should be treated. We were previously told explicitly that ALL SICK PAY was subject wages.</p> <p>Can you advise if this is a change in your prior stance? Please clarify in the finalized rules exactly how 3psp should be treated and give further examples.</p>	supplemental benefit payments made to an employee on leave.
10	Portal		Please ensure that the bonding timelines for Paid FMLA match that of Federal FMLA. Thank you.	ESD is tasked with implementing the law as written and cannot change the time allowed under RCW 50A.04.020 for paid family leave.
11		192-610-075	<p>For New Section WAC 192-610-075 Can an employer require an employee to take paid time off in place of paid family or medical leave benefits? Employers may not require employees to take paid vacation leave, paid sick leave, or other forms of paid time off provided by the employer before, in place of, or concurrently with paid family or medical leave benefits.</p> <p>ESD's notification to the employer of an employee's application for benefits is significant so that the employer may flag the employee record to prevent the employee from also using sick or vacation leave to augment the PFML payment. Our current ST disability plan allows ST disability plus concurrent sick/vacation leave to bring an employee to 100% salary during a qualified leave. It will also be necessary to notify the employer when the PFML benefit is stopped so that the employee may then tap into their sick and vacation leave.</p>	WAC 192-610-060 (phase three) establishes the notice that the department will send to employers when an employee files an application for benefits with the department. The employer may use the information contained in this notice in conjunction with its internal leave policies to approve or deny use of paid time off while the employee is on paid family or medical leave, subject to local, county, and state laws.
12		192-500-110	For employers with 24/7 operations (e.g. hospitals), this definition is problematic. In conjunction with the minimum claim duration requirements of WAC 192-620-005, there is potentially a scenario where an employee is unable to collect benefit payment for a portion of their shift that crosses over into the next claim "week." Example: employee is a nurse working three 12-hour shifts per week from 7pm to 7am. She is out of work for 2 weeks (6 shifts) but the last shift she misses starts on Saturday and ends on Sunday	RCW 50A.04.020(2)(c) requires the employee to file a weekly claim for at least eight consecutive hours of leave in order to receive payment.

			<p>morning. Would she only receive benefits for 5 full shifts and the portion of her last shift through 11:59pm? Or when she files for weekly claim for benefits, since she didn't work at all during that claim week, she then collects the full benefit?</p> <p>We recommend clarification on this issue so employees know what to expect as well as to ensure voluntary plans are compliant.</p>	
13		192-610-070	<p>Employees are encouraged to provide notice of the need for leave in advance when foreseeable. It is extremely common for maternity and scheduled surgery claims to be filed months in advance. If an employee files 4 months in advance and then needs to cancel the claim, will they not be able to do so since this regulation only allows for cancelation within 30 days of application?</p> <p>We recommend allowing an employee to cancel at anytime as long as no benefits have been paid.</p>	The department reserves the right to allow cancelation of a claim for which benefits have not been paid after the 30-day deadline has passed. Requests for such cancelations will be reviewed on a case-by-case basis.
14		WAC 192-620-005	<p>There has been significant discussion and confusion regarding how this will work for employees who are not out on a continuous leave of absence. The issues raised have been:</p> <p>Reduced Schedule leaves – many employees are released to return to work part time (e.g. working half days). Based on this regulatory requirement, an employee would not receive any benefit even though they are only working 50% of their scheduled shifts. This discourages an employee from returning to work when traditional disability plans typically cover this type of schedule in order to encourage employees to return to work and gradually build their stamina and endurance while recovering from a disabling event. The statutory language only says the minimum payment is for eight consecutive hours of leave but does not specify within a single claim week. It could be satisfied with an initial continuous leave then allow for smaller blocks of leave upon return to work. Or consecutive could be defined specifically in the regulation to allow for a reduced schedule option.</p> <p>Intermittent leave – If an employee misses eight consecutive hours, it appears they could then take leave (and receive benefits) for intermittent absences with no minimum increment. For example, an employee with a standard Monday through Friday work schedule could miss work on Monday</p>	<p>RCW 50A.04.020(2)(c) requires the employee to file a weekly claim for at least eight consecutive hours of leave in order to receive payment.</p> <p>Medical documentation is necessary to grant paid family or medical leave in any duration. If the employee is able to demonstrate with such documentation that leave is needed, the employee is entitled to that leave under this chapter.</p> <p>The minimum claim duration requirement is satisfied by claiming eight consecutive hours of leave at any point during a week in which leave is taken. The department does not feel that a rule change is necessary at this time, but will</p>

			<p>(8 hour shift) due to their family member's health condition, then come to work 15 minutes late on Tuesday, take an extra-long lunch on Wednesday, leave 30 minutes early on Thursday, and take a half-day on Friday as long as the certification supports the need for care. Is this the intent? Most paid medical and family leave programs, if they allow for intermittent at all, require full work day increments to avoid undue disruption to the workplace. We recommend a similar approach here to define increments of intermittent leave permitted if minimum claim duration is met.</p> <p>Timing of minimum claim duration – It's unclear if the 8 consecutive hours is an initial threshold issue or if it can be met at any time during the claim week. For example, if an employee with a standard Monday through Friday work schedule (8 hours per shift) misses an hour of work on Monday, 2 hours on Tuesday, then a full shift on Wednesday, can they collect benefits for all the time missed since there were 8 consecutive hours missed during the claim week? Or could they only collect for Wednesday and any absences following when they met the 8 consecutive hours in the claim week? We recommend clarification on this issue if the regulation remains as currently written – allowing for intermittent leave of any increment if minimum claim duration is met.</p>	commit to clarifying this information in other communications.
15	Hearing	192-620-005	<p>I would request clarification as to whether under (1) the minimum claim duration is eight consecutive hours in a week. Does an employee need to meet the eight consecutive hours first and then take less than eight hours? So, for instance, if they miss eight hours on a Monday and then four hours on a Wednesday, four hours on a Friday, that seems to meet the definition.</p> <p>I think clarification would be needed is an employee took four hours on a Monday, four hours on a Wednesday, and eight hours on a Friday if they work Monday through Friday. Would that scenario also meet WAC 192 620 005? So I would request clarification or examples, additional examples, than what you currently have in the proposed rules.</p>	The minimum claim duration requirement is satisfied by claiming eight consecutive hours of leave at any point during a week in which leave is taken. The department does not feel that a rule change is necessary at this time, but will commit to clarifying this information in other communications.
16	Hearing	192-620-025	<p>"What happens if an employee is being conditionally paid benefits?" I would request clarification as to whether this applies to an employer voluntary plan or if this section only applies to employees filing under the State program.</p>	Following the "same or better" standard required by voluntary plans, employers with approved voluntary plans will be expected to offer conditional payments in a manner that is consistent with

				what the state would offer to employees on leave, or a similar policy that is more advantageous to the employee on leave.
17	Portal	192-500-160	<p>WAC 192-500-160. "Continued Claim". This section of the rules says that an employee is a "continued claim" recipient if the employee (a) is eligible for benefits and (b) has received credit for the waiting period or payment of benefits for one or more weeks in a claim year and in the current "continued claim" series. The draft regulation also says that "continued claim" status will end following four or more consecutive weeks for which the employee does not file a claim or is not taking paid family or medical leave. I find this section extremely confusing. I note that you do not actually define what a "continued claim" is. I looked at the statute and the term "continued claim" is used only once. It is in section 50A.04.040(2) and it states:</p> <p>If an employee has received one or more benefit payments under this chapter, is in continued claim status, and his or her eligibility for benefits is questioned by the department or contested by the employer, the employee will be conditionally paid benefits without delay for any periods for which the employee files a claim for benefits, until and unless the employee has been provided adequate notice and an opportunity to be heard. The employee's right to retain such payments is conditioned upon the department's finding the employee to be eligible for such payments.</p>	WAC 192-500-160 provides a definition of continued claim. ESD is using language similar to Unemployment Insurance (UI) for clarity and consistency in the agency.
18	Portal	192-610-080	<p>WAC 192-610-080. "When should an employee reopen a claim?" The proposed regulation states, among other things, that "when an employee has an existing claim year and more than four consecutive weeks have passed since the employee filed a weekly claim for benefits, or if the employee experiences a new qualifying event, the employee must reopen the claim in order to receive benefits. This makes it seem as though there is only one claim ever open during a claim year? This does not make sense? All requests for leave will be filed under the same claim? If that is true, does that mean that the waiting period only needs to be satisfied once? If so, why does the draft regulation above refer to an employee getting credit for the waiting period for "one or more weeks" in a claim year?</p>	ESD is tasked with implementing the law as written. RCW 50A.04.040 requires a weekly application so no changes are being made to this rule.

			<p>50A.04.020. “Beginning January 1, 2020, family and medical leave are available and benefits are payable to a qualified employee under this section. Following a waiting period consisting of the first seven calendar days of leave, benefits are payable when family or medical leave is required. However, no waiting period is required for leave for the birth or placement of a child. Benefits may continue during the continuance of the need for family and medical leave, subject to the maximum and minimum weekly benefits, duration, and other conditions and limitations established in this chapter. Successive periods of family and medical leave caused by the same or related injury or sickness are deemed a single period of family and medical leave only if separated by less than four months.”</p>	
19	Portal	192-620-005	<p>WAC 192-620-005 “What is the minimum claim duration?”. The proposed regulation states that the minimum claim duration of PFML is 8 consecutive hours in a week. The statute itself says that the “minimum claim duration payment” duration is 8 consecutive hours. Those are two different things.</p> <p>Is “minimum claim duration” used in the regulations different from “minimum claim duration payment” used in the statute? If so, what is the difference.</p> <p>This seems to suggest that once an employee meets the minimum claim duration, the employee can take intermittent leave in smaller increments? Am I misreading that?</p>	<p>This comment does not request any changes to the rule in Phase 4 so no changes are made. IN response to the questions, an employee would need to claim the minimum duration of eight-consecutive hours in a week. To clarify, eight-hour minimum is only required at some point in the week for which the employee is claiming.</p>
20	Portal	192-620-010	<p>WAC 192-620-010 “How should an employee request benefit payments?” This regulation states that an employee “must file a weekly claim to receive benefits” and that a weekly claim can only be made after the end of the week being claimed.</p> <p>I am completely confused by this. In the regulations above, they seem to suggest that there is only one “claim” per benefit year.</p> <p>What do you mean by this statement that an employee must file a weekly claim to receive benefits?</p> <p>If an employee files a request for 12 weeks to bond with a new child and submits the appropriate certification and is approved, they nevertheless have to file a weekly claim?</p>	<p>This comment does not request any changes to the rule in Phase 4 so no changes are being made. In response to the hypothetical question, statute requires a weekly claim to determine eligibility and payment on a weekly basis. For example, if an employee works for part of a week in which they are on leave, the benefit must be prorated accordingly.</p>