

PRELIMINARY Significant Analysis
Title 50A RCW
Paid Medical and Family Leave

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Introduction

Title 50A RCW creates a statewide Paid Family and Medical Leave insurance program that provides for at least partial wage replacement when a qualified employee takes leave for an approved reason related to family or medical leave.

In 2019, the Employment Security Department (department) began collecting premiums and quarterly reporting for employers. In 2020, the department started accepting applications for the benefit portion of the program. The law requires the state to develop rules as we continue to administer the program.

These rules are being developed by the department and are filed in general rulemaking processes in accordance to Title 34 RCW. This filing contains rules related to the continuation of health care benefits.

Chapter 1: Describe the proposed rules, including a brief history of the issue, and explain why the proposed rules are needed.

AMENDATORY SECTION

WAC 192-700-010 Can an employer deny employment restoration? (1) An employee is not entitled to ~~((employment protection under Title 50A RCW))~~ rights under RCW 50A.35.010(1) if:

(a) An employer exercises its right to deny restoration under RCW 50A.35.010 (6)(b) and the employee has elected not to return to employment after receiving notice under subsection (2) of this section; or
(b) The employer is able to show that an employee would not otherwise have been employed at the time ~~((of reinstatement))~~ the employee would return to work after the employee's family or medical leave under Title 50A RCW ends.

(2) An employer that chooses to deny restoration under subsection (1)(a) or (b) of this section to an employee on paid medical or family leave must notify the employee in writing as soon as the employer decides to deny restoration. The employer must serve this notice to the employee either in person or by certified mail. The notice must include:

(a) A statement that the employer intends to deny employment restoration when the leave has ended;
(b) The reasons behind the decision to deny restoration;
(c) An explanation that health benefits will still be paid for the duration of the leave; and
(d) The date ~~((in))~~ on which eligibility for employer-provided health benefits ends.

(3) Employers that choose to deny restoration ~~((are required to adhere to the))~~ under this section must provide continuation of health benefits as required in RCW 50A.35.020 ~~((for the remainder of the employee's approved leave))~~ and WAC 192-700-020.

Generally speaking, employers are required to guarantee restoration of an employee who takes leave under Title 50A RCW to the same or a similar position the employee held prior to the commencement of leave if certain criteria are met. These criteria relate to the duration of employment and the size of the employer. In very limited circumstances, employers are permitted to deny restoration to an employee who would otherwise be entitled to restoration rights. Such denial is only possible if the conditions in RCW 50A.35.010(6)(b) are met. The amendment to this rule clarifies those conditions and makes other changes needed to align with WAC 192-700-020, the proposed rule related to the continuation of health benefits.

NEW SECTION

WAC 192-700-020 When does an employer need to provide a continuation of health benefits to an employee who is on paid family or medical leave? (1) An employee taking family or medical leave under Title 50A RCW is entitled to the continuation of health benefits as provided in this section when

there is at least one day of concurrent use with leave taken under the federal Family and Medical Leave Act as it existed on October 19, 2017.

(2) When required under subsection (1) of this section, the employee's health benefits must be maintained as if the employee had continued to work from the date family or medical leave under Title 50A RCW commenced until whichever of the following occurs first:

(a) The employee's family or medical leave under Title 50A RCW ends; or

(b) The employee returns from leave to any employment.

(3) If the employer and employee share the cost of existing health benefits, then during any continuation of health benefits as provided in this section, the employee remains responsible for the employee's share of the cost as prescribed by 29 C.F.R. 825.210, 825.211, and 825.212, and any subsequent amendments to those regulations.

(4) Nothing in this section should be construed as restricting an employer from providing a continuation of health benefits for any employee's claim for paid family or medical leave.

RCW 50A.35.020 requires employers to continue providing health insurance to employees under the same conditions as if the employee had continued to work, under certain circumstances. The law requires employers to continue providing these health benefits if they are also required by the federal Family and Medical Leave Act (FMLA). This law is subject to multiple interpretations regarding the exact start and end dates of such a requirement. As such, the department determined that a rule was necessary to clarify the more specific conditions under which an employer must continue health benefits and the duration of time for which those benefits must be maintained.

Chapter 2: Is a Significant Analysis required for these rules?

Rules requiring a significant analysis.

WAC Section	Section Title
192-700-020	When does an employer need to provide a continuation of health benefits to an employee who is on paid family or medical leave?

Rules not requiring a significant analysis.

WAC Section	Section Title	Exempting reason	Exempting statute
192-700-010	Can an employer deny employment restoration?	Interpretive Procedural	RCW 34.05.328(5)(c)(ii) RCW 34.05.328(5)(c)(i)

RCW 34.05.328(5)(c)(iii) defines a significant legislative rule:

A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

Procedural and interpretive rules are specifically excluded from the definition of a significant legislative rule and are defined in RCW 34.05.328(5)(c)(i):

A "procedural rule" is a rule that adopts, amends, or repeals (A) any procedure, practice, or requirement relating to any agency hearings; (B) any filing or related process requirement for making application to an agency for a license or permit; or (C) any policy statement pertaining to the consistent internal operations of an agency

and RCW 34.05.328(5)(c)(ii):

(ii) An "interpretive rule" is a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers.

The proposed rule does not require a Significant Analysis because it is procedural and interpretive under the above provisions of the Administrative Procedure Act, chapter 34.05 RCW.

Chapter 3: Clearly state in detail the general goals and specific objectives of the statute that the rules implement.

RCW 50A.35.020 requires employers to continue providing health insurance to employees under the same conditions as if the employee had continued to work in certain circumstances. The requirement is consistent with a requirement of FMLA, and cites subjectivity to that law as the requirement for application to a particular employer.

Chapter 4: Explain how the department determined that the rules are needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rules.

The department considered multiple approaches when examining the need for rulemaking around the requirement of employers to continue health care for employees who are on paid family or medical leave. The primary concern we received from employers was that statute does not adequately explain precisely when and for how long an employer is required to continue health benefits. Due to various reasons, such as a broader definition of family member for Paid Family and Medical Leave, an employer may not be required to continue health care for all leave under Title 50A RCW. “If required by the federal family and medical leave act” has many interpretations, and the department felt that it was necessary to offer guidance to both employers and employees on this important subject.

With no rulemaking guidance, employers would open themselves up to potential penalties or litigation for noncompliance with the requirements of Title 50A RCW. In addition, employees would face uncertainty with regard to their health care coverage during a period where such coverage might be necessary to cover the financial cost of a serious health condition. The very nature of Paid Family and Medical Leave demanded that clear requirements be outlined.

The proposed rule strikes, in the department’s view, the best compromise between employer burden mitigation and guaranteeing a certain level of stability to employees during an otherwise unstable period.

Chapter 5: Explain how the department determined that the probable benefits of the rules are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

The department estimates that the average cost to an employer required to maintain health benefits subject to this rule would be:

- \$116.81 weekly for an employee who has elected single medical coverage from their employer;
- \$204.42 weekly for an employee who has elected medical coverage for themselves and a spouse from their employer; and
- \$308.26 weekly for an employee who has elected family medical coverage from their employer.

This analysis is based on a 2018 Medical Expenditure Panel Survey conducted by the Agency for Healthcare Research and Quality, Center for Financing, Access and Cost Trends. The full survey may be found here:

https://meps.ahrq.gov/mepsweb/data_stats/quick_tables_results.jsp?component=2&subcomponent=2&year=2018&tableSeries=-1&tableSubSeries=CDE&searchText=&searchMethod=1&Action=Search

2018 Medical Expenditure Panel Survey - Insurance Component. Agency for Healthcare Research and Quality, Center for Financing, Access and Cost Trends Washington Employers					
Single	WA average	Fewer than 50 Employees	50+ Employees	Per week cost (50+ EEs)	+Inflation*
Total	\$6,646	\$6,142	\$6,795		
EE contribution	\$955	\$966	\$951		
ER contribution	\$5,691	\$5,176	\$5,844	\$112	\$114.41
EE + 1					
Total	\$12,557	\$11,903	\$12,632		
EE contribution	\$2,558	\$3,898	\$2,405		
ER contribution	\$9,999	\$8,005	\$10,227	\$197	\$200.21
Family					
Total	\$18,783	\$17,606	\$18,957		
EE contribution	\$3,862	\$6,075	\$3,535		
ER contribution	\$14,921	\$11,531	\$15,422	\$297	\$301.92

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*Including Inflation from CPI-U (EFRC February 2020 forecast

<https://erfc.wa.gov/sites/default/files/public/documents/publications/feb20pub.pdf>)

There is an unavoidable cost imposed upon certain employers to be compliant with RCW 50A.35.020. It was incumbent upon the department to develop a rule, in coordination with key stakeholders from the employee and employer advocacy communities, that mitigated this cost to the greatest extent feasible while still adhering to the requirements and intent of the law.

Chapter 6: Identify alternative versions of the rule that were considered and explain how the department determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated previously.

A previous version of the rule required employers to continue to provide health benefits as long as the employee met the eligibility requirements of FMLA. The employee was not required to be on leave under FMLA or even have leave available to them.

When the draft rule was filed, the department received a considerable amount of employer feedback that this would create an undue financial burden on employers whose employees took leave under Title 50A RCW. The draft rule was withdrawn and the department drafted a new version considering stakeholder feedback. As such, the department proposes the current draft rule, which strikes a balance between the need to mitigate excessive employer costs with both employee needs and statutory intent.

Alternative versions of the rule were considered, including limiting the requirement to continue health benefits during periods of leave that ran concurrently with FMLA. The department's view is that this version is inconsistent with statutory language, specifically "...for the duration of such leave..." and "...until the date the employee returns to employment." Limiting health benefit continuation to periods of leave that run concurrently with FMLA would likely result in scenarios where the employee would be without health insurance for any period of family or medical leave that was taken after the employee's duration of FMLA leave was exhausted. This interpretation is inconsistent with statutory language and intent.

Chapter 7: Conflicts with Federal or State law

None of the rules analyzed in this Significant Analysis conflict with Federal or State law.

Chapter 8: Performance impositions on private vs. public sectors

Since all employers and employees, regardless of public or private sector employment status, are required to participate in Paid Family and Medical Leave, there is no evidence to suggest that any proposed rule will have a measurably different impact between the two sectors.

Chapter 9: Conflicts with Federal or State regulatory bodies

None of the rules analyzed in this Significant Analysis conflict with any applicable Federal or State regulatory requirements.

Chapter 10: Coordination with Federal, State, or local laws

There are no other Federal, State, or local laws applicable to the rules analyzed in this Significant Analysis.