

Concise Explanatory Statement

Paid Family and Medical Leave

Rulemaking

Chapter 192-500 WAC • Chapter 192-510 WAC • Chapter 192-530 WAC • Chapter 192-550
WAC Chapter 192-560 WAC • Chapter 192-570 WAC • Chapter 192-630 WAC • Chapter 192-
640 WAC • Chapter 192-650 WAC • Chapter 192-700 WAC • Chapter 192-810 WAC

Public Hearing: November 26, 2019

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I. Introduction

The Employment Security Department (department) is developing rules to implement, clarify, and enforce Title 50A RCW. This document will serve as the Concise Explanatory Statement (CES) for this rulemaking, which covers the following topics:

- Definitions
- Assessing and collecting premiums
- Voluntary plans
- Small business assistance
- Dispute resolution
- Claim determinations
- Overpayment of benefits
- Collections and recovery of overpayments
- Employment restoration
- Public disclosure and privacy for Paid Family and Medical Leave

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 5 p.m. on December 4, 2019. The formal CR102 hearing was held on November 26, 2019 in Lacey, Washington.

II. Rules Summary and Agency Reasons for Adoption

AMENDATORY SECTION

WAC 192-500-080 Qualifying event. A "qualifying event" is:

(1) For family leave, events described in RCW ((~~50A.04.010~~)) 50A.05.010(9).

(2) For medical leave, events described in RCW ((~~50A.04.010~~)) 50A.05.010(14).

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY 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~~)) 50A.05.010 (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.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

NEW SECTION

WAC 192-500-185 Waiting period. (1) A "waiting period" is the first seven consecutive calendar days beginning with the Sunday of the first week an eligible employee starts taking paid family or medical leave.

(2) An employee will satisfy the waiting period requirement if the employee takes at least eight consecutive hours of leave during the first week of the employee's paid family or medical leave claim.

(3) An employee will not receive a benefit payment for hours claimed during the waiting period.

(4) Subject to subsection (6) of this section, an employee must only meet the requirement of one waiting period in a claim year.

(5) If an employee is denied eligibility for a period of time that satisfied the waiting period requirement, the waiting period requirement will not be deemed satisfied for a future claim for which the employee is deemed eligible.

(6) The waiting period does not apply to family leave taken for bonding after the child's birth or placement.

(7) An employee's use of paid time off for all of or any portion of the waiting

The department identified the importance and need to further define a waiting period to both inform customers of the requirements and clarify operational policy.

AMENDATORY SECTION

WAC 192-510-010 Election, withdrawal, and cancellation of coverage. (1) Self-employed persons as defined in RCW ((50A.04.105)) 50A.10.010(1) and federally recognized tribes as defined in RCW ((50A.04.110)) 50A.10.020 may elect coverage under Title 50A RCW.

(2) Notice of election of coverage must be submitted to the department online or in another format approved by the department.

(3) Elective coverage begins on the first day of the quarter immediately following the notice of election.

(4) A period of coverage is defined as:

(a) Three years following the first day of elective coverage or any gap in coverage; and

(b) Each subsequent year.

(5) Any self-employed person or federally recognized tribe may file a notice of withdrawal within thirty calendar days after the end of each period of coverage.

(6) A notice of withdrawal from coverage must be submitted to the department online or in another format approved by the department.

(7) Any levy resulting from the department's cancellation of coverage is in addition to the due and unpaid premiums and interest for the remainder of the period of coverage.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-510-020 Election of coverage for federally recognized tribes.

(1) Federally recognized tribes electing coverage are employers as defined in RCW ((50A.04.010)) 50A.05.010 and are subject to all rights and responsibilities under Title 50A RCW.

(2) Employees of federally recognized tribes that elect coverage are employees as defined in RCW ((50A.04.010)) 50A.05.010 and are subject to all the rights and responsibilities under Title 50A RCW.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY 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;
~~(((*)))~~ (j) Value of stocks at the time of transfer to the employee if
given as part of a compensation package;
~~(((+)))~~ (k) Compensation for use of specialty equipment, performance of
special duties, or working particular shifts; and
~~(((#)))~~ (l) 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))~~ Short-term or long-term disability;
(iii) Medical or hospitalization expenses in connection with sickness or
accident disability; or
(iv) Death.

To align with unemployment insurance reporting requirements, the department is removing bereavement
leave from what would be considered a wage that is subject to premium assessment. Additionally, the
department determined further clarification was needed on disability payments.

AMENDATORY SECTION

**WAC 192-510-040 How does an employer's size affect liability for premiums
and eligibility for small business assistance grants?** (1) To assess
premiums and determine eligibility for small business assistance grants,
the department must determine the size of each applicable employer. The

department will only count the number of in-state employees as defined in RCW ((50A.04.010)) 50A.05.010(4) when calculating employer size.

(2) If the department determines that the employer's status has changed as it relates to premium liability, the department will notify the employer. This notification will include the following information:

(a) If the employer was determined to have fifty or more employees for the preceding calendar year, and the employer is then determined to have fewer than fifty employees for the subsequent calendar year, the employer will not be required to pay the employer portion of the premium for the next calendar year; or

(b) If the employer was determined to have fewer than fifty employees for the preceding calendar year, and the employer is then determined to have fifty or more employees for the subsequent calendar year, the employer will be required to pay the employer portion of the premium for the next calendar year.

Example: On September 30, 2018, a business is determined to have had 53 employees on average during the previous four completed quarters, which covers July 1, 2017, through June 30, 2018. The employer is liable for the employer portion of premiums for 2019. On September 30, 2019, the business is determined to have had 48 employees on average during the previous four completed quarters, which covers July 1, 2018, through June 30, 2019. The employer is no longer liable for the employer share of premiums for 2020.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-510-050 How will the department assess the size of new employers?

An employer that has not been in business in Washington long enough to report four calendar quarters by September 30th will have its size calculated after the second quarter of reporting is due by averaging the number of employees reported over the quarters for which reporting exists. Premium assessment based on this determination will begin on this reporting date. This size determination remains in effect until the following September 30th pursuant to RCW ((50A.04.115)) 50A.10.030 (8)(c).

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-510-060 When are employer premium payments due? (1) Premiums must be paid quarterly. Each payment must include the premiums owed on all wages subject to premiums during that calendar quarter. Payments are due to the department by the last day of the month following the end of the calendar quarter for which premiums are being paid.

(2) Payments made by mail are considered paid on the postmarked date. If the last day of the month falls on a Saturday, Sunday, or a legal holiday, the premium payment must be postmarked by the next business day.

(3) Premium payments are due within ten calendar days when a business is dissolved or the account is closed by the department. Premiums not paid timely are delinquent and subject to interest under RCW ((50A.04.140)) 50A.45.025.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-510-065 When can an employer deduct premiums from employees? (1)

An employer may not deduct more than the maximum allowable employee share of the premium from wages paid for a pay period.

(2) If an employer fails to deduct the maximum allowable employee share of the premium from wages paid for a pay period, the employer is considered to have elected to pay that portion of the employee share under RCW ((50A.04.115)) 50A.10.030 (3)(d) for that pay period. The employer cannot deduct this amount from a future paycheck of the employee for a different pay period.

(3) Subsections (1) and (2) of this section do not apply if an employer was unable to deduct the maximum allowable employee share of the premium for a pay period due to a lack of sufficient employee wages for that pay period.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

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 eight hundred twenty 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)) 50A.45.025.

(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.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-530-040 Voluntary plans—Notice requirements under RCW

((50A.04.075)) 50A.20.020. (1) The department will provide a notice that meets the requirements of RCW ((50A.04.075)) 50A.20.020 to employers with approved voluntary plans if requested.

(2) Employers may create their own notices that meet the requirements of RCW ((50A.04.075)) 50A.20.020. Each employer must provide a copy of its voluntary plan notice to the department for approval. The notice must be submitted online or in another format approved by the department and must

contain at least the same information as the state notice.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-550-010 What happens if an employer fails to submit required reports? (1) An employer that willfully fails to file a complete and timely report under WAC 192-540-030 through 192-540-050 is subject to penalties under RCW ((50A.04.090)) 50A.45.010.

(2) The department will send a warning letter for an employer's first incomplete or untimely report. For a second or subsequent occurrence within five years of the date of the last occurrence, the department will assess penalties under the following schedule:

(a) 2nd occurrence: \$75.00

(b) 3rd occurrence: \$150.00

(c) 4th and subsequent occurrences: \$250.00

(3) After five years without a warning letter or occurrence, prior occurrences will not count and the employer shall receive a warning letter instead of a penalty on the next occurrence.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-550-020 What happens if an employer willfully fails to remit required payments? (1) An employer that willfully fails to remit payment for premiums in full when due is subject to penalties under RCW ((50A.04.090)) 50A.45.010 in addition to accruing interest under WAC 192-550-030.

(2) The total amount of the penalty will be equal to the entire balance of premiums not remitted and any interest accrued on those delinquent premiums.

Example: If an employer owes \$300 in premium payments and \$20 in interest, the penalty for willfully failing to remit payment will equal \$320, for a sum total due and owing of \$640.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-550-040 Can employer interest be waived? (1) An employer may submit to the department an interest waiver request that includes all relevant facts, including all available proof, as to why it is requesting a waiver under RCW ((50A.04.140)) 50A.45.025.

(2) At its discretion, the department may waive interest if it finds that the interest was caused by the department's own error or the department's inability to decide the issue.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-560-020 What is the application process for a small business assistance grant?

(1) Applications for small business assistance grants must be submitted online or in another format approved by the department. To be approved, an application must contain:

- (a) The name and Social Security number or individual taxpayer identification number of the employee taking leave;
 - (b) The amount and type of grant being requested;
 - (c) An explanation summarizing any personnel or significant additional wage-related costs that were taken because of an employee taking leave; and
 - (d) Written documentation including, but not limited to, personnel records related to the hiring of a new temporary employee, wage reports, and signed statements, showing the temporary worker hired or significant additional wage-related costs incurred are due to an employee's use of leave.
- (2) Incomplete applications will not be reviewed and will not count against an employer's limit of ten applications per year under RCW ((50A.04.230)) 50A.24.010(4).
- (3) The department will deny the application for reasons including, but not limited to, the employer's failure to demonstrate that:
- (a) It hired a temporary worker or incurred any significant additional wage-related costs; or
 - (b) The temporary worker hired or significant additional wage-related cost incurred was not due to an employee's use of family or medical leave.
- (4) If a grant application is denied, the application will count against an employer's limit of ten applications per year.
- (5) The denial of a grant application is appealable.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-570-020 Complaints regarding unlawful acts. (1) It is unlawful for an employer to discriminate against any employee for a reason specified in RCW ((50A.04.085)) 50A.40.010. When the department receives notification from an employee that discrimination may have occurred the department will investigate the allegation and issue a determination. The determination will include any remedies available under RCW ((50A.04.100)) 50A.40.030.

(2) Nothing in the chapter shall be construed to prohibit a private right of action under all applicable laws.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY 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~~)) 50A.50.030, 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.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-640-005 Definitions. For purposes of this chapter:

(1) "Overpayment" means any or all of the following:

(a) Payment of any paid family or medical leave benefits to which the department determines the employee is not entitled;

(b) Penalties assessed under RCW ((~~50A.04.045~~)) 50A.15.060; or

(c) Interest accrued under RCW ((~~50A.04.065~~)) 50A.15.090.

(2) "Equity and good conscience" means fairness as applied to each individual case after considering the totality of the circumstances.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-650-015 Are negotiated settlements of overpayments permitted?

(1) The department can accept a negotiated settlement to repay a debt of overpayment under RCW ((~~50A.04.185~~)) 50A.45.070. Except as provided in subsection (3) of this section, a negotiated settlement of the overpayment for less than the full amount owed will be considered when requiring an employee to repay the full amount would be against equity and good conscience as defined in WAC 192-640-005.

(2) In considering settlement offers, the department will first consider whether it is financially advantageous to the department to collect the debt. The department may also consider:

(a) The age and amount of the overpayment;

(b) The number of prior contacts with the employee;

(c) If the employee previously made good faith efforts to pay the debt;

(d) The ability to enforce collection; or

(e) Other information relevant to the employee's ability to repay the debt.

(3) Except in unusual circumstances, a settlement offer will not be accepted when the employee's overpayment is the result of fraud. Unusual circumstances that may warrant a negotiated settlement of the overpayment and associated penalties include, but are not limited to, long-term or terminal illness, severe permanent disability, or other circumstances that seriously impair the employee's long-term ability to generate income.

(4) The department's decision to accept or reject a settlement offer is not subject to appeal. If the department rejects the settlement offer, the employee is permitted to make another offer if the employee's circumstances change.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

AMENDATORY SECTION

WAC 192-700-005 When is an employee entitled to employment restoration after leave ends? (1) Subject to RCW ((50A.04.025)) 50A.35.010(3), an employee who meets the criteria listed in RCW ((50A.04.025)) 50A.35.010(6)(a) who takes leave under Title 50A RCW is entitled, on return from the leave, to be restored by the employer to:

- (a) The position of employment held by the employee when the leave commenced; or
- (b) An equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(i) "Equivalent position" means a position that is nearly identical to the employee's former position as if the employee did not take extended leave. This includes pay, benefits and working conditions, privileges, perks, location, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(ii) "Employment benefits" includes all benefits provided or made available to employees by an employer such as:

- (A) Insurance;
- (B) Paid time off;
- (C) Educational benefits; or
- (D) Retirement benefits.

(2) An employee is entitled to such reinstatement even if the employee has been replaced or the employee's position has been restructured to accommodate the employee's absence unless the employer can demonstrate the circumstances fall within WAC 192-700-010(1).

(3) The protections provided in RCW ((50A.04.025)) 50A.35.010 and this section apply to the employee beginning with the date the employee starts taking leave.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

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 if:

- (a) An employer exercises its right to deny restoration under RCW ((50A.04.025)) 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.

(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 which eligibility for employer-provided health benefits ends.

(3) Employers that choose to deny restoration are required to adhere to the continuation of health benefits in RCW ((50A.04.245)) 50A.35.020 for the remainder of the employee's approved leave.

This rule corrects references to statute that was recodified by SHB 1399. No other changes were made.

NEW SECTION

~~**WAC 192-700-020 When does an employer need to provide a continuation of benefits to an employee who is on paid family or medical leave?** (1) An employer is required to maintain any existing health benefits to an employee when the following criteria are met:~~

~~(a) The employee is taking leave under Title 50A RCW from an employer; and
(b) The employee meets the eligibility requirements for a continuation of health benefits as required by the Family and Medical Leave Act, as it existed on October 19, 2017.~~

~~(2) If the employer and employee share the cost of existing health benefits, the employee remains responsible for the employee's share.~~

~~(3) If the criteria in subsection (1) of this section are met at any point during an employee's duration of leave under Title 50A RCW, the employer is required to provide any existing health benefits for the entire duration of the employee's paid family or medical leave.~~

This rule was removed from this rulemaking.

Chapter 192-810 WAC

PUBLIC DISCLOSURE AND PRIVACY FOR PAID FAMILY AND MEDICAL LEAVE

NEW SECTION

WAC 192-810-010 Definitions. (1) The definitions set forth in RCW 42.56.010 apply to this chapter unless context clearly requires otherwise.

(2) "Public records officer" means the departmental employee responsible for responses to requests for public records or that person's designee.

(3) "Department" means the employment security department.

(4) An employer's "own records" as used in RCW 50A.25.040 means records and information provided to the department by the employer or the employer's predecessor in interest.

These definitions provide clarity for the rules in chapter 192-810 WAC related to public disclosure and privacy. The definitions help the community understand the scope of the other public disclosure and privacy provisions promulgated by rule.

NEW SECTION

WAC 192-810-020 Purpose. The purpose of this chapter is to provide rules for the paid family and medical leave program in implementing chapter 42.56 RCW relating to public records and chapter 50A.25 RCW relating to records and information deemed private and confidential by the paid family and medical leave program.

This rule is needed to clarify the purpose of adopting rules related to records and information deemed private and confidential by the PFML program. Because the Employment Security Department administers different programs that operate under different disclosure and privacy laws, this specificity helps the public understand which laws governs PFML disclosures.

NEW SECTION

WAC 192-810-030 How do individuals and entities request records from the department? (1) The department will manage all records re-quests consistent with the provisions of chapter 42.56 RCW.

(2) Requests for public records shall be submitted to the public records officer. Contact the public records officer at:

Public Records Officer

P.O. Box 9046

Olympia, WA 98507-9046

Phone: 1-844-766-8930

Email: Recordsdisclosure@esd.wa.gov

(3) If an individual requests records or information concerning that individual held by the department under RCW 50A.25.040(1), those records must be released only to the requesting individual.

(4) If an individual submits a records request and asks that the requested records be sent to a third party directly, the individual must follow the provisions of RCW 50A.25.040(3).

This rule is needed to describe the process by which individuals and entities may request records from the department.

NEW SECTION

WAC 192-810-040 Misuse or unauthorized disclosure. (1) If misuse or an unauthorized disclosure of records or information deemed private and confidential under chapter 50A.25 RCW occurs, each party involved in the data-sharing that is aware of the misuse or unauthorized disclosure must inform the department within two business days of the discovery of the data security breach.

(2) In addition to informing the department of the misuse or unauthorized disclosure, the party responsible for the disclosure must take all reasonably available actions to rectify the disclosure to the department's standards. In most cases, these actions will include, at a minimum:

(a) Ceasing any continued release;

(b) Informing all individual whose data may have been released improperly of the situation; and

(c) Providing identity protection mechanisms at no charge to the individuals whose data may have been released.

Under state statute, parties with access to records or information deemed private and confidential under the PFML program must take steps to ensure the security of that information. The statute also requires parties that are aware of a breach of security to take actions to notify the department and rectify the situation. This rule is necessary to describe the responsibilities and required actions of a party that is aware of misuse or unauthorized disclosure of records or information deemed private and confidential under this program.

III. Changes to Rules

WAC 192-500-185 *Waiting period.*

The proposed rule and the final rule differ only in (6) of this rule. The final rule makes it clear that a waiting period does not apply for leave taken for bonding after a child's birth or placement. The proposed rule could have led to the conclusion that having a child would qualify as family leave instead of correctly being medical leave where a waiting week is required. This change provides that clarification that a waiting period is not required only for leave for bonding after the birth or placement of a child.

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

This proposed rule has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

WAC 192-810-030 *How do individuals and entities request records from the department*

The proposed rule and the final rule differ in two ways. First, the final rule requires public disclosure requests to be sent to the public records officer whereas the draft rule used permissive language indicating that public disclosure requests "may" be sent to the public records officer. Second, the final rule lists the contact information for the public records officer. This information was not present in the draft rule.

The department does not believe these changes to be substantial under RCW 34.05.340 because the general content of the rule, its subject, and the issues within it are not altered. This change clarifies the method for contacting the public disclosure office, which is likely to result in better customer service.

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.*

Currently, Draft WAC 192-700-020 does not have a requirement that an employee actually be on FMLA to require the employer continue paying health insurance premiums. It only requires that the employee meet eligibility requirements. This appears to be an excessive burden on employers since there are multiple instances where FMLA and PFML do not overlap. If an employee has exhausted FMLA and applies for PFML, employers should not be required to continue paying premiums for health insurance.

Agency Response 1: This draft rule has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

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

Per RCW: Health insurance must be continued “[i]f required by” FMLA (50A.35.020). Employers need clarification on whether we are required to continue paying premiums for health insurance if an employee has exhausted their FMLA entitlement then applies for PFML. I would argue that we should not be required to do so. By definition, if the employee has exhausted their FMLA leave then they are no longer eligible for FMLA. It would be burdensome for the state to extend a benefit maintenance requirement beyond the standard 12 weeks provided under FMLA for an additional 12-18 weeks under PFML (potentially 30 weeks total). Allowing employees to apply for COBRA or private insurance after the FMLA 12 weeks would be a better, more sustainable outcome. Another (not exclusive) option would be to put a maximum requirement on how many weeks an employer must continue health benefits under the state plan, which could/would run concurrent with FMLA.

Agency Response 2: This draft rule has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

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

Once FMLA is exhausted, we do not believe continuation should continue for health insurance. The City should no longer be required to continue paying for health insurance. Currently per 50A.35.020 health insurance must continue.

Agency Response 3: This draft rule has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

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

Once an employee has exhausted FMLA and applies for PFML, the employer should no longer be required to continue paying premiums for health insurance. I am concerned that RCW 50A.35.020 states that health

insurance must be continued "if required by law." I am concerned that this could have unintended financial impacts for employers.

Agency Response 4: This draft rule has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

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

WAC 192-700-020 (relating to continuation of benefits during PFML)

Please clarify when an employer has the obligation to continue benefits coverage during PFML.

The draft regulation appears to require employers to continue health insurance throughout a PFML if the PFML overlaps an FMLA "at any point."

- Does this mean that benefits must be continued throughout a PFML if the PFML and FMLA overlap by even just one day?
- Does it mean that benefits must be continued even if the employee is not actually on FMLA?
- Does it mean that benefits must be continued even if the employee has no FMLA available?

The regulations appear to require benefits continuation under all these circumstances. This basically creates an independent requirement to continue benefits under the PFML, which is not consistent with the statute's language. Such a requirement would create a significant additional burden to employers that was not contemplated when the statute was written. It removes any incentive for an employee to take FMLA and PFML concurrently, while adding considerably to employers' costs in providing the additional weeks or months of benefits.

Agency Response 5: This draft rule has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

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

1. Can this benefit be used to supplement work related injuries (like workers comp)?
2. How does the state FLA, FMLA and now PFML interact?
3. Does the waiting period need to be met for each event/leave?
4. When will the employer portal be available for viewing?
5. Can employees use this leave intermittent?
 - a. Is it similar to FMLA (hours, days or weeks)
6. Does the benefit calculation include shift premium (6%)?
7. Will there be a benefit calculator available?
8. Will bonding time for the non-birthing parent always be approved for the full 12 weeks?
9. If a company has two employees who are married, does the family leave need to be shared if they are welcoming a new child like it does for FMLA?
10. Can we deny an employee reinstatement if they would've been laid off during the PFML period?
11. What record keeping is required on the employer side?
12. Can you confirm if an employee takes leave after birth or placement of a child, the leave must conclude within 12 months of the birth or placement?

Agency Response 6:

These questions are outside the scope of the rulemaking. The department greatly values questions from the public and is interested in working with constituents regarding their interest in programmatic details. Because these questions do not pertain to this rulemaking, we are not providing specific answers to them here, however, the individual who submitted these questions is encouraged to send them to

paidleave@esd.wa.gov, where our customer service specialists would be more than happy to engage on these issues and provide answers.

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

Please clarify New Section 192-700-020, (3). The original law states that benefits shall be continued only if the employee is eligible for benefits continuation under the federal FMLA. This section seems to indicate that even if the employee has already exhausted FMLA, the employer must still continue benefits for the duration of PFML. Given PFML and FMLA may not always run concurrently, and there are times when one can be taken but not the other (or FMLA has been exhausted before the employee elects to apply for PFML) this could result in an unreasonable burden for employers to maintain benefits for longer than 12 weeks.

Agency Response 7: This draft rule has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 8: *Received in-person.*

I have concerns about how the employer will know the weekly benefit amount being received by the employee. I am concerned about any other issues around the disclosure of information or the inability for an agency to know this or that with regard to the federal FMLA or their ability to understand what it is that their responsibility is without running afoul of privacy consideration or overpaying the employee. Have any of these concerns already been raised? It's an issue for trying to make this work for everybody. We want it to roll out smoothly, but there are a lot of questions. How do we implement? what is the communication between our agency and ESD? How are we going to know the information that we need to know to make the right decisions and do the right things to make sure the employee has what they need but also isn't gaming the system?

Agency Response 8:

These questions are outside the scope of the rulemaking. The department greatly values questions from the public and is interested in working with constituents regarding their interest in programmatic details. Because these questions do not pertain to this rulemaking, we are not providing specific answers to them here, however, the individual who submitted these questions is encouraged to send them to paidleave@esd.wa.gov, where our customer service specialists would be more than happy to engage on these issues and provide answers. Additional information about processes are being updated and we encourage anyone interested in knowing more about this to sign up for the Paid Family and Medical Leave listserv found on our website www.paidleave.wa.gov.

Formal Comment 9: *Received at formal public hearing.*

A brief background. We represent employers regarding navigating various employment law changes, including helping them, advising them to comply with those changes, so businesses, nonprofits. I've been practicing in this area for about 11 years now. I just have a couple comments regarding in particular proposed WAC 192-700-020. First off, thank you for your tremendous effort in implementing the Paid Leave Program. I know no matter, you know, what side you might view this, you've implemented tremendous effort in implementing this huge program, so thank you for that. A few comments, though. Regarding the proposing WAC I mentioned, RCW 50A.35.020 says that benefits continuation is only required if, quote, required by the Federal Family Medical Leave Act. However, we believe that the proposed language for WAC 700-020 that said benefits continuation will be required if eligibility requirements are met for the FMLA. We believe that is contrary to the explicit language of the RCW and can actually lead to situations requiring benefits

continuation that are not, quote, required by the FMLA as the statutory language directs. Several comments here on the online open forum. I've already pointed out situations, but one situation I'd like to point out in particular, for example, our understanding from the interpretation of this proposed WAC, including discussions with ESD have indicated that, for instance, even if an employee has first sought FMLA and exhausted their 12 weeks of FMLA and then delayed their application for Paid Family Leave benefits, in other words they seek FMLA, they exhaust that and then apply for 12 weeks of PFML, they would actually be entitled to continued healthcare benefits during PFML as well, so that would be close to 24 weeks or more of benefits continuation. In our view that does not comply with the statute because under FMLA explicit regulations state that when an employee exhausts FMLA the employer's obligation to continue benefits ceases. So under our view the rule would be inconsistent to the extent that employees would have -- excuse me, employers would have to continue benefits during that 12 weeks that they filed for PFML benefits after they've already exhausted FMLA leave. I'll provide more details in my actual written commentary to the online forum, and I know it's hard to take down details in terms of statutory citations to the CFR. Besides the legalese that is inconsistent with the actual written rules, we'd like to point out the huge economic cost to employers, and not only the huge economic cost but the surprising added cost of coming very late in the game before this is implemented. Per the RCW, as I said, employers have a reasonable expectation that they would not have to continue benefits during PFML particularly in a situation where the employee attempts to stack FMLA and PFML. Now there is a process that they will now have to pay potentially thousands more in premiums. Like I said, this is -- we all agree that Paid Family Leave is a very important benefit, but in addition to the very already surprising fact that employees can simply stack FMLA and get up to potentially 30 weeks of protected leave, the added cost of now having to continue benefits during that entire period could be thousands of dollars has been not only surprising in and of itself because of the statutory language, but the fact that we're now in November at this point and employers have already been planning for years to try to control operational costs and this is a very surprising change late in the game. Lastly, I'd just like to suggest it's unclear to me when comments close on this proposed rule. Currently the open town hall does not state that there's no deadline set, yet elsewhere, I had to dig for it, suggests that comments close today. I respectfully request that, given that the only hearing on this rule is actually taking place today, that there be a little bit extension for written comments to be submitted. Thank you so much for your time again and your tremendous work on this effort.

Agency Response 9: The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept. Additionally, the comment period was extended in response to stakeholder feedback.

Formal Comment 10: *Received at formal public hearing.*

I would like to actually echo a lot of what the previous speaker outlined starting with our appreciation for the hard work of the team here at ESD who is tasked with implementing this entirely new program. Again echoing perhaps many of the things that the earlier speaker said, including the note about the comment period appearing to remain open online. I was checking that just before coming here and thought, oh, there's no deadline, we've got time. So I would appreciate your consideration of perhaps giving us a few more days, especially with the holiday coming. I again want to express our concerns at AWC on behalf of the cities and the state with the interpretation of RCW 50A.35.020 as it's being interpreted in the proposed WAC 192-700-020. We do believe that this is contrary to the plain reading of the RCW which does state that continuation of benefits will occur if required by the Federal Family Medical Leave Act. As you heard from the previous speaker, it appears that under the proposed WAC those benefits would continue even if an employee has exhausted their FMLA leave time and are stacking PFML leave on top of it. We do believe that this creates a significant cost and an undue burden on employers. The typical medical benefit cost that city employers are providing ranges from about \$1,000 a month for an individual employee to \$2,400 a month for a family. If they're expected to continue those benefits for up to, in a worst case scenario, 30 weeks that's a significant

unanticipated cost for particularly the city employers that I represent. Again as the previous speaker indicated, this was not something that employers were expecting. Again based on the plain reading we believe in 50A.35.020 that it would continue to be consistent with our current requirement to continue benefits during FMLA authorized leave and not once those benefits are expired. So we would ask that the Department reconsider that interpretation and match that up with the RCW. Thank you.

Agency Response 10: The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept. Additionally, the comment period was extended in response to stakeholder feedback.

Formal Comment 11: *Received at formal public hearing.*

Our concerns are the continuation of benefits, the stacking of them. In our case, as of on January 1, 2020, we will also be introducing the new sub, our school employees benefits for medical for all K-12 education, and in that in the past with FMLA if the employee's portion was not paid we could stop benefits. Here we have a situation where with the new sub we are required to pay the monthly premiums that come in regardless and then try and collect from the employee if they return. This just stacks additional cost to the districts on top of that. We're looking at additional premiums. Our question is, in this case if they're not getting a paycheck who is going to be ultimately responsible for the employee's portion of the premiums for Paid Family & Medical Leave, and then we get into the medical coverage and we've already been told by sub or Healthcare Authority that we will have to pay those premiums and so we have grave concerns on that. Again, I echo the same sentiments that the previous two speakers had, so there's no need to go over that again. And then the child support notification portion of it, we do have one concern on that. Our concern is and it clearly states that the Paid Family & Medical Leave will send in their portion of it and stuff. In the school districts we are required to give notification also, and our concern is where is that ultimate responsibility going to lie. Thank you.

Agency Response 11:

To the first comment, draft WAC 192-700-020 has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept. To the other comments, the department can only provide comment to the laws and rules related to this program. These comments involve regulations for K-12 education which are outside the scope of PFML rulemaking.

Formal Comment 12: *Received at formal public hearing.*

I would like to add to the previous comments about the concern about the continuation of the healthcare and just add another consideration for that is that it doesn't seem as if the ESD either understands or is taking into consideration that an employee can affirmatively decline currently their FMLA under the Ninth Circuit Escriba Ruling and if they decline their benefits or decline FMLA we're not required to continue benefits. So when it previously stated if required, that is very different from if eligible. So under this same scenario if an employee were to decline their FMLA and take potentially up to 18 weeks of Washington Paid Family & Medical Leave then we would also have to continue the benefits for 12 additional weeks and that provides additional undue hardship to the city and the budget and ultimately the taxpayers are the ones who are paying for those benefits. And you probably are thinking why would an employee affirmatively decline their FMLA, and we have had that happen because there are certain other job protections under city policy, as well as while using leave there is certain job protection as our attorneys have deemed that, so I just wanted to tag on and add that additional component.

We have a concern about granting intermittent leave for baby bonding where under the Federal FMLA it is at the employer's discretion whether or not intermittent leave is allowed for baby bonding. And while we try to accommodate that as much as possible, there are times where that creates an operational hardship where

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

Agency Response 12: The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

FMLA does have provisions that regulate intermittent leave for bonding with a child. However, Title 50A does not include these same provisions so an employer does not have that same discretion as it does under FMLA. PFML does have WACs 192-600-020 and 192-600-005 that require notice be supplied to the employer containing the anticipated time and duration of leave, as well as requiring an employee to provide notice if there are changes to that original notice. Further, under RCW 5A.15.030, if the employee is subject to employment restoration, there is nothing that prohibits the employer from requiring an employee to report periodically to the employer on the status and intention to return to work.

Formal Comment 13: *Received at formal public hearing.*

Overall, I have some concerns about the Department's manner of calculating the waiting period which I don't think really squares with RCW 50A.15.020(1) which talks about a waiting period of seven consecutive calendar days. That said, I realize on November 26th that probably isn't going to change before this program rolls out, so putting that aside a couple operational pieces that would be really helpful. One is if we could get clarification of whether voluntary plan employers are required to use this definition of the waiting period that's set forth in WAC 192-500-185. Most voluntary plan employers I know wrote their plans assuming that seven consecutive calendar days meant seven consecutive calendar days, and now it's possible that employees if they were under the state plan will actually get benefits much sooner, they could get benefits after only taking actually one day of qualifying leave. I am concerned about whether voluntary plan employers are going to be at risk if they use seven calendar days waiting period and we need clarification on that. The second comment is about Subsection 6 which talks about -- it states the waiting period does not apply to family leave related to either a childbirth or a placement of a child, I guess the word "child" is in there a couple of times, so you'd probably eliminate one of them. But beyond that I don't think that the statute in RCW 50A.15.020 limits the no waiting period for birth or placement to situations of family leave and if it is truly -- which I understand it to be the Department sometimes to require a medical period for birthing mothers -- excuse me, a waiting period for birthing mothers who would presumably be taking their medical leave at the beginning and then take their bonding leave, so a full 16 weeks of leave, I think the Department should make that explicit because I think that Subsection 6 has got that word "family" in it, I don't think that most people have realized that that means that a birthing mother is actually going to have a waiting period during that first week after she gives birth.

Agency Response 13:

The waiting period language was drafted to align with previously promulgated rules related to the definition of a week (WAC 192-500-110). Voluntary plan employers are required to follow statutory regulations, specifically 5A.30.010 (5)(a) which states that benefits must be at least equivalent to the benefits of the state plan, and the monetary payment must be equal to or higher than what the employee would have received as part of the state plan. The department is continuing to develop materials for the website (www.paidleave.wa.gov) and encourage anyone interested in those updates to sign up for the listserv at that same website. Regarding the comment on WAC 192-500-185 was modified based on stakeholder feedback to provide clarity.

Formal Comment 14: *Received at formal public hearing.*

I don't think I need to repeat what has been said, but to pile on I wanted to offer our concern as well with the benefits issues that has been previously raised by other public employers such as the Association of Washington Cities and the attorney who spoke first. We are very concerned about what we perceive to be more or less a surprise cost that we weren't anticipating in this late hour.

Agency Response 14: The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 15: *Received through the online portal.*

The following statement is on behalf of CommonSpirit Health regarding the Washington State Paid FML. As a large healthcare employer, with approximately 13,000 employees in the state of Washington in our hospital systems, we encourage all our employees to take leave as necessary, providing flexible options for pay and job protection while on approved leave. Although the regulations, as proposed, will now provide notification to an employer on the amount an employee is approved through the state, we are still unable to ensure payment can be adequately supplemented and timely administration of employer benefits. The proposed regulation presents a significant administrative burden to an employer. Furthermore, given the regulations do not require an employee to file with the State of Washington for Paid FML or require the leave to run concurrently with the FMLA, an employee may receive extended job protection. The extended job protection is not what was initially proposed by the state of Washington nor the intent of this paid FML program. As a large employer, we ask that the state consider how employers will manage a high volume of Paid FML requests. Additionally, please consider requiring all employees in the State of Washington to file for Paid FML, and all approved state leaves run concurrently with federal FMLA.

Agency Response 15:

These questions are outside the scope of the rulemaking. The department greatly values questions from the public and is interested in working with constituents regarding their interest in programmatic details. Because these questions do not pertain to this rulemaking, we are not providing specific answers to them here, however, the individual who submitted these questions is encouraged to send them to paidleave@esd.wa.gov, where our customer service specialists would be more than happy to engage on these issues and provide answers.

Formal Comment 16: *Received through the online portal.*

We would like to see the originally proposed rule of allowing the employer to decide if FMLA and PMFL should run concurrently be approved. Recent information about a rule being approved that requires employers to allow FMLA and then PMFL is very concerning and would have a significant impact on business, likely for most employers.

Additionally, requiring employers to continue benefits beyond the FMLA eligibility would be a financial burden.

Agency Response 16:

FMLA is a federal program under the U.S. Department of Labor and is therefore PFML does not have authority to regulate FMLA. The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 17: *Received through the online portal.*

What is the timeline, primarily the cutoff that EE's can contact the state to retro the Paid Family Leave. There is concern if EE's do not file right away and our company pays 100% of their accruals. If the employee then files 30 days later or months later and even after the LOA ended that the employee could receive pay from the state and also by us employer at 100%.

Agency Response 17:

These questions are outside the scope of the rulemaking. The department greatly values questions from the public and is interested in working with constituents regarding their interest in programmatic details. Because these questions do not pertain to this rulemaking, we are not providing specific answers to them here, however, the individual who submitted these questions is encouraged to send them to paidleave@esd.wa.gov, where our customer service specialists would be more than happy to engage on these issues and provide answers.

Formal Comment 18: *Received through the online portal.*

This input was also submitted to rules@esd.wa.gov.

I am writing to comment on proposed WAC 192-700-020, a draft regulation related to the Paid Family and Medical Leave (PFML) law, Chapter 50A RCW. Our firm represents a significant number of employers around the State, including many public sector entities such as counties, cities, public transit agencies, fire districts, libraries, and other special purpose districts. On behalf of our clients, we have significant concerns about this proposed regulation. As discussed below, the draft rule is fundamentally inconsistent with the statute enacted by the Legislature. In addition, the proposed rule would impose substantial financial burdens on employers.

A. The Proposed Rule Is Inconsistent With RCW 50A.35.020

The law as enacted by the Washington State Legislature provides that an employer must maintain an employee's health benefits during PFML leave "[i]f required by the federal family and medical leave act, as it existed on October 19, 2017." RCW 50A.35.020 (emphasis added). The meaning of language is straightforward. If the FMLA requires health insurance continuation, then an employer must continue employer-paid coverage during a PFML leave. If the FMLA does not require continuation of health insurance, then an employer is not required to continue employer-paid health insurance.

Despite the plain language of the statute, ESD's draft regulation establishes a different (and lower) bar for health insurance continuation. WAC 192-700-020 would require an employer to maintain any existing health benefits for an employee when the following criteria are met: "(a) The employee is taking leave under Title 50A RCW from an employer; and (b) The employee meets the eligibility requirements for a continuation of health benefits as required by the Family and Medical Leave Act, as it existed on October 19, 2017." Thus, the draft regulation abandons the statutory requirement that benefit continuation actually be required by the FMLA. Instead, benefit continuation would be required merely where an employee "meets the eligibility requirements" for FMLA. The language would require benefit continuation in situations where it is not required by the FMLA. For example:

- An employee takes PFML leave to care for a grandparent. Such leave is not covered by the FMLA, so the employee is not entitled to protected leave or benefit continuation under the FMLA. But if the employee worked for his/her employer for 12 months and worked 1,250 hours in the 12 months preceding the leave, the draft WAC would purportedly require the employer to continue employer-paid health insurance during the PFML leave.
- An employee takes 12 weeks of FMLA and is entitled to job protection and benefit continuation. At the conclusion of FMLA leave, the employee applies for 12-18 weeks of PFML leave. Although the employee had already exhausted FMLA leave – and benefit continuation would clearly not be "required by" the FMLA – the draft WAC would purportedly require the employer to maintain the employee's health insurance for another 12-18 weeks beyond FMLA exhaustion.

As these examples reflect, contrary to the express statutory language of RCW 50A.35.020, proposed WAC 192-700-020 would compel employers to continue health insurance in situations where that is not “required by” the FMLA.

We respectfully submit that if ESD enacts proposed WAC 192-700-020 as currently written, it would be subject to legal challenge. As the Washington Court of Appeals recently explained:

Agencies lack the authority to “ ‘amend or change legislative enactments.’ ” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002) (quoting *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998)). Thus, “rules that are inconsistent with the statutes they implement are invalid.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846 (2007). “A rule that conflicts with a statute is beyond an agency’s authority. Invalidation of the rule is the proper remedy.” *Devine v. Dep’t of Licensing*, 126 Wn. App. 941, 956, 110 P.3d 237 (2005) (citing *H & H P’ship v. Dep’t of Ecology*, 115 Wn.App. 164, 170, 62 P.3d 510 (2003)).

Washington Rest. Ass’n v. Washington State Liquor & Cannabis Bd., 448 P.3d 140, 146 (Wn. Ct. App. 2019). To determine the legislative intent behind a statute, Washington courts focus on the statutory language itself, regardless of contrary interpretation by an administrative agency. *AOL, LLC v. Washington State Dep’t of Revenue*, 149 Wn.App. 533, 205 P.3d 159 (2017) (citing *Agrilink Foods, Inc., v. Dep’t of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)). If the meaning of the statute is plain on its face, courts must give effect to that plain meaning. *State v. Schwartz*, 450 P.3d 141 (Wn. Sup. Ct. 2019). Here, the meaning of RCW 50A.35.020 could not be any more plain: employers are required to continue an employee’s health insurance during a PFML leave if required by the federal FMLA. A rule that requires employers to provide benefit continuation in additional circumstances (and when not required by the FMLA) is inconsistent with the PFML statute, and therefore subject to invalidation. Because proposed WAC 192-700-020 attempts to do just that, we do not believe it would withstand judicial scrutiny.

Even assuming for the sake of argument that the meaning of RCW 50A.35.020 was not plain on its face, a basic rule of statutory interpretation provides further support for the conclusion that proposed WAC 192-700-020 is inconsistent with the PFML statute. It is a fundamental rule of statutory construction that the Legislature “is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wash. 2d 614, 625, 106 P.3d 196, 201 (2005). See also *State v. Beaver*, 148 Wash.2d 338, 343, 60 P.3d 586 (2002) (“[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended.”); *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wash.2d 139, 160, 3 P.3d 741 (2000) (it is “well established that when ‘different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.’ ” (quoting *State ex rel. Pub. Disclosure Comm’n v. Rains*, 87 Wash.2d 626, 634, 555 P.2d 1368 (1976))).

Had the Legislature intended to require employers to provide benefit continuation whenever employees meet FMLA eligibility requirements (versus when continuation is actually “required by” the FMLA), the Legislature would have used wording to that effect. Indeed, it did exactly that in another section of the PFML statute. RCW 50A.35.010 addresses employee eligibility for job protection during a PFML leave. In that portion of the statute, the Legislature adopted the following language:

This section does not apply unless the employee: (i) Works for an employer with fifty or more employees; (ii) has been employed by the current employer for twelve months or more; and (iii) has worked for the current employer for at least one thousand two hundred fifty hours during the twelve months immediately preceding the date on which leave will commence.

RCW 50A.35.010(6)(a). Notably, in addressing job protection, the Legislature did not elect to simply say that an employee is entitled to job protection “if required by” the FMLA. Rather, the Legislature spelled out the requirements set forth above (which happen to be the same eligibility requirements for the federal FMLA). Under this statutory language, it is possible that an employee would be eligible for job protection during a PFML leave even if such protection is not “required by” the FMLA. For example, if an employee had already exhausted his/her 12 weeks of FMLA leave and job protection was therefore not “required by” the FMLA, the employee could nevertheless be entitled to job protection during a PFML as long as the employee works for an employer with at least 50 employees, had worked for the employer for at least 12 months, and worked at least 1,250 hours in the 12 months preceding the leave.

Quite significantly, the Legislature used different language in RCW 50A.35.020, which addresses the obligation to continue health benefits during a PFML leave. The Legislature did not state, as it did in RCW 50A.35.010, that an employee is eligible for benefit continuation during a PFML leave whenever he/she meets the FMLA eligibility requirements of working for an employer with at least 50 employees, working for the employer for 12 months, and working 1,250 hours in the 12 months preceding the leave. Rather, the language used by the Legislature in RCW 50A.35.020 states that health benefits must be maintained “if required by the federal family and medical leave act” Under longstanding rules of statutory construction, by using different language in RCW 50A.35.020 than it chose to use in RCW 50A.35.010, the Legislature clearly intended different meanings. And yet, despite the very different wording, proposed WAC 192-700-020 would impose the same eligibility requirements for both job protection and health benefit continuation.

For all of the foregoing reasons, we urge the Employment Security Department to revise proposed WAC 192-700-020 to ensure that it is consistent with the statute as enacted by the Legislature. Employers should be required to maintain an employee’s health insurance benefits during a PFML only when doing so is “required by” the federal FMLA.

B. Proposed WAC 192-700-020 Would Impose Significant Additional Costs on Employers

The draft rule constitutes an eleventh-hour surprise to employers who have spent the last couple of years attempting to understand and prepare for the operational and economic impacts of the PFML law. Proposed WAC 192-700-020, which was promulgated by the Department just three months before the law fully takes effect, would dramatically increase the economic costs of PFML compliance for employers across the State. Under the FMLA, an employer with 50 or more employees must continue an eligible employee’s health benefits during an FMLA-covered absence, which includes the obligation to pay the employer’s share of health insurance premiums. Many of our public sector employers provide generous health insurance benefits, picking up the full monthly premium for coverage. The costs can be significant; an employer might pay \$1,000 or more per month to cover an individual employee and \$2,400 per month for full family coverage. As a result, the obligation to continue paying health insurance during an employee’s 12-week FMLA leave could cost an employer from \$3,000 to \$7,200.

Based on the statutory language in RCW 50A.35.020, employers have understood that when the PFML takes effect, their obligations regarding health insurance continuation would not increase – as they are only required to continue health benefits during a PFML leave “if required by” the FMLA. But proposed WAC 192-700-020 potentially doubles the economic burden on employers related to benefit continuation. As described above, an employee who has already taken 12 weeks of FMLA leave (and received paid health insurance during the leave) may turn around and take another 12-18 weeks of PFML leave. And under the draft rule, the employer would be required to continue providing employer-paid health insurance during this additional PFML leave, even though the employee is no longer eligible for FMLA leave and benefit continuation is not “required by” the FMLA. For an employer paying \$1,000 per month for health insurance, this results in an additional cost of \$3,000-\$4,000; for an employer paying \$2,400 per month, the additional cost could range from \$7,200-\$9,600. And these costs are per employee taking leave. The proposed regulation is thus not only inconsistent with the PFML statute, but it also imposes a substantial economic burden on employers.

For the reasons set forth above, we urge the Department to withdraw or revise WAC 192-700-020. The draft rule is not consistent with the PFML statute and it would impose significant additional costs on employers.

Thank you in advance for your consideration of this input.

Kind regards, Kristin Anger

Agency Response 18:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 19: Received through the online portal.

Currently, Draft WAC 192-700-020 does not have a requirement that an employee actually be on FMLA to

require the employer continue paying health insurance premiums. It only requires that the employee meet eligibility requirements. This appears to be an excessive burden on employers since there are multiple instances where FMLA and PFML do not overlap. If an employee has exhausted FMLA and applies for PFML, employers should not be required to continue paying premiums for health insurance.

Agency Response 19:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 20: *Received through the online portal.*

Per RCW: Health insurance must be continued “[i]f required by” FMLA (50A.35.020). Employers need clarification on whether we are required to continue paying premiums for health insurance if an employee has exhausted their FMLA entitlement then applies for PFML. I would argue that we should not be required to do so. By definition, if the employee has exhausted their FMLA leave then they are no longer eligible for FMLA. It would be burdensome for the state to extend a benefit maintenance requirement beyond the standard 12 weeks provided under FMLA for an additional 12-18 weeks under PFML (potentially 30 weeks total). Allowing employees to apply for COBRA or private insurance after the FMLA 12 weeks would be a better, more sustainable outcome. Another (not exclusive) option would be to put a maximum requirement on how many weeks an employer must continue health benefits under the state plan, which could/would run concurrent with FMLA.

Agency Response 20:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 21: *Received through the online portal.*

Once FMLA is exhausted, we do not believe continuation should continue for health insurance. The City should no longer be required to continue paying for health insurance. Currently per 50A.35.020 health insurance must continue.

Agency Response 21:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 22: *Received through the online portal.*

Once an employee has exhausted FMLA and applies for PFML, the employer should no longer be required to continue paying premiums for health insurance. I am concerned that RCW 50A.35.020 states that health insurance must be continued "if required by law." I am concerned that this could have unintended financial impacts for employers.

Agency Response 22:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 23: *Received through the online portal.*

WAC 192-700-020 (relating to continuation of benefits during PFML)

Please clarify when an employer has the obligation to continue benefits coverage during PFML.

The draft regulation appears to require employers to continue health insurance throughout a PFML if the PFML overlaps an FMLA “at any point.”

- Does this mean that benefits must be continued throughout a PFML if the PFML and FMLA overlap by even just one day?
- Does it mean that benefits must be continued even if the employee is not actually on FMLA?
- Does it mean that benefits must be continued even if the employee has no FMLA available?

The regulations appear to require benefits continuation under all these circumstances. This basically creates an independent requirement to continue benefits under the PFML, which is not consistent with the statute’s language. Such a requirement would create a significant additional burden to employers that was not contemplated when the statute was written. It removes any incentive for an employee to take FMLA and PFML concurrently, while adding considerably to employers’ costs in providing the additional weeks or months of benefits.

Agency Response 23:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 24: *Received through the online portal.*

When will the employers such as myself know all of the rules for the new FPL for employees who are going to be out on a Leave of Absence (LOA) come January 1, 2020?

I’m really looking for a simple one page that outlines, what employers have to comply when it comes to the employees taking FMLA/LOA or FPL this coming January 1, 2020.

I’ve heard employees who have been out on a LOA the 4th quarter of 2019 come Jan. 1, 2020, these employees can remain out on LOA for another 12 weeks.

But then I hear that employees who are out on a LOA and have taken all 12 weeks in 2019, they will have to requalify for LOA under FPL. Employees will have to show they worked another 1,200 hours to be eligible for a second FPL? Who is right? Where can I read about the details and see samples or scenarios?

I do not want to add to your plate, I’m sure you’re very busy. But any information that you can provide me would be great.

Also, will the ESD be providing any presentations later in the year prior to rolling out the new FPL?

Nora Newhouse

Agency Response 24:

These questions are outside the scope of the rulemaking. The department greatly values questions from the public and is interested in working with constituents regarding their interest in programmatic details. Because these questions do not pertain to this rulemaking, we are not providing specific answers to them here, however, the individual who submitted these questions is encouraged to send them to paidleave@esd.wa.gov, where our customer service specialists would be more than happy to engage on these issues and provide answers. Additional information about processes are being updated and we encourage anyone interested in knowing more about this to sign up for the Paid Family and Medical Leave listserv found

on our website www.paidleave.wa.gov.

Formal Comment 25: *Received through email*

Please clarify or amend WAC 192-700-020 to reflect that time under the new Washington Paid Family Medical Leave (PFML) which is also concurrently designated as FMLA is the **only time where health premiums must be maintained by the employer**. Otherwise, we will be faced with a situation where an employee is out for three months under FMLA (with maintained health insurance premiums) and then continues the absence for another three months under State PFML with an additional three months of paid health insurance premiums.

That would be six months of paid health insurance benefits for no time worked - an undue hardship for agencies and the public which we serve.

Agency Response 25:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 26: *Received through email*

My company has been monitoring the Employment Security Department Rulemaking and the WA Paid Family & Medical Leave webpages for the notice that employers are required to post per Sec. 75 of SSB 5975. According to the provision in the final bill, the Employment Security Department will develop the notice we are supposed to use and the WA Paid Family & Medical Leave website states that a mandatory poster will be available prior to 1/1/2020. I was hoping you might be able to provide insight about when that poster will be made available or if it has already been posted somewhere, could you please point me to its location?

Agency Response 26:

This question is outside the scope of the rulemaking. The department greatly values questions from the public and is interested in working with constituents regarding their interest in programmatic details. Because these questions do not pertain to this rulemaking, we are not providing specific answers to them here, however, the individual who submitted these questions is encouraged to send them to paidleave@esd.wa.gov, where our customer service specialists would be more than happy to engage on these issues and provide answers. Additional information about processes are being updated and we encourage anyone interested in knowing more about this to sign up for the Paid Family and Medical Leave listserv found on our website www.paidleave.wa.gov.

Formal Comment 27: *Received through email*

I am writing to provide feedback on proposed WAC 192-700-020.

King County appreciates the opportunity to comment on the draft regulation. King County employs over 15,000 employees in a great variety of work areas including transit, corrections, public safety, health care, information technology and public defense. We provide leave benefits far in excess of what the state requires, including Paid Parental Leave. We applaud the state's efforts to ensure all employees in Washington State have adequate leave benefits. However, we believe the proposed regulation expands employee benefits beyond what the legislature intended. The proposed regulation will also likely result in significant costs to employers beyond those contemplated by the legislation.

1. Draft Regulation WAC 192-700-020 is contrary to the law.

Under RCW 50A.35.020, an employer is required to continue health benefits "if required by the federal family and medical leave act....." The draft regulation would require an employer to continue leave benefits even when not required by the federal family and medical leave act.

The simplest example of this is an employee who takes 12 weeks of FMLA leave to care for a new born child, and then begins to take PFML for the same reason. In this instance, after the 12 weeks of FMLA leave, the employer is no longer "required by the family and medical leave act" to provide medical benefits. However, the draft regulation would require the benefits to be offered for at least another 3 months. Such a requirement is clearly contrary to the statutory language.

SUBMITTED VIA EMAIL (rules@esd.wa.gov)

November 25, 2019

2. The draft rule would lead to considerable expense for employers beyond what the legislature intended.

In the example above, the employee is entitled to 12 weeks of benefit coverage beyond that required by the FMLA. King County's medical plans are self-funded, but as a general proposition, 3 additional months of benefits would cost the county upwards of \$5000 of additional costs per employee who takes advantage of the state PFML benefit. These were not costs the County expected to incur given the language in the PFML law.

For the reasons stated above, King County requests that the Department reconsider the draft regulation, and either modify it to be clear that benefit coverage is only required when it is required under the FMLA, or withdraw the proposal.

Agency Response 27:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 28: Received through email

Re: Comments to Proposed WAC 192-700-020

The Washington State Association of Counties (WSAC) represents the county commissioners, council members, and county executives of all 39 of Washington's counties. WSAC also serves as an umbrella organization for affiliate organizations representing county road engineers, local public health officials, county administrators, emergency managers, county human service administrators, clerks of county boards, and others. County government is a significant source of employment for Washington's residents and it is in that capacity, as employers, that WSAC offers the following comments regarding proposed WAC 192-700-020.

WSAC appreciates the Employment Security Department's (ESD) efforts to effectuate Washington's new paid family and medical leave laws (PFML). No doubt, the undertaking has required countless hours and dedication from ESD staff. However, WSAC believes that proposed WAC 192-700-020, as drafted, exceeds what is required by law, creating a last minute surprise for employers that have been preparing for this new law to take effect for well over a year. Expanding benefits beyond that required by the plain language of RCW 50A.35.020 creates the real possibility for additional costs, potentially double that which had been previously anticipated.

We urge you to clarify the rule to reflect a permissive authorization to extend benefits based on the individual circumstances of the employer and employee rather than the more stringent requirement ESD has currently included in the proposed rule. The RCW requires an employer to maintain an employee's health benefits during PFML "[i]f required by the federal family and medical leave act... ." However, the proposed rule

establishes a lower standard for benefits continuation by requiring the continuation merely when an employee “meets the eligibility requirements” under the federal law. This is a significant expansion beyond that which is required by law, and one that we urge you to reconsider.

Agency Response 28:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 29: *Received through email*

Thank you for the Employment Security Department's extensive efforts to implement the Washington Paid Family Medical Leave law, RCW Ch. 50A et seq. (PFML). Witherspoon Kelley submits these comments regarding proposed WAC 192-700-020 addressing benefits continuation, which is submitted via email and the Open Town Hall engagement site. Our firm assists employers of all sizes and industries, including businesses and non-profit organizations that provide employment for fifty or more employees. We respectfully urge the Department to withdraw or revise WAC 192-700-020 because it is contrary to explicit statutory language and would otherwise propagate and exact significant and unexpected burdens on the eve of the PFML program's full implementation.

A. Proposed WAC 192-700-020 Is Contrary to Explicit Statutory Language.

1. The PFML Statute Requires Benefits Continuation If "Required by the FMLA"; FMLA Only Requires Benefits Continuation During FMLA Leave.

In July 2017, the Washington State Legislature approved the Washington Paid Family Medical Leave (PFML) law, the result of months of negotiations amongst legislators and stakeholders. As enacted, the PFML directs employers to maintain an employee's existing health benefits while the employee is on PFML leave “[i]f required by the federal family medical leave act [FMLA], as it existed on October 19, 2017.” RCW 50A.35.020 (emphasis added) (formerly RCW 50A.04.245).

The FMLA generally defines an “eligible employee” for FMLA purposes as an employee who has been employed (i) for at least 12 months; (ii) for an employer with 50 or more employees within a 75-mile radius; and (iii) worked at least 1,250 hours for that employer in the prior 12 months. 29 U.S.C. § 2611(2). Expectedly, if the employee is currently ineligible for FMLA protections, for example, the employee has not yet met the 12-month service threshold, the FMLA requires nothing in terms of substantive FMLA protections, such as the maintenance of health benefits at that time, even if the employee is otherwise then on leave. See 29 C.F.R. § 825.110(d) (“An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave.” (emphasis added)); 73 Fed. Reg. 67934-01 at 15 (Nov. 17, 2008) (explaining “FMLA protections do not apply to such leave” taken prior to FMLA eligibility).

Moreover, while meeting the above FMLA general “eligibility” criteria is necessary for FMLA protections, including health benefit continuation, it is not sufficient. Rather, the FMLA only requires continuation of an employee's health care benefits “[d]uring any FMLA leave.” 29

C.F.R. § 825.209(a) (emphasis added); 29 U.S.C. § 2614(c). That is, when the employee is in fact on FMLA leave, not just otherwise “eligible.” *Id.* For example, an employee who has exhausted his or her FMLA leave entitlement may otherwise still meet the general FMLA “eligibility” requirements (e.g., worked 1,250 hours that year), see 29 U.S.C. § 2611(2), but the FMLA regulations are explicit that an employer is not required by FMLA to continue healthcare benefits after exhaustion of FMLA leave:

[A]n employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when . . . the employee . . . continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

29 C.F.R. § 825.209(f) (emphasis added); see also 29 C.F.R. § 825.700 ("If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA." (emphasis added)). Courts as well as civil rights agencies like the Equal Employment Opportunity Commission (EEOC) have long recognized this end point to health benefits under the FMLA, even if the employee subsequently takes other protected leave. See, e.g., *Neal v. City of Danville, Va.*, 2014 WL 7011123, at *4 (W.D. Va. Dec. 11, 2014) ("[T]he FMLA regulations make clear than an employer has no obligation to continue providing health benefits if any employee continues on leave following the exhaustion of FMLA leave." (emphasis added)); see generally EEOC Enforcement Guidance: Facts About the Family Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act (1999), at Question 15 (ADA does not require benefit continuation during ADA disability leave; continuation only required if given to other employees on similar leave status generally).

In short, whether benefits continuation is "required" under the FMLA is not satisfied by an employee simply meeting the FMLA's general "eligibility" requirements; an employee must actually be on FMLA leave to receive such benefit.

2. Proposed WAC 192-700-020 Defies RCW 50A.35.020 by Attempting to Require Benefits Continuation Even When Not Required by the FMLA.

Proposed WAC 192-700-020, however, is contrary to the clear meaning of RCW 50A.35.020 and appears to require health benefits continuation even if not "required" by the FMLA. RCW 50A.35.020. Under this proposed rule, employers would instead be obligated to maintain health benefits when an employee takes PFML if the employee simply met the "eligibility requirements" for continuation of health benefits under the FMLA. WAC 192-700-020(1)(a)-(b) (proposed) (emphasis added). Proposed subsection (3) of WAC 192-700-020 also requires employers to maintain benefits for the entire duration of PFML leave if "at any point" during PFML leave, the employee meets such "eligibility requirements." *Id.*

Proposed WAC 192-700-020 is not fully clear what "eligibility requirements" means (a concern in and of itself), but presumably, and based on representations from ESD personnel, "eligibility requirements" refers to the FMLA's general threshold eligibility criteria discussed above (i.e., 12-months of service, employer size, hours worked). Either way, the proposed rule's attempt to substitute the term "eligibility requirements" in place of the actual statutory directive that benefits continuation must be in fact "required by the [FMLA]" is contrary to that plain statutory language, and may mandate benefits continuation even when not "required by the [FMLA]." Compare 192-700-020, with RCW 50A.35.020. For example:

- Proposed WAC 192-700-020 compels employers to maintain health benefits under PFML even if the employee has exhausted FMLA leave, for example, in the event the employee "stacks" PFML leave after exhausting FMLA leave (i.e., up to 30 weeks of total leave), because, as noted above, an employee may still meet FMLA's underlying "eligibility" criteria despite exhausting FMLA. Such proposed rule is contrary to RCW 50A.35.020 because the FMLA is explicit that benefits continuation is not required after FMLA exhaustion. 29 C.F.R. § 825.209(f).
- By operation of subsection (3) of WAC 192-700-020, the proposed rule also appears to compel employers to extend health benefits even before the employee is eligible for FMLA leave because the proposed

subsection requires benefits continuation for the "entire duration" of PFML leave if the employee meets "eligibility requirements" "at any point" during PFML leave—i.e., apparently even in the future. For example, an employee may begin PFML leave before working 12 months for the employer, and later meet such FMLA mark at any point during PFML leave (even if just a one day overlap). Such proposed rule is contrary to RCW 50A.35.020 because the FMLA makes clear that FMLA protections like benefits continuation are only required "during" FMLA leave and not required prior to FMLA leave eligibility. 29 C.F.R § 825.209(a); id. § 825.110(d); 73 Fed. Reg. 67934-01 at 15 (FMLA protections do not apply to leave taken prior to FMLA eligibility).

- Proposed WAC 192-700-020 also appears to require continuation of benefits in situations where the FMLA does not and cannot apply. For example, an employee can permissibly use PFML leave for a sibling, but the FMLA does not extend to siblings; thus, an employee cannot use—and employer is forbidden from applying—FMLA in such circumstance. But the proposed rule would apparently require benefits continuation in this circumstance if the employee otherwise meets the FMLA's service, employer size, and hours "eligibility requirements." Such proposed rule is contrary to RCW 50A.35.020 because FMLA leave, and thus benefits continuation, is not allowed in such circumstance and thus cannot be "required" by the FMLA.

As these scenarios show, proposed WAC 192-700-020 not only replaces the statutory "required by the [FMLA]" language with the very different "eligibility requirements" terms, but also treats such "eligibility" as sufficient for health benefits continuation—and apparently even unnecessary in some circumstances. On their face, such alterations are contrary to the plain language of RCW 50A.35.02. If approved as written, WAC 192-700-020 is likely subject to legal challenge and invalidation. *Wash. Rest. Ass'n v. Wash. St. Liquor Bd.*, 200 Wn. App. 119, 127 (2017) ("[Agency] [r]ules that are inconsistent with statutes they implement are beyond the agency's authority and are therefore invalid."). Accordingly, we urge the Department to revise WAC 192-700-020 to reflect that benefits continuation is only required "if required by FMLA":

[PROPOSED REVISION] WAC 192-700-020 When does an employer need to provide a continuation of benefits to an employee who is on paid family or medical leave?

(1) An employer is required to maintain any existing health benefits to an employee when the following criteria are met:

(a) The employee is taking leave under Title 50A RCW from an employer; and

(b) The employee meets the eligibility requirements for a continuation of health benefits as is required by the Family and Medical Leave Act, as it existed on October 19, 2017.

(2) If the employer and employee share the cost of existing health benefits, the employee remains responsible for the employee's share.

(3) If the criteria in subsection (1) of this section are met at any point during an employee's duration of leave under Title 50A RCW, the employer is required to provide any existing health benefits for the that entire duration of the employee's paid family or medical leave.

We believe these proposed revisions reflect the actual language of RCW 50A.35.020, including revising subsection (3) to accurately reflect RCW 50A.35.020's unremarkable proposition that if benefits continuation is required by the FMLA, an employer cannot otherwise deny benefit continuation "during any period" of PFML taken at that same time. RCW 50A.35.020. Such plain reading also avoids reading the statute to require benefits continuation before an employee even meets the FMLA's underlying eligibility criteria, which is not "required" by the FMLA as noted, and thus consistent with the language of RCW 50A.35.020.

Alternatively, we urge the Department to withdraw proposed WAC 192-700-020 entirely.

B. Policy Reasons Compel Revision or Withdrawal of Proposed WAC 192-700-020.

Besides inconsistency with the PFML statutory language, proposed WAC 192-700-020 should be revised as

indicated or withdrawn for policy reasons. If adopted as written, proposed WAC 192-700-020 would underscore concerns that the PFML law is being implemented in unexpected ways—on the eve of its full implementation—contrary to the plain language and statutory intent that employers and other stakeholders have long reasonably relied upon. Among other things, for example, proposed WAC 192-700-020 would propagate and exacerbate the burdens of unexpected (and unintended) FMLA and PFML "leave stacking."

As the Department is aware, the PFML program replaces the Washington Family Leave Act, RCW Ch. 49.78 (WFLA), Washington's long-standing state-law counterpart to the federal FMLA. Like the FMLA, WFLA also required employers to provide generally up to 12 weeks of job protected leave. RCW 49.78.220. For the many years the WFLA and FMLA have co-existed, WFLA and FMLA leave generally ran concurrently, ensuring that their legislatively compromised 12-week total leave entitlements were not enlarged to 24 weeks or more through "stacking" of each law's leave consecutively. RCW 49.78.390(2) ("Leave taken under this chapter must be taken concurrently with any leave taken under the federal family and medical leave act of 1993."). Besides preserving legislative intent, concurrent WFLA and FMLA use also permitted employers to better predict and balance financial and other impacts of employees' extended and/or recurrent WFLA/FMLA absences, not limited to the cost of maintaining health benefits during WFLA/FMLA leave. RCW 49.78.290. Employers have long relied upon this essential feature of the law to tailor and manage legitimate coworker and business needs.

Like its WFLA predecessor, the PFML law on its face assures that "leave taken under this title must be taken concurrently with any leave taken the federal family and medical leave act of 1993," unless "otherwise permitted by the employer." RCW 50A.15.110. Pre-passage legislative materials relied upon by legislators, stakeholders, and the public in developing and compromising the essential features of the PFML program likewise repeat this assurance.

But as the Department has acknowledged, it has become apparent that gaps in the PFML law effectively allow employees to end-run the requirement that PFML and FMLA leave run concurrently by simply delaying submission of their PFML benefits application until after the employee has sought and exhausted FMLA leave, resulting in stacking and doubling (if not more) the total amount of FMLA + PFML leave to 24 weeks or more.¹ This effect of this strategic maneuvering of what is essentially a paperwork requirement has surprised employers (and continues to do so as public comments to this day attest), leaving employers scrambling to quickly address the impact of unexpectedly doubled mandatory leave. Perhaps more significantly, this surprising end-run and result has eroded confidence that otherwise plainly written, bipartisan legislation will mean what it says.

Respectfully, adopting WAC 192-700-020 as written will further erode confidence in the otherwise plain terms of RCW Ch. 50A and exacerbate the burdens of unexpectedly doubled FMLA and PFML leave. While many employers recognize that they cannot cure any statutory loophole that permits FMLA and PFML stacking generally, employers have instead relied on RCW 50A.35.020's language specifically, i.e., that health benefit continuation is only "required" during concurrent FMLA and PFML use, as a plainly permitted means to otherwise encourage the concurrent use that has long been a hallmark of pre-existing family and medical leave law. Proposed WAC 192-700-020 would not only undermine this permissible avenue for encouraging such long-permitted concurrent leave use, but would do so on the eve of PFML implementation in just a few short weeks, long after employers have evaluated and revised their total leave programs and operational needs in view of such reasonable expectation. This includes, but is not limited to, other commentators' concerns regarding the unexpected and dramatic increase in financial costs that employers will bear if the proposed rule is adopted, potentially doubling (if not more) the duration employers must finance health benefits premiums. See, e.g., Kristin Anger, Summit Law Group (comment submitted via Open Town Hall, Nov. 25, 2019 at 9:45 a.m.).

It is undisputed that family and medical leave is a worthy and important aim. But this aim must be balanced

against reasonable employer needs and expectations—particularly expectations that are safeguarded by the plain letter of the law. For the foregoing reasons, we urge the Department to revise proposed WAC 192-700-020 as indicated, or withdraw it entirely.

Agency Response 29:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 30: *Received through email*

RE: Paid Family and Medical Leave Rulemaking To Whom It May Concern:

Vigilant is an employers' association with hundreds of member companies in five western states, including approximately 480 member locations in Washington. We advise private employers of all kinds and help them navigate the complexities of HR compliance, employee relations, employment and labor law, safety, and more.

On behalf of Vigilant and our member companies, we respectfully submit the following comments, questions, and concerns regarding the rules regulating Washington's Paid Family and Medical Leave (WPFML) program. We appreciate your attention to these concerns and attempt to resolve them. If future changes to the proposed rules reverse the language or create a new concern, we may submit further comments.

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

We recommend modifying this rule to establish a greater minimum number of hours claimed per week when the employee is approved for paid leave benefits to bond with a newborn or newly placed child, such that employees will be required to take such bonding leave in whole-week increments.

Federal FMLA regulations state:

(c) Birth or placement. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part, time after the birth of a child, or takes leave in several segments.

(29 CFR §825.202(c).)

Without this requested modification, an employee may submit weekly claims for paid leave benefits for one day of leave per week for the entire 12 month period after the birth or placement of a child. Such reduced schedule leave over such an extended period of time, where it is not medically necessary, places an undue burden on the employer, as well as an unnecessary administrative burden and cost to the department.

WAC 192-600-025 (What happens if an employee fails to provide proper notice?)

We recommend modifying this rule to clarify that the department's initial denial of benefits due to insufficient notice merely delays the employee's paid leave benefits; the time period in which benefits are denied will not satisfy the required waiting period, nor will it count toward the employee's maximum paid leave entitlement.

We further recommend adding the following provisions to this rule:

- An employer is not required to grant leave to an employee during the period the employee's leave benefits are denied by the department for failing to provide proper notice. Nothing in this rule prevents an

employer from taking disciplinary action against an employee who fails to provide proper notice without good reason.

We believe these changes are necessary so that an employee cannot extend their job-protected leave entitlement by failing to provide proper notice. To use the example in this rule, the employee is aware of the need for leave sixty days in advance, but only provides the employer with fifteen days notice. The employee's notice is insufficient by fifteen days. According to this rule, the department will deny paid leave benefits for fifteen days due to the insufficient notice. However, the employer may not be able to deny the employee's request for time off for those fifteen days. For example, if the employee has scheduled surgery that cannot be delayed. The employee will be on leave from work for fifteen days prior to starting the 12 weeks of WPFML benefits, and then would appear to be entitled to return to work after a total of 14 weeks of leave. Had the employee not been "penalized" for the fifteen days of insufficient notice, the employee would have only been entitled to 12 weeks off work with job protection, rather than 14 weeks. By delaying notification to the employer, the employee has benefitted and would receive an additional two weeks of leave.

In the alternative, the job restoration rule could be modified as suggested below.

WAC 192-700-005 (When is an employee entitled to employment restoration after leave ends?)

We recommend modifying this rule as follows:

(3) The protections provided in RCW 50A.35.010 and this section apply to the employee beginning with the date the employee starts taking leave unless the employee failed to provide proper notice to the employer. If the employee failed to provide proper notice, the protections provided in RCW 50A.35.010 and this section do not apply until the first day the department approves paid leave for the employee.

We further recommend modifying this rule to define when "leave ends" for purposes of employment restoration rights; and, specifically, that "leave ends" when the first of one of these events occurs:

- a) the employee on medical leave no longer qualifies for medical leave;
- b) the employee on family leave is no longer needed to care for a family member with a serious health condition; or
- c) the employee has exhausted the maximum number of weeks of leave allowed under WPFML.

An employee who fails to return to work when "leave ends" (as defined above) should no longer have any right to job restoration under WPFML, regardless of whether the employee is continuing to receive paid leave benefits from ESD. We believe this modification is necessary to ensure that any delay by the employee in submitting an application to the department for paid leave benefits, or any delay by the department in determining or approving leave benefits, will not extend the employee's leave from work beyond the maximum leave entitlement allowed in RCW 50A.15.020.

WAC 192-700-010 (Can an employer deny employment restoration?)

We recommend modifying this rule to clarify that an employee is not entitled to leave or employment protection under Title 50A RCW unless the employee is approved for paid leave benefits by the department.

We further recommend modifying this rule to state that an employer may deny employment restoration to any employee who has previously taken leave (i.e. FMLA) for the same qualifying reason as submitted to the department for WPFML benefits, if the employee was properly notified by the employer of WPFML rights at the start of the prior leave but chose to take the prior leave without applying for WPFML benefits concurrently. We believe a rule of this nature is necessary to ensure the rights granted to employers under RCW 50A.15.110, which requires WPFML to be taken concurrently with FMLA leave "[u]nless otherwise

expressly permitted by the employer."

Agency Response 30:

Comments on the Chapter 192-600 WAC and Chapter 192-620 WAC are outside the scope of this rulemaking and involve rules from previous rulemaking. Regarding the other comments, an employee will not be considered to have been taking leave under Title 50A RCW if there was insufficient notice provided. Also, the department does not have statutory authority to deny employment restoration for employees who have previously taken leave for FMLA.

Formal Comment 31: *Received through email and the online portal*

I am writing to comment on proposed WAC 192-700-020, a draft regulation related to the Paid Family and Medical Leave law, Chapter, 50A RCW.

The Washington Association of Sewer and Water Districts (WASWD) represents over 180 water and sewer districts that provide essential sewer and water services to nearly a quarter of the state's population, in urban and rural areas of the state. Combined, these special purpose districts support over 1300 jobs throughout the state. Our members are proud to offer good living wage jobs with robust benefits to community members.

WASWD members have serious concerns about the proposed draft rule pertaining to health care benefits for employees receiving PFMLA benefits. It is our understanding that the proposed rule will require employers whose employees "meet the eligibility requirements" of the federal FMLA to continue paying health care coverage under the Paid Family Medical Leave Act (PFMLA), even if an employee has otherwise exhausted his/her Family Medical Leave (FML) and even though the PFMLA statutes do not themselves provide for continued coverage .

This proposed rule will have significant fiscal impacts to districts with 50 or more employees. Because of another ESD rule that allows employees to "stack" PFML and FMLA, a "large" employer will be obligated to provide up to 30 weeks of combined PMFL/FML, and to continue health care coverage for the entirety of this leave. Employers have historically absorbed health insurance premiums during a 12-week leave, but under this proposed rule they would have to pay for health insurance for 24-30 months. Given that health care benefits can exceed \$1000 a month, the health care benefits represent a potentially significant expense. In addition, districts with employees numbering closer to 50 do not often have the staffing capacity for a person to be absent for such an extended period of time, so in addition to the cost of health care benefits for the person on leave, the district may be faced with hiring temporary workers. The additional cost of backfilling with a temporary employee adds to the cost of an employee on PFML.

We support employee benefits that respect the needs of employees. At the same time, employee costs are a significant driver for utility costs. In our concern for keeping essential public health services affordable, we urge you to weigh the cost to the employer in finalizing the rule.

Agency Response 31:

The draft rule related to the continuation of healthcare benefits has been removed from this rulemaking based on stakeholder feedback. PFML will be giving this regulation further consideration before promulgating the concept.

Formal Comment 32: *Received through the online portal.*

Washington State Department of Labor & Industries has information under Worker's Rights and Leave which does not align with the information being shared most recently via the Employer Overview's from ESD. If you refer to the below website, it states in various sections "Beginning Jan. 1, 2020....Paid Family Medical Leave

program is available... this is in tandem with, not in addition to, FMLA benefits". With the employee given the option to choose whether to utilize company benefits or the state, this would permit employees to exercise FMLA rights via company benefits, then once exhausted file with the state for WA Paid FML. The information provided through the two departments is contradictory.

<https://lni.wa.gov/workers-rights/leave/pregnancy-parental-leave>

Agency Response 32:

This comment is outside the scope of this rulemaking however, this information was forwarded on to management in PFML for consideration.