

REALTIME FILE

Phase 4, Stakeholder Meeting
Washington Employment Security Department

November 27, 2018

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>> APRIL: Welcome. Thank you for your patience. We wanted to give people an opportunity to be able to log in over WebEx or attend in person. We are now going to start our first of two stakeholder meetings for Phase 4 rule making for Paid Family and Medical Leave.

We are here to receive comments regarding our first draft of Phase 4 rules. Rules in this stage relate to continuation of benefits and fraud as well as other rules that we are proposing to implement for the administration of Paid Family and Medical Leave.

We do have a stenographer here today to record this meeting.

You can find Phase 4 rules by going to b-i-t dot l-y forward slash c-o-m-m-e-n-t f-o-r-u-m, again, that is bit.ly/commentforum. In the top banner select the "Info" dropdown in the middle of the list, select the link for Phase 4 rules. A couple of lines below you'll see the link for the first draft of Phase 4 rules. You can select that to review our current draft that we are speaking to today.

Thank you for being here today. My name is April Amundson, a Policy Analyst for Paid Family and Medical Leave, and I will be your host for today.

I will go ahead and allow my teammate to introduce himself.

>> MATT: Good morning. Thank you for joining us for this rulemaking hearing today. My name is Matt Buelow and I am the Policy and Rules Manager for Paid Family and Medical Leave. We look forward to getting your input today.

>> APRIL: Again, thank you for being here today. Our agenda is to go over our goals, give you a rulemaking update for our phases and then accept public comment for our first draft of Phase 4. We will also go over some final thoughts and what our next steps are in the rulemaking process for Phase 4.

As you can see here, this is one of six phases of rulemaking for Washington's Paid Family and Medical Leave. We have chosen to do our rulemaking in phases so we can have some finality for our rules over specific aspects of Paid Family and Medical Leave while the program is still in the system and in operational development.

We filed our Phase 2 rules to the Code Revisor on November 2nd and we expect the rules around employer responsibility, small business assistance and penalties to be effective early December 2018.

Phase 3 rules around benefit applications and benefit eligibility, ESD will host two public hearings in March of 2019.

Today we are here for Phase 4, continuation of benefits and fraud. We had a listening session prior to the development of rules for Phase 4 on October 15th, 2018, and we will be speaking to our draft shortly.

In January 2019, we will have our listening session for Phase 5 rules, which will be about the job protection and benefit overpayments, and then in April of 2019, we will begin Phase 6 rules around appeals.

This is our brief timeline overview of Phase 4 rulemaking. As you can see, we are still in the early stages of our rulemaking for Phase 4. This is our first of two stakeholder meetings. We will have hearings around our rules for this phase in May of 2019. We expect these rules to take effect around July 2019.

We are going to go ahead and start accepting comments for this first

draft of Phase 4 rules around continuation of benefits and fraud. As a reminder, we do have a court reporter here today so please be advised that this meeting is being transcribed. To prevent talking over each other, we will first take comments of those present in the room, then those attending by phone, and when you make a comment, please state your name, spell your last name, who you represent, then state your comment. For those attending in the room, please speak into the microphone. You'll have to push the on button to make the microphone green to make sure that you can speak into it.

For those attending by phone, you will remain muted until you have given an opportunity for those present in the room to make comment, and then at that time you will be unmuted and have the opportunity. You may also provide comments in the chat forum of our WebEx meeting if you have that available to you. So let's go ahead and start with our rules.

Our first rules are around definitions. We define WAC 192-500-110 Week; WAC 192-500-120 Employee Fraud; WAC 192-500-130 Nondisclosure; WAC 192-500-140 Willful Nondisclosure; and WAC 192-500-150 Misrepresentation.

Do we have any comments in the room regarding our definitions? We will now unmute our phones. Are there any comments about these definition rules on the phone? If there are no comments regarding our definitions, we will go ahead and move forward to our next set of rules.

We have Initial Application For Benefits, 192-610-070, Can an employee cancel a claim after it's been submitted to the department? Do we have any comments in the room about this rule? Do we have any comments over the phone? Are there any comments on the phone about WAC 192-610-070?

Our next set of rules are around Weekly Benefits. Are there any comments regarding 192-620-005, What is the minimum claim duration? Are there any comments in the room? Are there any comments on the phone? >> Proposed to be eight consecutive hours in a week.

>> APRIL: I am sorry, I am going to apologize and pause you for a moment. Do you mind repeating your name and your affiliation and spell your last name, please.

>> Sure. Megan Holstein, H-o-l-s-t-e-i-n.

>> APRIL: Thank you. Go ahead with your comment.

>> Number 1, under 192-620-005, "The minimum claim duration for paid family or medical leave is eight consecutive hours in a week." My concern with eight consecutive hours, I am assuming you're trying to get one day, but not all employees work an eight-hour day, some work more, some work less, so perhaps consider, you know, one full workday, however the employer defines it or --

>> MATT: Thank you, Megan for your comment. Are you finished? If you're not, that's okay.

>> Well, I'm just looking at it, thinking I hadn't quite prepared my comments in advance, but as I look through this along the column, I am just a little concerned that by limiting it to eight days, you're not picking up somebody who works like a twelve-hour shift or somebody who works a five-hour shift, so --

>> MATT: Understood.

>> So I just caution on that.

>> MATT: Fair enough. Thank you for the comment. I do want to address that in real time for you. The eight consecutive hours in a week is statutory language, that was set by the Legislature in law, so we do not have the discretion to change it. So I just want to point that out.

>> Okay.

>> MATT: And that's why it is the way that it is, and under sub 2 we address people that work different shifts intentionally because we are bound by the statute.

>> Okay. Thank you.

>> APRIL: Are there any other comments on the phone? All right. We do have a comment in the room regarding WAC 192-620-005.

>> So this is Michael Transue, T-r-a-n-s-u-e. So you have talked about if somebody only works four hours in a day, but what about, and, again, maybe this is statutory and we can't address it, what about the person who works a ten-hour shift and they want to take a day off and it's not eight hours, it's ten hours? So I think the eight consecutive hours is causing us problems both for those who work less than eight hours in a day and those that may work, as the lady on the phone said, four tens or three twelves or something, so we may have to go back and talk to the Legislature about this, but if you have got the problem both on the four-hour per day and the twelve-hour or like the four-ten scenario. Again, your comment is the same either way, but just to note

>> MATT: It is. Thank you, Michael. And the reality is it's eight consecutive hours in law, so someone who works more than eight hours a day does not need to miss an entire shift under the current construction of law.

>> APRIL: Thank you. Are there any other comments in the room or on the phone about WAC 192-620-005?

Our next WAC is 192-620-010, How should employees request benefits? Are there any comments in the room about this rule? Any comments on the phone?

We'll go ahead and move forward. We have WAC 192-620-015, How will earnings be deducted from the weekly benefit amount? Are there any comments in the room? There is a comment in the room. Thank you. Please state your name and spell your last name and who you are affiliated with, please.

>> My name is Nancy Steele. I am from Washington Health Benefit Exchange. I have a concern about how people that have sick leave and PTO at work, and also we have a great many employees that earn over the maximum here, how can we make them whole in coordination of leave benefits so that if they take three days of full sick leave and then they're only going to get 60 percent of the benefit for the other days, but it's not going to -- because of where their salary is, can we make up that difference with our PTO or sick leave or is that going to further limit their benefit? How it's coordinated with leave systems is really not clear in the --

>> MATT: Thank you for the question, Nancy, and I will address that as I can. It again is a statutory thing. So under the current construction of the statute, any wage that someone receives is deducted from Paid

Family and Medical Leave, so you get into a loop, right. If you pay someone paid time off, that is a wage. So it has to be deducted from Paid Family and Medical Leave. So under the current construction of the law, there is no way for an employer to pay a wage on top of Paid Family and Medical Leave without making someone whole because we would have to deduct it. An employer could choose, I'm not suggesting an employer should choose, I'm not making a judgment one way or the other, let me be clear, but employers could choose to top off through other means that is not a wage like paid time off, and that is just the way that the statute is currently constructed. It is something that we have talked with our advisory committee about and whether or not that is something that there might be interest in changing the law, and I don't know what the outcome of that will be, but under the current construction of the law, that's how it works.

>> When you say give them paid PTO in their bank rather than paying it to them at this time?

>> MATT: No, I mean an employer could make them whole through some other means, whether that's through private insurance, you know, like a long-term, short-term disability plan, or not part of a wage package, so if an employer just chose to, say, out of my pocket, I am going to pay you the additional hundred dollars to make you whole, but it is not paid time off not being taken from the bank, that could be acceptable. That may not count as a wage. We'd have to look at the facts specifically for an employer to make a determination, but generally speaking, that should be okay.

>> So if we created a pool that we are only going to take in these situations to make people whole, that they can't access it any other way or they don't have any rights to, you know, if they leave the company or whatever, then that may be something that we can consider.

>> MATT: It may be. We would want to look at in more detail what exactly it is, how it's constructed, because there are various fact patterns that could change whether it's a wage or not, but it's something that we're more than happy to work with you on and you can reach out to us off line and we can have that conversation with you.

>> APRIL: Thank you for your comment. Are there any other comments in the room? All right. We're going to go ahead and unmute the phone. Are there any comments over the phone about WAC 192-620-015, How will earnings be deducted from the weekly benefit amount?

>> I have a question.

>> APRIL: State your name and spell your last name and who you are affiliated with.

>> This is Lori Welty, W-e-l-t-y, from ReedGroup. Some of the discussion that you were just having was really hard to hear on the phone so I apologize if I'm repeating anything, but I have two questions here. The one question is, does paid time off, does that include short-term disability benefits? So if an employee has short-term disability benefits, are those going to be deducted from the state benefit?

>> MATT: Thank you for the question, Lori. This is Matt again. I'm trying a different mike so hopefully this works better. Are you hearing me better?

>> That sounds way better, yeah.

>> MATT: We will make sure that we share the mike from now on. Generally speaking, short-term disability will not be considered a wage and deductible from benefits, but it is another one of those things the bottom line is that the fact pattern around any sort of payment could change our answer, so I'm going to answer in generalities, not specifics. If you have a very specific situation that you would like us to take a look at, we'd be happy to have that conversation off line with you, but generally speaking, if you're talking about like a short-term disability insurance plan through a private insurance firm, for example, that would not constitute a wage and would not be deductible. If it was in house, I could come up with ways that it would be deductible and ways that it would not, just as an example.

>> Okay And I think what I'm asking, I think you may have addressed this in the last questions, I didn't hear it clearly, so if you have an employer who would like to top up benefits so that they receive the percentage they're going to receive from the state and then the employer is going to pay the remainder so they get up to a hundred percent, did I hear that that it isn't allowed, that instead any payments made by the employer would then be an offset to the state's benefits as opposed to the reverse of that?

>> MATT: If we're talking about traditional paid time off as in vacation leave, sick leave, something like that, then you did hear that correctly, that is true, under the current construction of the law.

>> Okay. So an employer is not permitted to pay -- to allow the state benefits to be the primary benefit and then to pay the difference to get their employee up to 100 percent.

>> MATT: Right, because the state would end up deducting that as a wage, so they would never get to 100 percent, you would just end up in a circle

>> Okay. I gotcha.

>> APRIL: Thank you.

>> This is Shannon Lawless on the phone. Can I make another comment/question?

>> APRIL: Absolutely.

>> Great. I am wondering if the Department could clarify whether an employer can require employees to use up their PTO or sick or vacation leave before they apply for or get Paid Family and Medical Leave benefits and how those two things interact.

>> MATT: I am happy to address that one for you as well, Shannon. Actually, under the statute, employers cannot force employees to use any paid time off prior to using Paid Family and Medical Leave. It is the employee's choice which benefit they choose to use

>> Okay. And when you're saying that that's in the statute, are you looking at RCW 50A.04.045(2) or is there another provision?

>> MATT: Yeah, so that's the major provision is the one that you point out where it's 50A.04.045, but there is another reference somewhere, and I apologize, I just don't remember off the top of my head

>> Okay If I emailed you, is that something you would be able to point me towards?

>> MATT: Absolutely. If you use our public email address on the

website, we will address that for you and get you an answer, not a problem.
>> Okay. Thank you. I think that would be helpful if you're able to clarify that in the rule around leave.

>> APRIL: Thank you for your comment

>> Or maybe another one.

>> APRIL: Thank you, Shannon. Do we have any other comments on the phone regarding this rule?

All right. Our next rule is WAC 192-620-020, What information will the department request from employees when filing for weekly benefits? Are there any comments in the room regarding this rule? We will go ahead and unmute the phones. Are there any comments over the phone regarding this rule?

>> This is Lana Forester with Standard Insurance Company.

>> APRIL: Go ahead with your comment, Lana.

>> My comment is in paragraph (1)(a), you're asking the employee to provide the information that they worked during the week that they're claiming, but I'm not clear how a person would provide -- how you would arrive at their average weekly wage if you only have one week's worth of data.

>> MATT: Thank you for the question and the comment, Lana. So the statute actually spells out how we determine the employee's average weekly wage. We take the total wages that are in the qualifying period, so the period of time that we're using to base the claim on, which does not include the current week that we're in, and we take the two highest quarters of earnings and we divide that by 26, because there's 26 weeks in two quarters, and that is how we derive the average weekly wage for an individual.

>> APRIL: Does that answer your question?

>> I guess I'm just still not clear how that information will be communicated because the regulation or the WAC only actually asks for the information for that particular week.

>> MATT: I think we're talking two different concepts. On the one hand, we're talking the concept of how do we determine the employee's average weekly wage to determine how much are we going to pay the individual. This WAC is not addressing that scenario. This WAC is addressing the scenario where someone has filed a claim and now they're coming in every week to answer a series of questions for us so we determine whether to pay and how much on a week-to-week basis once we have already established initial eligibility. Does that make sense?

>> Yes, that does. Thank you.

>> MATT: You're welcome. Thanks for asking.

>> APRIL: Are there any other comments over the phone regarding WAC 192-620-020?

We'll go ahead and move forward with our next set of rules. These rules are for Claim Determinations. Our first rule is 192-630-005, What happens if there is a question regarding whether an employee is qualified for benefits? Are there any comments in the room regarding this rule? We'll go ahead and unmute you. Are there any comments on the phone regarding WAC 192-630-005?

Our next set of rules is 192-630-010, What happens if an interested

party does not respond to the department's request for information? Are there any comments in the room? Are there any comments on the phone?

>> This is Megan Holstein again. I have a question about 2. It says, "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." So will the denial be overturned almost like a mini appeal and go back and look at the original requested dates or will the denial remain and only any forward-looking dates be considered?

>> MATT: It could be either, depending on the scenario, Megan, and so depending on what the reason for the denial was and when the employee communicates with us and whether or not it establishes eligibility retroactively or not will be on a case-by-case basis, so I would answer that by saying it could be either, depending on the facts of that specific case.

>> Okay. I think it's important -- I know you're not addressing the appeal procedure currently at this rulemaking, but it does get confusing whether something is just a claim being reopened or an actual appeal and knowing when do you appeal and when can an employee just submit information late.

>> MATT: Absolutely

>> It might be helpful to have some FAQs or some examples in the regulation.

>> MATT: Okay. Thank you.

>> APRIL: Thank you for your comment. Are there any other comments regarding this rule?

All right. We'll go ahead and go to 192-630-015, How will a determination be made about an employee's qualification for benefits? Are there any comments in the room regarding this rule? Are there any comments on the phone?

We will now head to the Practice and Procedure portion of Phase 4 draft rules. We have WAC 192-800-005, What is the standard the department will use to determine fraud? Are there any comments in the room regarding this rule? Are there any comments over the phone?

Our next WAC is WAC 192-800-010, How will the disqualification periods and penalties be assessed for an employee who is determined to have committed fraud? Are there any comments in the room? Are there any comments on the phone?

>> This is Lana Forester with Standard Insurance, and I wondered if this rule will clarify what responsibilities a voluntary plan and their fraud obligations are.

>> APRIL: Thank you for your comment. Are there any other comments over the phone?

We have our last rule, WAC 192-800-015, Redetermination and appeals on fraud determinations, nondisclosure, and willful non-disclosure. Are there any comments in the room? Thank you. Are there any comments over the phone? I wanted to give one more opportunity for people over the phone to give comment on WAC 192-800-015.

We have reached the end of our current draft. Now is an opportunity to speak to any rules we might have missed for this phase. If there are

any rules that should be included that we have not discussed or any rules that should be removed from this phase, in the room, are there any final comments about any of the rules that may have been presented here today or anything we may have missed that you didn't have an opportunity to speak to?

Any questions or any comments? We will go ahead and unmute you over the phone. On the phone, are there any final comments about any of the rules that have been presented here today or anything we may have missed?

>> This is Shannon Lawless on the phone and I just wanted to circle back to WAC 192-620-015. Matt's comment about the fact that there might be a way for an employer to offer a plan that would supplement the Paid Family and Medical Leave benefit up to a hundred percent of what the employee would have been earning, but that that can't be wages, some additional clarity around how employers can do that would be helpful, because the definition of wages is generally really broad and so that might not be in this phase, but at least in the future rulemaking phase, I would ask for some clarity on how employers can do that.

>> APRIL: Thank you for your comment, Shannon. Are there any comments on the phone, any other comments?

All right. Well, thank you for your attendance here for Paid Family and Medical Leave rulemaking. We here at the department truly appreciate any comments and consider every statement and have made edits to previous rules based on public feedback, so we really do appreciate your involvement.

Our next step for Phase 4 is to draft our second draft and that will be publicly posted on January 10, 2019. Our second stakeholder meeting will be held here January 16, 2019. And then we will hold two public hearings, one here and then one on the east side of Washington, and those will both be in May of 2019. Please stay tuned for the date and location of those meetings.

If there are any other unanswered or new questions or comments, you can contact us at paidleave@esd.wa.gov. You can also connect with our rulemaking efforts or any program information on our website. You can sign up for Paid Family and Medical Leave listserv and periodically receive information about our program. You can follow us on social media by following at [paidleave.wa](https://www.facebook.com/paidleave.wa). Finally, you can also review our rules and make any comments regarding our rules that you did not have an opportunity to make today at bit.ly/commentforum.

This concludes our meeting today and thank you for your attendance.
[End of meeting]