

1 APPEARANCES:

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FOR THE EMPLOYMENT SECURITY DEPARTMENT:

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MS. BRITTANY MCVICAR

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MS. APRIL AMUNDSON

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WASHINGTON STATE EMPLOYMENT SECURITY DEPARTMENT

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1 MS. MCVICAR: Pursuant to the authority
2 given under Washington State Law RCW 50.A.05.060, Chapter
3 42.30 RCW of the Open Public Meetings Act and Chapter 34.05
4 of the Administrative Procedures Act, this hearing is
5 hereby convened.

6 For the record, this hearing is beginning at
7 9:05 a.m. on November 12, 2019, at the DoubleTree by
8 Hilton Spokane City Center at 322 North Spokane Falls
9 Court in Spokane, Washington. This hearing is
10 convened to consider testimony concerning Phase 6 of
11 the Paid Family and Medical Leave rulemaking. Rules
12 in this phase are related to appeals, typical work
13 week hours, intermittent leave, implementing
14 legislative changes and other topics related to
15 establishing the program. Notice of the hearing was
16 filed with the Washington State Register on
17 September 5th, 2019, as number WSR 19-19-005. It was
18 sent to the interested parties and it was posted
19 online.

20 My name is Brittany McVicar and I'm a policy
21 analyst for the Paid Family and Medical Leave Division
22 of the Washington State Employment Security
23 Department. I represent Commissioner Suzi LeVine as
24 the hearing officer presiding at this public
25 rulemaking hearing. There is staff from the Paid



1 Family and Medical Leave Policy team attending this
2 hearing. Please introduce yourself.

3 MS. AMUNDSON: Thank you for being here
4 today. My name is April Amundson. I'm the Policy and
5 Rules Manager for Paid Family and Medical Leave.

6 MS. MCVICAR: Please be advised that this
7 hearing is being transcribed by a court reporter and
8 the transcript will become part of the official
9 rulemaking file. To facility this transcription,
10 please state and then spell your name each time before
11 you provide testimony. Please also note that this
12 hearing is convened to consider comments on proposed
13 rules. Because of the formal nature of this hearing
14 we are unlikely to answer any questions that you may
15 ask. If you do pose a question, I will ask you to
16 rephrase your question as a comment. Questions can be
17 sent to our online portal, which is managed by the
18 policy team. It can be found by typing
19 bit.ly/commentforum, and that's all one word, into
20 your browser window.

21 A concise, explanatory statement of the
22 agency's reasons for adoption of the rule, including a
23 summary and response to all the comments we receive
24 after the publication of the proposed rules, will be
25 placed in the permanent rulemaking file and will be



1 posted online. This document will be sent to all
2 interested parties who have signed up to receive Paid
3 Family and Medical Leave e-mails.

4 We will begin with April Amundson who will
5 provide a brief explanation about our proposal.

6 MS. AMUNDSON: Thank you, Brittany.

7 The Paid Family and Medical Leave Act was
8 passed by the Washington State Legislature in 2017.
9 January 1, 2019, employers started assessing premiums
10 on employee wages. Application for benefits will
11 begin to be accepted in January of 2020. We have
12 split the rulemaking into phases to align with this
13 aggressive, but achievable, schedule. And this formal
14 public hearing covers the topics of appeals, typical
15 work week hours, intermittent leave, the
16 implementation of changes related to the 2019
17 legislative session as well as other rules that
18 Brittany has stated a moment ago. More specifically,
19 these rules address how self-employed individuals
20 interact with the program, premium overpayments, how
21 typical work week hours are determined for benefits,
22 employee notice requirement waivers, child support
23 deductions, the weekly benefit calculation and
24 proration of benefits, provide clarity around the
25 voluntary plans, small business assistance grants, as



1 well as other topics.

2 In addition, these draft rules contain
3 several new and updated definitions that will pertain
4 to all Paid Family and Medical Leave rules. I
5 encourage you all to read the text of the rules for a
6 more robust understanding, and these draft rules are
7 intended to interpret and clarify the Title 58 of the
8 Revised Code of Washington.

9 We really do appreciate your interest and
10 attendance to these meetings and we appreciate your
11 participation in our rulemaking efforts to implement
12 this important program. We look forward to hearing
13 your comments. Thank you very much.

14 MS. MCVICAR: Thank you, April. We will now
15 hear testimony from those in attendance. To avoid
16 talking over each other, we will first take testimony
17 from those in the room. We will then open the phone
18 for comment once there is no more comment from those
19 in the room. Again, when you testify, please speak
20 into the microphone, state and spell your name and
21 state who you represent if you are here in a
22 representative capacity.

23 We are now ready to accept public comment
24 from this in the room. Is there anyone wishing to
25 provide comment?



1 My name is Angela Hayes, spelled
2 A-N-G-E-L-A, H-A-Y-E-S. I am Senior Legal Counsel
3 with Associated Industries here in Spokane,
4 Washington.

5 I did come prepared with questions, but in
6 the spirit of jeopardy, I'll rephrase it as a comment
7 instead of a question, I guess, or reverse jeopardy
8 here.

9 One of the issues that I have been working
10 with employers in our membership organization to work
11 through or to understand better and has become a real
12 concern for employers, particularly with what was an
13 addition to the statute that didn't exist initially
14 regarding the provision of health insurance benefits
15 for employees that are on Washington State Paid Leave
16 Benefits that did not exist in the original version of
17 the statute and it was not part of the Washington
18 Family Medical Leave Act as it currently exists. So
19 there was always an incentive for employees who were
20 otherwise qualified FMLA under federal law to be, I
21 guess, applying for and utilizing FMLA benefits
22 concurrent with whatever state benefit they might be
23 receiving.

24 Now with the addition of and the requirement
25 that the employer continue to provide health insurance



1 benefits for employees who will be receiving Paid
2 Family Leave benefits through the state program,
3 employers are very concerned about employees now
4 running FMLA and Washington State paid leave benefits
5 in an end-to-end fashion as opposed to concurrently
6 because there is no incentive for them to be utilizing
7 both benefits at the same time. Even though the
8 federal government and the Department of Justice
9 issued a letter opinion some months ago which stated
10 employers who are FMLA employers, and if you have an
11 employee who as an FMLA qualifying event, there is no
12 option but to start and to run FMLA with that
13 employee, otherwise qualified for. The employee
14 doesn't have any option saying, yes, I want FLMA or I
15 don't. Nor does the employer have an option of saying
16 you don't have to use it if you don't want to, you can
17 because you're qualified for it. The Department of
18 Justice issued a letter stating that employers were
19 required to utilize FMLA. Except, unfortunately, in
20 the 9th Circuit where our Washington employers sit,
21 there is a difference of opinion with respect to that
22 and it has been found to be actually an FMLA
23 interference claim for an employer to require an
24 employee to utilize FMLA even though they haven't had
25 a qualifying event and if the employee doesn't want



1 to. So, what we are really facing here in the state
2 of Washington now for employers is the real potential
3 for employers to have employees that are out of the
4 workplace for 24 weeks as opposed to, you know, the
5 intended 12 to 14 to 16 to 18, depending on what
6 whatever their condition is because there is no
7 incentive for an employee to use one or the other or
8 use these benefits concurrently FMLA. Because FMLA
9 doesn't provide any additional protection that the
10 state benefit now don't provide. And my understanding
11 from the state is that they are not going to be
12 considering whether somebody has already been out on
13 FMLA prior to coming to the State to apply for paid
14 leave benefits so the employee very well has been out
15 on FMLA protected leave for 12 weeks, they decide they
16 aren't ready to come back or they can't come back or
17 whatever the issue is and now they are just simply
18 going to go to the State and apply for another 12 to
19 14 to 16 weeks of benefits, depending on what their
20 condition is and receive paid leave benefits and the
21 employer will have to continue to provide job
22 protection and health insurance benefits for that
23 employee. And that is going to be a real, real burden
24 for even employers who have 50 employees. That's an
25 issue for employers and I think it's an unfortunate,



1 probably unintended, possibly, side effect of the
2 wording and the regulations as they now exist with the
3 addition now of paid leave benefits.

4 The other issues that I see is, is there --
5 and this is not a comment, but it is a question that
6 will remain -- I'm not expecting an answer to this,
7 but I'm throwing this out there, about how employers
8 will go about collecting any portion of employee's
9 premium that might be due and owing with respect to
10 those health insurance benefits. The FMLA regulations
11 do address specifically what an employer's options are
12 with respect to an employee who has failed to pay
13 their portion of the health insurance premium and
14 outlined the notification procedure for employers to
15 notify an employee that their benefits are at risk
16 because they haven't paid their portion of the
17 premium. Of course if the employee is simultaneously
18 utilizing a paid leave benefit provided to them by the
19 employer, for example, paid PTO or vacation or
20 something, the employer does have an income stream
21 from which they can deduct that premium. Under the
22 Paid Leave Benefit Program in the state of Washington,
23 if an employee is not opting to take supplemental
24 benefits so where the employer is offering to allow
25 the employee to make up that wage gap by utilizing



1 their sick leave or whatever, the employer does not
2 have an option to tap into the income stream that the
3 employee is receiving from the State in order to cover
4 a premium benefit payment that the employer might be
5 due and owing. So, I think it would be helpful to
6 have something addressed possibly in the rules about
7 what the employer's options are, much like the FMLA
8 regulations outlined, what the employer's options are.
9 If an employee is out on State-paid leave and has
10 failed to pay their portion of the premium how the
11 employer can go about either collecting that or
12 addressing it or terminating the employee's benefits
13 if they fail to make a payment. Thank you very much.

14 MS. MCVICAR: And thank you. And I want to
15 make sure I captured your comments so I'm just going
16 to paraphrase just to make sure.

17 So, your concern dealt with the concurrency
18 issues of FMLA in our law as well as the continuation
19 of not just job protection, but also the health
20 benefits. So, you know, looking for guidance or maybe
21 some more clarity for addressing those concerns.

22 And then, in addition, also for when those
23 employees are out on leave what are the options or
24 what's the guidance for employers when those
25 healthcare premiums that the employee is responsible



1 for and they are not paying, what are the options that
2 the employers have for that? Did I capture that
3 right?

4 MS. HAYES: Yes.

5 MS. MCVICAR: Is there anyone else in the
6 room wishing to provide comment on our Phase 6 Rules
7 today?

8 MS. BAILEY: My name is Stephanie Bailey.
9 I'm a Human Resources Director for the Upper Columbia
10 Conference. My concern is with the rules in regards
11 to look backs for starting in 2020. With an employee
12 that has already exhausted state and federal leave as
13 it is now going into January 2020, they'll have access
14 to, under my understanding, another 12 weeks. And if
15 they've already gone on a pregnancy leave or something
16 like that, they may have already taken 12-plus weeks
17 as it is in Washington State and then they may be
18 eligible for another 12 weeks. So, that's a concern
19 for me that you could have somebody out for 24-plus
20 weeks. Especially if this is an educational role, the
21 concern for the students and the consistency of the
22 program.

23 MS. MCVICAR: Thank you for your comments.
24 Just to make sure I've captured it correctly, your
25 concerns were about again that potentially using other



1 programs, federal and state. And then as of January 1
2 they are equal to, you know, look into our program and
3 depending on their qualifying period and, you know,
4 these serious health conditions and what have you,
5 their typical work weeks will be established and that
6 could be in addition to any other leave. So, again,
7 just more of that continuation of leave; is that
8 accurate?

9 MS. BAILEY: Correct.

10 MS. MCVICAR: Is there anyone else in the
11 room wishing to provide comments on our Phase 6 Rules?
12 Seeing no more comments in the room, we will turn it
13 to those on the phone. Thank you again for joining
14 us. Is there anyone on the phone wishing to provide
15 comments on our Phase 6 rulemaking?

16 This is Daris Freeman. My comments revolve
17 around primarily the voluntary plan --

18 MS. MCVICAR: Daris, I'm so sorry. Can I
19 get you to spell your name?

20 MS. FREEMAN: There is still a lot of
21 unknowns regarding how employers or their carriers
22 will access employee eligibility data, as well as any
23 time already taken under the state plan. In addition,
24 there has been no clarification or guidance provided
25 as to what, how, or where employers will be reporting



1 the approved voluntary planned time that's been paid.
2 It just says that they must report weekly benefit and
3 leave duration information. But there has been no
4 guidance as to how often or how that will be
5 transmitted as well.

6 MS. MCVICAR: Daris, thank you so much.
7 Could I get you to spell your name for our
8 transcriber, please?

9 MS. FREEMAN: Sure. First name is Daris,
10 D-A-R-I-S, last name is Freeman, F-R-E-E-M-A-N.

11 MS. MCVICAR: Thank you so much. And,
12 again, just to make sure I captured your comments,
13 your concerns are around the voluntary plans for
14 employers and how those employers are going to access
15 what the State would be providing so that they can
16 make sure that they are in compliance with the law.
17 And in addition to that, when voluntary plans start
18 providing those benefits, you're looking for maybe
19 some guidance for those employers on how that process
20 will look; is that accurate?

21 MS. FREEMAN: Correct.

22 MS. MCVICAR: Thank you so much.

23 MS. FREEMAN: Sure. Sorry, I'll just keep
24 going and then somebody else can jump in. I think
25 there is still a need for clarification on how the



1 waiting period interacts with the maximum entitlement.
2 There has been some conflicting guidance issues on
3 that. Basics does have the proposed right on maximum
4 amount of paid benefits, but whether -- again, it's
5 still unclear how that interacts with the waiting
6 period based on the guidance received to-date. So I
7 would recommend some clarity there.

8 MS. MCVICAR: Absolutely. So, again, just
9 to reiterate, looking for clarification on the
10 employees who need to serve a waiting week and how
11 that interacts with the maximum amount of the, you
12 know, the new rule that is used times their typical
13 work week to find that maximum.

14 MS. FREEMAN: Yes. How those interact.

15 MS. MCVICAR: How those interact. Okay.

16 MS. FREEMAN: Because that goes back to
17 voluntary plans. With employer's with voluntary
18 plans, they need to understand how much is a 12-week
19 benefit. Is it 12 weeks of pay plus an unpaid waiting
20 period or is it 12 weeks of leave?

21 And then lastly, I would just like to
22 confirm what was stated in the room earlier regarding
23 the whole benefit continuation issue. I think, again,
24 that came under the privacy rules or some other place
25 that there was a continuation of benefits. I think



1 they expressed the issues very well, but I do think
2 the proposed right contradicts the statutes. Those
3 definitely would ask that that be looked at and would
4 confirm whoever that was in the room it should be
5 specific to what FLMA is requiring benefits and is
6 consistent with the unpaid law that has always existed
7 in Washington as well as undue costs to employers.

8 MS. MCVICAR: Thank you for that comment.
9 Again, just reiterating, the benefit continuation
10 clarification of how PFML will interact with other
11 programs, state and federal.

12 MS. FREEMAN: Well, specifically, what the
13 requirements are going to be for continuation of
14 health benefits and the interaction with the federal
15 because that's where I think we have some -- the
16 statute appeared clear and now there is a proposed
17 writing that seems to contradict that.

18 MS. MCVICAR: Thank you for that
19 clarification.

20 Is there anyone else on the phone wishing to
21 provide comment on our Phase 6 rulemaking?

22 MS. WILSON: This is Maggie Wilson with
23 LOVA, spelled L-O-V-A.

24 We would like to make a comment on WAC
25 92-610-050, How are typical workweek hours determined.



1 We just wanted to comment that the WAC does not
2 clarify the voluntary plans options for alternative
3 calculations of typical workweek. We were told by
4 customer care center that voluntary plans does not
5 have to be 40 hours for salaried individuals and that
6 we can use the actual hours worked. So, for example,
7 if an individual works 37.5 hours you could use that
8 in place of 40 hours.

9 MS. MCVICAR: Okay. So, regarding 610-050
10 you are looking for clarification on the rules the
11 voluntary plans have of establishing what is
12 considered full time and then how this WAC would
13 either conflict or what it would require of those
14 voluntary plans; is that correct?

15 MS. WILSON: Correct.

16 MS. MCVICAR: Thank you for your comment.

17 Others on the phone wishing to make comment
18 on our Phase 6 rulemaking?

19 MR. DULGERIAN: This is Tony Dulgerian, with
20 MetLife. Dulgerian, spelled D, as in David,
21 U-L-G-E-R-I-A-N, as in Nancy. And my comment involves
22 WAC 192-500-120. And I was looking for some guidance
23 as to whether employers with voluntary plans can deny
24 fraudulent claims. And, if so, what is the standard
25 for a fraudulent claim in the voluntary plan context



1 and whether employees have the right to appeal such
2 determinations?

3 MS. MCVICAR: Could I get you to restate
4 that? I want to make sure I'm following the right
5 proposed rule. You said WAC 192-500-120?

6 MR. DULGERIAN: Yes. That was the provision
7 regarding employee fraud.

8 MS. MCVICAR: Okay. Would you mind
9 restating your comment, please?

10 MR. DULGERIAN: Sure. So, in the voluntary
11 plan context, if an employer with a voluntary plan
12 denied a fraudulent claim by the employee for
13 benefits. And so --

14 MCVICAR: So --

15 MS. DULGERIAN: So, what standards apply and
16 when their employees can appeal such determinations
17 and how.

18 MS. MCVICAR: Thank you again for restating
19 that. So, you were looking for when -- you know, what
20 rules do voluntary plans need to understand is
21 applicable to their voluntary plan and then how does
22 that person look for guidance specifically onto
23 employer fraud?

24 MR. DULGERIAN: Yes.

25 MS. MCVICAR: Thank you so much.



1 MR. DULGERIAN: I have a few more comments.
2 Should I --

3 MS. MCVICAR: Oh, yes, of course.

4 MR. DULGERIAN: Let's see here. This
5 comment about WAC 192-510-030.

6 MS. MCVICAR: Okay.

7 MR. DULGERIAN: When determining whether
8 employees work enough hours to be eligible for
9 benefits. Will the ESD be considering paid time off
10 or any unpaid leaves of absence as far as the hours
11 worked? I need some guidance on that.

12 MS. MCVICAR: And I want to make sure I'm
13 tracking this to the right rule. You said 510-030,
14 which is the proposed rule on how the department will
15 determine wages and hours for self-employed persons
16 electing coverage?

17 MR. DULGERIAN: I think I stated the wrong
18 rule. My apologies.

19 MS. MCVICAR: Yeah, I just want to make sure
20 I'm tracking.

21 MR. DULGERIAN: Let me find the right one.
22 One moment. I can't pull it out right now, but can I
23 just submit that as a general comment?

24 MS. MCVICAR: Absolutely. So, I want to
25 make sure. You are speaking to when PTO or other paid



1 time off counts towards wages; was that accurate?

2 MR. DULGERIAN: Counts towards hours worked.

3 MS. MCVICAR: Counts for hours worked.

4 Okay.

5 MR. DULGERIAN: Or hours of employment.

6 MS. FREEMAN: Is that for purposes of the
7 reinstatement job restoration provision?

8 MR. DULGERIAN: It's for the purposes of the
9 eligibility determinations.

10 MS. MCVICAR: Thank you. For the person who
11 just offered a clarification, could I get you to state
12 and spell your name, please?

13 MS. FREEMAN: This is Daris Freeman. I
14 think that's another -- while we're on that topic, it
15 may be a different standard for the job restoration
16 rights of the 1250 from the original Washington unpaid
17 FML that it may be for eligibility. So, clarification
18 on those two things, specifically, would be extremely
19 helpful.

20 MS. MCVICAR: Thank you, Daris. So, again,
21 I just want to make sure I captured the comment. So
22 we are looking for a clarification from the department
23 specifically on hours reported. And then also kind of
24 tied to that, what hours then would go towards that
25 1250 count for qualifying for job restoration.



1 MS. FREEMAN: At least from my part.

2 MS. MCVICAR: Any further comments from
3 either of you before I invite others?

4 MR. DULGERIAN: Not right now. Thank you.

5 MS. MCVICAR: All right. Is there anyone
6 else on the phone wishing to provide comment on Phase
7 6 rulemaking?

8 MS. MUELLER: This is Renee Mueller from the
9 City of Bellingham.

10 MS. MCVICAR: Yes, Renee. Could I ask you
11 to possibly speak a little louder? It's a little
12 difficult to hear you.

13 MS. MUELLER: This is Renee Mueller from the
14 City of Bellingham. My name is spelled R-E-N-E-E,
15 last name is M-U-E-L-L-E-R. I'm in Human Resources at
16 the City of Bellingham. Can you hear me okay?

17 MS. MCVICAR: Yes, I can. Thank you so
18 much.

19 MS. MUELLER: Okay. I have some comments or
20 considerations around the language personal
21 supplemental benefits, which is WAC 192-500-180. So
22 some of my comments are about considerations with the
23 health supplemental benefits are included and they are
24 are a mandatory subject of bargaining for anyone who
25 has collective bargaining agreements. And although an



1 employer is not offering supplemental benefits due to
2 the default, and I understand that, many employers are
3 not simply choosing to not offer those supplemental
4 benefits without bargaining which effects all those
5 labor groups.

6 Also, if the supplemental benefits aren't
7 allowed by the statute, the city would have to, as
8 most employers I'm assuming, would have to set up
9 multiple supplemental leave codes for each, at least
10 for us, for each of our bargaining groups. Which
11 would really constitute a tremendous additional
12 administrative reporting.

13 The other thing that seems to be a big
14 burden for us would be the timing of the eligibility
15 and benefit payment amounts. It would make it
16 difficult for us as employers to coordinate how much
17 supplemental leave to quote/unquote "top up" so that
18 there really is no loss of income, you know, for the
19 employee, which I'm assuming because of the lag in
20 time would result in a lot of (inaudible) on our end
21 as an employer. What we would like to propose for
22 consideration is to allow the employees to top up
23 without penalties and/or could change the reporting
24 requirements of the employer involving the dollars and
25 the hours being used by the employee as part of the



1 total current paid family leave premiums that we would
2 be paid to the state. So, don't take that away, just
3 allow the employer to go ahead and add that in as
4 hours towards your total hours that you can use
5 towards the PFML and/or the dollars would be included
6 to allow the money or premium to be used for dollars
7 for supplemental payments. That's it.

8 MS. MCVICAR: Thank you so much for
9 providing your comments. I want to make sure I
10 captured this. I've may have missed the last point
11 you were making so I want to make sure I captured it.
12 So, we're talking about supplemental benefits and
13 though, you know, the permissive language in statute
14 allows employers to do this, it can be an
15 administrative burden for those choosing to offer
16 those benefits. Additionally, you're looking for
17 maybe some guidance from the department on how
18 employers are going to know the amounts to be able to
19 top off or to offer those supplemental benefits to
20 kind of make that employee whole. And, Renee, what I
21 didn't capture is the last comments you were making.
22 I want it make sure I understood the reporting
23 comments. What I heard was there were maybe concerns
24 about what the employer needs to report in regards to
25 supplemental benefits. Was that -- am I capturing



1 that?

2 MS. MUELLER: Right. There is a concern and
3 the concern really has to do with the current language
4 which states that if you use a supplemental benefit,
5 if you designate something as a supplemental benefit,
6 and let's say it's sick time, that sick time that we
7 allow to top up so that the employee is whole for the
8 PFML, would the dollars would not count towards
9 dollars for gross pay that we currently calculate the
10 .4 percent and the hours would also not be reportable
11 to ESD as hours towards your, you know, next four out
12 of five quarters to count towards eligibility. Which
13 would really mean a whole separate set of lead codes
14 that we would have to institute for all our employees
15 because some pay would go towards gross pay, which
16 everything goes towards gross pay, and these
17 particular codes would not go towards gross pay or
18 reportable hours to the ESD. So, that's just for
19 consideration of -- it really would be easier to allow
20 to top up, but to allow those hours in dollars to just
21 count and not to not count as they are currently now
22 proposed in the rule.

23 MS. MCVICAR: Thank you so much for
24 clarifying that.

25 MS. MUELLER: Thank you.



1 MS. MCVICAR: Is there anyone else joining
2 us on the phone that would wish to provide comments on
3 our Phase 6 rulemaking?

4 MS. WINDOWS: Yes. This is Stacey Windows.

5 MS. MCVICAR: I'm sorry. Could you restate
6 your name, please?

7 MS. WINDOWS: Stacy Windows.

8 MS. MCVICAR: And would you spell that for
9 us too, please?

10 MS. WINDOWS: W-I-N-D-O-W-S.

11 MS. MCVICAR: Thank you.

12 MS. WINDOWS: And I want to get back on what
13 she was just commenting on about the supplemental pay
14 and also pairs with the gentleman who spoke about the
15 wages that are paid through another paid time off or a
16 sick day that was not part of a leave and those would
17 actually be in the reportable wages called premiums
18 and so that was a question on whether we have to pay
19 the premiums for those but does that also count as the
20 820 hours benefit. The thought is could we negate
21 around the whole supplementing and reporting the wages
22 that we're now having to duplicate all of their pay
23 codes. If the state of Washington would consider
24 anything that is paid through a paid time off, which
25 are hours actually not worked, as being removed from



1 reportable wages?

2 MS. MCVICAR: So kind of going along with
3 the previous comments, you're looking for just some
4 guidance or avenues regarding supplemental pay when it
5 comes to not only tracking, but also what wages would
6 be premiums be owed?

7 MS. WINDOWS: Correct. So my thought is if
8 the state may modify the regulations to say that paid
9 time off is not considered reportable wages because
10 they're not actually hours worked, then that helps
11 solve our issue around the supplemental wage pay by
12 having to determine if it's a supplement then I'm not
13 supposed to report it to the state or is it PTO
14 because they are on vacation then I have to report it
15 to the state. It's an administrative burden because
16 now we have to have duplicate pay codes for all of
17 those plans.

18 MS. MCVICAR: Thank you for providing that
19 clarification. I appreciate it. Are there any
20 further comments from those on the phone regarding
21 Phase 6 rulemaking? Are there any further comments
22 for those joining us by phone on Phase 6 rulemaking?

23 MS. WINDOWS: This is Stacey Windows again.
24 During this case for the initial application I'm not
25 sure of which piece of the rulemaking it speaks to the



1 retro claim. It would be nice to receive
2 clarification on how far the ESD will allow an
3 applicant to retroactively submit a claim.

4 MS. MCVICAR: Are you speaking to backdating
5 of claims?

6 MS. WINDOWS: Yes.

7 MS. MCVICAR: So, you're looking for a
8 clarification on when an employee has a qualifying
9 event that would allow that person to backdate a
10 claim?

11 MS. WINDOWS: If there are limitations. I
12 think I need a clarification to have a regulation of
13 the state, if it's 30 days or 60 days or --

14 MS. MCVICAR: Okay. So, in addition to
15 whether or not a serious health condition qualifies,
16 you're looking to see if there is more limitations
17 that would apply to that?

18 MS. WINDOWS: There is more clarification
19 and guidance so that, for example, if an employee will
20 be permitted to go back six months, what are the
21 limitations from the qualifying event?

22 MS. MCVICAR: Okay. Thank you.

23 Are there any further comments from those on
24 the phone on Phase 6 rulemaking?

25 MS. LOVA: This is Maggie Lova with



1 Sedgwick, last name L-O-V-A.

2 We would like to comment on what the state
3 is clarifying that those individuals who began a leave
4 on 2019 and transition into '20 will be eligible to
5 file the Washington FML benefits. We would like some
6 clarity from the department around how this will
7 affect existing Washington FLA claims for those
8 individuals who do not apply for Washington Schedule
9 on 1/1. Because they said that Washington FLA will
10 sunset on 12/31/19. So, will the existing Washington
11 FLA approval for these claims that began in 2019 and
12 that transitioned into 2020 continues, will that be
13 before it runs out or will those claims have to be
14 closed out since Washington FLA sunsets on 12/31/19?
15 And will employees be required to file for Washington
16 PFML on 1/1/20 if they want to continue on leave?

17 MS. MCVICAR: Thank you for that comment.

18 So, again, you're looking for understanding
19 of L & I's program of FLA and that that will sunset in
20 December. And then if there is any interaction of
21 that with our paid family medical leave. And I will
22 offer that, you know, those are two separate programs,
23 if that can help. And, as you know, paid family leave
24 will have their own qualifying qualifications and
25 eligibility requirements that are likely separate from



1 L & I's program. But I do hear the need maybe for
2 just some communication from the department on how
3 that looks. Is that accurate?

4 MS. LOVA: Yes, thank you.

5 MS. MCVICAR: Of course. Thank you.

6 Is there any further testimony from anyone
7 on the phone on Phase 6? Is there any further
8 testimony concerning the proposed rulemaking from
9 either those on the phone or anyone here in-person
10 before I conclude this hearing? We have a comment in
11 the room.

12 MS. HAYES: Again, I'm Angela Hayes from
13 Associated Industries. Two requests, I guess, for
14 clarification. Under WAC 192-500-180 where it's
15 talking about supplemental benefit payment and (2)
16 that employers may, but are not required to, designate
17 certain benefits including, but not limited to, salary
18 continuation, vacation leave, sick leave, or other
19 paid time off as a supplemental benefit. It probably
20 would be helpful to have clarification from the state
21 because I can see a potential conflict arising with
22 the inclusion of sick leave as a supplemental benefit
23 that the employer could decide not to allow an
24 employee to tap into it if the employer decides to do
25 that. And I can see employers wanting to perhaps not



1 allow supplemental benefits to be utilized because my
2 understanding from the state is that the employee
3 could be earning well over 100 percent of their normal
4 wage if they are tapping into both state paid leave
5 benefits and an employer provided benefit if the
6 employer is allowing them to tap into it at 100
7 percent. So, there may be employers that choose not
8 to allow employees to tap into supplemental benefits.
9 And my question is or my request for clarification is,
10 my understanding of the Washington Paid Sick Leave Law
11 is that an employer would not be able to deny
12 employees access to that benefit if they were out for
13 an authorized purpose under the statute and so this
14 creates somewhat of a conflict where an employer under
15 this WAC might be able to say we are not going to
16 allow you to utilize your paid sick leave benefit for
17 an authorized purpose because we aren't designating it
18 as a supplemental benefit under Washington Paid Family
19 Leave. So, we're requesting a clarification and is
20 there a conflict between paid sick leave and paid
21 family medical leave utilization of that benefit?

22 And then my second request for clarification
23 is to follow-up on the exchange that we had earlier
24 with respect to the continuation of health benefits
25 under Washington State Paid Leave and/or FLMA. When I



1 heard Ms. Freeman on the phone, I've not met her or
2 spoken to her, and she is very well-versed in all of
3 this and so I appreciate her follow-up. I would like
4 to think that she and I were reading the statute in
5 the same way, that my initial understanding was that
6 the employer would only be required to continue health
7 insurance benefits for an employee if they were also
8 utilizing, not just would be qualified FLMA, but were
9 actually utilizing FLMA, with the Washington State
10 Paid Leave Benefit. That's how I read the statute.
11 And I think the understanding or the clarification
12 that I had received at that time is that the state is
13 looking at the same type of criteria that that would
14 qualify somebody for FMLA or whether they were capping
15 FMLA or not, they would still be eligible for
16 continuation of health insurance benefits simply under
17 the state statute alone, even if they decided not to
18 utilize FLMA but the state was going to look at
19 criteria that mirrored, essentially, the FMLA criteria
20 to qualify for that. So, having some clarification.
21 And so I agree with Ms. Freeman that I think there is
22 a discrepancy between those statutes and what the WAC
23 says as to the employer's requirement to continue to
24 provide a benefit to an employee who is using only the
25 state paid leave and is not actually on FLMA but would



1 otherwise be qualified for FLMA because they meet its
2 criteria. Thank you.

3 MS. MCVICAR: Thank you. And, again, to
4 make sure I captured those, the first comment was
5 about -- and we definitely appreciate the challenges
6 of when you've got different laws in different state
7 agencies that address the same things, any
8 clarification that we can provide in working together
9 to do that, I think is a great comment. So, thank you
10 for that. And, additionally, on that continuation of
11 health benefits, just may be an opportunity for the
12 department to clarify and we do appreciate -- we hear
13 the comments, definitely, and it's an opportunity for
14 us to be able to communicate that more clearly so that
15 you guys understand the basis behind that rule. So
16 thank you again for that.

17 Is there any further testimony from anyone
18 here in the room or on the phone?

19 MS. SHEARER: This is Jean Shearer and it's
20 Jean, J-E-A-N and Shearer is S-H-E-A-R-E-R.

21 And my request for clarification is
22 regarding an employer after having met the waiting
23 period to clarify the minimum increment of hours that
24 an employee can file for leave and if they must be
25 consecutive, as well as the total minimum of hours



1 leave in a week to be eligible for the benefit.

2 MS. MCVICAR: Jean, thank you for your
3 comment. We had a bit of interference when you were
4 spelling your last name. Would you mind spelling your
5 last name again for us?

6 MS. SHEARER: Of course. It's
7 S-H-E-A-R-E-R.

8 MS. MCVICAR: Excellent. Thank you. And
9 again your comment was seeking clarification on the
10 eight hour consecutive minimum claim duration and one
11 that applies both in the waiting period as well as on
12 a weekly basis; is that correct?

13 MS. SHEARER: Correct. And also the minimum
14 increments that an employee could commit after they
15 became eligible for leave.

16 MS. MCVICAR: Okay. Thank you.

17 Is there any further testimony concerning
18 the proposed rulemaking from either those on the phone
19 or here in person before I conclude this hearing? At
20 this time, I see no additional testimony from those in
21 the room and hearing no additional requests for
22 testimony on the phone.

23 All right. In conclusion, this hearing was
24 convened to consider testimony on Phase 6 of the Paid
25 Family and Medical Leave rulemaking related to



1 appeals, typical workweek hours, intermittent leave,
2 implementing legislative changes and other topics
3 related to establishing the program. All oral
4 testimony presented at this hearing and written
5 submissions will become part of the official record.

6 The deadline for submission of written
7 comments is 5:00 p.m., November 12, 2019. You can
8 submit written comments online by entering
9 bit.ly/commentforum in your browser. Comments must be
10 received by that deadline to be considered as part of
11 this rulemaking. All final decisions regarding
12 adoption of this proposed rulemaking will be made
13 after all testimony and written comments have been
14 fully considered, with a target date of November 17th,
15 2019.

16 On behalf of Commission Suzi Levine, thank
17 you for participating in this hearing. This hearing
18 is adjourned at 9:57 on November 12, 2019.

19 (Whereupon, the hearing concluded at 9:57
20 a.m.)

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1 C E R T I F I C A T E

2

3 STATE OF WASHINGTON)
4) ss.
COUNTY OF STEVENS)

5

6 THIS IS TO CERTIFY that I, Elizabeth Race,
7 Certified Court Reporter in and for the State of
8 Washington residing at Nine Mile Falls, Washington,
9 reported the within and foregoing hearing; said
10 hearing being taken before me as a Certified Court
11 Reporter on the date herein set forth; that the said
12 hearing was taken by me in shorthand and thereafter
13 under my supervision transcribed, and that same is a
14 full, true and correct record of the testimony.

15 IN WITNESS WHEREOF I have hereunto set my hand
16 this day of , 2019.

17

18 CERT/LIC NO. 1921 /s/ Elizabeth Race
19 Certified Court Reporter in and for the
State of Washington, residing at Nine Mile Falls, WA

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