

Paid Family and Medical Leave Rulemaking
Phase 5
Final Draft

Chapter 192-520 WAC
Collective Bargaining Agreements

WAC 192-520-010 Parties to collective bargaining agreements.

(1) ~~((The rights and responsibilities under Title 50A RCW do not apply to parties covered by collective bargaining agreements in effect before October 19, 2017, unless and until the agreements expire, are reopened, or are renegotiated.))~~ Parties to a collective bargaining agreement that was in existence on October 19, 2017, are not required to be subject to the rights and responsibilities under Title 50A RCW and related rules unless and until the agreement is reopened or renegotiated by the parties or expires.

(2) Employers must inform the department immediately upon the reopening, renegotiation, or expiration of a collective bargaining agreement that was in effect prior to October 19, 2017.

(3) ~~((An employer must file quarterly reports once a collective bargaining agreement expires, is reopened, or is renegotiated. (4))~~ To be eligible for benefits, an employee must have worked at least eight hundred twenty hours during the qualifying period. If the employee's qualifying period includes any quarter prior to a collective bargaining agreement being reopened or renegotiated by the parties, or expiring, the department will request the employee's qualifying period wages and hours from the employer. The employer must provide the wages and hours to the department within ten calendar days.

(4) ~~((5))~~ Employees not covered by a collective bargaining agreement are subject to the rights and responsibilities of Title 50A RCW. Employers are also subject to the rights and responsibilities of Title 50A RCW and related rules for employees not covered by a collective bargaining agreement, regardless of whether the employer is party to a collective bargaining agreement covering other employees.

(5) ~~((6))~~ Employers party to multiple collective bargaining agreements among different bargaining units are subject to the rights and responsibilities of Title 50A RCW and related rules as they pertain to the bargaining units whose collective bargaining agreement ((has expired, been reopened, or renegotiated,)) is reopened or renegotiated by the parties or

expires, on or after October 19, 2017.

(6) Parties to a collective bargaining agreement that has not been reopened or renegotiated by the parties or expired, may elect to be subject to all of the applicable rights and responsibilities under Title 50A RCW and related rules prior to the expiration, reopening or renegotiation of the agreement by submitting a memorandum of understanding, letter of agreement, or a similar document signed by all parties, to the department.

**Chapter 192-540
Employer Responsibilities**

WAC 192-540-040 How should employers report hours worked for each calendar quarter?

Each calendar quarter, employers must report to the department the wages paid and the associated number of hours worked by for each employee. Employers must include the following hours in the report.

(1) **Hourly employees.** Report the total number of hours worked by each employee.

(2) **Employees on salary.** Report forty hours for each week in which a salaried employee, as defined in WAC 192-500-100, worked.

(3) **Vacation pay, sick leave pay, paid time off.** Report the number of hours an employee is on paid leave. Do not report hours for a cash out of leave.

(4) **Overtime.** Report the number of hours actually worked for which overtime pay or compensatory time is provided, without regard to the amount of wages or compensation paid.

(5) **Commissioned or piecework employees.** Report the actual number of hours worked by employees paid by commission or by piecework. If there are no reliable time keeping records, report a full-time commissioned or piecework employee at forty hours worked for each week in which any of their duties were performed.

(6) **Wages in lieu of notice.** Report the actual number of hours for which an employee was paid.

(7) **Faculty employees.**

(a) To be considered full-time, faculty members of community and technical colleges must (~~meet the definition of~~) have a "full-time academic workload" as defined in RCW 28B.50.489.

(i) For full-time faculty members, report thirty-five hours per week.

(ii) For part-time faculty members, multiply thirty-five hours by the percentage that is equal to the percentage of hours worked in relation to a full-time faculty member consistent with RCW 28B.50.489(~~(1)~~) and RCW 28B.50.4891.

Example: A technical college deems a teaching workload of fifteen hours per week to be full-time. An instructor teaches a workload of twelve hours per week. Twelve divided by fifteen is eighty percent. Eighty percent of thirty-five is twenty-eight. Report twenty-eight hours per week.

(b) Part-time faculty members may overcome the presumption of hours established by this formula by providing the department with sufficient evidence of hours worked that exceeds the hours reported by employer.

(8) **Severance pay.** Do not report hours for severance pay.

(9) **Payment in kind.** Report the actual hours worked for performing services which are compensated only by payment in kind.

(10) **Fractions of hours.** If the employee's total number of hours for the quarter results in a fraction amount, round the total to the next higher whole number.

(11) **Practice, preparation, and rehearsal time.** If an employee who is part of a performing group is paid for a performance but is also required by the employer to attend practice, preparation, and rehearsal on an organized group basis, report the hours spent in the required practice, preparation, and rehearsal as well as the performance.

(12) (a) **On-call and standby hours.** Report the number of actual hours for which an employee receives wages for being on call or on standby with the employer. Do not report hours for which an employee is scheduled to check in before work, and if not required to work, has no further obligations.

(b) For the purpose of this section, "on-call" and "standby" hours are defined as paid hours when employees must comply with employer requirements, such as maintaining physical or mental status, remaining in a specified location, or being required to report to work within a specific time frame.

Chapter 192-610
Initial application for benefits

NEW SECTION

WAC 192-610-065 Will the department provide assistance to an employee filing a claim for paid family and medical leave benefits?

The department will provide paid family and medical leave information and assistance to any employee who requests help filing an application for benefits.

NEW SECTION

WAC 192-610-070 Will the department make employees aware of their rights and responsibilities under Paid Family and Medical Leave?

(1) The department will publish and post on its web site an informational employee guide for basic information on the laws, rules and procedures for paid family and medical leave claims. A copy of the guide will be available to the public at no charge when it is requested.

(2) Upon receipt of an application, if the department has authorization to notify the employee by email or other electronic means, the department will send an electronic link for the guide to employees who file an application for paid family or medical leave. Otherwise, the department will send the employee a written notice containing the web address for the guide.

(3) The department will maintain a brief descriptive web address to help any person locate the employee guide online.

(4) Each employee is responsible for filing weekly applications and following all instructions as required in the employee guide for the duration of the paid family or medical leave unless other specific information is provided by the department.

(5) The department will assist any person who advises the department that he or she is having difficulty understanding the employee guide.

(6) The employee will be presumed to understand the contents of the employee guide and will be held responsible for any failure to act as directed by the employee guide.

Chapter 192-640 WAC
Overpayment of Benefits

NEW 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.
 - (c) Interest accrued under RCW 50A.04.065.
- (2) "Equity and good conscience" means fairness as applied to a given set of circumstances.

NEW SECTION

WAC 192-640-010 How are overpayments assessed on employees?

- (1) If the department determines an employee has an overpayment as defined in WAC 192-640-005, the department will provide the employee with an overpayment assessment.
- (2) The overpayment assessment will include the amount and reason for the overpayment.
- (3) The employee must repay the amount overpaid unless the department waives the overpayment to the department.
- (4) Any portion of overpaid benefits that were made on behalf of the employee to another entity are considered as paid to the employee. These payments are included as part of any overpayment assessment.

NEW SECTION

WAC 192-640-015 Can the department waive an overpayment?

- (1) An employee who is determined to have an overpayment must repay the full amount of the overpayment unless a waiver is granted. The decision to waive an overpayment at all times rests with the department.
- (2) An employee may be eligible for a waiver of an overpayment when the employee is not considered at fault and it would be against equity and good conscience for the department to require the employee to repay the full amount.
- (3) When an overpayment is identified by the department, the department will send an application for waiver to any potentially eligible employee.

(4) An employee may request an application for waiver of overpayment if one was not already provided by the department if the employee's overpayment is not a result of fraud, conditional payment, or fault attributable to the individual.

(5) The waiver application asks for information concerning the employee's financial condition and other circumstances which will help the department determine if the overpayment should be waived.

(6) The financial information requested may include, but is not limited to, documentation for the previous month, current month, and following month of the employee's household:

(a) Income and, to the extent available, the income of other household members who contribute financially to the household;

(b) Expenses; and

(c) Readily available liquid assets including, but not limited to, checking and savings account balances, stocks, bonds, and cash on hand.

(7) The completed application and supporting documents must be returned to the department by the response deadline indicated in the notice, which will be no less than five working days.

Reasonable mailing time will be added when the notice is sent via postal service. If information is not provided by the deadline, the department will make a decision about the employee's eligibility for a waiver based on the available information.

(8) Any benefits waived are considered paid to the employee and will count against the employee's available claim amount. A waiver cannot exceed the total amount of benefits available on a claim. The department will not waive the overpayment in such a way to allow the employee to receive either a greater weekly benefit amount or a greater total benefit amount than the employee was originally eligible to receive.

Example:

An employee files a claim for paid family leave for a period of 12 weeks. The employee's weekly benefit is calculated to be \$1,000 per week, with a maximum claim amount of \$12,000 for family leave. After the waiting period, the employee receives the first payment of \$1,000, and the employee's family leave available claim amount is reduced from \$12,000 to \$11,000. It is then determined that, due to department error, the weekly benefit was miscalculated, and is, in fact, \$800 per week. The employee applies for and receives an overpayment waiver from the department. For the second week of payment, the employee's payment will be \$800. The employee's family leave available claim amount is recalculated based on the correct weekly

benefit, including the \$1,000 payment, resulting in a new family leave available claim amount of \$8,600 (($\800×12) - $\$1,000$). Assuming the employee remains on leave for the entirety of the claim, the employee will continue to receive the \$800 weekly benefit until the final week of the claim, when the employee will receive \$600.

(9) If a waiver is approved based on information that is later found to be false or misleading, the waiver will no longer be in place and the amount would be added to any overpayment balance.

NEW SECTION

WAC 192-640-020 How will equity and good conscience be applied in overpayment waiver decisions?

(1) It is against equity and good conscience to deny a waiver request when repayment of the overpayment would create hardship for an employee to provide for basic needs such as food, shelter, medicine, utilities, and related expenses. Except in unusual circumstances that would be against a waiver, the department will presume repayment would leave the employee unable to provide basic needs if total household resources in relation to household size do not exceed seventy percent of the Lower Living Standard Income Level (LLSIL) and circumstances are not expected to change within the next ninety days.

(2) The department may also consider, but is not limited to, the following factors in determining whether waiver should be granted for reasons of equity and good conscience:

- (a) The employee's general health, including disability, competency, and mental or physical impairment;
- (b) The employee's education level, including literacy;
- (c) The employee's ability to repay the overpayment based on employment or financial resources;
- (d) The employee's marital status and number of dependents, including whether other household members are employed;
- (e) Whether an error by department staff contributed to the overpayment; and
- (f) Other factors indicating that repayment of the full amount would cause the employee undue economic, physical, or mental hardship.

(3) When determining whether a waiver of benefit overpayments may be granted based on equity and good conscience, the department must consider whether the employer or employer's agent failed to respond timely or adequately without good cause to a notice from the department. This subsection does not apply to negotiated settlements.

(4) The decision to grant or deny waiver will be based on the totality of circumstances rather than the presence of a single factor listed in subsections (1), (2), and (3).

NEW SECTION

WAC 192-640-025 What does the department consider "at fault" for an overpayment?

(1) The department will decide if the employee is at fault for an overpayment based on information provided by interested parties and from the department's records. The employee will always be considered at fault when the overpayment is the result of fraud or nondisclosure.

(2) The employee may be considered at fault, even though all relevant information was provided before a decision was issued, when the employee should reasonably have known the payment was improper. The department may determine the employee is at fault for an overpayment when, for example:

(a) The employer paid the employee sick leave, vacation leave or other paid-time off after the employee claimed paid family or medical leave for the same week.

(b) A lower level decision reversed by the office of administrative hearings, the commissioner, or a court causes an overpayment because of new information that the employee did not disclose to the department.

(3) In deciding if the employee is at fault, the department may also consider factors which may affect the employee's ability to report all relevant information to the department.

NEW SECTION

WAC 192-640-030 Will the employee be notified of rights to appeal the overpayment?

(1) The department will send the employee and all interested parties information about the overpayment assessment and the right to appeal. The employee will have the right to appeal any of the following elements of the assessment:

(a) The reason for the overpayment;

(b) The amount of the overpayment;

(c) The finding of fault; and

(d) If the employee requests a waiver, the reason waiver of the overpayment was partially or fully denied.

Chapter 192-650 WAC
Collections and Recovery of Overpayments

NEW SECTION

WAC 192-650-005 How will the department collect overpayments owed by an employee?

When an employee is assessed an overpayment, the department will calculate a minimum monthly payment as follows:

- (1) For overpayments due to fraud as defined by WAC 192-500-120, conditional payments, or fault attributable to the employee, the minimum monthly payment for an employee will be the greater of
 - (a) the employee's weekly benefit amount; or
 - (b) three percent of the outstanding balance when the billing statement is sent, rounded down to the next whole dollar amount.
- (2) For all other overpayments, the minimum monthly payment will be the greater of:
 - (a) One-third of the weekly benefit amount;
 - (b) Three percent of the outstanding balance when the billing statement is sent, rounded down to the next whole dollar amount;or
 - (c) Twenty-five dollars.

NEW SECTION

WAC 192-650-010 Can overpayments be offset against future benefit payments?

- (1) An overpayment may be offset on a valid benefit year at the department's discretion when:
 - (a) An employee asks to repay an overpayment;
 - (b) An employee does not repay an overpayment in full; or
 - (c) An employee misses a portion of two or more arranged payments.
- (2) If the new available claim amount for the current claim year is greater than the balance of the overpayment, the employee can choose the amount of benefits to be offset from each payment as agreed to by the department. However, if the new available claim amount for the current claim year is equal to or less than the balance of an overpayment on that benefit year, offset will be done at the rate of one hundred percent.
- (3) An employee may ask to repay overpayments owing on prior benefit years by offset.
- (4) In such circumstances under (1)(b) and (c) of this section, the overpayment will be offset as follows:

(a) If the overpayment was caused by a denial for fraud the amount deducted will be one hundred percent of benefits payable for each week(s) the employee claims. These overpayments will be collected first.

(b) For all other overpayments, the amount deducted will be fifty percent of benefits payable for each week claimed by the employee, or such other percentage requested, up to one hundred percent of benefits payable. The percent deducted is based on the total weekly benefit amount, before deductions for such items as pensions, child support, income taxes.

(c) Interest, penalties, surcharges, court costs, and charges for dishonored payments will not be deducted from benefit payments; they must be repaid.

(5) During any valid benefit year, the total amount of benefits paid to the employee plus offset credits granted will not exceed the maximum benefits payable on the claim.

(6) If offset of an overpayment is granted against weeks that are later found to have been paid in error or as a result of fraud, the offset for the week(s) will be canceled and the amount will be restored to the employee's overpayment balance.

NEW SECTION

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

(1) RCW 50A.04.185 permits the department to accept a negotiated settlement to repay a debt of overpayment. 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.

NEW SECTION

WAC 192-650-020 How does an employee make a negotiated settlement offer to repay overpayments?

(1) An employee may contact the department online or in another manner approved by the department to make an offer to settle a debt for less than the full amount the employee owes. The employee must:

(a) Specify the amount the employee is offering to repay; and
(b) Be prepared to provide financial and other information in support of the offer.

(2) The department may request a credit report to verify the information the employee provides.

(3) The department will notify the employee of its decision to accept or decline the offer.

(4) Settlement offers may also be made by authorized department staff.

NEW SECTION

WAC 192-650-025 How are payments and offsets applied when an employee has more than one overpayment?

(1) If the department has assessed more than one overpayment against an employee, the department will apply payments and offsets beginning with the oldest debt. The department will apply payments and offsets to the outstanding balance in the following order:

(a) Court costs including, but not limited to, filing fees and surcharges paid to the court for their official services, and surcharges and fees collected by the court for distribution to other programs or funds. It does not, however, apply to surcharges paid to the court under RCW 40.14.027 which are applied under (f) of this subsection.

(b) Interest.

(c) Penalties based on fraud.

- (d) Charges for payments dishonored by nonacceptance or nonpayment.
- (e) Overpaid benefits.
- (f) Surcharge assessed under RCW 40.14.027.
- (2) The department will charge twenty-five dollars for each dishonored payment the employee submits. This is considered a commercial charge under the Uniform Commercial Code (RCW 62A.3-515).

**Chapter 192-700 WAC
Employment Restoration**

NEW SECTION

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

(1) Subject to RCW 50A.04.025(3), an employee who meets the criteria listed in RCW 50A.04.025(6) (a) who takes leave under Title 50A RCW is entitled, on return from the leave:

(a) To be restored by the employer to the position of employment held by the employee when the leave commenced; or

(b) To be restored by the employer to 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" refers to all benefits provided or made available to employees by an employer including, but not limited to:

(A) Insurance;

(B) Paid time off;

(C) Educational benefits; and

(D) Retirement benefits.

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

NEW 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(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 reinstatement is requested.

(2) An employer that chooses to deny restoration under (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 an employer determines that restoration will be denied. The employer must serve this notice to the employee either in person or by certified mail. The notice must include:

(i) A statement that the employer intends to deny restoration to employment on completion of the leave;

(ii) The reasoning behind the decision to deny restoration;

(iii) An explanation that benefits will still be paid for the duration of the leave; and

(iv) The date in which eligibility for health benefits ends.

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

NEW SECTION

WAC 192-700-015 How is employer size determined for employment protection?

(1) Employment protection applies to employees who work for an employer with fifty or more employees in employment.

(2) For purpose of employment protection, employers are considered to have fifty or more employees when:

(a) The employer has fifty or more employees working each day that is considered a work day for twenty or more calendar workweeks; and

(b) The twenty calendar workweeks occur in the current calendar year or occurred in the preceding calendar year.

**Chapter 192-800 WAC
Practice and Procedure**

NEW SECTION

WAC 192-800-020 How will the department differentiate between employers?

(1) Generally, the department will determine each entity in possession of its own Unified Business Identifier number as assigned by the state's Business Licensing Service to be an individual employer.

(2) If the department inspects and audits employer files and finds that an employer willfully made a false statement, misrepresents their business or acts in such a way to avoid paying the full amount of premiums when due under RCW 50A.04.080(3)(b), the employer may be subject to penalties under RCW 50A.04.090.

(3) If the department makes such a determination, notice will be provided to the employer that will include the department's findings and the full amount of remaining premiums, if any, due by the entity responsible.