

# PAID FAMILY MEDICAL AND COVID EXPANDED LEAVES



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**The Road Ahead - WSIA Live Webcast**



WASHINGTON RETAIL  
ASSOCIATION

# Workshop Goals and Agenda

## □ Goals

- Improve your workers' comp claims management
- Strengthen your support for employers

## □ Agenda

- Nuts and bolts of PFML and COVID expanded leaves
  - Expanded leaves Q&A:  
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- Intersections with WC, UI, ADA
- Insights into PFML's benefit processing
- Q&A with Edsonya Charles, the PFML Ombud



# Covered Employer

## Paid Family Medical Leave

- ❑ All employers are covered
  - Employers < 50 employees may opt out contributing premiums, but can't access small business grant
  - Voluntary plan approved by the ESD
- ❑ Employee count: ESD averages 4 Qtrs employee count after 9/30 each year

## Expanded PSL & FML

- ❑ Employers with less than 500 employees Q&A 4, 58, 59
- ❑ Exemption for business viability reason if employer has < 50 employees
- ❑ Public employers
  - Covered if a non-federal public agency
  - Fed – mostly not covered
  - Q&A #53



# Employer requirements

## Paid Family Medical Leave

- ❑ Deduct and remit premiums
  - Can't cure failure to deduct accurately WAC 192-510-065
- ❑ Poster notice (50A.20.020)
- ❑ Notify rights by 5<sup>th</sup> business day after 7 days of consecutive absence (50A.20.010)
- ❑ Confidentiality of record & recordkeeping for 6 years (50A.20.030)

## Expanded PSL & FML

- ❑ Poster in every building, email/direct mail, website
  - <https://www.dol.gov/agencies/whd/pandemic>
- ❑ Not required to provide other languages available  
Notify new/current employees
- ❑ Cannot require employee to find a replacement



# Benefit Funding Source

## Paid Family Medical Leave

- ❑ Insurance premiums (0.4% gross wages) (50A.10.030)
  - Employee pays 1/3 Family premiums, 2/3 Medical premiums
  - Employer pays 55%
- ❑ Employer < 50 employees contribution is optional
- ❑ Annual rate adjust starts in 2021
  - RCW 50A.10.030(6)

## Expanded PSL & FML

- ❑ Employer pays wages
- ❑ Claim credit via payroll taxes offset and IRS refund
  - Wages, health benefits
  - No payroll tax liability on leave wages
  - Apply credit against employer federal taxes
  - <https://www.irs.gov/coronavirus/new-employer-tax-credits>
- ❑ Not available with PPP loan



# PFML reportable wages

- All wages paid including
  - Cash value of goods, services, prizes
  - Commission, piecework, bonuses, stipends
  - Compensation unrelated to expense reimbursement
    - RCW 50A.05.010(25)(a)
    - WAC 192-510-025(1)
- Max limit on wages = Social Security wage base
  - \$137,000 in 2020
  - Premium calculator (still using 2019 maximum)
    - <https://resources.paidleave.wa.gov/premium-calculator>



# Benefit effective date and # of events per year

## Paid Family Medical Leave

- ❑ Benefit starts 1/1/2020
- ❑ More than 1 event per year is allowed
- ❑ Use within 12 months and can't carry over

## Expanded PSL & FML

- ❑ Effective
  - April 1 to Dec 31 2020
- ❑ More than 1 event per year is allowed



# Employee definition and exemptions

## Paid Family Medical Leave

- ❑ All employees (corp officers & domestic workers)
- ❑ Exempt (opt-in available)
  - self-employed
  - Member of an LLC, joint venture, partnership
  - Independent contractor
  - Tribal
  - Out-of-state worker, waiver application (50A.10.040)

## Expanded PSL & FML

- ❑ FT/PT in the US, US Territories Q&A #48, 49
- ❑ Includes temporary, on leave, jointly employed regardless of payroll record responsibility, day laborers
  - Q&A #2
- ❑ Exempt from coverage: healthcare workers and first responders Q&A 56, 57





# To qualify for benefits

## Paid Family Medical Leave

- ❑ Worked 820 hours
  - First 4 out of 5 most recent completed quarters or the 4 most recent quarters
  - Could be with multiple employers

## Expanded PSL & FML

- ❑ EPSL does not require work history
- ❑ EFML
  - Employed 30 calendar days



# Initiating benefit

## Paid Family Medical Leave

- ❑ Employee may apply without employer's agreement
- ❑ Notify employer in writing:
  - 30 days if foreseeable
  - As soon as practicable
  - May result in denial for failure during late period
  - 192-600-005, 015, 020, 025, 030)

## Expanded PSL & FML

- ❑ Agreement between employee and employer
- ❑ Employer documentation
  - Name of employee
  - Dates of leave requested
  - Reason for leave
  - Statement from employee
  - Entity or health provider's quarantine order document
  - Q&A #15



# Authorized leaves

## Paid Family Medical Leave

- ❑ Medical: worker's own serious health condition
- ❑ Family: family's serious health condition or
  - Bonding within 12 months of a child's birth or placement
- ❑ Military family needs
- ❑ 12 months per year
  - Giving birth 16 weeks (med and family combined)
  - Pregnancy incapacity 2 more weeks

## Expanded PSL & FML

1. Quarantine order Q&A #60
2. Self-quarantine advice by a health care provider Q&A #62
3. COVID symptoms seeking a medical diagnosis
4. Caring for other(s) in #2, 3
  - Q&A #63-65
5. Experiencing substantial COVID conditions per HHS
6. Caring for child due to school/place of care closure
  - #6 is valid only for EFML



# PFML Employee benefits & waiting period

- ❑ Waiting period: 1<sup>st</sup> week after leave approval
  - No waiting for bonding leave
- ❑ Up to 90% of pay; current maximum is \$1,000/week
  - Maximum is 50% of statewide average weekly wage
  - Estimator: <https://paidleave.wa.gov/estimate-your-weekly-pay/>
  - \$77,900 annual income receives maximum benefit
- ❑ Minimum 8 hours of consecutive leave per week to receive benefit

# Expanded PSL/FML maximum benefits and waiting period

- ❑ Expanded paid sick leave – 80 hours max/2 weeks
  - No waiting period
  - For reasons under #1-3 – 100% of wages
    - ❑ Capped at \$511/day; \$5,511 total
  - For reasons under 4-6 – 2/3 of wages
    - ❑ Capped at \$200/day; \$2,000 total
- ❑ Expanded FML – 10 weeks max
  - 2 weeks waiting period (EPSL usage qualifies)
  - Valid only for reason #6
  - Capped at \$200/day; \$10,000 for 10 weeks



# Expanded PSL/FML benefit calculation

- ❑ Average work hours of last 6 months
  - FLSA calc standard; Q&A #8
- ❑ If hours fluctuate Q&A 80-85
  - 6 months' average hours
  - If work history < 6 months, use initial agreed work hours
  - If no initial agreement, avg hours/day of work history
  - May include OT as base (pay 80 hours max for the 2 weeks of PSL)
- ❑ If work hours reduced, use work schedule history
  - Q&A #5, 28



# Supplemental benefits

## Paid Family Medical Leave

- ❑ Employer may choose to offer w/out reducing PFML benefit pay
  - WAC 192-500-180
- ❑ Should draft policy language
  - Which PTOs, short-term disability to include
  - Receive more than usual earnings

## Expanded PSL & FML

- ❑ Employer may choose to pay beyond required wages Q&A #31,34
  - Excess payment portion cannot claim tax credit
- ❑ Employer mandates use of PTOs to supplement?
  - Not for EPSL Q&A #32
  - Yes for EFML if a policy exists Q&A #33



# Family member criteria

## Paid Family Medical Leave

- ❑ Child (biological, adopted, foster, step, legal guardian/ loco parentis); “in-law” Jun 2020
- ❑ Parent/parent in law
- ❑ Spouse (registered domestic partner)
- ❑ Grandchild, grandparent
- ❑ Sibling

ESD may request verification WAC 192-610-035 – requested internal policy to ensure consistency

## Expanded PSL & FML

- ❑ Same as FML
  - Q&A \$40 or
  - WHD Fact Sheet 28B
- ❑ Care for others’ with COVID condition: those with relationships or with the expectation to care Q&A #64
- ❑ Includes caring for child (18 or older) with disability incapable of self-care WHD 28K





# Intermittent leave

## Paid Family Medical Leave

- ❑ Yes - a minimum of 8 hours of consecutive leave each work week
  - 8 consecutive hours may consist of more than 1 shift
- ❑ Use within a year and can't carry over to next year
  - <http://paidleave.wa.gov/find-out-how-paid-leave-works/>
  - RCW 50A.15.020(2); WAC 192-620-035

## Expanded PSL & FML

- ❑ Teleworking if employer and employee reaches an agreement
  - Q&A #20
- ❑ COVID symptom leaves and working at usual worksite must be in full-day due to exposure Q&A #21
  - Exception: caring for child(ren) & employer agrees



# Job restoration and health benefit

## Same as FMLA in general

### Paid Family Medical Leave

- ❑ Health benefit 50A.35.030
- ❑ Job: same or equivalent position
  - 50A.35.010; 192-700-005
  - Only if => 50 employees and
    - ❑ Worked => 12 months and => 1,250 for current employer
    - ❑ RCW 50A.35.010(6)

### Expanded PSL & FML

- ❑ Same as FMLA
  - WHS Fact Sheet #28A
- ❑ If leave starts during employee's health benefit waiting period, no change to receiving benefit. Q&A #51



# Employee's right to dispute or file complaints

## Paid Family Medical Leave

- ❑ For interference, discharge or discrimination for using leave WAC 192-570-020
- ❑ Limited private right of action available
  - 2020 - HB 2614 Sec. 17

## Expanded PSL & FML

- ❑ First discuss with employer to resolve
- ❑ Wages and Hour Division of the US Dept of Labor
  - 1-866-487-9243



# Employer's right to protest PFML

- ❑ Yes. Information included in
  - Claim notification and determination letters
  - Not on website or toolkit
- ❑ 18 days from first notice
  - RCW 05A.050.020(2), 50A.10.050(1), 192-610-060
- ❑ 30 days from determination
  - WAC 192-500-040, 192-630-005, RCW 50A.50.010
- ❑ Employer may provide information to contest

Tuesday, April 7 2020

## Benefit Application Decision

██████████ and ██████████ applied for paid family or medical leave.

We have approved this application for benefits. This employee is approved for leave from 4/5/2020 through 10/7/2020. The number of hours of leave this employee can take is limited. The employee may take this leave consecutively or intermittently.

**Appeal Process:** If you disagree with this decision, you must file an appeal by 5/7/2020. The employee can also appeal the decision and you will be notified if they do.

If you would like to appeal this decision, please mail or fax a letter to us that includes:

- Your name, business name, address and phone number.
- Your employee's customer ID or the last four digits of their Social Security number
- The decision you're appealing and an explanation of your disagreement with the determination.
- Your signature, or the signature of your authorized representative. Unsigned appeals will be returned.
- Mail or fax your appeal to:

Employment Security Department  
Paid Family and Medical Leave Care Center  
P.O. Box 19020  
Olympia, WA 98507-0020  
Fax: 833-525-2273

Once we receive your complete appeal, we will send it and all information related to our decision to the Office of Administrative Hearings (OAH). OAH will schedule a hearing and send you a Notice of Hearing, including the date and time.

### Questions

If you have any questions, please contact us at 833-717-2273 or [paidleave@esd.wa.gov](mailto:paidleave@esd.wa.gov).

Thank you,



# Intersection with Workers' Comp

## Paid Family Medical Leave

- ❑ Cannot use concurrently
- ❑ Relieve guilt of some employers who may allow workers' comp for non-work related events

## Expanded PSL & FML

- ❑ Kept on Salary or Light Duty
  - Employer may consider claiming tax credit if the IW has one of the six qualifying events
  - <https://www.irs.gov/coronavirus/new-employer-tax-credits>



# Intersection with FMLA

## Paid Family Medical Leave

- ❑ Unless permitted by the employer, must take currently with FMLA
  - RCW 50A.15.110(2)
  - When employee initiates PFML, employer could document it as FMLA.
  - Employee uses FMLA first may initiate PFML thereafter
- ❑ Employer's agreement to initiate benefit not required

## Expanded PSL & FML

- ❑ Priority over FMLA for covered employer with qualifying reasons
- ❑ FMLA may start when expanded leaves are used up



# Intersection with unemployment benefit

## Paid Family Medical Leave

- ❑ May NOT use concurrently
- ❑ May use when unemployed with qualifying events and worked 820 hours in the qualifying period
  - <https://paidleave.wa.gov/more-answers/>

## Expanded PSL & FML

- ❑ Cannot receive both concurrently





# Intersection with ADA

## American Disabilities Act

- ❑ ADA applies => 15 employees
- ❑ WLAD applies => 8 employees
- ❑ Asking employee's "general health diagnosis" is a disability inquiry prohibited by the ADA
  - Let the employee disclose their "serious health condition" re PFML leave
  - "Health condition" records are confidential or an ADA violation

# COVID/Pandemic and ADA

- ❑ CDC data supports COVID meeting the **direct threat**” condition under a pandemic (public health)  
[https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
  - May send employees home (reasonable accommodation does not apply except for pre-existing disabilities)
  - May ask for symptoms; must keep medical record confidential to comply with the ADA
  - May take temperature and/or ask employee to self-quarantine after traveling to pandemic areas

# Paid Leave Ombuds

## an independent third party

- ❑ Edsonya Charles, Edsonya.Charles@esd.wa.gov
  - <https://paidleaveombuds.wa.gov>
  - 844-395-6697
- ❑ Investigates, reports on and helps settle complaints
- ❑ Identifies and eliminates service deficiencies
- ❑ Make recommendations/address concerns as quickly and efficiently as possible
- ❑ Confidentiality unless required by law
- ❑ Advocates, not lawyers/legal representatives
- ❑ Ombuds info on employee's guide, not employer's





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