

**The First Wave:  
Implementing Paid Family  
and Medical Leave**

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Lauren A. Johnston

WSPA  
Tukwila, WA  
November 22, 2019

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**Hypothetical: Rosemary's Baby**

Kindergarten teacher Rosemary Woodhouse is 38 weeks pregnant with her first child when she develops a mysterious ailment. Dr. Hill prescribes bed rest starting on October 31. She gives birth two weeks later via non-cesarean delivery, yet Dr. Hill indicates she will be temporarily disabled for four additional weeks. Six weeks after birth, Dr. Hill diagnoses the baby with a rare medical condition. Employee does not have any family, so she needs to stay home to care for the child with the help of her neighbors.

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**Hypothetical: Rosemary's Baby**

**Under PFMLA, how many total weeks of job-protected leave may Rosemary have for incapacity, recovery, and bonding with her "child"?**

A. 12 weeks to bond, plus her period of actual temporary disability (total of 18 weeks)  
B. 16 weeks total  
C. 18 weeks total, regardless of disability  
D. 18 weeks, plus her period of actual temporary disability (total of 24 weeks)

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D 12 weeks / 6 weeks / 6 weeks / 6 weeks

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### Introduction: PFMLA

- Legislature passed during 2017 session
- Modeled on FMLA/WFMLA and state leave insurance program
- Funded by premiums paid by both employers and employees – beginning 1/1/2019
- Provides portion of employee's regular pay during certain family or medical leaves – beginning 1/1/2020
- Amended and recodified as Title 50A RCW in 2019

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### Introduction: Agenda

- Background on federal and state leave laws
- Details of PFMLA
  - Types of leave (medical vs. family)
  - Collective bargaining impacts
  - Premium collection
  - Claims process
  - Benefit amount
  - Protected leave
- Quiz

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### BACKGROUND

*Federal and state leave entitlements*

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**BACKGROUND**  
Federal Family Medical Leave Act (FMLA)

- **Length:** Up to 12 weeks (may be intermittent)
- **Leave type:** Unpaid
- **Qualify after:** 1,250 hours in last 12 months
- **Concurrent (with PTO):** Yes, if employer specifies in policy
- **Job protection:** Return to same or equivalent position



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**BACKGROUND**  
Federal Family Medical Leave Act (FMLA) (Cont.)

1. Birth of a child and to bond with newborn within 12 months
2. Placement of child for adoption or foster care and to bond with child within 12 months
3. Employee's own "serious health condition"
4. Care for spouse, son, daughter, or parent with a "serious health condition"
5. Military deployment of spouse, son, daughter, or parent to foreign country
6. Care for covered servicemember with serious injury or illness



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**BACKGROUND**  
Washington Family Leave Act (WFLA)  
RCW 49.78.010-.904

- **Expires January 1, 2020**
- Up to 12 weeks protected leave in 12-month period
- Employed for at least 12 months and worked 1,250 hours in last 12 months
- May run concurrently with FMLA
  - Typically enforced under federal law
  - Three key exceptions



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**BACKGROUND**  
 Washington  
 Family Leave Act  
 (WFLA) (Cont.)  
 RCW 49.78.010-.904

**WFLA enforced separately when:**

1. **Pregnancy:** 12 weeks of WFLA in addition to pregnancy disability leave as accommodation (WLAD)
  - WLAD disability leave counts against FMLA; does not count against WFLA
  - WFLA runs after pregnancy when released by doctor to return to work (usually 6-8 weeks after birth)
2. **Domestic Partners**
3. **When exhausts all FMLA leave for qualifying exigency, may still use 12 weeks of WFLA**

  
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**BACKGROUND**  
 Family Leave  
 Insurance Program  
 Ch. 49.36 RCW

- Repealed by PFMLA
- Enacted in 2007, but benefits were to begin when Legislature appropriated funding and set implementation date
- \$250/week for up to five weeks for birth or placement of child
- Must have worked 680 hours during first four of last five calendar quarters or last four calendar quarters completed

  
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**BACKGROUND**  
 Family Leave  
 Insurance Program  
 (Cont.)  
 Ch. 49.36 RCW

- Covered most employers
- Concurrent with FMLA or WFLA
- Job protection if worked:
  - at least 12 months for employer with 25+ employees, or
  - at least 1,250 hours over previous 12 months with the employer

  
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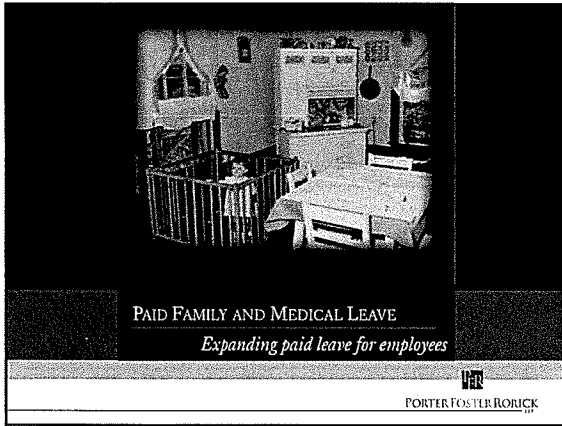
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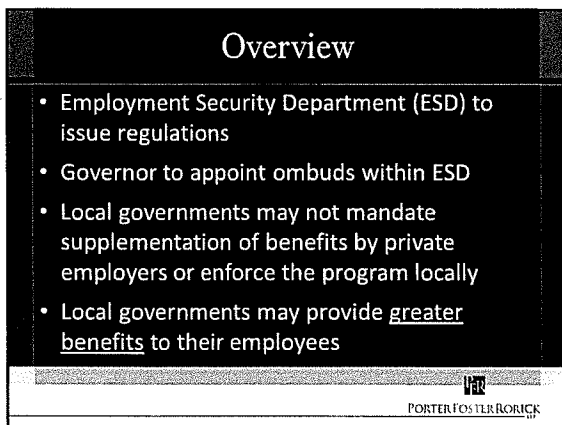
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## ESD Rulemaking

**Phase Six Rulemaking Topics:**

- Definitions
- Assessing and collecting premiums
- Voluntary plans
- Small business assistance
- Dispute resolution
- Employee notice to employer
- Initial application for benefits
- Weekly benefits
- Appeals and procedure

Updates at <https://www.paidleave.wa.gov/Rulemaking>

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## ESD Rulemaking

The timeline shows the following key events:

- April 2019: Public notice
- April 23, 2019: Comment period
- May 16, 2019: Comment period ends
- June 7, 2019: First public hearing
- July 17, 2019: Second public hearing
- July 16, 2019: Public notice
- Aug. 27, 2019: Comment period ends
- Aug. 27, 2019: Final rulemaking
- Nov. 12, 2019: Public notice
- Nov. 20, 2019: Public notice
- Nov. 20, 2019: Public notice

This timeline is an approximate timeline for phase six of the Paid Family and Medical Leave rulemaking process. Dates are subject to change.

Source: Employment Security Department <https://paidleave.wa.gov/Rulemaking>

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## Employers

- Includes any individual or type of organization
- Any unit of local government (e.g., school districts)
- Employment does not include: self-employed (including independent contractors)
- Tribes and self-employed may opt in

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3 part test to be indep  
contractor

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### Employees

- **Employment:** Personal service, of whatever nature, performed for wages or under any contract, written or oral, express or implied
- Includes out-of-state work if:
  - Service localized in WA, or
  - Not localized in any state, but some of service performed in WA

  
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### Two Purposes

- **Medical Leave:** Any leave due to own "serious health condition"
- **Family Leave:** Any leave to:
  1. Provide care (physical or psychological) for family member due to his/her "serious health condition";
  2. Bond with child during first 12 months after birth, or placement of minor child with employee; or
  3. "Qualifying exigency" per FMLA for family members

  
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### Duration of Leave

- 12x typical workweek hours (i.e., 12 weeks) during 52-week period for:
  - Family leave; or
  - Medical leave
- 16 weeks total, if both family and medical
- 18 weeks total, if serious health condition with pregnancy resulting in incapacity

  
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### Eligibility

- Worked at least 820 hours in "employment" during "qualifying period"
- **Qualifying Period:** First four of last five completed calendar quarters, or last four completed quarters immediately preceding application for leave
- File claim
- Consent to disclosure of info
- Notify employer
- Submit documentation

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did 820 hrs include PTO?

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### Eligibility (Cont.)

**Employee is not eligible for leave for:**

- Absence caused by willful intention of employee to cause injury or sickness of employee or another, or resulting from injury or sickness sustained in illegal act
- When employee suspended from employment
- Period during which recipient works for remuneration or profit

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could sub during leave, but would reduce WA-PT-M, but also doesn't extend leave

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### Eligibility (Cont.)

**Employee eligible to take paid leave during "claim year"**

- 52-week period beginning Sunday of the week of:
  - Date of birth or placement of child; or
  - Date of filing of complete and timely application for all other qualifying events
- For applications that are backdated, the claim year begins Sunday of the week to which the application was back dated

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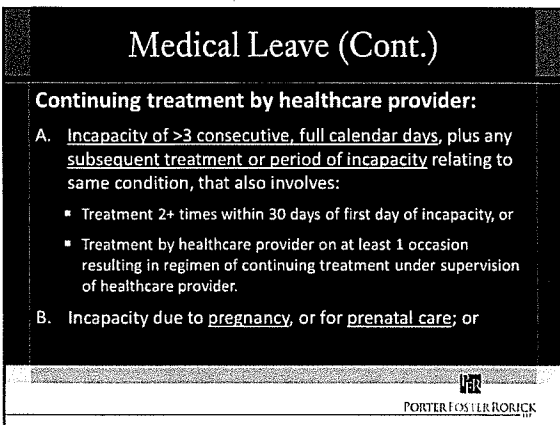
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1 day = 342.53  
 options 1020  
 265  
 1293  
 606.67

### Medical Leave (Cont.)

**C. Period of incapacity or treatment due to chronic serious health condition.**

- Requires periodic visits at least 2+ times per year for treatment by a healthcare provider, or a nurse under direct supervision;
- Continues over extended time, including recurring episodes of single condition; and
- May cause episodic vs. continuing period of incapacity (e.g., asthma, diabetes, epilepsy).



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### Medical Leave (Cont.)

**D. Period of incapacity that is permanent/long-term due to condition for which treatment may not be effective.**

- Employee or family member must be under continuing supervision of healthcare provider
- E.g., Alzheimer's, severe stroke, or terminal stages of disease



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### Medical Leave (Cont.)

**E. Period of absence to receive multiple treatments, including recovery therefrom, by healthcare provider or certain others for either:**

- Restorative surgery after accident/injury, or
- Condition likely result in period of incapacity of >3 consecutive, full calendar days in absence of intervention/treatment (e.g., cancer, severe arthritis, or kidney disease).



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### Medical Leave (Cont.)

**Serious health conditions may include:**

- Restorative dental or plastic surgery after injury or removal of cancerous growth
- Mental illness from stress or allergies
- Substance abuse (only for treatment, not using substance)
  - May still terminate even if on leave, if established policy, applied in nondiscriminatory manner, and communicated to all employees.
  - Cannot terminate for caring for family member.

  
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### Medical Leave (Cont.)

**Serious health conditions do not include:**

- Most conditions for which cosmetic treatments administered (e.g., acne, plastic surgery), unless complications or hospitalization
- Common cold, flu, ear aches, upset stomach, minor ulcers, non-migraine headaches, routine dental/orthodontia, periodontal disease

  
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### Medical Leave: Hypothetical

Employee contracted strep throat from a coworker. After work, the employee visits his doctor. The doctor proscribes an antibiotic that must be taken every day for the next seven days. As a result of the strep throat, employee misses two days of work. Is the employee eligible for paid medical leave?

A. Yes  
B. No

  
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### Family Leave Purposes

1. Provide care (physical or psychological) for family member due to his/her "serious health condition";
2. Bond with child during first 12 months after birth, or placement of <18 with employee; or
3. "Qualifying exigency" per FMLA for family members

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### Family Members

1. **Child:** Biological, adopted, foster, stepchild, in loco parentis, legal guardian, de facto (any age, does not require dependency)
2. **Grandchild:** Child of employee's child
3. **Parent:**
  - a. Biological, adoptive, de facto, foster, stepparent, or legal guardian of employee or employee's spouse; or
  - b. Someone in loco parentis to employee when he/she was child
4. **Grandparent:** Parent of employee's parent
5. **Sibling:** Not defined (forgot?)
6. **Spouse:** Husband, wife, or state-registered domestic partner

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### Family Leave: Hypothetical

Employee gave birth to a baby on February 1, 2019. She returned to work in August 2019 and has been teaching since. Is the employee eligible to take paid family leave starting January 1? If so, for how long?

- A. No, not eligible to take paid family leave
- B. Yes, eligible to take 4 weeks of paid family leave
- C. Yes, eligible to take 12 weeks of paid family leave

  
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**COLLECTIVE BARGAINING**  
*May delay implementation of PFMLA*

  
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### Collective Bargaining

- For parties to CBA effective on 10/19/2017, PFMLA does **not** require:
  - Reopening negotiations of existing CBA; or
  - Application of rights or responsibilities (e.g., premium collection, use of leave) until CBA reopened, renegotiated, or expires.
- Unions may seek:
  - Employer payment of employee's premium share
  - Employer subsidy of benefits during leave (i.e., supplemental benefits)

  
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### Collective Bargaining (Cont.)

Employer must inform ESD immediately upon reopening, renegotiation, or expiration of CBA in effect as of 10/19/2017 and:

- Begin withholding premiums; and
- Begin including covered employees in quarterly report

  
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### Collective Bargaining (Cont.)

- What is a "reopener"? ESD website states:  

[O]nly CBAs that have been renegotiated in their entirety meet the definition of reopened, renegotiated, or expired; A memorandum of understanding (MOU) covering a narrow or specific section of a CBA does not constitute a reopening or renegotiation.

For example, MOUs to accommodate the new paid sick leave law are not considered a reopening or renegotiation. This includes MOUs to expand the collectively bargained definition of family, accrual rates, and reasons for usage under the new paid sick leave law. Negotiations of future contracts do not constitute a reopening or renegotiation either.
- What happens if limited reopener results in extended expiration date?

  
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44

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**PREMIUM COLLECTION**  
*Employer and employee shares*

  
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### Premiums

- Initial rate is 0.4 percent of “wages” for the period 1/1/2019 through 12/31/2020
  - Medical leave is 2/3
  - Family leave is 1/3
- Beginning 2022, ESD may adjust percentages
- Beginning 2021, rate to be reviewed for annual adjustments using formula
- Solvency surcharge assessed if account balance reaches certain level

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### Premiums (Cont.)

Division of Premiums

Category	Percentage
Medical	67%
Family	33%

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### Premiums (Cont.)

- May deduct from employee’s wages:
  - 45 percent of premiums due for medical leave
  - 100 percent of premiums due for family leave
- Employer responsible for 55 percent of medical leave
- Employer may agree to pay all premiums
- Wages subject to premium capped at max wage base for Social Security tax (\$132,900 in 2019)
- Employer with ≤50 employees exempt from employer share

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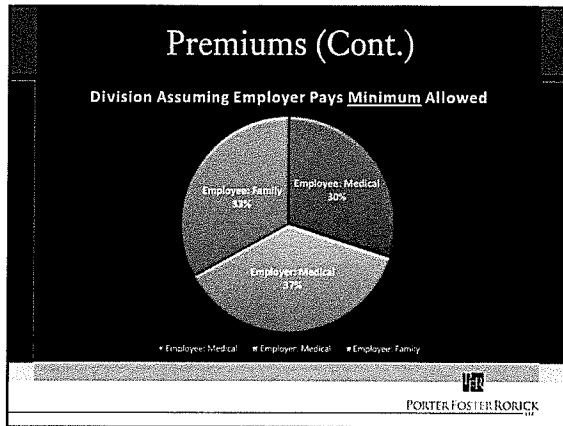
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- ### Premiums (Cont.)
- Employer must collect premiums and any surcharges through payroll deductions and remit to state quarterly
    - Due on last day of month following end of calendar quarter
    - Untimely payments subject to interest
  - May not deduct more than max allowable employee share for that period
  - If fail to deduct enough, employer deemed to have elected to pay that portion
  - Premiums placed in state trust fund
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- ### Premiums (Cont.)
- Must also file quarterly reports with ESD:**
- Employee name, SSN or TIN, and wages paid during quarter and associated hours worked
  - Total premiums deducted, if any
  - Also due on last day of month following end of calendar quarter
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### Premiums (Cont.)

<p><b>Reportable "wages" include (WAC 192-510-025):</b></p> <ul style="list-style-type: none"> <li>▪ Salary or hourly wages</li> <li>▪ Cash value of goods or serves in lieu of money</li> <li>▪ Commissions or piecework</li> <li>▪ Bonuses</li> <li>▪ Cash value of gifts or prizes</li> <li>▪ Cash value of meals and</li> </ul>	<p>lodging when given as compensation</p> <ul style="list-style-type: none"> <li>▪ Holiday pay</li> <li>▪ PTO (unless "supplemental benefit payments")</li> <li>▪ Bereavement leave</li> <li>▪ Separation pay</li> <li>▪ Certain stipends/per diems</li> </ul>
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### Examples

 "John," bus driver	 "Sarah," teacher	 "Tina," principal
Salary = \$30,000 Premium = \$120 John's share = \$75.78 District share = \$44.22	Salary = \$60,000 Premium = \$240 Sarah's share = \$151.56 District share = \$88.44	Salary = \$120,000 Premium = \$480 Tina's share = \$303.12 District share = \$176.88

  
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### Penalties

- Employer that willfully fails to make required reports subject to penalties from \$75-\$250 per incident
- Employer that willfully fails to remit full amount of premiums is liable for penalty equal to premiums and interest (plus premiums and interest)
- Interest on unpaid premiums accrues at 1 percent per month

  
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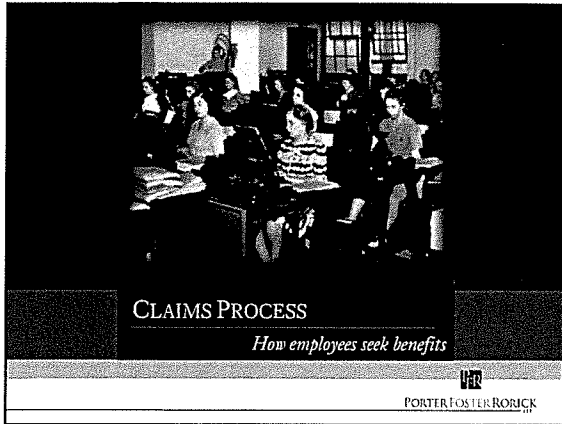
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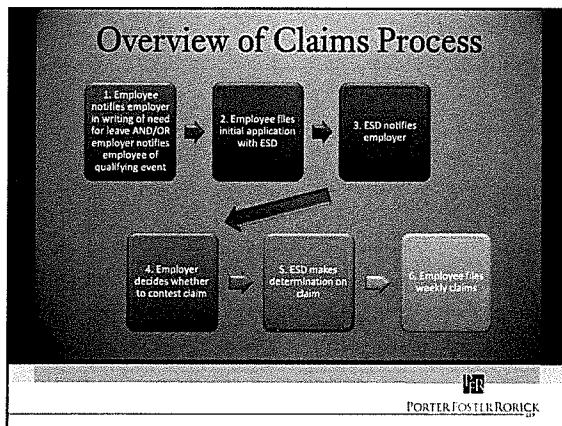
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### Step 1: Employee Notice

Employee must give employer written notice:

- For birth or placement: If foreseeable, at least 30 days' notice; if not, as soon as practicable
- For own or family member's serious health condition:
  - At least 30 days' notice (or as practicable)
  - Reasonable effort to schedule so not unduly disrupt operations, subject to healthcare provider approval

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*\* form include w/ leave request*

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### Step 1: Employee Notice (Cont.)

- Written notice must include:
  - Information to make employer aware that the employee requires PFML;
  - Anticipated timing; and
  - Anticipated duration
- Written notice may be given by another party on behalf of employee
- Failure to provide proper notice will result in benefit denial for days notice was insufficient

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### Step 1: Employer Notice

**Employer must give notice:**

- Whenever employee who is qualified is absent to provide family leave or take medical leave for >7 consecutive days
- State rights on form prescribed by ESD
- Within 5 business days after seventh consecutive day, or when employer receives notice that absence due to qualifying reason, whichever is later

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### Step 1: Employer Notice (Cont.)

**Employer must post notice:**

- In conspicuous place where customarily posts notices for employees/applicants
- Prepared or approved by ESD
- Civil penalty of not more than \$100 per offense

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### Step 2: Initial Application

**Documentation Requirements:**

- **Serious health condition (self or family member):** certification from healthcare provider
- **Bonding after birth or placement:** ESD may request birth certificate; certification from healthcare provider; court documents; other reasonable documentation
- **Military exigency:** active duty orders; approximate dates in which leave needed; other info
- **Family relationship:** info sufficient to establish familial relationship

  
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### Initial Application: Hypothetical

Employee typically works six-hour shifts as a paraeducator five days per week. Employee takes leave Monday, works Tuesday and Wednesday, and takes leave Thursday and Friday. Which hours may the employee claim for PFMLA leave on weekly report?

A. None                      B. Mon. only  
C. Thur./Fri. only        D. Mon./Thur./Fri.

  
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### Step 3: ESD Notice

- ESD will send a notice to employer upon receiving application

  
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### Step 4: Employer Response

- Employer must respond within 18 days of receipt
- Failure to timely contest = waiver
- Employee conditionally paid benefits "without delay" when contested



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### Step 5: ESD Determination

- ESD will send "interested parties" notice when question about whether employee qualifies for benefits prior to determination stating:
  - ESD's questions
  - Date for response (at least 10 days)
  - Employee has right to respond
- After ESD makes determination, all interested parties will be provided with a copy



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### Step 6: Weekly Claims

- Employee makes weekly claim online or by phone
  - Filed after week for which benefits claimed
  - Limit of four weeks of claims at one time
  - Employee must report: hours worked, whether received paid time off, whether received other benefits (e.g., unemployment insurance), any change in qualifying event
- ESD will pay employee within 14 days after first properly completed weekly application received
  - Subsequent payments sent biweekly



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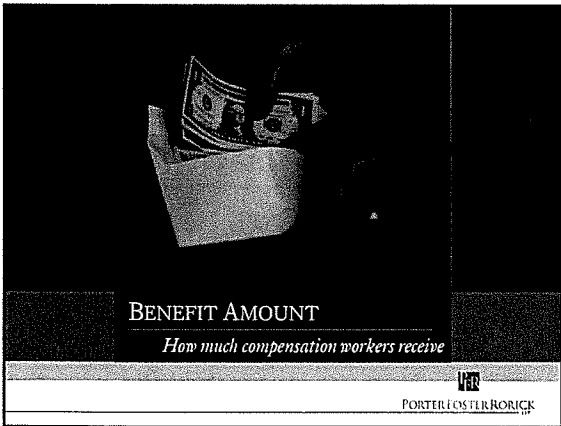
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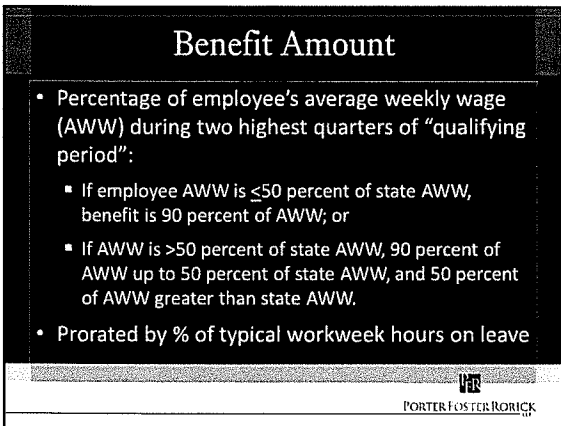
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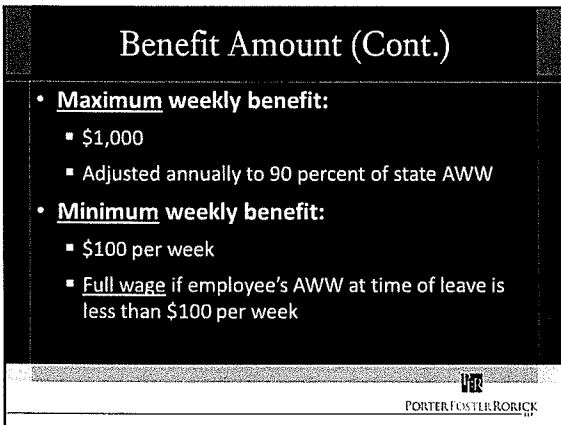
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### Benefit Amount (Cont.)

- 2018 state AWW was \$1,255
  - If earns ≤ \$628 average per week, gets 90 percent of his/her AWW
  - If earns > \$628, gets 50 percent of his/her AWW up to \$628, plus 50 percent of his/her AWW greater than \$628, up to cap
- E.g., if AWW is \$2,000, benefit is \$1,314 (\$628 plus \$686)


  
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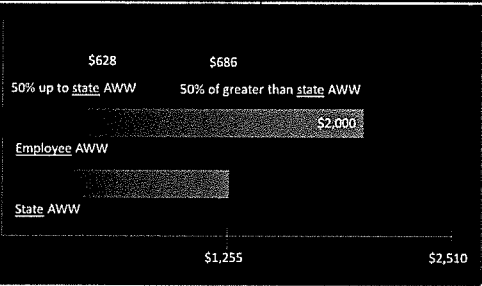
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### Benefit Amount (Cont.)



\$628                  \$686  
 50% up to state AWW    50% of greater than state AWW  
 Employee AWW                  \$2,000  
 State AWW                          \$1,255                  \$2,510


  
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### Proration of Benefits

- Proposed rule: weekly benefit amount will be prorated when employee:
  - Works hours for wages; or
  - Uses PTO (sick leave, etc.) that is not a supplementary benefit
- Example: Employee typically works five eight-hour shifts. Take medical leave on Monday, works the other four days. Receives 1/5 weekly benefit.
- Example: Same employee files claim for eight hours of PFMLA leave but also takes sick leave, which employer does not designate as supplemental. Sick leave is considered hours work and employee is ineligible for PFMLA benefits.


  
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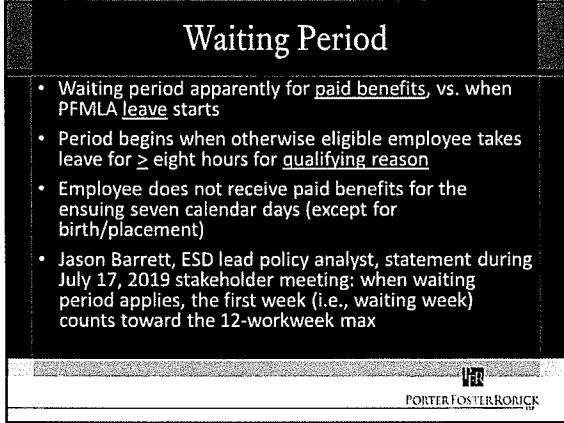
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### Interplay with Paid Leave

**Common types of school district paid leave:**

- Up to 12 days of sick leave for "illness, injury, and emergencies." RCW 28A.400.300.
  - May accumulate up to 180 days for cash out and number of contracted days (limit one year) for use as sick leave
- Sick leave under RCW 49.46.210 (I-1433)
- Personal leave per CBA, contract, or policy (often deducted from sick leave)
- Vacation per CBA, contract, or policy

  
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### Interplay with Paid Leave (Cont.)

**Use of paid leave concurrently with unpaid FMLA leave:**

- FMLA regulations: Employer may have policy requiring sick leave to be "substituted for" (i.e., used concurrently with) unpaid FMLA leave
- Ninth Circuit interpretation: Employee may sometimes use paid leave prior to unpaid FMLA. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014).
- DOL opinion (March 14, 2019): Employer may not delay designation of FMLA leave or designate more than 12 weeks of leave (26 weeks of military caregiver leave) as FMLA leave

  
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### Interplay with Paid Leave (Cont.)

- Employer may not require employee to take accrued paid leave before, in place of, or concurrently with PFMLA benefits. WAC 192-610-075.
- Employer may offer "supplemental benefit payments" to an employee on PFMLA leave in addition to PFMLA benefits. RCW 50A.04.045(2).
- Includes, but not limited to, vacation, sick, or other PTO
- Employee chooses whether to receive supplemental benefit payments

  
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can't require exhaust  
sick leave before PFMLA

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### Interplay with Paid Leave (Cont.)

What if employee seeks to use paid leave (e.g., sick leave) prior to applying for PFMLA benefits?

- RCW 50A.04.250(2): "Unless otherwise expressly permitted by the employer, leave taken under this title must be taken concurrently with any leave taken under" the FMLA (emphasis added)
- PFMLA prohibits school district from requiring use of paid leave prior to PFMLA leave
- But if employee elects to use paid leave before applying for PFMLA benefits for FMLA-qualifying reason, FMLA leave automatically begins...

  
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### Interplay with Paid Leave (Cont.)

**Ambiguity:** May school district deny PFMLA leave if employee has already elected to use paid sick leave first, and thus received 12 workweeks of FMLA-protected leave?

  
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*talk to legal?*

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### Supplemental Benefits

- Employer may designate benefits as "supplemental" for PFMLA purposes
- Two Key Ramifications:
  1. Employer and employee do not pay PFMLA premium on supplemental benefits
  2. Supplemental benefits received during PFMLA leave are in addition to, not in lieu of, PFMLA benefits

  
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### Supplemental Benefits (Cont.)

#### Existing Regulations:

- Wages reportable to ESD for calculating premiums include PTO (vacation, sick leave, cash outs) unless considered supplemental benefit payments. WAC 192-510-025.
- ESD will require employee to report PTO received during any week for which he/she is claiming PFMLA benefits (except for supplemental benefits). WAC 192-620-020.



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### Supplemental Benefits (Cont.)

- What about short-term disability insurance payments?
- Jason Barrett, ESD lead policy analyst, statement during July 17, 2019 stakeholder meeting:  
 ESD has always maintained that short-term disability payments have no impact on an employee's eligibility for PFML, and that is the only aspect that ESD are managing.  
 We are not managing the potential impact of a PFML payment on an STD payment. Those types of payments are governed by the Office of the Insurance Commissioner...



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### Supplemental Benefits: Hypothetical 1

Employee will be out for three weeks caring for his ailing mother who has a serious health condition. Employee chooses to use his paid sick leave for the three weeks. The district has elected to not designate paid sick leave as a supplemental benefit. Will employee be eligible to receive PFMLA benefits during the three weeks?

- A. Yes    B. No



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NO

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**Supplemental Benefits: Hypothetical 2**

Employee will be out for three weeks caring for his ailing mother who has a serious health condition. Employee chooses to use his paid sick leave for the three weeks. The district has elected to designate paid sick leave as a supplemental benefit. For how many weeks will the employee receive PFMLA paid benefits (vs. leave)?

A. Three weeks    B. Two weeks  
C. One week        D. No weeks



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*B 7 day waiting takes  
me of the wk*

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**Shared Leave**

- School district employees may receive shared leave under 28A.400.380 and Chapter 392-136A WAC if District determines seven factors are met.
- First, employee must have qualifying condition:
 

<ul style="list-style-type: none"> <li>a. Employee or relative or household member suffers from illness, injury, impairment, or physical or mental condition which is of an "extraordinary or severe nature"</li> <li>b. Has been called to uniformed service</li> <li>c. Volunteers for emergency response</li> <li>d. Victim of domestic violence, sexual assault, or stalking</li> </ul>	<ul style="list-style-type: none"> <li>e. Attends medical appointments or treatments for military service-connected injury or disability</li> <li>f. Attends service-connected medical appointments or treatments for spouse who requires assistance</li> <li>g. "Needs the time for parental leave"</li> <li>h. "Is sick or temporarily disabled because of pregnancy disability"</li> </ul>
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**Shared Leave (Cont.)**

- Second, qualifying condition must have caused, or is likely to cause, leave without pay status or termination
- Third, employee's absence and use of shared leave are justified
- Fourth, employee has exhausted or will shortly exhaust leave (personal holiday, sick leave, annual leave, etc., depending on reason for shared leave)
  - Not required to exhaust sick leave or annual leave for parental leave or temp disability due to pregnancy
  - Can maintain up to 40 hours of annual and sick leave



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### Shared Leave (Cont.)

- Fifth, employee has abided by district policies regarding sick leave or military leave, as applicable
- Sixth, if illness or injury is work-related, employee pursued but ineligible for worker's compensation benefits
- Seventh, employee's job is one in which annual leave, sick leave, military leave, or personal holiday can be accrued

  
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### Shared Leave (Cont.)

- Employees may volunteer to donate leave
- District determines the amount of shared leave, if any, which a leave recipient may receive (max of 522 days in total district employment)
- Neither PFMLA nor OSPI regulations explicitly address interplay between shared leave and PFMLA leave
  - If employee uses all PTO but still qualifies for PFMLA leave, has the employee met second requirement (leave "without pay" status)?
  - Could still have 40 hours of accrued sick leave and meet other requirements for shared leave for birth or pregnancy disability?

  
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### Shared Leave: Hypothetical 1

Employee broke her leg skiing at Snoqualmie Pass over holiday break 2019 and is unable to work for four weeks in January 2020 due to recovering from surgery. Prior to breaking her leg, employee exhausted all of her paid leave in fall 2019 and therefore makes a request for shared leave. At the same time, employee applies for PFMLA leave. Is employee entitled to receive shared sick leave?


A. Yes    B. No

C. Consult with district legal counsel

  
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### Shared Leave: Hypothetical 2

Assuming the employee who broke her leg skiing receives shared sick leave, is she entitled to take both PFMLA leave and shared sick leave simultaneously?

- A. Yes
- B. No
- C. Depends on whether district designates sick leave as a supplemental benefit

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### Interplay with Unpaid Leave

**Washington Law Against Discrimination (WLAD):**

- Protects woman with pregnancy-related disability (pre- or post-childbirth)
- May require unpaid leave as reasonable accommodation
- No set amount, but usually 6-8 weeks for birth without complications (see HRC guidance)
- Under PFMLA, leave is in addition to leave for sickness/temp disability due to pregnancy or childbirth (i.e., WLAD leave)

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### Interplay with Unpaid Leave (Cont.)

**Caution - PFMLA may not always overlap with FMLA:**

- **Spouses:** FMLA limits spouses employed by same school district to a combined 12 weeks for birth or bonding (unless FMLA leave used for other purposes, such as pregnant employee's own serious health condition). 29 C.F.R. § 825.120. PFMLA does not so limit.
- **Family care:** FMLA limits care to employee's spouse, son, daughter, or parent with serious health condition. See 29 C.F.R. § 825.112. If PFMLA used to care for a grandparent, etc., employee may still use FMLA for qualifying reason.
- **Teachers:** PFMLA contains no special rules for school employees regarding intermittent leave, reduced-schedule leave, and leave near end of academic term. Cf. 29 C.F.R. § 825.600-.604.

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*FMLA has restrictions specific to teachers*

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### Interplay with Unpaid Leave (Cont.)

- Additional unpaid leave may be required as a “reasonable accommodation” for an employee’s medical condition under the federal ADA and state WLAD
- Will likely arise after an employee has exhausted both PFMLA benefits and accrued paid leave
- May be denied if “undue hardship”

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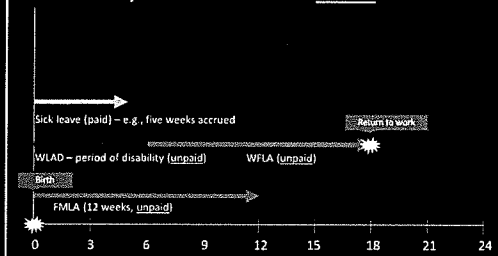
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### Examples

#### Example: Childbirth leave before PFMLA



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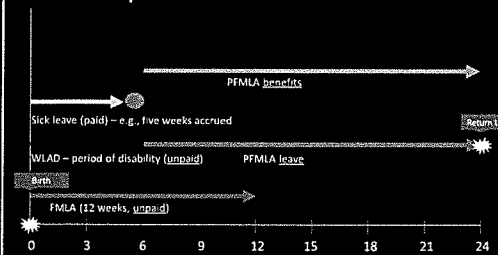
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### Examples (Cont.)

#### Example: Childbirth leave under PFMLA



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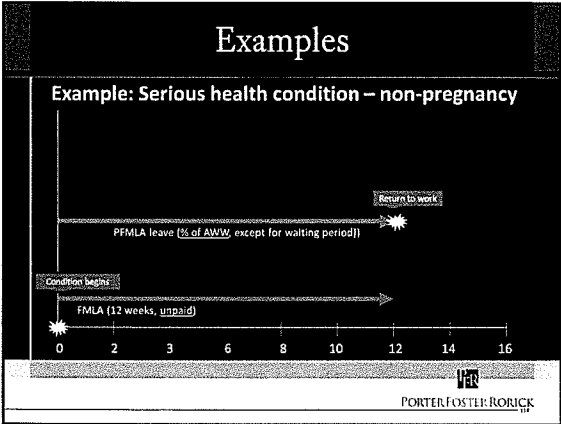
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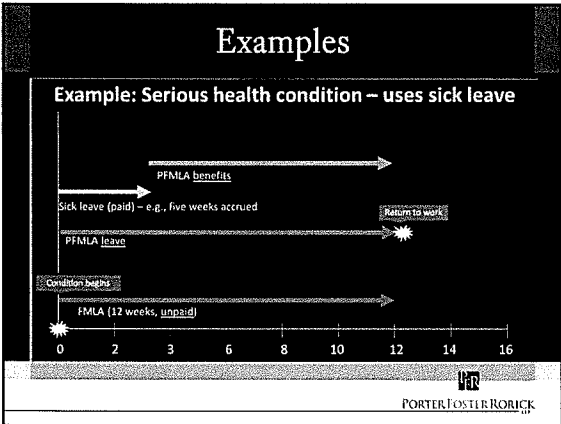
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- ### Return to Employment
- Must be restored to:
    - Same position, or
    - Equivalent position with equivalent employment benefits, pay, and other terms and conditions
  - Similar to FMLA job protections
  - Taking leave may not result in loss of employment benefits accrued
  - Not entitled to accrue seniority or benefits during leave (unless agreed)
- PORTER FOSTER RORICK

102

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### Return to Employment (Cont.)

- Job protections only apply if:
  1. Employer has 50+ employees;
  2. Worked for employer for 12+ months; and
  3. Worked at least 1,250 hours for employer during 12 months immediately preceding date of leave
- May deny restoration to salaried employees in top 10% if meet certain conditions

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### Return to Employment (Cont.)

- May have uniform policy requiring medical certification (like FMLA)
- May require employee on leave to periodically report status and intent to return

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### Continuing Health Benefits

- **FMLA Regulations (29 C.F.R. § 825.209):**
  - Must maintain coverage under any "group health plan"
  - Obligation ceases if and when employment relationship would have terminated absent FMLA leave
  - May sometimes recover premiums paid during FMLA leave if employee fails to return to work. See § 825.213.

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**Continuing Health Benefits (Cont.)**

- **PFMLA (RCW 50A.35.020):**
  - If required by federal FMLA, employer must maintain existing health benefits during PFMLA leave as if employee continued to work
  - Employee remains responsible for share of premium, if applicable
  - Does not apply if worker is not employed by any employer when applying for PFML benefits

  
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**Continuing Health Benefits (Cont.)**

- **SEBB Regulations (WAC 182-31-110):**
  - School employee on approved FMLA or PFMLA leave may continue to receive employer contribution toward SEBB insurance
  - May also continue supplemental life, AD&D, and long-term disability insurance
  - School district responsible for determining whether employee qualifies for FMLA and duration of leave; ESD responsible when employee takes PFML
  - Employee may pay to continue SEBB benefits after period of FMLA or PFMLA leave

  
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**UI and Worker's Comp**

- PFMLA leave in addition to leave during which receives workers' comp benefits
- May request relief of UI benefit charges from paying benefits to temp replacement employee who worked for 20 weeks or less and was laid off
- Employee disqualified from receiving PFMLA benefits for any week that he/she is eligible to receive UI benefits or worker's comp

  
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### Unlawful Acts

**Employer prohibited from:**

- Interference with, restraint of, or denial of exercise of any right provided (including attempted conduct)
- Discharge of or discrimination against employee for:
  - Opposing any practice made unlawful
  - Filing complaint
  - Giving information
  - Testifying

  
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### Unlawful Acts (Cont.)

- ESD investigates complaints, makes determination
- Employer liable for damages equal to:
  - Amount of wages, salary, employment benefits, or other compensation denied, or
  - Actual monetary losses sustained by employee as direct result (e.g., cost of providing care), up to sum equal to wages or salary for up to 16 weeks (18 weeks for pregnancy)
- Also charged for interest on damages at prevailing rate
- **Willful violations:** liquidated damages in sum of the above

  
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### Records

- **Creates PRA exemption:**  
"Information contained in the files and records pertaining to an employee under this chapter are confidential and not open to public inspection, other than to public employees in the performance of their official duties"
- Employee may review his/her records
- Employer may access:
  - Its own records relating to claim or determination for PFMLA benefits by employee
  - Records relating to ESD's decision to allow or deny benefits if based on material info from employer
  - Records related to employer's premium assessment

  
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### Records (Cont.)

- Employer must keep record of employment for six years with info needed by ESD
- Record must be open to inspection by ESD at all times
- ESD may inspect and audit employer files
- Improper disclosure of confidential records may result in fine of up to \$20,000

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### Misc. Issues

- Application to substitute employees (e.g., sub teachers)
- Employer must report back pay awards (i.e., settlement agreements) for "loss of wages" to state within 30 days for assessment of premiums
  - Must reduce back pay award by amount of any PFMLA benefits received during period covered
  - Must pay ESD any premiums due on entire amount of award, notwithstanding above reduction
- Intermittent leave?

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### Best Practices

- Consider revising District policy/procedure on leaves (subject to notice and opportunity to bargain any changes to "status quo")
- May look to existing FMLA policies (and CBA language)
- Establish procedure for giving employees notice when they are on leave for qualifying reasons

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# Paid Family and Medical Leave Pop Quiz Answer Sheet

- |  |                                     |                                     |                                     |
|--|-------------------------------------|-------------------------------------|-------------------------------------|
| 1. A.                                  | <input checked="" type="radio"/> B. | C.                                  | D.                                  |
| 2. A.                                  | <input checked="" type="radio"/> B. | C.                                  | D.                                  |
| 3. A.                                  | <input checked="" type="radio"/> B. | C.                                  | D.                                  |
| 4. A.                                  | <input checked="" type="radio"/> B. | C.                                  | D.                                  |
| 5. <input checked="" type="radio"/> A. | B.                                  | C.                                  | D.                                  |
| 6. A.                                  | <input checked="" type="radio"/> B. | C.                                  | D.                                  |
| 7. A.                                  | <input checked="" type="radio"/> B. | C.                                  | D.                                  |
| 8. A.                                  | B.                                  | C.                                  | <input checked="" type="radio"/> D. |
| 9. A.                                  | <input checked="" type="radio"/> B. | C.                                  | D.                                  |
| 10. A.                                 | B.                                  | <input checked="" type="radio"/> C. | <input checked="" type="radio"/> D. |
| 11. A.                                 | B.                                  | <input checked="" type="radio"/> C. | D.                                  |
| 12. A.                                 | B.                                  | <input checked="" type="radio"/> C. | <input checked="" type="radio"/> D. |

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WALD  
PFMLA  
time off







FMLA2019-1-A

March 14, 2019

Dear **Name\***:

This letter responds to your request for an opinion on whether an employer may delay designating paid leave as Family and Medical Leave Act (FMLA) leave or permit employees to expand their FMLA leave beyond the statutory 12-week entitlement. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

## BACKGROUND

You represent that some employers “voluntarily permit[ ] employees to exhaust some or all available paid sick (or other) leave prior to designating leave as FMLA-qualifying, even when the leave is clearly FMLA-qualifying.” You state that employers justify this practice by relying on 29 C.F.R. § 825.700, which provides in relevant part that “[a]n employer must observe any employment benefit or program that provides greater family and medical leave rights to employees than the rights provided by the FMLA.” You ask whether it is indeed permissible under this provision for an employer to delay the designation of FMLA-qualifying paid leave as FMLA leave or to provide additional FMLA leave beyond the 12-week FMLA entitlement.

## GENERAL LEGAL PRINCIPLES

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. 29 U.S.C. § 2612(a).<sup>1</sup> The employer may require, or the employee may elect, to “substitute” accrued paid leave (*e.g.*, paid vacation, paid sick leave, etc.) to cover any part of the unpaid FMLA entitlement period. *Id.* at § 2612(d)(2).<sup>2</sup>

The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee. 29 C.F.R. § 825.300(d)(1). WHD’s regulations require employers to provide a written “designation notice” to an employee within five business days—absent extenuating circumstances—after the employer “has enough information to determine whether the leave is being taken for a FMLA-qualifying reason.” *Id.*

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<sup>1</sup> Although employees are generally entitled to 12 weeks of leave, the FMLA provides that an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious illness or injury may take up to 26 weeks of leave during a single 12-month period to care for the servicemember. *See* 29 U.S.C. § 2612(a)(3). WHD refers to this type of leave as “military caregiver leave.”

<sup>2</sup> Under the FMLA, “[t]he term substitute means that the paid leave provided by the employer ... will run *concurrently* with the unpaid FMLA leave.” 29 C.F.R. § 825.207(a) (emphasis added).

Failure to follow this notice requirement may constitute an interference with, restraint on, or denial of the exercise of an employee's FMLA rights. 29 C.F.R. §§ 825.300(e), 825.301(e).

Nothing in the FMLA prevents employers from adopting leave policies more generous than those required by the FMLA. 29 U.S.C. § 2653; *see* 29 C.F.R. § 825.700. However, an employer may not designate more than 12 weeks of leave—or more than 26 weeks of military caregiver leave—as FMLA-protected. *See, e.g., Weidner v. Unity Health Plans Ins. Corp.*, 606 F. Supp. 2d 949, 956 (W.D. Wis. 2009) (citing cases for the principle that “a plaintiff cannot maintain a cause of action under the FMLA for an employer’s violation of its more-generous leave policy”); *cf. Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (“[T]he 12-week figure was the result of compromise between groups with marked but divergent interests in the contested provision... Courts and agencies must respect and give effect to these sorts of compromises.”); *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204–06 (11th Cir. 2001) (“Congress intended that the FMLA provide employees with a minimum entitlement of 12 weeks of leave, while protecting employers against employees tacking their FMLA entitlement on to any paid leave benefit offered by the employer.”).

## OPINION

An employer may not delay the designation of FMLA-qualifying leave or designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave.

First, an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. *See* 29 C.F.R. § 825.220(d) (“Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA.”); *Strickland v. Water Works and Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204 (11th Cir. 2001) (noting that the employer may not “choose whether an employee’s FMLA-qualifying absence” is protected or unprotected by the FMLA). Accordingly, when an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee’s FMLA leave entitlement. *See* 29 C.F.R. § 825.701(a) (“If leave qualifies for FMLA leave ... the leave used counts against the employee’s entitlement ...”); WHD Opinion Letter FMLA2003-5, 2003 WL 25739623, at \*2 (Dec. 17, 2003) (“Failure to designate a portion of FMLA-qualifying leave as FMLA would not preempt ... FMLA protections ...”).<sup>3</sup> Once the employer has enough information to make this determination, the employer must, absent extenuating circumstances, provide notice of the designation within five business days. 29 C.F.R. § 825.300(d)(1). Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation.

An employer is also prohibited from designating more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave. *See, e.g., Weidner*, 606 F. Supp. 2d at 956; *cf. Ragsdale*, 535 U.S. at 93–94; *Strickland*, 239 F.3d at 1204–06. Of course, “[a]n employer must

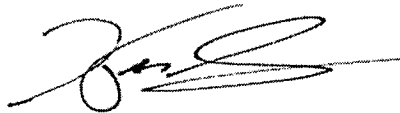
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<sup>3</sup> WHD therefore disagrees with the Ninth Circuit’s holding that an employee may use non-FMLA leave for an FMLA-qualifying reason and decline to use FMLA leave in order to preserve FMLA leave for future use. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014).

observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA.” 29 C.F.R. § 825.700. But providing such additional leave outside of the FMLA cannot expand the employee’s 12-week (or 26-week) entitlement under the FMLA. *See, e.g. Weidner*, 606 F. Supp 2d at 956. Therefore, if an employee substitutes paid leave for unpaid FMLA leave, the employee’s paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement.

We trust that this letter is responsive to your inquiry.<sup>4</sup>

Sincerely,



Keith E. Sonderling  
Acting Administrator

**\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

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<sup>4</sup> WHD rescinds any prior statements in previous opinion letters that are inconsistent with this opinion. *See* WHD Opinion Letter FMLA-67, 1995 WL 1036738, at \*3 (July 21, 1995); WHD Opinion Letter FMLA-49, 1994 WL 1016757, at \*2 (Oct. 27, 1994).

