

Washington Paid Family & Medical Leave Act: What Employers Need to Know to Be in Compliance

Legal Alert
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Washington employers are likely aware of Washington Paid Family & Medical Leave Act ("PFMLA") and the recently passed amendments, but they may have some lingering questions. This post seeks to answer those questions to ensure employers are in compliance and remain in compliance when benefits begin January 1, 2020.

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KEY PROVISIONS OF THE PFMLA

The PFMLA was signed into law on July 5, 2018 (now codified as Chapter 50A.04 RCW), which made Washington the fifth state in the nation to enact such legislation. Below is a summary of the relevant provisions of the law.

1. Premium Collection

Although employees will not be eligible to receive benefits until January 1, 2020, premium collection began on January 1, 2019. The purpose was to pre-fund the insurance program for one year prior to benefit eligibility beginning. Virtually all Washington employers must collect and remit premiums to the Employment Security Department ("ESD"), and all employers with more than 50 employees must pay the employer portion of the premiums.

The total premium for 2019 through 2020 is 0.4% of gross wages, which will be adjusted annually starting with 2021 premiums. Employers with 50 or more employees are allowed to withhold up to 63.33% of the total premium from employee wages, but are required to pay at least 36.67% of the total premium. Premiums are remitted to ESD on a quarterly basis beginning in July 2019.

2. Benefits Provided to Employees

The PFMLA allows employees to take up to 12 weeks (or as much as 18 weeks if certain circumstances apply) of leave for their own medical condition, caring for immediate family members, birth or placement of a child, or certain military-related events. Employees must be reinstated when they return from leave if the employer has more than 50 employees; if they have worked for the employer for more than 12 months; and if they have worked at least 1250 hours for the employer in the last 12 months.

Employees are also entitled to partial wage replacement. Low wage workers are entitled to at least \$100/week, and there is a cap of \$1,000/week for higher-wage workers.

3. Eligibility for Benefits

Employees will become eligible for benefits on January 1, 2020, assuming any Collective Bargaining Agreement ("CBA") covering them is expired. Employees are eligible for this benefit if they have worked 820 hours for *any* Washington employer in the preceding year. The monetary amount they are eligible for varies dependent on their earned wages, the state median income, and other factors.

Employers should be aware that employees will apply for benefits directly to ESD, which will determine whether or not employees are eligible. This is dissimilar to Washington Paid Sick Leave, which is a benefit employees request directly from the employer and is provided directly by the employer.

4. Voluntary Plans

Employers can opt out of the state insurance pool by creating a voluntary plan. Employers wishing to start voluntary plans must fill out an application and receive approval from ESD. Employers may choose to create voluntary plans for paid family leave only, paid medical leave only, or both paid family and medical leave. If an employer chooses to create a voluntary plan for one part and not the other, the employer must participate in the state plan for the part not chosen. Employers may use a third party administrator to run their voluntary plan, but the employer remains liable to satisfy the requirements of the plan.

One advantage of creating a voluntary plan is the ability to offer employees accelerated payments. This is an incentive for employees to return to work sooner. Such offers must allow the employee half of the time off they are entitled to and all of the monetary benefits they are entitled to. For example, if an employee is entitled to 12 weeks off work and \$1,000/week, the employer could offer to allow them six weeks off work but pay them \$12,000 in benefits.

5. Small Business Assistance Grants

Small employers are eligible for grants of \$3,000 to hire a temporary employee to fill in for an employee who takes leave under the PFMLA for seven days or longer. They are also eligible to receive up to \$3,000 to cover overtime or other increased wage expenses for employees on PFMLA leave. The PFMLA defines "small employers" as those with 150 employees or fewer.

6. Recent Amendment to the PFMLA

The PFMLA was recently amended, effective April 3, 2019. The amendment bill, SHB 1399, largely fixed some technical issues with PFMLA. The major substantive component of the amendment bill was to clarify that employers may offer supplemental benefit payments to employees on family or medical leave in addition to any paid family or medical leave benefits the employee may receive from ESD. Supplemental benefits include accrued benefits such as vacation, sick, or other paid time off. This is an important clarification for employees because the PFMLA benefits are only partial wage replacement and are capped at \$1,000/week. The ability to top off the PFMLA benefit with supplemental benefits payments will enable employees to fully replace their wages during PFMLA leave.

While employers may offer supplemental benefits, the amendment bill makes it very clear that it is up to employees to decide whether or not to accept supplemental benefits during their PFMLA leave. Employees who value full wage replacement over additional time off will choose to take the supplemental benefits. But employees may also elect to forego supplemental payments and use their accrued time *after* their PFMLA leave ends, resulting in much more paid time off than an employee would otherwise be entitled to.

7. The Effect of a CBA

All rights and responsibilities of the PFMLA are suspended regarding employees covered by a CBA in effect as of October 19, 2017 until that agreement expires (or is reopened or renegotiated by the parties). Accordingly, employers will not have any liability for premium collection or remittance regarding bargaining unit employees covered by such CBAs until the CBAs expire. Furthermore, bargaining unit employees will not be eligible for benefits until their CBAs expire, and they meet other eligibility requirements explained below.

WHAT EMPLOYERS SHOULD DO NOW

Review and update leave policies to ensure compliance with PFMLA.

Review Family Medical Leave Act ("FMLA") policies to ensure compliance with PFMLA. Employers may require FMLA and PFMLA to run concurrently. If a leave qualifies under both laws, however, employers may no longer require employees to use accrued benefits during their leave.

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Decide whether or not you will offer to top off PFMLA benefits with accrued benefits and create policies to implement that decision. Employers should give consideration to the procedure for employees to request supplemental benefits and the timing of the payments.

Evaluate existing paid leave policies. Given the new paid leave bestowed on employees by the Washington State Legislature, do changes need to be made to your existing leave policies to prevent inordinate employee absences?

Determine whether you will require employees to pay their share of PFMLA premiums, if you have not already done so.

If you have union employees:

- Determine whether the PFMLA exemption applies to each bargaining unit and what action you need to take when it expires.
- Determine whether any changes you are considering are mandatory subjects of bargaining and satisfy your bargaining obligation.
- Consider what changes, if any, you need to propose in your next round of collective bargaining.